

January 1991

# The Government Perspective: Effects upon Present Competition Policy

Derek Ireland

Follow this and additional works at: <https://scholarlycommons.law.case.edu/cuslj>



Part of the [Transnational Law Commons](#)

## Recommended Citation

Derek Ireland, *The Government Perspective: Effects upon Present Competition Policy*, 17 Can.-U.S. L.J. 189 (1991)  
Available at: <https://scholarlycommons.law.case.edu/cuslj/vol17/iss1/26>

This Speech is brought to you for free and open access by the Student Journals at Case Western Reserve University School of Law Scholarly Commons. It has been accepted for inclusion in Canada-United States Law Journal by an authorized administrator of Case Western Reserve University School of Law Scholarly Commons.

## The Government Perspective: Effects Upon Present Competition Policy

*Derek Ireland \**

I am pleased to have the opportunity to address this distinguished audience today. Howard Wetston, the Director of Investigation and Research of Canada's Bureau of Competition Policy, regrets that he cannot be with us for this most interesting seminar. Other duties unfortunately have intervened.

I have been the Director of Economics and International Affairs in the Bureau of Competition Policy for a little less than a year now. Over that limited period of time, I have become fascinated with the growing linkages between antitrust and other areas of public policy.<sup>1</sup> I would like to cite just a few examples.

Competition policy rules are playing a critical role in the completion of the European Community market under the Europe 1992 initiative. This is evidenced by the use of competition policy to discipline the activities of member states in such diverse fields as state-aids, the operations of state-owned corporations, government procurement and the deregulation of previously highly regulated sectors such as financial services, telecommunications and the airlines industry.<sup>2</sup>

Differences in competition law and enforcement practices have been raised often in the Strategic Impediments Initiatives talks between the United States and Japan. Some trade specialists have argued that competition policy will be on the agenda for the next round of multilateral trade negotiations (on the assumption that the current Uruguay Round comes to a fruitful conclusion).

Intellectual property rights were an important factor in a recent Bureau case under the abuse of dominance provisions involving NutraSweet,<sup>3</sup> and are expected to be a motivating force in a growing number of

---

\* Director of Economics and International Affairs, Bureau of Competition Policy (Ottawa).

<sup>1</sup> A discussion of the linkages between antitrust and other policy fields from a Canadian perspective is found in: Consumer and Corporate Affairs Canada, Bureau of Competition Policy, *Canadian Competition Policy: Its Interface with Other Economic and Social Policies, A Framework for Discussion* (Ottawa: September, 1989).

<sup>2</sup> A fuller discussion of this topic is found in: External Affairs and International Trade Canada, *Europe 1992, Working Group Report on Competition Policy* (Ottawa: January, 1991).

<sup>3</sup> A description of the NutraSweet case will be found in the forthcoming papers from an April 1990 Conference on Intellectual Property Rights jointly sponsored by Consumer and Corporate Affairs Canada and the Institute for Research on Public Policy (IRPP). The volume is to be called *POLICY DEBATES, Global Rivalry and Intellectual Property: Developing Canadian Strategies*, Smith, Murray G., ed. (Ottawa: April, 1990).

merger transactions in the coming years. It is incumbent upon all of us with an interest in competition law to become more familiar and knowledgeable with the linkages between competition and other public policies. In this regard, the Bureau expects that the research of the OECD Committee on Competition Law and Policy will play an important role in helping to enhance our understanding of these complex policy linkage issues.

This is why I find the issues surrounding the treatment of competition policy and antidumping under Article 1907 of the Canada-U.S. FTA so intriguing. What I would like to do in this presentation is to set out the current issues from the perspective of a Canadian competition policy advocate, with particular weight on issues and developments which could help to shape the Canada-U.S. discussions.

My presentation therefore focuses largely on economic, legal and competition policy issues from the perspective of Canada's Bureau of Competition Policy, and should not be interpreted as a statement of Canadian policy objectives. I would also like to state that, while the Bureau continues to be favourably inclined towards a replacement regime from a competition policy perspective, we recognize that there are trade policy issues—as well as the views of the business community with respect to the determination of negotiating positions—that will need to be tested on both sides of the border.

Many of the issues now in play were presented to this same forum almost four years ago by the previous Director of Investigation and Research, Cal Goldman.<sup>4</sup> For those who heard or read his speech, I will try to keep my comments on his text as brief as possible.

