



Competition Bureau

Annual Report of the Commissioner of Competition for the year ending March 31, 2005

Chapter 5: Advocating for Competition and for International Coordination

The Bureau carries out a wide range of activities to promote competition. In the domestic sphere, Bureau officials appear before federal and provincial government agencies and regulatory bodies, and also participate in departmental and interdepartmental policy-making. Internationally, the Bureau plays a leadership role in the International Competition Network, the Organisation for Economic Co-operation and Development and various trade bodies. Bureau officials also contribute to debates on competition issues through publications, speeches and seminars (see [chapter 7](#) and [appendices II](#) and [III](#)).

Domestic Activities

Transportation

Submission to the Canadian Transportation Agency

On February 1, 2004, the amended Railway Interswitching Regulations came into force, following a letter of intervention filed by the Commissioner on December 10, 2003. The letter of intervention made three recommendations on how interswitching could be made more competitive: lowering interswitching rates; increasing the number of car block sizes, which would affect the rate structure; and requiring the interswitching rates to be maximum rates. Details of the submission are available on the [Bureau's Web site](#). The Canadian Transportation Agency accepted the Bureau's proposal to lower current interswitching rates, a change that will lead to increased use of interswitching by shippers.

Submission to the Ontario Ministry of Consumer and Business Services

In April 2004, the Bureau filed a letter concerning the release of draft regulations to accompany the *Travel Industry Act, 2002*. It supported the draft's proposal to increase transparency in the advertising of travel services in Ontario, since accurate and transparent information should lead to more competitive prices. The Bureau also agreed to participate in the Consumer Measures Committee Working Group on Travel Services to ensure that its initiatives were not at odds with Bureau activities.

Telecommunications: Broadcasting

Testimony to the Standing Senate Committee on Transport and Communications

In April 2004, the Senate Standing Committee on Transport and Communications released an interim report entitled *The Canadian News Media*. The report referred to the Bureau's testimony on the state of the Canadian news media made on September 23, 2003. Details of the submission are available on the [Bureau's Web site](#). Since the Committee's work was incomplete, the interim report drew no conclusions and made no recommendations. The Committee will conduct hearings across Canada before it issues its final report.

Interventions Before the Canadian Radio-television and Telecommunications Commission The Bureau advocates that the development of competition in telecommunications services be governed by the following fundamental principles: maximizing the reliance on competition and market forces at the outset of the transition from monopoly to competition; minimizing regulation for incumbents and not imposing economic regulation on new entrants; adopting market-based pricing as soon as possible in local telecommunications and, if necessary, introducing specific, targeted mechanisms to address social policy objectives; establishing clear rules governing incumbents' obligations to provide competitors with access to their networks and adopting appropriate pricing principles (including rate rebalancing and restructuring) to encourage efficient competition; establishing timely and effective dispute resolution mechanisms to ensure incumbents do not attempt to deny or delay access to their networks; liberalizing foreign ownership rules for communications networks to assist in the rapid construction and development of communications networks; and ensuring any regulation is technologically neutral.

The Bureau's interventions before the Canadian Radio-television and Telecommunications Commission (CRTC) generally fall into three categories. The first is to advocate competition in situations in which it is feasible and in the public interest. Examples of such interventions are those the Bureau made in the areas of long-distance and local telephone service.

The second type of intervention is to provide competition-related recommendations on revisions to regulations to facilitate the transition from monopoly and regulation to competition and deregulation. Here the Bureau has intervened in areas such as interconnection and price cap regulation.

The third type of intervention involves forbearance, which occurs when the CRTC concludes that a service has become sufficiently competitive to ensure the interests of users are protected. An example of this type of intervention is the Bureau's support of forbearance in long-distance services. No new interventions were necessary over the past fiscal year. However, the Bureau is a party of record in the Aliant forbearance proceedings and a submission may be filed next year. In addition, the Bureau expects to participate in the next price cap proceeding.

The Bureau will continue monitoring this industry and exercising its responsibilities under sections 125 and 126 of the *Competition Act* in future hearings.

