Legislative Summary **LS-406E**

BILL C-23: AN ACT TO AMEND THE COMPETITION ACT AND THE COMPETITION TRIBUNAL ACT

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LEGISLATIVE HISTORY OF BILL C-23

HOUSE OF COMMONS		SENATE	
Bill Stage	**Date**	**Bill Stage**	**Date**
First Reading:	4 April 2001	First Reading:	11 December 2001
Pre-Second Reading Study:	5 December 2001	Second Reading:	5 February 2002
Report Stage:	7 December 2001	Committee Report:	2 May 2002
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Statutes of Canada 2002, c.16

N.B. Any substantive changes in this Legislative Summary which have been made since the preceding issue are indicated in **bold print.**

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TABLE OF CONTENTS

Page

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BILL C-23: AN ACT TO AMEND THE COMPETITION ACT AND THE COMPETITION TRIBUNAL ACT*

INTRODUCTION

Bill C-23 received first reading in the House of Commons on 4 April 2001. **It was referred before Second Reading to the House of Commons Standing Committee on Industry, Science and Technology. The Committee made a number of amendments to the bill; the most significant amendments concern the creation of a new right of "private access," i.e., the right of a person or business to seek a legal remedy against the anti-competitive conduct of another.**

The bill will be presented here in terms of its three main areas of focus:

- creating a new offence: "deceptive prize notices";
- providing new judicial powers to the Canadian Competition Tribunal; and
- facilitating cooperation with foreign competition authorities for the enforcement of civil competition and fair trade practices laws.

DECEPTIVE PRIZE NOTICES

In June 2001, the U.S. Senate's Permanent Subcommittee on Investigations heard testimony from victims of, and experts on, telemarketing fraud. Almost all of them described Canada as a haven for such fraud. The Committee heard that "phone scams" swindle more than $35 million every year from Americans, mostly seniors. And although apparently some fraud

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* Notice: For clarity of exposition, the legislative proposals set out in the bill described in this Legislative Summary are stated as if they had already been adopted or were in force. It is important to note, however, that bills may be amended during their consideration by the House of Commons and Senate, and have no force or effect unless they are passed by both Houses of Parliament, receive Royal Assent, and come into force.

originating in the U.S. is aimed at Canadians, it is only a small fraction of the amount aimed at Americans. Experts praised a U.S.-Canada Working Group on Telemarketing Fraud that has reportedly caught a few of the perpetrators. "Project Colt" was formed in April 1998, to coordinate efforts between the RCMP, the U.S. Customs Service, the FBI, and various arms of Quebec police. Since its inception, the project has returned $12 million to victims. Law enforcement officials on both sides of the border met in Ottawa in June 2001 to discuss these and related issues.(1)

A. Elements of the Offence

The new offence – "Deceptive Notice of Winning a Prize" – is created by the addition of new section 53. The offence is similar to the existing offence of telemarketing, currently set out in section 52.1 of the Act. Unlike certain other "deceptive marketing practices" set out in Part VII.1 of the Act, the new offence may only be prosecuted as a criminal matter, i.e., the Commissioner of Competition does not have the option of pursuing it as an administrative offence (*amended section 74.07(2)*).

The offence is committed if four elements are present:

- a person sends, or causes to be sent, by mail or e-mail, **a document or notice in any form**;
- the **document or** notice is for the purpose of "promoting, directly or indirectly, any business interest or the supply or use of a product";
- the **document or** notice "gives the general impression that the recipient has won, will win, or will win on **doing a particular act,** a prize or benefit"; and if
- the recipient is asked or given the option of paying money or doing anything to incur a cost.

B. Penalties

Section 53 creates a "hybrid" offence, i.e., one in which the Crown may proceed by way of summary conviction or indictment. A summary conviction may result in a fine of up to $200,000 and/or one year in prison. A conviction on indictment may result in a fine "in the

(1) CBC radio news, "Canada a breeding ground for telemarketing fraud, U.S. Senate told," WebPosted Friday, 15 June 2001, 20:22:18. http://cbc.ca/cgi-bin/templates/view.cgi?/news/2001/06/15/Consumers/telemarketing_010615.

discretion of the court" and/or up to five years in prison. In considering the sentence, the court is directed to consider the following aggravating factors:

- the use of a list of persons previously deceived in a deceptive prize notice or telemarketing offence;
- the particular vulnerability of the recipients to abusive tactics;
- the amount of proceeds realized;
- previous convictions in a deceptive prize notice or telemarketing offence; and
- the manner in which information is conveyed.