As you recall, four years ago, Canada and the U.S. were close to completing the negotiations on the FTA. In his April 1987 address, the previous Director posed three questions and in the nature of these things proceeded to respond to each question within his address. It is, in my view, worth revisiting these questions to provide a benchmark for more recent developments.

The first question posed by Mr. Goldman was whether antidumping was clearly negative in terms of its economic effects. Mr. Goldman stated that the effects were clearly negative, arguing that antidumping laws tend to protect competitors rather than competition and thus represent a serious impediment to the play of market forces in a free trade area. In addition, he stressed that the removal of trade barriers under the FTA should reduce the possibility that the price differentials addressed by antidumping orders would persist.

The second question was whether competition law provides a more suitable alternative to antidumping. His answer here was yes. Reliance

---

<sup>4</sup> Goldman, Calvin S., *Notes for an Address on Competition, Anti-dumping and the Canada-U.S. Trade Negotiations to the Canada/United States Law Institute of Case Western Reserve University School of Law*, Consumer and Corporate Affairs Canada, Speech S-87-12 (Ottawa: April 3, 1987).

on the price discrimination and predatory pricing laws is preferable, he suggested, for two main reasons. First, it is consistent with the intent of a free trade agreement to eliminate barriers at the border and ensure predictable and secure market access. Second, it enhances competitiveness and the efficiency of the market place, and precludes actions against pricing practices which have little or no injurious effect on the competition process.

The third question was what particular competition regime should be put in place in a freer trade environment. This was and remains a much more difficult question for which Mr. Goldman at that time did not have all the answers. He noted that there are significant differences in both the substantive and procedural provisions of the competition laws of our two countries. Nevertheless, in relation to the substantive laws, it was his view that the abuse of dominance provision adopted in 1986 in the Canadian Competition Act could provide a useful building block. He noted as well that there appears to be some movement in procedures toward greater compatibility between the two legal systems.

This is evidenced by the growing support for private actions on both sides of the border—assisted in Canada by the two recent decisions of the Supreme Court of Canada, particularly in *City National Leasing v. General Motors of Canada* which upheld the use of private actions in relation to the price discrimination provisions of the Competition Act. In this regard, he also noted the growing concerns in the United States regarding the application of treble damages. Mr. Goldman cited these procedural differences more as challenges than as problems to the use of competition laws to discipline transborder pricing practices.

He concluded that, if a freer trade environment does arise, a great deal of study is going to have to be devoted to this complex set of issues pertaining to what kind of antitrust regime should be put in place. In addition, he noted there are numerous other issues that require careful attention, particularly the conflict resolution mechanism, and the perennial issue of extraterritoriality.

Mr. Goldman made one further point. He recognized that a good deal of study was needed on the issue of whether the replacement of antidumping laws by antitrust laws between our two countries would leave any significant gaps that warrant special attention. He concluded therefore that those who are experts in both fields are going to have a good deal of work ahead of them if the trade discussions are to be successful. The large body of research being reviewed during this seminar indicates that considerable progress has already been made in this regard.

Turning to more recent developments, we are now in year three of the ten-year phase-in period of the FTA. With respect to the substitute regime work, we have seen significant progress in developing the knowledge base upon which future actions can be based. Let me identify three of these.

My department, Consumer and Corporate Affairs Canada, funded a January 1990 study by Lexenomics Inc. titled *The Relationship Between Competition Policy and Anti-Dumping Law: The Canadian Experience*.<sup>5</sup> This study provided a good review of the Canadian experience under the present antidumping regime and concluded that “a strong argument can be made that Canadian competition law leans more towards standards that promote efficiency than does Canadian anti-dumping law. . . .” The authors noted that, while the pricing rules under competition law may be imprecise, the enforcement discretion available to Canadian antitrust authorities makes them much more adaptable to prevailing economic theory on unilateral pricing, and facilitates a longer term perspective on the consequences of pricing practices on competition.

Secondly, a paper is currently well advanced by Presley Warner and Professor Michael Trebilcock of the University of Toronto Law School.<sup>6</sup> This study considers the theoretical coherence of antidumping laws and proposes what is described as a workable solution to the antidumping problem by outlining how Canada and the U.S. could amend their respective antidumping laws and bring about antitrust harmonization with respect to pricing practices.

