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The Role of Competition Policy in Canada’s Industrial Policy

Calvin S. Goldman, Q.C.*
Joel T. Kissack**

INTRODUCTION

This paper discusses the objectives of Canada’s industrial policy and the role of competition law and policy (or simply, “competition policy”) in achieving those objectives. It will demonstrate that Canada’s competition policy, principally as a result of substantial reforms in 1986, largely reflects Canada’s industrial policy objectives, although further reforms are desirable in some areas.

Part One of this paper defines “industrial policy” for the purposes of this paper and outlines the objectives of Canada’s industrial policy. Part Two discusses the importance of competition policy and certain features of Canada’s economy that shape competition policy. Part Three examines specific provisions of Canada’s Competition Act1 (the “Act”) and the enforcement policies of the Director of Investigation and Research (the “Director”) and the extent to which they reflect the objectives of Canada’s industrial policy. Part Four of this paper discusses proposals for reform in competition policy and related areas.

PART ONE: CANADIAN INDUSTRIAL POLICY AND ITS OBJECTIVES

(i) Defining Industrial Policy

In a recent draft paper (the “Anderson/Khosla Draft Paper”), Robert Anderson and Dev Khosla of the Bureau of Competition Policy (the “Bureau”) defined industrial policy as the “full range of measures through which governments seek to enhance the performance of individual industries as well as the economy as a whole”.2 They also pointed out that industrial policy could be defined to include only those economic policies that provide special advantages or assistance to particular industries,3 such as subsidies to specific industries. The first defi-
nition would include competition policy as an element of industrial policy, while the second would not. The first definition of industrial policy will be used in this paper.

(ii) The Objectives of Canada's Industrial Policy

When the current federal Government came to power in 1984, then Finance Minister Michael Wilson said the federal Government's objective was to:

put in place a policy framework that will release the creative energies of Canadians to build a better future for themselves . . . [and] adopt policies that foster higher investment, greater innovation, increased international competitiveness and a positive climate for the birth and growth of new enterprise. 4

The need to enhance the competitiveness of Canadian industries is particularly acute today, given the globalization of many markets and the presence of trading blocs such as the European Community. To meet the challenges presented by these developments, industries in Canada and the United States are rationalizing to attain economies of scale and efficiencies that will enable them to produce world class products at competitive prices. The recessionary environment has made these challenges even more difficult to meet.

The trend to globalization is especially significant for Canada because of its dependence on trade. A 1990 study co-sponsored by the Canadian federal Government (hereinafter, the "Government") and conducted by Professor Michael Porter of Harvard Business School and Monitor Company 6 (hereinafter the "Porter Study") described the export sector as a "vital component of Canada's economy" 8 and noted that Canada was second only to Germany in the importance of trade to its economy. 7 In a 1991 consultation paper entitled Prosperity Through Competitiveness, 8 the Government noted that since the Second World War, Canada's reliance on trade has doubled to reach over thirty percent of gross domestic product ("GDP"), more than twice the level for Canada's two largest trading partners: Japan, where trade accounts for fourteen percent of GDP, and the United States, where trade accounts

6 Id. at 10.
7 Id.
for ten percent of GDP. Canada also relies extensively on a single market, the United States, where seventy-five percent of its exported goods and services are destined.

In summary, since 1984, increased international competitiveness has been a key industrial policy objective. At the same time, the importance of achieving this objective has grown.

It appears that further progress is needed. The Porter Study identified weaknesses in the Canadian economy such as low productivity growth and low private sector investment in research and development. In 1991, the Government noted in *Prosperity Through Competitiveness* that the growth in Canadian real income (adjusted for inflation) had been steadily slowing since the mid-1970s because of a slowing trend in Canada’s productivity growth. The C.D. Howe Institute, a well-respected Canadian research and educational institution, noted in its 1991 *Policy Review and Outlook* that close to one-fifth of the adult population is functionally illiterate—that is, reading at or below the grade nine level. A recent Canadian Tax Foundation study noted that Canadian tax increases between 1980 and 1991 “outstripped nearly every major developed country.” Studies by other independent groups confirm that action is needed: in 1992, the *World Competitiveness Report*, published by the World Economic Forum and the International Institute for Management Development, ranked Canada’s competitiveness eleventh among industrialized nations. The previous year,

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9 Id. at 32.
10 Id.
11 The Porter Study stated that between 1979 and 1989, manufacturing labour and productivity growth in Canada was the lowest among the G7 countries, averaging only 1.8% per annum. Porter Study, supra note 5, at 7.
12 The Porter Study noted that private sector investment in research and development as a percentage of GDP is the second lowest among the G7 countries. Porter Study, supra note 5, at 8.
13 PROSPERITY, supra note 5, at 2.
15 Between 1980 and 1991, taxes in Canada increased nearly twenty-five percent, second only to Italy among the G7 countries. See Canadian Press, *Canada’s Tax Hikes Outdo Most Countries: Study*, THE FIN. POST, March 26, 1993. It has also been noted that the average tax burden in Canada is twenty-five percent higher as a percentage of GDP (about 7.5%) than in the U.S. and that “[t]his makes Canada fundamentally uncompetitive”. See Samuel Slutsky, *A Tax Reminder for Kim Campbell*, THE FIN. POST, June 23, 1993, at 12.
16 The 1992 *World Competitiveness Report* indicated that Canada ranked twentieth out of twenty-two industrialized countries on the need to restructure for long-term competitiveness. More recent statistics concerning Canada’s competitiveness are mixed. A 1993 study by the Bank of Canada stated that over the period of 1980 to 1992, there was little net change in Canada’s cost competitiveness on an economy-wide basis. However, the same study noted that the Canadian manufacturing sector had experienced a “substantial deterioration in competitiveness in recent years”, reflecting the fact that productivity growth in the Canadian manufacturing sector has lagged behind its U.S. counterpart. See *Productivity and Competitiveness of Canadian Firms Since 1980*, BANK OF CANADA REVIEW, Spring 1993. Further, the 1993 *World Competitiveness
Canada was fifth.

While further progress is needed, since 1984 the Government has taken many steps to achieve its industrial policy objectives. A number of sectors of the economy have been significantly deregulated, such as transportation, financial services and natural gas. There are calls for further deregulation. Some Crown corporations have been privatized. The Foreign Investment Review Act was replaced with the Investment Canada Act to encourage investment in Canada by non-Canadians. The Free Trade Agreement has been implemented and the North American Free Trade Agreement ("NAFTA") has been signed and, at least in Canada, ratified. The Government has attempted to eliminate barriers to trade among the provinces, although they are still significant. Most importantly, for the purposes of this paper, Canada's competition law was significantly revised in 1986 by amendments to the Combines Investigation Act, which was renamed the Competition Act.

PART TWO: THE IMPORTANCE OF COMPETITION POLICY AND CERTAIN CHARACTERISTICS OF CANADA'S ECONOMY THAT SHAPE COMPETITION POLICY

Canadian competition policy is based on the premise that free market forces, operating under competitive conditions, are the best means of allocating resources in the economy and maximizing total economic welfare. Competition policy, which applies to all industries on a generic basis, is a key element of Canada's industrial policy. The Report ranked Canada's competitiveness at eleventh among industrialized nations, unchanged from 1992.

