Legislative Summary **LS-494E**

BILL C-19: AN ACT TO AMEND THE COMPETITION ACT AND TO MAKE CONSEQUENTIAL AMENDMENTS TO OTHER ACTS

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17 November 2004

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LEGISLATIVE HISTORY OF BILL C-19

HOUSE OF COMMONS		SENATE	
Bill Stage	**Date**	**Bill Stage**	**Date**
First Reading:	2 November 2004	First Reading:	
Referred to Committee:	16 November 2004	Second Reading:	
Committee Report:		Committee Report:	
Report Stage and Second Reading:		Report Stage:	
Third Reading:		Third Reading:	

Royal Assent:

Statutes of Canada

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

Legislative history by Peter Niemczak

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TABLE OF CONTENTS

Page

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BILL C-19: AN ACT TO AMEND THE COMPETITION ACT AND TO MAKE CONSEQUENTIAL AMENDMENTS TO OTHER ACTS*

BACKGROUND

A. The *Competition Act*

The Minister of Industry introduced Bill C-19, An Act to amend the Competition Act and to make consequential amendments to other Acts, into the House of Commons on 2 November 2004. It forms part of the government's strategy for incremental reform of Canada's competition law.

The purpose of the *Competition Act* (the Act)(1) is to encourage Canadian businesses to compete with one another. Enhanced competition provides consumers with lower prices and more product choices. The Act contains both criminal and civil provisions, which apply to most industries and businesses in Canada. The Competition Bureau, an independent federal agency, administers the Act.

The Act criminalizes some anti-competitive practices. Criminal provisions include conspiracy to unduly lessen competition, bid-rigging, discriminatory and predatory pricing, price maintenance and refusal to supply, and certain misleading advertising and deceptive marketing practices. These offences are investigated by the Competition Bureau and then prosecuted in federal or provincial superior courts. Criminal prosecutions must be proven beyond a reasonable doubt and can lead upon conviction to fines, imprisonment, or injunctions ordering the offender to cease its anti-competitive behaviour.

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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 and until they are passed by both Houses of Parliament, receive Royal Assent, and come into force.

(1) R.S. 1985, c. C-34.

Practices that are not necessarily damaging to competition are "reviewable" by the Competition Commissioner, and are subject to civil, as opposed to criminal, sanctions. The civil provisions include:

- refusal to deal (section 75);
- consignment selling (section 76);
- tied selling, exclusive dealing and market restriction (section 77);
- abuse of dominant position (section 79);
- delivered pricing (sections 80 and 81); and
- merger review.

The Competition Commissioner[(2)] can institute formal civil proceedings against people or companies that engage in reviewable anti-competitive practices. These complaints are heard by the Competition Tribunal, a quasi-judicial body. The Tribunal has the power to issue injunctions and remedial orders preventing practices that are likely to substantially reduce competition.

B. Chronology of Proposals to Amend the Act

In April 2002, the House of Commons Standing Committee on Industry, Science and Technology (the Industry Committee) released a report entitled *A Plan to Modernize Canada's Competition Regime*.[(3)] It recommended extensive amendments to the *Competition Act*, including measures that would:

- strengthen the Act's civil sanctions by allowing the Tribunal to impose Administrative Monetary Penalties (AMPs) for many of the Act's "reviewable" anti-competitive practices. An AMP is similar to a fine;[(4)]

(2) Private individuals and corporations are allowed to bring a complaint under the refusal to deal (s. 75) and exclusive dealing, tied selling and market restriction (s. 77) sections of the Act, with leave from the Tribunal.

(3) House of Commons, Standing Committee on Industry, Science and Technology, *A Plan to Modernize Canada's Competition Regime*, 1st Session, 37th Parliament, April 2002, available on-line at: http://www.parl.gc.ca/InfoComDoc/37/1/INST/Studies/Reports/indurp06-e.htm.

(4) Administrative Monetary Penalties are theoretically different from fines in that the penalty is imposed not to punish, but to promote conduct that is in conformity with the Act. The distinction is unclear, however, since a punishment deters non-conformity with the Act.

- repeal criminal liability for price discrimination offences; and
- return the Act to being a law of general application by repealing the airline-specific provisions.

