

**Competition Policy in Canada**  
**Past and Future**  
**Backgrounder for**  
**Canadian Competition Policy**  
**PREPARING FOR THE FUTURE**

The forces of globalization, innovation and deregulation, are shaping the future in Canada and around the world. The structure of the marketplace is changing in response to more numerous and complex mergers, vertical integration, strategic alliances and international business relationships. Canadian competition policy must be able to meet the challenges these present. In preparing for the future, it is instructive to look briefly at the past. This paper looks at the evolution of competition policy in Canada since its origin and anticipates some of the challenges it is likely to face in the 21<sup>st</sup> century.

**19th Century Beginnings**

Responding to forces of globalization and innovation is not new for Canadian competition policy. The industrial revolution of 1860–1900 was characterized by rapid globalization, with free trade, international movement of labour and capital, and revolutionary innovation in technology,<sup>1</sup> travel<sup>2</sup> and communications.<sup>3</sup>

The modern industrial corporation first appeared during the final two decades of the 19th century. Giant industrial works became possible then because the recently accomplished integration of the railroad, telegraph, steamship and cable meant that firms could now source supplies and access markets nationally. Large plants became common in “high technology” industries, such as chemicals, branded packaged foods, steel and agricultural machinery.

Factor markets were also globally integrated. Labour moved across borders largely free of restrictions, and international travel grew with the new safe and swift transportation systems. By 1870, capital markets were highly integrated. Foreign investment faced few regulations. The telegraph and improved stock markets made financial information more readily available than ever before, and the gold standard provided a stable international monetary system. Commodity prices converged dramatically, particularly prices for bulky primary products such as wheat that were traded over long distances and faced no tariffs.

*Highlights of the Last 10 years of the 19<sup>th</sup> Century*

The first Act relating to competition became law on May 2, 1889. This Act was entitled *An Act for the Prevention and Suppression of Combinations in Restraint of Trade*. It was designed to address the problems of combines or conspiracies in restraint of trade to fix prices or restrict output. The penalty for breaking the law for a corporation was a fine between \$1,000 and \$10, 000 and for an individual \$200 to \$4,000 or imprisonment for up to two years.

In 1892, the substantive provisions of this Act were incorporated into the first *Criminal Code* of Canada.

In the first ten years of enforcement of this Act, one charge of conspiracy was laid against American Tobacco Company

The construction of the Canadian Pacific Railway was completed in 1885, which led to the development of the Canadian “wheat economy”. Efforts to integrate the “wheat economy” that emerged at this time with domestic manufacturing created tension between farmers and eastern manufacturers; farmers and consumers felt vulnerable to combines among eastern firms, who were benefiting from protected markets. Farmers also felt dependent on the large banks and the railroads that provided the financial and transportation infrastructure they needed to access the world grain market. As a result, farmers and others looked to competition policy as an instrument for preventing any abuse that might arise from increased concentration of economic power.<sup>4</sup>

All these developments led to Canada becoming, in 1889, the first country to pass competition legislation.<sup>5</sup>

One reason why Canada became the first country to pass competition legislation may be that Canada imposed tariffs just when large corporations were being formed. Creation of a protected market reinforced fears that large firms and combines would abuse their power. The framers of the original competition legislation in 1889 did not object to power as such, but rather to its abuse.<sup>6</sup> They believed that Canada as a whole would benefit from large aggregations of capital (such was the means to a higher standard of living for the nation), but recognized that with size came responsibility: consumers, workers and competitors must not be exploited. Interestingly, price fixing and other agreements among competitors were the only types of abusive conduct legislators addressed in the new competition law of 1889.

## **20th Century Reform**

Much of the 20th century history of Canadian competition law involved expanding and finetuning the law’s powers. The 1889 law was expanded in scope in 1910, for example, to include mergers and monopolization activities. The 1910 law was also the first to be named the *Combines Investigation Act*, and featured a specialized enforcement mechanism. In 1919, the government attempted to make enforcement more effective by converting the criminal provisions into civil law, and created a dedicated enforcement agency for the first time. However, the civil law was found to be unconstitutional in 1921, leading to the restoration of criminal law in 1923.

