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## **Market Studies: A Contextual Overview**

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## **1. Introduction**

This paper will review the former “research inquiries” power under the *Combines Investigation Act*,<sup>1</sup> the powers existing under the current *Competition Act*,<sup>2</sup> the recent legislative proposals, consultations and debates related to market studies in Canada, the international experience, and some possible alternatives for conducting market studies, in an attempt to provide a contextual overview of the issue, to allow for a more informed discussion.

## **2. Section 47 of the *Combines Investigation Act***

### **2.1 Rationale**

Between 1952 and 1986 there was a provision in the *Combines Investigation Act* – the predecessor to today’s Act - which allowed for general inquiries, commonly referred to as “research inquiries”. The genesis of this provision can be traced back to the 1952 report of the MacQuarrie Committee, which recommended that a more extensive program of research should be carried out by the agency than had been possible in the past:

Research in the field of monopolistic situations and practices should become one of the most important assignments of the investigation and research agency. Information concerning this aspect of the organization and the working of our economy is badly lacking in Canada. Very few studies have been made in this field and they are all incomplete and often out-dated.

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A sound programme of empirical research on this vast subject is much needed at present. At least our main industries should be the objects of continuing study and observations. Facts should be systematically assembled concerning the behaviour of an industry and its current policies bearing on prices, production, innovation, investment, costs, profits, market areas, business practices, the use of patents, corporate structures and inter-relations as well as any other matter affecting competitive conditions. We need to know much more in detail than we now do the various aspects of the movement of concentration of economic power in Canada.<sup>3</sup>

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The views expressed in this paper are those of the authors and do not necessarily reflect the views or position of the Competition Bureau or of the Government of Canada.

<sup>1</sup> R.S.C. 1970, c. C-23.

<sup>2</sup> R.S.C. 1985, c. C-34.

<sup>3</sup> J.H. MacQuarrie, *et al.*, “Report of the Committee to Study Combines Legislation and Interim Report” (Ottawa: Queen’s Printer and Controller of Stationery, 1952) at pp. 43-44.

## 2.2 Legislation

Subsequent to the MacQuarrie Committee review, several amendments were made to the *Combines Investigation Act*, including a provision providing for research inquiries. After additional minor amendments in 1976, the research inquiry section provided that:

47. (1) The Director

(a) upon his own initiative may, and upon direction from the Minister or at the instance of the Commission shall, carry out an inquiry concerning the existence and effect of conditions or practices relating to any product that may be subject of trade or commerce and which conditions or practices are related to monopolistic situations or restraint of trade, and

(b) upon direction from the Minister shall carry out a general inquiry into any matter that the Minister certifies in the direction to be related to the policy and objectives of this Act,

and for the purpose of this Act any such inquiry shall be deemed to be an inquiry under section 8.

(2) It is the duty of the Commission to consider any evidence or material brought before it under subsection (1) together with such further evidence or material as the Commission considers advisable and to report thereon in writing to the Minister, and for the purposes of this Act any such report shall be deemed to be a report under section 19.

## 2.3 How Was the Legislation Used?

Pursuant to section 18 of the *Combines Investigation Act*, the Director of Investigation and Research (“Director”)<sup>4</sup> could refer a statement of evidence to the Restrictive Trade Practices Commission (“RTPC”), at any stage of an inquiry, if the Director believed that the evidence disclosed an offence.<sup>5</sup> The RTPC was then obligated to conduct public hearings, during which the Director and all persons against whom allegations had been made would be allowed the opportunity to make representations. Following these proceedings, the RTPC would issue a report to the Minister. This resulted in what was essentially a two-part process – the initial inquiry conducted by the Director, and the subsequent proceedings conducted by the RTPC – with the potential to considerably lengthen the inquiries.

Topics studied pursuant to section 47 inquiries included discriminatory pricing practices in the grocery trade, automobile insurance, loss leader selling, distribution and sale of automotive products, the manufacture, distribution and sale of pharmaceuticals, the petroleum industry, and bid depositories in the construction industry. In some of

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<sup>4</sup> Prior to the 1999 amendments to the Act, the Commissioner of Competition (“Commissioner”) was called the Director of Investigation and Research.

<sup>5</sup> Subsection 18(1) stated: “At any stage of an inquiry, (a) the Director may, if he is of the opinion that the evidence obtained discloses a situation contrary to any provision in Part V, (...) prepare a statement of the evidence obtained in the inquiry which shall be submitted to the Commission and to each person against whom an allegation is made therein.”

these cases, the result of the inquiries led to programs of information and consultation within particular industries, the creation of new standards and rules, and the addition of amendments to proposed legislation to address some of the recommendations stemming from the inquiry reports.<sup>6</sup>

Section 47 was repealed in 1986. The official reason for its removal focussed on the need to ensure that the new Competition Tribunal (the “Tribunal”) was a truly adjudicative body (whereas the RTPC was functioning as an adjudicative body at the same time as it was conducting investigations and research inquiries). There have also been suggestions that section 47 was repealed, at least in part, due to objections expressed by the business community with respect to the significant expense of the last inquiry related to the gasoline industry. It began as an enforcement inquiry in 1973, was referred to the RTPC in 1981 for a research inquiry, and resulted in a three-volume report by the RTPC in 1986.

### **3. Current Competition Act**

Pursuant to section 10 of the current Act, the Commissioner may initiate an inquiry in specific circumstances. The provision states:

The Commissioner shall

- (a) on application made under section 9,
- (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) exists,

cause an inquiry to be made into all such matters as the Commissioner considers necessary to inquire into with the view of determining the facts.

When the above criteria are satisfied, the Commissioner can commence an inquiry and utilize, if necessary, the formal powers available under section 11 of the Act. Section 11 gives the Commissioner the power to apply to a judge to order certain individuals to attend for examination or to provide records or documents in relation to an inquiry.<sup>7</sup>

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<sup>6</sup> For instance, following an inquiry into bid depositories in the construction industry, the RTPC recommended that bid depositories “should have a set of rules that would not contain any authority for a bid depository management to enforce comparability of tenders or to set and enforce standards of tendering conduct.” Annual reports indicate that, as a follow-up, the Director undertook a program of information and consultation with members in that industry, and the Bureau helped establish a new set of standard rules for use on federal projects.