Thirdly, the Exposure Draft distributed in December 1990 of the *Study on Competition (Antitrust) and Antidumping Laws in the Context of the Canada-U.S. Free Trade Agreement*, prepared for the Committee on Canada-United States Relations of the Canadian Chamber of Commerce and the Chamber of Commerce of the United States,<sup>7</sup> offers many insights and a set of conclusions based essentially on the retention of national competition laws. At this juncture, I would like to commend the Canadian and U.S. Chambers of Commerce for their valuable contribution to our body of knowledge on this subject.

Our initial reading of these technically complex documents suggests to the Bureau that:

- (i) Replacing antidumping with competition policy rules is not only economically desirable but would also appear to be technically feasible.
- (ii) The replacement option would appear to be less complicated than initially perceived. This option may not require full harmonization of competition policy rules but rather only a certain degree of compatibility in law and practice as well as the institutional mechanisms needed to resolve any differences or disputes. To the ex-

---

<sup>5</sup> Lexenomics Inc. (Ottawa: January 1990).

<sup>6</sup> Presley Warner and Trebilcock, Michael J., *Found Two of the Canada-U.S. Free Trade Agreement: The Case for Replacing Antidumping with Antitrust*. Unpublished, Ontario Centre for International Business.

<sup>7</sup> Feltham, Ivan R., Stuart A. Salen, Robert F. Mathieson, and Ronald Wonnacott, *Competition (Antitrust) and Antidumping Laws in the Context of the Canada-U.S. Free Trade Agreement: A Study for the Committee on Canada-United States Relations of the Canadian Chamber of Commerce and the Chamber of Commerce of the United States*. Exposure Draft 12/19/90.

tent that amendments to our national laws are needed, these should not be substantive and would not undermine the fundamental intent and enforcement policies of either Canadian or U.S. law with respect to anti-competitive pricing practices.

- (iii) Differences between Canadian and U.S. law and practice in the areas of private actions, class actions, contingent fees and treble damages—as outlined in the Chambers' excellent study—will need to be addressed in further research and discussions. However, the questions posed by these differences appear capable of resolution under a national treatment framework.
- (iv) Consistent with the current economic thinking in the antitrust field, the focus of the new replacement regime for the most part would be on predatory pricing, where the seller clearly possesses market power, not on the more general forms of price discrimination.
- (v) Any problems which remain in the areas of jurisdiction, information collection, enforceability, and extraterritoriality should be comparatively easy to address under the FTA and other bilateral frameworks already in place such as the Mutual Legal Assistance Treaty (MLAT), the Memorandum of Understanding on Anti-trust (MOU), and the biannual meetings between Canadian and American antitrust agencies.

As well, some commentators have suggested that this bilateral process could afford a logical opportunity to address the export cartel exemptions of our respective competition laws in a mutually beneficial manner.

Since Mr. Goldman's speech, there have been other developments which in the Bureau's view tend to strengthen the arguments in favour of replacing antidumping with competition rules under the FTA. These are:

1. Developments under the Europe 1992 initiative.
2. The replacement of antidumping with competition policy rules under the Australia-New Zealand free-trade arrangement.
3. The growing cooperation between the antitrust agencies in Canada and the United States.
4. The evolving commercial interests of the Canadian and U.S. economies over the period of FTA implementation.
5. Work of the Canadian Bureau of Competition Policy on two enforcement guidelines on price discrimination and predatory pricing.
6. More general trends towards greater international harmonization and compatibility of market framework laws and policies among the modern industrialized economies.

I would like to briefly summarize the possible implications of these developments for the topic of this conference.

European developments are establishing interesting precedents for future work in this area. Mr. Goldman, in his earlier presentation to this forum, emphasized that the European Community, at the outset of its

development under the Treaty of Rome in 1957, had recognized the incompatibility of antidumping in its economic arrangement. Therefore, members states do not maintain independent national antidumping laws against other member states. In addition, the Treaty of Rome contains a provision dealing with abuse of dominant position which provides for uniform antitrust treatment of pricing practices among member states. Also of interest in this regard is that the European Community and the European Free Trade Association (EFTA) have agreed to complete their discussions to exempt the EFTA countries from the Community's antidumping regime and to apply only the Community's competition policy rules to EFTA-EC trade. The time could be coming when virtually all intra-European trade will no longer be subject to antidumping regimes.

