



Competition Bureau
Canada

Bureau de la concurrence
Canada

Annual Report

OF THE COMMISSIONER OF COMPETITION FOR THE YEAR ENDING MARCH 31, 2005

www.competitionbureau.gc.ca

on the enforcement and administration of the
Competition Act
Consumer Packaging and Labelling Act
Precious Metals Marking Act
Textile Labelling Act

Canada 

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ON THE ENFORCEMENT AND ADMINISTRATION OF THE

COMPETITION ACT

CONSUMER PACKAGING AND LABELLING ACT

PRECIOUS METALS MARKING ACT

TEXTILE LABELLING ACT

www.competitionbureau.gc.ca



Gatineau, Quebec

The Honourable Maxime Bernier, PC, MP
Minister of Industry
Ottawa, Ontario K1A 0H5

Dear Sir,

I have the honour to submit, pursuant to section 127 of the *Competition Act*, the following report of proceedings under the Act for the fiscal year ended March 31, 2005.

A handwritten signature in black ink, reading "Sheridan Scott". The signature is written in a cursive style with a light blue rectangular highlight behind it.

Commissioner of Competition

MESSAGE FROM THE COMMISSIONER

I have now completed my first full year as Commissioner of Competition, a year in which the Competition Bureau made an impressive difference in the Canadian marketplace.

Our many accomplishments during 2004–2005 are described in the pages of this annual report, so I will only mention a few key ones here.

To begin with, the Bureau had a major impact in the area of deceptive marketing practices. Not only were prison sentences given for the first time to a number of offending telemarketers, but also some key enforcement activities took place. One had to do with a landmark decision handed down by the Competition Tribunal, the first under the ordinary selling price provisions of the *Competition Act*. In January 2005, the Tribunal ruled that Sears Canada had breached the *Competition Act* by making false or misleading representations when advertising discounts on certain tires. Sears was required to pay a \$100 000 administrative monetary penalty, as well as \$387 000 towards the Bureau's legal costs. The Tribunal's order also prohibited Sears' automotive business division from engaging in similar conduct for 10 years.

The Bureau and Air Canada also resolved their litigation before the Competition Tribunal concerning allegations that Air Canada had engaged in anti-competitive behaviour towards WestJet and CanJet. The Bureau decided not to pursue the litigation any further, in light of the major changes that have occurred in the airline industry since the case began in 2001.

As well, the Bureau reviewed an extremely complex merger between the Canadian National Railway Company and British Columbia Rail Limited. Following this review, the Bureau filed a consent agreement with the Competition Tribunal to ensure that competition would be maintained in the pricing and transportation of products.

But we did much more than enforce Canada's competition legislation this past year. We released the *Merger Enforcement Guidelines* in September 2004. We introduced Bill C-19, which sets out important amendments to the *Competition Act*, in Parliament. We published two comprehensive reports on the gasoline industry. We made real progress internationally on cartels, consumer interface and merger review. We launched Fraud Awareness Month, a campaign to educate Canadians about how to protect themselves against fraud.

Needless to say, none of these impressive achievements would have been possible without the support of the entire Bureau. As usual, everyone worked very hard and very constructively. I send my sincere thanks to one and all.

The year ahead promises to be just as busy and productive as was the last. Our priorities include stepping up our attack on international and domestic cartels and fraudulent mass marketers. By the end of my mandate, I would like to see more of Canada's gross domestic product subject to competitive market forces. This will require us to continue investing in people in order to retain the high-quality staff we now have. We will also need to keep our focus on the key objectives we intend to pursue. And we must continue to improve our communications with Canadians through dialogue, workshops and outreach. I look forward to making progress on all these fronts in the year ahead.



Sheridan Scott
Commissioner of Competition





CONTENTS

- 01 CHAPTER 1: INTRODUCTION**
An outline of the contents of this year's annual report
- 07 CHAPTER 2: POLICING CRIMINAL ACTIVITIES**
How the Bureau disciplines companies and individuals that engage in criminal activities
- 23 CHAPTER 3: PROMOTING COMPLIANCE WITH THE CIVIL PROVISIONS**
How the Bureau encourages companies to avoid anti-competitive behaviour that contravenes the law
- 37 CHAPTER 4: REVIEWING MERGERS**
Merger cases, guidelines and related service standards
- 47 CHAPTER 5: ADVOCATING FOR COMPETITION AND FOR INTERNATIONAL COORDINATION**
How the Bureau advocates for increased reliance on market forces domestically and for co-operation on competition issues internationally
- 61 CHAPTER 6: MODERNIZING CANADA'S APPROACH TO COMPETITION LAW**
How the Bureau maintains an up-to-date legislative framework
- 67 CHAPTER 7: HOW WE DO IT ALL**
How the Bureau uses a wide variety of communications approaches to keep in touch with Canadians
- 79 APPENDIX I: DISCONTINUED INQUIRIES AND STAY OF PROCEEDINGS**
- 83 APPENDIX II: SPEECHES AND PAPERS**
- 87 APPENDIX III: CONFERENCES AND SEMINARS**



CHAPTER 1

INTRODUCTION

The Competition Bureau works to support a dynamic, healthy, innovative and competitive marketplace in which Canadians can enjoy the benefits of competitive prices, product choice and quality services. The Bureau accomplishes this by promoting and maintaining competition.

A competitive marketplace promotes the efficiency of the economy, expands opportunities for Canadian enterprises in world markets, ensures that small and medium-sized businesses have equal opportunities, and provides consumers with competitive prices, competitive product choice and accurate product information. Competition is the foundation of a strong, modern and knowledge-based economy, spurring innovation, competitiveness and productivity growth.

The Bureau administers four laws that help encourage and maintain competition in Canada: the *Competition Act*, the *Consumer Packaging and Labelling Act* (for non-food products), the *Precious Metals Marking Act* and the *Textile Labelling Act*. This report summarizes the Bureau's activities under these statutes for the fiscal year that ended on March 31, 2005.

The Bureau operates on the assumption that most businesses are law-abiding and, therefore, comply with the law and support marketplace framework legislation. The Bureau sees vigorous communication and advocacy as the best ways to achieve compliance and, consequently, works to inform businesses and other stakeholders about the laws. Through its advocacy program, the Bureau actively promotes a competitive marketplace and develops competition policy and legislation in Canada and internationally.

The Bureau's commitment to educating the players in the marketplace is complemented by several forms of voluntary compliance. These range from written opinions, which help businesses that want to avoid breaking the law, to alternative case resolution, which corrects anti-competitive behaviour in a timely and cost-effective fashion.

Businesses and individuals who disregard the law or fail to take advantage of opportunities for voluntary compliance may be prosecuted by the Attorney General of Canada in criminal court or be subject to civil litigation by the Bureau before the Competition Tribunal or in civil court.

This report deals with the Bureau's activities in the following areas:

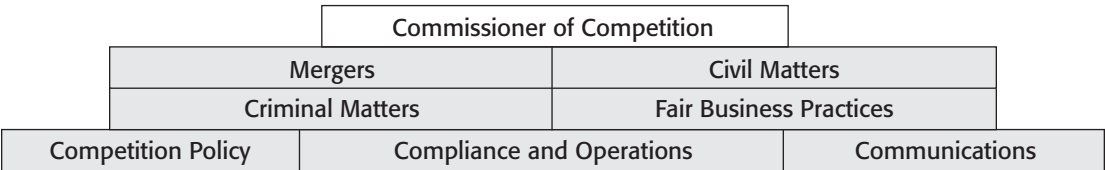
- Policing Criminal Activities (chapter 2);
- Promoting Compliance With the Civil Provisions (chapter 3);
- Reviewing Mergers (chapter 4);
- Advocating for Competition and for International Coordination (chapter 5);
- Modernizing Canada's Approach to Competition Law (chapter 6); and
- How We Do It All (chapter 7).

This report seeks to show how the Bureau's activities over the past year have benefited Canadians. For statistical data and legal references, please visit the Bureau's website (www.competitionbureau.gc.ca).

ORGANIZATIONAL STRUCTURE

In 2004–2005, the Bureau employed 355 people in the National Capital Region and 85 in seven regional offices. The regional offices are located in Halifax, Montréal, Toronto, Hamilton, Winnipeg,

Calgary and Vancouver. As the organizational chart below shows, the Bureau comprises seven branches.



The **Commissioner of Competition** is head of the Competition Bureau and is responsible for administering and enforcing the *Competition Act*, the *Consumer Packaging and Labelling Act*, the *Precious Metals Marking Act* and the *Textile Labelling Act*.

Mergers Branch reviews merger transactions to assess whether a proposed merger is likely to prevent or substantially lessen competition.

Civil Matters Branch reviews anti-competitive behaviour, such as abuse of dominant position, and restraints imposed by suppliers on customers, such as refusal to supply, exclusive dealing and tied selling.

Criminal Matters Branch administers and enforces the criminal provisions of the *Competition Act*, including those covering conspiracies that unduly lessen competition, such as price fixing, bid rigging, price discrimination, predatory pricing and price maintenance. The Branch carries out its enforcement activities through its National Capital Region office and the regional offices.

Fair Business Practices Branch administers and enforces the provisions of the *Competition Act* that cover false or misleading representations, and deceptive marketing practices. Among these provisions are those that deal with deceptive telemarketing, multi-level marketing and pyramid selling schemes, as well as misrepresentations, such as general false or misleading statements, misleading ordinary price claims and promotional contests in which organizers inadequately disclose contest rules. The Branch also administers and enforces the *Consumer Packaging and Labelling Act*, the *Precious Metals Marking Act* and the *Textile Labelling Act*, collectively known as the standards-based statutes. The Branch carries out its investigations through its National Capital Region office and the regional offices.

Competition Policy Branch comprises the International Affairs, Economic Policy and Enforcement, and Legislative Affairs divisions. The Branch advances the Bureau's interests in international co-operation, negotiations and policy development. It provides economic advice and expertise as well as enforcement support to the Bureau, and ensures that the provisions of the *Competition Act* and standards-based statutes remain relevant through regular review and amendment.

Compliance and Operations Branch oversees the Bureau's compliance program, enforcement policy, training program and client services. It also manages the Bureau's Information Centre, and its planning, resource management, administration and informatics activities.

Communications Branch ensures that Canadian consumers, businesses and government agencies, and the international community are aware of the Bureau's crucial contribution to Canadian competitiveness and to the growth of the economy. The Branch manages the Bureau's website, stakeholder and media relations, and internal communications.





CHAPTER 2 POLICING CRIMINAL ACTIVITIES

CHAPTER 2 POLICING CRIMINAL ACTIVITIES

The Bureau administers and enforces the provisions of the *Competition Act* prohibiting conspiracy, bid rigging, price discrimination, predatory pricing and price maintenance.

The conspiracy provision covers agreements among two or more competitors to unduly lessen competition, such as agreements to fix prices or allocate customers and territories.

The bid rigging provision deals with agreements to thwart the competitive tendering process.

The price discrimination provision helps to ensure that small and medium-sized businesses have an equal opportunity to participate in the economy by requiring suppliers to offer discounts, price concessions and advertising allowances to competing customers on fair terms.

The predatory pricing provision addresses situations in which a firm sells products below cost for a sufficiently long period of time to eliminate or deter rivals as competitors, and subsequently raises prices or otherwise harms the competitive process.

The price maintenance provision allows resellers of products to set their own prices and protects suppliers that deal with firms that have low-pricing policies from customer-led boycotts.

The Act also contains criminal and civil provisions to address false or misleading representations and deceptive marketing practices when promoting the supply or use of a product or any business interest. The general criminal provision prohibits all materially false or misleading representations made knowingly or recklessly. Other provisions specifically prohibit deceptive telemarketing, deceptive notices of winning a prize, double ticketing and pyramid selling schemes. The multi-level marketing provisions

also define the responsibilities of operators and participants in multi-level marketing plans.

The *Consumer Packaging and Labelling Act*, the *Precious Metals Marking Act* and the *Textile Labelling Act* prohibit false and misleading representations in specific sectors: pre-packaged non-food consumer products, articles made from precious metals, and textiles and apparel, respectively. In addition, these laws set out required labelling information, such as bilingual product descriptions, metric measurement declarations and dealer identity, that allows consumers to make informed choices.

The Bureau has a range of tools at its disposal to enforce these laws. It refers the most serious matters to the Attorney General of Canada and recommends prosecution. Offenders may receive heavy fines, prison terms or both.

The first section of this chapter describes these responses to non-conformity during 2004–2005. The Bureau also addresses anti-competitive behaviour through alternative case resolution; examples of this are provided in the second section of the chapter. Finally, under the *Competition Act*, parties may request written opinions, some of which are summarized in the third section of the chapter. For more information on these cases and others, including information notices, news releases and backgrounders, visit the Bureau's website (www.competitionbureau.gc.ca/internet/index.cfm?itemID=137&lg=e).

PROSECUTIONS

CONSPIRACY

The conspiracy provision of the *Competition Act* prohibits agreements between two or more persons to restrain or injure competition or to unreasonably enhance the price of a product. Agreements between competitors to fix prices, to allocate customers or geographic markets, or to restrict production of a product by setting quotas among competitors or by other means are considered to be "hard-core" cartel activities. Protecting consumers and businesses against harmful anti-competitive agreements is an important priority for the Bureau. The Bureau has developed an immunity program that has proven to be especially effective in detecting cartels (see page 15).

Crompton Corporation

In May 2004, Crompton Corporation, a U.S.-based global marketer of specialty chemicals, polymer products and processing equipment, pleaded guilty for its part in an international conspiracy to increase the price of rubber chemicals used in products such as tires, car bumpers and rubber hoses. The company was fined \$9 million.

Morganite Canada Corp. and The Morgan Crucible Company

In July 2004, Morganite Canada Corp. of Mississauga pleaded guilty and was fined \$450,000 for its part in a price-fixing conspiracy among manufacturers of carbon brushes and current collectors. These products transfer electrical current from wires or rails to vehicles such as subways, streetcars and light-rail trains. During the period in which the conspiracy operated, Morganite Canada Corp., also known as National Electrical Carbon Canada, sold approximately \$2 million worth of carbon brushes and current collectors to transit authorities in Canada.

In related proceedings, The Morgan Crucible Company, a holding company based in the United Kingdom, pleaded guilty to obstructing the Bureau's investigation. The company was fined \$550 000.

Taxi Companies

In July 2004, the Bureau charged six taxi companies and seven individuals with conspiracy under section 45 of the *Competition Act*, further to an inquiry initiated in January 2001 into an alleged agreement to lessen competition in bidding for taxi-service contracts in St. John's, Newfoundland and Labrador. The Bureau alleges that, between 1992 and 2004, the taxi companies agreed not to compete with each other for contracts to supply taxi services to institutional and commercial facilities in the city of St. John's. The preliminary hearing is scheduled to begin on January 9, 2006.

VAW Carbon GmbH and Nippon Electrodes Company, Ltd.

In September 2004, VAW Carbon GmbH, a German manufacturer and distributor of carbon and graphite cathodes, pleaded guilty for its role in an international conspiracy to fix the price of cathode blocks and was fined \$500 000. Cathode blocks are used principally in the production of primary aluminium.

Another conspirator, Nippon Electrodes Company, Ltd. of Japan, pleaded guilty in November 2004 for its role in the international conspiracy to fix the price of cathode blocks. The company was fined \$225 000.

UCAR International Inc.

In March 2005, a former senior vice-president of UCAR International Inc. (now GrafTech International Ltd.) pleaded guilty and was fined \$50 000 for his role in a conspiracy to fix the price of graphite electrodes.

BID RIGGING

The *Competition Act* prohibits agreements between two or more persons, usually competitors, to withhold bids in response to a tender or to fix a price for their bids. The bid rigging provision does not apply when the parties make the agreement known to the tendering authority before submitting their bids, since this allows the tendering authority to cancel the tendering process or modify it in a way that keeps it competitive. Bid rigging often targets government agencies and ultimately costs Canadian taxpayers.