<sup>7</sup> Section 11 states: “If, on the *ex parte* application of the Commissioner or his or her authorized representative, a judge of a superior or county court is satisfied by information on oath or solemn

In the absence of the above criteria – generally, where there is no evidence that an offence under the Act has been or is about to be committed – the Commissioner may undertake studies into various industries, but is limited to accessing voluntarily provided and publicly available information. The Commissioner may also hire outside experts, or “temporary, technical and special assistants,” to assist the Commissioner with particular matters arising under the Act.<sup>8</sup>

Recent examples of Bureau studies include its examination into cattle and beef pricing in Canada, commenced in February of 2004, and its examination of the Canadian petroleum market, commenced in May of 2004. For both of these studies, the Bureau gathered information provided voluntarily by industry participants and associations, used publicly available information and information from various federal and provincial government departments and agencies, and hired outside experts to assist the Bureau with its examination of these industries.<sup>9</sup>

#### **4. Recent Legislative Proposals, Consultations and Debates on Market Studies**

##### **4.1 Proposal by Hon. Dan McTeague (2001)**

A suggestion for a new market study power emanated from a Member of Parliament, the Hon. Dan McTeague, in the Fall of 2001, during Committee review of Bill C-23, *An Act to amend the Competition Act and the Competition Tribunal Act*. Mr. McTeague proposed a motion to allow the Commissioner, with the approval of the Minister of Industry, to ask the Canadian International Trade Tribunal (“CITT”), to inquire into the state of competition in any sector of the Canadian economy. Upon

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affirmation that an inquiry is being made under section 10 and that a person has or is likely to have information that is relevant to the inquiry, the judge may order the person to

- (a) attend as specified in the order and be examined on oath or solemn affirmation by the Commissioner or the authorized representative of the Commissioner on any matter that is relevant to the inquiry before a person, in this section and sections 12 to 14 referred to as a ‘presiding officer’, designated in the order;
- (b) produce to the Commissioner or the authorized representative of the Commissioner within a time and at a place specified in the order, a record, a copy of a record certified by affidavit to be a true copy, or any other thing, specified in the order; or
- (c) make and deliver to the Commissioner or the authorized representative of the Commissioner, within a time specified in the order, a written return under oath or solemn affirmation showing in detail such information as is by the order required.”

<sup>8</sup> Section 25 states: “All officers, clerks and employees required for carrying on this Act shall be appointed in accordance with the Public Service Employment Act, except that the Commissioner may, with the approval of the Governor in Council, employ such temporary, technical and special assistants as may be required to meet the special conditions that may arise in carrying out this Act.”

<sup>9</sup> See Competition Bureau, Backgrounder, “Competition Bureau concludes examination into complaints about high gasoline prices” (March 2005) and Competition Bureau, Backgrounder, “The Competition Bureau’s Examination into Cattle and Beef Pricing” (April 2005).

completion of the inquiry, a report would be prepared for the Minister of Industry to table in Parliament.

The Commissioner at the time recommended that the proposal should have the benefit of public consultations before such an amendment was considered.<sup>10</sup>

## 4.2 Public Consultations (2003)

National consultations were launched in June 2003 with the issuance of a discussion paper entitled *Options for Amending the Competition Act: Fostering a Competitive Market Place*.<sup>11</sup> The discussion paper incorporated a proposal for a market

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<sup>10</sup> House of Commons, Standing Committee on Industry, Science and Technology, *Evidence* (4 October 2001) at p. 381-2:

**Mr. Dan McTeague:** I have a question and perhaps even a motion—but I don't want to spring this on my colleague here—on clause 15. It refers to an amendment I had made earlier regarding the International Trade Tribunal and a reference there by the commissioner. It is contained in the package originally given to us. I just want to read the motion; I'm leaving it open to the committee whether or not to deliberate it at this time—we didn't have much discussion on it. The motion is that Bill C-23 be amended in clause 15 by adding after line 27 on page 31 the following:

124.3(1) The Commissioner may ask the Canadian International Trade Tribunal to inquire, in accordance with terms of reference approved by the Minister, into the state of competition and the functioning of markets in any sector or subsector of the Canadian economy.

(2) The Canadian International Trade Tribunal shall conduct the inquiry, submit a report to the Commissioner and the Minister and cause notice of its submission to be published in the *Canada Gazette*.

(3) The Minister shall cause a copy of the report to be tabled before each House of Parliament on any of the first fifteen days on which that House is sitting after the report is submitted.

Madam Chair, the reason I'm moving the motion is for obvious reasons. We've heard a number of witnesses come before us to suggest Canada's international competitiveness is in question. There have been a number of incidents, particularly with the airline industry, but also with gasoline and other industries, where there may be sectoral concerns. Currently the commission does not have this discretion, but it may very well be put to some use.

I'm advancing it on the presumption that this is not something that has created a lot of fire and incendiary remarks, and I think it's something we may well want to entertain, with the consent of the members of Parliament here. I'll gladly withdraw it, though, if there's a lot of objection.

Perhaps the commissioner would like to also comment on it while I'm putting it on the floor.

[...]

**Mr. Konrad von Finckenstein:** I have followed the proceedings of your committee very closely. I don't believe there was any discussion or debate on this particular amendment. Mr. Drouin will know better, but I don't believe the government supports it; it's not being put forward as a government amendment. Maybe this is an amendment that should have the benefit of full discussion before being moved.

<sup>11</sup> Government of Canada, Competition Bureau, Discussion Paper, "Options for Amending the *Competition Act: Fostering a Competitive Marketplace*" (20 June 2003), available online at: <http://strategis.ic.gc.ca/pics/ct/ct02584e.pdf>.

studies power, similar to the original proposal from the Hon. Dan McTeague in 2001.<sup>12</sup> The Public Policy Forum, a not-for-profit organization, conducted national consultations following the release of the discussion paper.

Those who supported the market studies proposal<sup>13</sup> indicated, in general terms, that they felt the power could be useful, that the government should be better informed on industry and the markets, and that the studies would provide for more transparency and contribute to helping Canadians better understand how markets work. International respondents explained that their competition authorities are vested with similar powers and that they have proven to be valuable assets.