The Committee believed that adding AMPs to the civil sanctions of the *Competition Act* would deter businesses from engaging in anti-competitive practices. It considered price discrimination offences redundant, since they were seldom prosecuted or enforced, and could, in any case, be enforced under the broader "abuse of dominance" provision of the Act. Finally, the Committee recommended the repeal of airline-specific measures first enacted after Air Canada's merger with Canadian Airlines.

In response to the Industry Committee's report, the Competition Bureau said it would consult with stakeholders on the proposed amendments. In June 2003, the government launched a consultation process on amendments to the Act. Legislative proposals were outlined in a discussion paper entitled *Options for Amending the Competition Act: Fostering a Competitive Marketplace*.(5) Among the issues examined, the discussion paper invited debate on measures that would:

- strengthen the civil provisions of the *Competition Act* by allowing the Competition Tribunal to impose AMPs for all reviewable practices, and to order restitution for consumers affected by deceptive marketing; and
- decriminalize the anti-competitive pricing practices and treat them as reviewable under the abuse of dominance provision.

The Competition Bureau, through an independent non-profit organization called the Public Policy Forum (PPF), conducted the consultation with stakeholders. On 27 April 2004, the PPF released its *National Consultation on the Competition Act: Final Report* (the PPF report),(6) which summarized stakeholders' positions on the proposed measures. After the report's release, the Competition Bureau held an additional roundtable to discuss in greater detail

(5) Government of Canada, *Options for Amending the Competition Act: Fostering a Competitive Marketplace*, June 2003, available on-line at: http://strategis.ic.gc.ca/epic/internet/incb-bc.nsf/en/ct02584e.html.

(6) Public Policy Forum, *National Consultation on the Competition Act: Final Report*, 27 April 2004, available on-line at: http://www.ppforum.com/competitionact/final_report.pdf.

the proposals on civil administrative monetary penalties and restitution, and on repeal of the pricing provisions.

The amendments proposed in Bill C-19 are based on recommendations made in the Industry Committee report and in the consultation conducted by the Competition Bureau through the PPF. It should be noted that Bill C-19 addresses only some of the issues raised in the Industry Committee's report and the subsequent consultation.

DESCRIPTION AND ANALYSIS

A. Highlights

Bill C-19 makes four changes to the *Competition Act*. It would:

- allow the Competition Tribunal to impose an AMP if it finds that a person or company abused its dominant position;
- increase the AMP that the Competition Tribunal or a Court can impose when it finds that a person or company has engaged in deceptive marketing. It also allows the Tribunal or Court to order restitution for deceptive marketing;
- repeal the airline-specific provisions currently found in the Act; and
- decriminalize the predatory and discriminatory pricing provisions.

B. Abuse of Dominant Position: Clause 5, 8 and 9

Section 79 of the *Competition Act* allows the Competition Tribunal to find that a person or company has abused its dominant position. Abuse of dominance requires:

- one or more persons to substantially or completely control, throughout Canada or any area thereof, a class or species of business;
- those people to have engaged in a practice of anti-competitive acts; and
- that the practice must have had the effect of preventing or lessening competition substantially in a market.

At present, section 79 of the Act allows the Tribunal to make an order prohibiting the person or company that has abused its dominant position from engaging in the anti-competitive practice.(7) Sections 79(3.1) to 79(3.3) allow the Tribunal to impose up to $15 million in AMPs, but these provisions currently apply only to airlines that abuse their dominant position. Under section 79(3.2), the Tribunal must consider a number of aggravating and mitigating factors when determining the amount of the AMP that can be imposed on the offending airline.

Clause 8 of Bill C-19 allows the Competition Tribunal to impose AMPs on any person or corporation. The amount of the penalty is reduced to $10 million or less for the first offence, and $15 million or less for subsequent offences. Bill C-19 also adds three new aggravating or mitigating factors to the list found in section 79(3.2). Gross revenue from sales, profits generated by the abuse of dominance, and the financial position of the offender are added to the list of relevant factors in determining the amount of the fine.

Clause 9 of Bill C-19 is a consequential amendment stating that the AMP is a debt owing the government and is enforceable by a court of law.

