# REPORT OF THE CONSULTATIVE PANEL ON AMENDMENTS TO THE *COMPETITION ACT*

TO

THE DIRECTOR OF INVESTIGATION AND RESEARCH
*COMPETITION ACT*
MR. GEORGE N. ADDY

March 6, 1996

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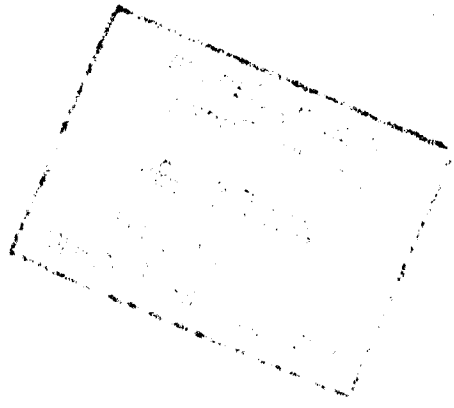

**Ed Ratushny, Q.C.**
23 Lacewood Court
Ottawa K2E 7E2

Mr. George N. Addy
Director of Investigation and Research
Competition Bureau
Industry Canada
50 Victoria Street
Hull, Quebec
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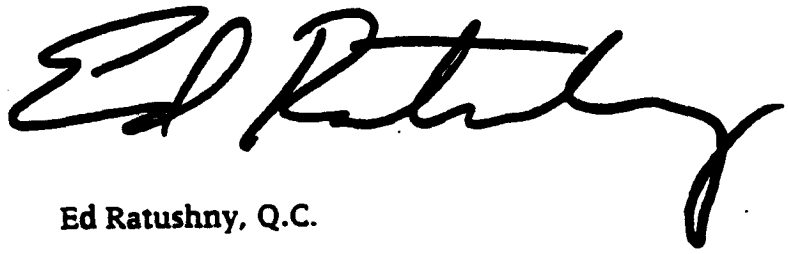
Dear Mr. Addy:

I have the honour of presenting to you the Report of the Consultative Panel on amendments to the *Competition Act* in the areas which were referred to us. We hope that our observations and recommendations will be of assistance to you in formulating the recommendations which you, in turn, will be submitting to the Minister for legislative amendments.

The Panel received considerable assistance in its task from the officers and staff of the Bureau, primarily through the coordination of Ms. Marcie Girouard. Many others from the Bureau provided valuable insights through the benefit of their experiences, background information and studies as well as assistance in formulating alternative approaches to the problems which were identified. The Panel is grateful for their contribution.

As Chairperson, I admired the expertise, sense of public responsibility and personal sacrifice which the Panel members devoted to this project. They were diligent in attending meetings, often on weekends, in spite of other, heavy professional demands on their time. Although acting in their personal capacities, members drew from their own backgrounds to enrich the discussions. Everyone strived to achieve a consensus Report and, while each part of the Report does not necessarily reflect the views of any particular member, each part does reflect the views of a majority. I feel privileged to have had the opportunity to work with all of them in this endeavour.

Yours sincerely,



Ed Ratushny, Q.C.

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# INTRODUCTION

## The Discussion Paper

On June 28, 1995, the Minister of Industry, the Honourable John Manley, announced the start of public consultations aimed at updating the *Competition Act*. His stated objective was to introduce legislative amendments to the *Act* within one year.

As part of a broad consultation process, the Director of Investigation and Research (the Director) of the Competition Bureau, George N. Addy, released a discussion paper which outlined a number of specific areas that were being considered, together with the rationale for specific amendments. The topics were:

- Notifiable Transactions;
- Confidentiality and Mutual Assistance;
- Misleading Advertising and Deceptive Marketing Practices;
- Regular Price Claims and Section 52(1)(*d*);
- Price Discrimination and Promotional Allowances;
- Access to the Competition Tribunal;
- Prohibition Orders; and,
- Deceptive Telemarketing Solicitations.

The Director stated that, for the most part, the *Act* is working well and the approach it represents is fundamentally sound. However, after nearly a decade of experience in applying the *Act* in its current form, these are areas where improvements are envisioned to address the current state of the marketplace.

The *Act* was last amended in 1986, when a substantial overhaul was completed after many years of research and public debate. The Director has expressed the view that the current amendment process is intended to be the start of periodic amendments every few years, as an ongoing process to fine-tune the legislation to keep pace with emerging business trends and enforcement requirements. Periodic review will also permit changes to be monitored and adjustments to be made where necessary.

The discussion paper was circulated widely to associations, businesses, and members of the legal, law enforcement and academic communities. Recipients were invited to comment on the proposed changes to the law and make alternative suggestions. The initial deadline for comments was September 15, 1995, but this was extended to October 6, 1995, at the request of stakeholders. Over 80 responses were received. Many of these were detailed and responded to each issue raised for discussion, reflecting considerable analysis and effort on the parts of the authors.

## The Consultative Panel

On September 29, 1995, the Director announced his intention to establish a Consultative Panel to review the responses to the discussion paper and "to advise on the suitability and feasibility of the proposals and alternatives". While the Panel was to be the principal forum for discussion of proposed changes to the law, the Director and his staff would continue to seek the views of other stakeholders. The Panel was established and held its inaugural meeting on October 13, 1995. The members of the Panel are listed inside the cover of this Report, with brief biographies attached as Appendix 1.

The Consultative Panel adopted the Terms of Reference which are attached as Appendix 2 to this Report. In particular, the Panel agreed to provide its advice to the Director "in a fair and balanced manner with regard to the objectives set out in section 1.1 of the *Competition Act*" (Item 4). It was agreed at the outset that all parts of the Report "will not necessarily reflect the views of any particular member of the Panel" (Item 2). The goal of the Panel was to provide a Report which reflects, to the greatest extent possible, a consensus among Panel members. In other words, each part of the Report reflects the views of at least a majority of the panellists, but shouldn't necessarily be taken to reflect unanimity. Although the Panel's discussions and debates were often vigorous, and opposing views were frequently expressed, Panel members made every effort to achieve a consensus Report in order to enhance the effectiveness of the Panel's advice to the Director.

The Panel met on the following dates: October 13, 31; November 3, 4, 24, 25; December 4, 5, 15, 16. Considerable work was required by Bureau staff between meetings. Panel members had access to all of the briefs submitted in response to the Bureau's discussion paper. Summaries, including analysis of the briefs, were also provided. Various officials from the Bureau attended portions of the Panel's meetings to relate their experiences with respect to some of the issues discussed. Some Panel members occasionally discussed concepts or proposals with other stakeholders and reported back to the Panel.

In view of the difficulty of some of the issues and the extent of the Panel's discussions, the ten days of meetings scheduled were insufficient to meet the target date of December 22, 1995, for completion of this Report. The Panel met again on January 12 and 13, and February 25, 1996 and, held various telephone conference calls to complete this Report.

**General Issues**

Two general issues emerged repeatedly during the Panel's deliberations. The first of these issues relates to the jurisdiction of the Competition Tribunal. The Panel, generally, considered it desirable for the adjudicative responsibility for the new reviewable practices under the *Act* to be directed to the Competition Tribunal where possible. The Panel supported the continued development of further experience and expertise within the Tribunal. The expanded jurisdiction which is proposed in this Report should lead to that result. However, it would result in an increased workload for the Tribunal. The Panel did not have the opportunity to explore the impact which such changes would have for the personnel, administrative and resource requirements of the Tribunal.

Secondly, this Report recommends that the Bureau adopt enforcement guidelines in a number of areas. The Panel was of the view that all such guidelines should be developed in conjunction with the legislative amendments. The Panel strongly recommends that draft enforcement guidelines be published when the legislative amendments are introduced, so as to facilitate a more informed discussion of the proposed changes.

# LIST OF RECOMMENDATIONS

**Mergers: Notifiable Transactions and Interim Orders**

1) Parties subject to notification should have a choice between two filings: a short form and a long form filing. The information required for these filings is set out in Appendix 3. These lists should be outlined in regulations, rather than the *Act*.

2) The Bureau should continue to have the discretion to require the long form filing if the short form filing is not considered sufficient.

3) The waiting period applicable to the short form filing should be 14 days and 42 days for the long form filing. In the case of acquisitions of voting shares to be effected through a stock exchange, the waiting period for long form filings should be 21 trading days, or such longer period of time, not exceeding 42 days, as may be allowed by the rules of the stock exchange before shares must be taken up.

4) The Bureau should have the ability to abridge the short form or long form filing waiting period where the full time allotment is not required. (Of course, advance ruling certificates should continue to be available.) Both these powers should be capable of delegation by the Director to other officials within the Bureau.

5) If the parties provide information pursuant to an advance ruling certificate request which is substantially similar to that required under prenotification, but the certificate is denied, the Bureau should be able to exempt the notifier from the obligation to supply information and to wait the prescribed time before completing the transaction. Notification requirements should also be capable of being waived, in whole or in part, if the required information, or some of it, has already been provided under other circumstances (e.g. early notice to the Bureau; previous notification).

6) In any merger case that raises serious concerns (whether the merger has been the subject of prenotification or not), the Bureau should have the ability to seek an interim order from the Competition Tribunal, and should not be required to file an application with the Tribunal subsequently as a condition of obtaining the order.

7) The Tribunal should be empowered to issue an interim order only where it finds that:

   - there has been a failure to notify, or
   - an inquiry is being conducted pursuant to s. 10(1)(*b*), and
     - the Director certifies that more time is required to carry out the inquiry, and
     - the Tribunal finds that its ability to remedy the effects of the proposed merger on competition would be substantially impaired because actions might be taken that would be difficult to reverse.

8) The Tribunal should be authorized either to forbid any person named in the application from doing any act or thing that may constitute or be directed toward the completion or implementation of the proposed merger, or to require the parties to hold separate the assets to be acquired in a manner it prescribes. The Tribunal should also be authorized to issue the order on such terms as it considers reasonable and necessary. It should be

open to the Tribunal to grant orders upon terms consented to by the parties. Applications for interim orders should be made on notice to the merging parties.

9) The law should provide that the maximum duration of such an order be 30 days. The Bureau should be obliged to proceed with its inquiry as expeditiously as possible. However, the Bureau should be entitled to apply to the Tribunal for an extension of the order after the expiration of the 30 days in exceptional circumstances, such as where the time allowed by a court for the execution of formal powers extends beyond the original 30 day term. Applications to extend the term of an interim order should also be made on notice to the merging parties.

10) Asset securitization and related types of transactions should be exempt from the application of the notification requirements pursuant to the authority provided under s. 113(*d*) to exempt classes of transactions. Precise statutory language delineating these matters should be developed by the Bureau in consultation with interested parties.

11) The underwriting exemption provided in ss. 111(*b*) and 5(2) should be expanded to apply to underwritings in respect of which a prospectus is required under either Canadian or foreign securities laws, or which are exempt from a prospectus requirement under such laws.

12) The Bureau should consult with interested parties to identify and define additional exemptions applicable to types of transactions or types of industries which rarely raise competition issues. It would also be helpful if guidelines were developed by the Bureau to clarify the interpretation of the various exemptions from notification available under the *Act*.

13) In the prenotification context, the *Act* should treat partnership interests as acquisitions of shares, rather than assets. In determining the appropriate threshold for notification of acquisitions of partnerships, the Bureau should have regard to the various forms of partnership arrangements that exist.

14) The fine for failure to notify should be increased. Imprisonment should no longer be available as a penalty for failure to notify.

15) As part of the revisions in this area, the Bureau should review the *Notifiable Transaction Regulations*, update them where required and address any ambiguities or omissions. For example, the regulations should specify the manner in which assets and revenues reported in foreign currency are to be converted into Canadian currency. The valuation should be done as of the date of the financial statements, and the exchange rate that should be applied is the wholesale rate published in newspapers.

16) The *Act* should clarify on whom the obligation to notify under these provisions rests.

**Confidentiality and Mutual Assistance in Enforcing Competition Laws**

General Scope of Protection

1) All information obtained by the Bureau in the administration or enforcement of the *Act* should be designated confidential. Excluded from this protection would be information which is public or where there is consent of parties directly affected.

2) A specific offence in the *Act* of willful communication of information contrary to the *Act* should be created.

Domestic Matters

Communication for "Administration or Enforcement" Purposes

3) The Director should further examine which communications should be permitted under the rubric of "administration or enforcement". Recognizing that some members of the Panel would allow broader discretion to the Director, the Panel's consensus was that the Director should be able to engage in the following communications:

- between the Director and his staff, his agents and the Attorney General of Canada;
- to a court or the Competition Tribunal in the course of enforcement proceedings or disclosure to parties to such proceedings;
- to the target of an investigation for the purpose of settlement negotiations; and,
- where the communication is about a record, to the record's apparent author or its recipient(s) or to persons referred to in the record.

Other Authorized Communications

4) The Bureau should be authorized to communicate information in the following instances:

- redirecting complaint information to agencies that deal with such matters;
- notifying foreign governments pursuant to international agreements or arrangements, subject to the confidentiality provisions in the *Act*; and,
- giving information to a Canadian law enforcement agency.

5) The Bureau should *not* be specifically authorized under the *Act* to communicate information obtained pursuant to the enforcement of the *Act* during interventions by the Director in proceedings under s. 125 or s. 126.

Matters with a Foreign Component

Safeguards and Public Interest Requirements

6) Obtaining and sending information to a foreign jurisdiction, where it is willing to reciprocate, should be authorized pursuant to mutual assistance agreements with foreign governments or competition law authorities. Such agreements should be subject to publication and a comment period before coming into force. To ensure that such assistance is in the Canadian public interest, a list of minimum requirements should be set out in the *Act*:

(i) mutual assistance agreements must only be entered into with countries whose competition laws are substantially similar to Canada's.

(ii) Mutual assistance agreements must require reciprocity regarding the scope of assistance that will be provided by the two governments.

(iii) Mutual assistance agreements must require that the foreign party comply with any conditions imposed on the use to be made of information and its return.

Where the communication of information is proposed in relation to a solely foreign competition law matter, mutual assistance agreements must require this to be approved by the Minister of Justice, who could refuse such assistance if it would be contrary to the Canadian public interest.

7) When communicating information to foreign competition law authorities, the *Act* should also require the following safeguards to apply:

   (i) information sent from Canada would be subject to confidentiality protection in the foreign jurisdiction which is substantially similar to that provided by Canada;

   (ii) information sent from Canada would only be used for competition law enforcement purposes by the foreign competition law authority;

   (iii) applicable rights or privileges would be preserved. For example, Canadian law respecting the use of compelled testimony would be recognized and applied by the receiving country. Another example would be solicitor-client privilege; and,

   (iv) if confidentiality obligation violated, information provider to be advised.

8) There should be sanctions for breaching a confidentiality obligation.

Oversight Mechanisms -- Canadian or Joint Competition Investigations

9) Having regard to the divergent views, the Director should further examine what, if any, oversight mechanisms, over and above the safeguards and public interest requirements (except review by the Minister of Justice), are appropriate when communication is proposed for the purpose of advancing a Canadian investigation.

Oversight Mechanisms -- Solely Foreign Competition Law Matters

10) The Bureau should largely adopt the approach set out in the *Mutual Legal Assistance in Criminal Matters Act (MLACMA)* and should seek judicial authorization to send confidential information to a foreign competition law authority, with or without a request.

11) Applications for authorization to communicate information to a foreign competition law authority should be on notice to the information provider unless prejudicial to an ongoing investigation. In the latter case, the Bureau should give notice as soon as practicable after the investigation would no longer be prejudiced or such sooner period as the court specifies. However, the Bureau should always give notice to a party that has been previously subject to formal powers at the request of a foreign competition law authority.

12) In authorizing the communication of information to a foreign competition law authority, conditions could be imposed at the hearing, including those:

   (i) necessary to give effect to any request;

   (ii) with respect to the preservation and return to Canada of any record or thing seized;

   (iii) with respect to the protection of the interests of third parties; and,

   (iv) providing other protections such as limitations on use.

**Misleading Advertising and Deceptive Marketing Practices**

Criminal Regime

1) Section 52(1)(*a*) should be changed by adding a subjective *mens rea* requirement. The provision should address intentional or knowledgeable conduct and recklessness in egregious cases.

2) The maximum fine in respect of summary conviction proceedings should be increased to $200,000 to reflect the seriousness of the new criminal provision.

3) Sections 55 and 55.1 (the multi-level marketing and pyramid selling provisions) should not be amended.

Civil Regime: Introduction

4) A civil regime should be established to address most instances of misleading advertising and deceptive marketing practices currently prosecuted in the criminal courts by the Attorney General of Canada.

5) The misleading advertising offences other than ss. 55 and 55.1 should be replaced by analogous reviewable practices provisions. (A general provision should continue to exist under both the civil and criminal regimes.)

6) Civil misleading advertising matters should be brought by the Director before a single judicial member of the Competition Tribunal, the Federal Court - Trial Division or a superior court in a province ("the adjudicators"). In choosing between adjudicators, the Director should carefully consider regional accessibility.

Civil Regime: Cease and Desist Orders

7) The presence of intent should not be a consideration regarding whether a cease and desist order should be issued. Once it has been established that reviewable conduct has occurred, a cease and desist order would issue requiring the respondent to cease engaging in such conduct and to not engage in substantially similar conduct in the future.

8) The duration of cease and desist orders should be determined by the adjudicator up to a maximum of ten years, subject to the parties' right to apply to rescind, vary or extend them where there has been a material change in circumstances.

Civil Regime: Interim Cease and Desist Orders

9) The adjudicator should also be empowered to issue cease and desist orders on an interim basis where the Director has established a strong *prima facie* case that the representation has breached one of the reviewable misleading advertising or deceptive marketing practices provisions of the *Act*; that, unless the order is granted, serious harm is likely to ensue; and, that the balance of convenience favours granting the order.

10) The Bureau should not be required to provide an undertaking as to damages, nor should costs be available against it in interim cease and desist order proceedings.

11) Interim orders should have a maximum duration of 14 days (or longer on consent), or such shorter period as may be ordered. The Bureau should be able to seek extensions for a further specified period to a maximum of 14 days (or longer on consent).

Civil Regime: Further Orders

General

12) Additional orders beyond cease and desist orders should be available only if the respondent fails to establish that it exercised due diligence.

13) Restitution orders and orders directed towards improving the general quality of marketplace information should not be authorized.

Information Notices

14) Orders requiring the publication of information notices to inform marketplace participants about the impugned practices should be available. Such orders should require respondents to publish notices directed at the class of persons likely to have been reached by the misrepresentation. The notices should include sufficient information to identify the respondent, the specific misrepresentations and products concerned, the time period and geographical area to which the representations related, the media concerned, and the nature of the reviewable practices in question. The current practice in the Bureau's alternative case resolution program with respect to such notices should be replicated in terms of the notices' format, size and duration.

Civil Monetary Penalties

15) The adjudicators should have the authority to order the payment of a civil monetary penalty in an amount appropriate in the circumstances giving rise to the breach of the relevant provision.

16) A maximum penalty of $100,000 in respect of a first breach (e.g. a number of separate advertisements involving the same misrepresentation in various media over a period of months would constitute one "breach") and $200,000 in respect of a second or subsequent breach involving similar conduct should be available.

17) The criteria for establishing an appropriate fine level within the *maxima* should be: the projected reach of the representation in the relevant market; the vulnerability of the target audience; the number of times that the representation was repeated and the duration of the representation; the materiality of the deception; the likelihood of marketplace self-correction; evidence of harm to the marketplace/competition; and the advertiser's compliance history. The Bureau should consider whether these criteria should be established by means of guidelines or in the legislation.

Civil Regime: Consent Matters

18) The terms of consent orders should not be reviewable by the adjudicators prior to making them formal orders of the adjudicators for enforcement purposes as long as agreed statements of facts as well as statements why the resolutions are appropriate in the circumstances are made available to the public

Civil Regime: Intervenors

19) Intervenors should not be permitted before the adjudicators in respect of reviewable marketing practices matters, whether contested or by consent.

The Bureau's Decision on which Regime to Use

20) The choice of one adjudication route should foreclose the other.