Those opposed to the proposal<sup>14</sup> suggested that the Commissioner already has the necessary tools to enforce the Act and that the Commissioner could carry out studies by hiring consultants or experts, or by seeking the Minister's approval to have Cabinet invoke existing reference powers under the *Inquiries Act*.<sup>15</sup>

Opponents raised a number of additional concerns, including: past experiences with section 47 of the *Combines Investigation Act* regarding the considerable time and potential significant costs of such studies for both the government and businesses; the appropriateness of the CITT for conducting studies on competition matters because it lacks expertise in competition and consumer protection issues; and, the lack of necessary detail on criteria for initiating such studies, or any procedural safeguards. They were also concerned that the proposal could be used as an inappropriate means of diverting political pressure on the Bureau to take action, even when there was no evidence of any wrongdoing or significant competition issues affecting the public interest.

### 4.3 38<sup>th</sup> Parliament (2004-05)

During the 38<sup>th</sup> Parliament, a member of the Bloc Québécois, Mr. Yvon Lévesque, brought forward Motion 165 which stated, *inter alia*, that the government should take action with regard to gasoline prices by setting up a petroleum monitoring agency and by bringing forward “amendments to strengthen the *Competition Act*,

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<sup>12</sup> The proposal contained in the discussion paper was as follows: “The Commissioner could be allowed to ask an independent and impartial body, such as the CITT, with the approval of the Minister of Industry, to inquire into the state of competition and the functioning of markets in any sector of the Canadian economy. The findings of the inquiry would then be provided in a report that the Minister of Industry would table in Parliament.”

<sup>13</sup> Supporters included the American Bar Association, the Canadian Federation of Independent Business, Option consommateurs, l'Association des consommateurs du Québec, and Goodmans LLP.

<sup>14</sup> Opponents included the Canadian Bar Association, the Canadian Bankers Association, the Canadian Council of Chief Executives, the Canadian Chamber of Commerce, Canadian Manufacturers and Exporters, and a number of law firms.

<sup>15</sup> R.S.C. 1985, c. I-11.

including measures to ensure that the Competition Commissioner has the power to launch investigations, summon witnesses and ensure confidentiality.”<sup>16</sup>

In addition, during Committee hearings on Bill C-19, *An Act to amend the Competition Act and to make consequential amendments to other Acts*, Mr. Paul Crête, also of the Bloc Québécois, asked the Commissioner why a market studies proposal was not included in Bill C-19. The Commissioner indicated that the Bureau was continuing its analysis of market studies, given the comments received during the 2003 consultations. As well, the Commissioner indicated that the Bureau would need to consider the *Charter* implications of any proposed market study power. As part of the analysis of this issue, the Bureau also planned to carry out an international benchmarking exercise to look at the ability of other jurisdictions to conduct market studies. It was indicated that the Bureau would share the results of its review with the Committee once the review was complete.<sup>17</sup>

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<sup>16</sup> See motion M-165, House of Commons, *Debates*, No. 055 (11 February 2005). This motion, while ultimately defeated, was supported by the Bloc and the NDP.

<sup>17</sup> House of Commons, Standing Committee on Industry, Natural Resources, Science and Technology, *Evidence*, No. 008 (18 November 2004) at p.6:

**Mr. Paul Crête:** On May 5, 2003, as part of a study of gasoline prices we were conducting, your predecessor made the following statement to the Industry Committee: “while the Bureau’s mandate includes the very important role of being an investigator and advocate for competition, the current legislation does not provide the Bureau with the authority to conduct an industry study”. At the time, the Committee was carrying out a comprehensive study which involved reviewing the legislation as a whole. So, I’m a little surprised that three years later, after quite properly carrying out extensive consultations, we end up with a bill that is completely silent on the most contentious issue affecting society today. The oil companies are a very good example, but that would also apply to a variety of industries. Do you not think this aspect of the legislation should be updated as soon as possible?

**Ms. Sheridan Scott:** It’s a question of consultations. Market studies were the second issue that some people had problems with. We had suggested that the Bureau be able to conduct its own studies. However, the problem revolves around the fact that we have the power to launch criminal proceedings. So, if we were able to carry out general studies, we might end up facing problems with the Charter of Rights and Freedoms, for example, if the testimony of individuals provided in a general context led us to carry out a criminal investigation. We therefore suggested referring these matters to the Tribunal, but that option would also give rise to some procedural problems. So, we are now trying to find a model that would operate as effectively as possible without giving rise to this kind of procedural problem. We would certainly be prepared to use a model, but not one that doesn’t work.  
[...]

**Mr. Paul Crête:** Will your consultations on the points not addressed in this bill have progressed enough that if, say, the Committee completes its study of the bill in February or early March, one or two items could be added to further amend the legislation?

**Ms. Suzanne Legault:** Yes. What I can tell you with respect to our consultations on weaknesses and the legislation is that we intend to complete the process we are currently proceeding with in the spring of 2005. We’re talking about extensive public consultations. [...] As for market studies, that is certainly a much easier issue to analyze. We are now reviewing how this is handled in other jurisdictions around the world, because there are some where such a power exists. It’s a matter of

On October 6, 2005, the Commissioner was called to reappear before the Committee and to share the Bureau's findings on its analysis of market study powers. The Commissioner tabled a document entitled "Market Studies: A Review by the Competition Bureau,"<sup>18</sup> and explained to the Committee the Bureau's position that, if market studies were conducted for a legitimate purpose to assess the state of competition in various sectors of the economy, and provided that such a power contained protections against self-incrimination, it could be possible to integrate such a power into the Act.

In her remarks to the Committee, the Commissioner stated:

...I think it is important to keep in mind the concerns that were raised about market studies during our consultations. Opposition to increasing the mandate of the *Competition Act* centred around Charter concerns and costs for business. Related to this was a worry that such a proposal might be used as an inappropriate means to divert political or popular pressure to the Bureau to take enforcement action even when there was no evidence of any wrongdoing or significant competition issues affecting the public interest. With respect to Charter concerns, there was some worry about the possibility of the power allowing the Bureau to engage in a fishing expedition and the possibility of self-incrimination by those providing market information.