In the years, 1935 to 1960, there were a number of significant amendments to the *Competition Act*. In 1935, price discrimination and predatory pricing provisions were added to the *Act* in response to the Report of the Royal Commission on Price Spreads. The *Combines Investigation Act* was effectively suspended in the war years, 1941–45, when the Wartime Prices and Trade Board regulated prices. In 1951 a *per se* prohibition of resale price maintenance was included in the *Act*. The report of the MacQuarrie Committee led to significant revisions in 1952, which consisted of the Restrictive Trade Practices Commission taking over appraisal and reporting duties, permitting prohibition orders as sole remedies and introducing the first structural remedy which allowed for dissolution of a merger, trust or monopoly. In 1960, the misleading advertising provisions were added.

By the 1960s, it had become clear that the tariff wall that Canada introduced under the National Economic Policy of 1879 had long-lasting effects on industrial structure and Canada's economic performance. Canadian plants had long been unable to achieve their optimal scale, and short production runs were the norm because firms wished to produce full product lines. This, in turn, led to high fixed costs for re-tooling.

To reap the benefits of economies of scale and scope, companies require massive investments and a large market to underwrite such investments. These structural characteristics would require a balance between competition and efficiency, with greater concentration being a necessary means of achieving greater efficiency.

In 1966, the government asked the Economic Council of Canada to examine possibilities for a broad revision of competition policy, in particular the scope for civil provisions, to ensure it was helping rather than hindering Canadian firms to compete. An objective of the review was to seek better integration of competition policy with other economic policy instruments.

The Council saw competition as the chief means of achieving economic efficiency. The Council's 1969 *Interim Report on Competition Policy* addressed the legacy of the National Economic Policy of 1879, recommending that efficiency be the primary objective of competition law:

“The main objective of competition policy should be that of obtaining the most efficient possible performance from the economy... in dynamic as well as static terms... and the avoidance of economic waste....”

#### **Price Discrimination and Predatory Pricing.**

The Price Discrimination and Predatory Pricing provisions were added in 1935 to the *Combines Investigation Act*.

The well known cases involving price discrimination (since this provision was added) are: Direct Lumber Co. (1962); Malo (1965); City National Leasing Ltd. (1986); Trans Canada Glass Ltd. (1986); Carnation Company Ltd. (1969); Allan Solmon Enterprises Ltd. (1972); Neptune Meters, Limited (1980); Simmons Limited (1980); Commodore Business Machines Limited (1982); Mont-Tremblant Lodge Inc. (1989) and Driving Schools (1997). Fines were imposed in the Neptune Meters, Limited; Simmons Limited; Commodore Business Machines Limited; and Driving Schools.

Under the predatory pricing provision the best known cases

#### *Highlights of the First 75 years of the 20<sup>th</sup> Century*

**Conspiracies.** The conspiracy provisions dominated the enforcement activity of the Competition Bureau, at least until 1960. During the first 75 years of the 20<sup>th</sup> century, eighty-four prosecutions were commenced under the conspiracy provisions. Convictions or prohibition orders were obtained in seventy-five of these prosecutions.

The well known cases in which total fines of over \$100, 000 were imposed were: Container Materials (1940); Howard Smith (1954); Johns Manville (1958); Abitibi (1960); Paperboard Shipping Containers (1966); Toronto Ready Mix Concrete (1972); Ocean Construction Supplies (1974); Victoria, B.C. Cement (1974); Toronto Lumber Dealers (1974); Armco (1974); and Nova Scotia Fire Insurance (1975).

Making efficiency a key element of merger law would facilitate dealing with the problems of scale and specialization that tariff protection created. The Council posited that legislation must look forward and be in line with an understanding of how markets work. The Council stressed that competition and efficiency must be viewed in dynamic rather than purely static terms. Economies change over time, with new products, industries and methods of distribution constantly coming forward and old ones dying off.<sup>7</sup>

The Council wanted to encourage rationalization but not at the expense of protecting the competitive process, but the merger provisions had proved all but inoperable under criminal law.<sup>8</sup> Therefore, a key reform recommended in the Interim Report was the decriminalization of merger and monopoly law to offer greater scope for consideration of efficiency factors and greater flexibility in finding remedies. To facilitate these changes, the report also called for the establishment of a tribunal with specialized expertise for addressing complex economic issues and finding appropriate remedies.