21) Rather than in the legislation, the Bureau should develop, publish and seek public input on guidelines indicating the factors it will take into account in exercising its discretion to make an application under the civil regime or refer evidence to the Attorney General of Canada with a recommendation for prosecution. Every effort should be made to indicate a decision to parties under inquiry within 90 days of first contact with the target. The following circumstances should influence this decision: repeat offences; a blatant disregard for the truth; the targeting of particularly vulnerable members of society; the adverse impact on the marketplace; and, the need for deterrence.

Existing Jurisprudence and the Transfer of Adjudication

22) Where the law is reasonably settled in respect of the current provisions, precedents should not be opened up again for debate simply because of the shift in adjudicative jurisdiction. In addition, the Bureau should, in its enforcement guidelines, indicate that it will be guided by the previous jurisprudence in deciding which cases to bring before the new adjudicators. Finally, the importance of abiding by the existing jurisprudence should be reiterated by the Bureau before the Parliamentary committee when the bill is under review.

**Regular Price Claims and Section 52(1)(*d*)**

1) Misleading ordinary price representations should be reviewable matters under the *Act* and subject to the civil regime as proposed in the chapter on misleading advertising.

2) The revised provision should explicitly identify two alternative tests to be met. In the case of representations as to former selling prices, these tests would be defined as the price of sellers generally in the relevant market at which a substantial volume of recent sales of the product took place, *or* the price of sellers generally in the relevant market at which the product was recently offered for sale in good faith for a substantial period of time prior to the sale.

   Where the comparison price is clearly specified to be the price of the advertiser, these tests should apply with reference to the prices of that person alone, rather than in relation to the price of sellers generally in the relevant market.

   Where price comparisons are to those of "like" products, these tests should apply with reference to the prices of those like products.

3) Where a price representation fails to qualify under these tests but is otherwise not misleading, the adjudicator should not make an order.

4) Ordinary price claims in relation to future prices should also be addressed in the new provision.

5) The Bureau should issue enforcement guidelines in draft form at the same time as the legislation is introduced confirming, among other things, that the practice in some industries of comparing an MSRP to a former MSRP is not necessarily misleading. The enforcement guidelines should also address issues arising in relation to clearance sales.

6) The new provision should be drafted to allow the nature of the product and relevant market to be considered by the adjudicator.

**Price Discrimination and Promotional Allowances**

1) The Panel recommended that ss. 50(1)(*a*) (price discrimination) and 51 (promotional allowances) of the *Act* be repealed.

**Access to the Competition Tribunal**

1) The Competition Bureau should conduct and make public by January 31, 1997, a study of the issues raised by the proposal to provide access to the Competition Tribunal to private parties.

2) The study should determine what the appropriate balance between private and public enforcement of the *Competition Act* is, including a review of the experience to date with the current civil damage remedy (s. 36), and the possible costs and benefits of private enforcement for all of the interested parties, as well as Canadian society in general. The following issues associated with allowing private access to the Competition Tribunal might also be addressed:

   - what provisions of the *Act* ought to be subject to actions before the Tribunal by private parties;
   - the role that should be played by the Director in the initiation of actions before the Tribunal by private parties, and the rights of the Director in relation to the conduct of such actions;
   - the need for mechanisms to prevent frivolous or abusive actions, such as a requirement to obtain leave to initiate an action, or a summary judgment procedure to allow such actions to be dismissed at an early stage;
   - the appropriate threshold for standing to initiate an action;
   - the remedies that should be available to private litigants, and, in particular, whether some form of damages should be available;
   - whether costs awards should be made available in actions before the Tribunal brought by private parties and, if so, under what circumstances;
   - whether case management or other procedures should be instituted to encourage the settlement of actions before the Tribunal by private parties;
   - the interaction between actions before the Tribunal by private parties and settlement negotiations or consent orders involving the Director; and,
   - the policies that should govern access to information held by the government that could be of assistance to private litigants.

3) As a means of obtaining additional resources for its operations, the Bureau should, in addition, continue to explore the feasibility of cost recovery initiatives .

**Prohibition Orders**

1) The *Act* should be amended to provide that any prescriptive term may be included in an order pursuant to s. 34(1) or (2) if all parties to the order consent.

2) Where there is a contested application, a court should be able to make an order containing prescriptive terms, but these should be limited to preventing the continuation or repetition of the offence. The amendments should also make clear that prescriptive terms which are necessary to ensure compliance with the prohibition order may be included (such as a requirement to inform company personnel or management of the contents, scope and purpose of an order, so that the order can be given effect).

3) Section 34(2) should be amended to provide that, when an application for an order pursuant to this provision has been adjudicated on the merits on a contested basis, the Attorney General will forfeit the right to lay any charges with regard to substantially the same facts.

4) The court hearing a matter should be required to specify the duration of an order, with a maximum statutory time limit of ten years.

5) The *Act* should provide the courts with the power to vary, rescind or interpret any order (including previously existing orders) at the request of any party to the order or the Attorney General of Canada. This power could be exercised where the court finds that the circumstances that led to the making of the order have changed and, in the circumstances that exist at the time the application is made, the order would not have been made or would have been ineffective to achieve its intended purpose. It should also be possible for a court to vary or rescind an order where the Attorney General of Canada and the person against whom an order has been made have given their consent.

6) Should a criminal law provision be repealed, outstanding prohibition orders relating to the provision should be withdrawn.

**Deceptive Telemarketing Practices**

1) Amendments to the *Act* should be developed to deal specifically with deceptive telemarketing practices.

2) These provisions should build upon the work that has been done to date by the Bureau in consultation with participants at the focus group, and other interested parties, to allow timely identification of suitable amendments that could be included in the current amendments initiative.

3) As many deceptive telemarketing schemes cross provincial and national boundaries, the Bureau should work with law enforcement agencies in other jurisdictions in addressing this problem.

**Additional Amendments**

1) Amendments should be pursued to revise s. 77(2) to clarify that the section will apply in respect of tied selling when the effects outlined in paragraphs (*a*), (*b*) and (*c*) occur in "a market" rather than "the market".

2) Amendments should be pursued to revise s. 7 to specify the powers of the Director with regard to the *Act's* administration and enforcement.

3) The title of the Director of Investigation and Research should be changed to "the Director, *Competition Act*".

4) Section 125 should be amended to provide the Director with the right to gain access to the confidential documentation filed with a federal board, commission or other tribunal.

5) The Bureau should consider the need to correct anomalies in the drafting of the *Act*, including differences between the English and French texts, with advice from legislative drafters. It may be preferable to conduct a comprehensive review of the wording of the *Act*, rather than making only a few isolated changes.

6) After the amendments arising from these recommendations come into force, the Director should be required to establish an advisory panel, which would meet at intervals of no more than five years, to prepare public reports offering advice on revisions to the *Act*.

# MERGERS: NOTIFIABLE TRANSACTIONS AND INTERIM ORDERS

## 1. Background

The notifiable transactions provisions of the *Competition Act* require that parties to certain transactions which exceed prescribed thresholds notify the Bureau prior to their completion and provide specified information. Notifications are intended to alert the Bureau to potentially problematic transactions, and provide it with the opportunity to assess their competitive impact and take appropriate action, if necessary.

Most transactions subject to notification do not raise competitive issues. However, in circumstances where potential competition concerns are raised, three main and interrelated problems with the merger provisions of the *Act*, and the merger review process in general, have been identified by the Bureau. First, the information currently required under the pre-merger notification provisions of the *Act* is not adequate. Second, the waiting periods prescribed under the *Act* are sometimes too short to be able to complete the assessment of a transaction. Finally, there is no effective mechanism under the *Act* to prevent the closing of a transaction unless the Bureau has decided to challenge it before the Competition Tribunal.

In addition to these main issues, some questions have been raised with regard to the need for further exemptions from notification. It has also been suggested that the application of the *Act* and the regulations could be clarified in certain respects.

## 2. The Public Consultations

The discussion paper issued by the Bureau proposed to modify the approach by which transaction notification is provided. Instead of the current system where parties have the choice between a short and a long form filing, it was proposed that an initial filing would be required for all notifiable transactions and that a second, much more detailed, filing could be requested by the Bureau for problematic transactions. The proposed initial waiting period was 30 days and the second period was 20 days.

It was proposed to create a new exemption for asset securitization transactions, pursuant to the authority provided under s. 113(*d*) to exempt classes of transactions. The proposal also suggested that the Bureau could have the discretion to waive the notification requirements on a case-by-case basis.

In order to clarify the application of the notifiable transactions provisions to the acquisition of partnership and joint venture interests, it was proposed to adopt the thresholds applicable to the acquisition of shares and define control as "a voting interest in a partnership or joint venture greater than 50%".

Comments received on the approach proposed in the discussion paper on the information to be filed were rather negative. The opponents were of the view that the current system works well. Accordingly, it was inappropriate to change the entire system for only a few problematic transactions. Many responses argued that the proposed approach was modeled on the United States *Hart-Scott-Rodino Act*, which they characterized as being more adversarial, burdensome and time-consuming. A majority also expressed a desire to keep the option of filing the information required for both filings at the outset, instead of waiting for the Bureau's request, to expedite the review process.

It was generally recognized that current statutory filing requirements do not provide the Bureau with the necessary information to assess the impact of a transaction, but that this

information typically can be obtained on a voluntary basis. In those few cases where the information required by the Bureau is not provided voluntarily, it can be obtained through the use of formal powers. Many responses observed that it was inappropriate to require subjective information in a filing under oath, and suggested that the requirements should be limited to readily available data. The proposed second filing was considered too voluminous and subject to delay and uncertainty in verifying compliance. There was considerable support for the proposal to set out the information requirements in regulations rather than in the *Act*. However, some commentators felt that it would be preferable to retain these requirements in the legislation.

Most responses to the discussion paper disagreed with the proposed waiting periods, which were considered too long. The Bureau can rely on the cooperation of the parties if more time is needed or can seek an order from the Tribunal. It was also suggested that the parties and the Bureau have the flexibility to extend the initial waiting period on consent.

The majority of comments were in favour of an exemption for asset securitizations and similar types of transactions, but had concerns about the definition. Suggestions were also made to add other exemptions.

As to the acquisition of partnership and joint venture interests, there was general agreement to treat these as share acquisitions, rather than asset acquisitions. However, a divergence of views were expressed regarding how to define the control of such entities.

Finally, other amendments were proposed, such as the removal of criminal sanctions for failure to comply with an obligation to notify, and an increase in the thresholds for notification.

## 3. The Consultative Panel

In light of these comments, the Panel concluded that, rather than dramatically changing the prenotification model in Canada, it would be preferable to retain the positive features of the current system, while addressing those areas that had proven to be problematic.

As is the case under the current law, the Panel felt that it would be desirable to continue to make available a short and a long form filing, enabling the parties to choose which they would file, depending on the nature of the transaction. The Bureau would continue to have the option to require a long form filing where a short form has been filed but additional information is required. The Panel reviewed detailed lists of the information that should be required under each type of filing. These appear in Appendix 3 to this Report. Much of the discussion focused on tailoring the information requirements applicable to the short and long form filings in a manner that would yield more useful information to the Bureau, without requiring subjective conclusions (as opposed to factual information) to be provided or creating an undue burden for businesses. This latter concern was addressed in part by specifying that some of the information need only be supplied in respect of categories of products produced by both the merging parties.

The new short form filing is based on information currently required under s. 121, with some changes to make it shorter and more relevant. The long form filing requires essentially all of the information currently required to be provided under s. 122, plus other basic information to address the competitive elements of the transaction. The Panel remains concerned that some of the elements are not relevant to all types of transactions . However, it recognizes that the notifier would continue to have the option not to supply information that it considers to be irrelevant, unless the Bureau specifically requests this information. The Panel also discussed whether or not it was necessary to include a specific provision indicating that documents for which solicitor-client privilege was claimed need not be supplied. However, on balance, it

concluded that this was not necessary, as the common law protection would apply to such information without specific statutory mention.

Concerning the waiting periods, the Panel recognized that the existing ones could be inadequate in certain cases, but was concerned that they not be unduly long, particularly in situations involving the use of a short form filing. It concluded that a waiting period of 14 days (i.e. 10 waiting days, which is double the current period) for the short form filing and 42 days (30 working days) for the long form filing should be sufficient. However, it would be desirable if the obligation to supply information and/or to wait the prescribed time before completing a transaction could be waived on request under certain circumstances. To expedite such requests, the Panel suggested that the Director be statutorily authorized to delegate the authority to waive the waiting period or information requirements to other officials within the Bureau.

Currently, s. 100(6) requires the Director to proceed as expeditiously as possible to commence and complete proceedings under s. 92 following the issuance of an interim order. The Panel considered that it would be necessary to amend the interim order provision (s. 100) to allow such orders to be obtained in circumstances where serious concerns might exist, but it has not yet become clear whether or not the Bureau has, or will have, grounds to challenge the transaction. The object of such an amendment would be to give the Bureau sufficient time to pursue an inquiry under s. 10. Such orders should be obtainable either to prevent the closing of a transaction or to require the parties to hold separate their assets.

The Panel concluded that these interim orders should only be granted by the Tribunal where the Bureau has serious concerns. The Panel also considered it important that such orders be related to the need to prevent the closing of the transaction. Ultimately, the Panel suggested the following conditions for obtaining an interim order:

- where there has been a failure to notify; or
- where an inquiry is being conducted pursuant to s. 10(1)(*b*); and
    - the Director certifies that more time is required to carry out the inquiry; and
    - the Tribunal finds that its ability to remedy the effects of the proposed merger on competition would be substantially impaired because actions might be taken that would be difficult to reverse.

Applications for interim orders should be made on notice to the party(ies). The Panel discussed the appropriate duration for such orders and concluded that the maximum should be 30 days, although the Bureau should be able to seek an extension in cases where it can demonstrate the existence of exceptional circumstances, such as where the time allowed by a court for the execution of formal powers extends beyond the original 30 day term. The Panel felt that an application to extend an interim order should be made on notice to the parties.

One of the questions raised by the discussion paper related to expanding the categories of exemptions from the prenotification requirements. The Panel noted that asset securitizations and similar types of transactions are two areas where there seems to be considerable agreement that notification is not required and concluded that such transactions should be exempted. However, these types of transactions can take different forms. Accordingly, the Panel suggested that the Bureau work with interested parties to develop appropriate language. The Panel also agreed with a suggestion in one of the responses to the discussion paper that the underwriting exemption provided in ss 111(*b*) and 5(2) also apply to underwritings in respect of which prospectuses are required under either Canadian or foreign securities laws, or in respect of which prospectuses would be required but for an express exemption from such laws.

Currently, only those requiring a prospectus under Canadian securities laws qualify for an exemption under the *Act*. Finally, the Panel recommended that the Bureau clearly signal that it is prepared to consider other types of exemptions and invite interested parties to bring forward additional suggestions for consideration.

The Panel discussed the thresholds for notification and the fact that these had not been revised since the legislation was introduced. It acknowledged the desire of some stakeholders for higher thresholds, and recommended that the Director should periodically review these under the existing statutory provisions. It also suggested that the Bureau review its case screening criteria to determine if the number of matters being reviewed could be reduced.

The Panel also considered how acquisitions of interests in partnerships and joint ventures should be treated under the prenotification requirements. The Panel agreed that these matters should generally be treated as share acquisitions, rather than asset acquisitions. However, the Panel was concerned that the identification of the threshold at which control is deemed to be acquired should capture the various types of partnership arrangements that exist, and recommended that the Bureau seek further legal advice on this point.

The Panel noted that the existing fine for failure to notify, as specified in s. 65(2), is inadequate to provide an incentive to comply, and discussed whether a civil monetary penalty would be appropriate. The Panel preferred maintaining a criminal approach, but recommended the removal of imprisonment as a possible penalty for failure to notify. It recommended that the amount of the penalty be increased to a level that would better reflect the significance of the obligation to notify.

Finally, the Panel noted that changes to the *Notifiable Transaction Regulations* would be required as a result of its recommendations. It was of the view that this would be a timely juncture for the Bureau to review the existing regulations and address any ambiguities or omissions. For example, it noted that it would be useful to specify in the regulations the basis for converting assets and revenues reported in foreign currency into Canadian currency. The valuation should be done as of the date of the financial statements and the exchange rate should be the wholesale rate published in newspapers. The Panel also concluded that it would be helpful to clarify either in the *Act* or in the regulations on whom the obligation to notify rests.

## 4. Recommendations

1) Parties subject to notification should have a choice between two filings: a short form and a long form filing. The information required for these filings is set out in Appendix 3. These lists should be outlined in regulations, rather than the *Act*.

2) The Bureau should continue to have the discretion to require the long form filing if the short form filing is not considered sufficient.

3) The waiting period applicable to the short form filing should be 14 days and 42 days for the long form filing. In the case of acquisitions of voting shares to be effected through a stock exchange, the waiting period for long form filings should be 21 trading days, or such longer period of time, not exceeding 42 days, as may be allowed by the rules of the stock exchange before shares must be taken up.

4) The Bureau should have the ability to abridge the short form or long form filing waiting period where the full time allotment is not required. (Of course, advance ruling certificates should continue to be available.) Both these powers should be capable of delegation by the Director to other officials within the Bureau.

5) If the parties provide information pursuant to an advance ruling certificate request which is substantially similar to that required under prenotification, but the certificate is denied, the Bureau should be able to exempt the notifier from the obligation to supply information and to wait the prescribed time before completing the transaction. Notification requirements should also be capable of being waived, in whole or in part, if the required information, or some of it, has already been provided under other circumstances (e.g. early notice to the Bureau; previous notification).

6) In any merger case that raises serious concerns (whether the merger has been the subject of prenotification or not), the Bureau should have the ability to seek an interim order from the Competition Tribunal, and should not be required to file an application with the Tribunal subsequently as a condition of obtaining the order.

7) The Tribunal should be empowered to issue an interim order only where it finds that:

- there has been a failure to notify, or
- an inquiry is being conducted pursuant to s. 10(1)(*b*), and
  - the Director certifies that more time is required to carry out the inquiry, and
  - the Tribunal finds that its ability to remedy the effects of the proposed merger on competition would be substantially impaired because actions might be taken that would be difficult to reverse.

8) The Tribunal should be authorized either to forbid any person named in the application from doing any act or thing that may constitute or be directed toward the completion or implementation of the proposed merger, or to require the parties to hold separate the assets to be acquired in a manner it prescribes. The Tribunal should also be authorized to issue the order on such terms as it considers reasonable and necessary. It should be open to the Tribunal to grant orders upon terms consented to by the parties. Applications for interim orders should be made on notice to the merging parties.

9) The law should provide that the maximum duration of such an order be 30 days. The Bureau should be obliged to proceed with its inquiry as expeditiously as possible. However, the Bureau should be entitled to apply to the Tribunal for an extension of the order after the expiration of the 30 days in exceptional circumstances, such as where the time allowed by a court for the execution of formal powers extends beyond the original 30 day term. Applications to extend the term of an interim order should also be made on notice to the merging parties.

10) Asset securitization and related types of transactions should be exempt from the application of the notification requirements pursuant to the authority provided under s. 113(*d*) to exempt classes of transactions. Precise statutory language delineating these matters should be developed by the Bureau in consultation with interested parties.

11) The underwriting exemption provided in ss. 111(*b*) and 5(2) should be expanded to apply to underwritings in respect of which a prospectus is required under either Canadian or foreign securities laws, or which are exempt from a prospectus requirement under such laws.

12) The Bureau should consult with interested parties to identify and define additional exemptions applicable to types of transactions or types of industries which rarely raise competition issues. It would also be helpful if guidelines were developed by the Bureau

to clarify the interpretation of the various exemptions from notification available under the *Act*.

13) In the prenotification context, the *Act* should treat partnership interests as acquisitions of shares, rather than assets. In determining the appropriate threshold for notification of acquisitions of partnerships, the Bureau should have regard to the various forms of partnership arrangements that exist.

14) The fine for failure to notify should be increased. Imprisonment should no longer be available as a penalty for failure to notify.