Any amendments proposing to introduce such a power should therefore guard against these dangers. For example, publicly disclosed terms of reference could be provided for each study, clearly outlining the circumstances in which a judge would order the production of documents. These types of studies would need to be done for legitimate purposes, with a view to assessing the state of competition in markets, and not be disguised enforcement inquiries. In addition, such studies should be carried out as quickly as possible. It would also be important to ensure that confidential information would not be disclosed.

With respect to a burden on business, a power to study markets would need to appropriately balance the need for timely and accurate information and the cost burden on companies to provide it. Addressing the concerns regarding the scope and length of market studies that I've just spoken to would also address some of the concerns on cost to business.<sup>19</sup>

On October 27, 2005, the Government of Canada introduced amendments to Bill C-19, including an amendment that would have provided the Bureau with the power to assess the state of competition in an industry. The text of the proposed amendment was as follows:

124.11(1) The Commissioner may carry out a study on the state of competition in any sector or sub sector of the Canadian economy.

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determining how such a model will apply in the Canadian context and, as Ms. Scott pointed out, in light of the Canadian Charter of Rights and Freedoms. [...]

**Ms. Sheridan Scott:** We will be in a position to make our own recommendations when this exercise has been completed.

<sup>18</sup> Competition Bureau, Reports, "Market Studies: A Review by the Competition Bureau" (6 October 2005), available online at <http://www.competitionbureau.gc.ca/internet/index.cfm?itemID=1988&lg=e>.

<sup>19</sup> House of Commons, Standing Committee on Industry, Natural Resources, Science and Technology, *Evidence*, No. 054 (6 October 2005) at p.12.

(2) The Commissioner shall publish in the Canada Gazette a notice indicating that such a study will be carried out and indicating what its terms of reference will be.

(3) The Commissioner shall carry out the study as expeditiously as possible.

(4) If, on the *ex parte* application of the Commissioner or his or her designated representative, a judge of a superior or county court is satisfied by information on oath or solemn affirmation that a study is being carried out under this section and that a person has or is likely to have information that is relevant to the study, the judge may make an order under section 11.

The government's proposed market study power differed in important respects from the former inquiry power. First, the Bureau would be able to use formal powers pursuant to section 11 of the Act to compel evidence or the production of information. However, the Bureau would not be given the power to conduct searches of premises. In addition, under the former section 47, evidence obtained during an inquiry could be referred to the RTPC for public hearings and a report to the Minister. This process added to the length and expense of inquiries. However, the proposed market study power did not involve hearings before the Tribunal or the courts. Finally, the proposed market study provision required that terms of reference be published in the *Canada Gazette*, giving public notice and explicitly limiting the scope of each market study. These distinctions between the former inquiry power and the proposed market study power would help to limit the length and cost of market studies.

These studies would be conducted with a view to assessing the state of competition in markets. In terms of the subsequent use of information validly obtained as a result of the market study power, Canadian jurisprudence is generally receptive to possible subsequent use, subject to protections against self-incrimination, provided that the initial receipt of the information was valid and done in good faith for a legitimate and proper use.<sup>20</sup>

Under the proposed provision, the existing protections against self-incrimination would apply to individuals compelled to give information during the conduct of market studies. Any individuals subject to the exercise of a formal power pursuant to section 11 of the Act would attract the protection of subsection 11(3) of the Act which stipulates that

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<sup>20</sup> For a discussion of 'legitimate and proper purpose', see *Le Comité Paritaire de l'Industrie de la Chemise v. Potash*, [1994] 2 S.C.R. 406 and *Del Zotto v. Canada*, [1999] 1 S.C.R. 3; *Brown v. Durham Regional Police Force* (1998), 131 CCC (3d) 1 (Ont. C.A.). Regarding the subsequent use of information, generally, see *R. v. Jarvis*, [2002] 3 S.C.R. 757. In this case, the Court determined that, where a regulatory/administrative enforcement entity is acting *bona fide* in the course of its mandated activities and comes across evidence of criminality related to the very matter that it is required to investigate for compliance purposes, it may without need for further authorization validly report and pass on such information to the police. However, where the 'predominant purpose' of the activity is to determine the penal liability of an individual, there is an adversarial relationship between the individual and the state, and the full range of *Charter* rights will apply (see paragraph 88). At paragraph 97, the Court confirmed the principle that parallel administrative audits and criminal investigations are permissible and investigators can avail themselves of information obtained pursuant to the audit power prior to the commencement of the criminal investigation.

the testimony given by an individual pursuant to a section 11 order shall not be used against that individual in subsequent criminal proceedings.<sup>21</sup> In addition, other applicable Canadian legislation provides individuals with protection against self-incrimination, including subsection 5(2) of the *Canada Evidence Act*,<sup>22</sup> and sections 7, 11(c) and 13 of the *Canadian Charter of Rights and Freedoms*.<sup>23</sup>

In terms of confidentiality, whether information was voluntarily provided to the Bureau or provided pursuant to a formal power, the confidentiality of the information would be protected under section 29 of the Act. Under that section, it is a criminal offence for anyone employed by the Bureau to publicly release the information without the person's consent or unless the information is otherwise public.<sup>24</sup> This confidentiality provision, pursuant to paragraph 29(1)(b), explicitly applies to information obtained pursuant to section 11 orders. Therefore, by referring to orders made under section 11 of the Act, the proposed market study provision automatically triggers the confidentiality protection contained in section 29.

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<sup>21</sup> Subsection 11(3) states: "No person shall be excused from complying with an order under subsection (1) or (2) on the ground that the testimony, record or other thing or return required of the person may tend to criminate the person or subject him to any proceeding or penalty, but no testimony given by an individual pursuant to an order made under paragraph (1)(a), or return made by an individual pursuant to an order made under paragraph (1)(c), shall be used or received against that individual in any criminal proceedings thereafter instituted against him, other than a prosecution under section 132 or 136 of the *Criminal Code*."

<sup>22</sup> Subsection 5(2) states: "Where with respect to any question a witness objects to answer on the ground that his answer may tend to criminate him, or may tend to establish his liability to a civil proceeding at the instance of the Crown or of any person, and if but for this Act, or the Act of any provincial legislature, the witness would therefore have been excused from answering the question, then although the witness is by reason of this Act or the provincial Act compelled to answer, the answer so given shall not be used or admissible in evidence against him in any criminal trial or other criminal proceeding against him thereafter taking place, other than a prosecution for perjury in the giving of that evidence or for the giving of contradictory evidence."