Many of us believe that the experience and success of the Europe 1992 initiative will place growing pressure on governments on both sides of our common border to apply competition policy rules and related measures to better integrate the Canadian and U.S. economies under the FTA. In a similar manner, there could be pressure in Canada to reduce the many interprovincial barriers which to date have prevented the full integration of the Canadian economy and marketplace.

The situation within the European Community is in stark contrast to the rapidly expanding application of antidumping rules to the Community's imports from non-EC countries. Sylvia Ostry, Patrick Messerlin and other experts in this field have noted with growing concern that antidumping has become the "weapon of choice" among the western economies for dealing with supposedly unfair trade, with the European Community leading the way. In a recent paper,<sup>8</sup> Mr. Messerlin documented:

- the rapid expansion of the application of antidumping regulations in less than a decade and a half from a position of insignificance to one of dominance in the EC protectionist arsenal;
- how these regulations allow import-competing firms to dominate trade policy formulation in the European Community;
- the extent to which these actions are undermining the GATT; and
- how the latest developments in EC antidumping regulation are being used to distort not only trade patterns but also investment patterns among countries.

Many analysts are worried that the possible spread of the North American recession to the rest of the world will lead to even greater application of antidumping rules by European and other trade authorities. The consequences would be even greater distortions of trade and investment patterns and further deepening of a worldwide economic downturn.

In a recent article, Ms. Ostry has argued that:<sup>9</sup>

---

<sup>8</sup> Trebilcock, Michael J. and Robert C. York, eds. *Fair Exchange: Reforming Trade Remedy Laws*. C.D. Howe Institute, Toronto and Calgary: Renouf Publishing Company, November 1990.

<sup>9</sup> *Id.* at 20.

Logically, the principle of national treatment under domestic competition policy should replace antidumping regulation. The same definition of undesirable pricing behaviour that is applied to domestic firms should apply to foreign firms exporting into the domestic market.

She further argued that this reform would require a prior commitment to harmonize competition policy and perhaps go beyond harmonization to establish a supranational competition authority to deal not only with disputes but also to handle transnational issues. It could be argued, however, that to an important degree these issues already are being addressed bilaterally between the U.S. and Canada through:

- the similarity of Canada-U.S. competition law and practice in the area of anti-competitive pricing, particularly with respect to predatory pricing where analytical approaches in the two countries are converging;
- the close relations between our respective antitrust agencies, as evidenced by our biannual meetings in addition to our almost daily informal contacts to discuss specific cases as well as enforcement policy (such as the soon to be published Merger Guidelines and the two enforcement guidelines on pricing noted earlier);
- the bilateral institutions which have been or in the future can be established under the FTA.

Also relevant in this regard is the joint decision of the Australian and New Zealand governments to drop the application of their respective antidumping statutes to their bilateral trade, and instead to apply their respective antitrust statutes. As an extension of their earlier free-trade agreement, the two countries abolished their antidumping laws and enacted a *Misuse of Trans-Tasman Market Power* provision in their respective antitrust laws. Under this provision, both private parties and the two antitrust agencies are able to take action based on a civil “balance of probabilities” standard of proof. The critical question is whether the defendant seller possesses a significant degree of market power. The new regime addresses refusals to deal and predatory pricing in the context of misuse of market power, but does not penalize cross-border primary-line price discrimination involving a company and its direct competitors (for example, when a company charges different prices in two geographic areas).

In a recent discussion of the replacement of antidumping with competition policy rules, Greg Cox, principal legal officer for the Competition Policy Branch in the Australia Attorney General’s office, stated:

Harmonization is not replication. The object is not that we get mirror legislation but that the pieces of legislation sit comfortably side by side and that they effectuate a better market access across the Trans-Tasman.