15) As part of the revisions in this area, the Bureau should review the *Notifiable Transaction Regulations*, update them where required and address any ambiguities or omissions. For example, the regulations should specify the manner in which assets and revenues reported in foreign currency are to be converted into Canadian currency. The valuation should be done as of the date of the financial statements, and the exchange rate that should be applied is the wholesale rate published in newspapers.

16) The *Act* should clarify on whom the obligation to notify under these provisions rests.

# CONFIDENTIALITY AND MUTUAL ASSISTANCE IN ENFORCING COMPETITION LAWS

## 1. Background

Currently, s. 29 of the *Act* addresses the confidentiality of information obtained under the *Act*. It prohibits the communication of certain specified categories of information "except to a Canadian law enforcement agency or for the purposes of the administration and enforcement" of the *Act*. This prohibition does not apply to any information that has been made public. In addition, s. 10(3) requires that all inquiries by the Director be conducted in private.

Stakeholders have a number of concerns about the confidentiality protections afforded information obtained by the Director in the administration or enforcement of the *Act*. First, the protection accorded confidential information under the *Act* is not comprehensive. For example, s. 29 does not protect information that is provided voluntarily to the Bureau.

Second, there are differing views on the extent to which s. 29 permits the Bureau to communicate confidential information. On the one hand, it is customary and often necessary for effective law enforcement for law enforcement agencies to communicate confidential information selectively to third parties and other law enforcement agencies to advance their investigations. On the other hand, the type of information relevant to investigations under the *Act* is often commercially sensitive. If this information came into the hands of competitors or other parties indiscriminately, it might be harmful to the business interests of the information provider.

Third, communicating information to a foreign competition law authority has the potential to result in private antitrust litigation outside of Canada, particularly in the case of the United States. There is also a concern about the potential harm to Canada's national interests if the information is given to other agencies of a foreign government.

Finally, there is the question of the place and scope of international antitrust cooperation in light of the enactment of blocking statutes in Canada to protect against the extraterritorial application of foreign laws. There has been a more recent countervailing trend involving joint investigations between the Bureau and the Antitrust Division of the U.S. Department of Justice, where confidential information was exchanged which resulted in enforcement action that would not otherwise have occurred absent such cooperation. This new spirit of cooperation is also reflected in the August 1995 agreement between Canada and the United States regarding the application of their competition and deceptive marketing practices laws.

Accordingly, an appropriate balance between effective law enforcement and the concerns of information providers needs to be struck.

## 2. The Public Consultations

The Bureau's discussion paper sought comments on a number of issues in relation to confidentiality and mutual assistance. In the domestic context, these were:

- whether all information in the Bureau's possession, including that voluntarily provided, should be subject to the same general level of statutory protection;

- how the *Act* should be amended to clarify the Director's authority to communicate confidential information for the purposes of:

- advancing an investigation or assisting in the administration of the *Act*;
- negotiating an alternative case resolution;
- assessing the value of evidence or the credibility of witnesses by communicating confidential information to industry participants; and,

- correcting the record in the event a party misleads a tribunal in the course of the Director's intervention under ss. 125 or 126.

- how the *Act* should be amended to clarify the Director's authority to refer complaints to other government agencies involving matters which fall within their jurisdictions; and,

- how the *Act* should be amended to clarify the Director's authority to communicate information in his possession to assist Canadian law enforcement agencies in carrying out their duties.

The discussion paper also solicited views on a mutual assistance regime involving communicating confidential information to foreign competition law authorities in relation to a Bureau or joint investigation or to assist in a foreign competition law authority's investigation. Mutual assistance could include authorizing the Director to:

- use compulsory powers to obtain information for the enforcement of another country's competition laws; and,

- provide a foreign authority with information relevant to the enforcement of the *Act* or foreign competition law.

The Bureau asked recipients of the discussion paper:

- whether such mutual assistance is generally in the public interest;

- what safeguards would be appropriate to ensure that assistance would not occur in specific cases where it would be contrary to the public interest;

- whether the full range of compulsory powers available under the *Act* should be available to assist foreign authorities;

- whether certain categories of information should be exempted from communication under a mutual assistance regime and how exempt information should be defined without unduly hindering effective cooperation;

- what safeguards are appropriate to ensure that information communicated to a foreign authority is not used, or communicated to third parties, for purposes unrelated to the enforcement of the foreign competition law; and,

- in deciding whether to enter into a particular mutual assistance agreement under the proposed regime, what factors should be considered.

Commentators overwhelmingly agreed that all information in the Bureau's possession should fall within the *Act's* confidentiality protections. However, opposition outweighed support for giving the Bureau broad discretion to communicate confidential information domestically. Commentators preferred a narrowly defined set of circumstances absent which it would be

prohibited from such communications. Views on the Bureau's authority to refer complaints were mixed. Those who were opposed questioned the necessity for such authority.

Responses were also mixed on whether communicating information in the Bureau's possession to assist Canadian law enforcement agencies in carrying out their duties is in the public interest. Indeed, some felt the Bureau's authority to communicate to Canadian law enforcement agencies should be curtailed, since the Bureau's expertise is in competition law matters, not other law enforcement areas.

A strong majority of respondents held the view that mutual assistance with foreign competition law authorities is generally in the public interest. However, support from legal and business interests was generally predicated on the mutual assistance regime having significant safeguards and limitations. Judicial and Attorney General of Canada review was identified by some as desirable, as was consent.

There was general agreement that the full range of compulsory powers under the *Act* should be available to assist foreign authorities. However, a significant minority felt civil matters should be excluded from a mutual assistance regime.

Generally, commentators felt that, where a foreign competition law authority is prohibited by its legislation from providing certain categories of information, such categories of information should be also exempted from communication by the Bureau. Reciprocity was generally viewed as a *sine qua non* in this regard.

A number of safeguards were suggested to ensure that information communicated to a foreign authority is not used, or communicated to third parties, for purposes unrelated to the enforcement of the foreign competition law, or to private plaintiffs in competition law proceedings. Commentators also addressed themselves in some detail to other factors that should be considered in deciding whether to enter into a mutual assistance agreement with a particular foreign jurisdiction.

### 3. The Consultative Panel

The Panel addressed three main issues in its deliberations:

1) the general scope of confidentiality for information provided to the Director;

2) the appropriate confidentiality regime as it relates to domestic matters without an international component; and,

3) confidentiality in relation to matters involving assistance between jurisdictions.

General Scope of Protection

Currently, s. 29 of the *Act* imbues specified categories of information with confidentiality protection. Its protection does not, for example, cover information provided to the Bureau on a voluntary basis. Given the commercial sensitivity of information obtained by the Bureau in the administration or enforcement of the *Act* as well as personal privacy interests, the Panel concluded that the *Act* should ensure the confidentiality of all such information. Excluded from this protection would be information which is public or where there is consent of parties directly affected.

The Panel found it important that compliance with the new confidentiality regime be ensured. Accordingly, it urged that a specific offence in the *Act* of willful communication of information contrary to the *Act* be created.

Domestic Matters

Communication for "Administration or Enforcement" Purposes

Section 29 of the current *Act* excludes from confidentiality protection communications "for the purposes of the administration or enforcement" of the *Act*. Some members of the Panel agreed with the Bureau's assertion that the Director required some latitude within this rubric to communicate information to Canadian marketplace participants to advance an investigation under the *Act*. Others, however, believed that the *Act* should specify which communications should be permitted under "administration or enforcement". Recognizing that some members of the Panel would allow broader discretion to the Director, the Panel's consensus was that the Director should be able to engage in the following communications:

- between the Director and his staff, his agents and the Attorney General of Canada;
- to a court or the Competition Tribunal in the course of enforcement proceedings or disclosure to parties to such proceedings;
- to the target of an investigation for the purpose of settlement negotiations; and,
- where the communication is about a record, to the record's apparent author or its recipient(s) or to persons referred to in the record.

Other Authorized Communications

Section 29 of the current *Act* also excludes from confidentiality protection communications to Canadian law enforcement agencies. The Panel reached consensus that the Bureau should be authorized to communicate information in the following instances:

- redirecting complaint information to agencies that deal with such matters;
- notifying foreign governments pursuant to international agreements or arrangements[1]; and,
- giving information to a Canadian law enforcement agency.

The Panel's consensus is also that the Bureau should *not* be specifically authorized under the *Act* to communicate information obtained pursuant to the enforcement of the *Act* during interventions by the Director in proceedings under s. 125 or s. 126.

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[1] Such notifications include a brief description of the nature of the investigation and the applicable provisions of the *Act* and remain subject to the confidentiality provisions in the *Act*.

Matters with a Foreign Component

Safeguards and Public Interest Requirements

The Panel discussed the place of international cooperation in competition law enforcement and concluded that the controlled exchange of information is justified in today's interdependent world. The Panel endorsed engaging in mutual legal assistance with foreign competition law authorities on a reciprocal basis. Specifically, obtaining and sending information to a foreign jurisdiction should be authorized pursuant to mutual assistance agreements with foreign governments or competition law authorities. Such agreements should be subject to publication and a comment period before coming into force to permit public input on their provisions. To ensure that such assistance is in the Canadian public interest, a list of minimum requirements should be set out in the *Act*:

(i) Mutual assistance agreements must only be entered into with countries whose competition laws are substantially similar to Canada's.

(ii) Mutual assistance agreements must require reciprocity regarding the scope of assistance that will be provided by the two governments.

(iii) Mutual assistance agreements must require that the foreign party comply with any conditions imposed on the use to be made of information and its return.

Also, where the communication of information is proposed in relation to a solely foreign competition law matter, mutual assistance agreements must require this to be approved by the Minister of Justice, who could refuse such assistance if it would be contrary to the Canadian public interest.

When communicating information to foreign competition law authorities, the Panel concluded that the *Act* should also require that the following safeguards apply:

(i) information sent from Canada would be subject to confidentiality protection in the foreign jurisdiction which is substantially similar to that provided by Canada;

(ii) information sent from Canada would only be used for competition law enforcement purposes by the foreign competition law authority;

(iii) applicable rights or privileges would be preserved. For example, Canadian law respecting the use of compelled testimony would be recognized and applied by the receiving country. Another example would be solicitor-client privilege; and,

(iv) if a confidentiality obligation is violated, the information provider will be advised.

The Panel also concluded that there should be sanctions for breaching a confidentiality obligation. Depending on the nature of the breach, these sanctions could include the withdrawal of authority to use the information in the foreign jurisdiction and the return of the information.

Oversight Mechanisms -- Canadian Competition Investigations

The Panel considered at length what, if any, oversight mechanisms beyond the safeguards set out above are appropriate to ensure accountability when reliance is placed on mutual assistance agreements for the purpose of advancing a Canadian investigation.

Some members felt that it was crucial that information obtained by the Bureau in respect of its own investigation should not be sent to a foreign jurisdiction, even where the above-noted safeguards and public interest requirements have been satisfied, without the approval of a court following a hearing on notice to the information provider and target(s) of the investigation. The basic features of such an oversight hearing would be designed so as not to be overly costly and cumbersome. This would ensure accountability of the government. Notice could be delayed until the Bureau determines the investigation would no longer be prejudiced. One suggestion in this regard would be that any hearing before a judge would take place within 30 days of notice with no right of appeal. At the hearing, the judge could order the return of information or limitations on its use. The purpose of the judicial hearing would to be ensure that the safeguards in the law have been complied with.

On the other hand, other members felt that even this was too cumbersome a process which could result in unnecessary costs and delays with little gain in terms of protection. These members believed the safeguards and public interest requirements set out above, but not including review by the Minister of Justice, should be sufficient to address adequately the interests of the information provider. Review by the Minister of Justice would not be in keeping with similar practices of other Canadian law enforcement agencies.

In the end, the Panel was unable to reach a consensus on whether third party oversight, over and above the safeguards and public interest requirements, was necessary in situations where the Bureau wishes to use a mutual assistance agreement to further a Canadian investigation.

Oversight Mechanisms -- Solely Foreign Competition Law Matters

One final circumstance covers the treatment of information sharing relating to a foreign competition law matter, whether the information was obtained as a result of a foreign request or an investigation under the *Act*. It was the Panel's consensus that the Bureau should largely adopt the approach set out in the *Mutual Legal Assistance in Criminal Matters Act (MLACMA)* and should seek judicial authorization to send such information to a foreign competition law authority. The notice and judicial review regime described in "Oversight Mechanisms -- Canadian Competition Investigations" should be applicable for these purposes, *mutatis mutandis*. However, in addition, the Bureau should always give notice that it is seeking such authorization to a party that has been subject to previous formal powers at the request of a foreign competition law authority. Some members of the Panel asserted that notice should also be provided to the target(s) of the investigation, while others felt the process set out in *MLACMA* (notice to providers of information only) was adequate.

In addition, it was the Panel's consensus that, even in the absence of a request for information, the Bureau should nevertheless be able to seek authorization to send information in its possession to a foreign competition law authority. However, this should only be permitted if the foreign jurisdiction is prepared to reciprocate[2] and only if the information is to be communicated to assist in respect of an ongoing foreign investigation. The Bureau should not be permitted to provide information which triggers a new foreign investigation.

In authorizing the communication of information to a foreign competition law authority, conditions could be imposed at the hearing, including those:

(i) necessary to give effect to any request;

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[2]It is noteworthy, in this regard, that the U.S. *International Antitrust Enforcement Assistance Act* does not provide authority for communicating information absent a request.

(ii) with respect to the preservation and return to Canada of any record or thing seized; and,

(iii) with respect to the protection of the interests of third parties;

(iv) providing other protections such as limitations on use.

## 4. Recommendations

General Scope of Protection

1) All information obtained by the Bureau in the administration or enforcement of the *Act* should be designated confidential. Excluded from this protection would be information which is public or where there is consent of parties directly affected.

2) A specific offence in the *Act* of willful communication of information contrary to the *Act* should be created.

Domestic Matters

Communication for "Administration or Enforcement" Purposes

3) The Director should further examine which communications should be permitted under the rubric of "administration or enforcement". Recognizing that some members of the Panel would allow broader discretion to the Director, the Panel's consensus was that the Director should be able to engage in the following communications:

- between the Director and his staff, his agents and the Attorney General of Canada;
- to a court or the Competition Tribunal in the course of enforcement proceedings or disclosure to parties to such proceedings;
- to the target of an investigation for the purpose of settlement negotiations; and,
- where the communication is about a record, to the record's apparent author or its recipient(s) or to persons referred to in the record.

Other Authorized Communications

4) The Bureau should be authorized to communicate information in the following instances:

- redirecting complaint information to agencies that deal with such matters;
- notifying foreign governments pursuant to international agreements or arrangements, subject to the confidentiality provisions in the *Act*; and,
- giving information to a Canadian law enforcement agency.

5) The Bureau should *not* be specifically authorized under the *Act* to communicate information obtained pursuant to the enforcement of the *Act* during interventions by the Director in proceedings under s. 125 or s. 126.

Matters with a Foreign Component

Safeguards and Public Interest Requirements

6) Obtaining and sending information to a foreign jurisdiction, where it is willing to reciprocate, should be authorized pursuant to mutual assistance agreements with foreign governments or competition law authorities. Such agreements should be subject to publication and a comment period before coming into force. To ensure that such assistance is in the Canadian public interest, a list of minimum requirements should be set out in the *Act*:

   (i) mutual assistance agreements must only be entered into with countries whose competition laws are substantially similar to Canada's.

   (ii) Mutual assistance agreements must require reciprocity regarding the scope of assistance that will be provided by the two governments.

   (iii) Mutual assistance agreements must require that the foreign party comply with any conditions imposed on the use to be made of information and its return.

   Where the communication of information is proposed in relation to a solely foreign competition law matter, mutual assistance agreements must require this to be approved by the Minister of Justice, who could refuse such assistance if it would be contrary to the Canadian public interest.

7) When communicating information to foreign competition law authorities, the *Act* should also require the following safeguards to apply:

   (i) information sent from Canada would be subject to confidentiality protection in the foreign jurisdiction which is substantially similar to that provided by Canada;

   (ii) information sent from Canada would only be used for competition law enforcement purposes by the foreign competition law authority;

   (iii) applicable rights or privileges would be preserved. For example, Canadian law respecting the use of compelled testimony would be recognized and applied by the receiving country. Another example would be solicitor-client privilege; and,

   (iv) if confidentiality obligation violated, information provider to be advised.

8) There should be sanctions for breaching a confidentiality obligation.

Oversight Mechanisms -- Canadian or Joint Competition Investigations

9) Having regard to the divergent views, the Director should further examine what, if any, oversight mechanisms, over and above the safeguards and public interest requirements (except review by the Minister of Justice), are appropriate when communication is proposed for the purpose of advancing a Canadian investigation.

Oversight Mechanisms -- Solely Foreign Competition Law Matters

10) The Bureau should largely adopt the approach set out in the *Mutual Legal Assistance in Criminal Matters Act (MLACMA)* and should seek judicial authorization to send confidential information to a foreign competition law authority, with or without a request.

11) Applications for authorization to communicate information to a foreign competition law authority should be on notice to the information provider unless prejudicial to an ongoing investigation. In the latter case, the Bureau should give notice as soon as practicable after the investigation would no longer be prejudiced or such sooner period as the court specifies. However, the Bureau should always give notice to a party that has been previously subject to formal powers at the request of a foreign competition law authority.

12) In authorizing the communication of information to a foreign competition law authority, conditions could be imposed at the hearing, including those:

(i) necessary to give effect to any request;

(ii) with respect to the preservation and return to Canada of any record or thing seized;

(iii) with respect to the protection of the interests of third parties; and,

(iv) providing other protections such as limitations on use.

# MISLEADING ADVERTISING AND DECEPTIVE MARKETING PRACTICES

## 1. Background

The prohibitions against misleading or deceptive advertising in the *Act*, generally, have been effective in dealing with many aspects of this problem. However, the provisions are criminal offences. There are a number of reasons why a wider range of enforcement mechanisms would allow more appropriate and effective responses to the variety of such conduct in the marketplace:

- the criminal law process can be inappropriate to some instances of misleading advertising;
- the stigma of the criminal process may encourage an adversarial response and preclude the informal resolution of many of the cases;
- the offensive conduct can continue throughout the course of the lengthy criminal process (even where there is no undue delay);
- the evidentiary requirements of the criminal process can unnecessarily increase the costs of preparing for trial; and,
- the criminal burden of proof can be inappropriate in some circumstances of misleading advertising.

The stigma of a criminal conviction can also be too harsh a response in the case of an advertiser who has simply failed to exercise due diligence. In general, the principle of restraint should be followed in avoiding recourse to the criminal law where other, less severe, processes can be effective.

Since the 1970s, studies have suggested that criminal sanctions are an incomplete response to misleading advertising. In June, 1988, the Parliamentary Standing Committee on Consumer and Corporate Affairs issued a unanimous report (the "Collins Report"), which recommended a series of non-criminal responses to misleading advertising. As a result, the Bureau engaged in extensive consultations culminating in the formation of a working group to develop reform proposals. On January 31, 1991, the working group submitted a unanimous report to the Director, recommending revisions to the criminal law provisions and the adoption of a non-criminal adjudication alternative before the Competition Tribunal.

## 2. The Public Consultations

The Bureau's discussion paper solicited comments on a number of issues on the subject of misleading advertising and deceptive marketing practices. It proposed as follows:

- a general criminal provision similar to s. 52(1)(*a*) and the criminal provision in s. 55.1 related to pyramid sales would continue to exist. The absence of due diligence would continue to be sufficient to support a criminal conviction.
- a single member of the Competition Tribunal would be empowered to order advertisers engaging in misleading or deceptive practices to "cease and desist" if it were established that the advertising was materially misleading or deceptive on a balance of probabilities. Interim cease and desist orders would also be available.

- in conjunction with cease and desist orders, the Tribunal would be authorized to issue additional remedial orders, namely:

- restitution orders -- where the Bureau established that a clearly identifiable person had suffered a readily determinable financial loss caused by the misleading advertising and that such losses were significant on an individual basis;

- orders respecting marketplace information -- where a restitution order would not be available but the misleading advertiser should repay the gains from such advertising by improving the quality of marketplace information; and,

- orders requiring the publication of information notices -- where the relevant market should be informed of the misleading nature of the earlier advertisements.