<sup>23</sup> *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11. Section 7 states: "Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice." Subsection 11(c) states: "Any person charged with an offence has the right [...] (c) not to be compelled to be a witness in proceedings against that person in respect of the offence". Section 13 states: "A witness who testifies in any proceedings has the right not to have any incriminating evidence so given used to incriminate that witness in any other proceedings, except in a prosecution for perjury or for the giving of contradictory evidence."

<sup>24</sup> Subsection 29(1) states: "No person who performs or has performed duties or functions in the administration or enforcement of this Act shall communicate or allow to be communicated to any other person except to a Canadian law enforcement agency or for the purposes of the administration or enforcement of this Act

- (a) the identity of any person from whom information was obtained pursuant to this Act;
- (b) any information obtained pursuant to section 11, 15, 16 or 114;
- (c) whether notice has been given or information supplied in respect of a particular proposed transaction under section 114;
- (d) any information obtained from a person requesting a certificate under section 102; or
- (e) any information provided voluntarily pursuant to this Act."

Confidential business information that has been gathered by the Bureau and has been consistently treated as confidential information by the business, or information that, if disclosed, would cause financial or competitive injury, is also exempt from disclosure under the *Access to Information Act*.<sup>25</sup>

Although the proposed amendment did not deal specifically with criteria for selecting markets for study, this could have easily been addressed in guidelines. For instance, guidelines could outline what criteria might be used to initiate a study and could include considerations such as whether the benefits were likely to exceed the costs, whether the Bureau was the most appropriate body to undertake the study, whether the Bureau's competition perspective would be useful, whether the study would be likely to yield useful recommendations, whether the study would fall within the advocacy priorities of the Bureau, the significance of the market or industry to the economy, and the degree to which there existed or appeared to exist significant market problems or failures.

In addition, given that the proposed market study provision was silent regarding the possible outcomes of a market study, it is assumed that the result of such studies would be non-binding recommendations. This issue could also be addressed and clarified in guidelines.

It is interesting to note that the Bloc Québécois had also prepared its own amendment to Bill C-19 that would have given the Bureau the power to commence an inquiry – and access the formal powers contained in section 11 – whenever grounds existed for the making of an inquiry into an entire industry sector.<sup>26</sup> The Bloc withdrew this proposed amendment, however, after the government tabled its market studies proposal.

The Standing Committee on Industry, Natural Resources, Science and Technology heard from 11 additional witnesses on November 22 and 24, 2005 in order to allow the witnesses to respond to the government amendments. Of the 11 witnesses who appeared, 8 opposed the market study proposal.<sup>27</sup>

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<sup>25</sup> R.S.C. 1985, c. A-1.

<sup>26</sup> The text of the Bloc Québécois' proposal was as follows:  
“1.1 Paragraph 10(1)(b) of the Act is amended by striking out the word “or” at the end of subparagraph (ii) and by adding the following after subparagraph (iii): (iv) grounds exist for the making of an inquiry into an entire industry sector, or”.

<sup>27</sup> Opponents included the Canadian Association of Petroleum Producers, Canadian Chamber of Commerce, Canadian Real Estate Association, Canadian Council of Chief Executives, Association of Canadian Advertisers, Canadian Bar Association, Retail Council of Canada, and the Competition Policy Group. A ninth witness, the Canadian Restaurant and Foodservices Association, did not take a position on the market study proposal during its testimony before the Committee.

The concerns raised by those who opposed the market study amendment were as follows:

- a market study power is unnecessary because the Commissioner already possesses the tools to investigate legitimate competition issues;
- a market study power could distract the Bureau from its core mandate of investigating anti-competitive conduct under the Act, and is a poor use of the Bureau's limited resources;
- market studies could prove costly for businesses, which might have to divert attention away from regular business operations in order to focus on responding to orders for information;
- market studies could damage the public's perception of a business or industry; the fact that an industry is the target of a study might taint that industry in the eye of the public, even in the absence of wrongdoing; and
- the proposed market study power lacks procedural safeguards necessary to protect against potential *Charter* concerns that could arise if information gathered as part of a study led to a criminal investigation.

The two witnesses supportive of the government's amendments were the Public Interest Advocacy Centre ("PIAC") and the Canadian Federation of Agriculture (the "CFA"). The CFA specifically supported the market studies proposal, noting that knowledge is important and essential, and imperfect information is inefficient. PIAC noted that, while an inquiry is a micro-tool used to single out particular businesses that may be engaged in anti-competitive behaviour, market studies would serve a different purpose, namely to look at an industry as a whole, to see the state of competition. PIAC noted that competition should replace regulation and that these studies could help in researching the market beforehand.<sup>28</sup> Additional witnesses, representing the Canadian Consumers' Initiative, namely Jacques St. Amant of Option consommateurs and Sue Lott of PIAC, were scheduled to appear before the Committee on November 24, but were ultimately unable to testify. It was anticipated that these witnesses would have expressed support for the government's amendments, including the proposed market study power. In addition, the Commissioner did not have an opportunity to reappear before the Committee to address any concerns raised by the other witnesses regarding the market study proposal.

Bill C-19, including the government's proposed amendments, died on the Order Paper on November 28, 2005.

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<sup>28</sup> See PIAC's testimony at: House of Commons, Standing Committee on Industry, Natural Resources, Science and Technology, *Evidence* (22 November 2005). See CAF's testimony at: House of Commons, Standing Committee on Industry, Natural Resources, Science and Technology, *Evidence* (24 November 2005).

## 5. International Experience

This section summarizes the nature of research or non-enforcement inquiry powers in the United States, United Kingdom, the European Union and Australia. In short, all of these jurisdictions have some powers relating to starting general inquiries into the state of competition.

In the United States, the Federal Trade Commission (“FTC”) has the authority to conduct research and policy studies with few limits on subjects that it can consider. In the United Kingdom, the Office of Fair Trading (“OFT”) has the ability to conduct market studies. It can also refer market investigation references to the Competition Commission. The European Commission (“EC”) has the power to conduct general inquiries into an economic sector. The Australian Competition and Consumer Commission (“ACCC”) can conduct general inquiries into sectors of the economy.