C. Vicarious Liability

In prosecuting a corporation, it is sufficient to prove that the offence was committed by an employee or agent of the corporation, whether or not that person is specifically identified. Liability extends to any officer or director who is in a position to influence the corporation's policies regarding the offence, whether or not the corporation itself is convicted.

D. Defences

Both a person and a corporation may escape liability if it is shown that "due diligence" was exercised to prevent the commission of the offence. An offence is not committed if the following conditions are met:

- the recipient actually wins the prize or benefit; and
- the sender makes adequate and fair disclosure of:
  - the number and approximate value of the prizes or benefits;
  - the areas to which the prizes have been allocated; and
  - any facts within the sender's knowledge that "materially affect" the chances of winning;
- the prize or benefit is distributed without unreasonable delay; and
- participants are selected or the prizes are distributed randomly on the basis of participants' skill in any area to which the prizes or benefits have been allocated.

THE COMPETITION TRIBUNAL

In June 2000, the House of Commons Standing Committee presented its *Interim Report on the Competition Act*.(2) The Committee recommended that:

> 14. The Government of Canada give further consideration, in consultation with stakeholders, to enacting legislative changes necessary to permit private individuals who have been prejudiced in the conduct of their business by anticompetitive conduct to make application to the Competition Tribunal for relief in matters involving civil review. The issue of the relief available to private litigants, whether in the form of injunctive relief or damages, or both, may also be the subject of further consultation.

The concept of private access was debated at length by the Committee. The Commissioner of Competition himself also endorsed the idea:

> Private rights of access to the Competition Tribunal in our view would work very well in conduct which is essentially a private matter between buyers and sellers and which therefore does not warrant public intervention. The provisions that come to mind are section 75, refusal to deal, and section 77, tied selling, market restrictions, and exclusive dealing.(3)

The majority of witnesses endorsed the concept of private access, but with reservations:

> In previous discussions about the merits of private access … stakeholders have expressed concerns about the needs for safeguards and against strategic litigation. Private access should be introduced with safeguards such as leave from the Tribunal to make sure for cost awards and certainly … it should not provide for damages.(4)

Bill C-23**, as introduced in the House of Commons, did** not create a private right of access **to the Tribunal**. However, the bill did "lay the groundwork" for a private-access regime. By giving the Tribunal significant new powers to hear references, make summary disposition, and award costs, the bill **would equip the Tribunal to** act as a "gatekeeper" to weed

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(2) June 2000, 36th Parliament, 2nd Session. http://www.parl.gc.ca/InfoComDoc/36/2/INDU/Studies/Reports/indu01-e.html.

(3) Konrad von Finckenstein, Proceedings of the House of Commons Standing Committee on Industry, 43:9:15.

(4) *Ibid*.

out frivolous or groundless proceedings in the early stages, or to prevent "strategic litigation" (i.e., legal action commenced not for the purpose of seeking a remedy to anti-competitive behaviour, but rather to gain an advantage over a competitor). **This appeared** to suggest that Bill C-23 **was** the first step towards the eventual creation of a right of private access to the Tribunal.

The Tribunal's new powers will permit:

- a judicial member of the Tribunal sitting alone to grant summary judgment (i.e., to dismiss a case or to grant judgment without a full hearing);
- **the Tribunal to award costs in accordance with the *Federal Court Rules, 1998***; and
- parties to refer questions of law, mixed law and fact, jurisdiction, practice or procedure to the Tribunal for summary determination.

A. Cost Awards

A new section, 8.1, will provide the Tribunal with the authority to award costs, on a final or interim basis, in proceedings before it under Part VII.1 (*Deceptive Marketing Practices*) and Part VII (*Matters Reviewable by the Tribunal*) **in accordance with the *Federal Court Rules, 1998***. Costs may also be awarded against the Crown.

Where costs are awarded to the Government, the assessment ("taxation") is not to be reduced merely by reason that the lawyers involved were salaried employees of the government.

B. Summary Dispositions

Clause 18 of the bill would provide the Tribunal with new powers to determine applications under Parts VII.1 or VIII "in a summary way, in accordance with any rules on summary disposition." Summary disposition matters may be dealt with by the Chair of the Tribunal or a single judicial member of the Tribunal designated by the Chair. An application may be dismissed in whole or in part if the member finds there is "no genuine basis" for it. Similarly, the member may allow the application in whole or in part if the member is convinced that there is no genuine basis for a response.

