



Government  
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# **Amending the *Competition Act***

**A Discussion Paper  
on**

**Meeting the Challenges of the Global Economy**

April 2000

**Canada**





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APR 14 2000

Dr. David Zussman  
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Dear Dr. Zussman:

The Minister of Industry, the Honourable John Manley, has asked me to launch a national, multi-sectoral consultation with stakeholders on possible amendments to the *Competition Act*. I am asking you, at the Public Policy Forum, to lead these consultations on our behalf and to prepare a report on the discussions and on the written submissions that you will receive from interested stakeholders.

Four Private Members' Bills addressing various issues in relation to the *Competition Act* and the *Competition Tribunal Act* were recently tabled in Parliament. The attached discussion paper has been prepared to help focus discussion on the key changes that are being proposed. The four private members' bills are annexed to the paper for comment and to illustrate how the proposals in the discussion paper might be written into law.

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If there is broad public support, the Minister will consider the scope for government legislation which meets the spirit of the proposed improvements and anticipates the needs of enforcement in the changing global marketplace.

I look forward to receiving your report, planned for public release at the end of August 2000.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Konrad von Finckenstein', written in a cursive style.

Konrad von Finckenstein, Q.C.

Enclosure(s)

## INTRODUCTION

Legislation which provides the marketplace framework for an efficient and productive economy must keep pace with the rapidly changing global economy. The *Competition Act* is part of Canada's marketplace framework legislation, aimed at encouraging competition to the benefit of both business and consumers, giving small and medium businesses an equitable chance to participate fairly in the economy and making Canada an attractive place to invest.

Learning from the last major reform of the *Competition Act*, in 1986, the Competition Bureau has taken an incremental approach to amending its legislation. Last year saw the enactment of Bill C-20 whose amendments made deceptive telemarketing a criminal offence, streamlined the merger review process through changes to merger prenotification requirements, and created a civil process as a faster and more effective means of putting a stop to misleading advertising and other deceptive marketing practices.

In line with this policy of continuous legislative renewal, the Bureau has been considering the kind of changes that would be desirable for the next round of amendments to meet the challenges of the changing economy. However, recent public interest in competition and the effectiveness of the *Competition Act* has led to pressures for further, more immediate changes, notably those in the four Private Members' bills which are annexed to this discussion paper.

These four Private Members' bills, recently tabled in the House of Commons, propose a number of changes that are consistent with the kind of changes the Competition Bureau has advocated over the last two years and which it intended to put forward in its next round of consultations. Consequently the Bureau supports the principles set out in the Private Members' bills. Competition legislation is complex, however, and the proposals have not been the subject of public discussion or formal consultations.

The Competition Bureau is unequivocally committed to the consultative process as an indispensable part of its legislative development. At the request of the Minister of Industry, the Commissioner of Competition has launched consultations on the legislative changes in these bills with a view to hearing from stakeholders. If there is broad public support for the principles behind these proposals, the Minister will consider the scope for developing government legislation which meets the spirit of the proposed improvements and anticipates the needs of enforcement in the changing global marketplace.

## THE FOUR PRIVATE MEMBERS' BILLS

### **Bill C-438 (Ms. Redman), *An Act to amend the Competition Act (game of chance)***

- ▶ Bill C-438 deals with Canadians' concerns about deceptive contests sent through the mail and would introduce an enforcement approach similar to the *Competition Act's* provisions against deceptive telemarketing.

### **Bill C-402 (Mr. McTeague), *An Act to amend the Competition Act (abuse of dominant position)***

- ▶ Bill C-402 provides specific examples of anti-competitive acts of particular relevance to the grocery and other retail markets, to be added to the illustrative list of anti-competitive acts in the abuse of dominance provisions of the *Competition Act*.

### **Bill C-471 (Ms. Jennings), *An Act to amend the Competition Act (international mutual assistance and references) and the Competition Tribunal Act (references)***

- ▶ Bill C-471 would provide for a regime for international mutual cooperation to facilitate enforcement of competition law. It also proposes the use of references to allow some key issues to be referred to the Competition Tribunal for an early decision, possibly avoiding the need for a full review.