### 5.1 United States

The FTC views “research and policy” reports as an important part of their work. Timothy Muris, former Chairman of the FTC, has stated that:

[o]ur capacity to do good work, and our credibility as a voice for competition policy requires a continuing commitment – indeed, I believe, an expanded commitment – to conduct research to increase our understanding of how markets and firms operate, the conditions under which business conduct is likely to be anticompetitive, and whether the agency’s previous enforcement efforts were necessary and successful.<sup>29</sup>

These studies can be started in three ways:

- (1) Congress uses its legislative authority to ask the FTC to do a specific report.
- (2) Members of Congress or a Congressional Committee, without using its legislative authority, asks the FTC to do a study.
- (3) The FTC initiates a study on its own.

For the last two types of inquiries, the FTC authority to conduct such inquiries is derived from the *Federal Trade Commission Act*, 15 U.S.C. 2 §46, subsection 46(f):

(f) Publication of information; reports

To make public from time to time such portions of the information obtained by it hereunder as are in the public interest; and to make annual and special reports to the Congress and to

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<sup>29</sup> Timothy J. Muris, Chairman, Federal Trade Commission, “Looking Forward: The Federal Trade Commission and the Future Development of U.S. Competition Policy” (Speech, Milton Handler Annual Antitrust Review, New York, 10 December 2002), available online at <http://www.ftc.gov/speeches/muris/handler.htm>.

submit therewith recommendations for additional legislation; and to provide for the publication of its reports and decisions in such form and manner as may be best adapted for public information and use: Provided, that the Commission shall not have any authority to make public any trade secret or any commercial or financial information which is obtained from any person and which is privileged or confidential, except that the Commission may disclose such information to officers and employees of appropriate Federal law enforcement agencies or to any officer or employee of any State law enforcement agency upon the prior certification of an officer of any such Federal or State law enforcement agency that such information will be maintained in confidence and will be used only for official law enforcement purposes.

There are no formal criteria limiting what kind of research and policy inquiries the FTC can undertake.

The process followed depends on the nature of the inquiry. A research or policy inquiry may include “workshops” or a series of panels early in the inquiry involving invited business people, experts, economists or legal authorities discussing a discrete topic. Sometimes, those working on the report may consider that available information is sufficient. While the FTC has the ability to compel oral or documentary evidence for these inquiries, it rarely does so.<sup>30</sup>

Use of research and policy inquiries by the FTC has varied over time. While the power was seldom used in the 1970s and 1980s, it has been frequently used in the late 1990s and early 2000s.

Section 46(f) of the *Federal Trade Commission Act* allows the FTC to publish portions of information obtained pursuant to market studies. The FTC may not make public any trade secret or other commercial or financial information that is privileged and confidential. However, the FTC may disclose such information to a law enforcement agency upon certification that the information will be maintained in confidence and will be used only for official law enforcement purposes.

Among other things, the FTC has published reports on gasoline pricing,<sup>31</sup> cigarette sales and advertising,<sup>32</sup> alcohol marketing and advertising,<sup>33</sup> credit report accuracy and completeness,<sup>34</sup> consumer fraud,<sup>35</sup> possible anticompetitive barriers to e-

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<sup>30</sup> Information obtained during conversations with representatives of the FTC.

<sup>31</sup> Federal Trade Commission, *Gasoline Price Changes: The Dynamic of Supply, Demand and Competition* (2005), available online at <http://www.ftc.gov/reports/gasprices05/050705gaspricesrpt.pdf>.

<sup>32</sup> Federal Trade Commission, *Cigarette Report for 2003* (2005), available online at <http://www.ftc.gov/reports/cigarette05/50809cigrpt.pdf>.

<sup>33</sup> Federal Trade Commission, *Alcohol Marketing and Advertising: A Report to Congress* (September 2003), available online at <http://www.ftc.gov/os/2003/09/alcohol03report.pdf>.

<sup>34</sup> Federal Trade Commission, *Report to Congress: Under sections 318 and 319 of the Fair and Accurate Credit Transactions Act of 2003* (December 2004) available online at <http://www.ftc.gov/reports/facta/041209factarpt.pdf>.

commerce regarding contact lenses,<sup>36</sup> and the potential role of competition in the health care system.<sup>37</sup>

## 5.2 United Kingdom

In the White Paper *Productivity and Enterprise: A World Class Competition Regime*,<sup>38</sup> the UK Government “stated its wish for competition authorities to take on a high profile advocacy role, both by advising on the impact of the Government’s own laws and regulations on competition, and acting more widely to promote competition in the economy in a variety of ways. The Government saw strong competition contributing to productivity, innovation and economic growth - hence to long-run economic benefits as well as to more immediate and direct consumer benefits.”<sup>39</sup>

Market studies were introduced by the OFT “as a means of identifying and addressing all aspects of market failure, from competition issues to consumer detriment and the effect of government regulations.”<sup>40</sup>

Market studies will usually be conducted under section 5 of the *Enterprise Act 2002*<sup>41</sup> in order to identify whether perceived problems should be addressed through the OFT’s other functions.

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<sup>35</sup> Federal Trade Commission, *Consumer Fraud in the United States: An FTC Survey* (August 2004), available online at <http://www.ftc.gov/reports/consumerfraud/040805confraudrpt.pdf>.

<sup>36</sup> Federal Trade Commission, *Possible Anticompetitive Barriers to E-Commerce: Contact Lenses* (March 2004), available online at <http://www.ftc.gov/os/2004/03/040329clreportfinal.pdf>.

<sup>37</sup> Federal Trade Commission and Department of Justice, *Improving Health Care: A Dose of Competition* (July 2004), available online at <http://www.ftc.gov/reports/healthcare/040723healthcarerpt.pdf>.

<sup>38</sup> U.K., Department of Trade and Industry, *Productivity and Enterprise: A World Class Competition Regime* (July 2001), available online at <http://www.archive.official-documents.co.uk/document/cm52/5233/5233.htm>.