Finance

On February 10, 2005, the Commissioner and other Bureau officials appeared before the Senate Standing Committee on Banking, Trade and Commerce to participate in a study on consumer issues in the financial sector. The Commissioner's remarks fell into four categories: merger review, accurate and reliable information in the marketplace, staying informed, and current developments.

The Commissioner described the Bureau's approach to bank merger reviews in 1998, noting that a detailed competitive analysis had been conducted that revealed particular concerns in the areas of credit cards, securities and branch banking services to individuals and businesses.

The essential analytical framework for reviewing transactions in this industry has not changed since 1998 and the Bureau will continue to apply this framework in any future transactions. However, the Commissioner noted that while the framework for review will remain the same, the outcome of such analysis might differ, given changing circumstances in the marketplace. Generally, when the Bureau concludes that a merger will substantially lessen or prevent competition, it works with the parties to find a remedy. When there is no settlement, the parties either abandon the transaction or face litigation. In the case of bank mergers, the Minister of Finance has the final decision.

The Commissioner addressed the Bureau's jurisdiction over false and misleading advertising in the financial sector, referring in particular to the Conformity Continuum and Fraud Prevention Forum, which were created to enhance consumer confidence. The Commissioner referred to the Bureau's hosting of an inaugural meeting in December 2004 to develop an open and constructive dialogue with representatives of consumer associations and consumer groups. She also mentioned the creation of sector teams and sector days that included meetings with industry leaders at the Bureau.

The Commissioner described ongoing consultations concerning efficiencies under the *Competition Act*. The consultation process comprises three components: a consultation paper, an international round table and an advisory panel of experts.

Agriculture

Remarks to the Standing Committee on Agriculture and Agri-Food

In April 2004, the House of Commons Standing Committee on Agriculture and Agri-Food released its report on beef pricing. The Commissioner appeared before the Committee to discuss the study in February 2004. Details of the submission are available on the [Bureau's Web site](#). The following two recommendations ensued:

- that the Minister of Industry instruct the Commissioner of Competition, under section 10 of the *Competition Act*, to immediately conduct an inquiry into the pricing of slaughter cattle and beef at the wholesale level; and
- that the Competition Bureau monitor the wholesale and retail pricing of beef, as well as feed and feeder cattle prices, and that the Commissioner report periodically, or at the call of the chair, to the committee.

Energy

In November 2004, the Bureau provided a written submission to the Ontario Energy Board Natural Gas Forum. The forum was established to review the board's regulatory approach and set its future hearing agenda for natural gas supply and storage. The Bureau's submission identified the following central competition issues to resolve:

- the features of activities of utilities that are natural monopolies and should continue to be supplied by gas utilities; and
- the role of the utilities versus competitors in providing other services.

To resolve these matters, the Bureau's submission set out competition principles for the Forum:

- establish open and competitive markets where they are likely to result in net economic benefits;
- create a level playing field for competition;
- establish effectively competitive markets where feasible;
- maintain interim regulation of market power where effective competition cannot be established;
- deal with any stranded costs or benefits in a manner that does not unnecessarily distort competition; and
- minimize any restriction of competition to deal with market imperfections or to protect consumers or meet social, environmental or other policy imperatives.

The submission noted the Bureau's serious competition concerns about a proposal for regulated gas utilities to provide fixed-price, one-year gas supply contracts to consumers, and recommended that consideration be given to a utility supply option based on the average monthly cost of gas. Currently, gas utilities bill consumers using a quarterly rate adjustment mechanism. Concerning gas storage, the Bureau's submission outlined a nine-step approach for determining which activities should continue to be provided by utilities and which ones should be provided through markets.

The Ontario Energy Board had not released its Natural Gas Forum report as of year-end.

Trade

Prepared Jarred Baby Foods

On May 26, 2004, the Federal Court of Appeal upheld a Canadian International Trade Tribunal ruling that overturned a duty on U.S. jarred baby food imports, thereby providing Canadian consumers and retailers with more product choice.

The Federal Court of Appeal dismissed an application by Heinz Canada for judicial review of the April 2003 trade tribunal ruling, finding that Heinz Canada, as the sole domestic producer of jarred baby food under its Heinz and Pablum brands, would unlikely suffer material injury due to renewed dumping. The court also ordered costs in favour of the Commissioner of Competition, Gerber Products Company and Novartis Consumer Health Canada Inc.