The Interim Report set in motion the Stage I amendments to the *Combines Investigation Act*, which became law in 1976, and the Stage II amendments, which led to the sweeping changes 10 years later that created the *Competition Act*. The more modest Stage I amendments were intended to prepare the ground for the more ambitious Stage II.

**Mergers and Monopolies.** Monopoly or merger charges under the criminal provisions were laid in upwards of eighteen cases.

The well known cases are: Canadian Import Co.(1933); Staples(1940); Eddy Match (1954); B. C. Sugar (1960); ERCO (1970); Montreal diapers (1971); Chipman Chemical Ltd. (1972); Canada Safeway Ltd. (1973); Anthes Cast Iron Pipe (1973); Allied Chemical and Cominco (1975); K.C. Irving (1976); Canadian General Electric (1976); Polyethylene insulation (1979); Hoffman LaRoche (1980); Québec Concrete (1983); Thomson-Southam (1983); Mediacom (1984); and Gray Line Bus (1985).

Convictions were obtained only in the Eddy Match and ERCO cases resulting in total fines of \$85, 000 and \$40, 000, respectively. Convictions were obtained under other provisions. Prohibition orders were obtained in ERCO; Montreal diapers; Chipman Chemical Ltd.; Canada Safeway Ltd.; Anthes Cast Iron Pipe; and Gray Line Bus

**Resale Price Maintenance and Refusal to Sell.** The Resale Price Maintenance and Refusal to Sell provisions which went into effect in 1952 resulted in approximately thirty convictions until July 1975. The total fines levied amounted to \$97, 805.

The well known cases in which substantial fines were levied were: Philips Appliances (1968); Browning Arms (1973); Hartz Mountain (1974); Petrofina (1974); Black & Decker (1974); and Kito Canada (1975).

**Misleading Advertising Cases.** In terms of volume, the misleading advertising cases outnumber the cases under the other provisions. During the period April 1960 (when the misleading advertising provisions were added to the Act) to March 1975, 572 misleading advertising cases were launched compared to 91 conspiracy, merger or RPM cases.

*Highlights of the Past 25 Years*

**Mergers**

The Competition Bureau examined more than 3250 mergers since 1986, reaching a peak of 425 in 1999. Most of these were in the manufacturing sector, followed by the financial, resource, agriculture and service sectors. Seventeen merger cases resulted in applications to the Competition Tribunal.

**Orders.** The Palm Dairies Ltd. case and others pointed out the benefits to private parties of resolving merger cases without resorting to contested proceedings. An order that is simple and can better meet the objectives of the *Competition Act* is preferable to an order that is complex and difficult to administer.

**Remedies.** The Hillsdown Holdings (Canada) Limited merger highlights the observation that a divestiture remedy is particularly difficult to pursue in markets characterized by structural demand reductions and when firms are heavily dependant on immobile, single-function assets. The Southam Inc. application, referred to the breadth of remedies by the Supreme Court, stating that “if the choice is between a remedy that goes farther than is strictly necessary to restore competition to an acceptable level and a remedy that does not go far enough even to reach the acceptable level, then surely the former option must be preferred.”

**Economic issues:** The cases provide some guidance, although many issues remain unresolved. In the Southam Inc. application, product market definition must consider both direct and indirect evidence of substitutability. Direct evidence of price sensitivity is “sufficient” but “not necessary” to show that two lines of business are in the

The 1976 amendments to the *Combines Investigation Act* made the legislation more applicable and relevant to the changing environment. The amendments expanded the purview of the *Act* to cover services of all kinds. Certain practices, including the following, that were not explicitly included in the previous *Act* were now included and could be referred to the Restrictive Trade Practices Commission for adjudication under civil law:

- refusal to deal;
- consignment selling;
- exclusive dealing;
- tied selling;
- market restriction;
- extraterritorial application of foreign judgments;
- foreign laws and directives that have an adverse effect on competition in Canada; and
- refusal to supply by a foreign competitor.