C. Deceptive Marketing Practices: Clauses 3, 5 and 6

1. Larger AMPs for Deceptive Marketing

Part VII.1 of the *Competition Act* creates a number of reviewable deceptive marketing practices, such as misleading advertising. The Commissioner is empowered to pursue administrative remedies through an application to the Competition Tribunal, or a Provincial Superior Court. Under the current section 74.1(1), the Tribunal or Court can issue a “cease and desist” order or impose AMPs. For an individual, the AMP is limited to $50,000 or less for a first offence and $100,000 or less for subsequent offences. In the case of a corporation, the AMP is restricted to $100,000 for a first offence and $200,000 for subsequent offences.

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(7) *Competition Act*, s. 79(1). In the event that a prohibition would be ineffective, section 79(2) allows the Tribunal to direct the company to take positive actions to remedy the abuse.

Clause 5[8] of Bill C-19 increases the existing level of AMPs that can be imposed under section 74.1(1)(c) for deceptive marketing practices. Bill C-19 allows maximum AMPs of:

- $750,000 for the first offence and $1 million for each subsequent offence for an individual; and
- $10 million for the first offence and $15 million for each subsequent offence for corporations.

The Act currently makes it a criminal offence to contravene an order made under Parts VII.1 and VIII of the Act. Clause 3 of Bill C-19 makes an exception for the new AMPs that could be imposed under section 74.1(1)(c). Violation of an AMP order made under this section will not attract criminal sanctions.

2. Court-ordered Restitution for Deceptive Marketing

Clause 5(3) of Bill C-19 adds another remedy to the deceptive marketing practices provisions. The new section 74.1(1.1) empowers the Tribunal or Court to order offenders who engage in deceptive marketing to provide restitution to consumers in an amount that will not exceed the amount paid for the products. Section 74.1(1.2) allows the Tribunal or Court to allocate undistributed or unclaimed money from the restitution fund to a non-profit organization for the benefit of persons in similar circumstances. Clause 6 institutes a new section 74.111(1) which would allow the Tribunal or Court to make temporary freezing orders where the "articles" are likely to be depleted.[9]

The new restitution order will be subject to the same due diligence defence as the current AMPs, and cease and desist orders that apply to deceptive marketing. In line with other administrative remedies, the restitution order and AMPs could not be imposed as a punishment. Bill C-19 adds a number of factors that must be taken into account when the Tribunal or Court determines the size of the AMP or the restitution order. Under section 74.1(5), gross revenue

(8) Note that in the English version of Bill C-19, the number 5 has been omitted from clause 5. This legislative summary assumes that the typographical error will be corrected before second reading.

(9) The freezing order is similar to a Mareva injunction. It is not clear what "articles" the section refers to – presumably the articles that were the subject of the misleading advertising.

from sales, the financial position of the offender, and whether the restitution was voluntary will be added to the list of relevant factors in determining the amount of the AMP or restitution order.

The *Competition Act* currently makes it a criminal offence to contravene an order made under Parts VII.1 and VIII of the Act. Clause 3 creates an exception for restitution orders imposed under the new section 74.1(1.1). Violation of a restitution order will not attract criminal sanctions.

D. Repeal of the Airline-specific Provisions: Clauses 1, 7, 8 and 10-12

Several airline-specific sections were added to the *Competition Act* after the merger of Canadian Airlines and Air Canada in 1999.

Bill C-19 will restore the *Competition Act* to being a law of general application. The following airline-specific provisions will be repealed:

- Clause 1 repeals section 4.1 of the Act, which exempts travel agents from the conspiracy and price maintenance offences;
- Clause 7 eliminates subsections 78(1)(j) and (k), which expand the definition of anti-competitive acts for the purpose of the abuse of dominance provisions contained in section 79;
- Clause 8 replaces the airline-specific subsection 79(3.1) with a general provision allowing the imposition of AMPs for abuse of dominance. It also reduces the AMP from $15 million to $10 million; and
- Clause 10 eliminates section 104.1, which allows the Competition Commissioner to issue temporary cease and desist orders against an airline for up to 80 days.

E. Removing the Pricing Provisions: Clauses 2 and 4

Section 50 of the *Competition Act* prohibits price discrimination. Section 50(1)(a) operates where a supplier places a "disfavoured purchaser" at a competitive disadvantage. Section 50(1)(b) prohibits "geographic" price discrimination, where competition is harmed by predatory pricing in one geographic area. Section 50(1)(c) is a more general prohibition against predatory pricing through offering "unreasonably low" prices.

