



Canada is situated in North America, bordering the North Atlantic Ocean on the East, North Pacific Ocean on the West, and the Arctic Ocean on the North, North of the conterminous United States of America.

Canada is the second largest country in the world after Russia. Its population is, however, only about one-fifth of Russia's.

Economy

Canada ranks seventh in the world in GDP. As an affluent, high-tech industrial society, newly entered in the trillion-dollar class, Canada closely resembles the US in its market-oriented economic system, pattern of production, and affluent living standards.

Given its great natural resources, skilled labour force, and modern capital plants, Canada enjoys solid economic prospects. Solid fiscal management has produced a long-term budget surplus, which is substantially reducing the national debt. Canada is one of the world's largest producers of a wide variety of minerals. Minerals, forest products, and agriculture have been major factors in Canada's economic development.

Canada enjoys a substantial trade surplus with its principal trading partner, the United States, which absorbs more than 85 percent of Canadian exports. The spectacular growth of Canada's manufacturing segment, particularly since the 1950s, has transformed the nation from a rural, agricultural society into one primarily industrial and urban. Industry is now the leading segment of the nation's economy, employing one-third of the work force.

Competition Evolution and Environment

In 1889, the Canadian Parliament became the first national Government to pass a competition legislation. During the nineteenth century, a time when a protected market was

PROFILE	
Population:	31.6 million***
GDP (Current US\$):	856.5 billion***
Per Capita Income: (Current US\$)	24,470 (Atlas Method)*** 29,480 (at PPP.)
Surface Area:	10.0 million sq kms.***
Life Expectancy:	79.3 years**
Literacy (%):	97 (of ages 15 and above)
HDI Rank:	4
Sources: - World Development Indicators Database, World Bank, 2005 - Human Development Report Statistics, UNDP, 2004 (**) For the year 2002 (***) For the year 2003	

created through tariffs, large corporations were being formed and farmers feared that abuse might arise from increased concentration of economic power. The only types of abusive conduct the federal legislators addressed in this new *Act for the Prevention and Suppression of Combinations in Restraint of Trade* (Act) were combines or conspiracies to fix prices or restrict output.

In 1892, the substantive provisions of the Act were incorporated into the first *Criminal Code* of Canada. By 1897, one charge of conspiracy was laid against American Tobacco Company of America, which pleaded guilty and was acquitted.

In 1910, the scope of the renamed Act, the *Combines Investigation Act* (CIA), was expanded to include, for example, a prohibition against anticompetitive mergers and monopolistic activities that were reviewed under criminal law. To make enforcement more effective, the Government converted the criminal provisions into civil law and

* Original paper submitted in October 2004. Revised in October 2005 & March 2006.

¹ The views expressed in this Article are entirely the views of the author in her personal capacity and do not necessarily reflect the views of the Competition Bureau".

established an enforcement agency. Two years later, in 1921, the civil law was found to be unconstitutional,² and by 1923, the criminal law was restored but the newly created enforcement agency remained.

In the years, 1935 to 1960, the legislation underwent a number of significant amendments, most of which aimed to expand the scope of prohibited activities, including price discrimination and predatory pricing (1935), resale price maintenance (1951) and misleading advertising (1960).

Faced with the controversy involving the suspension of the CIA during the Second World War, when production, allocation of resources, and the setting of prices were subject to the control of the Wartime Prices and Trade Board, the Government in 1950 appointed the MacQuarrie Committee to study the purposes and methods of the legislation. An objective of the review was to recommend any amendments desirable to make the CIA 'a more effective instrument for the encouraging and safeguarding of our free economy'.

With a view to strengthening and improving the procedures, organisation and remedies in the CIA, the chief recommendation of the MacQuarrie Committee was the separation of functions and responsibilities between investigation and research on the one hand and appraisal and report on the other.

The 1952 amendments to the CIA, therefore, provided for a Director of Investigation and Research and a Restrictive Trade Practices Commission, today, the Commissioner of Competition, and the Competition Tribunal, respectively. The legislation of 1952 also incorporated the first structural remedy for the dissolution of a merger.

Until at least 1960, the conspiracy provisions dominated the enforcement activity of the Director, with convictions or prohibition orders being obtained in 75 of the 84 prosecutions that were commenced under the conspiracy provisions. With the scope of the legislation and the breadth and vigour of its enforcement having increased during the postwar period, the nature and objective of the CIA had become better known by the Canadian public, and some observers would argue that it increased its power to deter. But what was the impact of the legislation on economic efficiency?

