India’s New Competition Law: A Canadian Perspective*

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Abstract

In September of 2007, India’s parliament passed a bill amending the Competition Act it had enacted in 2002. This will allow the 2002 Act to take full effect and will usher in a new era in Indian competition policy. The purpose of this article is to introduce readers to India’s recent experience with competition law and to describe the new law, with a particular emphasis on features that we believe will interest Canadian antitrust scholars. We argue that India’s competition law deserves attention from Canadians, both because of the rising importance of India as a global economic partner and rival, and because of the lessons we might learn from a country that has worked hard to craft a modern competition law.

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1.0 Introduction

In September of 2007, India’s parliament passed a bill amending the Competition Act it had enacted in 2002. Most of the 2002 Act had not been activated pending the resolution of some constitutional issues raised by members of the Supreme Court. With these amendments, the full Act (as amended) will become effective very soon. The purpose of this article is to introduce readers to India’s recent experience with competition law and to describe the new law, with a particular emphasis on features that we believe will interest Canadian antitrust scholars.

There are at least two good reasons for Canadians in the antitrust field to inform themselves of the important recent developments with respect to India’s competition policy. The first lies in India’s large and growing importance as an emerging economic power. Currently the third largest economy in the world as measured by purchasing power parity (behind only USA and China), it is also among the fastest growing major economies in the world, with a GDP growth rate of 9.2% at the end of the second quarter of 2006 — 2007. This growth has attracted, and is some part the product of, foreign investment from around the world: a recent study regards India as the second most popular destination for foreign direct investment (FDI).

In addition, Indian companies large and small are reaching beyond their country’s borders to sell services and invest in – and even purchase control of – major companies in the Canada, the United States and elsewhere. Indeed, the stock of Indian FDI in Canada has risen over 600% in

2 India’s Corporate Affairs Minister announced to the press on September 10, 2007, that the Competition Commission of India (CCI) will be fully operational by 2008, after the Amendment Bill is signed by the President and selection of personnel for the CCI is completed.
6 For example, the formerly Calcutta-based Mittal Steel Company, now joined with Luxembourg’s Arcelor, has control of Canada’s Dofasco Steel Company. The Indian conglomerate, Aditya Birla Group has acquired a number of pulp and paper mills in eastern Canada as well as Minacs Worldwide, Canada’s largest business process outsourcing firm, and parts of Alcan (Novelis). Essar Global, an Indian firm with operations in steel, energy, power, communications, shipping and logistics, and construction completed its purchase of Algoma Steel in June 2007. Finally, a subsidiary of the large Indian conglomerate Tata Group (VSNL) now owns Teleglobe (as of 2006). There have been fewer high profile transactions involving Canadian firms as acquirers. One example was SNC-Lavalin’s acquisition of RJ Associates (Engineers), a service engineering and contracting firm based in Mumbai, as a way to establish a permanent local presence in the Indian market for infrastructure services. There are Indian-Canadian joint ventures of note. For example, Sun Life Financial has teamed up with the Aditya Birla Group to
the last 5 years. In comparison, while Canadian FDI in India has not had such a spectacular rise, it has increased steadily, and has more than trebled since 1990.\textsuperscript{7} Bilateral trade between India and Canada has also increased significantly, with merchandise trade registering an annual growth rate of 11.5\% over 1999-2006, and services trade increasing even more rapidly, at 13.9\% annually over 1999-2004.\textsuperscript{8}

With the Indian economy growing so rapidly and Indian firms and consumers increasingly integrated into global markets, it is inevitable that Canadian firms interested in participating in this growth will become exposed to a variety of Indian domestic policies, including antitrust law. Just as a working knowledge of American and European antitrust has become an asset for competition policy practitioners in this country over the last many years, knowledge of the emerging competition regimes in the new economic powers, particularly China and India, should be expected to become important as well.