The National Transportation Act Review Commission (the "Commission") recently considered whether changes are needed to the National Transportation Act, 1987 (Canada), among other reasons, to improve Canada's international competitiveness. The Commission suggested additional deregulation and, in some cases, repealing the legislative provisions which regulate transportation and relying instead on the provisions of the Competition Act to ensure markets functioned effectively. See C.L. Witterick, Transporting Canada into the Global Economy: an Increasing Role for the Competition Act, CANADIAN COMPETITION RECORD, 14-2 (forthcoming July 1993).

The Government has estimated that these barriers add $6.5 billion in costs annually. Interprovincial barriers are discussed in "Proposals for Reform", infra Part Four. See also These Barriers Must Come Down, THE FIN. POST, Nov. 20, 1992 at 8.


See also Canada, Prosperity Through Competitiveness, supra note 8, at 26 wherein the Government affirmed its belief that:

[...]competition policy is a key element of the policy framework for a dynamic and competitive market economy. By promoting a healthy rivalry among firms, competition enhances choices for consumers and strengthens pressures that lead to continuing innovation in the provision
Porter Study stressed the importance of a strong competition law in creating an environment that fosters international competitiveness.21

The importance of competition policy is highlighted by the relatively small size of Canada’s economy, which significantly reduces the scope for using alternatives such as subsidies to increase the competitiveness of Canadian industries. The C.D. Howe Institute recently noted22 that the cost of such subsidies is likely to be so substantial that countries like Canada will simply be out-bid by countries with larger economies. Thus, increasing the international competitiveness of Canadian business must be achieved by relying on other means, including an effective and realistic competition policy. Making competition policy effective and realistic includes taking account of certain characteristics of Canada’s economy.

The relatively small size of the Canadian economy is such that, in some industries, relatively high levels of concentration are necessary before minimum efficient scale can be achieved. Domestic firms often need to achieve these scales to compete more effectively in international markets. As a result, where mergers or specialization agreements23 are required to achieve efficiencies and synergies, the objectives of Canada’s industrial policy would suggest that concentration is not necessarily bad and therefore a flexible approach to mergers and specialization agreements is appropriate. It would also suggest that as global markets develop, what levels of concentration are acceptable in Canada should be re-examined.24

However, concentration in an industry increases the risk of anticompetitive behavior, such as price fixing and bid-rigging. These practices are widely condemned as having no redeeming social benefits. Such activities can also affect the international competitiveness of Canadian firms, since collusion which raises prices or reduces the availa-
bility of intermediate goods or other inputs can affect negatively the
attractiveness of Canadian products compared to those offered by for-
eign suppliers.26 Similarly, abuses of market power by dominant firms
that prevent or lessen competition can increase costs for Canadian busi-
nesses above those that would exist in the presence of competition. Thus, a flexible approach to mergers and specialization agreements
should be balanced by a strict approach to conspiracies in restraint of
trade and abuses of market power.

The past influence of political considerations on Canada’s indus-
trial policy is another characteristic of Canada’s economy that affects
competition policy. The Porter Study noted that:

Governments in Canada have often had a detrimental effect on the
competitiveness of Canadian industries. Traditionally, Canadian gov-
ernments have exhibited a paternalistic outlook in their management
of the economy, often seeking to insulate the Canadian economy from
international competition through such mechanisms as high tariffs,
subsidies, government ownership and other interventionist policies.
Government has been a protector, an agent of economic development,
and a generous provider of goods and benefits. Only infrequently has
government in Canada aggressively pressed firms to innovate, upgrade
competitive advantage and meet high standards.26

Canada’s industrial policy seeks to increase the role of market
forces. However, because of political expediency or the influence of
more powerful interests, governments do not always act in a manner
consistent with this stated policy objective.27 As a result, the enforce-
ment of competition policy in Canada needs to be independent of all
levels of government and political considerations.

In summary, the objectives of Canada’s industrial policy focus on
developing international competitiveness. While recent studies suggest
that more work needs to be done, the Government has taken several
steps in furtherance of its industrial policy objectives. Competition pol-
icy is one of the areas where there has been significant progress. As we
shall see in the next section of this paper, in 1986 the Government
introduced a number of reforms with the result that Canada’s competi-
tion policy now largely reflects the objectives of its industrial policy.

26 Wetston, supra note 19, at 2.
27 Porter Study, supra note 5, at 43-44.
28 In addition to inconsistency at the federal level, many sectors of the economy are subject
to regulation by the provincial governments. While it may be desirable, there is no requirement
that the ten provincial governments always act in a manner consistent with the Government’s
stated policy objectives.
This section will examine several elements of Canadian competition policy and demonstrate that Canada’s competition policy largely reflects its industrial policy objectives. In some cases, this conclusion can be drawn from the provisions of the Act itself. In other areas, the Director’s enforcement policies make the legislative provisions more responsive to Canada’s industrial policy objectives.

(i) The Act

The Act has a purpose clause. Section 1.1 states that the purpose of the Act is to maintain and encourage competition in Canada, in order to achieve four objectives: (i) promoting the efficiency and adaptability of the Canadian economy; (ii) expanding opportunities for Canadian participation in world markets (while at the same time recognizing the role of foreign competition in Canada); (iii) ensuring that small and medium-sized enterprises have an equitable opportunity to participate in the Canadian economy; and (iv) providing consumers with competitive prices and product choices.

It has been noted that these four objectives may not be consistent. Arguably, ensuring that small or medium-sized enterprises have an “equitable opportunity” to participate in the Canadian economy is inconsistent with the objectives of promoting efficiency and expanding opportunities for Canadian participation in world markets, which are often based on rationalization. Reflecting these apparent inconsistencies, the Act contains both provisions which are consistent with the objectives of Canada’s industrial policy as well as provisions which seem more concerned with protecting small businesses, even at the cost of efficiency. Certain provisions of the Act strongly reflect the objectives of Canada’s industrial policy. Some of the most important are the provisions respecting mergers. As part of the extensive revisions to the Act in 1986, the former criminal law provisions respecting mergers were replaced with an administrative law review which precludes...
reaching conclusions solely on the basis of concentration or market share, and which draws attention to the relevance of a host of realistic qualitative factors. Further, the Act specifically provides that the Competition Tribunal (the “Tribunal”), a quasi-judicial tribunal that has jurisdiction over mergers and certain other matters, may not block a merger if it finds that the merger has brought about or is likely to bring about gains in efficiency that will be greater than and will offset any anti-competitive effects of the merger, so long as the gains in efficiency would not likely be attained if the merger were blocked. For this purpose, the Director takes the view that “anti-competitive effects” refers to the part of the total loss incurred by buyers and sellers in Canada that is not merely a transfer from one party to another, but represents a loss to the economy as a whole, attributable to the diversion of resources to lower value uses. This loss is sometimes referred to as the deadweight loss to the Canadian economy. In the Director’s view, if the Canadian economy as a whole would benefit from the merger, the Act explicitly resolves the conflict between competition and efficiency in favor of efficiency.