Since bid rigging is considered a serious crime that increases costs to the public, the Bureau launched an outreach program to teach individuals how to prevent and detect it. Bureau officials provide guidance to tendering authorities who suspect they are victims of bid rigging on how to help the Bureau with its investigation. In 2004–2005, the Bureau's seven regional offices assumed greater responsibility for criminal competition investigations, particularly those related to bid rigging. As part of the outreach program, the Bureau gave more than a dozen presentations on bid rigging to tendering authorities and potential bidders across Canada.

PRICE MAINTENANCE

The *Competition Act* prohibits attempts by agreement, threat, promise or any like means, to influence upward the prices of a supplier's products or to discourage the reduction of those prices. Refusals to supply or discrimination against suppliers who have low-pricing policies are also

illegal under the Act. The price maintenance provision is designed to ensure that suppliers, notably retailers, are free to set their own prices for their products. This provision also protects suppliers from customer-led boycotts because they have decided to do business with other suppliers that have low prices.

Royal Group Technologies (Quebec) Inc.

In November 2004, Royal Group Technologies (Quebec) Inc. pleaded guilty to attempting to influence another company to maintain the price of polyvinyl chloride window coverings, such as vertical blinds and valances. Royal Group Technologies was fined \$200 000 and, under a prohibition order, is required to implement a policy to ensure that the company's future business practices comply with the *Competition Act*.

John Deere Limited

In October 2004, the Bureau resolved price maintenance concerns arising from allegations that John Deere Limited was preventing its dealers from selling its Series 100 lawn tractors below a certain price, contrary to section 61 of the *Competition Act*. Following a Bureau investigation, John Deere Limited agreed to the terms of a prohibition order, which includes an obligation to compensate consumers. The prohibition order requires the company to make a five percent voluntary rebate payment to each person who purchased a Series 100 lawn tractor in the period between January 1, 2003, and August 31, 2003, an expected consumer restitution of \$1.2 million. The prohibition order also requires John Deere Limited to develop and implement a competition compliance policy and training program for its dealers and their employees responsible for pricing, selling and marketing the Series 100 tractors in Canada.

FALSE OR MISLEADING REPRESENTATIONS

Yellow Business Directory.com

In October 2004, four Toronto-area residents were sentenced to prison, fined or both for their involvement in the Yellow Business Directory.com phony invoice scam.

Those sentenced sent out letters inviting recipients to have their business details appear in Internet-based directories operating under the names Yellow Business Pages.com and Yellow Business Directory.com. The letters, sent to approximately 900 000 businesses and non-profit organizations in Canada, appeared to be bills or invoices from Bell Canada or Yellow Pages and generated more than \$1 million in sales between May and December 2000.

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

Anitech Enterprises Inc. (PetNet)

In July 2004, Anitech Enterprises Inc., also known as PetNet, pleaded guilty in the Federal Court of Canada to a criminal charge of misleading thousands of pet owners through a deceptive mail campaign.

PetNet, based in Markham, was a distributor of microchips used to permanently identify pets, and owned and operated the National Pet Registry and Recovery Service. From 1991 to September 2002, PetNet's advertisements and marketing materials

stated that clients only had to pay a one-time fee for its microchip and recovery service. Over the years, PetNet built up its customer base to more than 400 000 registrants across Canada, mostly under the direction of Paul Brown.

On January 1, 2003, PetNet changed its fee policy, instituting an annual administration fee of \$19.95 for registrants, both new and existing. PetNet's decision to apply this new policy to its pre-2003 registrants raised concerns under the *Competition Act* and led the Bureau to intervene.

PetNet was fined \$150 000. In addition, Paul Brown agreed to abide by a 10-year prohibition order requiring PetNet and any successor company to do the following:

- stop demanding pre-2003 registrants to pay any fee for services originally contracted;
- clearly disclose the annual administration fee to all new registrants;
- establish and implement a corporate compliance program; and
- stop making false or misleading representations.

Paul Brown was also required to sever all relations with PetNet and any successor company, including disposing of all his shares in the company. In acknowledgement of the seriousness of the matter, he was also required to pay \$50 000 to PetNet.

This case marks the first time the Bureau has used the Immunity Program in a case of false or misleading representations (see page 15).

JD Marvel Products Inc. and CDN MailOrder Exchange Inc.

In March 2005, the Bureau announced that criminal charges under the *Competition Act* had been laid against JD Marvel Products Inc., CDN MailOrder Exchange Inc. and their president,

John Dragan, for having made false or misleading representations targeting Canadian and U.S. residents, mainly senior citizens.

The two companies offered a wide range of consumer products through mail order, advertising inserts, coupons in discount envelopes and magazines, catalogues and the Internet. The Bureau alleged that the products were not delivered in the advertised time period of two to five weeks and that some consumers never received the products. The Bureau also alleged that consumers were misled about the performance of some of the products.

Yellowbusiness.ca

In May 2004, James Tetaka of 1473253 Ontario Incorporated was fined \$60 000 and made subject to a five-year prohibition order for his role in the Toronto-based Yellowbusiness.ca phoney invoice scam. The invoice mail-outs charged recipients \$85.55 to have their organization's details listed in an Internet business directory that appeared to come from an existing service provider such as Bell Canada or the Yellow Pages. As part of the investigation, the Bureau and Canada Post seized mail containing an estimated \$700 000 in payments. The Bureau's investigation revealed that the 40 000 businesses and non-profit organizations targeted in this scam had been victimized with similar mail-outs in 2000.

Internet Registry of Canada

In June 2004, Daniel Klemann was fined \$40 000 and made subject to a five-year prohibition order for making misleading representations through his company, Internet Registry of Canada (IROC). More than 73 000 businesses and non-profit organizations received deceptive mail informing them that their Internet domain name registration was about to expire and offering several renewal options. The letter was designed to mislead recipients into believing they were existing IROC customers and gave the impression that IROC was

the Government of Canada agency in charge of Internet domain name registration.

DECEPTIVE TELEMARKETING

The *Competition Act* prohibits telemarketers from making materially false or misleading representations when promoting a product or business interest during telephone calls. Telemarketers are also prohibited from doing the following:

- asking for payment in advance as a condition of receiving a prize that has been, or supposedly has been, won in a contest or game;
- failing to adequately and fairly disclose the number and value of the prizes;
- offering a gift as an inducement to buy another product (without fairly disclosing the value of the gift); and
- offering a product at a grossly inflated price and requiring the consumer to pay for it in advance.

The Act also requires that telemarketers disclose the name of the company or person for whom they are working, the type of product or business interest they are promoting, the purpose of the call, the price of any product being sold, and any restrictions or conditions the consumer must meet before the product is delivered.

Hanson Publications Inc., Associated Merchant Paper Supplies Inc., Copier Supply Centre Inc. and OS Networks Inc.

In June 2004, two directors and three employees at four Toronto-based telemarketing firms pleaded guilty to using deceptive telemarketing practices to target Canadian and U.S. consumers. Between May 1999 and September 2002, telemarketers used false and misleading sales techniques to induce U.S. organizations to purchase business directories and credit card paper supplies, and Canadian organizations to purchase photocopier

toner cartridges. The telemarketers led potential clients to believe that their organization had an established business relationship with the telemarketing firms and that the purpose of the call was to confirm product orders and delivery.

The four companies were fined a total of \$100 000. Adrian Towning, director of all the firms, and Charles Hamouth, director of both Hanson Publications and Associated Merchant Paper Supplies, received 10-month conditional sentences comprising six months of house arrest and a four-month curfew, one year of probation and 75 hours of community service. Three company managers, Jamie Lynes, Neil Underwood and Sean Beesley, were fined a total of \$25 000 and were sentenced to 50 hours of community service and one year of probation. Another manager, (Russell) Todd Ivison, was fined \$20 000 in March 2004. All companies and individuals were made subject to a 10-year prohibition order banning them from selling business directories, credit card paper supplies, photocopier and printer toner cartridges, or any other non-durable office supplies and from selling any product over the phone without the customer being able to agree to purchase the product either in writing or in a face-to-face transaction.

The Federal Trade Commission launched parallel litigation, which resulted in Towning and Hamouth being prohibited from selling directories or non-durable office supplies in the United States and requiring them to turn over US\$853 000 for consumer redress. The U.S. court also entered an order prohibiting Montréal defendant Albert Mouyal from selling business directories and non-durable office supplies by telephone in the United States, and requiring him to post a US\$500 000 bond before he sells other products over the telephone.

Alexis Corporation

In January 2005, Constantina Athanasopoulos was sentenced to a 15-month conditional sentence and two years of probation for her role in a prize-pitch scam that targeted consumers in Australia. In March 2005, five participants pleaded guilty in the Court of Quebec (Judicial District of Montréal) to taking part in the same scam. One of them, Sheldon Cutler, was fined \$20 000 and received a 20-month conditional sentence and two years of probation. William Kenwood received a six-month conditional sentence, and must serve two years of probation and do 100 hours of community service. Armenia Linhares received a six-month conditional sentence, and must serve two years of probation and do 100 hours of community service. Two others, Scarlet Jove and Gerald Goldstein, had not received their sentences as of March 31, 2005.

The guilty pleas followed a criminal investigation that used wiretaps to gather evidence into the deceptive telemarketing activities of Alexis Corporation (3636135 Canada Inc.) and 3587932 Canada Inc. Between May 2000 and June 2001, the Bureau and PhoneBusters received numerous complaints alleging that telemarketers were telling consumers they had won valuable prizes, such as a new car, diamond watches, a washer and dryer set, a sapphire bracelet and a video camera. To receive the prizes, consumers had to purchase a promotional item. The Bureau investigation confirmed allegations that the telemarketers greatly deceived and misled consumers about the quantity and value of these prizes and the value of the promotional items.

In late 2002 and early 2003, six other people were penalized in various ways, including a fine, conditional sentences, probation and community service, as a result of this scam.

MULTI-LEVEL MARKETING AND PYRAMID SELLING

The *Competition Act* sets out the differences between multi-level marketing plans and pyramid selling schemes, as well as the responsibilities of operators and participants in these types of plans. Multi-level marketing, when it operates within the limits of the Act, is a legal business activity, while a pyramid selling scheme is not.

Multi-level marketing is a plan for the distribution of products through which participants earn money by supplying products to other participants in the same plan. They, in turn, make money by supplying the same or other products to other participants. Operators and participants in multi-level marketing plans are prohibited from making representations about the compensation available under the plan without also disclosing the amount of compensation typical participants receive or are likely to receive.

A pyramid selling scheme is a multi-level marketing plan that includes compensation for recruitment, required purchases as a condition of participation and inventory loading, or the lack of a buy-back guarantee on reasonable commercial terms.

Global OnLine Systems Inc.

In November 2004, Global Online Systems Inc., a Vancouver-based multi-level marketing firm, pleaded guilty under the multi-level marketing and pyramid selling provisions of the *Competition Act*. An investigation by the Bureau revealed that Global OnLine was operating a pyramid selling scheme that involved health-related products marketed by Herbalife Canada Ltd. Contrary to the Act, participants were compensated for recruiting new participants, who had to buy specific quantities of products as a condition of joining the plan. In addition, Global OnLine and its participants recruited new participants

by exaggerating income expectations without disclosing the income of a typical participant.

The company was fined \$150 000 and, along with its directors, Deborah Jane Stolz and Marilyn Thom, was made subject to a prohibition order issued by the Federal Court of Canada in which it agreed to do the following:

- disclose the average income all participants actually received;
- inform existing distributors and participants of the terms of the prohibition order; and
- not become directly or indirectly involved in any other pyramid selling schemes.

Millnaires of Canada Ltd.

In November 2004, the Bureau announced that charges had been laid against Stalin McIntosh, president of Millnaires of Canada Ltd., under the *Competition Act* and the *Criminal Code* for his involvement in alleged fraudulent pyramid selling schemes. The Bureau alleged that from September 2000 to December 2001, McIntosh operated and promoted pyramid selling schemes that promised participants free cellular telephones and to eliminate cellular telephone bills, and vehicle, rent and mortgage payments. McIntosh was also charged with making false representations to the public in order to induce people to pay to join and with defrauding members of the public of more than \$5000.

NSV Nutrinautes Inc.

In March 2005, NSV Nutrinautes Inc. and its vice-president, Richard Arsenaault, pleaded guilty in Quebec Court to four charges under the *Competition Act's* multi-level marketing, pyramid selling and general false or misleading representation provisions.

The Quebec-based company operated a multi-level marketing plan known as the Cocooning Club. A Bureau investigation found that the Cocooning Club and its participants made representations on websites and in a television infomercial that exaggerated income expectations without disclosing the income of a typical participant in the plan.

NSV Nutrinautes Inc. was fined \$75 000 and Arsenault received a conditional jail sentence of two years less a day and was made subject to a prohibition order preventing him from being involved in any future multi-level marketing plans for 10 years. Charges against two other individuals are outstanding.

IMMUNITY PROGRAM

The Competition Bureau launched its Immunity Program in 2000 in an effort to increase its ability to detect, investigate and prosecute cartels. Under the program, immunity is available to the first applicant that reports its involvement in illegal anti-competitive activity under the *Competition Act* and that meets all other eligibility criteria. Immunity is available to both businesses and individuals, and when immunity is granted, the Attorney General of Canada takes no enforcement action against the party in question. The Bureau is responsible for investigating the illegal activity and recommending to the Attorney General whether immunity should be granted. The final decision to grant (or revoke) immunity is the responsibility of the Attorney General. The details of the program are described in the Information Bulletin *Immunity Program Under the Competition Act* and supplemented by a series of frequently asked questions published in 2003. Both documents are available on the Bureau's website (www.competitionbureau.gc.ca/internet/index.cfm?itemID=1752&lg=e).

In September 2004, the Commissioner of Competition announced a review of the Immunity Program. The review will draw on the Bureau's experience with the program since 2000 and will ensure the program's transparency and that it provides applicants with a high degree of certainty about their treatment under the program. A public consultation is planned for the autumn of 2005.

ALTERNATIVE CASE RESOLUTION

The Bureau chooses the best and most efficient means of restoring competition in the marketplace, only resorting to an adversarial approach when all other avenues have failed or are likely to fail, or the anti-competitive activities constitute a flagrant disregard for the law. Some matters may be resolved quickly and easily, without a full inquiry or judicial proceeding. This reduces uncertainty, saves time and avoids lengthy court actions.

The following are summaries of cases resolved through alternative case resolution.

CONSPIRACY

Hotel Associations

In January 2004, the Bureau received two similar complaints that members of two separate hotel associations located in different parts of Canada had each agreed to implement a three percent destination marketing fee on room rates to fund increased marketing initiatives in the destination cities. The Bureau met with each association to discuss its concerns about the alleged agreements, as well as concerns that the fee might be misrepresented to the public as a government tax. The Bureau advised both groups that an agreement between competitors to contribute money to a central fund to finance marketing in the destination cities would not, in and of itself, violate the *Competition Act*, provided each

hotel independently decided how it would finance its contribution. To resolve the Bureau's concerns, the associations implemented training programs to ensure that hotel staff accurately portrayed the nature of the fee to consumers. One association also agreed to redraft its agreement to make clear that it was up to each member to decide how it would finance its fee contribution, while the second association delayed implementing the fee, pending a review of its membership agreement.

BID RIGGING

Access to Information and Privacy

In October 2004, a procurement and contracting officer from a government agency contacted the Bureau about a tender issued to hire two information access specialists to work in the area of Canada's *Access to Information Act* and *Privacy Act*. Two very similar bids were received in response to the tender. The information suggested that the two bid respondents, who were first-time entrepreneurs, had agreed on the bid and were unaware of the bid rigging provision of the *Competition Act*. The Bureau met with the respondents and explained the bid rigging provision. They agreed to comply with the *Competition Act* in any future bid activity.