<sup>39</sup> Office of Fair Trading, “Market Studies: Guidance on the OFT approach” (November 2004), available online at <http://www.offt.gov.uk/NR/rdonlyres/03AD31EC-3533-40BE-AE79-2A83424E9C9B/0/OFT519.pdf>, at p. 3. It is interesting to note that similar views have been expressed by the Ontario Institute for Competitiveness and Prosperity. See Ontario Institute for Competitiveness and Prosperity reports and working papers, including *Rebalancing priorities for Canada’s prosperity: Report on Canada 2006* (March 2006), available online at [http://www.competeprosper.ca/public/public\\_reports.html](http://www.competeprosper.ca/public/public_reports.html), and *Reinventing innovation and commercialization policy in Ontario*, Working Paper No. 6 (October 2004), available online at [http://www.competeprosper.ca/public/public\\_papers.html](http://www.competeprosper.ca/public/public_papers.html).

<sup>40</sup> *Ibid.*

<sup>41</sup> *Enterprise Act 2002*, 2002 Chapter 40 (U.K.). Section 5 states: “(1) The OFT has the function of obtaining, compiling and keeping under review information about matters relating to the carrying out of its functions. (2) That function is to be carried out with a view to (among other things) ensuring that the OFT has sufficient information to take informed decisions and to carry out its other functions effectively. (3) In carrying out that function the OFT may carry out, commission or support (financially or otherwise) research.”

The possible outcomes of a study include:

- giving the market a clean bill of health;
- publishing information to help consumers;
- encouraging firms to take voluntary action;
- encouraging a consumer code of practice;
- making recommendations to the Government or regulators;
- investigation, or enforcement action against companies or individual suspected of breaching consumer law or competition law; and
- a market investigation reference to the Competition Commission.<sup>42</sup>

The OFT created guidelines to provide guidance, among other things, on how it will identify possible candidates for market studies, how it will select markets for review, when it will decide to conduct a study, and on the various procedures it might use (for instance it may seek information from market participants through questionnaires, conduct meetings, telephone surveys, commission research, etc). The OFT will publish the results of its studies after redacting for potentially sensitive information.

The OFT has conducted market studies on various topics, including, among others, the liability insurance market, new car warranties, private dentistry, taxi services, store cards, and pharmacies.<sup>43</sup>

The OFT forecasts that it will have spent approximately Cdn \$34.7 million in market studies between 2002 and 2006. For the period 2005-06, the OFT allocated at least 13% of its budget to market studies, *i.e.* approximately Cdn \$14.5 million.<sup>44</sup>

The OFT is also able to make a market investigation reference to the Competition Commission when it suspects that a feature, or combination of features of a market, prevents, restricts or distorts competition. If a reference is made, the Competition Commission will conduct a detailed public investigation and reach its own conclusions about the market concerned. The Competition Commission may use formal powers to compel the production of information and has the power to impose remedies which go beyond those available to the OFT in conducting market studies.

### **5.3 European Union**

The EC has the power to conduct general inquiries into any sector of the economy if “the trend of trade between Member States, the rigidity of prices or other circumstances

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<sup>42</sup> Office of Fair Trading, “Market Studies: Guidance on the OFT approach”, *supra* note 39 at p. 13.

<sup>43</sup> See Office of Fair Trading, Market Studies, at <http://www.of.gov.uk/Business/Market+studies/cases.htm>.

<sup>44</sup> Office of Fair Trading, *Annual Plan 2005-06* (24 March 2005) at p. 27.

suggest that competition may be restricted or distorted within the common market.”<sup>45</sup> The power, while used to a limited extent in the past, has been used more frequently since 2005. In June 2005, two ‘sector inquiries’ were launched, one into competition in the energy sector, specifically gas and electricity markets, and another into the financial services sector.<sup>46</sup>

## 5.4 Australia

Australia can conduct general inquiries through section 28(1)(c) of the *Trade Practices Act* (“TPA”) which allows the ACCC “to conduct research in relation to matters affecting the interests of consumers.”<sup>47</sup> An inquiry can be initiated by the ACCC’s Commissioner or its Minister. The ACCC has no power to compel information for such an inquiry. Information is usually provided voluntarily as the relevant parties recognize it is in their interests to avoid a potentially more formal government inquiry.<sup>48</sup> Part IIA of the TPA also contains provisions to allow the ACCC, with Ministerial authorization, to research, monitor and investigate specific persons and industries. These provisions allow for the compelling of information and documents.

In terms of costs, as an example, the ACCC spent in the range of Cdn \$1.5 million over the last three years to monitor medical indemnity insurance premiums.<sup>49</sup>

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<sup>45</sup> *Treaty establishing the European Economic Community*, Council Regulation No. 1/2003 (16 December 2002) at Article 17:

“Where the trend of trade between Member States, the rigidity of prices or other circumstances suggest that competition may be restricted or distorted within the common market, the Commission may conduct its inquiry into a particular sector of the economy or into a particular type of agreements across various sectors. In the course of that inquiry, the Commission may request the undertakings or associations of undertakings concerned to supply the information necessary for giving effect to Articles 81 and 82 of the Treaty and may carry out any inspections necessary for that purpose.”

<sup>46</sup> See European Commission, Sector Inquiries, at [http://europa.eu.int/comm/competition/antitrust/others/sector\\_inquiries.html](http://europa.eu.int/comm/competition/antitrust/others/sector_inquiries.html).

<sup>47</sup> *Trade Practices Act*, 1974 at s. 28(1)(c);

“In addition to any other functions conferred on the Commission, the Commission has the following functions: [...]

(b) to examine critically, and report to the Minister on, the laws in force in Australia relating to the protection of consumers in respect of matters referred to the Commission by the Minister, being matters with respect to which the Parliament has power to make laws;

(c) to conduct research in relation to matters affecting the interests of consumers, being matters with respect to which the Parliament has power to make laws; [...].”

<sup>48</sup> Information obtained during conversations with representatives of the ACCC.

<sup>49</sup> Australian Competition and Consumer Commission, *ACCC Annual Report 2002-03* at p. 108, and *ACCC Annual Report 2003-04* at p. 117.