The Bureau intervened in the 1998 trade tribunal hearing, arguing against any duties being placed on U.S. imports. It also intervened in the 2003 trade tribunal expiry review and the recent Federal Court of Appeal judicial review hearing. Additional information on the Bureau's intervention can be found on the [Bureau's Web site](#).

Regulated Conduct Defence Bulletin

The Bureau invited parties to provide comments and suggestions on the role the "regulated conduct defence" plays in the application of the *Competition Act*. The defence is an interpretative tool developed by the courts to resolve apparent conflicts between validly enacted laws. In December 2002, the Bureau published the Information Bulletin on the Regulated Conduct Defence to provide guidance to the public on the Bureau's approach to this issue. The Bureau recognizes that a review of the Bulletin may help to improve and clarify the defence. Furthermore, the Supreme Court of Canada decision in *Garland v. Consumer's Gas* earlier this year may affect the application of the defence. In light of comments received, the Bureau is reviewing the Bulletin.

International Activities

As the result of increasingly global markets, the Bureau is working to promote effective competition enforcement and advocacy at the international level through active participation in a number of organizations, notably the International Competition Network and the Organisation for Economic Co-operation and Development, and various trade negotiations.

Empagran

On June 14, 2004, the U.S. Supreme Court allowed Empagran's appeal in *F. Hoffman-LaRoche, Ltd., et al. v. Empagran, S.A., et al.* The case involved a civil suit in the U.S. by foreign plaintiffs for financial harm suffered outside the U.S. as a result of a worldwide vitamin price-fixing conspiracy. The Supreme Court, in allowing the appeal, held that U.S. law did not embrace antitrust claims arising solely out of a foreign injury that is strictly independent of the domestic effects of the alleged anti-competitive conduct. The Supreme Court remanded two issues to the U.S. Court of Appeals for the District of Columbia for determination, including whether the claim could give rise to a U.S. claim by foreign purchasers against their foreign suppliers.

The Minister of Justice of Canada, acting in close collaboration with the Competition Bureau, Foreign Affairs Canada and International Trade Canada, filed an *amicus curiae* brief with the U.S. Supreme Court in February 2004. Canada submitted, among other things, that the broad interpretation of the U.S. law urged by the plaintiffs would be unreasonable and impermissible under U.S. and international law and that, under principles of comity, U.S. courts should not exercise jurisdiction in the circumstances of the case. Canada's brief identified implications for the enforcement of Canada's *Competition Act*, for international co-operation in the detection, investigation and prosecution of international cartels and for the Bureau's Immunity Program. The Supreme Court referred to and relied on Canada's brief, among others, in reaching its decision.

In February 2005, the Minister of Justice, again acting in close collaboration with the Bureau, Foreign Affairs Canada and International Trade Canada, filed an *amicus curiae* brief with the District of Columbia Court of Appeals on remand raising essentially the same issues submitted to the Supreme Court. Canada's brief focused on the effects of the extra-territorial application of U.S. antitrust law on the enforcement of Canada's *Competition Act* and the importance of principles of international law and comity to the interpretation and application of U.S. antitrust laws.

The remand hearing was scheduled for April 2005.

International Organizations

International Competition Network

Launched in October 2001, the International Competition Network (ICN) currently includes 87 member agencies from 78 jurisdictions. Its aims are as follows:

- to be a focused network for addressing practical antitrust enforcement and policy issues of common concern;
- to promote efficient, effective antitrust enforcement worldwide through the enhancement of procedural and substantive convergence and co-operation;
- to promote consistent enforcement policy and the elimination of unnecessary or duplicative procedural burdens, for the benefit of consumers and businesses around the globe; and

- to be a network or networks of private and public sector competition practitioners in developed and developing countries alike.

Over the past year, the ICN has continued to make progress through working groups on mergers, competition policy implementation, antitrust enforcement in regulated sectors, and cartels (a working group created at the 2004 annual conference in Seoul). Bureau officials participated in these working groups and continued to play a pivotal role in organizational aspects of the ICN. The Commissioner is a vice-chair of the ICN Steering Group, and Bureau staff co-chair important subgroups on cartels, consumer interface and the ICN's operational framework.