The second reason relates to what we can learn from the experience of another country trying to fashion a modern competition law, and in doing so trying to draw on current economic thinking on competition and efficiency and on the experiences of many countries with longer antitrust histories. In this regard, India is a much more interesting study for Canadians than would be many other developing countries.\textsuperscript{9} First, it took on this task with great seriousness; the work involved numerous studies and consultations with experts from within and outside the country. Attempts were made to draw on the experience of Canada and other countries with well-established antitrust regimes. Second, while our histories and traditions are clearly different on many levels, there are also some important similarities in law, government and language thanks to our common historical connections to Britain. India is also a federal state struggling to balance the needs of states for the freedom to address more local concerns with the need for a strong central authority. For these reasons, it is particularly interesting to see how the Indians

\begin{itemize}
\item create Birla Sun Life and Magna International is in a partnership with Indian firm Amtek Auto to supply flexplate assemblies to the European and Indian markets. In the banking sector, the Royal Bank of Canada has sent two teams to India recently, and looks set to enter the Indian market, where Toronto Dominion and Scotia Bank are already present.
\item Calculations of export figures from International Monetary Fund (IMF), Direction of Trade Statistics Yearbook, 1995, 2005 and 2007.
\end{itemize}
addressed some of the challenging antitrust questions with which we have been struggling in Canada.

2.0 Evolution of Competition Law in India

While our principal focus here will be on India’s new law, it is important to recognize that this is not India’s first competition law. Unlike many other developing countries, India has had a competition law for some time – in fact, since 1969. We begin, therefore, with a short discussion of the historical development of antitrust in India before moving to our review of the new law.

Competition policy in India draws inspiration from the Articles 38 and 39 of the Constitution of India (which came into effect January 1950), which are a part of the Directive Principles of State Policy.\(^\text{10}\) These articles reflect the aim of moving India toward a welfare state, and building a just and equitable society, and mandates that the State shall, in particular, direct its policy towards securing (a) “that the ownership and control of material resources of the community are so distributed as best to subserve the common good;” and (b) “that the operation of the economic system does not result in the concentration of wealth and means of production to the common detriment.”\(^\text{11}\)

Accordingly, after independence, the government of India assumed increased responsibility for the development of the country, and followed policies what may be called “Command and Control” laws, rules and regulations. In 1951, the Industries (Development and Regulation) Act (IDRA) was implemented, through which the government sought even greater control of the industrial sector through an industrial licensing policy, which required firms in many industries to have licenses for the entry into a business or the expansion of an existing business.\(^\text{12}\)


\(^{11}\) Article 39, Constitution of India

\(^{12}\) “Industries (Developing and Regulation) Act” (1951), Act No. 65 of 1951, Government of India.
In this situation, a series of three government studies led to the enactment of the *Monopolies and Restrictive Trade Practices Act (MRTP)* (1969), the first competition law in India.\(^\text{13}\)

### 2.1 *Monopolies and Restrictive Trade Practices Act (MRTP Act) (1969)*

The preamble to the *MRTP Act* describes it as: “An Act to provide that the operation of the economic system does not result in the concentration of economic power to the common detriment, for the control of monopolies, for the prohibition of monopolistic and restrictive trade practices (RTPs), and for matters connected therewith or incidental thereto”.\(^\text{14}\) The *Act* was amended significantly twice, first in 1984, adding consumer protection provisions. In the next amendment in 1991, provisions related to concentration of economic power and various restrictions on dominant undertakings, like prior approval of federal government for setting up a new undertaking, were removed from the *Act*. Below, we discuss the *MRTP Act* briefly. Until the new law takes effect, the *MRTP Act* remains the competition law of the land, so we will discuss it in the present tense.

#### 2.2 Outline of the *MRTP Act*

The *MRTP Act* was clearly a product of the “command and control” mindset that dominated Indian government thinking at the time it was drafted. There was more of an effort to control who entered, exited, expanded and contracted in an industry than to foster true competition.