Summary disposition is available for applications under subsection 4.1(2) or (4),[5] section 100(1),[6] section 103.1 (new – see below under "Interim Orders"); and subsection 104(1)[7] or 104.1(7).[8]

C. References

Section 124.2 is new. It creates a mechanism whereby the Commissioner and the person who is subject to an inquiry under section 10[9] may agree to apply to the Tribunal for a determination of any question of law, mixed law and fact, jurisdiction, practice or procedure in relation to the application or interpretation of Part VII.1 (*Deceptive Marketing Practices)* or Part VIII (*Matters Reviewable by the Tribunal*) whether or not an application has been made under those sections. The Commissioner may also, of his own accord, refer a question of law, jurisdiction, practice or procedure (but not of mixed law and fact) in relation to the application or interpretation of Part VII.1, VIII or IX (notifiable transactions, i.e., mergers). **As well, the parties to a private action may agree to direct a reference to the Tribunal. They are required to notify the Commissioner, who may intervene.** The Tribunal is required to decide the question "informally and expeditiously" in accordance with its normal rules.

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(5) (2) If, on application by an airline, the Tribunal finds that the airline and its affiliates account for less than 60% of the revenue passenger-kilometres of all domestic services over the 12 months immediately before the application, the Tribunal shall issue a certificate to that effect; (4) If, on application by a travel agent, the Tribunal finds that an airline that holds a certificate issued under subsection (2) and its affiliates account for at least 60% of the revenue passenger-kilometres of all domestic services over the 12 months immediately before the application, the Tribunal shall revoke the certificate.

(6) 100.(1) The Tribunal may issue an interim order forbidding any person named in the application from doing any act or thing that it appears to the Tribunal may constitute or be directed toward the completion or implementation of a proposed merger.

(7) 104. (1) Where an application has been made for an order under this Part (*Part VIII – reviewable matters)*, other than an interim order under section 100 (*mergers*), the Tribunal…may issue such interim order as it considers appropriate, having regard to the principles ordinarily considered by superior courts when granting interlocutory or injunctive relief.

(8) 104.1 (1) The Commissioner may make a temporary order prohibiting a person operating a domestic service, as defined in subsection 55(1) of the Canada Transportation Act, from doing an act or a thing that could, in the opinion of the Commissioner, constitute an anti-competitive act.

(9) Section 10 states that the Commissioner shall make an inquiry: (a) on application made under section 9 (*by any six persons resident in Canada*); or (b) whenever the Commissioner has reason to believe that: (i) a person has contravened an order made pursuant to section 32, 33 or 34, or Part VII.1 or Part VIII, (ii) grounds exist for the making of an order under Part VII.1 or Part VIII, or (iii) an offence under Part VI or VII has been or is about to be committed, or (c) whenever directed by the Minister to inquire whether any of the circumstances described in subparagraphs (b)(i) to (iii) exist.

D. Interim Orders **and Private Action**

1. Introduction

Clause 12 of the bill adds a new section, section **103.3**, that provides the Tribunal with new powers to issue an interim order **to prevent anti-competitive behaviour** under Part VIII. Part VIII deals with restrictive trade practices or, as they are sometimes called, "reviewable trade practices." Reviewable practices are generally legal – and, in fact, quite common – until subject to an order of the Tribunal, which prohibits their practice *only* as against the person named in the order. This is based on the theory that, in some cases, these practices may be pro-competitive. As such, each case is assessed on its merits. The standard of proof is that of civil law (i.e., balance of probabilities or preponderance of evidence).

In reviewable (civil) actions under Part VIII, the Commissioner acts as the investigator and prosecutor; the Tribunal acts, in effect, as the judge. Where the Commissioner seeks to stop a particular behaviour, he does so by making an application to the Tribunal for relief. The Commissioner is required to make out a case, on a balance of probabilities, that the relief requested is warranted by the circumstances.