## 6. Alternatives

### 6.1 CITT

The CITT has often been put forward as a possible body to conduct market studies. It describes itself as “an administrative tribunal operating within Canada’s trade remedies system ... an independent quasi-judicial body that carries out its statutory responsibilities in an autonomous and impartial manner and reports to Parliament through the Minister of Finance.”<sup>50</sup>

Legislative authority for carrying out general economic inquiries (as opposed to general trade or tariff inquiries) is derived from section 18 of the *Canadian International Trade Tribunal Act*:

18. The Tribunal shall inquire into and report to the Governor in Council on any matter in relation to the economic, trade or commercial interests of Canada with respect to any goods or services or any class thereof that the Governor in Council refers to the Tribunal for inquiry.<sup>51</sup>

Since 1988 (when the *CITT Act* was passed), the CITT has done four inquiries under section 18:

(1) Competitiveness in the Horticulture Industry (1991 - 92)<sup>52</sup>

- Terms of Reference – Develop representative national and regional profiles of the horticultural industry, examine the impact of government intervention in Canada and the US, determine factors that contribute to differences in competitiveness between Canadian and foreign producers and assess the challenges and opportunities facing the industry, including factors that would improve the industry's viability.

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<sup>50</sup> The CITT describes its mandate more fully as to: (1) conduct inquiries into whether dumped or subsidized imports have caused, or are threatening to cause, material injury to a domestic industry; (2) hear appeals of decisions of the Canada Customs and Revenue Agency made under the Customs Act, the Excise Tax Act and the Special Import Measures Act; (3) conduct inquiries into complaints by potential suppliers concerning procurement by the federal government that is covered by the North American Free Trade Agreement, the Agreement on Internal Trade and the World Trade Organization Agreement on Government Procurement; (4) conduct safeguard inquiries into complaints by domestic producers that increased imports are causing, or threatening to cause, serious injury to domestic producers; (5) conduct investigations into requests from Canadian producers for tariff relief on imported textile inputs that they use in their production operations; and (6) conduct inquiries and provide advice on such economic, trade and tariff issues as are referred to the Tribunal by the Governor in Council or the Minister of Finance. See CITT’s mandate at its website at [http://www.citt-tcce.gc.ca/mandate/index\\_e.asp](http://www.citt-tcce.gc.ca/mandate/index_e.asp).

<sup>51</sup> R.S.C. 1985, c. 47.

<sup>52</sup> CITT, *An Inquiry into the Competitiveness of the Canadian Fresh and Processed Fruit and Vegetable Industry*, Reference No. GC-90-001 (December 1991), available online at [http://www.citt-tcce.gc.ca/refer/reports/gc90001\\_e.asp](http://www.citt-tcce.gc.ca/refer/reports/gc90001_e.asp).

- Duration – 18 months.
- Additional Funding Required - \$1,275,000

(2) Allocation of Import Quotas (1991 - 92)<sup>53</sup>

- Terms of Reference – Recommend an optimum method of allocating import quotas for agricultural products subject to controls, based on factors of equity, predictability, economic efficiency, transparency, market entry, market responsiveness and competitiveness.
- Duration – 14 months
- Additional Funding – \$1,308,000

(3) Cattle and Beef (1992 - 93)<sup>54</sup>

- Terms of Reference – Develop a profile of and review conditions and trends in the cattle and beef industries in Canada, the US and Mexico and examine and determine factors, including the impact of government measures, that affect the competitiveness of the industries in Canada, the US and Mexico. Assess the challenges and opportunities facing the industry.
- Duration – 12 months
- Additional Funding – \$825,000

(4) Dairy Product Blends (1997 - 98)<sup>55</sup>

- Terms of Reference – Examine factors influencing the market for the import of dairy product blends and identify options for addressing any problems taking account of Canada's rights and obligations under the NAFTA and WTO.
- Duration – 7 months
- Additional Funding – \$46,000

## 6.2 *Inquiries Act*

Potential use of the *Inquiries Act* as an ad hoc instrument was the alternative put forward by the government when section 47 of the *Combines Investigation Act* was repealed. In short, section 2 of the *Inquiries Act* stipulates that:

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<sup>53</sup> CITT, *An Inquiry into the Allocation of Import Quotas*, Reference No. GC-91-001 (October 1992), available online at [http://www.citt-tcce.gc.ca/refer/reports/gc91001\\_e.asp#Toc](http://www.citt-tcce.gc.ca/refer/reports/gc91001_e.asp#Toc).

<sup>54</sup> CITT, *An Inquiry into the Competitiveness of the Canadian Cattle and Beef Industries*, Reference No. GC-92-001 (November 1993), available online at [http://www.citt-tcce.gc.ca/refer/reports/gc92001\\_e.asp](http://www.citt-tcce.gc.ca/refer/reports/gc92001_e.asp).

<sup>55</sup> CITT, *An Inquiry into the Importation of Dairy Product Blends Outside the Coverage of Canada's Tariff-Rate Quotas*, Reference No. GC-97-001 (June 1998), available online at [http://www.citt-tcce.gc.ca/refer/reports/gc97001\\_e.asp](http://www.citt-tcce.gc.ca/refer/reports/gc97001_e.asp).

The Governor in Council may, whenever the Governor in Council deems it expedient, cause inquiry to be made into and concerning any matter connected with the good government of Canada or the conduct of any part of the public business thereof.

Subsequent provisions empower Commissioners to summon witnesses, demand production of documents and employ counsel, advisors or experts.

Some of the “Royal Commissions” or “Commissions of Inquiry” started under the *Inquiries Act* represent major and important inquiries in recent Canadian history (e.g. the Royal Commission on Bilingualism and Biculturalism). The last five inquiries have been:

- Roy Romanow’s Commission on the Future of Health Care in Canada;
- Commission of Inquiry into the Deployment of Canadian Forces to Somalia;
- Commission of Inquiry on the Blood System in Canada;
- Canadian Transportation Accident Investigation and Safety Board Act Review Commission; and
- Royal Commission on Aboriginal Peoples.

There have been no inquiries related to competition issues started under the *Inquiries Act* since section 47 was repealed in 1986.

## **7. Conclusion**

During the past few years, many have expressed significant interest in the idea of market studies. Concurrently, market studies have been used by antitrust authorities around the world to promote the benefits of competition in their economies. It is hoped that this paper has provided a contextual overview to allow for a more informed discussion of the merits of market studies.