The Australia/New Zealand experience shows that the replacement of antidumping law with competition policy rules does not require a full

customs union but rather can be effectively implemented under a free trade agreement. In their recent draft report, Presley Warner and Professor Trebilcock concluded from the Australia-New Zealand experience that the abolition of anti-dumping laws in favour of harmonized antitrust laws enhances economic welfare, is theoretically coherent and offers a practical solution to the global increase in antidumping actions.<sup>10</sup>

Discussions on replacing antidumping with competition rules will also be coloured by future trade developments and in particular the extent to which the FTA truly results in a more integrated North American economy as intended under the Agreement. It is interesting to note that the total value of trade between our two countries covered by antidumping orders increased substantially through the 1980's. In 1987, about one-tenth of one percent of Canadian imports from the U.S. were covered by antidumping orders, while in 1988, a much higher proportion, namely nine-tenths of one percent of Canadian exports to the U.S. were covered by American orders.

The steel industry appears as the major "beneficiary" of antidumping orders in both countries, and therefore steel users have been the economic activities which have been most negatively affected by our respective antidumping regimes. A report prepared by the Bureau about three years ago illustrated how antidumping orders and other non-tariff barriers on both sides of the border have not only hurt the competitiveness of North America's steel-using industries, but as well have retarded the rationalization needed to make the North American steel industry more competitive with offshore imports.<sup>11</sup>

Generally, antidumping has been applied to a greater dollar value of Canadian exports to the U.S. in comparison with Canadian imports from that market. However, regardless of the past record, to the extent that the recession hits Canada harder than the U.S. and Canada's export trade continues to be impeded by antidumping regulation in the American and European markets (perhaps as one consequence should there be a full GATT breakdown), the Canadian government could encounter additional pressure from the business community to apply antidumping more often and to greater effect to the import trade of our major trading partners, including the U.S.

At the same time, conceptually (and leaving aside the pressures of a recession), one would expect that the opportunities for cross-border price discrimination and predatory pricing would decline substantially as the removal of tariff and non-tariff barriers more fully integrate the North American economy. Unless there are in place barriers to entry, other competitive restraints, or licensing or other agreements based for exam-

---

<sup>10</sup> Presley and Trebilcock, *supra* note 6, at 94.

<sup>11</sup> Ronayne, M.F., R.D. Anderson and S.D. Khosla, *Non-Tariff Barriers in Canada-U.S. Trade: A Case Study of the Steel Industry* (Ottawa: Consumer and Corporate Affairs Canada, Bureau of Competition Policy, Economic Policy and International Affairs Branch, June 1987).

ple on intellectual property rights, expanded opportunities for arbitrage—supported in part by better information flows, reduced transaction costs and closer corporate linkages resulting from the FTA—should make it increasingly difficult for the same seller to charge different prices for the same or similar goods on the two sides of the border.

In addition, as our industries and companies become more integrated, an antidumping order in one country is more likely to hurt producer interests on both sides of the border and therefore undermine the competitiveness of North American industry in competing against the rest of the world. Under these conditions, the economic rationale underlying antidumping (which some argue is dubious at the best of times) and perhaps more important the business pressure for antidumping actions, could diminish substantially.

One possible complexity is the trilateral discussions on a free trade area between Canada, the U.S. and Mexico. Given that Mexico presently does not have a competition law, this trade negotiation could complicate the negotiations under Article 1907 of the FTA. However, in light of the growing interest among developing and Eastern European countries in antitrust law, this problem could be resolved in the relatively near future through the development of a Mexican competition statute.

Turning to domestic enforcement matters, the Canadian Bureau of Competition Policy has been attempting to address many of these pricing issues in clarifying its enforcement policy in the areas of predatory pricing and price discrimination. Draft bulletins on these two subject areas were circulated for comment in the Summer and Fall of 1990. We are now attempting to incorporate the many helpful comments which we received, before distributing the final documents over the first months of 1991.

The Bureau's draft paper on price discrimination attempts to reflect the more recent economic thinking that price discrimination, rather than being injurious to competition, may in fact be of assistance to the economy in realizing allocative efficiencies. The economic literature also questions whether price discrimination law in fact protects small business and whether small business needs the protection of that type of law. By reinterpreting the specific statutory elements of the price discrimination section of the Competition Act, the final guidelines on price discrimination will seek to provide broader scope for innovative pricing strategies.

The Bureau and the Director are also wrestling with many complex issues in completing the predatory pricing document. These include:

- the link between market power and successful predation;
- the role of entry and exit conditions in the relevant industry and market;
- the need to develop enforcement guidelines which, while discouraging price predation, would at the same time encourage vigorous healthy price competition;

—the price-cost relationships of the alleged predator and the target firm(s).