The public responses to these proposals were divided. Although most were supportive, some favoured the *status quo* while others favoured complete decriminalization. Some criticized a "hybrid" (criminal/civil) regime because of concerns that the Bureau could choose the civil track but still use the threat of criminal prosecution to induce civil settlement. Other commentators felt that there would be nothing to prevent the Bureau from proceeding civilly at first, only to switch to a criminal prosecution after cooperation and information had been obtained.

Several written comments proposed safeguards in relation to these potential problems, such as specific criteria for determining when a matter would proceed by criminal prosecution; an election by the Bureau at an early stage as to which avenue would be pursued; and protection against the use of information provided civilly in a subsequent criminal prosecution.

While there was general support for the concept of "cease and desist" orders as well as interim "cease and desist" orders, many concerns were expressed about the availability of additional remedial orders. The potential misapplication of these orders was seen as highly threatening to the reputation and goodwill of businesses. Moreover, some believed that such orders had the potential to be at least as punitive as existing criminal sanctions. Many of the submissions stressed that, if such orders were available, specific conditions should be established for their use which would encourage restraint and reduce the risk of unduly harsh consequences to advertisers.

## 3. The Consultative Panel

Overview

The Panel concluded that misleading advertising should be addressed through two adjudicative regimes: (1) a criminal regime for egregious cases; and (2) a civil regime. A more detailed discussion of these regimes follows this overview. In point form, the two regimes can be summarized as follows:

Criminal Regime

- a general criminal prohibition, similar to s. 52(1)(*a*);
    - require subjective *mens rea* or recklessness in egregious cases; and,
    - increase in maximum fine on summary conviction to $200,000.
- ss. 55 and 55.1 would remain as current;

Civil Regime

- all of the existing misleading advertising provisions except s. 55 and 55.1 would be enacted as reviewable matters under Part VIII of the *Act*;

- reviewable by a single judicial member of the Competition Tribunal, the Federal Court - Trial Division, or a superior court in a province;

- available orders would be: (1) cease and desist orders; (2) interim cease and desist orders in urgent situations involving serious harm; (3) orders requiring the publication of information notices; and, (4) civil monetary penalties -- the latter two only available in the absence of due diligence;

- consent matters registered with the adjudicator but not reviewed;

- intervenors not permitted; and,

- public consultations resulting in published guidelines to indicate the basis on which the decision will be made to proceed criminally or civilly.

In designing the two regimes, the Panel concluded that the onus on the government for the general criminal prohibition should be raised from strict liability to subjective *mens rea* (i.e. that the accused *intended* to act contrary to the law). The Panel viewed this as a proper balance for the lower burden of proof, the balance of probabilities, that would exist under the new civil regime.

Criminal Regime

The Panel proposed that s. 52(1)(*a*) be maintained as a criminal provision to deal with most egregious cases but that it be changed by adding a subjective *mens rea* requirement. In the Panel's view, subjective *mens rea* includes intentional or knowledgeable conduct or recklessness in egregious cases. Because of the increase in seriousness which such a change from the current strict liability regime would signal, the severity of penalties upon conviction should be increased. This would be achieved by raising the maximum fine in respect of summary conviction proceedings to $200,000, in addition to the existing term of imprisonment. The new criminal regime would be available for the relatively small number of egregious cases involving misleading advertising or deceptive marketing practices. The Panel concluded that the Bureau should publish guidelines indicating how it would exercise its discretion in deciding when a particular case warrants being referred to the Attorney General for criminal prosecution. (See further discussion below.)

Sections 55 and 55.1 (the multi-level marketing and pyramid selling provisions) should remain unchanged as criminal offences.

The Panel observed that orders under ss. 33 (interim injunctions) and 34 (prohibition orders) would continue to be available under the criminal regime.

Civil Regime

a) Introduction

The Panel concluded that, when misleading advertising occurs, it is essential that it be stopped quickly to minimize any harm to the competitive process, including consumers, competitors and others. If an effective remedy is available to achieve this, it will also, in most cases,

eliminate the need for further remedial action. These principles guided the Panel in its deliberations in this area.

The Panel had a wide-ranging discussion of various models including modifications to the current, exclusively criminal approach. In the end, it concluded that a civil regime should be established to address most instances of misleading advertising and deceptive marketing practices currently prosecuted in the criminal courts by the Attorney General of Canada. Specifically, the misleading advertising and deceptive marketing practices offences other than ss. 55 and 55.1 (the multi-level marketing and pyramid selling provisions) should be replaced by analogous reviewable practices provisions. (A general provision should continue to exist under the criminal regime, as outlined above, but also be enacted under the civil regime.)

Civil misleading advertising matters should be brought before a single judicial member of the Competition Tribunal, the Federal Court - Trial Division or a superior court in a province [hereafter referred to as "the adjudicator"]. While the Panel felt that having the Competition Tribunal handle all such cases would allow it to develop a specialized expertise, it decided that enabling the Bureau to apply to the civil courts in some areas of the country where access to the Tribunal might otherwise be difficult would ensure adequate regional accessibility. Recourse to an adjudicator other than the criminal courts would have a number of advantages over the current system, including: a lower evidentiary burden for the Bureau; avoidance of the harsh stigma attached to advertisers becoming involved in the criminal justice system even though they had broken the law inadvertently; faster and more efficient remedial action; and, in the case of the Competition Tribunal, an ability to develop expertise in adjudicating such matters.

Following an inquiry into any of the misleading advertising and deceptive marketing practices reviewable matters, the Bureau would initiate proceedings in the civil regime by filing an application with one of the adjudicators if grounds exist to obtain an order.

b) Cease and Desist Orders

The Panel felt that most instances of misleading advertising can be appropriately dealt with by cease and desist orders. Proof of intent should not be required to obtain such orders. The purpose here is to stop the impugned practices in the marketplace. Accordingly, once it has been established that a materially misleading representation has been made (or that another of the reviewable misleading advertising or deceptive marketing practices provisions has been breached), the advertiser should be required to cease doing so and not make substantially similar representations (or engage in substantially similar prohibited conduct) in the future. The duration of such orders should be determined by the adjudicator up to a maximum of ten years, subject to a party's right to apply to rescind, vary or extend them where there has been a material change in circumstances.

c) Interim Cease and Desist Orders

The Panel decided that the adjudicator should also be empowered to issue cease and desist orders on an interim basis. Akin to interim injunctions, such orders should be available on notice in urgent situations involving serious harm.

The Panel shared the concerns of some of those who had made submissions regarding the availability of interim cease and desist orders. While necessary, their application should be limited to the most serious cases. To obtain such an extraordinary order, the Director should be required to establish a strong *prima facie* case that the representation has breached one of the reviewable misleading advertising or deceptive marketing practices provisions of the *Act*; that, unless the order is granted, serious harm is likely to ensue; and, that the balance of

convenience favours the granting of the order. It should not be necessary for the Director to provide an undertaking as to damages, nor should costs be available against him in such proceedings. However, the Director should be required to proceed to hearing as expeditiously as possible upon receipt of an interim order. Accordingly, such interim orders should have a maximum duration of 14 days or longer on consent. After this time, or such shorter period as may be ordered, the interim order would expire unless the Director has sought and been granted an extension for a further specified period (again, to a maximum of 14 days or longer on consent). The Director's conduct in proceeding expeditiously will be considered in whether to grant such an extension.

d) Further Orders

General

In the opinion of the Panel, cease and desist orders would be acceptable for all situations where advertising is misleading or deceptive, even when the advertiser has not been negligent. However, the Panel shared many of the concerns expressed by commentators about the creation of additional orders. Since most of these are potentially burdensome, they should not be available on the same basis as a cease and desist order. They impose a greater burden than the mere stopping of a misleading or deceptive practice. Accordingly, the Panel has concluded that additional remedies should only be available if the advertiser fails to establish that it exercised due diligence (i.e., took reasonable care to avoid engaging in the reviewable practice).

The Panel also shared many of the significant concerns expressed by commentators regarding the appropriateness of restitution orders and orders directed towards improving the general quality of marketplace information, particularly regarding their efficacy. The potential scope of such orders is too broad. In light of these concerns, and in place of such remedial orders, the Panel concluded that a civil monetary penalty regime is preferable. Orders requiring the publication of information notices specific to the misleading advertising in question are also desirable in some circumstances. Both types of orders are discussed below.

Information Notices

When misleading advertising or deceptive marketing practices have occurred, there may be residual mistaken impressions in the marketplace even if the practices in question have ceased. In such cases, it is desirable to inform marketplace participants about the impugned practices. The Panel felt that orders requiring the publication of information notices would meet this need. In line with the previous discussion, such orders would not be available unless the advertiser failed to exercise due diligence.

Such orders should require advertisers to publish notices directed at the class of persons likely to have been reached by the misrepresentation. The notices should include sufficient information to identify the respondent, the specific misrepresentations and products concerned, the time period and geographical area to which the representations related, the media concerned and the nature of the reviewable practices in question. The current practice in the Bureau's alternative case resolution program with respect to such notices should be replicated in terms of the notices' format, size and duration.

Civil Monetary Penalties

There arises the question of how to encourage businesses to exercise due care to avoid making misleading or deceptive representations. The Panel concluded that the adjudicator should have the authority to order the payment of a civil monetary penalty in an amount appropriate in the circumstances giving rise to the breach of the relevant provision. However, there should be a

cap on the potential penalty as well as a set of criteria for establishing the appropriate levels within that maximum. The Panel concluded that similar subsequent breaches should be subject to a higher penalty and recommended a maximum penalty of $100,000 in respect of a first breach (e.g. a number of separate advertisements involving the same misrepresentation in various media over a period of months would constitute one "breach") and a maximum penalty of $200,000 in respect of a second or subsequent breach involving similar conduct. The Panel recommended that the relevant criteria be: the projected reach of the representation in the relevant market; the vulnerability of the target audience; the number of times that the representation was repeated and the duration of the representation; the materiality of the deception; the likelihood of marketplace self-correction; evidence of harm to the marketplace/competition; and, the advertiser's compliance history. The Bureau should consider whether these criteria should be established by means of guidelines or in the legislation.

e) Consent Matters

The Panel discussed whether the terms of consent orders should be reviewable by the adjudicator prior to making it a formal order of the adjudicator for enforcement purposes. Concern was raised about the potential for abuse if the system did not provide for independent review. There was also a concern that information adequate for third parties to assess the appropriateness of such resolutions might not be forthcoming from the parties. However, in the end the Panel concluded that the overriding consideration was speed in stopping the deceptive practices. As long as an agreed statement of facts as well as a statement why the resolution is appropriate in the circumstances is made available to the public, the adjudicator need not perform a review function of a consent order.

f) Intervenors

The Panel concluded that, in light of the need for speed of resolution in respect of civil marketing practices matters, intervenors should not be permitted before the adjudicators.

g) The Bureau's Decision on which Regime to Use

The choice of one adjudication route would foreclose the other. (For example, seeking an interim cease and desist order would mean that the criminal process would be foreclosed.) However, the Panel acknowledged the concerns of commentators regarding the potential for arbitrariness in the Bureau's ability to elect between regimes in taking enforcement action (i.e., deciding whether to make an application under the civil regime or refer evidence to the Attorney General of Canada with a recommendation for prosecution). After weighing various alternatives, the Panel decided that no statutory conditions or time-limits should be adopted regarding this decision.

There may be circumstances in which, while there is adequate evidence to launch a criminal prosecution, a non-criminal intervention is preferable. Therefore, the Panel concluded that it would be desirable for the Bureau to publish, and seek public input on, guidelines indicating the basis on which the decision will be made to proceed criminally or civilly. Every effort should be made to indicate a decision to parties under inquiry within 90 days of first contact with the target. In addition to a materially false or misleading representation with intent, the Panel considers the following circumstances to be relevant to this determination to proceed criminally: repeat offences; a blatant disregard for the truth; the targeting of particularly vulnerable members of society; the adverse impact on the marketplace; and, the need for deterrence.

h) Existing Jurisprudence and the Transfer of Adjudication

The Panel considered it crucial, where the law is reasonably settled in respect of the current provisions, that precedents not be opened up again for debate simply because of the shift in adjudicative jurisdiction. Changes in the legislation should not be construed by the new adjudicators as entitlement to ignore previous jurisprudence in settled areas. The Panel concluded that, if the same statutory language is retained in respect of the substantive provisions, this will bolster arguments as to the persuasive effect of earlier jurisprudence before the new adjudicators. In addition, the Bureau should, in its enforcement guidelines, indicate that it will be guided by the previous jurisprudence in deciding which cases to bring before the new adjudicators. Finally, the importance of abiding by the existing jurisprudence should be reiterated by the Bureau before the Parliamentary committee when the bill is under review.

## 4. Recommendations

Criminal Regime

1) Section 52(1)(*a*) should be changed by adding a subjective *mens rea* requirement. The provision should address intentional or knowledgeable conduct and recklessness in egregious cases.

2) The maximum fine in respect of summary conviction proceedings should be increased to $200,000 to reflect the seriousness of the new criminal provision.

3) Sections 55 and 55.1 (the multi-level marketing and pyramid selling provisions) should not be amended.

Civil Regime: Introduction

4) A civil regime should be established to address most instances of misleading advertising and deceptive marketing practices currently prosecuted in the criminal courts by the Attorney General of Canada.

5) The misleading advertising offences other than ss. 55 and 55.1 should be replaced by analogous reviewable practices provisions. (A general provision should continue to exist under both the civil and criminal regimes.)

6) Civil misleading advertising matters should be brought by the Director before a single judicial member of the Competition Tribunal, the Federal Court - Trial Division or a superior court in a province ("the adjudicators"). In choosing between adjudicators, the Director should carefully consider regional accessibility.

Civil Regime: Cease and Desist Orders

7) The presence of intent should not be a consideration regarding whether a cease and desist order should be issued. Once it has been established that reviewable conduct has occurred, a cease and desist order would issue requiring the respondent to cease engaging in such conduct and to not engage in substantially similar conduct in the future.

8) The duration of cease and desist orders should be determined by the adjudicator up to a maximum of ten years, subject to the parties' right to apply to rescind, vary or extend them where there has been a material change in circumstances.

Civil Regime: Interim Cease and Desist Orders

9) The adjudicator should also be empowered to issue cease and desist orders on an interim basis where the Director has established a strong *prima facie* case that the representation has breached one of the reviewable misleading advertising or deceptive marketing practices provisions of the *Act*; that, unless the order is granted, serious harm is likely to ensue; and, that the balance of convenience favours granting the order.

10) The Bureau should not be required to provide an undertaking as to damages, nor should costs be available against it in interim cease and desist order proceedings.

11) Interim orders should have a maximum duration of 14 days (or longer on consent), or such shorter period as may be ordered. The Bureau should be able to seek extensions for a further specified period to a maximum of 14 days (or longer on consent).

Civil Regime: Further Orders

General

12) Additional orders beyond cease and desist orders should be available only if the respondent fails to establish that it exercised due diligence.

13) Restitution orders and orders directed towards improving the general quality of marketplace information should not be authorized.

Information Notices

14) Orders requiring the publication of information notices to inform marketplace participants about the impugned practices should be available. Such orders should require respondents to publish notices directed at the class of persons likely to have been reached by the misrepresentation. The notices should include sufficient information to identify the respondent, the specific misrepresentations and products concerned, the time period and geographical area to which the representations related, the media concerned, and the nature of the reviewable practices in question. The current practice in the Bureau's alternative case resolution program with respect to such notices should be replicated in terms of the notices' format, size and duration.

Civil Monetary Penalties

15) The adjudicators should have the authority to order the payment of a civil monetary penalty in an amount appropriate in the circumstances giving rise to the breach of the relevant provision.

16) A maximum penalty of $100,000 in respect of a first breach (e.g. a number of separate advertisements involving the same misrepresentation in various media over a period of months would constitute one "breach") and $200,000 in respect of a second or subsequent breach involving similar conduct should be available.

17) The criteria for establishing an appropriate fine level within the *maxima* should be: the projected reach of the representation in the relevant market; the vulnerability of the target audience; the number of times that the representation was repeated and the duration of the representation; the materiality of the deception; the likelihood of marketplace self-correction; evidence of harm to the marketplace/competition; and, the

advertiser's compliance history. The Bureau should consider whether these criteria should be established by means of guidelines or in the legislation.

Civil Regime: Consent Matters

18) The terms of consent orders should not be reviewable by the adjudicators prior to making them formal orders of the adjudicators for enforcement purposes as long as agreed statements of facts as well as statements why the resolutions are appropriate in the circumstances are made available to the public

Civil Regime: Intervenors

19) Intervenors should not be permitted before the adjudicators in respect of reviewable marketing practices matters, whether contested or by consent.

The Bureau's Decision on which Regime to Use

20) The choice of one adjudication route should foreclose the other.

21) Rather than in the legislation, the Bureau should develop, publish and seek public input on guidelines indicating the factors it will take into account in exercising its discretion to make an application under the civil regime or refer evidence to the Attorney General of Canada with a recommendation for prosecution. Every effort should be made to indicate a decision to parties under inquiry within 90 days of first contact with the target. The following circumstances should influence this decision: repeat offences; a blatant disregard for the truth; the targeting of particularly vulnerable members of society; the adverse impact on the marketplace; and, the need for deterrence.

Existing Jurisprudence and the Transfer of Adjudication

22) Where the law is reasonably settled in respect of the current provisions, precedents should not be opened up again for debate simply because of the shift in adjudicative jurisdiction. In addition, the Bureau should, in its enforcement guidelines, indicate that it will be guided by the previous jurisprudence in deciding which cases to bring before the new adjudicators. Finally, the importance of abiding by the existing jurisprudence should be reiterated by the Bureau before the Parliamentary committee when the bill is under review.

# REGULAR PRICE CLAIMS AND SECTION 52(1)(*d*)

## 1. Background

Regular price claims are common in the marketplace. They can be a powerful and perfectly legitimate marketing tool because many consumers are attracted to promotions that promise a savings, from the "ordinary" or "regular" price of a product.

Where comparisons are made between prices (e.g., the "regular" price and the "sale" price), customers are exhorted to buy based on implied savings. If there is no sound basis for the reference price, a misrepresentation has occurred. Fictitious ordinary selling prices can also manifest themselves in the phenomenon of continuous sales, wherein products are perpetually "on sale". In these circumstances, consumers are misled and fair and effective competition is undermined.

To protect against this type of misrepresentation, s. 52(1)(*d*) was enacted in 1960. The section prohibits materially misleading representations to the public concerning the price at which a product or like products have been, are, or will be ordinarily sold.

## 2. The Public Consultations

Most commentators on the Bureau's discussion paper felt that the volume test applied by the Bureau[3] and the Attorney General did not adequately reflect marketplace reality. Some asserted that the test should be based on the price at which a product is offered for sale for at least half of a relevant time period. It was asserted by both consumer and business commentators that consumers are most likely to interpret regular price claims as referring to the price at which the product is normally offered for sale. Such a test would be easy for retailers to meet since they can control the length of time at which they offer a product at a certain price.

However, those supporting a time test generally were concerned that the offered price be *bona fide*. They believe a retailer should be required to demonstrate that it made *bona fide* efforts to generate some sales at the represented regular price to avoid artificially inflated regular prices for a product.

Other commentators felt that the volume test was appropriate. Still others felt that both tests should be available, as alternatives.

## 3. The Consultative Panel

The Panel recognized the importance of a provision in the *Act* prohibiting misrepresentations as to regular price, but sought to make the section easier for retailers to understand and apply as well as more reflective of what consumers and retailers understand by "regular" price claims in today's marketplace. In devising an amended ordinary price claim provision, one of the

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[3] Generally, representations as to regular price must refer to the actual price at which a substantial volume of sales have occurred in the relevant market.

submissions on the discussion paper proposed a number of criteria:

> In looking for a law that will establish fair competitive practice in comparative sale price advertising, there are a number of principles that can be used to guide policy development:
>
> i) Clarity: the wording and intent of the law should be clear;
>
> ii) Comprehension: it should be easily understood by retailers and consumers;
>
> iii) Workability: it can be implemented by all retailers;
>
> iv) Enforceability: it can be effectively and inexpensively enforced; and,
>
> v) Choice: it should give merchants and consumers a measure of freedom of choice in selecting pricing strategies.