Pursuing such an assessment of Canada's competition policy, the Economic Council of Canada, an independent and research-based body established by federal statute in the mid-sixties to advise the Government of Canada on economic policy, was tasked in 1966 to undertake a review

of 'combines, mergers, monopolies and restraint of trade' with a view to bring competition policy in harmony with other economic policy instruments and ensuring a balance between maintaining competition in domestic markets and helping, not hindering, the international competitiveness of Canadian firms.

In its 1969 Interim Report on Competition Policy, the Council stated that competition is an important means of achieving economic efficiency, and therefore:

"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...with a view to enhancing the well-being of Canadians".

In doing so, the Council made recommendations to be implemented in two Stages. The Stage I amendments included:

- the decriminalisation of the merger and monopoly provisions that proved to be inoperable under criminal jurisdiction, and the establishment of a civil tribunal with specialised expertise;
- the expansion of the scope of the CIA to cover services of all kinds;
- the addition of practices that would be referable to the tribunal for adjudication:
 - refusal to deal;
 - consignment selling;
 - exclusive dealing;
 - tied selling;
 - market restriction;
 - extraterritorial application of foreign judgments;
 - foreign laws and directives with an adverse effect on competition in Canada; and
 - refusal to supply by a foreign competitor.

Competition Law

The Stage II 1986 amendments represented a fundamental change to the former law and its procedures. The amendments led to the creation of today's *Competition Act*, the introduction of a purpose clause and brought in, among other things:

- new reviewable matters relating to mergers, pre-notification of large merger transactions, abuse of dominant position, delivered pricing and specialisation agreements;
- clarified and strengthened criminal conspiracy provisions; and

2 The constitutional validity of the CIA was later confirmed by the Supreme Court of Canada as a valid legislation under the federal general trade and commerce power, and the federal criminal law power.

- new investigatory powers and procedures to bring the competition legislation into conformity with the *Charter of Rights and Freedoms*³.

In addition, the Government passed an accompanying legislation, the *Competition Tribunal Act*, which established the Competition Tribunal as a new adjudicative body to succeed the Restrictive Trade Practices (RTPs) Commission.

Apart from a few exceptions, the Competition Act applies to businesses in all sectors of the Canadian economy.⁴ Prohibitions contained in the Act take two different forms: criminal offences and civil reviewable matters. Criminal offences include conspiracy, bid-rigging, discriminatory and predatory pricing, price maintenance, misleading advertising and deceptive marketing practices.

The Director may refer a case to the Attorney General of Canada for consideration as to what action the Attorney General may wish to take, which can include criminal charges. Criminal charges are prosecuted before the various courts of criminal jurisdiction in each province. Courts may impose fines, order imprisonment, issue prohibition orders and interim injunctions or any combination of these sanctions.

Civil reviewable matters include mergers; abuse of dominant position; refusal to deal; consignment selling; exclusive dealing; tied selling; market restriction and delivered pricing. The Director may address these matters by filing an application with the Competition Tribunal for an interim order or final order to stop certain activities or requiring a person to take certain steps that the Tribunal considers necessary to prevent injury to competition.

Although the two Stages of amendments substantially reformed the competition legislation, the protection of competition in Canada continued through incremental amendments. In 1999, the amendments added a new criminal offence of deceptive telemarketing, made changes to the merger pre-notification requirements and created a civil process to deal with misleading marketing practices. Finally, the Director was replaced by a Commissioner of Competition, who is appointed by the Governor in Council to direct the Competition Bureau.

In the face of a changing global economy and parliamentary interest in competition law, the turn of the century gave rise to further sets of amendments. By way of a Bill that was tabled in the House of Commons in 2001, and entered into force a year later, the 2002 amendments sought to increase Canada's ability to:

- effectively enforce and administer competition policy and provided for provisions to facilitate cooperation with foreign competition authorities regarding evidence for civil competition matters;
- prohibit the sending of deceptive notice of winning a prize aimed at the general public and sent through the mail and Internet;
- streamline the Competition Tribunal process by providing for cost awards, summary dispositions and references; and
- broaden the scope under which the Competition Tribunal may issue temporary orders.

Soon after, the April 2002 Report of the House of Commons Standing Committee on Industry, Science and Technology, led to a new round of amendments. Canada is currently considering proposals to strengthen the civil provisions with administrative monetary penalties, restitution and civil cause of action, reform of the conspiracy and pricing provisions, and allow for inquiries into the functioning of markets in Canada.