The civil provisions also allowed members of the public to seek recovery of loss or damages resulting from violations of the *Act*. The amendments also provided for interim injunctions and specifically included criminal provisions against certain practices.<sup>9</sup> Other criminal provisions were also strengthened.<sup>10</sup> Finally, intervention by competition authorities before any federal board concerning the maintenance of competition was permitted.

The 1986 amendments, based upon the recommendations for Stage II, were substantial, primarily due to the constitutional challenge to the *Combines Investigation Act*. This resulted in the renaming of the *Act* as the *Competition Act*, and a purpose clause, or set of objectives, to the legislation was introduced. The amendments also brought in new provisions related to mergers, pre-notification of large merger transactions, abuse of dominant position, delivered pricing and specialization agreements, and these were all added to the list of reviewable matters. The criminal conspiracy provisions were also

#### *Highlights of the Past 25 Years*

##### **Civil Provisions**

From 1976 to 1986, six applications were made to the Restrictive Trade Practices Commission, three on refusal to deal, two on tied selling and one on exclusive dealing. Of these, four were withdrawn, one was dismissed and one resulted in a prohibition order.

The three refusal to deal applications involved rubber products in door construction (National Rubber Company Limited, 1977), the supply of oil to a chain of gasoline bars (Perrette Dairies Limited, 1979), and motion pictures (Cineplex, 1982). The applications were later withdrawn as the competition issues were resolved.

The two tied selling applications involved the sale of radio and television data (BBM Bureau of Measurement, 1979) and the provision of wire, voice and cable news products and the transmission of those products (Broadcaster News Limited, 1985). An order prohibiting BBM from engaging in the alleged practices was issued by the Restrictive Trade Practices Commission (RTPC), while the application in Broadcaster News was withdrawn when the company changed its policies.

The only exclusive dealing application involved snowmobiles (Bombardier Limited, 1979). The RTPC denied the order because “the evidence relating to entry and to the expansion of sales by Bombardier’s competitors does not show a substantial lessening or reduction of competition nor a likelihood thereof.”

From 1986 to 1999 two civil provisions, mergers and abuse of dominance, received most of the Bureau’s attention (see other highlights boxes). However, after 1986, three refusal to

clarified and strengthened. Finally, the scope of the *Act* was extended to cover the commercial activities of agent Crown corporations in competition with other persons.

The Director (now the Commissioner) of Competition's advocacy powers also were broadened to include intervention in front of provincial boards. In addition, the responsibility for investigating bank mergers and agreements was transferred to the Director from the Inspector General of Banks. Finally, new investigatory powers and procedures were enacted to bring the competition legislation into conformity with the *Charter of Rights and Freedoms*.

These amendments represented a fundamental change to the former law and its procedures. The government also passed an accompanying piece of legislation, the *Competition Tribunal Act*. This *Act* set up a new adjudicative body, the Competition Tribunal, to succeed the Restrictive Trade Practices Commission.

The close of the century saw two further sets of amendments to the *Competition Act*. In March, 1999, amendments came into effect to deal with some of the issues raised by information and communications technologies, including fraudulent telemarketing, misleading and other deceptive marketing practices and ordinary price claims. The Competition Bureau's ability to respond to misleading and other deceptive marketing practices was improved through the creation of a civil process that allows the Bureau to seek court orders to stop such marketing practices, while retaining criminal law for the most serious cases of deliberate misrepresentation. The Bureau's ability to deal with ordinary price claims was enhanced through the creation of two alternative tests and a civil process.

In December, 1999, amendments to the notifiable transaction provisions of the *Competition Act* and related amendments to the Notifiable Transactions Regulations came into force.