After some discussion and the consideration of several alternative proposals, a consensus was arrived at on amending the *Act* to address misleading price comparisons under the civil reviewable practices regime (see chapter on Misleading Advertising), and to permit price comparisons based on a substantial volume of sales or an offer of sale for a substantial period of time.

The Panel concluded that the revised provision should explicitly identify two alternative tests. A price comparison that complied with either test would not raise a question. By clearly identifying the circumstances under which a challenge could take place, the revised provision would provide greater certainty.

Specifically, to comply with the law in the case of a representation of a former selling price, the represented price would have to reflect either the price of sellers generally in the relevant market at which a substantial volume of recent sales of the product took place, *or* the price of sellers generally in the relevant market at which the product was recently offered for sale in good faith for a substantial period of time prior to the sale.

Where the comparison price is clearly specified to be the price of the advertiser, these tests would apply with reference to the price of that person alone, rather than in relation to the price of sellers generally in the relevant market.

Where price comparisons are to those of "like" products, these tests would apply with reference to the prices of those like products. The Panel felt that price comparisons should not be restricted to "identical" products but should continue to be permitted in respect of "like" products. The former approach would appear to rule out comparisons between house brands or between competing national brands.

Finally, the Panel agreed that situations where price comparison representations failed to qualify for these tests but were not otherwise misleading should be addressed. Advertisers should be allowed the freedom to make any price representations they wish so long as they are reasonably based and not deceptive or misleading. The Panel produced an example of a provision which illustrates its consensus on how regular price claims should be treated. This appears at the conclusion of this chapter.

The Panel discussed the desirability of defining for greater certainty several terms contained in the revised provision. Such terms included "substantial volume", "good faith", "like products", "substantial time", "nature of the product" and "relevant market". Some Panel members cautioned against defining these terms too precisely, since their meanings could vary

depending on the circumstances of each case. The consensus was that existing and future jurisprudence could provide sufficient guidance regarding the meaning of some of these terms.

The Panel reviewed some practical situations and the application of the new provision.

Introductory Sales/Future Price Claims

Ordinary price claims can be made in relation to past prices (e.g., "Was"), current prices ("Regular") or future prices (e.g., "After Sale Price"). Future price representations should not be construed as misleading in principle. All three types of claims should be addressed in the new provision and the alternative tests should apply to each of them.

Manufacturers' Suggested Retail Price (MSRP)

The Panel observed that the formulation of the new provision would likely prohibit comparisons between a manufacturer's suggested retail price (as well as like phrases) and a transaction price where the MSRP failed to meet one of the alternative tests. However, the Panel agreed that the practice in some industries of comparing an MSRP to a former MSRP was not necessarily misleading and that this should be confirmed through enforcement guidelines from the Bureau, which should be released in draft form at the same time as the legislation is introduced.

Nature of the Product and Relevant Market

The Panel recommended that the new provision be drafted in such a way as to allow the nature of the product and relevant market to be considered. Different products have different life spans. (For example, many fashion goods typically sell in small volumes to fashion leaders who want to be first with the product, and then in increasing volumes to others as they are discounted steadily until the stocks are depleted. Another example involves frequently shopped products which can often have volatile prices.)

Clearance Sales

The Panel recognized that clearance sales may raise a number of unique issues vis-à-vis their treatment in the revised provision. The consensus was that the Bureau should address these situations in the enforcement guidelines so that advertisers could have as clear guidance as possible on the potential application of the law.

## 4. Recommendations

1) Misleading ordinary price representations should be reviewable matters under the *Act* and subject to the civil regime as proposed in the chapter on misleading advertising.

2) The revised provision should explicitly identify two alternative tests to be met. In the case of representations as to former selling prices, these tests would be defined as the price of sellers generally in the relevant market at which a substantial volume of recent sales of the product took place, *or* the price of sellers generally in the relevant market at which the product was recently offered for sale in good faith for a substantial period of time prior to the sale.

   Where the comparison price is clearly specified to be the price of the advertiser, these tests should apply with reference to the prices of that person alone, rather than in relation to the price of sellers generally in the relevant market.

Where price comparisons are to those of "like" products, these tests should apply with reference to the prices of those like products.

3) Where a price representation fails to qualify under these tests but is otherwise not misleading, the adjudicator should not make an order.

4) Ordinary price claims in relation to future prices should also be addressed in the new provision.

5) The Bureau should issue enforcement guidelines in draft form at the same time as the legislation is introduced confirming, among other things, that the practice in some industries of comparing an MSRP to a former MSRP is not necessarily misleading. The enforcement guidelines should also address issues arising in relation to clearance sales.

6) The new provision should be drafted to allow the nature of the product and relevant market to be considered by the adjudicator.

**Panel's Model Provision**

52. (1) No person shall, for the purpose of promoting, directly or indirectly, the supply or use of a product or for the purpose of promoting, directly or indirectly, any business interest, by any means whatever...

(*d*) make a materially misleading representation to the public concerning the price at which a product or like products have been, are or will be ordinarily supplied, and for the purposes of this paragraph a representation as to price is deemed to refer to the price at which the product has been supplied by sellers generally in the relevant market unless it is clearly specified to be the price at which the product has been supplied by the person by whom or on whose behalf the representation is made.

(*e*) For the purposes of paragraph (*d*):

(i) a representation to the public concerning the price at which a product or like products have been, are or will be ordinarily supplied is not misleading if the person making the representation establishes that it is the price at which sellers generally in the relevant market have:

(A) recently sold a substantial volume of the product, or

(B) recently offered the product for sale in good faith for a substantial period of time prior to the sale, or

(ii) a representation to the public concerning the price at which a product or like products have been, are or will be ordinarily supplied which is clearly specified to be the price of the person by whom or on whose behalf the representation is made is not misleading if the person making the representation establishes that it is the price at which that person:

(A) recently sold a substantial volume of the product, or

(B) recently offered the product for sale in good faith for a substantial period of time prior to the sale.

(*f*) In making determinations under paragraphs (*d*) and (*e*), the adjudicator shall have regard to the nature of the product and the relevant market.

# PRICE DISCRIMINATION AND PROMOTIONAL ALLOWANCES

## 1. Background

Section 50(1)(*a*) of the *Act* deals with price discrimination. Price discrimination is a criminal offence and involves the practice of granting price concessions to one purchaser which are not available to competing purchasers in respect of a sale of articles of like quality and quantity. The provision is part of the criminal law for historical (constitutional) reasons, not because it deals with a practice which is so serious as to warrant a criminal law deterrent.

The promotional allowances provision (s. 51) was added to the *Act* in 1960 to prohibit granting allowances for advertising or display purposes that are not offered on proportionate terms to competing purchasers. Studies preceding its introduction had found that very large buyers received substantial extra allowances not as discounts but as payments for promotional services. It was decided that this situation warranted specific treatment because it did not appear to be captured by the price discrimination provision.

There have been very few cases, and only one contested case, involving the price discrimination and promotional allowances provisions. As a result, the dearth of jurisprudence provides businesses and their counsel with little guidance as to the interpretation of these provisions.

In 1992, the Bureau issued price discrimination enforcement guidelines. Their purpose was to bring policy more in line with the general mandate of the *Act* to maintain and encourage competition, and to address uncertainty about the provision. It was generally perceived to have a "chilling" effect on businesses, who were refraining from adopting pricing practices and strategies which could be pro-competitive and making a significant number of requests to the Bureau for advice and interpretation.

Despite the release of enforcement guidelines, there remains a degree of uncertainty concerning the legality of various pricing strategies. The price discrimination provision is capable of different interpretations and private parties could seek to challenge practices that would not be touched by the Bureau because its limited resources are directed at other, higher priority matters. The companion provision on promotional allowances is more rigid insofar as it outlaws the granting of allowances except on proportionate terms. The net effect is a potential chill on pricing strategies that could be pro-competitive and promote the efficient functioning of a dynamic marketplace.

## 2. The Public Consultations

The discussion paper proposed that both the price discrimination and promotional allowances provisions be repealed and that such practices be addressed under the existing reviewable matters provisions.

Most of the responses received supported repealing the provision. The majority agreed that the existing reviewable matters provisions, particularly the abuse of dominance provision, could adequately cover situations where there are "any legitimate competition law concerns" and that, to the extent that price discrimination is engaged in by a supplier who is one of many, the market itself will correct the situation. The most frequent comment received in support of the proposal was that firms would be more inclined to engage in pricing activities that would be pro-competitive if these provisions were repealed.

However, a few of the responses expressed concern. In particular, there was concern that, if the deterrent of a criminal prohibition were no longer in place, suppliers would quickly change their practices, which would tend to eliminate small businesses. It was suggested that a criminal offence be maintained for the most egregious cases. Concern was expressed that the existing reviewable matters provisions would not cover all situations involving price discrimination, thus requiring a specific provision to deal with them.

## 3. The Consultative Panel

Following a careful review of this proposal and the issues it entails, the Panel concluded that the current provisions should be repealed. The Panel felt that issues with respect to suppliers' pricing could be better dealt with under the reviewable matters provisions of the *Act*. The Panel agreed that a criminal prohibition and criminal sanctions were not the appropriate tools to deal with these types of behaviour.

The Panel considered the concerns of some elements of the small business sector that placed reliance on these provisions. However, it felt that the benefit to those businesses was overstated -- more a matter of perceived, than real, benefit. The existing provisions do not prevent a supplier from granting a discount or a rebate to a purchaser who buys more, and so have done very little to protect small retailers from the exertion of buying power on the part of large buyers. Rather, they have had the perverse effect of discriminating against dynamic small businesses by permitting suppliers to make price concessions solely on the basis of volume.

Issues which the Panel also considered in support of the repeal of these provisions included:

- the fact that there are still businesses that feel very constrained by these provisions. There is a tendency to continue adhering to past practices, despite the issuance of the Bureau's guidelines;

- even with guidelines, compliance with the price discrimination provision represents a significant burden for businesses;

- there is a continuing threat of private actions which may not be pro-competitive in their effects; and,

- these provisions are inconsistent with the general thrust of the *Act*, which focuses on the competitive impact of conduct.

The Panel considered including a specific civil provision for price discrimination and promotional allowances or dealing with this conduct as a type of anti-competitive act under s. 78. In the end, the Panel concluded that the reviewable matters provisions, and particularly the abuse of dominant position provision (s. 79), are broad and flexible enough to deal with price discrimination. Accordingly, no new provisions should be created.

## 4. Recommendation

1) The Panel recommended that ss. 50(1)(*a*) (price discrimination) and 51 (promotional allowances) of the *Act* be repealed.

# ACCESS TO THE COMPETITION TRIBUNAL

## 1. Background

The *Competition Act* contains a group of provisions, referred to as reviewable matters, that includes mergers, abuse of dominant position, tied selling, exclusive dealing, delivered pricing and refusal to deal. These matters may be reviewed by the Competition Tribunal and, when the criteria outlined in the *Act* are met, the Tribunal may issue remedial orders designed to overcome the effects of the practices in question. The Tribunal may also issue interim orders and orders that have been arrived at by consent of the parties. The Tribunal does not award damages or costs.

Currently, only the Bureau may launch these proceedings before the Tribunal (except in the case of specialization agreements). However, if proceedings are initiated by the Bureau, s. 9(3) of the *Competition Tribunal Act* provides that any affected person may apply for leave to intervene before the Tribunal to make representations relevant to those proceedings in respect of any matter that affects that person.

The large and increasing volume of business activity that is subject to the *Act* prevents the Competition Bureau from investigating and pursuing all of the apparently meritorious complaints that come to its attention. This situation has become more pronounced in recent years due to a variety of factors, such as the following:

- deregulation or reduced direct regulation of industries such as transportation, telecommunications, and financial services has increased the range of activities that are subject to the *Act*. The intensity as well as the scope of the demand for enforcement resources is greater during periods of market transition due to concerns of new entrants about abuses of market power;

- the expanding scope of economic activity falling under the *Act* has forced the Bureau to adjust its priorities and focus resources on those matters which are of the greatest economic significance. The increasing complexity of individual cases has also altered enforcement priorities. The Bureau's ability to act upon new instances of anti-competitive behaviour can be constrained by existing priorities; and,

- government budget restraint has reduced the resources available for competition law enforcement in real terms, despite the expansion of the Bureau's responsibilities.

In reviewing complaints, the Bureau screens out matters that are clearly minor in nature or outside the scope of the provisions of the *Act*. However, a number of complaints that appear to have merit following preliminary examination are not now pursued by the Bureau as a result of priorities or resource factors. There is no standard case profile for those matters that are not currently pursued. In determining the allocation of resources for investigation among a variety of complaints, consideration is given to factors such as the economic impact of the alleged violation and the need to develop jurisprudence regarding such complaints. Moreover, although the Bureau has no way of determining their number, there are matters that are not brought to its attention because those affected may believe that action by the Bureau is unlikely.

The Bureau has indicated that the objective of amendments in this area would be to allow private parties who are victims of certain anti-competitive behaviour to obtain a remedy to stop the conduct in cases where the Bureau cannot pursue a matter. The Bureau would not leave the field of civil matters enforcement to private parties. Rather, access to the Tribunal by

private parties would supplement existing public resources devoted to reviewable matters enforcement.

## 2. The Public Consultations

The discussion paper solicited comment on whether private parties should have access to the Competition Tribunal, and posed a number of specific questions as to the appropriate procedural regime to adopt, should such a proposal proceed. Specific input was sought with respect to the following issues:

- whether access to the Competition Tribunal by private parties should be possible in respect of all of the reviewable matters provisions except mergers;
- whether access to the Competition Tribunal by private parties should be possible in respect of misleading advertising matters;
- the remedies that should be available to private litigants;
- the appropriate threshold for a private party to gain standing to launch an action before the Competition Tribunal;
- the appropriateness of costs rules, or other mechanisms, as a means of addressing concerns about frivolous or vexatious litigation; and,
- the role that should be played by the Bureau in private litigation.

Responses to the discussion paper were clearly divided as to whether or not access to the Competition Tribunal by private parties ought to be allowed. Those opposed to the proposal frequently asserted concerns about a potential for strategic or abusive litigation against competitors that would be harmful to the economy and impose needless costs on businesses. There was also considerable concern about the risk that access to the Competition Tribunal by private parties would focus on injury to individual businesses, rather than injury to competition generally.

Those in favour of the proposal viewed it as inappropriate for the Bureau to act as a gatekeeper to the Tribunal if it cannot pursue some cases where parties might deserve a remedy. It was suggested that this concern was increasing due to the growing deregulation of many sectors of the economy and the greater reliance being placed on the *Competition Act* as an instrument to ensure competitive markets. For example, the field of telecommunications was cited as one where greater reliance on market forces would mean a need for increased application of the law to address potential abuses of market power on the part of dominant firms.

Regardless of whether private access to the Tribunal should be granted, opinion was also clearly divided with regard to many of the procedural issues raised in the discussion paper. Numerous suggestions were made as to additional issues or solutions that the Bureau ought to consider. To summarize briefly:

- views were mixed as to whether mergers and misleading advertising matters should be included in the proposal to allow access to the Tribunal by private parties;
- most responses stated that private litigants should be able to obtain remedial orders and injunctions, but some felt, in addition, that restitution, single or treble damages ought to be available;

- it was suggested that litigants seeking an injunction ought to be required to post security for costs or provide an undertaking as to damages;

- views varied widely on the appropriate threshold for standing to launch a suit, although several responses suggested the need to incorporate an "antitrust injury" test;

- most responses agreed that the Tribunal should be able to award costs, although views as to the appropriate rule to apply varied;

- some responses suggested that a summary judgment procedure ought to be instituted; and,

- while virtually all commentators agreed that the Bureau should be entitled to play a role in actions by private parties before the Tribunal, views as to the scope of the role ranged from serving as an absolute "gatekeeper" to the Tribunal to a simple right of intervention.

### 3. The Consultative Panel

As a result of the divergence in public comments on the discussion paper, the Panel discussed at length whether the need for private litigation before the Competition Tribunal had been established; the propriety of involving private parties in the enforcement of a public interest statute; and the interaction between the proposal and budgetary constraints faced by the Bureau. In the end, most members of the Panel accepted that the Competition Bureau cannot address all meritorious cases that may exist. The Panel felt that the most appropriate approach is to ensure that the Bureau is adequately funded to meet its statutory responsibilities under the *Act*. It was also noted that cost recovery measures should be explored as an alternative means of addressing resource constraints, particularly if it could be assured that the Bureau would directly benefit from the imposition of any such fees that might be introduced.

Several Panel members noted that the issue of access to the Tribunal by private parties raised considerable controversy and concern among stakeholders and that it had not been sufficiently studied and discussed. Many felt that, regardless of the merits of any proposal that might be put forward, a reasonable period of public discussion of individual and inter-related issues associated with access to the Tribunal by private parties would be required to develop a level of understanding necessary to address these concerns. It was also felt that considerable care would need to be taken to arrive at a legislative proposal that would be appropriate to the Canadian context.

Overall, the Panel felt that the issue of access to the Competition Tribunal by private parties is extremely complex and, therefore, deserves more detailed analysis to fully understand its implications. This analysis would be crucial to any meaningful public discussion. The Panel agreed, however, that the issue warranted further consideration and was an appropriate subject for the Bureau to consider in the context of a subsequent review of the *Act*, after more detailed review and analysis had been done.

The Panel also discussed what further study ought to be undertaken. It noted that there is a need to consider the broader question of the role of private versus public actors in enforcing the *Competition Act*, and the experience to date under the existing civil damages remedy (s. 36). The Panel felt that review of these issues should form part of any further examination of this issue.

## 4. Recommendations

1) The Competition Bureau should conduct and make public by January 31, 1997, a study of the issues raised by the proposal to provide access to the Competition Tribunal to private parties.

2) The study should determine what the appropriate balance between private and public enforcement of the *Competition Act* is, including a review of the experience to date with the current civil damage remedy (s. 36), and the possible costs and benefits of private enforcement for all of the interested parties, as well as Canadian society in general. The following issues associated with allowing private access to the Competition Tribunal might also be addressed:

   - what provisions of the *Act* ought to be subject to actions before the Tribunal by private parties;
   - the role that should be played by the Director in the initiation of actions before the Tribunal by private parties, and the rights of the Director in relation to the conduct of such actions;
   - the need for mechanisms to prevent frivolous or abusive actions, such as a requirement to obtain leave to initiate an action, or a summary judgment procedure to allow such actions to be dismissed at an early stage;
   - the appropriate threshold for standing to initiate an action;
   - the remedies that should be available to private litigants, and, in particular, whether some form of damages should be available;
   - whether costs awards should be made available in actions before the Tribunal brought by private parties and, if so, under what circumstances;
   - whether case management or other procedures should be instituted to encourage the settlement of actions before the Tribunal by private parties;
   - the interaction between actions before the Tribunal by private parties and settlement negotiations or consent orders involving the Director; and,
   - the policies that should govern access to information held by the government that could be of assistance to private litigants.

3) As a means of obtaining additional resources for its operations, the Bureau should, in addition, continue to explore the feasibility of cost recovery initiatives .

# PROHIBITION ORDERS

## 1. Background

Section 34 of the *Act* deals with prohibition orders. Such orders prohibit the continuation or repetition of an offence. Under s. 34(1), they are available following criminal conviction or, under s. 34(2), they may be obtained as a "stand-alone" remedy without criminal conviction. While a wide variety of prohibition orders has been issued over the years, s. 34 does not permit prescriptive terms which would require a party to take positive steps or acts. Such a power does already exist in other federal statutes, such as the *Fisheries Act*.