Section 51 of the Act is similar to section 50(1)(a), except that it operates when the purchaser has been put at a competitive disadvantage through discriminatory advertising or promotional allowances. Unlike section 50(1)(a), which allows volume discounts, section 51

contains a clause that requires suppliers to give advertising or promotional allowances on "proportionate terms" to each purchaser.

Clause 2 of Bill C-19 repeals the following sections of the *Competition Act*:

- price discrimination (section 50(1)(a));
- geographic price discrimination (section 50(1)(b));
- predatory pricing (section 50(1)(c)); and
- promotional allowances (section 51).

It is expected that all price discrimination and predatory pricing offences would be enforced under the *Competition Act*'s more general provisions on abuse of dominance.

As a consequential amendment, Clause 4 of Bill C-19 changes section 73(1) of the Act so that the Attorney General of Canada will no longer be able to prosecute price discrimination offences.

COMMENTARY

The contents of Bill C-19 are not uniformly seen as a positive development of the law, and are not without controversy.

A. Administrative Monetary Penalties

The imposition of AMPs was a contentious issue during the PPF consultation process. The majority of stakeholders that made submissions to the PPF opposed the imposition of AMPs. Stakeholders cited concerns that:

- The civil provisions govern behaviour that is not inherently anti-competitive, and is prohibited only after the Competition Tribunal determines it is anti-competitive. Critics believed that penalties should be limited to forward-looking remedies such as cease and desist orders.
- The AMPs were punitive in nature. Critics questioned the validity of imposing AMPs without also including customary criminal law safeguards.

Critics also told the PPF that the Competition Bureau could not provide evidence that the current remedies were inadequate in achieving compliance goals. Critics believed the AMPs would have a harmful and chilling effect on the Canadian economy because they would place companies on the defensive through overexposure to financial liability.

Although Industry Canada has said that it intends to take an incremental approach to competition law reform, a number of recommendations made in the Industry Committee report *A Plan to Modernize Canada's Competition Regime* were not acted upon in the proposed legislation. The Industry Committee report recommended AMPs for breach of sections 75, 76, 77, 79 and 81 of the *Competition Act*. The proposed legislation would institute AMPs for only the section 79 abuse of dominance provisions.

The Committee's report also recommended that the abuse of dominance provision itself be reformed by deleting section 79(1)(a) of the Act. This provision requires the Commissioner to prove that the offender "substantially or completely control[s], throughout Canada or any area thereof, a class or species of business." The Industry Committee expressed concern that broad judicial interpretations of this section would make it difficult to enforce in the case of the pricing provisions.

B. Restitution Orders for Deceptive Marketing

The PPF report (*National Consultation on the Competition Act: Final Report*) outlined some of the objections made to restitution orders for deceptive marketing practices. These objections included the following:

- The Tribunal already has the power to award AMPs, and the Commissioner can already institute criminal proceedings for false and misleading representations under section 52 of the Act. Together with the proposed expansion of a statutory cause of action to allow injured consumers to sue for and recover damages, and provincial consumer protection laws, the cumulative remedies would chill lawful competitive advertising.

- Providing restitution orders shifts the emphasis of competition law away from the competitive process as a whole and toward protection of individual consumers.

- The costs associated with identifying affected persons, determining entitlements and administering restitution would be large.

C. Repeal of the Pricing Provisions

In the PPF report, most submissions supported the proposal to repeal the criminal pricing provisions of the Act. Support for the proposed repeal focused on pricing practices that were not inherently harmful to economic welfare, and could be beneficial to competition. The possibility of criminal prosecution, many submissions stated, discouraged pro-competitive activities. Most submissions agreed that predatory pricing could be dealt with under the civil abuse of dominance provisions.

It was not universally agreed that the abuse of dominance section would adequately address all issues related to price discrimination. Some submissions stated that repeal of the pricing provisions should be accompanied by a new civil provision or amendments to the section on abuse of dominant position.

D. Repeal of the Airline-specific Provisions

There has been little commentary on the repeal of the airline-specific provisions of the Act. The Competition Bureau has stated that the marketplace has changed since the merger of Canadian Airlines and Air Canada in 1999. As justification for the repeal, the Competition Bureau cites the decline of Air Canada's domestic market share, the entry and growth of low-cost carriers, the growth of the Internet as a means of distributing tickets, and the changing role of travel agents.