### **Bill C-472 (Mr. McTeague), *An Act to amend the Competition Act (conspiracy agreements and right to make private applications), the Competition Tribunal Act (costs and summary dispositions) and the Criminal Code as a consequence***

- ▶ Bill C-472 proposes amendments to respond to the changing business and enforcement environment:
  - modernizing the conspiracy provisions to improve their effectiveness against anti-competitive agreements while avoiding discouraging legitimate strategic alliances;
  - giving individuals access to the Competition Tribunal for refusal to deal, exclusive dealing, tied selling and market restriction;
  - broadening the powers of the Competition Tribunal to include cost awards and summary dispositions; and
  - introducing cease and desist powers to allow the Commissioner of Competition to deal with abuse of dominance (as have been introduced for airlines).

## **THE PRIVATE MEMBERS' BILLS**

Private Members' Public Bills are legislative initiatives affecting the general public and sponsored by a Member of Parliament who is not a Minister of the Crown.

The four bills introduced by Members of Parliament Dan McTeague, Karen Redman and Marlene Jennings are described briefly in the preceding chart.

## **RATIONALE BEHIND THE PROPOSED AMENDMENTS**

The four Private Members' initiatives would contribute to the Government's productivity agenda in five important ways:

1. Illustrating abuse of dominance
2. Informing consumers
3. Facilitating cooperation between competition authorities
4. Providing for better dispute resolution
5. Facilitating strategic alliances and improving the investment climate.

### **1. Illustrating Abuse of Dominance in Retail Markets**

Small businesses are increasingly concerned about current trends in the structure of the retail and distribution marketplace and the potential for the abuse of market power when markets, both domestic and international, are dominated by a few large firms.

- The Competition Bureau already has the tools to stop the abuse of a firm's dominant position (section 79 of the *Competition Act*). Bill C-402 would add to the examples provided in section 78 of the Act which illustrate the kind of behaviour that constitutes anti-competitive acts for the purposes of the abuse of dominance provisions. These examples are particularly relevant to the grocery and other retail markets. This amendment would be of direct benefit to small businesses and would help protect consumers from the higher prices which tend to follow abuse of dominance in a market.

## 2. Informing Consumers

Consumers depend on accurate information to make informed decisions in the marketplace. Deceptive practices hurt the consumers who are prey to such scams and hurt businesses which compete legitimately and fairly. Measures to prevent deceptive telemarketing were introduced in the last round of amendments to the *Competition Act*. The current proposal would introduce measures to protect consumers from scams sent through the mail.

- Bill C-438, endorsed by the House of Commons Standing Committee on Industry on April 10, would prohibit sending deceptive contests through the mail -- printed material that gives the recipient the general impression that he or she has won a prize but must first make a payment of a sum of money or incur telephone charges.

## 3. Facilitating Cooperation between Competition Authorities

With continuing technological change and falling trade barriers accelerating the globalization of markets, the Competition Bureau has a pressing need to improve its tools to deal with anti-competitive conduct that spills across borders.

Measures are already in place to allow enforcement agencies in different countries to exchange information on criminal matters<sup>1</sup> but the *Competition Act* also deals with civil matters, such as merger review and abuse of dominance. There are no measures in place that will permit an agreement for the exchange of evidence on civil matters. International cooperation among competition agencies, especially between Canada and its main trading partner, the United States<sup>2</sup>, is urgently needed to strengthen the tools to promote competition in an integrated North American marketplace and in international markets more generally.

- Bill C-471 would provide enabling legislation to allow the Minister of Industry to enter into mutual legal assistance agreements allowing for the exchange of evidence between competition authorities on civil matters.

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<sup>1</sup>The *Mutual Legal Assistance in Criminal Matters Act* (MLACMA) is the enabling legislation which allows Canada to enter into a Mutual Legal Assistance Treaty with a foreign country to cooperate on criminal matters.

<sup>2</sup>The United States has enabling legislation for mutual cooperation on all competition matters, civil and criminal, in its *International Antitrust Enforcement Assistance Act* (IAEAA).

Such powers to cooperate would necessarily be subject to restrictions and controls to strike the right balance between the need to maintain confidentiality and a meaningful reciprocal exchange of information between antitrust agencies.