The inclusion of a provision which would allow courts to make orders containing prescriptive terms would facilitate the effective enforcement of the *Act* by allowing the government greater flexibility in enforcing the provisions of the *Act*. As the delays and costs of pursuing a matter before the courts have increased, so has the use of alternative dispute resolution processes. Using prescriptive terms in orders would be an effective tool in seeking alternatives to litigation. Enforceable orders would encourage compliance with the *Act* in the future, provide an educational tool concerning competition offences and help restore the marketplace.

Finally, s. 34 does not expressly authorize the courts to rescind, vary or interpret a prohibition order. Whether authority to do so forms part of the courts' inherent jurisdiction is uncertain and, thus, warrants clarification.

## 2. The Public Consultations

The Bureau's discussion paper identified the need for prescriptive terms in prohibition orders and sought suggestions for the way in which such orders should be structured.

While some responses to the discussion paper did not support the proposal, overall, most were in favour of the inclusion of prescriptive terms where the parties to the order consent.

Responses which did not support the proposal expressed concern that orders containing prescriptive terms may become overly intrusive. They could impose an unreasonable burden on businesses, having a counterproductive effect on a corporation's ability to compete and an unacceptably high risk of adverse impact on business reputation and goodwill. Other concerns related to the far-reaching nature of the proposal, since orders could be made against firms or individuals who have not been convicted of any violation of the *Act*.

Most responses supported providing the courts with the discretion to order any prescriptive term which meets certain defined criteria. Very few responses supported the creation of an exhaustive list of possible orders.

Further amendments suggested were:

- allowing for the variation or rescission of orders;
- formalizing the Bureau's ability to accept undertakings and rendering them enforceable;
- providing the right to seek relief where the terms of an undertaking become unreasonable by reason of changed circumstances;
- imposing a statutory time limit on prohibition orders (with the possibility of extension if this is necessary and in the public interest); and

- providing for the automatic termination of those prohibition orders that are based on the price discrimination or promotional allowances provisions of the *Act*, should those provisions be repealed.

## 3. The Consultative Panel

The Panel expressed support for establishing a general provision authorizing the issuance of prescriptive orders. It discussed the circumstances in which such orders should be available and the manner in which the provision ought to be drafted. The Panel favoured creating a general power to include prescriptive terms. It did not see a need for an illustrative list of possible prescriptive terms. Should such a list prove to be useful, this could be provided in Bureau guidelines.

Panel members agreed that prescriptive orders be permitted in circumstances where all parties consent, but expressed concern that their terms not be excessively onerous in contested proceedings.

With respect to contested proceedings, the Panel concluded that prescriptive terms should only be directed towards preventing the continuation or repetition of the offence. It was the Panel's view that it is inappropriate, for example, to have prescriptive orders for the purpose of overcoming the effects of the offence, since the courts would be engaging in *de facto* regulatory oversight by the crafting of such orders.

A concern was also raised with s. 34(2), which allows the Attorney General to pursue a remedy under this provision and later charge the same party with an offence. This was viewed as being unfair since it forces the party to present a defence before trial on the substantive offence. Following discussion on this issue, it was suggested that, if the Attorney General chooses to proceed by way of s. 34(2), the Crown should forfeit its right to lay any charges with regard to substantially the same facts.

The Panel also agreed that, should a criminal law provision be repealed, the outstanding prohibition orders relating to this provision should be withdrawn. It would make no sense to have in force prohibitions against practices that would no longer be illegal.

The Panel concluded that the *Act* should provide the courts with the power to vary, rescind or interpret any order (including previously existing orders) at the request of any party to the order or the Attorney General of Canada. In the Panel's view, this power could be exercised where the court finds that the circumstances that led to the making of the order have changed and, in the circumstances that exist at the time the application is made, the order would not have been made or would have been ineffective to achieve its intended purpose. It should also be possible for a court to vary or rescind an order where the Attorney General of Canada and the person against whom an order has been made have given their consent.

Finally, the Panel was of the view that the statute should require the court to specify a time limit for an order, with a maximum statutory time limit of ten years.

## 4. Recommendations

1) The *Act* should be amended to provide that any prescriptive term may be included in an order pursuant to s. 34(1) or (2) if all parties to the order consent.

2) Where there is a contested application, a court should be able to make an order containing prescriptive terms, but these should be limited to preventing the continuation or repetition of the offence. The amendments should also make clear that prescriptive

terms which are necessary to ensure compliance with the prohibition order may be included (such as a requirement to inform company personnel or management of the contents, scope and purpose of an order, so that the order can be given effect).

3) Section 34(2) should be amended to provide that, when an application for an order pursuant to this provision has been adjudicated on the merits on a contested basis, the Attorney General will forfeit the right to lay any charges with regard to substantially the same facts.

4) The court hearing a matter should be required to specify the duration of an order, with a maximum statutory time limit of ten years.

5) The *Act* should provide the courts with the power to vary, rescind or interpret any order (including previously existing orders) at the request of any party to the order or the Attorney General of Canada. This power could be exercised where the court finds that the circumstances that led to the making of the order have changed and, in the circumstances that exist at the time the application is made, the order would not have been made or would have been ineffective to achieve its intended purpose. It should also be possible for a court to vary or rescind an order where the Attorney General of Canada and the person against whom an order has been made have given their consent.

6) Should a criminal law provision be repealed, outstanding prohibition orders relating to the provision should be withdrawn.

# DECEPTIVE TELEMARKETING PRACTICES

## 1. Background

Deceptive and fraudulent telemarketing practices involve representations, made by telephone, for the purpose of promoting the sale of products or other business interests that either do not exist or are claimed to have grossly exaggerated values. Deceptive telemarketers target all groups in society, although they tend to focus on those who are more vulnerable, and use the anonymity of the telephone as a way of persuading potential victims to place their trust in what are purported to be reputable businesses. This trust is then often exploited by the use of repetitive and abusive, high pressure sales tactics and a variety of other misrepresentations. While consumers need to be ever vigilant against offers which seem "too good to be true", self-education and self-protection are not always enough to counter the sophisticated and persuasive methods used by deceptive telemarketers.

The detection and prevention of deceptive telemarketing is complicated by a number of factors. Deceptive telemarketing operations are frequently characterized by a variety of "fly-by-night" companies which, once detected, close down quickly and change corporate identities readily. Many of these operators can, once apprised of the fact that the enforcement authorities are aware of their activities, easily transfer their personal assets to avoid seizure. Operators may also be able to shield themselves from potential liability for representations made by employees. Victims are often geographically scattered. In addition, when illicit telemarketers base their operations in another country, exchanging information with other law enforcement agencies, and taking enforcement action against such telemarketers, can be difficult. Deceptive telemarketing representations are generally made orally, which means it can be extremely difficult to establish the specifics of the representations through witness recollection.

Not all deceptive telemarketing practices will necessarily be amenable to remedial action under the *Act*. Indeed, many other agencies and levels of government have been involved in addressing different dimensions of the issue. For example, self-regulatory initiatives have been undertaken by the Canadian Bankers' Association to address some credit card laundering techniques. Direct mail order techniques are subject to a combination of provincial consumer protection legislation and/or voluntary professional codes of conduct. Finally, some forms of deceptive telemarketing may currently be addressed under the fraud provision of the *Criminal Code*.

Although some convictions have been obtained under the *Act* against deceptive telemarketing-type operations, there are concerns about the adequacy of the existing legislation to deal with this problem. With diminishing resources available to law enforcement agencies, statutory provisions that provide tools to deal with these practices could be improved to facilitate effective and efficient enforcement. The frequent cross-jurisdictional nature of such practices also suggests a need for a federal presence to police the marketplace effectively.

It is estimated that, in the United States, $40 billion is lost each year as a result of fraudulent telemarketing activity. The U.S. has responded to this problem with the recent introduction of legislation which, among other things, prohibits specified abusive telemarketing practices and establishes elaborate affirmative disclosure requirements on all telemarketers.

## 2. The Public Consultations

The Bureau's discussion paper invited comment on five key issues:

- who should bear legislative responsibility for deceptive telemarketing representations;
- whether those engaged in telemarketing should be obliged to disclose specific information to those being called;
- whether telemarketers should be required to obtain expressed, verifiable authorization from customers before payment is made by credit card, bank draft or cheques;
- whether telemarketers using prize promotions or premium offers should be prevented from obtaining payment from customers before a prize or premium is delivered to the recipient; and,
- whether telemarketers should be required to keep fairly extensive and accurate records of certain aspects of their activities.

Comments on this issue were received from federal and provincial government representatives, legal organizations, police organizations, businesses, financial/credit institutions, advertising organizations, consumer protection associations and philanthropic organizations. More than half indicated that the nature and extent of deceptive telemarketing practices in Canada constitutes a significant problem. Some responses, however, were of the view that the gravity of the deceptive telemarketing situation is not as great in Canada as in the U.S.

Comments were also divided on their reaction to the proposals put forth in the discussion paper. Those who effectively endorsed adoption of most or all of the proposals felt that such measures were necessary and that greater legislative specificity would be desirable. Some responses expressed support, but qualified this either because of a concern that the proposals regarding affirmative disclosure and record-keeping might be burdensome for legitimate businesses, or because of skepticism that such marketplace regulation would be effective against the most determined deceptive telemarketers. Those who rejected all of the discussion paper's proposals were concerned about duplicative or overlapping responsibility between the federal and provincial governments and other agencies dealing with this problem, potential difficulties in monitoring and enforcement of the new provisions, and concerns about the adoption of a more regulatory approach than has traditionally been the case under the *Act*.

Many responses also suggested other means for dealing with deceptive telemarketing under the *Act*. These included invoking the prohibition order provision (s. 34) or the injunctive relief remedy (s. 33) where possible; increasing the existing criminal sanctions; assigning additional resources to the Bureau's Marketing Practices Branch; amending the *Act* to require all telemarketers to make a deposit with the Bureau in advance of their conducting any telephone solicitations; and giving the Bureau the authority to request that the Competition Tribunal and/or the Canadian Radio-television and Telecommunications Commission order phone companies to disconnect the telephone lines of those telemarketers who fail to provide such an advance deposit.

Apart from potential remedies under the *Act*, the responses identified numerous other initiatives for dealing with the deceptive telemarketing problem. These included: continued support of the efforts of other law enforcement agencies (e.g. the Ontario Provincial Police's "Phonebusters"); continued enforcement of the fraud provision of the *Criminal Code* (s. 380); continued close liaison with the CRTC and the telecommunications industry; greater

encouragement of a more active role for Canada Post; greater emphasis on enhanced provincial regulatory schemes (e.g. permit or licensing schemes and security bond or central registry schemes); greater recognition of the important role already being played by certain self-regulatory industry associations (e.g. widely publicized professional codes of telemarketing ethics; voluntary registration/complaints systems); and continued emphasis on public education initiatives.

### 3. The Consultative Panel

In view of the specialized nature of deceptive telemarketing, and the importance of obtaining feedback from stakeholders directly involved, the Bureau advised the Panel that it wished to organize a focus group discussion on this topic. The focus group would be presented with a possible legislative approach and invited to provide comments on it. Through this means, the focus group members would be able to contribute their expertise to assist the Panel in understanding the nature of the problem and in formulating its recommendations on this subject.

The Panel agreed that this would be an appropriate approach and such a discussion was organized on January 15, 1996. The following individuals participated in the focus group discussion:

**Fréderic Cantin**, Counsel, Bell Canada;
**Harry Chandler**, Head, Amendments Unit, Competition Bureau;
**Barry Elliott**, Detective Staff Sergeant, Ontario Provincial Police;
**Paul Facciol**, Director, Card Services Security, Canadian Bankers' Association;
**Al Finn**, Manager, Risk Management and Security, Visa Canada Association;
**Gail Lacomb**, Consumers' Association of Canada;
**Rachel Larabie-LeSieur**, Deputy Director of Investigation and Research (Marketing Practices), Competition Bureau;
**Roland MacDonald**, Director, Security and Risk Management, Master Card International;
**Rick Solkowski**, Director, Internal Trade and Special Projects, Alberta Municipal Affairs, Government of Alberta;
**Ivor Thompson**, Director, Canadian Survey Research Council;
**Wendy Ward**, Telecommunications Complaints Analyst, Canadian Radio-television and Telecommunications Commission;
**Bonnie Wasser**, Director, Councils and Education, Canadian Direct Marketing Association;
**David Wolinsky**, Counsel, Bell Canada; and,
**Peter Woolford**, Senior Vice-president, Policy, Retail Council of Canada;
**Ed Ratushny, Q.C.**, Faculty of Law, University of Ottawa (acted as focus group moderator).

A summary of the focus group discussion was prepared by the Bureau and circulated to participants and members of the Panel. The summary is attached as Appendix 4 to this Report.

The Panel acknowledged that deceptive telemarketing is a serious problem in Canada that requires action on the part of government. In particular, it felt that this is an area that merits attention at the federal level because of its international and interprovincial dimensions. It also noted that resolution of the issues raised in this Report regarding the ability of the Bureau to engage in cooperative enforcement activities with other agencies, both inside and outside Canada, would be an important component of the solution to this problem. The Panel also felt that it might be appropriate to encourage private entities supplying products to deceptive telemarketers to contribute to the resolution of this problem through denial of service in certain cases. Finally, some members of the Panel questioned whether a solely criminal approach to this issue would be appropriate, as this was an area where a mixed civil-criminal regime paralleling the one proposed for misleading advertising may be appropriate.

Notwithstanding these general views, the Panel did not consider that it was in a position to make a concrete recommendation for legislative reform in this area. Deceptive telemarketing involves a broad spectrum of activities and practices. The Panel was concerned that the amount of time that would be required to explore this complex topic thoroughly and develop detailed recommendations could considerably delay the completion of its Report. However, it recognized the merit of furthering public debate and discussion on this issue, and concluded that it would be helpful to include in this Report a draft legislative proposal developed by the Bureau. The draft proposal is attached as Appendix 5.

## 4. Recommendations

1) Amendments to the *Act* should be developed to deal specifically with deceptive telemarketing practices.

2) These provisions should build upon the work that has been done to date by the Bureau in consultation with participants at the focus group, and other interested parties, to allow timely identification of suitable amendments that could be included in the current amendments initiative.

3) As many deceptive telemarketing schemes cross provincial and national boundaries, the Bureau should work with law enforcement agencies in other jurisdictions in addressing this problem.

# ADDITIONAL AMENDMENTS

## 1. & 2. Background and the Public Consultations

A number of additional amendment proposals were put before the Panel beyond the eight matters originally identified in the discussion paper. Some of these matters were proposed by members of the public in the course of the amendments consultation process, while others were issues that had been identified by the Bureau, many of a technical or housekeeping nature. The advice of the Panel was sought regarding the desirability of including any or all of these in the proposed amendments package and, where appropriate, the best method for correcting the problem.

## 3. The Consultative Panel

As a preliminary matter, the Panel considered whether there should be a specific provision in the *Act* requiring the Director to review the *Act* at regular time intervals (such as every three years) and make recommendations on whether amendments are desirable. However, the Panel expressed concern that opening up the entire *Act* could create uncertainty in those areas where it is working well. In any event, where new concerns about the operation of the *Act's* provisions arise, stakeholders will bring their concerns to the government's attention. However, the Panel concluded that the current Consultative Panel process seems to be a useful model to adopt on a periodic basis in relation to possible future amendments. Accordingly, after the amendments arising from this initiative come into force, the Director should establish an advisory panel which would meet at intervals of no more than five years to prepare public reports offering advice on revisions to the *Act*.

The Panel was provided with an outline of various potential amendments for consideration. One large group of matters consisted of proposed changes to the French text of various sections of the *Act*, to provide clarification or consistency with the English texts. These proposed changes consisted of an amendment to s. 31(*b*) to correct an error in the French text by removing the word "ne" in "...ou ne pourrait être atténué par la suppression ou la réduction de ces droits"; an amendment to s. 22(3) to change the word "requête" to "demande"; an amendment to s. 34(6) to exchange the word "ordre" for "ordonnance"; an amendment to s. 49(2)(*c*) to replace the term "soumission pour des" in "soumission pour des valeurs mobilières" with a more appropriate term such as "offre d'achat de" (valeurs mobilières); and an amendment to s. 108 to change the term "se rendent" to "se rapportent" in the definition of "entreprise en exploitation".

Panel members felt that they were not in a position to comment on the propriety of such changes. It was noted by one Panel member that, apart from the matters submitted by the Bureau, there were numerous other wording and translation anomalies in the *Act*. It might be preferable to carry out a more comprehensive examination of the statute as a whole at some future point, rather than undertaking corrections to only a small number of matters at this time. Few of the proposed changes seemed to affect the substance of the provisions in question. On the whole, the Panel felt that the propriety of such changes should be determined by the Bureau in consultation with experts in legislative drafting, and should encompass a review of the English texts of the same provisions to ensure that they also use the most appropriate terminology.

The Panel considered several minor amendments proposed by the Bureau to be logical, however and did not object to the inclusion of such changes in the proposed amendments

package. These proposals included amendments:

- to s. 77(2) to clarify that the section will apply in respect of tied selling when the effects outlined in paragraphs (*a*), (*b*) and (*c*) occur in "a market" rather than "the market", so that the section can be invoked when market power in one market is used to affect competition in another market;

- to s. 7(1) to specify the powers of the Director with regards to the administration and enforcement of the *Act*, to provide clarity, correct an apparent oversight and facilitate the Director's ability to make certain payments for the enforcement of the *Act*; and,

- to change the title of the Director of Investigation and Research to "the Director, *Competition Act*", to reflect the functions of this position more accurately.

The Panel also considered a proposal to amend s. 125 of the *Act* to provide the Director with access to confidential documentation filed with a federal board, commission or other tribunal. On this issue, the Panel agreed that the effectiveness of the Bureau's representations could be undermined if denied access to confidential records, but noted that a similar amendment to s. 126 would likely be precluded by provincial jurisdictional issues. The Panel also considered and agreed with an amendment to remove any inconsistencies between the French text of this section and that of s. 126.

The Panel also considered a number of more substantive issues, and recommended against their inclusion in the package for various reasons. These included:

- a proposal received in response to the discussion paper, and also from a Panel member, to designate the Director as a Deputy Head within the meaning of the legislation dealing with the administration of the public service, to give him greater control over confidential information and resource allocation. After considerable discussion, the Panel concluded that this topic should receive further review, but that it does not properly form part of this report to the Director;

- several issues which were raised with regard to subss. 12(3) & (4) of the *Act*, which deal with the right of certain parties and their counsel to attend an examination pursuant to s. 11. It was proposed that the term "representation" be defined and that the right of representation be limited to the person being examined. While the Panel was of the view that these provisions are unclear, poorly drafted and, at times, inconsistent, it was recommended that this amendment proposal was sufficiently significant to warrant public consultations and perhaps form part of a subsequent amendments initiative;

- a proposal to lower the maximum penalty for all competition offences to a term of imprisonment of less than five years, to eliminate the availability of jury trials and thereby introduce greater efficiency into the criminal process. However, the Panel was concerned that this would likely be perceived as a significant change which had not been raised in the Bureau's discussion paper. The Panel concluded that the place of jury trials in prosecutions under the *Act* ought to be the subject of further study and public consultation; and,

- a proposal to amend the *Act* to prohibit "anti-dualing provisions in franchise agreements" in the business of new motor vehicles and agricultural equipment. (Dualing occurs when a dealer who has an agreement with a supplier to carry a particular line of goods, also offers for sale the product of another supplier on the same premises.) After considerable discussion, the Panel noted that a general provision already exists in the *Act* to protect against such behaviour, where it has an anticompetitive effect (s. 77 -- exclusive dealing).

The Panel recommended against including an industry-specific anti-dualing provision because of a lack of persuasive evidence demonstrating that significant harm exists.

## 4. Recommendations

1) Amendments should be pursued to revise s. 77(2) to clarify that the section will apply in respect of tied selling when the effects outlined in paragraphs (*a*), (*b*) and (*c*) occur in "a market" rather than "the market".

2) Amendments should be pursued to revise s. 7 to specify the powers of the Director with regards to the *Act's* administration and enforcement.