Currently, an interim order "may issue ... having regard to the principles ordinarily considered by superior courts when granting interlocutory relief." The test for issuing a temporary order is as follows:

- First, the court must determine whether the applicant (i.e., the Commissioner) has a *prima facie* case, i.e., whether the case appears to have merit.
- If the Commissioner makes out a *prima facie* case, the Tribunal will then ask whether irreparable harm will occur if the injunction is *not* issued. "Irreparable harm" means harm that either cannot be quantified in monetary terms or cannot be cured, usually because one party cannot collect damages from the other. In the case of predatory pricing, for example, irreparable harm could arise if the victim has been so "undercut" that they are forced out of the industry.
- If the second part of the test is met, the Tribunal will then address "the balance of convenience," i.e., which party will suffer the greater harm from the granting or refusal to grant the injunction pending a resolution. Currently, only the Commissioner of Competition can apply for an order.

As a result of the amendments made by the Committee (section 103.1), private individuals will have the right to seek relief directly from the Competition Tribunal. The right is quite limited:

- **it will only be available with respect to the practices described in sections 75 and 77 (exclusive dealing, tied selling, market restriction and refusal to deal);**
- **a prospective applicant will be required, as a first step, to obtain "leave" of the Tribunal to bring a case;**
- **in granting leave, the Tribunal must believe that the applicant's business is directly and substantially affected by the relevant anti-competitive practice; and**
- **the Tribunal will not grant leave if the Commissioner of Competition has started an inquiry or settled the mater.**

This will permit the Tribunal to act as the "gatekeeper," and to "weed out" cases which have no merit, or which have been commenced for other than *bona fide* reasons (so-called "strategic" litigation).

2. Test for Injunctive Relief – Two Exceptions

Clause 13 (amending section 104) specifies that, with two exceptions, an application for an order under Part VIII will be assessed according to the principles "ordinarily considered by superior courts when granting interlocutory or injunctive relief." The first exception is for an application made under section 100.(10) The second exception is created by the bill in new section **103.3**.

Under new section **103.3**, an interim order would be available to prevent the continuation of certain types of conduct:

- refusal to deal (section 75);(11)

(10) The Tribunal may issue an interim order forbidding any person named in the application from doing any act or thing that it appears to the Tribunal may constitute or be directed toward the completion or implementation of a proposed merger in respect of which an application has not been made under section 92 or previously under this section, where (a) on application by the Commissioner, certifying that an inquiry is being made under paragraph 10(1)(b) and that, in the Commissioner's opinion, more time is required to complete the inquiry, the Tribunal finds that in the absence of an interim order a party to the proposed merger or any other person is likely to take an action that would substantially impair the ability of the Tribunal to remedy the effect of the proposed merger on Competition under that section because that action would be difficult to reverse; or (b) the Tribunal finds, on application by the Commissioner, that there has been a contravention of section 114 in respect of the proposed merger.

(11) "refusal to deal" occurs where (a) 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; (b) the person is unable to obtain adequate supplies of the product because of insufficient competition among suppliers of the product in the market; (c) the person is willing and able

- consignment selling (section 76);[12]
- exclusive dealing,[13] tied selling[14] and market restriction[15] (section 77);
- abuse of dominant position (section 79);[16]
- delivered pricing (section 81);[17] and
- refusal to supply by foreign supplier (section 84).[18]

(cont'd)

to meet the usual trade terms of the supplier or suppliers of the product; (d) the product is in ample supply; and **(e) the refusal to deal is having or is likely to have an adverse effect on competition in a market**.

(12) "consignment selling" issues arise where a supplier of a product who ordinarily sells the product for resale, introduces consignment selling for the purpose of (a) controlling the price at which a dealer in the product supplies the product, or (b) discriminating between consignees or between dealers to whom he sells the product for resale and consignees.

(13) "exclusive dealing" means

(a) any practice whereby a supplier of a product, as a condition of supplying the product to a customer, requires that customer to

(i) deal only or primarily in products supplied by or designated by the supplier or the supplier's nominee, or (ii) refrain from dealing in a specified class or kind of product except as supplied by the supplier or the nominee, and

(b) any practice whereby a supplier of a product induces a customer to meet a condition set out in subparagraph (a)(i) or (ii) by offering to supply the product to the customer on more favourable terms or conditions if the customer agrees to meet the condition set out in either of those subparagraphs.