Mergers Working Group

As a member of the Mergers Notification and Procedures Working Group, the Bureau actively co-operates with its counterparts and nongovernmental advisors. At the 2004 annual conference in Seoul, ICN members adopted four recommended practices from this group. The group also updated a survey on costs and burdens of merger notification, linked to members' merger laws through the ICN website, and developed templates with answers to frequently asked questions.

The Bureau also participated in the ICN Merger Investigative Techniques Workshop in Brussels in October 2004. The session addressed merger review procedures and covered areas such as preparing and planning an investigation, gathering evidence from the merging parties, quantitative analysis, and gathering evidence from third parties.

Competition Policy Implementation Working Group

The Competition Policy Implementation Working Group identifies the key elements of successful capacity building and competition policy implementation in developing and transition economies. The Bureau co-chairs a subgroup on enhancing the stature of competition authorities. This subgroup addresses some of the complex issues raised by the interaction between competition enforcement and consumer interests. In February 2005, the Canadian co-chair hosted a workshop to discuss approaches to practical communication techniques, such as consumer outreach and consumer messaging. Representatives of 22 countries attended the session.

Cartel Working Group

The Competition Bureau is an active participant in the ICN Cartel Working Group. Since its establishment in 2004, this working group has made significant progress exploring practical cartel investigative techniques and tackling some of the essential building blocks of an effective anti-cartel regime, and issued the following reports: "Defining Hard Core Cartel Conduct; Effective Institutions; and Effective Penalties".

The Bureau, together with the Australian Competition and Consumer Commission, co-chairs the ICN Cartel Working Group's subgroup on enforcement techniques. This subgroup has focused its activity on the development of an anti-cartel enforcement manual and the coordination of an annual enforcers-only cartels conference. The first ICN Cartel Workshop and the associated Leniency Workshop, held in Sydney, Australia, in November 2004, provided an opportunity for competition enforcement agencies to discuss issues and share experiences related to cartel detection, obstruction and leniency programs. The annual workshop serves as a venue for enforcers to develop collaborative relationships, with a view to future co-operation in international anti-cartel enforcement.

Antitrust Enforcement in the Regulated Sectors Working Group

The Bureau also participated in one of the subgroups of the Antitrust Enforcement in the Regulated Sectors Working Group. This subgroup is exploring the interrelations between antitrust and regulatory authorities to determine in what areas each was most efficient.

Organisation for Economic Co-operation and Development

The Bureau oversees Canada's involvement in competition issues at the Organisation for Economic Co-operation and Development (OECD).

In 2004, the OECD's Economic and Development Review Committee and Competition Committee reviewed Canada's competition law and institutions as a follow-up to the OECD's 2002 review of Canada's regulatory environment. Two new reports — "[Report on Competition Law and Institutions](#)" (released January 2005) and "Economic Survey of Canada 2004" (released October 2004) — evaluate the Bureau's implementation of the policy recommendations in the 2002 report and make additional recommendations on how the Bureau can improve competition law in Canada.

Competition Committee

Over the years the OECD's Competition Committee and its working parties have examined various competition issues, including the following:

- mergers, including the role of economists in merger control, cross-border remedies in merger cases, information sharing and media mergers;
- cartels, including raising awareness about the harm cartels cause, information sharing in international cartel investigations, and sanctions against individuals;
- regulation of market activity by the public sector;
- intellectual property rights;
- private enforcement;
- co-operative relationships;
- predatory foreclosure; and
- consumer-competition interface.

In 2004-2005, most of the Committee's work involved examining mergers and regulated market activity by the public sector.

The Global Forum on Competition took place on February 17-18, 2005, and focused on the relationship between competition authorities and sectoral regulators. Participants included OECD member countries as well as non-member countries from developed and developing parts of the world. Bureau representatives also participated in a joint meeting with the Committee on Consumer Policy to determine the links existing between consumer policy and competition law and the benefits that can be drawn from them.

On June 8, 2004, the Commissioner was elected to the executive of the Competition Committee.