3) The title of the Director of Investigation and Research should be changed to "the Director, *Competition Act*".

4) Section 125 should be amended to provide the Director with the right to gain access to the confidential documentation filed with a federal board, commission or other tribunal.

5) The Bureau should consider the need to correct anomalies in the drafting of the *Act*, including differences between the English and French texts, with advice from legislative drafters. It may be preferable to conduct a comprehensive review of the wording of the *Act*, rather than making only a few isolated changes.

6) After the amendments arising from these recommendations come into force, the Director should be required to establish an advisory panel, which would meet at intervals of no more than five years, to prepare public reports offering advice on revisions to the *Act*.

# APPENDICES

# PANEL MEMBERS' BIOGRAPHIES

## DONALD S. AFFLECK, Q.C.

Donald Affleck obtained his LL.B. from the University of Toronto in 1964. He is engaged in litigation at the trial and appellate levels as well as before a wide range of specialized tribunals. He has acted as counsel in numerous competition law and trade practice cases as well as estate and products liability litigation. In the 1970s, he was counsel to the Parliamentary Committee on Finance, Trade and Economic Affairs which considered amendments to the *Combines Investigation Act* and, from 1980 to 1982, was Chief Counsel to the federal Royal Commission on Newspapers.

From 1966 to 1992, Mr. Affleck was a partner with the firm of Fasken Campbell Godfrey. He is a senior partner and founder of Kelly Affleck Greene in Toronto where he has practiced since 1992. He is also co-author of *Canadian Competition Law*, a two volume loose-leaf service first published in 1989.

## ROBERT D. ANDERSON, Q.C.

Robert Anderson was called to the bar from Osgoode Hall Law School in 1960, received a Queen's Counsel appointment in 1975 and a Master of Laws degree from Osgoode Hall in 1976, and has been a lawyer with Procter & Gamble Canada for over 30 years. He is also a Director and on the Management Committee of his company.

Mr. Anderson has been a Director of The Canadian Manufacturers' Association, The Ontario Chamber of Commerce, The Children's Aid Society of Metropolitan Toronto and was President of the Association of Canadian General Counsel. He is currently a Director of Mission Air and the Ontario Division of the CMA. He was a member of consultative groups which developed the 1986 federal *Competition Act* amendments, the Ontario class action legislation, the proposed Ontario Marketplace Code and the Ontario Environmental Bill of Rights.

## YVES BÉRIAULT

Yves Bériault is a partner and a member of the litigation group in the Montreal office of McCarthy Tétrault. He obtained his law degree from the University of Ottawa and also holds degrees in philosophy, arts and economics from the Universities of Ottawa and St. Paul. Mr. Bériault was counsel to the Royal Commission on Corporate Concentration (1977-78) which, among other things, examined the relationship between competition law and corporate concentration in Canada.

For many years, Mr. Bériault has specialized in the area of competition law and has been involved in many landmark cases involving competition legislation before all courts and the Competition Tribunal.

He has also lectured on competition law at the Faculty of Law of the University of Montréal, and written extensively in this area. He is currently Vice-President of the Competition Law Section of the Canadian Bar Association.

## SARA BLAKE

Sara Blake is Senior Investigation Counsel in the Enforcement Branch of the Ontario Securities Commission where she has had extensive experience conducting investigations and proceedings before the Commission and the Courts.

She is also author of the textbook Administrative Law in Canada (Butterworths, 1992) and is Past Chair of the Administrative Law Section of the Canadian Bar Association of Ontario.

Ms. Blake attended Osgoode Hall Law School and was called to the Bar in Ontario in 1985.

## HARRY CHANDLER

Since January 1995, Harry Chandler has been Head of the Amendments Unit at the Competition Bureau within Industry Canada and, in that capacity, has been responsible for developing legislative proposals for possible revisions to the *Competition Act*. For a number of years prior to this appointment, he was responsible for operations under the *Act* as a Deputy Director of Investigation and Research.

He holds degrees in economics from Carleton University and McGill University.

## ROSALIE DALY TODD

Rosalie Daly Todd is a member of the Law Society of Upper Canada (Ontario) and the New York Bar Association. She holds degrees from Marquette University - in journalism, American University - masters in communications, and McGill University - LL.B.

Ms. Todd worked for nine years as a writer and editor before pursuing her legal career. She also practiced civil litigation in New York State for a number of years prior to joining the Ontario Bar and has had experience with U.S. competition law issues. Ms. Todd currently is executive director and counsel for the Consumers' Association of Canada. She has represented CAC before the Canadian Radio-television and Telecommunications Commission (CRTC), the Canadian International Trade Tribunal (CITT), and the Competition Tribunal.

In addition, she has prepared briefs and appeared before parliamentary committees on a wide range of consumer issues including credit card interest rates, proposed bankruptcy, energy, privacy, telecommunications and financial services legislation and the introduction of Direct-to-Home satellites in Canada. She also worked with CAC's representative on the Working Group on amendments to the misleading advertising and deceptive marketing practices provisions of the *Competition Act*.

## CALVIN S. GOLDMAN, Q.C.

Calvin Goldman is a member of the law firm of Davies, Ward & Beck based in Toronto, where he is the senior partner in the firm's Competition Law and Trade Practices Group.
Mr. Goldman obtained an LL.B. from Osgoode Hall Law School and an LL.M. from Harvard Law School. Until 1986, Mr. Goldman was in private practice in Toronto specializing in antitrust litigation. In May 1986, he was appointed Director of Investigation and Research under the *Competition Act*. From 1987 until 1989, he also was a Vice Chairman of the OECD Committee on Competition Law and Policy. Mr. Goldman was the first appointee to the Soloway Chair of Business and Trade Law at the University of Ottawa (1989-1990).

Mr. Goldman is Chair of the National Competition Law Section of the Canadian Bar Association and is Chairman of the Competition Policy Committee of the Canadian Council for International Business. He was a member of the American Bar Association's Antitrust Section Task Force on NAFTA (1993-1994) and is currently a member of the American Bar Association's Antitrust and Global Economy Task Force. Mr. Goldman was appointed in June, 1995, by the Government of Canada to the roster of panelists established under Chapter 19 of the NAFTA for binational dispute settlement in antidumping and countervailing duty cases. He is also currently Chairman of the International Chamber of Commerce's Joint Working Party on Competition and International Trade. Mr. Goldman is a member of the Advisory Boards of the BNA Antitrust & Trade Regulation Report and the Canadian Competition Record and is co-editor of Competition Law of Canada published by Juris Publishing, Inc.

Mr. Goldman has published extensively and spoken widely in Canada, the U.S.A. and elsewhere on the subjects of competition law, trade practices and the interface between competition policy and trade policy.

## LAWSON A.W. HUNTER, Q.C.

Lawson Hunter, whose specialty is competition law, joined Stikeman, Elliott as a partner in 1993. From 1986 until joining Stikeman, Elliott, he was a partner with Fraser Beatty and served as Vice-Chairman of that firm in 1992. From 1983 to 1985, Mr. Hunter served as Assistant Deputy Minister, Bureau of Competition Policy and Director of Investigation and Research under the *Combines Investigation Act*.

Mr. Hunter is currently on the Board of Directors of the Canadian Retransmission Collective and the Advisory Boards of the *Antitrust & Trade Regulation Report* and *Canadian Corporate Counsel*. He is past Chairman of the National Competition Law Section of the Canadian Bar Association and a member of the Executive Committee of the Anti-Trust and Trade Committee of the IBA. Mr. Hunter served as a binational panelist under Chapter 19 of the NAFTA in the softwood lumber dispute. He is the past Editor-in-Chief of the *Canadian Competition Policy Record* and was a part-time lecturer at the University of Toronto on competition policy issues.

Mr. Hunter is very active on the conference circuit, speaking frequently on competition issues. He received his LL.M from Harvard Law School in 1971, his LL.B from the University of New Brunswick in 1970, and, in 1967, earned a degree in mathematics from the University of New Brunswick.

## GEORGE POST

Dr. Post is a retired federal public servant who now works as a consultant in the fields of government policy and public administration, where he specializes in the area of public service renewal and reorganization. He is a Senior Research Fellow at the Canadian Centre for Management Development and a member of the Board of the Commonwealth Association for Public Administration and Management.

Between 1978 and 1985, Dr. Post served as the Deputy Minister of Consumer and Corporate Affairs Canada. From 1975 to 1978, he was a Director of the Economic Council of Canada and the Acting Chairman of the Council for two years. Prior to joining the Economic Council, Mr. Post was an Assistant Secretary to the Cabinet (Economic Policy) in the Privy Council Office. Mr. Post began his career with the Research Department of the Bank of Canada, where he held various positions.

Dr. Post was educated at Queen's University (B.A.) and Northwestern University in Chicago (Ph.D.).

## ED RATUSHNY, Q.C.

Ed Ratushny is a native of Saskatchewan, where he obtained degrees in Arts and Law. From 1965 until 1967, he was engaged in the practice of law in Saskatoon. He has completed three graduate degrees in law, including a Doctorate, from the University of London, England in 1968 and the University of Michigan in 1972 and 1979. He was appointed Queen's Counsel by the Government of Canada in 1985, and was admitted to the Order of Canada in 1992.

Since 1970, Professor Ratushny has been a law professor at Windsor and Ottawa Law Schools teaching in the areas of Constitutional and Administrative Law, Criminal Procedure and Evidence and Human Rights and Civil Liberties. He was the author of a book on self-incrimination and numerous scholarly articles and government reports.

From 1973 until 1976, Professor Ratushny was on leave as Special Advisor on Judicial Affairs to two federal Justice Ministers.

He has served as a member or as counsel to numerous governmental boards, commissions and task forces in the area of Human Rights, Environmental and Immigration Law. He also serves frequently as a consultant to ministers, departments and agencies such as federal and provincial Law Reform Commissions, Minister of Justice, Solicitor-General, Minister of Transport, Minister of National Revenue, Canada Broadcasting, Royal Canadian Mounted Police.

Professor Ratushny was the chair of a working group to develop proposals for reform to the administration and adjudication of the misleading advertising and deceptive marketing practices provisions of the *Competition Act* for the Director of Investigation and Research in 1990-1991.

## W.T. STANBURY

W.T. Stanbury is UPS Foundation Professor of Regulation and Competition Policy in the Faculty of Commerce and Business Administration at the University of British Columbia. Dr. Stanbury received his B.Comm. from U.B.C. (1966) and his M.A. (1969) and Ph.D. (1972) degrees in Economics from the University of California at Berkeley.

Professor Stanbury is the author, or editor of almost 300 publications including some 40 books. His research has ranged quite widely -- from the problems of native peoples, to competition policy, government regulation, interest group behaviour, and the social and political effects of new communications and information technologies.

Between June 1978 and November 1979, Dr. Stanbury was Director of the Regulation Reference for the Economic Council of Canada and was responsible for preparing its *Preliminary Report* (Nov. 1978) and its interim report, *Responsible Regulation* (Nov. 1979). He then became Director of Research for the Regulation Reference until August 1980. Between November 1977 and August 1982, he was Director, Regulation and Government Intervention Program of the Institute for Research on Public Policy. From September 1982 to December 1984, he was Senior Program Advisor for the Institute.

Dr. Stanbury has been a consultant and researcher to several Royal Commissions and numerous government departments and private organizations. He has testified before several parliamentary committees on competition policy, airline regulation/deregulation, the regulatory process, lobbying and its regulation, and the financing of political parties.

Currently, he is directing a major research program on interest groups in the information age, funded by the Donner Canadian Foundation.

## NORMAN J. STEWART

Norman J. Stewart is Vice President and General Counsel, and a Director, of the Ford Motor Company of Canada, Limited. He also serves as a director of Ford Credit Canada Limited, Ford Ensite International Limited, Ford Transportation Services Limited, and Geometric Results Canada, Limited.

Mr. Stewart conducted a general litigation practice as a partner in the Toronto law firm of Weatherhead & Weatherhead before joining General Motors in various functions, including Assistant Counsel, Director of Government Relations and Assistant General Counsel. He joined Ford Motor Company of Canada, Limited in 1989.

Mr. Stewart is a former director and executive councilor of the Ontario Chamber of Commerce, a director of the Canadian Manufacturers' Association, Chairman of its Legislation Committee, and Vice Chairman of its Ontario Division. He is also a member of the Canadian Bar Association, the Canadian Chamber of Commerce (Ottawa Liaison Committee), the Motor Vehicle Manufacturers' Association, Metropolitan Toronto Board of Trade, and the York University Alumni Association. Mr. Stewart has presented numerous addresses at conferences and seminars on product liability, warranty, consumer, environmental, competition, labour and employment law, and on topics such as class actions, freedom of information, the Workplace Hazardous Material Information System, alternate dispute resolution and multi-stakeholder consultative task forces.

He graduated from the University of Toronto in 1971, with an Honours B.A. in Political Science and Economics and from Osgoode Hall Law School in 1974, with an LL.B. He was admitted to the Ontario Bar in 1976.

## PETER WOOLFORD

Peter Woolford is Senior Vice-President, Policy, of the Retail Council of Canada, the national trade association which speaks on behalf of the retail community. Its members account for approximately 70% of Canadian store trade sales. He is an active member of several government issue committees and the Secretary for the Retail Council's Board of Directors.

Prior to joining the Council, Mr. Woolford held various policy positions with the Federal Department of Finance, the Federal Department of Industry, Trade and Commerce, the Federal Ministry of State for Economic Development and the Ontario Federal Co-ordinator's Office.

Mr. Woolford holds an Honours B.A. in Political Studies and Economics, as well as a Masters degree in Public Administration from Queen's University in Kingston.

# TERMS OF REFERENCE

## General Mandate

1. The purpose of the Panel is to provide advice to the Director of Investigation and Research (DIR) on how to amend the *Competition Act* within the areas outlined in the discussion paper issued June 28, 1995, and with regard to other matters referred to it by the Competition Bureau (CB) and which the Panel agrees to consider. Such other matters will include housekeeping amendments and other issues arising from the public consultation.

2. The goal of the Panel is to provide the DIR with a written report that reflects, with regard to each of the areas of the *Act* to be amended, and to the greatest extent possible, a consensus among Panel members. All parts of the report will not necessarily reflect the views of any particular member of the Panel. Where feasible, the Report should include suggested language for any proposed legislative amendments. The final Report will be due December 22, 1995.

3. The principal work of the Panel will be carried out by December 22, 1995 (Phase 1). During this time, the Panel will be asked to review policy proposals for amendment prepared by CB with a view to providing advice to the DIR on the content of future amendments. Proposals from CB will take the form of possible solutions to issues arising from the discussion paper or from the public consultation. The proposals will take into account the comments received from the general public during the consultation process, as well as information gathered and analysis undertaken by CB. The Panel will be requested to determine the suitability and feasibility of the proposals or alternatives.

4. Members of the Panel agree that its advice to the DIR will be provided in a fair and balanced manner with regard to the objectives set out in section 1.1 of the *Competition Act*.

5. Once the deliberations of the Panel in Phase 1 conclude, the recommendations of the DIR will be forwarded to the Minister of Industry. The DIR's advice to the Minister will report on the Panel's deliberations and its advice.

6. If the government approves amendments, draft legislation will be prepared by the Department of Justice. In the late winter/spring of 1996 (March-May) the DIR will invite some or all of the members of the Panel to meet to review the legislative text prior to the introduction of a bill in the House of Commons and provide comments on the wording of the draft legislation (Phase II).

## Roles and Responsibilities of Panel Members

7. The DIR will name a Chair of the Panel who will be responsible for the coordination and organization of the work of the Panel during Phase I. The Chair should be an individual with experience in managing similar consultations and effective consultation and facilitation skills. The Chair will be a part-time position. At the direction of the Panel members, the Chair may create sub-committees or adopt such other working arrangements as would facilitate the task of the Panel.

8. The Panel will consist of invited representatives including a representative of the DIR. Panel members will be appointed by the DIR. Panel members should be knowledgeable about the subject matter to be discussed and the legal and policy consequences of their decisions. They should be people who can clearly and concisely state their views on all

relevant issues, understand the merits of opposing views, seek viable policy alternatives, and be capable of working towards a reasonable and balanced outcome. Panel members agree to make every effort to attend scheduled Panel meetings to maintain consistency and continuity in the process. Panel members may not send substitutes in their place.

9. While the Chair will determine the meeting schedule of the Panel in consultation with Panel members, Panel members should be prepared to meet at least twice a month for one full day during Phase I, or an equivalent time commitment. Panel members should also be willing to prepare for meetings through the review of documentation and may need to devote time to communicating and consulting with other stakeholders between meetings. During Phase II, it is anticipated that approximately four (4) meetings of a half-day each may be scheduled.

10. The Panel will hold an organizational meeting to establish an agenda of its proposed meetings during Phase I and reasonable time lines. This will allow the Amendments Unit of CB (AU) to prepare briefing materials for Panel members in a timely fashion.

11. The deliberations of the Panel will be carried out in private. Background papers, briefings, legislative drafts, and other documents provided to facilitate the work of the Panel which are designated by the AU as confidential, will be confidential to Panel members. However, Panel members will be free to discuss concepts or proposals with other stakeholders, without reference to the names of any Panel members, to allow the Panel to obtain information on the acceptability or feasibility of such concepts or proposals. Inquiries made with regard to the work of the Panel will be referred to Harry Chandler.

12. A summary will be kept of all meetings of the Panel, and will be provided to members for review in advance of the subsequent meeting.

**Roles and Responsibilities of CB**

13. CB will have a representative on the Panel, will participate in all meetings and will communicate the views and concerns of the DIR as part of Panel deliberations. AU staff members with expertise in particular areas may attend meetings where those areas are discussed to provide information and follow the discussion.

14. The DIR may attend Panel meetings and participate in discussions.

15. The formation of the Panel, the nature of its mandate, and the names of Panel members will be made public.

16. The AU will provide support and information to the Chair and the Panel to facilitate its work. Such support will take the form of:

- an introductory briefing to provide more detailed elaboration of the issues under discussion;
- provision of information, briefings, documents or legislative drafts;
- provision of secretariat services for the Panel (assistance in the organization, planning of meetings, preparation of meeting records, distribution of documents, etc.);
- assistance from legal counsel to CB in the identification and analysis of legal issues or the development of potential draft legislative language; and,
- assistance from economists employed by CB in the identification or analysis of economic issues.

# NOTIFIABLE TRANSACTIONS

## I. Short Form Filing

The information referred to in paragraph 120(*a*) is

(a) a description of the proposed transaction and the business objectives intended to be achieved as a result thereof; and,

(b) in respect of each person who is required to supply the information and, in the case of information required under paragraph 114(1)(*a*), the corporation the shares of which or the person the assets of whom are proposed to be acquired,

(i) their full names,

(ii) the addresses of their principal offices,

(iii) a list of their affiliates that have significant assets in Canada or significant gross revenues from sales in, from or into Canada and a chart describing the relationships between themselves and those affiliates,

(iv) a summary description of their principal businesses and the principal businesses of their affiliates referred to in subparagraph (iii), including statements identifying the current suppliers and customers accounting for more than 2% of the total annual volume of purchases and sales, respectively, contact names, telephone numbers and addresses of such suppliers and customers of those principal businesses and the annual volume of purchases from and sales to those suppliers and customers,

(v) the geographic regions of sales or geographic regions in which they carry on their principal businesses and the businesses of their affiliates or geographic regions in which their customers are located,

(vi) statements of

(A) their gross and net assets as of the end of their most recently completed fiscal year, and

(B) their gross revenues from sales for that year, and

(vii) to the extent available, financial statements of

(A) the acquiring party, in the case of a proposed transaction referred to in paragraph 114(1)(*a*),

(B) the continuing corporation, in the case of a proposed transaction referred to in paragraph 114(1)(*b*), or

(C) the combination, in the case of a proposed transaction referred to in paragraph 114(1)(*c*),

prepared on a pro forma basis as if the proposed transaction had occurred previously. R.S., 1985, c. 19 (2nd Supp.), s. 45.