## 21st Century

The beginning of the 21st century is proving to be a period of change that, some say, challenges or even surpasses that which occurred in the latter part of the 19th century. Today, as then, globalization, innovation and deregulation are key drivers of competition policy, and these forces are dynamically related. Transportation and communication technologies have made local markets national and international ones. Globalization and innovation prompt deregulation, which stimulates a further round of innovation and globalization. Globalization also exposes firms to more competition and disseminates technology, which stimulates more innovation and has become a key source of sustainable competitive advantage.

A defining characteristic of the knowledge-based economy (KBE) is the creation of new technologies, products, business models and markets. Advances in industrial organization economics and competition law enforcement has shed light on how businesses are likely to acquire and exercise market power in the KBE. Behaviour that was previously thought to be competitively benign or positive is now seen to lead to an increase or preservation of market power under certain circumstances.

Conversely, new economic thinking recognizes the benefits of intellectual property licensing arrangements where in previous decades, such arrangements were regarded with suspicion and subjected to an extensive and rigid set of rules by competition agencies. The Bureau will need to apply the new learning which has developed some tractable analytical techniques and rule-based procedures

### *Highlights of the Past 25 Years*

#### **Criminal Provisions**

Bid rigging, conspiracy/ international cartels, and deceptive marketing were the provisions most extensively used after the 1976 amendments. Bid rigging proved to be the most often used of the three new provisions, with more than 20 investigations in the 1980s and convictions obtained in cases related to suppliers of school bus services, contractors for glass and glazing, contractors for heating and air conditioning, contractors for construction equipment, suppliers of business forms, suppliers of reinforced steel, hotel operators, suppliers of reprographic services and others. Some very high fines were collected, including the record fine of \$3.4 million in the flour mills case in 1990–1991.

Jurisprudence concerning bid-rigging resulted from the initial prosecutions. For example, the Supreme Court of Canada provided guidance on when a corporation cannot be held accountable for the actions of an individual. Other courts indicated that when there is an arrangement or agreement among the bidders there is an affirmative obligation on the bidders to notify the person calling the bids of such an arrangement or agreement. Further, this section also makes it essential that there be an identifiable person who requests or calls for bids.

Domestic and international conspiracies have attracted considerable attention, particularly because of the large fines that were levied on international conspirators. The conspiracy provisions are the oldest and form the core of the *Competition Act*. Since 1986, there have been more than 30 convictions under these provisions. The interpretation of this law was clarified with the 1986 amendments, which stated that it was not necessary to establish that the firms intended to lessen competition unduly. The Supreme Court of Canada's decision in the Nova Scotia Pharmaceutical Society case in 1992 sets out important jurisprudence with regard to not only intent but also an analytical framework. In establishing undue, the Supreme Court stated that it is the combination of market power and behaviour injurious to competition that makes a lessening of competition undue.

for antitrust enforcement that reliably distinguish between anti- and pro-competitive behaviour without the resource costs and complexity of full-rule-of-reason analysis. From this it is clear that the KBE challenges the Bureau to rethink some components of the analytical framework and to reinforce others. To continue to promote the competitive process, competition policy must play two roles:

- set the marketplace framework that best enables new markets (e.g. deregulated markets and the electronic marketplace) to develop; and
- promote efficient operation of those markets by ensuring that the Bureau's analytical framework, the *Competition Act* and related legislation, and the Bureau's approach to conformity (the Conformity Continuum) remain relevant and effective.

The Bureau can no longer rely on the knowledge acquired from past cases. The KBE allows for the continual creation of new value which has implications for how the Bureau identifies efficiencies, evaluates competitive effects and defines markets.

While the anticompetitive techniques that are likely to arise in the electronic marketplace are yet unknown, their effects will be familiar: cutting off access to suppliers and markets, inducing rivals not to compete, targeting schemes at consumers, trying to force customers to purchase other products, and raising rivals' costs or reducing their revenues through predatory tactics.