In a move to further strengthen the Canadian system, on November 02, 2004 Federal Ministry of Industry tabled Bill C-19 – An act to amend the Competition Act and to make consequential amendments to other Acts – in the House of Commons. Bill C-19 was referred to the standing committee for review on November 16, 2004, although the committee has temporarily deferred consideration of the bill pending resolution of an issue pertaining to the deductibility of fines under the Competition Act for income tax purposes.

Institutions, its Competencies and Anticompetitive Business Practices

The Competition Act establishes the Competition Bureau, which is responsible for the enforcement and administration of the Competition Act. The Commissioner of Competition who heads the Bureau has full independence in the conduct and disposition of inquiries under the Competition Act.

The Bureau conducts its work in five main areas:

- to investigate anticompetitive activities that range from price fixing and bid-rigging to misleading advertising; the Competition Act contains provisions dealing with criminal offences and civil reviewable matters. Stiff penalties, such as fines and/or prison time can be imposed upon those who choose to engage in anticompetitive behaviour;
- to review proposed mergers to ensure they do not lead to a substantial lessening or prevention of competition;

3 The Canadian *Charter of Rights and Freedoms* is part of the constitution, which is the supreme law of Canada, and guarantees certain rights and freedoms. Any actions taken by Canadian authorities will be governed by the Charter. The most relevant provisions are the following:

Sections 8: the right of any person to be secure against unreasonable search and seizure;

Section 11(c): the right of any person charged with a criminal offence not to be compelled to be a witness in proceedings against him or her in respect of that offence; and

Section 13: the right of any person not to have any incriminating evidence given in a proceeding used against him or her in any other proceeding, except in the case of false testimony.

4 The Act does not apply in respect of the following activities or sectors: collective bargaining activities, amateur sport, ocean shipping, energy, airlines, farm products, copyright collectives and certain regulated conduct.

- plays the role of supervisor, drawing the line between anticompetitive conduct and vigorous competition;
- ensures that consumers have the accurate information at their disposal; and
- promotes and advocates greater competition. The Bureau has a statutory right to make interventions and independent representations in respect of competition.

To ensure both effective enforcement of and continued compliance with the Competition Act, the Bureau updates itself in light of technological change, industry trends, and consumer and business issues.

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 the application of the Competition Act, *Consumer Packaging and Labelling Act*, *Textile Labelling Act*, and *Precious Metals Marking Act*. These statutes aim to protect consumers and maintain marketplace confidence in the quality of such products. The three standards-based laws concern the adequacy and accuracy of information provided to consumers in labelling, packaging and marking of consumer goods.

Prohibitions contained in the *Competition Act* take two different forms: criminal offences and civil reviewable matters. Criminal matters include false or misleading representations, deceptive telemarketing, deceptive notice of winning a prize and schemes of pyramid selling. The reviewable matters include materially false or misleading representations to the public, misleading price representations, representations not based on adequate and proper testing, misleading warranties and guarantees, untrue misleading or unauthorised use of tests and testimonials, non-availability of advertised specials, sale above advertised price and promotional contests.

Box 105.1: Canada Catches up with Food Cartel

Canada's Competition Bureau has fined food conglomerates Ajinomoto and CJ Corp US\$1.4mn for fixing the price of food flavourings.

Both companies pleaded guilty to running a cartel between 1992 and 1996, which inflated the cost of nucleotides – flavourings used in soups and sauces. Ajinomoto must pay US\$1.5mn and CJ Corp US\$175,000.

Ajinomoto is Japan's largest producer of seasonings. It also makes food additives used in sweeteners, nutritional supplements, and animal feeds. Based in Tokyo, it reported sales of US\$9.8bn in 2004.

CJ Corp makes animal feed, food seasonings and medicines. It also owns restaurants and operates cable and satellite channels. Based in Seoul, it reported sales of US\$2.5bn in 2004. Civil and criminal cases against Ajinomoto and CJ Corp are pending in the US.

Source: *Global Competition Review*, September 2005

The Bureau as a whole received 19,639 complaints between April 01, 2002, and March 31, 2003; of those, 18,597 related to the activities of the Fair Business Practices Branch.

Other Market Regulatory Legislation

Besides the Competition Act, other federal and provincial statutes relating to regulated sectors also address competition matters in particular sectors of the economy.

Telecommunications Sector

The Canadian Radio-television and Telecommunications Commission Act empowers the Canadian Radio-television and Telecommunications Commission (CRTC) to forbear from regulation where there is adequate competition.