Under the *Act*, a company was classified as an “MRTP Company” when it by itself or together with its interconnected undertakings had an asset value of at least one billion Indian rupees (about $25 million CDN) or was dominant in the relevant market (i.e. commanded a market share in excess of one-quarter (25%)). Such MRTP companies were required to be registered with the federal government and to obtain government approval to expand an existing

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undertaking, establish an undertaking or carry out a merger, amalgamation, or takeover, as these were believed to lead to an undesirable concentration of economic power.\textsuperscript{15}

\textbf{Prevention of Restrictive Trade Practices (RTPs):} The \textit{Act} defined a RTP as a practice “which has, or may have, the effect of preventing, distorting or restricting competition in any manner and in particular, (i) which tends to obstruct the flow of capital or resources into the stream of production, or (ii) which tend to bring about manipulation of prices, or conditions of delivery or to affect the flow of supplies in the market relating to goods or services in such manner as to impose on the consumer unjustified costs or restrictions”\textsuperscript{16}. Broadly, the RTPs listed in the \textit{MRTP Act} are: (i) refusal to deal, (ii) tie-up sales; (iii) full line forcing; (iv) exclusive dealings; (v) concerted practice; (vi) price discrimination; (vii) re-sale price maintenance; and (viii) area restriction.\textsuperscript{17}

The MRTP Act states all the above types of RTPs to be legally prejudicial to the public interest. Hence, anyone against whom the charge of RTP has been established can only plead for gateways provided in the MRTP Act.

\textbf{Prevention of Monopolistic Trade Practices (MTPs)\textsuperscript{18}:} According to the \textit{Act}, an MTP is a trade practice, which has, or is likely to have, the effect of: (i) maintaining the prices of goods or charges for services at an unreasonable level by limiting, reducing or otherwise controlling the production, supply or distribution of goods or the supply of any services or in any other manner; (ii) unreasonably preventing or lessening competition in the production, supply or distribution of any goods or in the supply of any services; (iii) limiting technical development or capital investment to the common detriment or allowing the quality of any goods produced, supplied or distributed, or any services rendered, in India, to deteriorate; (iv) increasing unreasonably: a) the cost of production of any goods; or b) charges for the provision, or maintenance, of any services; (v) increasing unreasonably: a) the prices at which goods are, or may be, sold or re-sold, or the charges at which the services are, or may be, provided; or b) the profits which are, or may be,
derived by the production, supply or distribution (including the sale or purchase of any goods or in the provision or maintenance of any goods or by the provision of any services; and vi) preventing or lessening competition in the production, supply or distribution of any goods or in the provision or maintenance of any services by the adoption of unfair methods or unfair or deceptive practices.\footnote{Section 31, \textit{MRTP Act}, 1969}

**Prevention of Unfair Trade Practices:** Unfair trade practices (UTPs) were included in the 1984 amendments of the \textit{MRTP Act}, and effectively fall under the following categories: a) misleading advertisements and false representations, b) bargain sales, bait and switch selling, c) offering of gifts or prizes with the intention of not providing them and conducting promotional contests, d) product safety standards, and e) hoarding or destruction of goods.\footnote{Section 36A, \textit{MRTP Act}, 1969}

**Enforcement Authorities:** The \textit{MRTP Act} provides for a MRTP Commission, whose Chairman is required to be a person who is or has been or is qualified to be a judge of the Supreme Court (highest court of India) or High Court (highest court of a State). The Commission will consist of not less than two and not more than eight other members.\footnote{Sections 5, 6, \textit{MRTP Act}, 1969} The Commission is assisted by the Director General of Investigation and Registration for carrying out investigations, for maintaining register of agreements and for undertaking carriage of proceedings during the enquiry before the MRTP Commission.\footnote{Section 8, \textit{MRTP Act}, 1969}