PRICE MAINTENANCE

Telescopes

In January 2004, a Western Canada distributor sent a letter to retailers of his telescopes imposing a minimum advertised price for the products and stating that non-compliance would result in retailers being cut off from their supply. The Bureau informed the distributor about the price maintenance provision of the *Competition Act*. The Bureau secured the distributor's agreement to comply with the Act and supply the product regardless of the prices the retailers advertised.

Dog Food

In the spring of 2004, a company informed one of its retailers that it would reduce its dog food discounts because the retailer was selling the product at lower prices than were its competitors. The Bureau met with company representatives to explain the price maintenance provision of the *Competition Act*. As a result, the company agreed to provide the same discounts to all retailers, regardless of the prices they were charging.

Advertising

In September 2004, the Bureau responded to a complaint concerning a by-law of a professional association regarding advertising. The Bureau's review of the by-law identified provisions on the advertising of prices that raised concerns under the price maintenance provision of the *Competition Act*. The by-law stipulated that any advertisement of a price or a price reduction by a member of the association must remain in effect for a minimum period, which may have led members to believe that they no longer had control over their retail prices. The association agreed to modify the by-law so that it would no longer raise concerns under the *Competition Act*.

Bicycles

In the fall of 2004, a bicycle manufacturing company terminated its supply to a Western Canada retailer because of its low prices. The matter was resolved after the Bureau met with company representatives to review the price maintenance provision of the *Competition Act* and the company agreed to re-supply the retailer.

Fine Art Prints

In November 2004, an East Coast distributor informed retailers that discounted their fine art prints below recommended retail prices that they would be cut off from their supply if they maintained their low-price policy. The Bureau

discussed the price maintenance provision of the *Competition Act* with company representatives, who agreed to inform their retailers of the *Competition Act* and indicate that price discounting was allowed.

FALSE OR MISLEADING REPRESENTATIONS, DECEPTIVE MARKETING PRACTICES AND THE STANDARDS-BASED STATUTES

In 2004–2005, the Bureau settled through alternative case resolution 35 matters under the false or misleading representations and deceptive marketing practices provisions of the *Competition Act* and the provisions of the three standards-based statutes.

The Bureau may examine certain matters under both the criminal and civil provisions of the *Competition Act*, the provisions of the standards-based statutes or both. Depending on the circumstances, the Bureau examines matters under all relevant provisions of the statutes it enforces. The following are examples of cases in which concerns were raised under the criminal false or misleading representations and deceptive marketing practices provisions of the *Competition Act*, the provisions of the standards-based statutes or both.

Stainless Steel Jewellery

In April 2004, the Bureau resolved a complaint about misleading representations made in a jewellery store's brochure. The brochure alleged that stainless steel jewellery with 18-karat gold accents contained more gold than stainless steel, when in fact the reverse was true.

A Bureau examination conducted under the marking provisions of the *Precious Metals Marking Act* and the false or misleading representations provisions of the *Competition Act* confirmed that

the brochure could lead consumers to believe that the gold content of the articles was greater than it actually was. The Bureau contacted company officials, who agreed to recall the remaining brochures and print new ones containing accurate information about the gold content.

Garments

In April 2004, the Bureau addressed an enquiry from a garment manufacturer that had discovered its product was being shipped into Canada with an incomplete dealer name and address on the label. Under the Textile Labelling and Advertising Regulations, these garments require "the name and postal address of the dealer" to be listed on a permanent label attached to each garment.

After discussions with Bureau officials, the company provided written assurances that all of the articles would have a new label attached, that garments produced in the future would be labelled with a complete dealer name and postal address, and that a quality control program had been established to prevent similar labelling errors in the future.

Fastener Products

In April 2004, the Bureau resolved a complaint about misleading "Made in Canada" claims on fastener products. The complaint alleged that these types of products were no longer manufactured in Canada. Under the misleading representation provision of the *Consumer Packaging and Labelling Act*, it is illegal to make a false statement on a label; it is a reviewable matter under the *Competition Act*.

After discussions with the Bureau, two major distributors of the products agreed to correct the representations on the packages that incorrectly identified the country of origin, correct all in-stock packaging, and ensure the compliance of future packaged products.

Telecommunications Company

In July 2004, the Bureau resolved a complaint alleging that a telecommunications company's advertisements about its high-speed Internet service were not in compliance with the *Competition Act*. A Bureau examination revealed that the company's advertised comparisons of its speed of service to its competitors' could not be substantiated. As a result of Bureau contact, the company instituted a compliance program that included the following:

- the review of all advertising material by legal counsel;
- an annual compliance education session for advertising personnel;
- a bi-annual message from senior management to reinforce the importance of compliance; and
- a requirement that advertising managers annually review and confirm their understanding of the Bureau's advertising guidelines.

The company also clarified the meaning of the phrase *dedicated access/service* by adding a footnote in its advertising clearly indicating that this access extended from the customer's premises to its switching facility. The Bureau substantiated the company's claim that its high-speed Internet service was "consistently fast."

Imported Textile Products

In July 2004, the Bureau resolved a complaint alleging that a company was importing various textile products, including quilts, without attaching the required labels. The Bureau contacted the company and provided information on the labelling requirements of the *Textile Labelling Act*. As a result, the company agreed to attach the labels to the imported textile products.

Windshield Washer Antifreeze

In January 2005, the Bureau resolved a complaint about a misleading labelling claim concerning windshield washer antifreeze. A preliminary test of the product's density revealed that the windshield washer antifreeze would freeze at -32°C not at -40°C , as the label claimed. The Bureau examined the matter under provisions of the *Competition Act* and the *Consumer Packaging and Labelling Act*.

After discussions with Bureau officials, the automotive supply company agreed to correct the current stock of windshield washer antifreeze by adding methanol to meet the required density and to adjust the formulation for the product fill line to meet the -40°C freezing point claim. The company also agreed to replace the windshield washer antifreeze of any purchaser who complained about the product. The company has instituted new production procedures to ensure future compliance.

Infant Bunting Bag

In January 2005, the Bureau resolved a complaint about an infant bunting bag that did not comply with the labelling requirements of the *Textile Labelling Act*. The bunting bag lacked a dealer's name and address and a CA number on a sewn-in label. Information was only printed on the packaging material and the fibre content was only listed in English, when French is also required for articles sold in bilingual areas of the country. The retailer agreed to resolve the matter by ensuring that future shipments showed the correct information both on the garment's label and on the packaging.

Small Kitchen Appliances

In June 2004, the Bureau received a complaint about the labelling of small, pre-packaged kitchen appliances, alleging that the name and address of the dealer were not completely disclosed. Under the *Consumer Packaging and Labelling Act*, pre-packaged products must include a declaration of the dealer's name and principal place of business.

Bureau officials discussed the requirements of the Act with the company, which subsequently provided verbal commitments that all future products it imported would be correctly labelled and that it would put a quality control program in place to prevent similar errors in the future.

WRITTEN OPINIONS

The Bureau provides legally binding written opinions to businesses seeking to comply with the *Competition Act*. Company officials, lawyers and others may request a written opinion on whether a proposed business plan or practice would raise concerns under the Act. The Bureau's written opinions take into account jurisprudence, previous written opinions and current policies. Written opinions remain binding for as long as the material facts stay substantially unchanged and the conduct or practice is carried out substantially as proposed.

To promote compliance with and foster transparency in the administration and enforcement of the Act, the Bureau publishes detailed summaries of its written opinions on its website (www.competitionbureau.gc.ca/internet/index.cfm?itemID=782&lg=e).

While the Bureau does not provide written opinions based on provisions of the standards-based statutes, a company may request a written opinion on a proposed label under the false or misleading representations and deceptive marketing practices provisions of the *Competition Act*. During 2004–2005, the Bureau issued 23 written opinions, 22 of which related to the false or misleading representations and deceptive marketing practices provisions of the Act.¹ Descriptions of some of these written opinions appear below.

¹ See page 8 for a general description of the criminal false or misleading representations and deceptive marketing practices provisions of the *Competition Act*. See page 24 for a general description of the civil false or misleading representations and deceptive marketing practices provisions of the *Competition Act*.

CONSPIRACY AND MERGERS

Strategic Alliance

In January 2005, an insurance institution sought a written opinion to determine whether entering into a strategic alliance for the supply of a certain type of insurance would raise concerns under the *Competition Act*. The Bureau examined the matter under the criminal and civil provisions of the Act, specifically those on conspiracy and mergers. The Bureau determined that the strategic alliance, as proposed, did not meet the definition of a merger and that the parties involved did not have the necessary market power for their alliance to contravene the conspiracy provisions of the Act.

FALSE OR MISLEADING REPRESENTATIONS AND DECEPTIVE MARKETING PRACTICES

The Bureau issued 22 written opinions concerning the criminal and civil false or misleading representations and deceptive marketing practices provisions of the Act. Sixteen of these opinions dealt with the criminal provisions of the Act, specifically sections 52, 55 and 55.1. Section 52 prohibits all representations made knowingly or recklessly in any form and that are false or misleading in a material respect. Under sections 55 and 55.1, an operator or participant in a multi-level marketing plan cannot make representations about compensation without disclosing the compensation a typical participant would receive. Further, a multi-level marketing plan that features recruitment bonuses, a required volume of purchases by participants as a condition of entry and inventory

loading, or that lacks a buy-back guarantee on reasonable commercial terms constitutes a prohibited pyramid selling scheme. The following are examples of written opinions that dealt with the criminal provisions of the Act.

False or Misleading Representations

Online Business Directory Website

In December 2004, a company sought a written opinion on whether a proposed direct mail advertisement promoting an online business directory would raise concerns under the *Competition Act*. The Bureau concluded that the promotion would not give the Commissioner grounds to commence an inquiry, since the proposed material clearly disclosed the nature of the service and the charges levied.

Multi-level Marketing and Pyramid Selling

The written opinions dealing with the multi-level marketing and pyramid selling provisions covered plans for marketing a wide variety of products and services.

Nutritional Supplements

In April 2004, a multi-level marketing company distributing nutritional supplements sought a written opinion on whether a proposed multi-level marketing plan would raise concerns under the *Competition Act*.

In its written opinion, the Bureau stated that the plan might cause concern, since the compensation of a typical participant was not stated and the promotional video included lifestyle representations, even though no information about compensation was provided.

Adult Novelties

In May 2004, a multi-level marketing company promoting the sale of adult novelties sought a written opinion on whether a proposed multi-level marketing plan would raise concerns under the *Competition Act*.

In its written opinion, the Bureau stated that the plan might cause concern, since the compensation of a typical participant was not stated nor was there clear indication that the websites only targeted U.S. consumers. Furthermore, a one-time cash training bonus appeared to provide compensation to participants who recruited other participants into the plan.

Nutritional Supplements

In August 2004, a company that distributes and sells nutritional supplements sought a written opinion on whether its proposed multi-level marketing plan would raise concerns under the *Competition Act*.

In its written opinion, the Bureau stated that the plan might cause concern, since the operator failed to disclose the earnings of typical participants in a reasonable and timely fashion, and the plan appeared to constitute a pyramid selling scheme, as defined in the Act, for the following reasons.

- All product sales were tied to participation in the marketing plan. Membership could not be separated from product purchase.
- Compensation was paid to existing participants for the sale of the product, suggesting that the initial products were not sold at cost, nor that their purchase was intended to facilitate sales. As well, existing participants received compensation for the recruitment of new participants.

Automotive Products

In August 2004, a company that distributes and sells automotive products sought a written opinion on whether its proposed multi-level marketing plan would raise concerns under the *Competition Act*.

In its written opinion, the Bureau stated that the plan might cause concern, since the plan appeared to constitute a pyramid selling scheme for the following reasons.

- Bonuses were paid to participants in the plan when they recruited other prospective participants, who themselves paid to join the plan.
- The plan required participants to purchase products as a condition of fully participating in the plan.
- Return of the product was conditional on the participants' exit from the plan, a condition that is not commercially reasonable. Furthermore, the severity of these return policy conditions combined with the plan's minimum purchase thresholds might have led to inventory loading.

Weight Loss Products

In October 2004, a company that distributes and sells weight loss products sought a written opinion on whether its proposed multi-level marketing plan would raise concerns under the *Competition Act*.

In its written opinion, the Bureau stated that the plan might cause concern, since the operators failed to disclose the earnings of typical participants in a reasonable and timely manner. Furthermore, the plan appeared to constitute a pyramid selling scheme for the following reasons.

- Participants were required to purchase a "starter kit" and reach a one-time volume threshold. A product package was promoted as an optional purchase to reach this threshold. The Bureau believed that this constituted a de facto purchase requirement, since it created sufficient incentive to join the plan.
- The de facto purchase requirement signified that compensation was provided for the recruitment of participants. Furthermore, the product was not sold at the seller's cost.
- The plan's buy-back guarantee was conditional on participants' exit from the plan. This was not considered to be commercially reasonable.
- The severity of the return policy along with the plan's minimum purchase thresholds might have led to inventory loading.



CHAPTER 3

PROMOTING COMPLIANCE
WITH THE CIVIL PROVISIONS

The Competition Bureau acts as a referee in the marketplace to address competition-related disputes arising between businesses or between consumers and businesses.

It investigates possible anti-competitive behaviour, such as abuse of dominance, and restraints imposed by suppliers on customers, such as refusal to supply, exclusive dealing and tied selling. The Bureau also investigates cases of false or misleading representations and other deceptive marketing practices.

The *Competition Act* contains criminal and civil provisions to address false or misleading representations and deceptive marketing practices when promoting a product or business interest. The general civil provision prohibits all materially false or misleading representations. Other provisions specifically prohibit performance representations not based on adequate and proper tests, misleading warranties and guarantees, false or misleading ordinary selling price representations, untrue, misleading or unauthorized use of tests and testimonials, bait and switch selling, and selling a product above its advertised price. The promotional contest provisions set out the requirements for conducting a contest, lottery, or game of chance or skill.

When appropriate, Bureau officials hold discussions with firms to try to obtain voluntary compliance with the law. Sometimes this is all the action needed

to correct the situation. A more formal solution involves registering a consent agreement with the Competition Tribunal, in which all parties agree on actions that will restore competition to the marketplace. When voluntary compliance cannot be achieved, the Bureau may file an application with the Competition Tribunal for an order to remedy the situation. Depending on the issue, the Bureau may also register the consent agreement or file the application with the Federal Court or a provincial superior court.

The following illustrates the Bureau's response to instances of non-conformity in civil matters over the past year. For more information on these cases and others, including information notices, news releases and backgrounders, visit the Bureau's website (www.competitionbureau.gc.ca/internet/index.cfm?itemID=137&lg=e).

ENFORCEMENT ACTIONS

AIRLINE INDUSTRY

Competition Tribunal Hearing: *Commissioner of Competition v. Air Canada*

On October 29, 2004, the Competition Bureau and Air Canada resolved their litigation before the Competition Tribunal concerning allegations that Air Canada engaged in anti-competitive practices directed against the low-cost carriers WestJet and CanJet. The Bureau decided not to pursue the matter in light of the significant changes that have occurred in the airline industry since the litigation began in 2001.

On September 24, 2004, the Bureau sent a letter to major Canadian airlines outlining the approach it will take in its future enforcement of the *Competition Act* in the airline sector. The letter is available on the Bureau's website (www.competitionbureau.gc.ca/internet/index.cfm?itemID=247&lg=e).

Authority to Issue Temporary Orders

On June 3, 2004, the federal government withdrew its appeal to the Supreme Court of Canada regarding the decision by the Quebec Court of Appeal to render section 104.1 of the *Competition Act* inoperative. Section 104.1 gave the Bureau the authority to issue temporary cease and desist orders during inquiries into the airline industry.