The Bureau needs to continue to promote its view that an efficient allocative function is crucial for sustaining change. Competition has a key role to play in promoting the efficient allocation of resources

#### *Highlights of the Past 25 Years*

##### **Fair Business Practices Provisions**

The Competition Bureau's Fair Business Practices Branch promotes fair competition in the marketplace by discouraging deceptive business practices and encouraging the provision of sufficient information to enable informed consumer choice. This goal is achieved through application of the *Competition Act*, the *Consumer Packaging and Labelling Act*, the *Textile Labelling Act* and the *Precious Metals Marking Act*.

The Bureau as a whole received 13 340 complaints between September 1, 1999, and August 31, 2000; of those, 12 276 related to the activities of the Fair Business Practices Branch. The branch focusses on matters having the greatest economic impact, which has resulted in a substantial decline in the number of cases pursued but larger fines being imposed.

A large part of branch resources has been committed to enforcing criminal provisions in areas such as deceptive telemarketing, deceptive mail solicitations and lotteries, and pyramid selling and multilevel marketing. These matters continue to be the main source of consumer complaints. New provisions in the *Competition Act* on telemarketing are now having an impact, with complaints shifting from telemarketing to deceptive mail in response to effective enforcement of the new provisions.

The civil provisions for fair business practices are fairly new, and include revised rules for making ordinary-selling price claims. The focus of investigation in this area has been the jewellery industry.

for research and development and the commercialization of new knowledge, because competitive markets generate more accurate information on where firms should allocate their resources.

As well, in the KBE the Bureau needs to rethink the distinction between market power that enables production of superior value or is the result of superior competitive performance, from market power that protects or creates monopoly profits (supra normal profits) by anti-competitive means. As such we need to consider how to define markets when they are totally differentiated, down to the individual consumer and how to handle substitutes and complements in such markets.

In addition the KBE will present new enforcement challenges. Factors creating those challenges are internationalization and deregulation which lead to increasing complexity of markets and products. As a result it is critical to recognize the effects that competition law enforcement may have on innovation.

There are particular industries the Bureau believes will likely present significant competition issues and require substantial resources on the part of the Bureau in order to effectively enforce the *Competition Act*. Examples of such industries are: financial services, transportation, telecom, energy and broadcasting and cable.

National enforcement agencies are meeting the challenge of internationalization by working towards closer coordination among themselves to achieve harmonization of rules in order to minimize the regulatory burden associated with multi-country review and to promote efficiency-based antitrust analysis. Decisions made by companies outside of Canada affect Canadian consumers and companies. As well, more mergers with an international dimension have competitive implications in more than one country, making review more difficult and costly. Actions taken by foreign antitrust agencies can also have significant effects in Canada. Cooperation among antitrust agencies and other enforcement agencies is necessary in order to “find the smoking bit” (as opposed to the “smoking gun” document in a paper environment) when information can be stored in foreign jurisdictions and quickly shifted through the Internet.

#### Highlights of the Past 25 Years

##### Advocacy

Prior to the 1976 amendments, which allowed the Commissioner of Competition to make representations to federal (upon request or own initiative) and provincial (upon request or with consent) boards, commissions and tribunals, there was no mechanism for the Commissioner to address competition concerns before regulatory bodies. From 1976 to 1999, the Commissioner made 251 such representations, addressing issues such as tariff applications, licence and access applications, regulations, merger agreements, policy matters, supply management and dumping of imports. Most interventions were in the communications sector (98) and the transportation sector (61). The Commissioner’s contribution was noted by several writers who found that 64 percent of the decisions were consistent with the Commissioner’s recommendations and another 16 percent were partially consistent.

Attempts have also been made to introduce competition in other regulated sectors. In finance, the Competition Bureau has played a major role in banning tied selling and developing merger guidelines for banks. In the agriculture sector, the Competition Bureau not surprisingly has opposed supply-management schemes and price control.

The Bureau will continue to negotiate cooperation agreements with foreign governments and antitrust agencies. Free trade agreements now routinely include sections on competition policy issues. The Bureau will also continue to provide and offer technical assistance in the design of competition laws, institutions and enforcement practices to other countries.

With increased international trade comes an increased likelihood for disputes. As a result, the Bureau may find itself involved in international trade disputes over non-tariff barriers and antidumping before the Canadian International Trade Tribunal, NAFTA Panel Reviews, and the World Trade Organization.