The powers of the Commission include the powers vested in a civil court and include further powers: (i) to direct an errant undertaking (under RTP or UTP) to discontinue a trade practice and not to repeat the same; (ii) to pass a ‘cease and desist’ order; (iii) to grant temporary injunction, restraining an errant undertaking (under RTP, or UTP) from continuing an alleged trade practice; (iv) to award compensation for loss suffered or injury sustained on account of RTP or UTP; (v) to direct parties to agreements containing restrictive clauses to modify the same; (vi) to direct parties to issue corrective advertisements; and (vii) to recommend to the Central Government, division of undertakings or severance of inter-connection between

undertakings, if their working is prejudicial to public interest or has led or is leading to an MTP or a RTP.\textsuperscript{23}

Thus the MRTP Commission could pass final orders in respect of RTP, and UTP, but only had an advisory role in the disposal of cases of MTPs and concentration of economic power. The central government had the sole authority to pass final orders in these other cases. Appeals against the MRTP Act can only be heard at the Supreme Court.

2.3 Economic Reforms and 1991 Amendments to the \textit{MRTP Act}

The year 1991 was a watershed year in the Indian economic history, as it witnessed sweeping reforms in many areas of government policies, with a remarkable change from the previous "command and control" regime to a more market-driven one. A new Industrial Policy was announced by the government in July, 1991 based on the pillars of liberalization and competition.\textsuperscript{24}

Keeping pace with such reforms in other policy areas, an important set of amendments to the \textit{MRTP Act} were introduced in 1991. Two of the five major areas of the \textit{MRTP Act}, namely prevention of concentration of economic power to the common detriment; and control of monopolies, were de-emphasized, after the 1991 amendments to the \textit{MRTP Act}. More specifically, provisions relating to concentration of economic power and various restrictions on MRTP companies (e.g. the requirements to obtain prior approval of the Central Government for establishing a new undertaking, expanding an existing undertaking, amalgamations, mergers and takeovers of undertakings) were all deleted from the statute. Strikingly, then, merger control was effectively removed from the \textit{MRTP Act}.

Further, in the same year the government, through a notification, brought previously exempt public sector enterprises, cooperative societies and financial institutions under the purview of the Act.

\textsuperscript{23} Sections 10, 11, 12, 36B, \textit{MRTP Act}, 1969
2.4 Problems with the MRTP Act

The MRTP Act was not very successful in its stated objectives. This was partly because the Act was created at a time when all the process attributes of competition such as entry, price, scale, and location were regulated through other policies over which the MRTP Commission had no influence. Unfortunately, while the MRTP Act was created to check the various competition concerns that resulted from the then command and control regime, it was not empowered to change the very elements of the regime that resulted in such concerns.

For example, chapter III of the MRTP Act mandated that dominant companies were required to seek permission from the federal government (not the MRTP Commission) to expand, establish new undertakings, and to merge or acquire other businesses. The Government may at its discretion refer the request to the MRTP Commission for its opinion, but, in any case, it was not bound by the MRTP Commission’s opinion. In fact, the frequency with which cases were sent to the MRTP Commission for an opinion was extremely low. As a result, the MRTP Commission became largely toothless to act against dominant undertakings. Moreover, no action was taken to reduce concentration of economic power that was already widespread at the time of passing of the MRTP Act, as noted by the three studies that led to its enactment.

Another problem stemmed from the lack of proper definitions in the Act. A perusal of the MRTP Act shows that there is no definition of certain offending anti-competitive practices, for example, cartels, price-fixing, predatory pricing, and bid-rigging, with the result that bringing successful actions became very difficult.

Significantly, the MRTP Commission was poorly funded, which further constrained its efficient functioning. A recent study by the non-governmental organization CUTS International included a comparative analysis of the antitrust agencies of seven developing countries, namely India, Kenya, Pakistan, Sri Lanka, South Africa, Tanzania and Zambia. The report revealed that all the other countries devoted a larger fraction of their total government budget to their antitrust agency than did India – some a much larger fraction.