(14) "tied selling" means

(a) any practice whereby a supplier of a product, as a condition of supplying the product (the "tying" product) to a customer, requires that customer to

(i) acquire any other product from the supplier or the supplier's nominee, or

(ii) refrain from using or distributing, in conjunction with the tying product, another product that is not of a brand or manufacture designated by the supplier or the nominee, and

(b) any practice whereby a supplier of a product induces a customer to meet a condition set out in subparagraph (a)(i) or (ii) by offering to supply the tying product to the customer on more favourable terms or conditions if the customer agrees to meet the condition set out in either of those subparagraphs.

(15) "market restriction" means any practice whereby a supplier of a product, as a condition of supplying the product to a customer, requires that customer to supply any product only in a defined market, or exacts a penalty of any kind from the customer if he supplies any product outside a defined market.

(16) "abuse of dominant position" occurs where (a) one or more persons substantially or completely control, throughout Canada or any area thereof, a class or species of business, (b) that person or those persons have engaged in or are engaging in a practice of anti-competitive acts, and (c) the practice has had, is having or has likely to have the effect of preventing or lessening competition substantially in a market.

(17) "delivered pricing" means the practice of refusing a customer, or a person seeking to become a customer, delivery of an article at any place in which the supplier engages in a practice of making delivery of the article to any other of the supplier's customers on the same trade terms that would be available to the first-mentioned customer if his place of business were located in that place.

(18) Refusal to supply by foreign supplier occurs where a supplier outside Canada has refused to supply a product or has otherwise discriminated in the supply of a product to a person in Canada (the "first" person) at the instance of and by reason of the exertion of buying power outside Canada by another

As well, an interim order would be available in situations where the Tribunal would be entitled to take measures under section 82 (implementation of foreign judgment)[19] or section 83.[20]

If the conduct is being engaged in by an entity incorporated under the *Bank Act,* the *Insurance Companies Act*, the *Trust and Loan Companies Act* or the *Cooperative Credit Associations Act*, the Commissioner must consult with the Minister of Finance about the entity's safety and soundness before applying for an order under section 75 to 77, 79, 81 or 84.

3. Test for Issuing Order

New section **103.3**(2)[21] specifies the circumstances in which the Tribunal may make an interim order. The order may issue if:

- injury to competition will occur that cannot be adequately remedied by the Tribunal;
- a person is likely to be eliminated as a competitor;
- a person is likely to suffer:
  - a significant loss of market share,
  - a significant loss of revenue, or
  - other harm that cannot be adequately remedied by the Tribunal.

(cont'd)

person. The Tribunal may order any person in Canada (the "second" person) by whom or on whose behalf or for whose benefit the buying power was exerted (a) to sell any such product of the supplier that the second person has obtained or obtains to the first person at the laid-down cost in Canada to the second person of the product and on the same terms and conditions as the second person obtained or obtains from the supplier; or (b) not to deal or to cease to deal, in Canada, in that product of the supplier.

(19) Where the Tribunal finds that the implementation by person or company in Canada of a judgment, decree, order or other process issued by a court or other body in a foreign country, and the implementation would (i) adversely affect competition in Canada, (ii) adversely affect the efficiency of trade or industry in Canada without bringing about or increasing in Canada competition that would restore or improve that efficiency, (iii) adversely affect the foreign trade of Canada without compensating advantages, or (iv) otherwise restrain or injure trade or commerce in Canada without compensating advantages, the Tribunal may direct that no measures be taken in Canada to implement the judgment, decree, order or process, or that the measures be taken only in such manner as the Tribunal prescribes.

(20) "Specialization agreement" means an agreement under which each party agrees to discontinue producing an article or service on condition that each other party agrees to discontinue producing an article or service. An agreement may include any agreement under which the parties also agree to buy exclusively from each other the articles or services that are the subject of the agreement.

(21) For a more detailed discussion of section **103.3**, please refer to "Commentary," *infra.*

4. Appeal and Variance

A person against whom an order is made has 10 days to apply to the Tribunal to have the order set aside or varied. The Commissioner is entitled to 48 hours notice of the application. If the Tribunal remains satisfied that any of the foregoing situations is likely to occur, it shall make an order, with or without variation as it considers necessary, and fix the period of the interim order for a maximum of 70 days from the date **of the order confirming the interim order**.