Other Airline Examinations

In the summer of 2004, a regional carrier based in Quebec complained that Air Canada had added capacity on some routes at fares that did not cover the cost of providing the service and had increased the number of tickets offered at fares matching the carrier's lowest fares. However, the complainant failed to respond to requests for further information, so the matter was closed.

In June 2004, a regional carrier operating in northern Ontario complained that its competitor was undercutting its fares on some routes in

northern Ontario. The information the regional carrier made available, however, did not provide grounds to pursue the matter.

ABUSE OF DOMINANCE

Canada Pipe

On February 3, 2005, the Competition Tribunal issued a decision dismissing the Commissioner's 2002 application for an order prohibiting Canada Pipe Company Ltd./Tuyauteries Canada Ltée from engaging in anti-competitive acts through its Bibby Ste-Croix Division. The Bureau alleged that Bibby was abusing its dominant position in the market for the supply of cast iron pipe, fittings and mechanical joint couplings for drain, waste and vent applications in markets across Canada. The company's loyalty program required its clients to purchase all their drain, waste and vent products exclusively from Bibby in return for substantial rebates. The Bureau argued that the loyalty program locked in Bibby's customers, reduced competition and prevented greater competition from existing competitors and potential entrants.

The Tribunal concluded that Canada Pipe controlled more than 80 percent of the market but that its loyalty program was not anti-competitive and, based on the evidence, had not substantially lessened or prevented competition.

The Commissioner filed a notice of appeal of this decision with the Federal Court of Appeal on March 7, 2005. Canada Pipe filed a notice of cross-appeal on March 17, 2005.

Beef

Beginning in February 2004, the Bureau conducted an examination into allegations of collusive or anti-competitive conduct by packers in the beef industry. There has since been widespread concern about the significant decrease in prices paid for cattle, cows and calves and the failure of wholesale and retail beef prices to follow suit. This decline in prices followed the closing of international borders to exports of live cattle upon the discovery of a case of BSE in Canada in 2003.

The Bureau examined this matter under the conspiracy and abuse of dominance provisions of the *Competition Act*. The Bureau found no evidence that the pricing patterns since the border closure were the result of agreements among competitors to artificially lower prices paid to farmers or to raise or maintain wholesale or retail prices. The Bureau also determined that there was no evidence to suggest the pricing patterns could be attributed to one or more dominant firms attempting to restrict competition.

Broadcast Rights to the Olympics

In August 2004, CBC/Radio-Canada filed a complaint with the Competition Bureau over an arrangement between Bell Globemedia (CTV/TSN/RDS) and Rogers Media Inc. (Sportsnet) to submit a joint bid to the International Olympic Committee for the Canadian broadcast rights to the 2010 and 2012 Olympics. The complainants were concerned that the combination of CTV's conventional broadcasting

capability with the two largest sports specialty channels in Canada, TSN/RDS and Sportsnet, would preclude CBC/Radio-Canada from bidding, since it would not have access to a sports specialty channel. The complainants alleged that the alliance raised issues under the *Competition Act's* abuse of dominance, mergers and criminal provisions.

The Bureau carefully examined the allegations and found no evidence to suggest that a Bell Globemedia/Rogers Media Inc. partnership would impair CBC/Radio-Canada's ability to compete for the broadcasting rights or that the partnership would substantially lessen competition.

The Bureau concluded that the bidding process for the Canadian broadcasting rights to the 2010 and 2012 Olympics did not violate the *Competition Act*.

Insurance

In March 2004, six members of Parliament complained to the Bureau about increases in car, property and commercial insurance premiums in Canada. They alleged that the insurance industry was abusing its dominant market position and not providing Canadians with reasonable and competitive rates. The Bureau also received complaints from several members of the public.

The Bureau reviewed complaints regarding insurance premiums in Canada and found no evidence to suggest that any insurance company or group of companies had engaged in conduct that violated the *Competition Act*.

EXCLUSIVE DEALING

The major case in this section is Canada Pipe, described on page 25.

REFUSAL TO SUPPLY, PRIVATE ACTIONS (NEW APPLICATIONS)

The following new applications were made to the Competition Tribunal for leave to file private actions.

Mrs. O's Pharmacy Inc. v. Pfizer Canada Inc.; Paradise Pharmacy Inc. and Rymal Pharmacy Inc. v. Novartis Pharmaceuticals Canada Inc./Novartis Canada Inc.; 1177057 Ontario Inc. c.o.b. as Broadview Pharmacy v. Wyeth Canada Inc.; and 1177057 Ontario Inc. c.o.b. as Broadview Pharmacy v. Pfizer Canada Inc.

There were four private actions against pharmaceutical companies concerning the sale of drugs into the U.S. The applicants alleged that the pharmaceutical companies refused to supply them with various pharmaceutical products and forbade their distributors to deal with them. The applicants sought an order from the Competition Tribunal requiring Pfizer Canada Inc., Novartis Pharmaceuticals Canada Inc./Novartis Canada Inc. and Wyeth Canada Inc. to accept them as customers and dealers of the products on the usual trade terms.

The judge in these cases declined to hear the cases because the applicants had failed to demonstrate that their business was substantially affected.

Robinson Motorcycle Limited v. Fred Deeley Imports Ltd.; and Quinlan's of Huntsville Inc. v. Fred Deeley Imports Ltd.

In applications filed in June and July 2004, respectively, Robinson Motorcycle Limited and Quinlan's of Huntsville Inc. alleged that Fred Deeley Imports Ltd. was refusing to supply them with Harley-Davidson products, despite having had a long sales relationship with them. Both retailers

sought an order from the Competition Tribunal requiring Fred Deeley Imports Ltd. to accept them as customers and dealers of the products on the usual trade terms.

When Robinson was granted leave to make an application to the Tribunal, Fred Deeley Imports Ltd. filed an appeal to the Federal Court of Appeal, claiming the Tribunal had failed to give reasons for granting the leave application. On November 23, 2004, the Federal Court of Appeal agreed and referred the matter back to the Tribunal. On February 15, 2005, the Tribunal issued its reasons. The Tribunal hearing is scheduled for October 4–14, 2005.

On August 13, 2004, Fred Deeley Imports Ltd. appealed the Tribunal's decision to grant leave to Quinlan's to file an application.

Robinson and Quinlan also sought an interim order for relief under section 75 of the *Competition Act*. On November 3, 2004, Fred Deeley Imports Ltd. was ordered to supply Quinlan's with non-seasonal general merchandise and parts until the Tribunal reached a final decision. On December 7, 2004, the Tribunal also granted Robinson a consent interim relief order.

REFUSAL TO SUPPLY, PRIVATE ACTIONS (RECENT DEVELOPMENTS)

There were new developments in 2004–2005 in ongoing cases.

Barcode Systems Inc. v. Symbol Technologies Canada ULC

On October 7, 2004, the Federal Court of Appeal dismissed Symbol Technologies' appeal of the Competition Tribunal's January 2004 decision to give Barcode Systems permission to make an

application in a private action under section 75 of the *Competition Act*. Barcode Systems had applied to the Tribunal for an order to require Symbol Technologies to provide bar code equipment. On February 24, 2005, Symbol Technologies filed an application with the Tribunal to have that order rescinded under section 106, on the grounds that circumstances had changed. The receiver for Barcode Systems had been successful in its application to the Manitoba Court of Queen's Bench in January 2005 to obtain supply from Symbol Technologies.

On March 29, 2005, Barcode Systems, in its response to this proceeding, argued that the Manitoba Court of Queen's Bench order requires Symbol Technologies to supply the receiver for the company, not Barcode Systems itself. Barcode Systems also argued that, even though the receiver had sold the assets of the company, this did not prevent Barcode Systems from taking legal action before the Competition Tribunal to obtain supply from Symbol Technologies.

Allan Morgan and Sons Ltd. v. La-Z-Boy Canada Limited

On March 3, 2004, La-Z-Boy appealed to the Federal Court of Appeal requesting a reversal of the Competition Tribunal's decision to grant Allan Morgan and Sons leave to make an application. La-Z-Boy's motion for a stay of the section 75 application was also dismissed, since the firm provided no persuasive evidence of irreparable harm. On April 8, 2005, the parties filed a notice of discontinuance with the Tribunal, having settled the matter between them.

FALSE OR MISLEADING REPRESENTATIONS AND DECEPTIVE MARKETING PRACTICES

The Forzani Group Ltd.

In July 2004, a consent agreement was registered with the Competition Tribunal concerning certain ordinary selling price representations made by The Forzani Group Ltd., Canada's largest sporting goods retailer. As a result of a Bureau investigation, which included a search of Forzani's Calgary headquarters, the Commissioner had reason to believe that the firm had significantly inflated the regular price of certain products, thereby overstating the savings to consumers buying goods on sale at its Sport Chek and Sport Mart retail locations.

Under the terms of the consent order, Forzani agreed to do the following:

- pay a record administrative monetary penalty of \$1.2 million;
- pay all the costs of the Bureau's inquiry (\$500 000);
- publish corrective notices in Canadian newspapers, in store flyers, on its corporate websites and in retail stores across Canada; and
- establish a corporate compliance program.

Sears Canada Inc.

In January 2005, following a lengthy hearing, the Competition Tribunal decided that Sears had breached the *Competition Act* by making false or misleading representations when advertising discounts on certain tires. This landmark decision

is the first to be handed down by the Tribunal under the ordinary selling price provisions of the *Competition Act*. In its ruling, the Tribunal found that Sears had not sold a substantial volume of the tires at the regular prices featured in the advertisements, and that Sears could not truly have believed that its regular tire prices were genuine and bona fide prices. The Tribunal also upheld the constitutionality of the relevant provisions of the *Competition Act*.

The written decision was followed in April by an order for Sears Canada Inc. to pay a \$100 000 administrative monetary penalty, as well as \$387 000 towards the Bureau's legal costs. The Tribunal's order also prohibited Sears' automotive business division from engaging in similar conduct for a period of 10 years. The administrative monetary penalty, which was agreed to by Sears in a joint submission to the Tribunal, was the maximum that could be imposed in these circumstances.

Fabutan Sun Tan Studios

In March 2005, the Bureau filed an application with the Competition Tribunal to stop Calgary-based Fabutan Sun Tan Studios and its president, Douglas McNabb, from making false representations to the public about the health benefits of indoor tanning. The company allegedly implied that moderate indoor tanning treated vitamin D deficiency and seasonal affective disorder, stimulated metabolism and prevented or reduced the risk of cancer, heart or cardiovascular disease, osteoporosis and sunburn. The company also stated that tanning in moderation is safe. The Competition Bureau asked the Tribunal to order Fabutan to stop making certain representations regarding the benefits and safety of indoor tanning, to publish a corrective notice and to pay an administrative monetary penalty.

Performance Marketing Ltd.

This is the Bureau's first case under Project FairWeb, a dedicated Internet surveillance and enforcement program aimed at combating misleading and deceptive advertising found on the Internet.

In December 2004, the Bureau registered a consent agreement with the Competition Tribunal in which Performance Marketing agreed, among other things, to refund consumers the full price of two diet patches, called Dyapex and Zypapex.

Performance Marketing claimed that the patches were a safe and natural weight loss product, giving the false impression that without performing any physical exercise or dieting individuals could lose weight, reduce their appetite, control their cravings and speed up their metabolism. The patches were sold through the company's affiliates and advertised on numerous websites hosted under a variety of addresses. Performance Marketing also failed to enforce its anti-spam policy, which resulted in its affiliates using spam to sell its products.

Under the terms of the consent agreement, Performance Marketing has agreed to do the following:

- ensure that spam is not used as a means of marketing its products;
- stop making any performance claims to the public, unless the Bureau agrees that they are based on adequate and proper tests;
- post a corrective notice on its website; and
- provide a full refund to those who purchased the product.

Urus Industrial Corporation (Koolatron)

In July 2004, Urus Industrial Corporation, operating as Koolatron, and the Commissioner of Competition registered a consent agreement with the Competition Tribunal concerning the sale and marketing of the AB Energizer, an electronic muscle stimulation device. The Bureau's inquiry concluded that Urus, through infomercials and its website, made representations that could give consumers the false impression that by using the device they could lose weight, obtain well-defined abdominal muscles and replace the workout benefits of a fully equipped gymnasium without doing any physical exercise.

Under the consent agreement, Urus agreed to stop selling and marketing the device and any similar devices offering weight loss or muscle toning that do not require exercise, unless the Bureau agreed that the claims were based on adequate and proper tests. Urus also agreed to refund any unsatisfied consumers, to broadcast corrective notices on each of the television stations initially used for the promotion of the AB Energizer and to pay an administrative monetary penalty of \$75 000. It also agreed to establish, implement and maintain a formal corporate compliance program regarding the use and content of advertisements and other promotions.

Platinum Vapour Injector

In May 2004, the Federal Court of Appeal upheld a Competition Tribunal ruling that found that claims made to consumers about a fuel-saving device known as the Platinum Vapour Injector (PVI) were false or misleading.

The 2002 Tribunal decision ordered the company to stop making fuel-saving and emission-reduction claims about the PVI, and ordered the company and individuals to pay an administrative monetary penalty.

The Federal Court of Appeal denied the company's appeal of the Tribunal decision. At the same time, the Court also found that the Tribunal had erred in not ordering the company to publish corrective notices.

Federal Auction Service

In March 2005, the Bureau registered a consent agreement with the Competition Tribunal under which Federal Auction Service and its president, Amir Durrani, agreed not to make representations that the company had been retained, authorized or instructed to sell items on behalf of the federal government, unless those representations were accurate. The company agreed to pay an administrative monetary penalty of \$25 000. The consent agreement also required the company to clearly identify the volume and source of each item for sale at its auctions, to publish corrective notices in newspapers and on its website, and to implement a formal company compliance policy regarding the use of promotions.

Goodlife Fitness Clubs Inc.

In February 2005, in a consent agreement filed with the Competition Tribunal, Goodlife Fitness Clubs Inc. agreed to stop making representations about the price of memberships in its clubs that failed to adequately disclose all the mandatory additional fees. It also agreed to pay an administrative monetary penalty of \$75 000. The consent agreement also required the company to publish a corrective notice on its website and in certain Ontario and Quebec newspapers, and to administer a new corporate compliance policy about promotions. Goodlife owns and operates 90 fitness clubs in six Canadian provinces.

ALTERNATIVE CASE RESOLUTION

In 2004–2005, the Bureau settled through alternative case resolution 35 matters under the false or misleading representations and deceptive marketing practices provisions of the *Competition Act* and the provisions of the three standards-based statutes.¹

The Bureau may examine certain matters under both the criminal and civil provisions of the *Competition Act*, the provisions of the standards-based statutes or both. In each case, the Bureau examines matters under all relevant provisions of the statutes it enforces. The following are examples of cases in which concerns were raised under the civil false or misleading representations and deceptive marketing practices provisions of the Act.

SEAL OF AUTHENTICITY

In June 2004, the Bureau resolved a complaint regarding a certification seal on the bottle label of an apple-based product. The certification seal could have potentially led consumers to believe the seal had been awarded by an independent organization when in fact it belonged to the company. The manufacturer also used its website to promote the seal as proof of the product's authenticity. This practice gave the company an unfair advantage over manufacturers of identical products. When the Bureau informed the company of the requirements of the *Competition Act*, it agreed to stop using and publicizing the seal.

¹ See page 8 for a general description of the criminal false or misleading representations and deceptive marketing practices provisions of the *Competition Act* and a general description of the *Consumer Packaging and Labelling Act*, the *Precious Metals Marking Act* and the *Textile Labelling Act*. See page 24 for a general description of the civil false or misleading representations and deceptive marketing practices provisions of the *Competition Act*.

RETAIL SALE FLYERS

In April 2004, the Bureau responded to an enquiry from a health-food distributor that discovered that 1.4 million of its sale flyers had advertised incorrect prices for two products.