In the ever increasing deregulated environment of the KBE, the transition from government regulation to competition as regulator carries important responsibilities for the Bureau. It is not obvious where the distinction between regulation and competition lies nor what are the appropriate regulatory institutions. The Bureau will have a continuing role to play in managing the transition to competition as champion of regulatory restructuring and forbearance (as can be seen in the telecommunications, electricity, professional, postal, broadcasting and financial markets). There is also an important oversight role for governments to play that will need Bureau advice and expertise. After deregulation, there will often be relatively few firms and high barriers to entry requiring monitoring and enforcement under the merger and abuse provisions.

Network industries, such as natural gas, electricity and telecommunications, feature stages of production that are natural monopolies, raising access issues in the stages of production that have been deregulated and opened up to competition. The restructuring of network industries presents the

#### *Highlights of the Past 25 Years*

##### **International Affairs**

Activities related to the Memorandum of Understanding (MOU) between the U.S. and Canada reached a climax in August 1995 with the signing of an international agreement between then Industry Minister John Manley and former Attorney General Janet Reno and Federal Trade Commission Chairman Robert Pitofsky. The new accord now has the status of an international agreement and contains new features addressing cooperation and coordination in the area of deceptive marketing practices together with improvements in light of the experience gained under the MOU.

Efforts were also made to incorporate competition laws into trade agreements, beginning with the Canada-U.S. Free Trade Agreement (FTA). Consideration of competition policy in the FTA arose as a result of the possibility of a convergence of antidumping and antitrust laws. Related is the North American Free Trade Agreement (NAFTA), which is the first international trade agreement to explicitly include competition law. NAFTA reflects a commitment in principle to maintain and enforce national competition laws and to promote effective competition law enforcement in the North American free trade area.

The Canada European Community Agreement was finalized in late 1990s. The agreement codifies a state-of-the art approach to bilateral cooperation and coordination in competition law enforcement. It is expected to ensure that the benefits of multilateral trade liberalization are not hindered by private restraints to trade and to reflect the close cooperation that exists between the competition authorities of Canada and the European Union. This is also reflected in the introduction of a positive comity provision, which is expected to go into effect shortly.

Finally, the Competition Bureau is participating in the project of the World Trade Organization (WTO) to study issues raised by members countries of the GATT relating to the interaction between trade and competition policy, including anti-competitive practices.

challenges of distinguishing between efficient and anti-competitive behaviour in the potentially competitive segments initially dominated by the incumbent firm; and controlling the incentives and ability of the vertically integrated incumbent to raise the costs of its competitive rivals (competitive safeguards).

Competition law enforcement is likely to have an effect on the level of innovation and the Bureau needs to pay more attention to finding the appropriate remedies. The speed of economic change can make remedies designed to address actions that were the cause of an inquiry appear moot by the time a court or the Competition Tribunal has rendered a decision. Remedies are neither simple to find nor apply when both tangible and intangible assets must be taken into consideration and intellectual property is a factor. In finding remedies, the Bureau must consider the effects on incentives to innovate. When network effects are strong, anti-competitive conduct may play a significant, perhaps decisive, role in making a firm's standard the *de facto* industry standard. When the public benefits from a single standard, it may be very difficult to find remedies that take back the "ill-gotten gains" without also hurting public welfare. Significant cases have involved Microsoft, Intel, Dell, Silicon Graphics, ATM networks, credit cards, Internet backbone service, direct broadcast satellite, cable television, airline reservation systems, real estate listings, yellow page directories, Interac, Southam, and numerous others.

Errors in the Bureau's enforcement action<sup>11</sup> may have greater consequences if they affect innovation. Failure to intervene<sup>12</sup> in order to preserve competition and stop private behaviour that reduces or stifles innovation could entail large public welfare losses. Protecting against making these errors has always been a concern of the Bureau's, and its importance has intensified in the KBE.