## II. Long Filing

The information referred to in paragraph 120(*b*) is

(a) a description of the proposed transaction and the business objectives intended to be achieved as a result thereof;

(b) copies of the legal documents, or the most recent drafts thereof if the documents have not been executed, that are to be used to implement the proposed transaction;

(c) in respect of each person who is required to supply the information and, in the case of information required under paragraph 114(1)(*a*), the corporation the shares of which or the person the assets of whom are proposed to be acquired, a list of their affiliates that have significant assets in Canada or significant gross revenues from sales in, from or into Canada and a chart describing the relationships between themselves and those affiliates; and,

(d) in respect of each person who is required to supply the information, each of their affiliates referred to in paragraph (*c*) and, in the case of information required under paragraph 114(1)(*a*), the corporation the shares of which or the person the assets of whom are proposed to be acquired,

(i) their full names,

(ii) the addresses of their principal offices and, in the case of a corporation, the jurisdiction under which it was incorporated,

(iii) the names and business addresses of their directors and officers,

(iv) a summary description of their principal businesses including

(A) to the extent available, financial statements relating to their principal businesses for their most recently completed fiscal year and subsequent interim periods,

(B) statements identifying for their principal businesses: current suppliers and customers accounting for more than 2% of the total annual volume of purchases and sales, respectively, contact names, telephone numbers and addresses of such suppliers and customers and the annual volume or dollar value of purchases from and sales to such suppliers and customers, and

(C) the location of principal offices and plants, warehouses, retail establishments or other places of business,

(v) statements of

(A) their gross and net assets as of the end of their most recently completed fiscal year, and

(B) their gross revenues from sales for that year,

(vi) the principal categories of products produced, supplied, distributed or being developed by them as defined by them in their day to day operations, and their gross sales for each principal category of products identified in (iv)(C),

(vii) for each of the principal categories of products identified in (vi) that, to the extent known by that party, are produced, supplied, distributed or being developed by both that party and the other party to the proposed transaction, or, in the case of information required to be supplied under paragraph 114(a), by the first-mentioned party and the corporation the shares of which or the person the assets of whom are proposed to be acquired,

(A) the current production capacity for each such category of products produced at each facility identified by that party in response to (iv)(C),

(B) the geographic regions where such categories of products are sold by that party, where that party carries on business in respect of such products, or in respect of which customers of each such facility are located, as defined by them in their day to day operations,

(C) the principal mode of transportation for each such category of products in each geographic region defined in (B), and

(D) the total annual cost of transportation expressed in dollar values, the total revenues in dollars, and the total number of units shipped, for each such category of products and each geographic region defined in (B),

(viii) the principal categories of products purchased or acquired by each of them and their total expenditures for each principal category of product, for their most recently completed fiscal year,

(ix) the number of votes attached to voting shares held, directly or indirectly through one or more affiliates or otherwise, by each of them in any corporation carrying on an operating business, whether through one or more subsidiaries or otherwise, where the total of all votes attached to shares so held exceeds twenty per cent of the votes attached to all outstanding voting shares of the corporation,

(x) a copy of every proxy solicitation circular, prospectus and other information form filed with a securities commission, stock exchange or other similar authority in Canada or elsewhere or sent or otherwise made available to shareholders within the previous two years,

(xi) all studies, surveys, analyses and reports which were prepared for the entity or the corporation by a third party, or by or for any senior officer(s) or director(s)* (or, in the case of unincorporated entities, individuals exercising similar functions or in the case of a limited partnership, any general partner(s) of such partnership and, in the case of a general partnership, the partners of such partnership), for the purpose of evaluating or analyzing the proposed transaction with respect to the principal categories of products, the potential impact of the transaction on prices, market shares, competition, competitors, the potential of the market for sales growth, or expansion into new products or geographic regions and indicate (if not

* "senior officer(s) or director(s)" would be defined to include the following: "the chairman, president, vice-president, secretary, treasurer, comptroller, general counsel, general manager, managing director or any individual who performs functions for a corporation similar to those normally performed by an individual occupying any such office".

contained in the document itself) the date of preparation, the name and title of each individual who prepared each such document,

(xii) to the extent available, financial statements of

(A) the acquiring party, in the case of a proposed transaction referred to in paragraph 114(1)(*a*),

(B) the continuing corporation, in the case of a proposed transaction referred to in paragraph 114(1)(*b*), or

(C) the combination, in the case of a proposed transaction referred to in paragraph 114(1)(*c*),

prepared on a pro forma basis as if the proposed transaction had occurred previously, and

(xiii) if any of them have taken a decision or entered into a commitment or undertaking to make significant changes in any business to which the proposed transaction relates, a summary description of that decision, commitment or undertaking,

(xiv) all marketing plans, business plans and strategic plans, and similar documents which were prepared for the entity or the corporation by a third party, or by or for senior officer(s) or director(s), and have been implemented over the last three years or are to be implemented, for each of the principal categories of products produced, supplied, distributed or being developed by each of them.

# FOCUS GROUP ON DECEPTIVE TELEMARKETING PRACTICES SUMMARY OF DISCUSSIONS – JANUARY 15, 1996

## I. INTRODUCTION

On January 15, 1996, the Competition Bureau ("CB") convened a meeting with thirteen interested stakeholders representing provincial governments, police organizations, business organizations, financial/credit institutions, advertising organizations and consumers. The purpose of this focus group was twofold: 1) to elicit comment on a draft proposal for legislative change under the *Competition Act* ("the *Act*") to address the issue of deceptive telemarketing practices in Canada; and: 2) to consider other possible non-*Competition Act* solutions to this problem. Some of the key issues and principal themes which emerged from the roundtable discussion are summarized below.

At the outset Harry Chandler, outlined the relationship of this particular roundtable exercise to the rest of the legislative amendments process. He noted that the comments made during this focus group exercise would be incorporated into a newly re-drafted telemarketing proposal, that would be considered by the Consultative Panel on *Competition Act* amendments. He also indicated that the focus group participants would be informed as to the outcome of further deliberations on this issue.

## II. CHARACTERISTICS OF DECEPTIVE TELEMARKETING PRACTICES IN CANADA

The participants at the roundtable discussion were asked to assist in defining the problem by identifying principal characteristics of deceptive telemarketers. The list below was compiled. It was emphasized, however, that many of these characteristics could also describe legitimate telemarketers and could only serve as indicia where a pattern of such practices could be identified.

- principally "out-bound" telephone calls (those initiated by the telemarketer);
- criminal intent;
- high-volume contacts;
- ready transfer of funds;
- transient businesses;
- involve a large number of telephone "hang-ups";
- multiple identities (both corporate and individual);
- use of different telephone lines, both for incoming and outgoing calls;
- "fronts" set up for corporate records; bank accounts; etc.;
- "1-900" numbers are used to create lists of target victims;
- reluctance on the part of the legal system to vigorously prosecute, to impose adequate fines/sentences, or include charges against employees of deceptive telemarketers;
- frequent use of courier pick-up method of payment;
- frequent use of mail drop, as a method of payment (e.g. money orders; bank drafts);
- no systematic record-keeping, on the part of deceptive telemarketers;
- multi-jurisdictional in nature;
- general lack of consumer redress; and,
- need to educate both the public and the justice system.

Participants also identified a number of examples of types of practices that are characteristic of deceptive telemarketing, such as the following:

- prize promotion schemes with strings attached;
- lottery ticket schemes which target senior citizens outside Canada; and,
- newspaper advertisements offering attractive payment schemes for obtaining credit cards, regardless of a customers' credit status.

## III. NATURE AND EXTENT OF THE PROBLEM IN CANADA

Participants were invited to provide their comments regarding the nature and extent of deceptive telemarketing practices in Canada from their individual perspectives.

- There was general recognition that deceptive telemarketing practices encompass a wide range of communication techniques, of which "out-bound" telephone calls constitute but one example. Other examples include faxes, the "Internet", and mail solicitation techniques.

- There was also general recognition that deceptive telemarketing practices have been a problem in Canada, with cross-border implications, since the early 1970s.

- Deceptive telemarketing practices are regarded by many as anti-competitive in nature, for the following reasons:

  - they reduce the disposable income of "victimized" consumers, which would otherwise be spent on legitimate, truly competitive businesses;
  - they decrease business for all legitimate businesses, by generally lowering consumer confidence in the marketplace; and,
  - by giving legitimate telemarketers a "bad name", they make the services of such telemarketers less effective.

- There was a sense that the largest volume of complaints has been received from Ontario victims, as a result of the activities of Quebec-based deceptive telemarketing operators.

- In the opinion of many participants, this problem has historically not been pursued very vigorously by prosecutors under the fraud provision (section 380) of the *Criminal Code.*

- Although some convictions have been obtained, during the 1970s and early 1980s under the *Act*, the penalties (ranging up to a maximum of $35,000) have not been regarded by the CB as sufficiently effective, long-run deterrents.

- Some of the estimated statistics on the relative gravity of this problem, in Canada, include the following:

  - the OPP received 21,000 complaints last year;
  - it is estimated that approximately $57 million is lost each year as a result of this activity;
  - 10% to 15% of all telemarketers are deceptive telemarketers;
  - this 10% to 15% estimate is a conservative one, since it is difficult to estimate what percentage of the victims are reluctant to register a formal complaint;
  - 13% of the victims are senior citizens; and,
  - 68% of those victims, who each lost $5,000 or more, are senior citizens.

## IV. POTENTIAL NON- LEGISLATIVE RESPONSES TO THE PROBLEM

Participants generally agreed that, in addition to whatever legislative changes might be introduced under the *Act*, certain additional initiatives should also be pursued as a means of addressing the issue of deceptive telemarketing.

- Although some initiatives, in other *fora*, have already been reasonably effective (e.g. OPP's "Phonebusters"; CRTC Decision 94-10; and, Canadian Bankers' Association public

education programs, with respect to credit card laundering), there needs to be continuing emphasis on prevention and education, both of the public and of the justice system.

- There was recognition that all participants directly involved or affected by deceptive telemarketing need to work together in this area, in co-operative education and enforcement efforts.

- There was general agreement that additional initiatives to improve law enforcement (either under the *Criminal Code* or under the *Act*) would be useful, but that long-term education initiatives were equally important.

- There was some support for assigning more resources to the CB to combat this problem.

- There was considerable discussion as to the appropriate role of third party suppliers in combating the problem, and the existing limits to the statutory authority of various players. One suggestion put forth was that both the *Act* and the CRTC mandate be amended so as to allow the Director to require either the CRTC and/or the telephone companies to disconnect the telephone lines of suspected fraudulent telemarketers.

## V. RESPONSE TO PROPOSED *COMPETITION ACT* AMENDMENTS

The CB presented a draft proposal for legislative change under the *Act* which presented ten sub-issues, and invited comment on the general approach adopted as well as the specific wording used.

The group expressed general support for the legislative approach presented, although there was considerable discussion of particular features, and clear concern in a few areas, as noted below. The group's responses to each of these sub-issues are summarized below.

Nature of proposed telemarketing offence.

- There was general support for making telemarketing a criminal offence, subject to the restrictions noted below.

- There was no objection to defining the concept of "business interest", so as to include products and/or services that are only purported to be offered for sale.

Definitional scope of proposed telemarketing offence:

- The definitional scope of deceptive telemarketing activities should be restricted so as to apply only to those involving the use of the telephone as a means of solicitation.

- It was also suggested that the definitional scope of deceptive telemarketing activities could be restricted to "out-bound" telephone calls (i.e. only to those telephone calls which are initiated by the telemarketer, not by the customer).

Affirmative disclosure requirements:

- Any affirmative disclosure requirement should be "upon request of payment" from a customer.

- Deceptive telemarketers may be more inclined to refuse to disclose certain types of information required under the proposed affirmative disclosure requirement (e.g. a principal business address) than others (e.g. a P.O. box number).

- Additional consultation with the direct-mail segment of the business community is required to determine whether the proposed affirmative disclosure requirement will be overly burdensome on legitimate telemarketers.

- The CDMA will provide information on the proportion of its members, who request payment, before delivery of a product and/or service.

Prize promotions and premium offers -- affirmative disclosure requirement and pre-delivery payment prohibition:

- Few objections were raised to a specific affirmative disclosure requirement with respect to situations involving prize promotions or premium offers. It was noted, however, that this requirement may already be adequately encompassed under the general affirmative disclosure requirement.

Record-keeping requirements:

- Any record-keeping requirement should be very precise as to the type of information which should be maintained.

- Any record-keeping requirement should not also impose a requirement to mechanically record the pertinent information (e.g. on tape).

- Small businesses, with infrequent and irregular telemarketing promotional schemes, may find it more difficult than larger businesses to keep records.

- For the most part, the record-keeping requirements should not present a problem to legitimate businesses, although some concern was expressed about the retention of records relating to former employees, as employee turnover can be high.

Expanded liability and third party liability:

- There was general agreement with respect to the concept of expanded responsibility, which is intended to assign appropriate individual and/or corporate liability.

- Concerns were raised with respect to the concept of third party liability, for the following two reasons:

  - need legal research to ascertain whether the concept of third party liability is already adequately covered under the common law.

  - may impose unnecessarily burdensome monitoring requirements on certain legitimate institutional telemarketers.

- Many legitimate telemarketers already monitor the activities of third party service bureaus hired to run promotional schemes.

Safeguards for legitimate telemarketers -- due diligence defence, or "ongoing business relationship" defence.

- Concerns were raised that the proposed concept of a due diligence defence (as part of a strict liability offence) may still impose unnecessarily burdensome monitoring requirements on certain institutional telemarketers.

- The phrase "ongoing business relationship" should be interpreted to mean "in the course of a normal business cycle". It was recognized that this concept needs to be examined further to ensure it clearly captures what is intended.

Requirement to obtain advance express and/or written pre-payment authorization from customers:

- A requirement with regard to obtaining advance express verifiable pre-payment authorization from customers would raise serious concerns that this will impose an unnecessarily burdensome set of restrictions on legitimate telemarketers. This is particularly so in light of the fact that a self-regulatory initiative undertaken by the banking industry over the last few years has gone some distance to deal with this aspect of the deceptive telemarketing problem.

Hybrid indictment/summary conviction offence; increased summary conviction offence penalty:

- No objections were raised to the creation of a hybrid indictment/summary conviction offence.

- General support was given for the idea of increasing the summary conviction penalty from twenty-five thousand dollars to two hundred thousand dollars.

Proposed sentencing criteria.

- The view was expressed that it is important for the courts to understand that certain factors need to be taken into consideration when considering sentencing for telemarketing offences.

- Consensus was reached that the judicial system could benefit from further information on the seriousness and impact of deceptive telemarketing.

- General agreement was reached that any sentencing criteria which may be adopted are most appropriately set out in CB guidelines, as opposed to the *Competition Act* itself.

## VI. CONCLUSION

Overall, participants communicated their thanks for the opportunity to participate in this focus group. It was agreed that there should be an ongoing forum on deceptive telemarketing practices to continue discussion of these issues.

The Deputy Director of the CB's Marketing Practices Branch offered to organize a subsequent meeting to focus on co-ordinating additional educational efforts in this field. It was suggested that an invitation should also be extended at future gatherings to Canada Post, courier companies, and the provinces.

The Bureau indicated that it would prepare a summary of the roundtable discussion that would be circulated to all participants. In addition, the CB undertook both to prepare a revised proposal, following modification to reflect the telemarketing focus group comments, and to advise the group's participants on the progress of this issue.

# DECEPTIVE TELEMARKETING
# REVISED LEGISLATIVE PROPOSAL OF THE COMPETITION BUREAU

Following the focus group discussion on deceptive telemarketing held on January 15, 1996, the CB reviewed the comments received from focus group participants and other sources and drafted a revised legislative proposal. The revised proposal builds upon a text that was discussed at the focus group meeting, but differs from that earlier text in several respects.

1) A new legislative provision would be added to the *Competition Act* to provide a criminal prohibition against participating in or operating a scheme of deceptive telemarketing.

2) The provision would apply to the use of one or more telephone calls, including situations where telephone calls are combined with other forms of communication. The provisions would encompass both out-bound calls (those calls initiated by the telemarketer) and in-bound calls (those initiated by a prospective purchaser).

3) For the purposes of this provision, a scheme of deceptive telemarketing would be defined as a scheme for the sale of products or the promotion of a business interest, or that is purported to be for this purpose, where representations are made by means of one or more telephone calls, or a combination of telephone calls and other forms of communication, and,

   (a) the representations are false or misleading in a material respect, or

   (b) the representations relate to a prize promotion, and the telemarketer requests or requires the payment of any consideration as a condition of receiving the prize in advance of delivery of the prize, or fails to comply with section 59 of this *Act*, or

   (c) the representations relate to a premium offer and the telemarketer fails to adequately and fairly disclose the approximate fair market value of the premium and the terms upon which the premium will be provided, or

   (d) payment of any consideration is required in relation to the sale of a product in advance of delivery, where the product is offered for sale at a price that is substantially inflated, having regard to the fair market value of the product.

4) For the purpose of sub-section (a), a representation shall be deemed to be false or misleading where there is not fair, reasonable and timely disclosure of the true identity of the seller, the type of product being sold, the total cost of the product to the consumer, and any material restrictions or terms applicable to the purchase of the product. For greater certainty, it would be specified that the disclosure obligations cannot be fulfilled through false disclosures.

5) In determining fair, reasonable and timely disclosure, the court shall consider the characteristics of the audience to whom the call is directed and the manner in which the information is conveyed.

6) Exemptions to the timely disclosure requirement as described in 4) should be identified to eliminate the obligation in circumstances where it could be burdensome or

disproportionate, such as:

- in the case of telephone calls initiated by the prospective purchaser, in response to written promotional materials, where such disclosure was clearly and conspicuously made in any media within a reasonably proximate period of time; or

- in cases where it would be reasonable to presume that the purchaser would already know this information through a pattern of previous purchases from the same seller or telemarketer, provided the purchases were made at fair market value upon reasonable commercial terms, and the information is supplied upon the purchaser's request.

7) To address the problem of deceptive telemarketing scheme owners or operators shielding themselves from potential liability for the representations made by their employees or agents, anyone operating or participating in a scheme of telemarketing would be required to ensure that actions by agents or employees conform to the requirements of the legislation.

8) Deceptive telemarketing would be a strict liability, criminal offence. A party could avoid responsibility for violations under the law provided that it could establish taking reasonable precautions and exercising due diligence to ensure that the law was complied with. In other words, provided telemarketers (whether sellers, owners, or operators) took reasonable steps to ensure that the required disclosures were made, the prohibition on advance payments was complied with, etc., they would not be liable.

9) Deceptive telemarketing would be an offence where the Attorney General may proceed by way of summary conviction in less serious matters, or on indictment in more serious matters. However, to provide more effective deterrence, the maximum fine available upon summary conviction would be increased from twenty-five thousand dollars to two hundred thousand dollars.

10) To further assist in obtaining penalties which would be appropriate to deter deceptive telemarketing practices, a non-exhaustive list of factors would be developed to be considered in relation to the sentencing of such offences. Appropriate aggravating factors might include: 1) the use of lists of frequent purchasers; 2) the intentional targeting of particularly vulnerable persons; 3) the amount of ill-gotten gains; 4) the repetition of telemarketing offences; 5) the use of harassing or abusive tactics; and, 6) the use of unauthorized charges or payments. These factors should be used as enforcement guidelines relied upon by the Bureau in developing sentencing recommendations for the Attorney General.

11) Deceptive telemarketing can cause considerable harm to the marketplace in a short period of time. Although a criminal offence provision is an appropriate means of deterring such conduct and punishing offenders, there are nonetheless cases where it would be desirable to be able to halt the offending conduct pending disposition of the criminal case before the courts. Consideration would be given to amending the interim injunction provision in section 33 of the *Act* to provide adequate access to such an order in the case of telemarketing. In addition, consideration would be given to extending the interim injunction in a manner to compel third party suppliers to withhold service from an identified corporation or individual for a specific period of time in circumstances where the service is being used principally for the conduct of a deceptive telemarketing scheme, and the likelihood of public harm is particularly strong. This might be appropriate, for example, in cases of repeat offenders.