As a result of discussions with the Bureau, the company provided written and verbal assurance that corrective notices would be published in the same newspapers that carried the flyers, that in-store corrective notices would be posted, and that a quality control program would be put in place to prevent similar errors.

FASTENER PRODUCTS

See page 17 for a summary of this case.

TELECOMMUNICATIONS COMPANY

See page 18 for a summary of this case.

WINDSHIELD WASHER ANTIFREEZE

See page 18 for a summary of this case.

JEWELLERY RETAILER

In April 2004, the Bureau resolved a complaint alleging that a jewellery retailer's Yellow Pages advertisement that included the phrase "50% off on jewellery year-round" was potentially misleading.

After being contacted by the Bureau, the company agreed to remove the advertisement from subsequent editions of the Yellow Pages and to remove all in-store signs carrying the advertisement. The company also agreed to place a corrective notice in the local newspaper.

NATIONAL PUBLISHING COMPANY

In December 2004, the Bureau resolved a complaint under the promotional contests provision of the *Competition Act* regarding a delay in the distribution of prizes. The contest was advertised on a website and open to all residents of Canada. The prizes included 10 trips valued at approximately \$5000 each and secondary prizes valued between \$28.95 and \$99.99. The complainant discovered that she had won a secondary prize by checking the promoter's website, but she had never been notified of her win.

Although the contest closed on October 20, 2003, a number of secondary prizes were not sent to the winners until November 5, 2004. This could have raised an issue under the Act.

Company representatives indicated that mistakes did occur with the distribution of secondary prizes because of confusion caused by overlapping responsibilities in different cities. The company took 12 months to investigate, identify and resolve the problem. To ensure future compliance with the Act, the company agreed to do the following:

- remind the people responsible for promotional contests in each of their markets to keep proper documentation for future contests; and
- establish safeguards to ensure that all prizes are distributed expeditiously, ideally within 30 days of a contest's conclusion, with remedial action when a prize is not delivered within that time frame.

WRITTEN OPINIONS

The Bureau provides legally binding written opinions to businesses seeking to comply with the *Competition Act*. Of the 22 written opinions the Bureau issued in 2004–2005 on the civil and criminal false or misleading representations and deceptive marketing practices provisions of the Act, seven dealt with the civil provisions, specifically, paragraph 74.01(1)(a) and section 74.06. Paragraph 74.01(1)(a) prohibits all representations, in any form whatever, that are false or misleading in a material respect. Section 74.06 of the Act prohibits any promotional contest that does not disclose the number and approximate value of prizes, the geographic area or areas in which the prizes may be awarded and any important information relating to the chances of winning, such as the odds. The Act also stipulates that the distribution of prizes must not be unduly delayed and that participants must be selected or prizes distributed randomly or on the basis of skill.

The following are examples of written opinions that dealt with the civil provisions of the Act.

PROMOTIONAL CONTEST: CHARITABLE SWEEPSTAKES

In August 2004, a Canadian registered charity sought a written opinion on whether a proposed promotional contest would raise concerns under the *Competition Act*. The charity proposed running a casino video terminal sweepstakes game resembling 8-Liners. The charity terminals would be located at various retail establishments. To play the game consumers would need to purchase pre-paid long distance phone cards that would give access to the video terminal. The cost of the phone card would then be donated to the charity. A "no purchase necessary" method of entry would apply. The complete rules and regulations for the contest would be posted at retail establishments.

The Bureau's written opinion stated that the contest as proposed would not give the Bureau grounds to launch an inquiry.

PROMOTIONAL CONTEST: WIN A MINI COOPER

In April 2004, a real estate agency sought a written opinion on whether a proposed promotional contest would raise concerns under the *Competition Act*. The company planned to purchase a Mini Cooper Classic and promote it with advertisements, which would also include a short list of contest rules. At the end of a year, a draw for the car would take place.

The Bureau's written opinion stated that the contest as proposed would not give the Bureau grounds to launch an inquiry.

PROMOTIONAL CONTEST: TELEVISION GAME SHOW

In May 2004, a law firm sought a written opinion on behalf of a Canadian film and television production company on whether a proposed promotional contest would give rise to concerns under the *Competition Act*. The company's television program would allow home viewers to participate in a real-time contest played on the television show.

The Bureau's written opinion stated that the contest as proposed would not give the Bureau grounds to launch an inquiry.

PROMOTIONAL CONTEST: "CASH-CALL" CONTEST

In December 2004, a printing company sought a written opinion on whether a proposed promotional contest would give rise to concerns under the *Competition Act*. The company planned to operate a sweepstakes by selling break-open tickets that

would give the purchaser two minutes of long-distance calling time and an opportunity to win cash prizes by matching three symbols identified on the front of the ticket. Free tickets could also be obtained by sending a self-addressed, stamped envelope to the company. The complete rules and regulations for the contest would be posted at retail establishments and on the dispensing machines.

The Bureau's written opinion stated that the contest as proposed would not give the Bureau grounds to launch an inquiry.

ONLINE BUSINESS DIRECTORY WEBSITE

See page 20 for a summary of this case.

SPORTS POOL ON COMPUTER TERMINALS

In October 2004, a law firm sought a written opinion on behalf of an entertainment company on whether a proposed promotional contest would raise concerns under the *Competition Act*.

The company proposed to run a sports pool on computer terminals that would interact with closed circuit broadcasts accompanying sporting events. The terminals would be located in various bars. To play the game, a consumer would purchase a card that gave access to the terminal. A "no purchase necessary" method of entry would also apply. The complete rules and regulations for the contest would be posted at the bar.

The written opinion the Bureau issued on December 10, 2004, stated that the contest as proposed would give the Bureau grounds to launch an inquiry. In the Bureau's view, the official rules and regulations and the printed promotional material, which would be available in participating bars as well as on the company's website, contained misleading representations and did not

provide adequate and fair disclosure to potential participants of the number and value of prizes being awarded.

The company revised its proposal and submitted it to the Bureau, which issued a second written opinion on March 4, 2005. The second opinion stated that the contest as proposed would not give the Bureau grounds to commence an inquiry because the official rules and regulations did not include any misleading representations and provided adequate and fair disclosure to potential participants of the number and value of prizes being awarded, the existence of skill testing questions, any regional allocation of prizes (if applicable), the contest closing date, the chances of winning, and facts possessed by the contest organizer that would materially affect the chances of winning.

PREPAID CALLING CARDS

In June 2004, a long-distance prepaid calling card company sought a written opinion on the application of the *Competition Act* to the proposed marketing representations and promotional plans for its prepaid telephone calling cards.

The Bureau examined the proposal under both the criminal and civil false or misleading representations and deceptive marketing practices provisions of

the Act. It was unable to determine whether the proposed material for two calling cards provided sufficient grounds to launch an inquiry because the relevant information was not clear about how charges would be applied to these cards.

With respect to the promotional materials for the other three cards, the Bureau's opinion was that there were sufficient grounds to launch an inquiry under the false or misleading representations and deceptive marketing practices provisions of the Act for the following reasons.

- The materials contained fine print disclosures contradicting the general impression created about the advertised rates and the telephone minutes available.
- The materials used ambiguous language that could mislead consumers when choosing the products.
- In some cases, it appeared to be impossible to achieve the long-distance minutes advertised.

More details about these written opinions can be found on the Bureau's website (www.competitionbureau.gc.ca/internet/index.cfm?itemID=782&lg=e).





CHAPTER 4 REVIEWING MERGERS

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The Bureau reviews merger transactions under section 92 of the *Competition Act* and assesses whether a proposed merger is likely to substantially lessen or prevent competition. In an investigation in which the Bureau finds that a transaction meets the test of the law, the Commissioner asks the merging parties to restructure the merger or suggests remedies to solve particular competition issues. When problems cannot be resolved by negotiation, the Commissioner may decide to bring an application to the Competition Tribunal.

The number of mergers the Bureau reviewed in 2004–2005 increased significantly from the previous year. The size and scope of the mergers were also notable, as was the complexity of the competition issues they raised. In fact, there were more complex mergers in 2004–2005 than in the preceding year, particularly in the last quarter of the year.

This escalation follows three consecutive years of decline, caused in part by global economic conditions and the raising on April 1, 2003, of the dollar-value threshold above which merging parties must notify the Bureau of their transaction. Even without this increase (from \$35 million to \$50 million), the number of transactions this year would have been higher than that in 2002–2003.

The Bureau had originally estimated that increasing the size-of-transaction threshold would result in a 10 percent decrease in the number of merger notifications. Although data on the number of transactions in the \$35 million to \$50 million range is lacking, a comparison over time between the number of mergers the Bureau examined and other outside data suggests that raising the threshold did decrease the number of filings, by as much as 20 percent or more.

INTERNATIONAL CO-OPERATION

International co-operation is critical when reviewing mergers that involve more than one jurisdiction. To the extent possible, the Bureau shares its views and information about mergers with other reviewing jurisdictions, coordinates the timing of the review process and seeks consistent remedies.

In 2004–2005, the Bureau continued to co-operate with international organizations, such as the Organisation for Economic Co-operation and Development (OECD) and the International Competition Network. The Bureau works with the OECD's Competition Committee to promote international co-operation in competition enforcement in merger review procedures. In addition, it contributes significantly to the International Competition Network's Mergers Working Group (see chapter 5).

This chapter summarizes some of the key merger cases that were new or ongoing during 2004–2005 and provides comprehensive tables of merger examinations concluded during the year, along with statistics on service standards.

KEY MERGER CASES

ROGERS WIRELESS COMMUNICATIONS INC. AND MICROCELL TELECOMMUNICATIONS INC.

On September 20, 2004, Rogers Wireless Communications Inc., Rogers Communications Inc. and Microcell jointly announced that Rogers Wireless and Microcell had entered into an agreement under which Rogers Wireless would make an all-cash bid for Microcell securities valued at approximately \$1.4 billion.

The Bureau conducted a comprehensive merger review to determine the competitive effects of the removal of Microcell as a competitor in the mobile wireless services market in Canada. The Bureau was concerned about the potential for the merged firm to exercise unilateral market power, as well as whether the merger would lead to coordinated behaviour and whether Microcell could be considered a maverick in the mobile wireless market. (A maverick is a firm with a strong incentive to deviate from coordinated behaviour and thereby provide a strong stimulus to competition in the market.)

After carefully reviewing the merger's competitive effects on the mobile wireless industry, the Bureau concluded the following.

- The transaction would not create or enhance market power in the mobile wireless market.
- The merger would not increase the likelihood of coordinated behaviour among the major cellular telephone companies.
- Microcell would have faced significant challenges in maintaining its position as competitors proceeded with the next generations of cellular service offerings.

On November 3, 2004, the Bureau announced that it had cleared the proposed acquisition.¹ Subsequently, the Bureau issued a technical backgrounder and published it on its website (www.competitionbureau.gc.ca/internet/index.cfm?itemID=257&lg=e).

¹ The Commissioner took no part in this matter.

WEST FRASER TIMBER CO. LTD. AND WELDWOOD OF CANADA LTD.

On December 7, 2004, the Bureau filed a consent agreement with the Competition Tribunal, addressing competition concerns raised by the merger of West Fraser Timber Co. Ltd. and Weldwood of Canada Ltd. The agreement allowed the forestry companies to merge while preserving choice for independent timber harvesters, wood re-manufacturers and log sellers in northern and southern parts of British Columbia.

The consent agreement required West Fraser and Weldwood to sell their sawmill interests in Babine Forest Products Limited and in Burns Lake and Decker Lake (Babine Timber Limited) and associated forest tenures. West Fraser also agreed to surrender certain timber harvesting rights in the Williams Lake to 100 Mile House area. This would permit a new offering of forest tenures, thereby removing significant barriers to competition and allowing a new player to enter the market or an existing one to expand its capacity. The agreement provided for the appointment of a trustee to complete the sales should West Fraser be unable to sell the assets as agreed. The registered consent agreement can be found on the Tribunal's website (www.ct-tc.gc.ca/CMFiles/CT-2004-013_0001b_38OBP-1122005-9848.pdf?windowSize=popup).

In February 2005, the Burns Lake Native Development Corporation et al. filed an application with the Tribunal for an order rescinding or varying the consent agreement to recognize the applicants' rights and interests. This litigation is ongoing.

TOLKO INDUSTRIES LTD. AND RIVERSIDE FOREST PRODUCTS LTD.

On November 18, 2004, the Bureau filed a consent interim agreement with the Competition Tribunal with regard to the acquisition of Riverside Forest Products Ltd. by Tolko Industries Ltd. This agreement and the resulting Tribunal order hold separate all of Riverside's assets in the Okanagan-Shuswap Forest District that give rise to competition concerns and preserves the Tribunal's ability to order appropriate relief pending completion of the Bureau's review of the transaction. The order expired on December 29, 2004. Tolko extended the order through an undertaking that expired on January 31, 2005. Tolko then provided undertakings to hold the Armstrong mill and associated tenures separate while the Bureau continued its inquiry. At year-end, the Bureau's review was ongoing.

CANADIAN NATIONAL RAILWAY COMPANY AND BRITISH COLUMBIA RAIL LIMITED

On November 25, 2003, the Canadian National Railway Company (CN) and the Government of British Columbia announced that CN would be acquiring the outstanding shares of British Columbia Rail Limited (BC Rail) along with a long-term lease to operate on BC Rail's railbed.

On July 2, 2004, following a comprehensive review of this very complex merger, the Bureau filed a consent agreement with the Competition Tribunal aimed at preserving competition for interline transportation of lumber and other commodities, and maintaining competitive rates and services for grain transportation in the Peace River area.

With regard to interline traffic, the consent agreement contains an “open gateway” arrangement that should allow shippers to continue to have direct access to competing rail carriers in Vancouver for the long-haul transportation of their products to various markets in North America. The arrangement includes a set of published rates for the haulage of traffic between BC Rail points and Vancouver, where competing carriers can pick up rail cars for transportation to final destinations. In addition, clear standards have been set to measure CN’s compliance with its commitment to improve BC Rail’s transit times. Safeguards have also been introduced to see that shippers are not discriminated against for choosing competing long-haul carriers.

As well, the consent agreement includes measures to protect the competitive prices and maintain the frequency of switching service offered to grain shippers in the Peace River area. It also contains safeguards aimed at ensuring non-discriminatory supply of covered hopper cars for the transportation of grain. The registered consent agreement can be found on the Tribunal’s website (www.ct-tc.gc.ca/CMFiles/CT-2004-008_0001a_53PXD-3142005-99.pdf?windowSize=popup).

WASTE MANAGEMENT OF CANADA AND BROWNING-FERRIS INDUSTRIES LTD.

On June 28, 2004, following a contested hearing held in late 2003, the Competition Tribunal dismissed with costs an application by Waste Management of Canada (formerly Canadian Waste Services) to rescind a divestiture order. The Tribunal found that the circumstances leading to its October 2001 order requiring divestiture of the Ridge Landfill had not changed; therefore, Waste

Management still had to comply with it. On July 21, 2004, Waste Management filed an appeal in the Federal Court of Appeal and sought a stay of the order, pending the appeal. The Federal Court of Appeal granted a stay on August 6, 2004, and agreed to hear the appeal on November 4, 2004.

At the appeal hearing, the Federal Court of Appeal dismissed the appeal. As a result, Waste Management had 60 days to sell the Ridge Landfill. Deutsche Bank carried out the sale on behalf of Waste Management. Following a thorough review of prospective purchasers, the Commissioner approved BFI Canada Inc. as an acceptable purchaser. The acquisition of the Ridge Landfill by BFI Canada Inc. closed on January 4, 2005.

BERTELSMANN AG AND SONY CORPORATION

In December 2003, Bertelsmann AG (BMG) and Sony Corporation of America announced their intent to form a global, jointly owned recorded music enterprise to be named Sony BMG.