Committee on Consumer Policy

The Bureau also participates in the OECD Committee on Consumer Policy. Part of the committee's mandate is to examine questions relating to consumer policy and law in member countries and within international and regional organizations. The Office of Consumer Affairs

leads Canada's participation, with its director general serving as one of the vice-chairs. The Bureau participates in its capacity as a Canadian law enforcement agency.

Bureau representatives contributed to the major work items of the committee in 2004-2005, including dispute resolution and consumer redress, combating deceptive unsolicited commercial e-mail (also known as spam), mobile commerce, consumer education and awareness, and the interface between competition and consumer policy.

The implementation of the OECD Guidelines for Protecting Consumers from Fraudulent and Deceptive Commercial Practices Across Borders remains at the core of the committee's work. The guidelines were adopted in June 2003 with a view to fostering international co-operation in the fight against fraudulent and deceptive commercial practices. The Bureau, in collaboration with the Office of Consumer Affairs and provincial and territorial consumer authorities, is responsible for implementing these guidelines in Canada and has undertaken a number of initiatives in that regard.

Bureau representatives have been actively engaged in a number of key international meetings on the issue of spam, including two workshops hosted by the OECD, one in September 2004 in Busan, South Korea, and the other in March 2005 in Paris. Bureau representatives introduced the Canadian enforcement approach into the OECD discussions at all of these meetings. One of the key products arising from discussions was an OECD toolkit aimed at fighting spam; it is currently being finalized by the OECD Task Force on Spam. Among other elements, the toolkit includes measures outlining co-operative enforcement actions, public education and awareness activities, and a comparative analysis of the various anti-spam laws OECD member countries have adopted.

Bureau representatives also attended an October 2004 workshop in London on co-operative enforcement measures against spam, co-hosted by the United Kingdom's Office of Fair Trading and the U.S. Federal Trade Commission.

Asia-Pacific Economic Cooperation

Asia-Pacific Economic Cooperation-OECD Agreement on Regulatory Reform

The Bureau participated in the development of an agreement on joint work on regulatory reform between the Asia-Pacific Economic Cooperation group (APEC) and the OECD. The first phase of this work involved holding workshops. The second, ongoing phase focuses on the elaboration of a checklist for self-assessment on regulatory competition and market openness policies. In November 2004, participants at a conference in Thailand completed the preparation of the checklist and elicited the comments and support of members and stakeholders. The checklist will be submitted to the respective political bodies of APEC and the OECD for subsequent approval and endorsement in 2005.

APEC Annual Report

Each APEC member submits an annual report, or Individual Action Plan, that sets out progress in meeting the targets adopted in 1994 for freer and more open trade and investment in the APEC region. The Bureau participated in the preparation of Canada's 2004 report. For additional information, see the [Competition Policy Chapter of Canada's report](#) .

International Consumer Protection and Enforcement Network

In October 2004 and March 2005, Bureau representatives participated in the bi-annual meetings of the International Consumer Protection and Enforcement Network (ICPEN), held in London and Edinburgh. ICPEN is a voluntary organization of the trade practices law enforcement authorities of 33 countries, most of which are members of the OECD. ICPEN's mandate is to share information about cross-border commercial activities that may affect consumer interests and to encourage international co-operation among law enforcement agencies.

At the London meeting, Bureau representatives delivered a presentation on best practices on consumer education and awareness, based on the experience gained through Canada's Fraud Prevention Forum, which the Bureau chairs. Based on the success of the forum, interest expressed by ICPEN members and recognition by members of the importance of consumer education in combating deceptive marketing practices, ICPEN decided to follow Canada's lead and declare ICPEN Fraud Awareness Month in February 2005. Seventeen ICPEN members, including Canada, participated.

At the Edinburgh meeting, a Bureau representative reported back to ICPEN on the Fraud Awareness Month in Canada. Given its overall success, ICPEN decided to repeat the initiative in 2006 in the hope that more members will participate. The Edinburgh meeting was also an opportunity for members to explore the role ICPEN can play in furthering the implementation of the OECD Guidelines for Protecting Consumers from Fraudulent and Deceptive Commercial Practices Across Borders. ICPEN members agreed to set up a working group on mass-marketing fraud, since ICPEN member law enforcement agencies are committed to working towards achieving greater co-operation in crossborder law enforcement.