The efficiency exception is particularly noteworthy, for two reasons. First, it distinguishes Canadian competition policy from U.S. competition policy. The joint Merger Guidelines recently issued by the U.S. Department of Justice and the Federal Trade Commission appear to be more receptive to efficiencies than previous U.S. guidelines, but they do not change the basic consumer surplus approach that efficiencies will not permit a merger which otherwise negatively impacts con-

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30 The Competition Tribunal, a quasi-judicial tribunal, is given the power by the Act to prevent and dissolve mergers where the merger would “prevent or lessen, or be likely to prevent or lessen, competition substantially”. Subsection 92(2) of the Act provides that the Tribunal “shall not find that a merger or proposed merger prevents or lessens, or is likely to prevent or lessen, competition substantially solely on the basis of evidence of concentration or market share”, The Act, supra note 1.

31 For example, the role of foreign competition, the nature and extent of change and innovation in the relevant market and whether the business or a part of the business of a party to the merger is likely to fail. See section 93 of the Act. In the Anderson & Khosla Draft Paper, supra note 2, at 35, the authors express the view that “[t]hese factors respond directly to developments such as the growth of foreign competition and the need to facilitate the efficient restructuring of Canadian businesses”. See also CONSUMER AND CORPORATE AFFAIRS OF CANADA, supra note 28, at 25.

32 CONSUMER AND CORPORATE AFFAIRS OF CANADA, MERGER ENFORCEMENT GUIDELINES (1991) at 45 [hereafter, the “MEGs”]. For a discussion of the approach to efficiencies taken in the Act, see P.S. Crampton, The Efficiency Exception for Mergers: An Assessment of Early Signals from the Competition Tribunal, 121-3 CAN. BUS. L.J., 371 (1993). However, the Tribunal’s decision in Director of Investigation and Research v. Hillsdown Holdings (Canada) Ltd. (infra note 68) has raised some concerns about the manner in which the Tribunal may apply the efficiency provisions of the Act. This issue is further discussed in “Proposals for Reform”, infra Part Four.

33 See the MEGs, supra note 32, at 45.
umer prices.\textsuperscript{34} Second, the efficiency exception reflects one of the features of the Canadian economy mentioned in Part Two of this paper; namely, the relatively small size of Canada’s economy. Achieving the objectives of Canada’s industrial policy in the context of Canada’s relatively small economy suggests that Canadian businesses should be permitted to rationalize (and therefore reduce competition) if doing so permits them to operate in a more efficient manner.\textsuperscript{35}

The provisions respecting specialization agreements were introduced as part of the 1986 reforms and also reflect Canada’s industrial policy objectives.\textsuperscript{36} The Act provides that the conspiracy provisions and the abuse of dominance provision (as it applies to exclusive dealing) do not apply to a registered specialization agreement.\textsuperscript{37} To register, a person must apply to the Tribunal, which is entitled to balance efficiencies arising from the agreement against the effects of any prevention or lessening of competition.\textsuperscript{38}

New provisions respecting joint ventures were also introduced in 1986. The Act provides that the Tribunal will not block or dissolve a joint venture to undertake a specific project or program of research and development if, among other things, the joint venture does not and is not likely to prevent or lessen competition except to the extent reasonably required to undertake and complete the project or program. Joint ventures which satisfy the criteria are exempt from the merger provisions of the Act, which means that all the considerations (the role of foreign competition and barriers to entry, for example) that would normally be applied in considering a merger are not considered in the context of the joint venture.\textsuperscript{39} Further, unlike the specialization agreement

\textsuperscript{34} See Anderson & Khosla, supra note 2, at 45 n.139.
\textsuperscript{35} In CONSUMER AND CORPORATE AFFAIRS CANADA, COMPETITION LAW AMENDMENTS: A GUIDE (December 1985) at 16 the Minister of Consumer and Corporate Affairs noted that:

The existing merger provision [i.e., the criminal law merger provision that was contained in the Combines Investigation Act] is considered to be unsuitable for the Canadian economy, which is small and open. Canadian firms often have to compete with larger foreign rivals both at home and abroad. In these circumstances, they should not be prevented from obtaining economies of scale which improve their competitive position. An effective merger law for Canada must weigh the advantages of economic efficiency against the disadvantages of a lessening of competition.

\textsuperscript{36} Section 85 of the Act, supra note 1 defines a specialization agreement as follows:

‘Specialization Agreement’ means an agreement under which each party thereto agrees to discontinue producing an article or service that he is engaged in producing at the time the agreement is entered into on the condition that each other party to the agreement agrees to discontinue producing an article or service that he is engaged in producing at the time the agreement is entered into, and includes any such agreement under which the parties also agree to buy exclusively from each other the articles or services that are the subject of the agreement.

\textsuperscript{37} See § 90 of the Act, supra note 1.
\textsuperscript{38} See § 86(1) of the Act, supra note 1.
\textsuperscript{39} For a further discussion of these provisions, see H.I. Wetston, The Treatment of Co-operative R&D Activities Under The Competition Act, Notes for an Address to the Committee on
provisions, joint ventures do not need to be registered. The provisions are merely raised as a defense to an application by the Director challenging the joint venture under the merger provisions of the Act. These simpler rules respecting joint ventures facilitate their formation and therefore encourage research and development.

As with the efficiency exemption in the merger provisions, the joint venture provisions distinguish Canadian competition policy from its American counterpart. Specifically, the National Cooperative Research and Production Act of 1993 applies to research and development and production joint ventures, while the Canadian provisions apply to research and development joint ventures and joint ventures established to carry out a "specific project".40 Further, while the merger provisions of the Act will not apply to qualifying joint ventures, the U.S. legislation in contrast provides that qualifying joint ventures will be judged under a "rule of reason" standard under conspiracy laws and not considered illegal per se.41

The Act, unlike its predecessor legislation, deals with mergers and monopolies outside the criminal law context, where the standard of proof and the remedies of fines and imprisonment are particularly ill-suited to achieving industrial policy objectives.42 This non-criminal approach, which is also the approach adopted toward most non-price vertical restraints, recognizes that firms are more likely to pursue efficient practices if they do not have to face the prospect of imprisonment or fines.

The flexible policy applied to mergers, specialization agreements and joint ventures is balanced by a strict approach to conspiracies and bid-rigging. The Act provides unlimited fines for bid-rigging and fines of up to ten million dollars for conspiracy. The Director assigns the highest priority to enforcing the bid-rigging, conspiracy and abuse of dominance provisions of the Act43 and recent speeches by the Director indicate that the Bureau intends to deter such conduct by pursuing

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40 Id. at 5. For discussion of the recent amendments to the U.S. legislation introducing provisions respecting production joint ventures, see Antitrust & Trade Reg. Rep. No. 1618 (BNA), 688:1 (June 10, 1993).

41 The Canadian provisions do not insulate parties to a joint venture from charges under the conspiracy provisions. The Act provides that a person will not be made subject to proceedings on the basis of the same facts under more than one of the conspiracy, abuse of dominance or merger provisions. The Director is at liberty to select which of these three remedies he might choose to pursue. See §§ 45.1, 79(7) and 98 of the Act, supra note 1.