Box 105.2: Tribunal Pulled up for not Asking the Perpetrator to Place Corrective Advertisements

In May, 2002, the Competition Tribunal ruled that a gas-saving device known as the Platinum Vapour Injector (PVI), marketed by PVI International Inc., did not work and the company's claims of saving fuel and reducing emissions were false and unsubstantiated by 'adequate and proper tests'.

The full hearing followed the Bureau's investigation into allegations that PVI International Inc., and its owners enticed consumers into buying gas and diesel versions of the PVI through newspaper, radio and internet advertisements, by claims that the PVI could reduce fuel consumption by as much as 22 percent, while reducing harmful emissions.

PVI International Inc. and its two owners were ordered to cease making representations with respect to the gas-

saving device for a period of 10 years. Furthermore, the company was ordered to pay an administrative penalty of US\$75,000 while the owners were each ordered to pay US\$25,000. Their appeal to the Federal Court of Appeal was denied.

In July, 2002, the Bureau commenced a cross-appeal against the decision in order to force the company to inform customers, through corrective notices in newspapers across Canada and on the Internet, that its gas-saving device does not work. The Federal Court of Appeal upheld the Tribunal's ruling that claims made to consumers about the PVI, were false or misleading.

Furthermore, the Court also found the Tribunal erred in exercising its discretion not to order PVI to publish corrective notices.

Box 105.3: Phoney Invoice Scam

A Competition Bureau investigation has led to jail time and fines totalling US\$915,000 against four Toronto-area residents for their involvement in the Yellow Business Directory.com 'phoney invoice' scam. All four were convicted in April 2004 following a five-week jury trial in the Ontario Superior Court in Toronto.

Alan and Elliot Benlolo were sentenced to three years in federal penitentiary and fined US\$400,000 each for violating the false or misleading representations provisions of the *Competition Act*. Also sentenced for their involvement in the scam were: Victor Serfaty who received an 18-month conditional jail sentence (including six months house arrest), 100 hours of community service and a US\$15,000 fine; while Simon Benlolo received a nine-month conditional jail sentence

(including three months house arrest) and a US\$100,000 fine.

The individuals sent out mail pieces that falsely appeared to be bills or invoices from Bell Canada or the Yellow Pages, when in fact they were solicitations to have the recipients' business details appear in Internet-based directories operating under the names Yellow Business Pages.com and Yellow Business Directory.com. Between May and December 2000, they sent mail to approximately 900,000 businesses and non-profit organisations in Canada and generated sales of over US\$1mn.

The Competition Bureau received more than 4,400 complaints about the phoney invoices, which asked recipients to send either US\$25.52 or US\$37.40 to a postal box in Toronto.

The CRTC is vested with the authority to regulate and supervise all aspects of the Canadian broadcasting system, as well as to regulate telecommunications common carriers and service providers that fall under federal jurisdiction. Its regulatory powers are derived from the *Telecommunications Act* of 1993 and the *Bell Canada Act*.

The main objective of the *Telecommunications Act* is to ensure that Canadians have access to reliable telephone and other telecommunications services at affordable prices.

Energy Sector

The Canadian energy sector is committed to developing and promoting economic, regulatory and voluntary approaches that encourage sustainable development of energy resources.

National Energy Board Act established the National Energy Board, an independent federal agency, that regulates several aspects of Canada's energy industry. Its purpose is to promote safety, environmental protection and economic efficiency in the Canadian public interest within the mandate set by Parliament for the regulation of pipelines, energy development and trade.

Concluding Observations and Future Scenario

An overview of Canada's competition regime would be incomplete without recognising the key challenge of maintaining the evolution of competition law and policy to remain in step with an environment of increased

international competitiveness, characterised by changing market conditions, innovation and deregulation. Although these key drivers of the economy have been changing the nature of competition policy for many years, continuous attention to these forces will ensure that competition is maintained and encouraged in the interests of consumers, business and the economy as a whole.

Furthermore, to adapt Canadian competition policy to a rapidly changing business environment, institutional and legislative changes are necessary so that the Competition Bureau can better cope with an expanded and more high profile mandate. Certain aspects which calls for an immediate attention are:

- As of all the regulatory agencies in Canada, the Competition Bureau's broad mandate is of fundamental importance, both to the business community and the national economy, it should be equipped with the necessary tools in order to meet the challenges of the new environment;
- The Competition Bureau should be established as a stand-alone federal agency, attached to Industry Canada and reporting as it now does to Parliament through the Minister of Industry; and
- The chief area that needs reform is the present processes focusing on merger review.

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