The Bureau of Competition Policy believes that the publication of the two enforcement guidelines on pricing will clarify some of the questions posed by the replacement option. First, the contents of the two documents take account of economic principles which are recognized in both Canada and the U.S., and benefitted from consultation with U.S. antitrust authorities. Therefore, the guidelines should help to promote greater compatibility in the application of competition law between our two countries with respect to anti-competitive pricing practices. Second, it is hoped that the guidelines will lead to greater understanding of the appropriate (and inappropriate) role of government in disciplining pricing practices among the business and policy communities on both sides of the border.

Returning to the policy linkage issues raised earlier, I would also like to bring to your attention some research conducted by the Canadian Bureau of Competition Policy on the links between international trade, the territorial divisibility of intellectual property rights and trade, international price discrimination and competition law. This research, which has been published in a working paper called *Intellectual Property Rights and International Market Segmentation: Implications of the Exhaustion Principle*,<sup>12</sup> indicates that territorially divisible intellectual property rights differ importantly from traditional non-tariff barriers such as quotas and are not necessarily harmful to consumer welfare. The research findings are consistent with recent advances in economic theory which suggest that allowing patent holders to engage in third-degree price discrimination can enhance economic efficiency by providing increased incentives to make investments to open new markets. It is hoped that the distribution of this working paper will further enhance our understanding of the roles of market segmentation and price discrimination in a modern, increasingly globalized economy.

Turning to a final more general issue, there is growing pressure from large and small companies alike in Canada for greater harmonization and compatibility in market-based framework laws and policies between Canada and our major trading partners in such areas as competition law, intellectual property rights, and company law. The interest in greater harmonization was particularly evident in a survey of intellectual property rights conducted by Consumer and Corporate Affairs Canada about two years ago.<sup>13</sup> Our consultations suggest this interest covers other ar-

---

<sup>12</sup> Anderson, R.D., P.J. Hughes, S.D. Khosla, and M.F. Ronayne, *Intellectual Property Rights and International Market Segmentation: Implications of the Exhaustion Principle* (Ottawa: Consumer and Corporate Affairs Canada, Bureau of Competition Policy, Economics and International Affairs Branch, October 1990).

<sup>13</sup> The results from this research are summarized in: *Intellectual Property and Canada's Commercial Interests: A Summary Report*, prepared by Consumer and Corporate Affairs Canada for the Intellectual Property Advisory Committee (Ottawa: Supply and Services Canada, 1990).

eas of framework law. My department, Consumer and Corporate Affairs Canada, is exploring these questions of harmonization, the alignment of our statutes to international developments and the linkages between market-based framework laws and policies in a departmental priority project called *Canadian Marketplace/International Directions* headed up by Howard Wetston, the Director of Investigation and Research.

To conclude, the view of the Canadian Bureau of Competition Policy is that the research and economic developments since Mr. Goldman spoke to you nearly four years ago further strengthens the case for replacing antidumping with competition policy rules. The growing body of evidence is generally consistent with the Bureau's view that the replacement regime would be economically desirable, technically feasible and to the mutual advantage of both parties under the FTA. If amendments to our existing statutes are needed, we expect these to be relatively minor.

The replacement regime would be fully compatible with a free trade area, would help to promote a trade-enhancing model for future multilateral trade negotiations, and would be consistent with the forces of globalization and harmonization which currently are driving all national economies. The Bureau believes that as the North American economy becomes more integrated through the forces of the FTA, deregulation, privatization, and law harmonization, the opportunities for anti-competitive pricing practices in cross-border sales should diminish and therefore a replacement regime should not place an undue enforcement burden on our antitrust agencies.

The decision of Australia and New Zealand to adopt the replacement option and the very different treatment afforded by the European Community to members in contrast to non-members also provides some important lessons for the future. A fundamental question posed by European developments is whether Canada and the U.S. will treat each other as the Community treats the rest of the world, or whether Canada and the U.S. will treat each other as members of an integrated economic family.

At the same time, the Bureau recognizes that many legal and technical questions remain to be resolved, and many members of the business community on both sides of the border remain to be convinced that their long term interests will be better served by a replacement regime based on competition policy rules. It is hoped that this seminar and the research discussed here will help to promote that understanding in both Canada and the United States.