42 See CONSUMER AND CORPORATE AFFAIRS CANADA, supra note 35, at 3, 16-17.

43 See, e.g., Howard I. Wetston, Q.C., Decisions and Developments: Competition Law and Policy, Remarks delivered to the Canadian Institute, Toronto at 9 (June 8, 1992). Assigning a high priority to enforcing these provisions is consistent with the industrial policy objectives identified in this paper. In R. v. Nova Scotia Pharmaceutical Society et al. (see infra note 45), Gonthier, J. referred to the conspiracy provisions as "central to Canadian public policy in the economic sector".
substantial fines and, in appropriate cases, the prosecution of individual executives involved in conspiracies or bid-rigging.\textsuperscript{44}

While high fines and the priority given to enforcing these provisions are consistent with industrial policy objectives, the conspiracy provisions do not permit consideration of any efficiencies arising from co-operation between competitors. The decision of the Supreme Court of Canada in \textit{R. v. Nova Scotia Pharmaceutical Society et al.} (hereinafter “PANS”)\textsuperscript{45} confirmed that the conspiracy provisions contemplate a “partial rule of reason” analysis that forecloses consideration of efficiencies if the agreement is likely to prevent or lessen competition unduly. While this is probably the proper approach with respect to naked price fixing cartels, some may suggest that Canada’s conspiracy law may be impeding the pursuit of efficiency-enhancing activities.

To insulate enforcement of competition policy from the political influences mentioned in the Porter Study, the Act provides for the enforcement of competition law in many respects\textsuperscript{46} by the Director, who exercises his mandate independently of political considerations and influences.

In summary, the merger, specialization agreement, joint venture and, to some extent, the conspiracy provisions of the Act, reflect the objectives of Canada’s industrial policy. This may not be true of certain other provisions of the Act. In many cases, the Director’s enforcement policies help to make the legislative provisions more responsive to industrial policy objectives.

\textbf{(ii) The Director’s Enforcement Policies}

The provisions of the Act which may not be consistent with Canada’s industrial policy objectives underscore the importance of the Director’s role in making and implementing competition policy. For example, the Director’s recently announced enforcement policy respecting price discrimination\textsuperscript{47} allows for functional and other types of discounts previously considered illegal on a strict reading of the Act, if they are

\textsuperscript{44} In the past three years, there has been a series of record fines imposed for conspiracy. Most recently, on June 11, 1993, Chemagro Limited was fined two million dollars for domestic and foreign-directed conspiracies. For a discussion of the Director’s policies with respect to fines and individual prosecution, see Paul S. Crampton and Joel T. Kissack, \textit{Recent Developments in Conspiracy Law and Enforcement: New Risks and Opportunities}, 38 \textit{McGill L.J.} 567 (1993). See also Calvin S. Goldman, \textit{The Competition Bureau’s New Focus: Increased Risks for Individuals Under the Competition Act}, 13, \textit{Canadian Competition Policy Record} (1992).


\textsuperscript{46} For example, only the Director may challenge a merger or bring an action under the abuse of dominance provision of the Act. This is in contrast to the ability of private parties or state attorneys-general in the U.S. to challenge mergers and abuses of market power.

made available to competing purchasers of like quality and quantity. This allows vendors to respond more flexibly to conditions and changes in the market for their goods.

The Director’s recently announced enforcement policy respecting predatory pricing similarly attempts to respond to the objectives of Canada’s industrial policy. The Act provides that it is a criminal offense to engage in a policy of selling products at unreasonably low prices with the intent of eliminating a competitor (regardless of whether competition is in fact adversely affected as a result). The Director’s policy contemplates enforcement only where, among other things, the alleged predator has market power (i.e., is likely to be able to recoup profits lost during the period of alleged predation). The Director’s policy therefore focuses on pricing behavior that can have long-term anti-competitive effects. This increases the scope for vigorous price competition.

The Act’s refusal to supply provisions appear to be another area in which the Director is developing an enforcement policy that responds to the objectives of industrial policy. Section 75 permits the Tribunal to order a supplier of a product in a market to accept a person as a customer where, among other things, a person is substantially affected in his business or is precluded from carrying on business due to his inability to obtain adequate supplies of a product anywhere in a market on usual trade terms. This section applies even if the refusal to supply does not lessen or prevent competition substantially. This feature has drawn criticism, and a representative of the Bureau recently indicated that, as a matter of policy, the Director does not intend to apply to the Tribunal under section 75 unless there is a substantial anti-competitive effect arising from the refusal to supply.

The Director’s enforcement policies respecting price discrimination and predatory pricing are contained in published enforcement guidelines. Publication of guidelines in these areas and in relation to mergers supports Canada’s industrial policy by promoting certainty with

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49 In Director of Investigation and Research v. Chrysler Canada Ltd. 27 C.P.R. (Can. 3d) 1, at 10 (1989), the Tribunal contrasted the refusal to deal provision with the merger provisions, saying that while the ultimate test for mergers is whether the merger will substantially lessen competition, for the refusal to deal provisions “the ultimate test concerns the effect on the business of the person refused supplies”.

50 These comments were made by Mr. Robert McCrone, Chief, Division “B” of the Civil Matters Branch of the Bureau at an Insight Conference held at Toronto, Canada on May 11, 1993.

51 MEGS, supra note 32. For a detailed discussion of the MEGS, see COMPETITION LAW OF CANADA, ch. 10 (Matthew Bender & Co., Inc.) (1993). See also Calvin S. Goldman, Q.C. & J.D. Bodrug, GUIDELINES UNDER THE CANADIAN COMPETITION ACT: A SURVEY OF THE PRINCIPAL PROVISIONS OF THE NEW MERGER ENFORCEMENT GUIDELINES, CLAYTON’S COMMENTARIES (July 1991); Paul S.
respect to the Director's likely approach in a particular case. Uncertainty can have a chilling effect on vigorous competitive behavior and prevent mergers which would ultimately prove benign or even efficiency-enhancing. Certainty is also promoted by the Director's Program of Compliance,\textsuperscript{62} pursuant to which the Director provides advisory opinions and other informal feedback respecting the Act's application to a proposed transaction or course of conduct.\textsuperscript{63} The Act also allows the Director to issue advance ruling certificates in merger cases where he is satisfied that he does not have sufficient grounds to challenge the merger.\textsuperscript{64}

(iii) The Director's Submissions to Other Branches of Government

Finally, the role of a strong competition policy within Canada is promoted through the Director's submissions to federal and provincial bodies\textsuperscript{65} and through the ongoing involvement of the Director and others in the Bureau in inter-departmental working groups within the Government. For example, the Bureau provided input to the Canada/U.S. Free Trade negotiations and to federal and provincial governments concerning the recent liberalization of legislation governing financial markets.\textsuperscript{66} The Director and Bureau staff play a continuing role in developing competition policy positions for consideration by other federal and provincial departments.\textsuperscript{67}

In summary, in several important respects, Canada's competition policy reflects its industrial policy objectives. The merger, specialization agreement and joint venture provisions of the Act are all designed to allow Canadian businesses to respond to the need to operate more efficiently and innovatively. However, consideration should be given to reforming certain provisions of the Act, including those which rely on the

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\textsuperscript{64} Advisory opinions are obtained on an informal basis, since the Act does not expressly contemplate them. They are provided on a confidential basis. The informal and confidential process in Canada contrasts with the formal procedure for obtaining and the publication of business review letters in the United States.

\textsuperscript{65} Subsection 102(2) of the Act, \textit{supra} note 1, requires the Director to consider any request for an advance ruling certificate "as expeditiously as possible".