In light of the high degree of concentration in the industry, the Bureau conducted an in-depth review of the proposed joint venture. In particular, it carefully examined the possibility that the transaction would reduce competition by making coordinated behaviour among record companies more likely. The examination did not reveal evidence of previous coordinated behaviour among the major record companies in Canada, nor did it suggest that the transaction would likely create potential for such behaviour. The Bureau co-operated with the Competition Directorate of the European Commission and the United States Federal Trade Commission throughout the review. On July 29, 2004, the Bureau announced that there were no grounds for challenging the transaction.

MERGER ENFORCEMENT GUIDELINES

In March 2004, the Bureau released draft revisions to its *Merger Enforcement Guidelines*. Various stakeholders provided written submissions concerning the guidelines, including the Canadian Bar Association, individual members of the Canadian competition bar, the American Bar Association, economists and other interested parties. The Bureau posted these submissions on its website and subsequently held public consultations with stakeholders in Vancouver, Toronto and Montréal in June and July 2004. It also held extensive discussions with competition authorities in the United States and Europe.

After careful consideration of stakeholders' comments, the Bureau revised the March 2004 draft of the guidelines to better explain various points. The revised guidelines were released in September 2004 and are available on the Bureau's website (www.competitionbureau.gc.ca/internet/index.cfm?itemID=1245&lg=e).

BANK MERGER ENFORCEMENT GUIDELINES

In June 2003, the Government issued its response to two House of Commons and Senate committee reports, *Large Bank Mergers in Canada: Safeguarding the Public Interest for Canadians* and *Canadian Businesses and Competition in the Public Interest: Large Bank Mergers in Canada*, with a recommendation that the Bureau review the *Bank Merger Enforcement Guidelines*. The guidelines set out the Bureau's analytical framework for assessing the competitive effects of a merger involving two or more banks listed in Schedule 1 of the *Bank Act*.

The Bureau consulted stakeholders in the fall of 2003 and sought public comment on the revised guidelines in February 2004. All submissions were made available to the public and posted on the Bureau's website (www.competitionbureau.gc.ca/internet/index.cfm?itemID=1355&lg=e), except when confidentiality was specifically requested. The Bureau has reviewed the comments it received and intends to issue the revised guidelines concurrently with the Government's policy paper on large bank mergers.

MERGER EXAMINATIONS, 2004–2005

EXAMINATIONS COMMENCED (1)	269
Notifiable Transactions	77
Advance Ruling Certificate Requests (2)	214
(1) Includes notifiable transactions, advance ruling certificates and examinations commenced for other reasons, but not ongoing examinations from the previous fiscal year. (2) Total number of notifiable transactions with advance ruling certificate requests exceeds the number of examinations commenced because in many instances the parties filed a long- or short-form notification along with a request for an advance ruling certificate.	
EXAMINATIONS CONCLUDED (1)	265
No Issue Under the Act	259
Advance Ruling Certificates Issued (2)	179
With Agreed Remedies (A)	3
Consent Orders and Registered Consent Agreements (3)	2
Contested Proceedings (4)	0
Parties Abandoned Proposed Mergers in Whole or in Part as a Direct Result of the Commissioner's Position	1
Proposed Mergers Abandoned for Other Reasons (5)	2
(1) When a transaction has a notification as well as an advance ruling certificate, it is only counted once. This number also includes advance ruling certificates and matters that have been concluded before or withdrawn from the Competition Tribunal. (2) <i>Advance Ruling Certificates Issued</i> is a subset of the <i>No Issue Under the Act</i> category. These cases have only been counted once in <i>Examinations Concluded</i> . (3) <i>Consent Orders and Registered Consent Agreements</i> is a subset of the <i>With Agreed Remedies</i> category. These cases have only been counted once in <i>Total Examinations Concluded</i> . (4) Year Completed. (5) Cases for which the Bureau opened a file but parties abandoned the transaction for reasons unrelated to the Bureau's review and before completion of the review. (A) Consent agreements registered with Competition Tribunal: West Fraser and Weldwood, and CN and BC Rail. In Sanofi-Synthelabo/Aventis, the worldwide divestitures accepted by the European Commission resolved competition concerns in Canada.	

TOTAL EXAMINATIONS DURING THE YEAR	283
Total Examinations Concluded	265
Examinations Ongoing at Year-end	18
ADVISORY OPINIONS ISSUED	0
SECTION 92 MATTERS BEFORE THE TRIBUNAL AND THE COURTS ⁽¹⁾	
Ongoing at Year-end	0
Concluded ⁽²⁾ or Withdrawn ^(B)	2
(1) Includes applications for consent orders and consent agreements. (2) "Concluded" means that the Competition Tribunal or the courts issued an order or decision and there were no further appeals. (B) Cases concluded: West Fraser and Weldwood, and CN and BC Rail.	
OTHER TRIBUNAL PROCEEDINGS ⁽¹⁾	
Ongoing at Year-end ^(C)	3
Concluded ⁽²⁾ or Withdrawn ^(D)	2
(1) Includes section 106 applications. (2) "Concluded" means that the Competition Tribunal or the courts issued an order or decision and there were no further appeals. (C) Rona section 106 application, <i>Commissioner of Competition v. Rona</i> divestiture approval under section 105, <i>Burns Lake Native Development Corporation et al. v. Commissioner of Competition</i> and West Fraser Timber Co. Ltd. and West Fraser Mills Ltd. section 106(2) application. (D) Cases concluded: Waste Management of Canada and Browning-Ferris (section 106), and Tolko/Riverside (section 100).	

BREAKDOWN OF MERGERS BY YEAR, 2002–2005

BUSINESS LINE	2001–2002	2002–2003	2003–2004	2004–2005
Pre-Merger Notification Filings*	59	28	22	31
Advance Ruling Certificate Requests	243	224	159	214
Other Examinations	26	27	21	24
TOTAL MERGERS	328	279	202	269

* Excludes notification filings in which advance ruling certificates were also requested.

MERGER REVIEW: MEETING SERVICE STANDARDS

NUMBER OF TRANSACTIONS				
COMPLEXITY	2001–2002	2002–2003	2003–2004	2004–2005
Not Complex	271	215	165	213
Complex	41	21	18	19
Very Complex	2	2	2	8
TOTAL	314	238	185	240

SERVICE STANDARDS MET					
COMPLEXITY	TARGET	2001–2002	2002–2003	2003–2004	2004–2005
Not Complex	14 days	258 (95.7%)	213 (99.1%)	164 (99.4%)	208 (97.7%)
Complex	10 weeks	36 (87.8%)	20 (95.2%)	17 (94.4%)	17 (89.5%)
Very Complex	5 months	2 (100%)	2 (100%)	2 (100%)	7 (87.5%)
TOTAL		296 (94.3%)	235 (98.7%)	183 (98.9%)	232 (96.6%)



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 at www.competitionbureau.gc.ca/internet/index.cfm?itemID=1346&lg=e.) 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 at www.competitionbureau.gc.ca/internet/index.cfm?itemID=1346&lg=e.) 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 at www.competitionbureau.gc.ca/internet/index.cfm?itemID=1346&lg=e.) 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 website (www.competitionbureau.gc.ca/internet/index.cfm?itemID=1346&lg=e).

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 non-governmental 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; available at www.oecd.org/dataoecd/51/17/34425393.pdf) 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 (www.apec-iap.org/document/CDA_2004_IAP.htm).

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 cross-border 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 co-operation 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.





CHAPTER 6 MODERNIZING CANADA'S
APPROACH TO COMPETITION LAW

The *Competition Act* is a vital piece of Canadian legislation that affects virtually all industry sectors. Its goal is to ensure that Canadians enjoy the benefits of a competitive economy, including competitive prices, product choice and quality services. To ensure that the Act remains effective in a rapidly changing global environment, the Government of Canada takes an incremental approach to amendments. The Bureau actively seeks the views of stakeholders and the general public when legislative changes are proposed.

AMENDMENTS TO THE COMPETITION ACT

BILL C-19

In April 2002, the House of Commons Standing Committee on Industry, Science and Technology released a report entitled *A Plan to Modernize Canada's Competition Regime*. The report proposed a wide range of amendments to the *Competition Act*, including the following:

- strengthening the civil provisions;
- reforming the treatment of conspiracies; and
- eliminating the criminal pricing provisions dealing with price discrimination, geographic price discrimination, predatory pricing and promotional allowances.

The Committee also recommended the following:

- repealing the airline-specific provisions to return the *Competition Act* to being a law of general application; and
- implementing general provisions that comprise sufficient deterrence to achieve adequate compliance.

In response to these recommendations, the Competition Bureau committed to consult widely with stakeholders on a number of specific proposals. In June 2003, the Bureau launched a consultation process with Canadians on certain proposed changes to the Act.

On April 13, 2004, the Public Policy Forum published a report about the consultations.

On November 2, 2004, Bill C-19, an Act to amend the *Competition Act* and to make consequential amendments to other Acts, was introduced in the House of Commons. The proposed changes contained in the Bill are designed to strengthen Canada's competition framework in a global economy, balancing the interests of consumers and large and small businesses. These proposed amendments are firmly rooted in the Industry Committee's comprehensive 2002 report and will benefit consumers and businesses by doing the following:

- giving authority to the Commissioner of Competition to seek restitution for consumer loss resulting from false or misleading representations;
- introducing a general administrative monetary penalty for abuse of dominance in any industry;
- removing the airline-specific provisions from the Act to return it to being a law of general application;
- increasing the administrative monetary penalties for deceptive marketing practices; and
- decriminalizing the pricing provisions.

Bill C-19 received first reading in the House of Commons on November 2, 2004, and was referred to the Standing Committee on Industry, Natural Resources, Science and Technology on November 16, 2004. The Committee's study is ongoing.

BILL C-249

As reported in the Bureau's 2003–2004 annual report, Bill C-249, an Act to amend the *Competition Act*, proposed amending section 96 of the Act to make efficiencies a factor in the analysis of a proposed merger. The House of Commons passed this private member's bill, but it was still on the order paper in the Senate when the 2004 election was called. In September 2004, the Bureau launched extensive consultations on the role of efficiencies under the *Competition Act*. To assist in discussions, the Bureau issued a consultation paper entitled *Treatment of Efficiencies in the Competition*

Act. Details of this consultation paper are reviewed in chapter 7.

In January 2005, following a period in which the Bureau accepted written submissions on the consultation paper, the Bureau held round tables in Vancouver, Toronto and Montréal to further the discussion with stakeholders. In addition, an international round table on efficiencies, including participants from the European Union, the United States, Australia, Mexico and the United Kingdom, took place in October 2004.

Finally, the Bureau commissioned an advisory panel of experts with backgrounds in business, economic policy and international trade to assess the role that efficiencies should play in the administration and enforcement of the *Competition Act* in the context of Canada's evolving economy.

The Bureau will make the reports on these three consultation initiatives public when they are available.

BILL C-27

On November 26, 2004, the Minister of Agriculture and Agri-Food introduced Bill C-27 in the House of Commons. Bill C-27 comprises a number of legislative changes, including the deletion of several references to the Minister of Industry in the *Consumer Packaging and Labelling Act*, and sets out statutorily the transfer of duties between Industry Canada and the Agriculture and Agri-Food Canada in the *Competition Act*.

PRIVATE MEMBER'S BILLS

Private member's bills related to the work of the Bureau include the following:

- Bill C-229: An Act to establish the Energy Price Commission;
- Bill C-242: An Act to amend the *Criminal Code* (proceeds of crime);
- Bill C-249: An Act to amend the *Bank Act* (bank mergers);
- Bill C-316: An Act to amend the *Bank Act* (branch closures); and
- An Act to amend the *Competition Act* (investigations by the Commissioner and class proceedings), which was also designed to make a related amendment to another Act.





CHAPTER 7 HOW WE DO IT ALL

Education is essential to the work of the Bureau. Consumers need truthful and accurate information to make informed purchasing decisions. Similarly, businesses need information about the Bureau and its enforcement approach to ensure they can comply with the law. The Bureau increasingly uses the media to reach Canadians. In 2004–2005, the Bureau issued 38 news releases and 27 information notices describing the benefits of its activities for the economy and for Canadians. Staff also responded to hundreds of enquiries from journalists in Canada and abroad. Senior Bureau managers and Communications Branch staff were available to the media and acted as spokespersons on key issues.

MEDIA RELATIONS

In This outreach resulted in 2624 media stories referring to the Bureau, an increase of almost 25 percent from the previous year. Independent analysis indicates that more media outlets than ever before are covering the Bureau and that the coverage is increasingly positive.

Stories that appeared in the media included those on merger reviews and Bureau investigations into various anti-competitive business practices. Coverage also focused on consumer issues, which shows that Bureau stories did not only appear in the business section of newspapers. The amount of radio and television coverage also increased from previous years. Broadcast stories reached small, regional communities where people might not have been exposed to Bureau messages previously.

INFORMATION BULLETINS, GUIDELINES, HANDBOOKS AND PAMPHLETS

REVISED MERGER ENFORCEMENT GUIDELINES

On September 21, 2004, the Bureau issued the *Revised Merger Enforcement Guidelines* to replace the guidelines issued in 1991. The key improvements are the following:

- a better explanation of the Bureau's approach to market definition;
- a more detailed description of the Bureau's analysis of competitive effects arising from a merger; and
- a summary of the current law on efficiencies as set out in section 96 of the *Competition Act*.
- The purpose of avoidable costs set out in the Airline Regulations (to distinguish predatory actions from vigorous competition) was to focus on the response of a dominant domestic carrier to competition or new entry into the market.
- A dominant carrier's actions that could attract enforcement action include reducing fares to undercut competitors, adding significant capacity, failing to remove capacity in accordance with seasonal or other usual practices, and substantially increasing the number of tickets offered at fares matching the lowest fares of a competitor.

CLARIFICATION OF THE ENFORCEMENT APPROACH IN THE AIRLINE INDUSTRY

On September 23, 2004, the Bureau clarified its approach on the enforcement of the *Competition Act* in the airline industry by sending an open letter to major Canadian airlines. The letter outlined changes to the airline industry and indicated the policy it would follow when enforcing the predatory pricing and abuse of dominance provisions of the Act in light of these changes.

The major points in the Bureau's policy are as follows.

- The principles established by the Competition Tribunal (in the first phase of the Air Canada case) regarding application of the avoidable cost test are relevant for similar cases that might arise in the future.
- The avoidable cost test would only constitute one part of the abuse of dominance analysis. The other elements of section 79 (i.e. the practice of anti-competitive acts and a substantial lessening or prevention of competition) would also have to be considered.

- The Bureau would not take enforcement action against fare matching (i.e. reducing fares to match but not to undercut competitors' prices), unless it is accompanied by other acts, such as a significant increase in capacity or in seats offered at the lowest price.
- The Bureau would consider all the elements of abuse of dominance rather than only the avoidable cost test when deciding to take enforcement action against a dominant carrier responding to entry or competition by doing something more than fare matching.

In early August 2004, Air Canada made an application to the Minister of Transport to rescind the undertakings Air Canada provided to the Commissioner of Competition in December 1999. The Minister requested the Commissioner's views and rescinded the undertakings by Order in Council on August 17, 2004.

CONSULTATIONS ON THE TREATMENT OF EFFICIENCIES UNDER THE COMPETITION ACT

On September 24, 2004, the Bureau launched national consultations on the role of efficiencies under the *Competition Act*. To assist in those consultations, the Bureau issued a consultation paper entitled *Treatment of Efficiencies in the Competition Act*. The paper covered the Bureau's experience with the current treatment of efficiencies under the Act as well as other jurisdictions' experience with efficiencies. It also examined the merits of various proposals, including the following:

- maintaining the status quo (i.e. an efficiencies defence);
- maintaining the status quo except when the merger created a monopoly or near-monopoly;
- reviewing efficiencies as part of the overall assessment of a merger (rather than an efficiencies defence);
- allowing a post-merger assessment of whether the predicted claims of efficiencies were achieved; and
- allowing for the consideration of efficiencies in specialization agreements, joint ventures and strategic alliances.