An interim order will be effective for 10 days. The Commissioner may apply, on 48 hours notice to affected parties, to extend the interim for two periods of up to 35 days each, or to rescind the order. **The Commissioner may also apply for a further extension of the order if information requested (or ordered to be produced) has not been provided, or if more time is required to complete the investigation.** The Commissioner must proceed "as expeditiously as possible" to complete the inquiry in respect of which the order was made. An interim order may not be appealed, notwithstanding section 13 of the *Competition Tribunal Act*.[22]

E. Administrative Monetary Penalties in Air Transportation

A new section – 79(3.1) – will give the Competition Tribunal the authority to levy an "administrative monetary penalty" of up to $15 million against a domestic air carrier (in addition to granting injunctive relief) where the Tribunal finds that the air carrier has abused its dominant position in the market. Section 78 of the Act describes the anti-competitive acts which may attract the penalty. These include such things as the use of "fighting brands" (i.e., brands introduced selectively on a temporary basis to discipline or eliminate a competitor) or "predatory pricing" (i.e., selling at a price lower than acquisition cost for the purpose of eliminating or disciplining a competitor). The list of abusive practices in section 78 is non-exhaustive.

Section 79(3.2) sets out a list of factors the Tribunal is required to take into account when determining the amount of the penalty.

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(22) Section 13 reads: An appeal lies to the Federal Court of Appeal from any decision or order, whether final, interlocutory or interim, of the Tribunal as if it were a judgment of the Federal Court – Trial Division.

F. Consent Orders

Section 105 of the bill would permit the Commissioner and a person against whom an order has been or may be applied for under Part VIII to enter into a consent agreement. The agreement may not include any terms that the Tribunal could not make in an order. The agreement may then be filed with the Tribunal, and will have the same effect as an order of the Tribunal itself.

A person directly affected by the order, other than a party to the agreement, may apply to the Tribunal within 60 days to have the order rescinded or varied. The Tribunal may also rescind or vary the order if circumstances that led to the order change and, under the current circumstances, the order would have not been made or would not have been effective.

Similar provisions exist in s. 106.1 to permit the filing of consent orders in private access matters. The agreement is registered after 30 days, unless a third party applies within that period to cancel or replace it.

The Commissioner may also apply to have the order rescinded or varied on the grounds that it would be likely to have anti-competitive effects.

MUTUAL LEGAL ASSISTANCE WITH FOREIGN STATES

Part III of the Act is completely new. It is the lengthiest and most technical part of the bill, incorporating approximately 31 sections. The part entitled "Mutual legal assistance" sets out the rules for dealing with "requests" by foreign states[23] for assistance in gathering evidence in Canada required for prosecution of competition offences in the foreign country. The foreign state makes a request pursuant to an "agreement" – i.e., a treaty, convention or other international agreement to which Canada is a party – that provides for mutual legal assistance in competition matters. The new Part does not apply to matters in respect of which the *Mutual Legal Assistance in Criminal Matters Act* applies.

(23) A "foreign state" may also include an international organization of states.

A. Agreements with Foreign States – sections 30.01 to 30.02

Before Canada may enter into an agreement, the Minister of Justice must be satisfied that:

- The laws of the foreign state that address the conduct are substantially similar to Canadian law;
- The information provided will be subject to confidentiality laws substantially similar to Canadian laws;
- The proposed agreement will contain provisions specifying:
    i. The circumstances wherein Canada may refuse a request; and
    ii. The applicable confidentiality provisions
- The proposed agreement will contain undertakings that:
    i. the foreign state will provide similar assistance to Canada;
    ii. information will not be used for purposes other than for which it was provided, and will be used only subject to any terms and conditions upon which it was provided;
    iii. all information will be returned or, with consent, destroyed at the end of the investigation;
    iv. the recipient will keep the information confidential and oppose its disclosure to third parties; and
    v. the recipient will promptly notify the Minister of Justice if the confidentiality agreement is breached; and
- The agreement contains a termination provision.

An agreement must be published in the *Canada Gazette* or may be published in the *Canada Treaty Series* no later than 60 days after it comes into force. Once published, a court may take "judicial notice" of the agreement (i.e., the existence of the treaty does not need to be proven by evidence).

Where the Canadian government undertakes a search and seizure pursuant to a request by a foreign government, the procedural protections in sections 15, 16 and 19 of the Act will continue to apply, except to the extent that those sections are inconsistent with Part III. Those sections set out search warrant requirements, procedures for asserting solicitor-client privilege, and rules for retrieving data from a computer system.