\textsuperscript{66} The Act specifically empowers the Director to make representations in respect of competition matters to federal and provincial commissions, boards and other tribunals. In the Director's 1991 Annual Report, the Director refers to submissions of this nature being made in the transportation, telecommunication, agriculture and energy sectors of the economy. \textit{See Annual Report For The Year Ended March 31, 1991, DIRECTOR OF INVESTIGATION AND RESEARCH}, at 20-21 (1991).

\textsuperscript{67} The former Director has suggested that in the 1990s, the Bureau intends to get more involved with the issue of competition in the regulated sector of the Canadian economy. \textit{See Wetston, supra} note 20, at 7.

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Director's enforcement policy to make them responsive to the objectives of Canada's industrial policy. Proposals for reforming those provisions and related reforms are discussed in the next section of this paper.

**PART FOUR: PROPOSALS FOR REFORM**

This section discusses proposals for reforming Canada's competition policy and related areas to make them more consistent with Canada's industrial policy objectives. While the focus will be on proposals for reforming the Act, the desirability of replacing antidumping laws with competition policy and the need to eliminate interprovincial barriers to trade will also be briefly reviewed. The discussion is divided accordingly.

(i) *The Act*

Price Discrimination, Predatory Pricing and Refusal to Deal

As suggested above, the legislative provisions respecting price discrimination and predatory pricing should be reformed to codify the Director's approach to their enforcement. The Director's Guidelines are not binding on Canadian courts, which means that there is a limit to how much comfort one can draw from them, especially with respect to civil actions by private parties based on the provisions. Similarly, the refusal to deal provisions should be amended to embody a test which requires that competition in Canada be substantially lessened or prevented before the Tribunal can order a supplier to accept a customer.

Misleading Advertising

Amending the misleading advertising provisions would also be desirable to allow remedies which better respond to the nature of the offense. Misleading advertising is currently a criminal offense under the Act. However, a report by a Working Group of Consumer and Corporate Affairs Canada suggests that most cases of misleading advertising

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58 The Guidelines contain statements to this effect, as well as the fact that they are not binding on the Director or the Attorney-General of Canada.

59 The Act provides, in § 36, for the ability of private parties to sue for damages caused by a breach of the criminal provisions of the Act, supra note 1.

60 A disproportionate penalty can have a chilling effect on vigorous competition. For example, in the preface to the *PRICE DISCRIMINATION GUIDELINES*, supra note 47, the Director has stated that "[p]lacing a criminal ban on certain pricing behaviour ... carries with it the risk that business persons may, because of uncertainty about the application of the law, refrain to some extent from engaging in forms of pricing behaviour which would be healthy and beneficial for the markets involved" (at Preface).
should be resolved through a non-criminal adjudicative process where the remedies would include restitution and the publication of information notices.61

Price Maintenance

Consideration should also be given to decriminalizing price maintenance. The criminal provisions respecting price maintenance contrast noticeably to the treatment afforded other non-price vertical restraints such as tied selling and exclusive dealing.62 For these offenses, the Tribunal may issue a remedial order following a determination that competition has been or is likely to be lessened substantially. As mentioned earlier in the context of mergers and monopolies, a non-criminal approach recognizes that firms are more likely to pursue efficient practices if they do not face the prospect of imprisonment or fines. Avoiding deterrence of pro-competitive conduct may be especially important in the case of price maintenance, since there is debate about whether price maintenance is in fact harmful.63

Specialization Agreements and Joint Ventures

The provisions respecting specialization agreements and joint ventures may also need reform. In 1986, it was hoped that these provisions would play a significant role in facilitating restructuring in Canada, but they have never been used.64 Messrs. Anderson and Khosla suggest five possible explanations for their lack of use: (i) in many cases it may be that the parties have not had recourse to the joint venture and specialization agreement provisions because “the general standards applicable under the merger and conspiracy provisions of the Act are considered to provide sufficient scope for co-operative arrangements”,65 (ii) a lack of awareness of the provisions within the business community; (iii) the specific wording of the provisions, which may be perceived as limiting their application; (iv) procedural difficulties, particularly in respect of the specialization agreement provisions which involve proceedings...


62 The Bureau itself has noted that the economic effects of these practices are often similar. See Consumer and Corporate Affairs Canada, supra note 28, at 41.

63 In a 1992 speech, the former Director stated that “it may be time for the Bureau to assess how it enforces the statute against price maintenance given the vigor of the economic debate which surrounds this issue”. See Wetston, supra note 43, at 28. See also Consumer and Corporate Affairs Canada, supra note 28, at 41.

64 Messrs. Anderson and Khosla state no specialization agreement has been registered nor has there been a joint venture defended on the basis of the joint venture provisions. Anderson & Khosla, supra note 2, at 72.

65 Id. at 72-3.
before the Tribunal; and (v) concerns that even if a particular arrangement is sanctioned, it might raise issues under the competition laws of the other jurisdictions in which the parties operate (for example, the United States). 66 Further study of this issue is required.

The Tribunal

Issues concerning the Tribunal’s role and procedures that date back to the Tribunal’s first rulings in consent cases 67 have resurfaced following the Tribunal’s decisions in its first two contested merger cases, Hillsdown 68 and Southam. 69 The statute which creates the Tribunal, the Competition Tribunal Act, 70 provides that proceedings before the Tribunal “shall be dealt with as informally and expeditiously as the circumstances and considerations of fairness permit”. Yet, in a June 1992 speech, a former Director observed that both Hillsdown and Southam were “plagued with procedural disputes. In Southam alone, there were a total of ten decisions on interlocutory matters”. 71 The Director further stated that the extensive analytical evidence which the Tribunal either required or said was lacking in Southam suggests the Bureau may need to reconsider both the scope and type of information it gathers during the review process and the manner in which information is gathered. 72 For example, the Director noted that it may now be necessary for the Bureau to undertake major pricing research as part of its review of mergers. Such research would increase the time and cost necessary to resolve difficult merger cases and “would be difficult to balance . . . with the need for expeditious merger review”. 73 In summary, it is becoming increasingly recognized that the Tribunal’s process needs to be streamlined. 74

66 Id. at 73.
70 R.S.C., ch. 19 (2d Supp.) (1985) (Can.).
72 Id. at 4.
73 Id.
74 At a June 7, 1993 conference conducted by The Canadian Institute in Toronto, the new Chairman of the Competition Tribunal referred to proposed revisions to the Competition Tribunal Rules for the purpose, among other things, of streamlining the process for conducting hearings before the Tribunal. See The Honorable Justice W.P. McKeown, Remarks to the Fourth Annual Conference of the Canadian Institute (June 7, 1993). The new Chairman noted that the proceedings in Hillsdown took thirteen months and those in Southam took twenty-four months, while in contrast the four consent orders that have been issued each involved proceedings which took less
In addition to issues of process, the Tribunal's decisions in both Southam and Hillsdown may have created uncertainty by failing either to endorse or reject the Director's Merger Enforcement Guidelines. Further, many competition law counsel in Canada believe the Tribunal's decision in Hillsdown reflects a view of efficiencies which is inconsistent with giving a meaningful role to the efficiency exception for mergers and specialization agreements in the Act. The Director has indicated that he views the portion of the Tribunal's decision dealing with efficiencies as obiter dictum and that he will continue to apply efficiencies in the (total welfare) manner contemplated by his Merger Enforcement Guidelines. The uncertainty created by the different approaches of the Tribunal and the Director needs to be resolved.