The Bureau hired the Intersol Group to conduct national consultations based on the consultation paper. As well as reviewing the results of this process, the Commissioner will look at the results of an international round table discussion that coincided with an Organisation for Economic Co-operation and Development meeting in October 2004.

In addition, on March 18, 2005, the Commissioner appointed an advisory panel of experts with

backgrounds in business, economic policy and trade to help assess the role that efficiencies should play in the context of Canada's economy in the 21st century. The Advisory Panel on Efficiencies will consider the general economic and business implications of the current treatment of efficiencies under the *Competition Act*. It will comment on the characteristics that Canada's competition policy framework should contain in order to ensure that efficiencies are properly addressed. It will also consider the treatment of efficiencies in other jurisdictions and review the results of national consultations on efficiencies initiated by the Bureau. Its report will be published in the summer of 2005.

AUTHENTICATING CANADIAN DIAMOND CLAIMS

The Bureau continues to participate as an observer member of the Canadian Diamond Code Committee. This group administers the Bureau-endorsed *Voluntary Code of Conduct for Authenticating Canadian Diamond Claims*, which was revised in July 2004. For more details, go to www.canadiandiamondcodeofconduct.ca/html/EN_code.htm.

WARNINGS TO CONSUMERS

CASHABLE VOUCHERS

In December 2004, the Bureau issued a warning about cashable voucher promotions. A growing number of Canadian retailers have been running cash-back promotions to lure customers to spend money on big-ticket items. These promotions often require purchasers to file their claims within a limited time and under strict conditions. There is also no guarantee that purchasers will get back 100 percent of the voucher's face value.

SKYBIZ.COM

In May 2004, the Bureau advised Canadian consumers, on behalf of the U.S. Federal Trade Commission (FTC), that Canadians who invested in SkyBiz.com could submit a claim for redress. In June 2001, the FTC charged that SkyBiz violated the Federal Trade Commission Act. SkyBiz promoted a work-at-home business opportunity and a chance to earn thousands of dollars. Participants were required to purchase a \$125 e-Commerce Web Pak. The case, scheduled to go to trial in January 2003, was settled out of court. The settlement provided \$20 million for consumer redress, among other elements.

WORK-AT-HOME OPPORTUNITIES

In May 2004, the Bureau warned Canadians about work-at-home business opportunities, which are often fraudulent, requiring individuals to invest money in order to work.

THE WEBSITE

The Bureau's website (www.competitionbureau.gc.ca) continues to provide a wealth of valuable information to a wide and varied audience — from consumers and businesses to law and media professionals.

Following an in-depth examination of the Bureau's audience and its information needs, an assessment of the site's existing content as well as the identification of best practices and an analysis of peer sites, the Bureau restructured the site.

The site continues to feature an automatic e-mail distribution list that sends subscribers information updates. To subscribe, go to <https://www.competitionbureau.gc.ca/internet/index.cfm?itemID=1046&lg=e>.

Information notices, news releases, speeches, warnings and the most recent versions of publications are available on the site. Consumers and businesses also have access to electronic commerce applications, such as the CA Number Database.

INFORMATION CENTRE

The Information Centre is the primary access point for incoming information requests and complaints from Canadians, international consumers, businesses and agencies. The Bureau's clients include business people, chief executive officers, members of Parliament, the media, lawyers, consumers, domestic and foreign corporations, importers, retailers and the general public. Information and complaint specialists provide information and advice to clients, mainly over the telephone, and register complaints on subjects such as the following:

- false or misleading representations and deceptive marketing practices;
- packaging and labelling of consumer products;
- textiles and precious metals;
- CA identification number searches;
- restraints to competition; and
- mergers.

The Information Centre is also responsible for providing information and advice related to the four statutes administered by the Bureau, and for capturing complaints that may lead to formal Bureau investigations. The information gathered by the Centre is essential to helping the Bureau shape its public awareness and enforcement activities.

The public can contact the Centre in several ways:

- through its toll-free line (1 800 348-5358) from 8:30 a.m. to 5:00 p.m. (Eastern Time);

- through an electronic complaint form (www.competitionbureau.gc.ca/internet/index.cfm?itemID=130&lg=e);
- by facsimile (819-997-0324); and
- by mail (Competition Bureau, 50 Victoria Street, Gatineau QC K1A 0C9).

STAKEHOLDER CONSULTATIONS

Stakeholder outreach ensures that the Bureau is in a position to take all Canadian interests into account as it promotes and maintains a fair and competitive economy. Throughout 2004–2005, the Commissioner held consultations across Canada with representatives of small, medium-sized and large businesses, consumer and public interest groups, and private sector organizations, members of the legal and academic communities, and provincial government and law enforcement officials. In August and September 2004, the Commissioner travelled to Nunavut, the Northwest Territories and Yukon to better understand the competition concerns of Canadians living in the North.

A team dedicated to outreach to small and medium-sized business worked on several projects this past year. First, for the launch of the Bureau's new website, the team developed a portal for owners of small and medium-sized businesses that provides targeted information and messages about many of the common competition concerns that arise for them.

The team also identified key organizations that may better help the Bureau understand the competition issues facing small and medium-sized businesses. Bureau representatives met with members of the Canadian Federation of Independent Business in January 2005. The participants provided the Bureau with excellent feedback on their concerns and

presented future possibilities for Bureau messages to reach the organization's 105 000 members.

Finally, the team met with representatives from Industry Canada's Small Business Policy Branch, who provided insight into policy issues and upcoming Industry Canada initiatives affecting small and medium-sized businesses.

The large enterprise outreach team identified key organizations that represent large companies, and Bureau representatives met with two of the organizations during the year. The meetings were a valuable opportunity for representatives of these organizations and the Bureau to exchange views.

CONSUMER AND COMPETITION DIALOGUE

On December 6, 2004, the Bureau hosted a meeting with representatives of various consumer associations to develop an open and constructive dialogue about keeping Canadian consumers well informed on competition issues. The one-day meeting, which the Commissioner chaired, provided the Bureau with an opportunity to outline its work, mandate and benefit to consumers, explain its approaches to competition law enforcement and explore ways to strengthen links between the Bureau and consumer organizations. Participants were representatives from eight Canadian consumer associations: Option consommateurs, Public Interest Advocacy Centre, L'Union des consommateurs, Consumers Council of Canada, Automobile Protection Association, Canada's Association for the Fifty Plus, Consumers' Association of Canada, and Canadian Consumer Initiative. Senior Bureau officials and the Director General of Industry Canada's Office of Consumer Affairs also attended. It was agreed that the dialogue would continue with regular meetings.

COMMUNICATIONS PROJECTS

PAMPHLETS

On March 31, 2005, the Bureau published new pamphlets on the subjects of fraudulent work-at-home opportunities and bait and switch selling. The pamphlets provide an overview of the provisions of the *Competition Act* that touch on these anti-competitive practices and explain how they can affect consumers and businesses.

BI-ANNUAL CONSULTATION FORUM ON FEES AND SERVICE STANDARDS

In November 2004, the Bureau held its bi-annual consultation forum on fees and service standards. Since 1995, Bureau officials have met regularly with stakeholders to discuss the Fee and Service Standards Policy and related documents in order to report on the Bureau's success in meeting service standards for merger notification, discuss stakeholder concerns and report on the Bureau's progress with written opinion requests. Two performance reports were published and distributed to participants before the meeting, one on Bureau performance in merger review and the other on written opinion requests. The forum also included a discussion on the current filing fee structure and possible alternative structures. These information-sharing opportunities are positive opportunities for stakeholders to meet with Bureau representatives and share points of view. The Bureau is committed to holding these forums every two years. For more on the Bureau's Fee and Service Standards Policy, visit the Bureau's website (www.competitionbureau.gc.ca/internet/index.cfm?itemID=1337&lg=e).

OTHER INITIATIVES

ICPEN WORLDWIDE BLITZ ON SCAMS AND SPAM

In February 2005, the Bureau and 76 government agencies from around the world participated in a special two-day Internet surveillance and enforcement program. The Internet sweep was carried out under the leadership of the International Consumer Protection and Enforcement Network (ICPEN). The Bureau has been a member of this network since its creation in 1992, and always participates in this annual event. This year, the Bureau elected to focus on bogus weight loss product claims. Bureau officers searched for Canadian-based sites that were making unrealistic performance claims and sending out spam using "harvested" e-mail accounts. The Bureau will analyze the results of the sweep and take follow-up enforcement action, as necessary. Final results will be presented at the next ICPEN semi-annual meeting in November 2005.

FRAUD AWARENESS MONTH IN CANADA AND ABROAD

On February 1, 2005, the Fraud Prevention Forum, which the Bureau chairs, launched its Fraud Awareness Month campaign, the largest of its type to date in Canada. Over the course of the month, more than 40 private and public sector organizations educated Canadians about fraud. Activities included airing public service announcements on radio and television, distributing nearly 40 million fliers, posters and tip cards, and publishing newspaper advertisements and Web banners.

The Fraud Prevention Forum comprises private sector firms, consumers and volunteer groups, government agencies and law enforcement

organizations committed to fighting fraud aimed at consumers and businesses.

The concept of Fraud Awareness Month has been adopted abroad. During the fall 2004 meeting of International Consumer Protection and Enforcement Network (ICPEN), the Bureau proposed that an ICPEN Fraud Awareness Month be held within network countries. In addition to Canada, 17 ICPEN member countries ran Fraud Awareness Month in February 2005. Given the success of this first event, ICPEN has decided to repeat the initiative in 2006. A survey after Fraud Awareness Month indicated that Canadians feel public awareness is the most effective tool for combating fraud. The survey found that the majority of Canadians recalled exposure to messages relating to fraud in 2005, with most saying that what they saw, read or heard had altered the way in which they would respond to fraudulent solicitations.

Top Ten Scam Lists

During Fraud Awareness Month, organizations in various parts of Canada worked to alert consumers to common consumer fraud in their area.

In Manitoba, the Fraud Prevention Forum informed residents of the 10 most common consumer scams in the province: identity theft, Internet scams, telemarketing scams, lottery scams, deceptive sales practices, pyramid selling schemes, bogus business opportunities, bogus charities, Nigerian letter schemes and office supply scams. Participants in the campaign included the Competition Bureau, the Consumers' Bureau of the Manitoba Department of Finance, the Winnipeg Police Service, and D-Division of the Royal Canadian Mounted Police.

In southern Ontario, the Bureau, PhoneBusters and the Better Business bureaus of Hamilton, Kitchener, London and Windsor alerted residents to the 10 most common scams in the area: identity theft, Internet scams, office supply scams,

lottery scams, deceptive sales practices, bogus charities, bogus business opportunities, deceptive vacation schemes, Nigerian letter schemes and fraudulent cheque schemes. More information can be found on the Bureau's website (www.competitionbureau.gc.ca/internet/index.cfm?itemID=203&lg=e).

In British Columbia, the Bureau, the Better Business Bureau of Mainland B.C. (www.bbbvan.org) and the Business Practices and Consumer Protection Authority of British Columbia alerted residents to the 10 scams most often carried out in B.C.: Internet fraud, identity theft, bogus business and franchise opportunities, Nigerian letter schemes, bogus health and wellness products, foreign lotteries, Internet work-at-home scams and bogus employment services, bogus charities, unsolicited e-mail, and mail and office supply scams and unsolicited invoices.

British Columbia's Scam Jam 2005

Scam Jam is a one-day public fraud awareness event organized by the Better Business Bureau (www.bbbvan.org). The Competition Bureau's Pacific Region office is a sponsor of this annual event, which was held in Vancouver on March 16, 2005, and featured speakers, kiosks and a live radio show to educate people about what they can do to avoid being victims of fraud.

Creation of Atlantic Partnership

In February 2005, the Bureau announced the creation of the Atlantic Partnership: Combating Cross-Border Fraud. The goal of this partnership between law enforcement and government agencies in Atlantic Canada and the United States is to work together to reduce, identify, investigate and prosecute cross-border fraud. Partners are Canada Post Corporation, Charlottetown Police Department, Halifax Regional Police, Office of the Attorney General of New Brunswick, Royal Newfoundland Constabulary, Saint John Police Force, Service

Nova Scotia and Municipal Relations, U.S. Federal Trade Commission, U.S. Postal Inspection Service and the Competition Bureau.

SPECIAL CONSTABLE STATUS GRANTED TO COMPETITION LAW OFFICERS

Four competition law officers from the Bureau's Atlantic Region were granted special constable status, allowing them to serve summonses and subpoenas in New Brunswick while fulfilling their duties under the *Competition Act*, the standards-based statutes and the *Criminal Code*. The Bureau now has officers with special constable status in Prince Edward Island, Nova Scotia, New Brunswick, Quebec, Ontario, Manitoba, Saskatchewan, Alberta and British Columbia.

PROJECT FAIRWEB

Project FairWeb is the Bureau's first dedicated Internet surveillance and enforcement program aimed at combating misleading and deceptive advertising found on the Internet. Launched in April 2004, FairWeb's initial focus has been on misleading and unsubstantiated claims relating to bogus weight loss products. For more information, go to the Bureau's website (www.competitionbureau.gc.ca/internet/index.cfm?itemID=237&lg=e).

STOP SPAM HERE AWARENESS CAMPAIGN

The Bureau is a member of Industry Canada's Task Force on Spam, which officially launched Stop Spam Here, a public education and awareness campaign. More information is available at www.stopspamhere.ca.

ANTI-PHISHING AWARENESS CAMPAIGN

The Bureau, as chair of the Fraud Prevention Forum, joined Visa Canada and the RCMP on November 3, 2004, to launch a consumer awareness campaign about phishing scams (stealing personal identity and financial information online). For more information, go to the Bureau's website (www.competitionbureau.gc.ca/internet/index.cfm?itemID=122&lg=e).

CROSS-BORDER FRAUD AND DECEPTION

In March 2004, the Bureau signed information-sharing protocols with two of its international partners to more effectively fight cross-border consumer fraud and deception perpetrated through telemarketing, mail and the Internet. These protocols formalize how the Bureau and its law enforcement partners share complaint and investigation data, and streamline prior co-operation agreements. They advance the implementation of the 2003 *OECD Guidelines for Protecting Consumers from Fraudulent and Deceptive Commercial Activities Across Borders*. The Bureau signed a similar information-sharing protocol in 2002 with the U.S. Federal Trade Commission.

This protocol was amended in May 2004 to clarify the conditions under which certain information could be shared. A similar modification was made to the Canada-Australia Information Sharing Protocol in October 2004. In March 2005, the Canada-United Kingdom Information Sharing Protocol was amended in the same way, and a provision added concerning the disclosure gateway for the U.K. Office of Fair Trading.

VANCOUVER STRATEGIC ALLIANCE AGAINST DECEPTIVE MARKETING PRACTICES

In June 2004, the U.S. Federal Trade Commission joined the Vancouver Strategic Alliance, which had been established in March 2004 to fight deceptive marketing practices targeting citizens and businesses. The Competition Bureau and the Vancouver Police Department are also partners. The purpose of this joint venture is as follows:

- to coordinate law enforcement activities;
- to identify fraudulent, deceptive and misleading practices with a British Columbia connection;
- to facilitate information sharing; and
- to support action against individuals or groups engaging in these deceptive practices across borders.





APPENDIX I | **DISCONTINUED INQUIRIES AND
STAY OF PROCEEDINGS**

DISCONTINUED INQUIRIES

ADVERTISING

In May 2002, the Bureau opened an inquiry dealing with providers of advertising space in greater Montréal and the surrounding area who had refused to publish real estate brokerage commission rates in their advertisements. It was also alleged that certain brokers and real estate agents from the greater Montréal area had pressured the advertising space providers to act accordingly and had also pressured certain brokers and real estate agents to increase their commission rates. In June 2003, the Bureau informed these advertising space providers of the relevant provisions of the *Competition Act* with regard to price maintenance and discriminatory practices. The providers under inquiry assured the Bureau that they would take the necessary steps to comply with the *Competition Act*. The information obtained in the course of subsequent checks on the brokers and real estate agents did not justify the case or taking any further action and the inquiry was discontinued in May 2004.