Finally, internationalization of markets and rapid economic change require a continuous and timely process for amending the *Competition Act* so the law can be effectively enforced in the KBE. Parliamentarians are increasingly interested in specific competition law reforms. There is a need to ensure that the amendments focus on enabling markets and reallocating resources to the most highly valued use and not undermining this by protecting competitors and locking resources into less productive endeavours. A number of factors are creating uncertainty about the ultimate outcome of reform: greater, but diffuse, public interest in competition policy, entrenched power of large corporations and those in the business community who are nervous of change.

## **Conclusion**

The task of reforming Canada's competition law is ongoing. The new economy, characterized especially by forces such as globalization, innovation and deregulation, is demanding effective responses from the Competition Bureau. This entails continuing efforts to keep the legislation up to date and relevant to changing market conditions. In particular, competition policy will have to demonstrate its ability to adjust and deal with the high-tech economy and the rapidly changing world we live in, the increasing role of intellectual property rights and freer markets, together with enterprises operating in more global industries.

As industries find themselves in new circumstances, facing rapid changes, they need to know where they stand in terms of the competitive strategies to which they may turn to survive and prosper. When faced with the pressures of rapid changes, some parties may see the *Competition Act* as an impediment to what they view are legitimate business practices. Firms need to know what is permissible under the *Act* so as to remove any chill upon legitimate business conduct and to promote compliance with the *Act*. This involves engaging the competition community in a dialogue on competition law enforcement to do the following:

- come to a common understanding of the nature of economic change;
- learn what forms of business conduct are permissible and which are not;
- foster confidence in the *Competition Act* and the competition law analytical framework;
- provide, more pro-actively, sufficient guidance on the law and enforcement approach to avoid any chill that uncertainty concerning the application of law could place upon pro-competitive business conduct.

In this national conference, leading experts in competition law and policy, business and consumer affairs are engaged in a dialogue on the necessary evolution of competition law enforcement and policy. Such a dialogue will ensure that competition is maintained and encouraged in the interests of consumers, business and the economy as a whole.

## Notes

1. Electricity led to fundamental improvements in the productivity of production processes.
2. Trains, automobiles and, later, airplanes.
3. Telegraph, telephone, radio and motion pictures. Communications and transportation technologies enabled large-scale enterprises to serve national and international markets.
4. The role of farmers in supporting combines legislation was noted by R.M.A. Loyns in “Competition and Public Policy on Competition in the Canadian Food Industry: An Introduction,” in R.M.A. Loyns and R.L. Louks, eds. *Competition and Public Policy on Competition in the Canadian Food Industry*, Occasional Series No. 7, Department of Agricultural Economics and Farm Management, University of Manitoba, Winnipeg, Manitoba, May 1997. This role was also recognized by the Economic Council of Canada in its *Interim Report on Competition Policy*, in 1969.
5. *An Act for the Prevention and Suppression of Combinations formed in restraint of Trade*; Statutes of Canada, 1889, 52 Vic., c. 41.
6. The discussion here follows Paul K. Gorecki and W.T. Stanbury (1984), *The Objectives of Canadian Competition Policy 1888–1983*, The Institute for Research on Public Policy.
7. This dynamic perspective was given additional prominence in competition law by the 1976 Skeoch-McDonald report, *Dynamic Change and Accountability in a Canadian Market Economy*. The report gave weight to the forces responsible for strong economic growth. It focussed on innovation in technology and business organization to produce new products and services and reduce costs.
8. The only two cases brought to court under the merger provisions (the *Canadian Breweries* and *Western Sugar Refining* cases) were both lost by the Crown, and were not appealed.
9. These were foreign conspiracies, bid rigging, conspiracy relating to sports, misleading warranties or testimonials, double ticketing, pyramid and referral selling, sale above advertised prices, and promotional contests unless they meet certain rules.
10. Namely, conspiracy, disproportionate allowances, misleading advertising, bait-and-switch selling, and price maintenance.
11. These are referred to as Type I Errors: enforcement action hurts the competitive process in a market or impairs the efficient operation of firms.
12. These are referred to as Type II Errors: there are effective remedies available that would have protected or enhanced the competitive process.