The Conspiracy Exemption for Export Consortia

Like many other jurisdictions, Canada exempts from its criminal law conspiracies which relate only to the export of products. In a world where markets are rapidly becoming global, such an exemption has been described by a Bureau representative as arguably "inconsistent with, and a potentially destabilizing policy in, a free trade area and an increasingly interdependent world economy". As the American Bar Association Special Committee on International Antitrust recognized in 1991, such laws, viewed from a global perspective, are "at best a zero-sum game". From the perspective of increasing Canada's international competitiveness, Canadian industries which collude to reduce competition between themselves in the export market will impede the development of their individual ability to compete internationally.

than one year (the longest taking seven months). The new Chairman noted that proceedings for consent orders permit faster resolution of merger cases, commenting that the time taken in the consent proceedings "were a small fraction of what would have resulted from contested proceedings", id. at 9.

See Crampton, supra note 32.

See § 45(5) of the Act, supra note 1. Unlike in the United States, export cartels do not need to register or otherwise disclose their existence with the government in order to rely on the defense provided for export consortia. See, with respect to the U.S. rules respecting export consortia, Paul Victor, Export Cartels: An Idea Whose Time has Passed, 60 ANTITRUST L.J. 571 (1991).

See Derek Ireland, Notes for an Address on International Coordination of Competition Policy to the 1991 Summer Conference on Industrial Organization, Strategic Management and International Competitiveness, B.C. at 8 (June 21, 1991).

Victor, supra note 77, at 577. Messrs. Anderson and Khosla refer to such cartels as an attempt by one country to shift the terms of trade against other countries and, in effect, a "beggar thy neighbour" strategy and that the continued existence of provisions sanctioning these cartels "needs to be revisited from the standpoint of fostering efficient international integration". Supra note 2, at 73.
International Harmonization of Merger Review

Many mergers currently have dimensions that transcend a single country.\(^{80}\) Complex issues of international dimension have emerged, including how competition policy will affect multinational corporations and mergers involving such corporations. Examples such as the DeHavilland and Institut Merieux\(^{81}\) decisions (by the European Community's Merger Task Force and U.S. Federal Trade Commission, respectively) demonstrate an increasing need for inter-governmental communication and harmonization of substantive principles and processes. This is especially desirable between Canada and the United States,\(^{82}\) since most international mergers involving Canadian firms also involve U.S. firms.\(^{83}\)

While the different characteristics of the two economies and political factors may make it difficult to adopt identical laws in both countries, harmonization would not require it. One step toward harmonization would be using a single notification form and time frame for pre-merger filings. Providing one country with primary jurisdiction in reviewing a merger which affects both Canadian and U.S. markets may also be desirable, but any such proposal should respect the need for authorities in both countries to exercise their statutory mandates.\(^{84}\)

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\(^{80}\) The Director recently noted that of the 500 mergers that came to the attention of the Bureau during the first eight months of 1991, seventy-three percent involved foreign acquisitions. See H.I. Wetston, Q.C., Developments and Emerging Challenges in Canadian Competition Law, CORP. L. INST., FORDHAM U. SCH. OF L., at 21 (October 1991).

\(^{81}\) For a discussion of the DeHavilland and Institut Merieux cases in the context of international harmonization of merger laws, see Calvin S. Goldman, Q.C. and J.D. Bodrug, Update on Merger Enforcement Under the Canadian Competition Act and Its Application to Multi-National Transactions, Clayton's Commentaries, June 1992, at 3 et seq.

\(^{82}\) For a review of the differences and similarities between Canadian and U.S. antitrust laws, see C.S. Goldman, Bilateral Aspects of Canadian Competition Policy, ANTITRUST L.J. 401 (1988).

\(^{83}\) For a discussion of the Director's and the Tribunal's jurisdiction over international transactions involving Canadian firms, see Calvin S. Goldman, et al., International Mergers and the Canadian Competition Act, CORP. L. INST., FORDHAM U. SCH. OF L., (1992), where the authors note that nothing in the Act prevents the taking of such jurisdiction, there are valid policy reasons and a basis in law for taking such jurisdiction and that the Bureau has indicated that it will claim jurisdiction over such cases.

\(^{84}\) In this context, it may be instructive to note the cooperation between government agencies on matters affecting jurisdiction in other contexts. The Securities and Exchange Commission in the United States and the provincial securities commissions in Canada have entered into arrangements that permit certain public disclosure documents which satisfy the requirements of one jurisdiction to be accepted in the other jurisdiction with minimal additional formality. This permits, for example, Canadian corporations meeting certain criteria to effect public offerings in the United States of certain securities using a Canadian prospectus cleared with the Canadian securities authorities without preparing and clearing through the Securities and Exchange Commission a standard U.S. registration statement. This arrangement, referred to as the multijurisdictional disclosure system, is implemented in Canada at the provincial level through policy statements issued by the provincial securities commissions or similar authorities.
sent agreements on primary jurisdiction, increased exchange of information between enforcement authorities may assist in achieving consistent and expeditious merger review in the two countries. This might be achieved through a treaty similar to that on mutual legal assistance in criminal matters between Canada and the U.S.\textsuperscript{85} which went into effect in 1990. In that regard, a former Director has noted that a major hurdle to increased international cooperation in antitrust enforcement "is the restriction on information sharing between competition authorities imposed by various national competition laws".\textsuperscript{86} The Act prohibits the Director from disclosing certain information other than to a Canadian law enforcement agency or for the purposes of the administration and enforcement of the Act.\textsuperscript{87} Depending on the circumstances, therefore, disclosure to U.S. antitrust authorities could be prohibited.

Conspiracy

Section 45 of the Act prohibits agreements and other arrangements which prevent or lessen competition unduly. In PANS, Gonthier, J. said that the public policy interests underlying the conspiracy provisions:\textsuperscript{88}

are perhaps best summarized from this passage from the majority judgment in \textit{Howard Smith} . . . :

the statute proceeds upon the footing that the preventing or lessening of competition is itself an injury to the public. It is not concerned with public injury or public benefit from any other standpoint.

Considerations such as private gains by the parties to the agreement or counterbalancing efficiency gains by the public lie therefore outside of the inquiry under [s. 45].

This statement brings into focus an unfortunate and unjustifiable inconsistency in the Act. The specialization agreement provisions, the merger provisions and, arguably, the joint venture provisions all reflect a total welfare approach to competition. It is not obvious why the same approach (which is consistent with industrial policy objectives) that Parliament decided to take in 1986 to these matters should not be ex-


\textsuperscript{86} See Wetston, \textit{supra} note 80, at 22.

\textsuperscript{87} The inability of one antitrust authority to disclose information to the other may also arise in the context of antitrust litigation in the United States, where a common feature is the imposition of a protective order which prevents disclosure of documents provided in the United States pursuant to discovery requests and depositions. For a discussion of the importance of ensuring that such protective orders allow disclosure to foreign antitrust authorities such as the Bureau, see Goldman, \textit{supra} note 83, at 51-53.

\textsuperscript{88} PANS, \textit{supra} note 45, at 6.
tended to other agreements in restraint of trade. For that reason, reforming the conspiracy provisions to eliminate this inconsistency should be considered.