#### **4. Better Processes for Dispute Resolution**

##### ***a. Private rights of access to the Competition Tribunal***

Currently only the Commissioner can refer cases to the Competition Tribunal: individuals cannot apply to the Tribunal for remedies on civil matters. If the Commissioner decides not to pursue a complaint, or if, on conducting an investigation, he decides not to refer a matter to the Competition Tribunal (as its impact on competition is minimal and does not warrant public intervention), the complainant cannot take up the case on his own behalf.

Private rights of access to the Competition Tribunal would complement public enforcement and increase the deterrent effect of the law by providing individuals with the right to take action on their own behalf, if they choose to do so. Private cases would have the added advantage of building up much needed case law. (Apart from mergers, there have been only nine cases contested before the Competition Tribunal in the 14 years since it was established.). Additional jurisprudence improves the review process over the longer run and gives the business community a clearer understanding of how the law applies.

- Bill C-472 would introduce private rights of access to the Competition Tribunal for the provisions which deal essentially with private matters between buyers and their suppliers – namely sections 75 and 77 (refusal to deal and tied selling, market restrictions and exclusive dealing).
- Bill C-472 also provides four safeguards against strategic or frivolous litigation:
  - ▶ There will be no power to award damages;
  - ▶ The Competition Tribunal would act as gatekeeper. Cases could only be brought with leave of the Tribunal, allowing it to screen out cases which do not appear to have merit;
  - ▶ The Tribunal would be given the power to award court costs, an effective means to discourage frivolous cases and discipline strategic litigation (this discretion to award costs would apply for all cases, not just private actions);



- ▶ The power to summarily dispose of a matter would allow the Tribunal to bring cases to a close quickly, if warranted (summary dispositions would be available for all cases, not just private access).

This initiative to introduce private rights of action for sections 75 and 77 does not mean that the Competition Bureau would withdraw from enforcing these particular provisions. It will continue to take cases that meet its criteria for enforcement priorities (for example, those cases where the conduct in question has a significant impact on competition generally, rather than those where the effects are largely private)<sup>3</sup>.

As a practical matter, the success of private action depends on improving the efficiency of current review process. Cost is a factor in any private decision to litigate and, while not necessarily typical of the kind of cases that would be taken on privately, past cases before the Tribunal have sometimes proved to be slow and expensive<sup>4</sup>. The Private Members' bills' proposals for references and cost awards could improve efficiency in both time and expense for all parties, helping to make private access a feasible option for small businesses.

#### **b. References**

Cases before the Tribunal require substantial preparation and resources for parties on both sides. The outcome may depend on a single key issue, such as the definition of the market in question, that might have been anticipated as pivotal to the case. An early ruling on such an issue, before deciding on whether to proceed with a case, or whether to contest it, could save all parties considerable time and expense.

- Bill C-471 proposes the use of references to allow some key questions to be referred to the Competition Tribunal on consent of both parties for a decision, thereby hopefully avoiding the need for a full review.

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<sup>3</sup>See *International Comparative Analysis of Private Rights of Access*, by R. Jack Roberts, for a comparison of the international experience with private action on competition matters (available on the Competition Bureau's website <http://competition.ic.gc.ca>)

<sup>4</sup>*Study of the Historical Cost of Proceedings Before the Competition Tribunal*, by Richard M. Wise, FCA and Sheri-Anne Doyle, CA (Wise, Blackman) (available on the Competition Bureau's website)

**c. Cost Awards and Summary Dispositions**

Unlike most courts and tribunals, the Competition Tribunal does not have the power to award costs. The discretion to award court costs could be a valuable tool to discipline and deter frivolous action and avoid long and protracted cases. Costs could be awarded, for example, against parties who used interlocutory actions or an unreasonable number of witnesses as delay tactics.

- Bill C- 472 would give the Competition Tribunal the power to award court costs in all its proceedings, including mergers. Costs of a proceeding, or a step in a proceeding, could be awarded against any party, including intervenors and the Crown, at the discretion of the Tribunal.

A further proposed improvement to the Tribunal process would provide for summary dispositions to bring a case to an early close if there appears to be no merit in the application or if there appears to be no genuine defence.

- Bill C-472 would provide for a single judicial member of the Tribunal to summarily dispose of a matter on the application of a party.