Bilateral Talks with the United States

In May 2004, the Commissioner and a number of Bureau officials met with the Chairman and staff of the U.S. Federal Trade Commission in Washington. During that visit, they also held a bilateral meeting with the Assistant Attorney General of the Antitrust Division of the U.S. Department of Justice. These meetings were important opportunities for discussing current enforcement efforts, policy considerations, other matters of mutual interest with regard to competition and deceptive marketing practices laws, ways of improving inter-agency co-operation, and the state of the Bureau's working relationship with the two agencies.

Technical Assistance

The Bureau continues to provide technical assistance to a number of countries, such as China, Vietnam and Mexico.

Technical assistance may include providing information on Canadian policy, law and practices; welcoming visitors from foreign competition authorities and governments; helping develop or refine foreign competition laws; and providing advice on specific investigations.

Co-operation

Merger Review and International Cartels

On October 5, 2004, Canada's Ambassador to the United States, the U.S. Attorney General and the Chairman of the U.S. Federal Trade Commission, on behalf of Canada and the United States, signed an agreement on the application of positive comity principles to the enforcement of competition law.

Positive comity agreements allow one country to ask another to investigate and, when warranted, remedy anti-competitive activities that are causing harm to the requesting country's economy. One country can only make such a request when the anti-competitive conduct causing harm violates the other country's laws. The latter country has sole discretion to decide whether to address the matter under its laws.

The agreement supplements the 1995 agreement between Canada and the United States that set out a framework for notification, coordination and co-operation on enforcement activities, exchange of information, avoidance of conflict and positive comity. The new agreement describes in greater detail the circumstances and procedures for making positive comity requests.

On January 19, 2005, the prime ministers of Canada and Japan announced a framework for addressing mutual strategic economic priorities. As part of this framework, the two countries agreed in principle on major elements of a draft co-operation agreement on anti-competitive activities. Once finalized and implemented, the proposed agreement is expected to provide a framework for coordination and co-operation for dealing with anti-competitive business activities affecting both countries.

International Case

NAFTA Chapter 11 Arbitration: *United Parcel Service of America, Inc. v. Government of Canada*

The Bureau continued to work with Canada's litigation team in preparing to defend Canada's position with respect to a NAFTA Chapter 11 United Parcel Service (UPS) claim. The claim argued that Canada Post was engaging in anti-competitive practices by providing its courier services with advantages that were not extended to UPS Canada services.

Trade Negotiations

The Bureau, in partnership with Foreign Affairs Canada and International Trade Canada, contributes to the development of competition provisions in bilateral and regional trade agreements. Canada is currently involved in free trade negotiations with the Central American Four (El Salvador, Guatemala, Honduras and Nicaragua) and Singapore, and is seeking to include competition policy provisions in these agreements. Canada has also begun exploratory discussions with the Republic of Korea on a bilateral free trade agreement and is seeking to include competition policy provisions in that agreement. Although formal Free Trade Area of the Americas negotiations have been stalled since February 2004, the Bureau continues to support the development of a regional framework on competition policy within a future Free Trade Area of the Americas.

At the Canada-European Union Summit in Ottawa on March 18, 2004, Prime Minister Martin and European Union (EU) leaders agreed to a framework for a new Canada-EU Trade and Investment Enhancement Agreement. With respect to competition policy the framework sets out the following:

- Canada and the EU recognize the importance of the principles of competition to the efficient functioning of their respective markets.
- Canada and the EU ensure that the benefits of the trade and investment liberalization process are not diminished by anti-competitive conduct.
- Canada and the EU commit to continued cooperation and coordination among competition authorities on the basis of the 1999 competition agreement.

- Canada and the EU agree to co-operate on policy issues of common interest in relevant international forums.

Following the collapse of negotiations at the 2003 Cancun Ministerial Conference, World Trade Organization members adopted a framework for the next phase of the Doha Round Negotiations in July 2004. Competition policy was not included within this framework.

Date Modified: 2011-06-29