However, eliminating inconsistencies in the Act is not the only reason to consider reforming the conspiracy provisions. Differences between Canadian competition policy and its counterpart in the United States may place Canadian businesses at a competitive disadvantage. The rule of reason approach to certain conspiracies in the United States allows consideration of the efficiencies and other benefits arising from an agreement that constrains competition. Since the PANS case confirmed that efficiencies and other benefits are not considered in applying the Canadian conspiracy provisions, U.S. businesses may be able to pursue agreements and enjoy efficiencies which are not available to their Canadian counterparts.

Finally, it may be worthwhile reforming the conspiracy provisions to more clearly deal with information exchanges among competitors for the purpose of permitting them to "benchmark" themselves against competitive leaders. The application of Canada's conspiracy law to these types of arrangements is not clear, but there are policy reasons that suggest they should be permitted in certain circumstances.

Messrs. Jorde and Teece have written extensively on the application of antitrust law to information exchanges between competitors. They define benchmarking as follows:89

Benchmarking is the process by which firms discover the degree to which they are not world-class in their various functional activities and institute programs to emulate best practice. Typically, benchmarking involves collecting information from excellent companies inside the industry as well as outside the industry, either directly or through third parties.

Benchmarking is one of the ways in which businesses strive to make themselves more internationally competitive. To that extent, benchmarking appears to be consistent with the objectives of Canada's industrial policy.80 However, there have been no reported cases which


80 It should be noted that it appears that the Bureau has not yet accepted this proposition. In a 1990 speech, a former Director commented:

Another justification that is often advanced for agreements among firms is the need to compete effectively in global markets. This rationale must not be accepted blindly. Many writers have argued to the contrary — that vigorous competition in a domestic market is important to position firms to meet the tests of international competition. Weston, supra note 19, at 5. As authority for the proposition that vigorous competition in a domestic market is important to position firms for international competition, the former Director cites Michael Porter's The Competitive Advantage of Nations. However, in a recent paper, David Teece argues that:
confirm its status under the conspiracy provisions of the Act.

It is possible to argue that an arrangement pursuant to which competitors exchange information other than with respect to price (for example, information on historical costs) which reduces in some respect but, viewed overall, enhances competition between them should be outside the scope of section 45.91 Arguably, this result is consistent both with Canada's industrial policy objectives and the purpose clause of the Act, in that such agreements may "expand opportunities for Canadian participation in world markets" and "promote the efficiency and adaptability of the Canadian economy". Since the Supreme Court noted in PANS that interpretation of the conspiracy provision "is conditioned, first of all, by the purposes of the Act",92 it is arguable that benchmarking which meets this criteria should be viewed favorably under Canada's conspiracy law even as it exists today.93

However, in the absence of definitive guidance, the application of the law to these types of arrangements is not clear. Messrs. Anderson and Khosla note in their Draft Paper that "considerable caution is warranted in reflecting on the policy implications of these conceptual developments".94 Given the key role that competition policy plays in implementing industrial policy objectives, it is to be hoped that the Director and the Bureau will continue to analyze the issues raised by

[a] closer reading of Porter indicates, however, that there is absolutely nothing in [The Competitive Advantage of Nations] to suggest that U.S. antitrust law is too lax, or that cooperation is not in fact desirable. Indeed, Porter's own examples, illustrations, documentation and analysis consistently point to the importance of cooperation. Hence his own and other commentator's use of his study to emphasize competition over cooperation is unwarranted.


91 This is not the same as considering efficiencies. The argument is not that the arrangement creates efficiencies, it is that competition is enhanced by the arrangement.

92 PANS, supra note 45, at 29.

93 Section 45 itself provides certain areas in which the exchange of information is permitted. Subsection 45(3) provides a defence where the agreement or arrangement relates only to the exchange of statistics, defining product standards, the exchange of credit information, the definition of terminology, cooperation in research and development, restriction of advertising or promotion (other than a discriminatory restriction), the sizes and shapes of containers, the adoption of the metric system or measures to protect the environment. Gonthier, J. suggested in PANS (at 36) that these are areas that may not be injurious to competition. However, the Act restricts the availability of the defence. Subsection 45(4) provides the defence is unavailable if the arrangement lessens or is likely to lessen competition unduly in respect of prices, quantity or quality of production, markets or customers and channels or methods of distribution or restricts or is likely to restrict a person from entering into or expanding in the business. These restrictions have, in the words of representatives of the Canadian Department of Justice, had the effect of making the defence in subsection 45(3) "somewhat hollow". See Dambrot & Tyhurst, Conspiracy and Bid-Rigging: A Conceptual Framework, 29 (Dec. 1989) (Paper prepared for an Insight Conference, Toronto, Canada).

94 Anderson & Khosla, supra note 2, at 69.
benchmarking and consider whether the conspiracy provisions should be reformed to more clearly indicate when such activities are permissible. 95

In the absence of legislative reform, this is an area where the effectiveness of competition policy can be enhanced by increasing the level of communication between business and the Bureau so that there is as much consultation as realistically possible both in specific cases and in areas requiring new enforcement approaches. The enforcement policies of the Director will be especially important in this regard, 96 since the Supreme Court of Canada is unlikely to reconsider the conspiracy sections in the near future. From the perspective of Canadian businesses competing internationally and the objectives of Canada’s industrial policy, it should be noted that it has been argued that the “rule of reason” approach should apply to benchmarking by U.S. corporations and that “in almost all circumstances there will be no anti-competitive harm” . 97

(ii) Antidumping and Competition Policy

The basic theme of this section is that antidumping law 98 in both Canada and the United States should be replaced with a harmonized competition law dealing with predatory pricing.

95 In fact, there are indications that the Bureau is now considering its position. Messrs. Anderson and Khosla refer in their Draft Paper to a forthcoming working paper entitled Inter-Firm Cooperation and the Law on Conspiracy. See Anderson & Khosla, supra note 2, at 65.

96 Some guidance is already being given. In a recent paper, Harry Chandler, Deputy Director of Investigation and Research (Criminal Matters), discussed information exchanges between members of the oil and gas industry. See Harry Chandler, Competition Law Issues in the Upstream Oil and Gas Industry, 31-1 ALBERTA L. REV. 72 (1993). Mr. Chandler provided some “suggestions to avoid coming into conflict with the conspiracy sections”. These included:

(i) information exchanges should be of a generalized nature and non-company specific;
(ii) individual firms should be free to determine which policies to follow on their own;
(iii) information should be based on past historical data. There should be no indication of future prices or trading terms;
(iv) associations should exercise extreme caution in the formulation and implementation of guidelines in relation to important competitive aspects of their business;
(v) where there is collection of data from industry participants (market share, pricing, etc), they should be collected by an independent firm, and the collection of this data should ensure that the anonymity of members is preserved;
(vi) the results from the data collected should be publicly available. The prospect of a wider audience, be they non-members or the general public, will reduce the likelihood of anti-competitive effects;
(vii) associations should avoid any policing to coerce members to follow association guidelines; and
(viii) no sanctions should be imposed on members who choose not to follow association guidelines.