LOTTERY SUBSCRIPTION

In June 2004, the Bureau discontinued its inquiry into allegations that certain direct mail marketers had made materially false or misleading representations to the public when promoting their lottery subscription services worldwide. Purveyors of these services were alleged to have done the following:

- offered to play foreign lotteries on behalf of subscribers for an undisclosed service fee;
- exaggerated the size of the prize pools to be won; and
- conveyed the false or misleading impression that recipients had won a major prize or that their

chances of winning one would be significantly enhanced by subscribing to the service.

After extensive investigation, the Bureau concluded that in some cases there was insufficient evidence to demonstrate beyond a reasonable doubt that the representations were materially false or misleading and that a criminal offence had been committed. In other cases, the Bureau concluded that the evidence did not disclose a sufficiently strong link between deceptive marketing materials and anyone in Canada to establish that they had committed a criminal offence under the *Competition Act*.

ELECTRONIC ANTI-CORROSION DEVICE

In June 2004, the Bureau discontinued its inquiry into allegations that Canadian Auto Preservation Inc. had made false or misleading representations about the efficacy and performance of its Final Coat electronic anti-corrosion device. The company had claimed that this device could inhibit corrosion on the entire surface of a vehicle. At the beginning of the inquiry, the Bureau believed that the tests provided by the company were insufficient to support these claims. At the Bureau's request, the company performed additional tests on the device and the Bureau decided that the claims could now be supported.

REAL ESTATE

In December 2004, the Bureau discontinued its inquiry into allegations that real estate companies and their common counsel had conspired to fix prices charged to telecommunications services providers for access to buildings that the real estate companies owned or managed. After reviewing the information obtained through the inquiry, the Bureau determined that the conduct in question did not amount to a violation of the conspiracy provision of the *Competition Act*.

SNOW CRAB

In December 2004, the Bureau discontinued an inquiry launched under the conspiracy provision of the *Competition Act* into allegations that, during the 1994 to 2002 fishing seasons, a number of fish processors in Newfoundland and Labrador had conspired to fix or eliminate bonus payments made to fish harvesters for snow crab and had allocated snow crab quota among themselves. The Bureau concluded that the fish processors did not have sufficient control over the market to implement an agreement that would unduly lessen competition and that there was competition among fish processors in the purchase of snow crab, including the payment of bonuses.

LAWN TRACTORS

In January 2005, the Bureau discontinued its inquiry into allegations that John Deere Limited and a wholesale retailer had unreasonably enhanced the selling price of John Deere Series 100 lawn tractors, contrary to the conspiracy provision of the *Competition Act*. The Bureau concluded that it did not have sufficient evidence of conspiracy. The price maintenance aspect of the inquiry was resolved without charges by way of a prohibition order on the consent of John Deere Limited (see page 10).

DIGITAL CHARTS

In February 2005, the Bureau discontinued an inquiry begun at the request of six residents who alleged that a company holding an exclusive licence with a government agency to market digital charts and other products had abused its dominant position, intellectual property rights or both in its sales to consumers and in its pricing and licensing arrangements with corporate entities. After investigating, the Bureau concluded the following.

- The company's policies on sales to consumers did not contravene the *Competition Act*.
- There was no evidence that the company had refused to license its intellectual property.
- The contractual arrangements between private parties to license intellectual property were of such a nature that the Bureau would generally not intervene.

CREDIT CARDS AND LOANS

In March 2005, the Bureau discontinued its inquiry into the telemarketing practices of two Canadian companies. The inquiry followed the receipt of 91 complaints from clients in the United States who were offered a MasterCard or Visa for US\$197 or a pre-approved loan for US\$500. Since the inquiry, the Bureau has received no other complaints regarding the activities of these two companies and one of them has closed. The Bureau concluded that it would not be in the public interest to continue the investigation, since information on the remaining company was transferred to other law enforcement agencies.

STAY OF PROCEEDINGS

ANTHRAQUINONE

In September 2003, charges were laid in the British Columbia Provincial Court against Chanoix Trading Ltd. and two company executives for an alleged conspiracy to lessen competition in the supply of anthraquinone, a chemical used in the manufacture of pulp. In December 2004, the Attorney General stayed charges in this matter, having determined that it was not in the public interest to proceed.



APPENDIX II SPEECHES AND PAPERS

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SPEECHES

Sheridan Scott, remarks to the Standing Senate Committee on Banking, Trade and Commerce on Bill C-249, An Act to amend the *Competition Act*, Ottawa, May 12, 2004.

Sheridan Scott, remarks on competition law compliance to the Insight Conference, Toronto, May 26, 2004.

Sheridan Scott, remarks to the 2004 Canadian Telecom Summit, Toronto, June 16, 2004.

Richard J. Taylor, remarks to the Nova Scotia Legislature Select Committee on Petroleum Pricing, Halifax, July 27, 2004.

Sheridan Scott, *Competition in a Dynamic Marketplace*, remarks to the National Competition Law Section of the Canadian Bar Association at its Annual Fall Conference on Competition Law, Gatineau, September 23, 2004.

Chris Martin, *Multi-Jurisdictional Developments: Issues of Substance and Process*, remarks to the National Competition Law Section of the Canadian Bar Association at its Annual Fall Conference on Competition Law, Gatineau, September 23, 2004.

John Barker, *Working with the Bureau*, remarks to the National Competition Law Section of the Canadian Bar Association at its Annual Fall Conference on Competition Law, Gatineau, September 23, 2004.

Sheridan Scott, *Cartel Enforcement: International and Canadian Developments*, speech given at the Fordham Corporate Law Institute during its Conference on International Antitrust Law and Policy, New York, October 7, 2004.

Sheridan Scott, *Ahead to the Future: Challenges of Competition and Competition Policy*, speech given to the C. D. Howe Institute, Toronto, October 25, 2004.

Sheridan Scott, *Leadership and Diversity: Remove Barriers to Competition so Women can Make a Difference*, address to the Women's Executive Network at the National Club, Toronto, November 16, 2004.

Sheridan Scott, remarks to the Standing Committee on Industry, Natural Resources, Science and Technology on Bill C-19, An Act to amend the *Competition Act* and to make consequential amendments to other Acts, Ottawa, November 18, 2004.

Colette Downie, *The Fix is in Detecting Cartels in Canada*, remarks to the Australian Competition and Consumer Commission at the Cracking Cartels Conference, Sydney, November 24, 2004.

Sheridan Scott, remarks on competition law and telecommunications to the International Institute of Communications at its fourth conference, Ottawa, December 9, 2004.

Sheridan Scott, remarks to the Standing Senate Committee on Banking, Trade and Commerce on a study on consumer issues in the financial sector, Ottawa, February 10, 2005.

Sally Southey, remarks to the Consumer Outreach Workshop, International Competition Network, Paris, February 16, 2005.

PAPERS

Allen, Gwilym, Joseph Monteiro and David Krause, "Transportation Alliances Under the *Competition Act*," *Canadian Transportation Research Forum, Proceedings of the 2004 Annual Conference*, Calgary, May 9–12, 2004, pp. 31–46.

Allen, Gwilym and Peter G. C. Townley, "Inter-Media Mergers: An Antitrust Alternative to the Marketplace for Ideas," *Canadian Business Law Journal*, Volume 41, Number 1, December 2004, pp. 1–18.

Matthews, Susan, Joseph Monteiro and Gerald Robertson, "Milestones in Canadian Transportation — The Future," *Canadian Transportation Research Forum, Proceedings of the 2004 Annual Conference*, Calgary, May 9–12, 2004, pp. 342–360.

Monteiro, Joseph, "Pipeline Transportation in the Natural Gas Industry," *Canadian Transportation Research Forum, Proceedings of the 2004 Annual Conference*, Calgary, May 9–12, 2004, pp. 310–325.



APPENDIX III CONFERENCES AND SEMINARS

APPENDIX III CONFERENCES AND SEMINARS

CONFERENCES

From March 29 to April 2, 2004, Bureau representatives attended the Toronto Police Service Fraud Conference in Toronto to discuss the issue of cross-border fraud.

On April 14, 2004, a Bureau official gave a presentation at the Insight Conference in Toronto on mergers and acquisitions, and antitrust and other regulatory approvals.

On April 14, 2004, a Bureau representative gave a presentation to the Groupe Réseau de crédit in Montréal on Canada's competition laws and when a company's credit policy could become the subject of a Bureau examination.

On April 29, 2004, a Bureau representative gave a presentation, *Competitive Effects Analysis: What's New in the Draft Revised Merger Enforcement Guidelines*, at the Competition Law and Policy Forum held at Langdon Hall in Cambridge, Ontario.

From May 5 to 7, 2004, a Bureau representative attended the Northern Ontario Fraud Investigators Partnership Initiative conference in Sault Ste. Marie and gave an overview of the *Competition Act* and the Bureau.

From May 25 to 27, 2004, a Bureau representative attended the Operation Roaming Charge Symposium in Chicago (sponsored by the U.S. Department of Justice) and presented an overview of the *Competition Act* and the Bureau.

From June 4 to 6, 2004, Bureau representatives attended the 38th Annual Meeting of the Canadian Economics Association. Presentations at the conference included Information and Winning: Evidence from the Canadian Treasury Auction, An Economic Analysis of Compulsory Licences for Needed Medicines, and Buying Power and Strategic Interactions. The meeting covered several areas related to competition, including horizontal

mergers, market power, competition in the financial services market, collusion, economic analysis of price discrimination, and regulatory convergence between Canada and the U.S.

From June 27 to 30, 2004, a Bureau representative attended the 29th Annual Meeting of the National Association of Consumer Agency Administrators in San Diego. The representative participated as a speaker in a panel discussion, Cross Border Fraud: New Challenges.

From July 11 to 15, 2004, a Bureau representative participated as the Canadian technical advisor on packaging and labelling requirements at the 89th National Conference on Weights and Measures, held in Pittsburgh. The theme of the conference was Recognition Through Transparency.

On August 16, 2004, a Bureau official spoke about the Bureau's role in competition law administration and enforcement at the annual meeting of the Canadian Corporate Counsel Association in Winnipeg.

From October 6 to 8, 2004, Bureau representatives attended the International Consumer Protection and Enforcement Network semi-annual meeting in London, England. The theme of the meeting was Delivering Seamless Global Enforcement. Bureau representatives gave a presentation entitled Fraud Prevention and Awareness. On October 12, a Bureau representative participated in a best practices session on fraud prevention and awareness.

On October 15, 2004, a Bureau official participated in a panel on merger review in the Americas at the American Bar Association's International Law Section Fall Meeting in Houston.

On October 20 and 21, 2004, a Bureau representative was a moderator and presenter at the International Competition Network's Investigative Techniques Workshop in Brussels.

On November 10, 2004, a Bureau representative spoke at the Nova Scotia College of Art and Design in Halifax about the *Precious Metals Marking Act*.

In November 2004, a Department of Justice lawyer representing the Bureau presented a paper at the International Competition Network Leniency Workshop in Sydney, Australia, called *Making Leniency Work: Living with Bifurcation*. Bureau representatives were also panellists at the Network's Cartel Workshop, addressing the topics of searches, leniency and interview techniques.

On November 29, 2004, a Bureau representative gave a presentation at the 7th Annual Insight Advertising and Marketing Law Conference in Toronto. The title of the presentation was *Making the Case for Compliance: A Recap of Recent Developments in the Fair Business Practices Branch*.

On November 30, 2004, a Bureau official was a panellist at a meeting of the Canadian Association of Broadcasters in Ottawa and spoke about merger review in broadcasting transactions.

On December 1, 2004, a Bureau representative gave a presentation to the U.S. Postal Inspection Service and the Federal Trade Commission in Arlington, Virginia. The subject of the presentation was the 2004 Consumer Fraud Forum.

On December 1, 2004, a Bureau official spoke about the role of the Bureau to the Radio Advisory Board of Canada in Ottawa.

On December 16, 2004, Bureau representatives gave a presentation in Gatineau to a delegation from the Competition Administration Department of the Ministry of Trade of Vietnam. The presentation provided an overview of the Bureau's mandate and enforcement of the provisions relating to multi-level marketing schemes.

On January 26, 2005, a Bureau representative gave a presentation to the U.S. Federal Trade Commission

in Washington on the mandate and structure of the Bureau's Fair Business Practices Branch.

From February 8 to 11, 2005, representatives from the Bureau and Department of Justice attended the International White Collar Crime and Telemarketing Fraud Conference in Columbia, North Carolina. A Bureau official gave a presentation on the Competition Bureau, *Competition Act* and Canadian law.

On February 15, 2005, a Bureau representative presented a paper at the Organisation for Economic Co-operation and Development's Working Party 3 meeting in Paris on the subject of cross-border remedies in merger review.

On March 3, 2005, a Bureau representative gave a presentation on merger review to the University of British Columbia's graduate class in economics in Vancouver.

From March 9 to 11, 2005, Bureau representatives attended the International Consumer Protection and Enforcement Network meeting in Edinburgh, Scotland. The theme of the meeting was the Continued Delivery of Seamless Global Enforcement. A Bureau official presented an overview and preliminary assessment of Fraud Awareness Month.

On March 16, 2005, Bureau representatives attended Scam Jam in Vancouver, an annual event on preventing and protecting against scams. Bureau representatives gave a presentation entitled *Fraud: Recognize It, Report It, Stop It*.

On March 24, 2005, a senior Bureau official gave a presentation to the competition law class at the University of Western Ontario on the subject of merger review.

SEMINARS

On April 21, 2004, Professor Greg Shaffer from the University of Rochester gave a seminar entitled Upfront Payments and Exclusion in Downstream Markets.

On May 10, 2004, Professor Gautam Gowrisankaran from the University of Washington gave a seminar entitled The Welfare Consequences of ATM Surcharges: Evidence from a Structural Entry Model.

On June 11, 2004, the Bureau organized a round table in Ottawa on tacit collusion as applied to mergers and joint abuse of dominance. Aidan Hollis, the 2003–2004 holder of the Bureau's T. D. MacDonald Chair in Industrial Economics, chaired the round table. Speakers included expert antitrust economists such as Dr. Andrew Dick, Professor Kai-Uwe Kuhn, Valerie Rabassa, Professor Tom Ross and Dr. David Scheffman. They spoke on topics such as the general principles of collusion, the U.S. approach to responding to collusion and the role of mavericks, the role of asymmetries in facilitating and hindering collusion, and the Canadian approach to responding to tacit collusion.

On September 10, 2004, Michael Brady, an associate from the law firm Miller & Chevalier, gave a seminar to the Bureau on the decision of the United States Supreme Court in the Empagran case.

On September 17, 2004, Professor Zhiqi Chen from Carleton University, and current holder of the T. D. MacDonald Chair in Industrial Economics, gave a seminar to the Bureau entitled Monopoly and Product Diversity: The Role of Retailer Countervailing Power.

On October 14 and 15, 2004, Professor Timothy Brennan from the Policy Sciences and Economics Department at the University of Maryland in Baltimore gave two seminars to the Bureau: Saving Section 2 of the Sherman Act and Verizon v. Trinko.

On January 12, 2005, Dr. John Baldwin and Dr. Wulong Gu from the Micro-economic Analysis Division at Statistics Canada presented a research paper to the Competition Bureau called *Industrial Competition, Shifts in Market Share and Productivity Growth*.

On February 28, 2005, Professor Ralph Winter from the Sauder School of Business at the University of British Columbia presented a paper to the Bureau entitled *Price-Matching Guarantees*.