B. Requests from Foreign States for Assistance – section 30.03

The Act contemplates four different judicial orders by which evidence may be gathered for use in a foreign proceeding:

- a search and seizure order (i.e., a search warrant);
- an order to permit evidence-gathering for use in the foreign state;
- an order to permit the "virtual presence" (i.e., video teleconferencing) of a person in the foreign state; and
- an order permitting the lending to a foreign state of an exhibit admitted previously as evidence in another proceeding.

In all cases, the process is commenced by the foreign state making a "request."

C. "Search and Seizure" Order – Search Warrant Requirements – sections 30.04 to 30.09

A warrant for the search and seizure of evidence is issued in the following manner: The Minister of Justice, upon receiving a request, provides the Commissioner of Competition with the information necessary to apply *ex parte*(24) to a judge for the warrant; the judge(25) may issue the warrant where the judge is satisfied that there are reasonable grounds to believe that:

- conduct that is the subject of the request by the foreign state is taking place, has taken place or will take place;
- evidence of the conduct will be found on the premises for which the warrant is sought; and
- it would not be more appropriate to make an "evidence-gathering order," under section 30.11 (see below).

The judge must, at the time the warrant is issued, schedule a hearing to "consider the execution of the warrant." Any person claiming to have an interest in the information seized may make representations at the hearing. The person who executes a search warrant must file with the court, at least five days in advance of the hearing, a written report concerning the execution of the warrant and a general description of the information seized. After considering all the representations at the hearing, a judge of the court may:

- order that the information be sent to the foreign state, subject to any conditions the judge considers desirable; and

(24) "*ex parte*" means without notice to any other party.

- if the search warrant has not been properly executed, order the information returned.

No information may be sent unless the Minister of Justice is satisfied that the foreign state will comply with the conditions imposed by the Court.

A person in control of the premises or in possession of information sought under the warrant must permit the search. Failing to do so, "without good and sufficient cause, the proof of which lies on that person" is liable to a fine of up to $5,000 and/or up to two years' imprisonment (*section 65.1*). Similarly, destroying or altering such information is an offence punishable on summary conviction by a fine of up to $25,000 and/or imprisonment up to two years or, on indictment, by a fine of up to $50,000 and/or up to five years' imprisonment.

D. "Evidence-Gathering" Order – sections 30.1 to 30.14

In appropriate cases, a court may also order the examination under oath of a person, as well as the production of records in the person's possession. As in the case of a search warrant, the Minister of Justice shall, upon approving a request by a foreign state, provide the Commissioner of Competition with the necessary information to apply *ex parte* to a judge for an order. The judge may make the order where the judge is satisfied that:

- conduct that is the subject of the request by the foreign state is taking place, has taken place or will take place; and
- evidence of the conduct will be found in Canada.

The order may be executed anywhere in Canada and may be subject to the terms and conditions the judge "considers desirable," including those relating to the protection or interests of a person named in the order and of third parties.

The person being examined pursuant to the order is required to answer questions and produce records in accordance with the laws of the requesting state, but may refuse to disclose information that is protected by Canadian laws of non-disclosure or privilege. If a person refuses to answer a question, the examiner – if he or she is a judge of a Canadian or foreign court – may rule immediately on the refusal and require the person to answer.

(cont'd)

(25) "judge" includes a judge of the Superior or Supreme Courts of the provinces or Territories, a judge of the Court of Queen's Bench, or a judge of the Federal Court – Trial Division.

Maintaining the refusal in spite of an order overruling the objection is an offence punishable by a fine of up to $5,000 and/or up to two years' imprisonment (*section 65.2*).

Where the examiner is not a judge, the person must provide a detailed written statement within seven (7) days setting out the reasons for the refusal. Where the refusal is based on Canadian law, a judge may then determine whether to uphold the refusal or order that the question be answered. Where a refusal is made based on the law of the foreign state, the Canadian court may order the continuation of an examination (and that the question be answered) if a court of the foreign state advises the Minister of Justice that the reasons for the refusal are not well-founded by the laws of the foreign state. A judge may order that the results of the examination (i.e., transcripts or records) be sent to the foreign state. Destroying or altering information required by the order to be produced is an offence punishable on summary conviction by a fine of up to $25,000 and/or imprisonment up to two years or, on indictment, by a fine of up to $50,000 and/or up to five years' imprisonment (*section 65.1*).