97 See Jorde & Teece, supra note 84, at 598.

98 Antidumping duties can be distinguished from countervailing duties, which are meant to overcome subsidies provided by a foreign government.
Canada introduced antidumping laws in 1904.\textsuperscript{99} Currently, both Canada and the United States frequently impose antidumping duties. In a recent study by the C.D. Howe Institute,\textsuperscript{100} the authors note that during the period 1980-90, Canada and the United States initiated 49.5\% of global antidumping actions and that antidumping duties are used more frequently by Canadian firms against U.S. firms than vice versa.\textsuperscript{101}

Many reasons have been cited for replacing antidumping laws with competition law. Among these are that there is no economic justification for them,\textsuperscript{102} that they are inconsistent with the objectives of freer trade between Canada and the United States\textsuperscript{103} and that they have been used for political expediency rather than with a consistent policy objective.\textsuperscript{104} One of Canada’s objectives in negotiating the Free Trade Agreement was to reduce their use and, in fact, the Free Trade Agreement achieved some success in this area.\textsuperscript{105}

A case can be made for replacing antidumping laws with a harmonized law respecting predatory pricing in both Canada and the United States. The example of the European Community demonstrates that such an arrangement is workable. It must be acknowledged, however, that the Treaty of Rome creates a substantially closer relationship among the members of the European Community than the relationship between Canada and the United States under the Free Trade Agreement or that among Canada, the United States and Mexico under the

\begin{footnotes}
\textsuperscript{99} The United States did so in 1916. For a further discussion of the background to and the evolution of Canadian antidumping laws, see Calvin S. Goldman, \textit{Competition, Anti-Dumping Law and the Canada-U.S. Trade Negotiations}, 4 (Notes for an Address to the Canada/United States L. Inst. of Case W. Res. U. Sch. of L., Cleveland, Ohio) (April 3, 1987).


\textsuperscript{101} During the period, Canada initiated fifty-two actions against the United States, while the U.S. initiated twenty-four. \textit{Id.} at 15. Most recently, the United States increased its antidumping duties on hot and cold-rolled steel from, among other places, Canada. See M. Hallman and K. McParland, \textit{Steel Companies Hammered Again}, THE FIN. POST, June 23, 1993 at 1. Less than one week later, Canada imposed antidumping duties on cold-rolled sheet steel from, among other places, the United States. See Reuter, \textit{Canada Slaps Duty on Steel Imports}, THE FIN. Y POST, June 30, 1993 at 3.

\textsuperscript{102} Boddez & Trebilcock, \textit{supra} note 100, at 163-85, where the authors discuss both the economic and “ethical” arguments in favour of antidumping duties, concluding in each case that these arguments do not support the use of antidumping duties.

\textsuperscript{103} See Goldman, \textit{supra} note 99, at 6.

\textsuperscript{104} It has been noted that antidumping “not only reduces international competitiveness and consumer welfare but as well has a negative influence on the enforcement of other parts of the Canadian Competition Act and other aspects of international competition policy coordination”. See Ireland, \textit{supra} note 78, at 11.

\textsuperscript{105} See Boddez & Trebilcock, \textit{supra} note 100, at viii where the authors suggest that the creation of the bi-national panel under the Free Trade Agreement has “imposed a substantially more rigorous standard of review on domestic administrative agencies charged with applying these laws than the domestic judicial review processes that previously applied”. \textit{See also} at 152.
\end{footnotes}
NAFTA. Another and perhaps better model for Canada and the United States is the arrangement between Australia and New Zealand, which eliminated antidumping between the two countries in favor of a harmonized predatory pricing law which permits courts to take jurisdiction over predating parties in either country. Admittedly, one danger in relying too heavily on the Australia and New Zealand example is that they have not had the high level of antidumping actions that has existed between Canada and the United States. However, there appears to be a growing body of opinion that harmonization is not only desirable, but feasible. The implementation of the NAFTA should not change the desirability or feasibility of eliminating antidumping laws as between Canada and the United States. Under Article 1501 of the NAFTA, each country commits itself to adopting and maintaining effective competition laws. While the recent C.D. Howe Study suggests that given the short history of Mexican competition laws, Canada and the United States will be unlikely to rely on Mexican competition law as a substitute for antidumping duties vis-a-vis Mexico, the study also notes that there is no reason that Canada and the United States cannot make progress between themselves by replacing antidumping with competition laws. Allowing Canadian and American business to operate on a larger scale would assist in placing them on an equal footing with their competitors in the European Community. This would be consistent with Canada’s industrial policy objectives.

(iii) Interprovincial Barriers to Trade

In the Meech Lake Accord, the federal and provincial govern-

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107 The chairman of the Canadian International Trade Tribunal, which rules on some aspects of dumping complaints from Canadian businesses, recently said that “Canadian businesses would benefit from attempts to negotiate a new trade dispute system between Canada and the U.S. that would not permit either country to launch anti dumping cases against each other. Instead, companies in both countries would use competition laws, such as laws banning predatory pricing, to seek recourse.” See J. McFarland, Disputes Worse Under FTA, THE FIN. POST, March 25, 1993 at 6. See also Boddez & Trebilcock, supra note 100, at 230.

108 See Boddez Trebilcock, supra note 102, at 271, where the authors state that the Mexican government has recently introduced into Congress “an extensive Federal Act Governing Economic Competition”.

109 Id. at 273. This may be possible by building on the success of bi-lateral arrangements such as the Mutual Legal Assistance Treaty (cited in note 85). Another example of bi-lateral cooperation is the development of the Multijurisdictional Disclosure System between Canada and the United States, supra note 85.

110 See Ireland, supra note 78, at 12, where the author states that until “antidumping and other [non-tariff barriers] between [Canada and the United States] disappear, North American producers will not be competing on equal terms with European Community companies.”
ments proposed to strengthen the common market clause in the Canadian constitution. This would have led to a reduction in or the elimination of interprovincial trade barriers and a substantial savings to the Canadian economy. The Government has estimated that interprovincial barriers to trade add $6.5 billion in costs to the Canadian economy each year. In addition to these massive costs, barriers to interprovincial trade also prevent interprovincial competition between firms. The Porter Study highlighted the importance of vigorous domestic competition as a critical element of strengthening Canadian businesses to compete internationally.

Unfortunately, the Meech Lake Accord died and with it the proposal to strengthen Canada’s common market clause. Following the collapse of the Meech Lake Accord, the general view of government officials seems to have been that it was time to put aside for a while attempting to reform the constitution. While a constitutional solution does not seem likely, it was recently announced that the federal Finance Minister would meet with his provincial counterparts to determine strategies to eliminate interprovincial barriers to trade. It is to be hoped that direct negotiation between governments, unburdened from the other political issues associated with the Meech Lake Accord, will achieve greater results.

**CONCLUSION**

This paper has outlined the objectives of Canadian industrial policy and the manner in which Canadian competition policy implements those objectives. Despite the initiatives taken by the Government since 1984, and the generally effective manner in which the Act reflects industrial policy objectives, certain reforms remain highly desirable. Some of these reforms will require changes in the law. Others will require only that the Director demonstrate a willingness, as he has done in the past, to enforce the Act in a manner consistent with industrial policy objectives. The Government has sponsored a number of studies in recent years which have highlighted the critical importance to the Canadian economy of developing international competitiveness. Simply put, rising competitiveness means a rising standard of living. The con-
verse is also true. For that reason, in the 1990s competition policy should remain a key element of Canada's industrial policy.