**d. Cease and Desist Powers**

Speed is becoming enormously important in the global, knowledge-based marketplace. The current enforcement process provides for the Competition Tribunal to issue remedial orders after it has undertaken a full review. Where abuse of dominance is concerned, the victims of the anti-competitive conduct may well have gone out of business before the issue is resolved. Effective enforcement of competition in today's rapidly changing economy calls for powers to put an immediate temporary stop to anti-competitive conduct by a firm alleged to be abusing its dominance in a market, instead of having to wait until the case can be reviewed by the Tribunal. Such powers have recently been introduced to allow the Commissioner to deal with abuse of dominance in the airlines sector<sup>5</sup>.

- Bill C-472 would introduce new cease and desist powers to allow the Commissioner of Competition to deal swiftly with alleged abuse of dominance matters in all sectors of the economy which are subject to the *Competition Act*.

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<sup>5</sup>The Bureau consulted with the Department of Justice to ensure that these powers set out in Bill C-26 (*An Act to amend the Canada Transportation Act, the Competition Act, the Competition Tribunal Act and the Air Canada Public Participation Act and to amend another Act in consequence*) are consistent with the *Charter of Rights and Freedoms*.

The question that needs to be examined is whether the airlines sector is a special case, or whether the same considerations can and should be applied to all sectors.

## 5. Facilitating Strategic Alliances and Improving the Investment Climate

In pursuit of new markets, Canadian businesses are developing close ties with other firms, to gain access to technologies, to cooperate in research and development and to achieve economies in marketing and supplier arrangements, among other benefits. Such strategic alliances allow small and medium sized firms to compete more effectively in global markets.

The *Competition Act's* criminal conspiracy provision (section 45) prohibits agreements which prevent or unduly lessen competition. Price-fixing and market-sharing among competitors are the kind of egregious behaviour which this criminal provision is meant to catch. However, criminal sanctions are severe and may unintentionally discourage some business people from entering into arrangements which cause no harm to consumers or which are, in fact, pro-competitive.

Both consumers and industry benefit from competition laws that are effective in prohibiting behaviour that is unequivocally anti-competitive. They also stand to gain if such laws provide the clarity and certainty that the business community needs to compete effectively, through joint ventures or other types of legitimate strategic alliances, without fear of criminal sanctions. To this end, the *Competition Act* can be improved and strengthened by drawing a clearer line between egregious criminal behaviour to be caught by the conspiracy provisions and arrangements among competitors whose effects might be better assessed under civil law.

- Bill C-472 would amend section 45 to create a *per se* prohibition<sup>6</sup> against arrangements to fix prices, allocate markets, restrict production or supply, or engage in boycotts targeted at competitors;
- A companion civil provision would be introduced under which the Commissioner could seek a remedial order from the Tribunal to deal with arrangements which substantially lessen competition but do not amount to price-fixing, market allocation, output restrictions or boycotts; and
- Businesses proposing an arrangement would be able to apply to the Commissioner for clearance in respect of prospective strategic alliances, removing uncertainty about whether they would face prosecution or civil action if they were to proceed with the arrangement. A clearance certificate issued by the Commissioner would normally be valid for three years.

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<sup>6</sup>A *per se* offence is illegal in itself, regardless of its effects or justification.

## HEARING FROM STAKEHOLDERS

In summary, the four Private Members' bills discussed in this paper include measures which the Competition Bureau believes would improve the *Competition Act* and its administration in facing the challenges of the global marketplace. Indeed, the principles behind the proposed amendments reflect the kind of changes the Bureau has been advocating during the last two years. The draft bills attached to this discussion paper illustrate how such principles might be written into law.

The Minister is not ready to move ahead with proposals for legislative change until he has heard from stakeholders -- consumers, the small, medium and large business communities, the legal and academic community and any other group or individual who wishes to contribute to the discussion. Your views are invited on both the principles and the details of how they should be framed into legislation.

Finally, with more than a year's experience since the last amendments came into effect, these consultations also offer an opportunity to invite your suggestions on housekeeping amendments that may be required relating to the new provisions of the Act, such as the new merger provisions, the civil track for misleading advertizing, and the new criminal provisions against deceptive telemarketing, among other things.

Comments on the proposals may be sent electronically (check the Public Policy Forum website at <http://ppforum.com> ), by fax to the Public Policy Forum at (613) 238-7990, or by mail to:

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