E. "Virtual Presence" Order – sections 30.15 to 30.16

The Minister of Justice may also approve a request from a foreign state to compel a person's "virtual presence" in the foreign state by means of a video link or similar technology. Again, the Minister of Justice will provide the Commissioner of Competition with the necessary information to make an *ex parte* application to a judge. The judge may grant the order where there are reasonable grounds to believe that:

- conduct that is the subject of the request by the foreign state is taking place, has taken place or will take place; and
- the foreign state believes that the person's evidence would be relevant to the investigation in respect of the conduct.

As with other orders, the order is executable throughout Canada and may be subject to the terms and conditions the judge considers desirable, including those relating to the protection or interests of a person named in the order and of third parties.

A person giving evidence pursuant to an order requiring a "video link" does so subject to the laws of evidence and procedure of the foreign state; however, the person may still refuse to answer questions on the basis of Canadian laws of non-disclosure or privilege.

Refusals to answer questions on the basis of Canadian law are dealt with by a Canadian judge according to the same procedure used in "evidence-gathering" orders, set out above.

Destroying or altering information required by the order to be produced is an offence punishable on summary conviction by a fine of up to $25,000 and/or imprisonment up to two years or, on indictment, by a fine of up to $50,000 and/or up to five years' imprisonment (*section 65.1*).

F. "Lending Exhibit" Order – sections 30.19 to 30.23

A foreign state may request the loan of an exhibit admitted as evidence in a proceeding before a Canadian court or the Competition Tribunal. The Minister of Justice, upon approving the request, provides the Commissioner of Competition with the necessary information to apply to the court in possession of the exhibit or to the Tribunal, as the case may be. Unlike the other application procedures for orders under the Act, an application for a loan order is not made *ex parte* but rather on "reasonable notice" to the parties (to the original proceeding), the Attorney General of Canada, the province or the territory (depending on where the application is commenced), or the Chair of the Tribunal.

The Court or Tribunal, as the case may be, may make the loan order where they are satisfied that the loan is for a fixed period and that the foreign state has agreed to comply with the terms and conditions of the order. The Tribunal or the Court may include such terms and conditions as they consider desirable.

A party who alleges that a loaned exhibit has been returned in an altered condition bears the onus of proving the allegation. In the absence of proof, the exhibit is presumed to have been continuously in the possession of the Court or the Tribunal, as the case may be.

G. Sanctions – sections 30.17 to 30.18

Canadian laws of contempt of court will apply to a person who refuses to obey a court order requiring that a question be answered. The contempt law, however, only applies in the case of "video link" orders, but not in the case of "evidence-gathering" orders. However, in either case, a judge may order the arrest of the person. A warrant for arrest may issue where the judge is satisfied that:

- the order was served personally on the person;

- the person did not attend as ordered, or is about to abscond; and
- the person has evidence that is material or relevant to the investigation or proceedings.

The warrant for arrest is executable anywhere in Canada by a peace officer.

H. Appeals – section 30.24

Decisions of provincial courts may be appealed to the court of appeal of the province. Appeals from the Tribunal or the Federal Court (Trial Division) are to the Federal Court of Appeal. The only ground of appeal is on questions of law (i.e., no appeal on questions of fact or mixed fact and law).

I. Evidence Obtained by Canada from Abroad – section 30.25

In addition to responding to requests from foreign governments, the Government of Canada may also request the assistance of foreign governments. Where the Minister of Justice receives evidence from a foreign government in response to a request, he must send it promptly to the Commissioner of Competition. A thing, record, affidavit, certificate or other statement is not inadmissible by reason only that it is, or contains, hearsay or statement of opinion. In order to determine the "probative value" of a record, courts may examine the record itself, receive evidence orally, by affidavit, or in a certificate or statement made in conformity with the laws of the foreign state attesting to the circumstances in which the record or information was made.

J. Confidentiality of Requests – section 30.29

A person who deals in the administration or enforcement of the Act is prohibited from communicating or allowing to be communicated the contents of a request, the fact that a request has been made, or the contents of any record or thing obtained by a foreign state from Canada. Similarly, no one may communicate or allow to be communicated any information obtained by Canada pursuant to a search warrant or an evidence-gathering order. The rule does not apply to information that has been made public or to disclosure that is authorized by the Act.

K. Preservation of Informal Arrangements – section 30.3

Part III does not abrogate, or derogate from, existing cooperation arrangements between the Government of Canada and any foreign state.