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26 For example, India’s fraction of 0.0009 was lower than those of South Africa (0.033), Sri Lanka (0.003), Tanzania (0.017) and Zambia (0.056). CUTS International, (2003) “Pulling Up Our Socks: A Study of Competition Regimes of Seven Developing Countries of Africa and Asia under the 7-Up Project”. In a paper presented to the International Bar Association Global Competition Forum in Mexico City in 2003, Margaret Sanderson reported on competition agency staffing in a large number of countries. India’s agency was reported to have only 120 employees of which
The problem of poor funding was compounded by the fact that the MRTP Commission required Government permission to incur expenditure beyond certain limits. This severely hampered its independence. The independence of the MRTP Commission was further impaired due to the discretionary power of the Government to appoint senior level officers. Moreover, the MRTP Commission sat only in Delhi, making it difficult to access for small plaintiffs in distant locations in the large country.

2.5 Reasons for a New Competition Law

Several factors contributed to the need for a new competition law for India. Most importantly, it was seen that India needed a law reflective of its more open approach to business – protections for competition and the competitive process should replace governmental command and control mechanisms. Further, over the years, a large number of judicial decisions had weakened certain aspects of the MRTP Act. For example, in a case involving the American Natural Soda Ash Corporation (ANSAC), the Supreme Court of India had directed that the MRTP Commission is not permitted to take actions against international cartels if the cartel meetings took place outside the country.27

Another contributing factor relates to the changing international economic environment. India’s Ministry of Commerce set up an Expert Group on interaction between Trade and Competition Policy, subsequent to the establishment of a similar group at the WTO, following the Singapore Ministerial Declaration of 1996.28 The Expert Group reported that there was a need for an appropriate competition law to protect fair competition and to check anticompetitive practices, many of which could surface during the implementation of WTO Agreements.29

In view of the above, the Government appointed a High Level Committee on Competition Policy and Law in October 1999 to propose a modern competition law for the country in line with international developments.30 Finally, the Competition Act 2002 was enacted

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27 Supreme Court (2002), “Haridas Exports Vs. All India Float Glass Manufacturers Association”, 6 SCC 600.
in January 13, 2003 to replace the *MRTP Act*. The Competition Commission of India (CCI) was established in October 2003 to implement the provisions of the *Act*. Some constitutional issues delayed implementation of the law, but these appear to have been resolved with the passage of the Competition (Amendment) Bill, 2007.

### 3.0 *Competition Act (2002)* after the *Competition Amendment Bill (2007)*

Since 2003, India has been in a unique situation with respect to its competition regime, in that it has two competition laws, the outgoing -- but still functional -- *MRTP Act* (1969) and the newly enacted, but not yet (at this writing) activated, *Competition Act (2002)*. However, the *Competition Act* will supersede the *MRTP Act* soon. The delay is due to a writ petition in the Supreme Court (India’s highest court) which challenged the validity of the *Act*. It claimed that since the CCI would exercise judicial functions, in view of the doctrine of separation of powers recognized by the Indian Constitution, the Chairman of the CCI should necessarily be a judge chosen by the chief justice of India.  

The *Competition Act* has been consequently amended, making the CCI an expert body, and providing for the creation of an appellate body to hear appeals from the decisions of the Commission, and to provide that the Commission’s orders be executed by a civil court. The *Competition Amendment Bill (2007)* was passed by the parliament in September 10, 2007, and will come into force (and the *MRTP Act* will be repealed) after it is signed by the President.

While the main reason for the amendment was the objection of the Supreme Court, the policymakers took the opportunity to incorporate other changes and delete some other sections to face the changing situation, and correct certain loopholes in the *Act*. In the end, the Amendment bill (2007) amended a majority of the sections of the original *Act*. These amendments include replacement of 13 sections, and complete deletion of 5 sections. Further the bill introduced 21 new sections to the *Act*. We will discuss the *Competition Act* as it stands after the passage of the

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32 However the MRTP Commission shall continue to exercise jurisdiction and power under the repealed *MRTP Act* for a period of two years from the date of commencement of *Competition Act* (2002) to adjudicate the pending cases. After two years, the cases still pending will be transferred either to the CCI or, if the case is regarding Unfair Trade Practice, to the National Commission constituted under the Consumer Protection Act (1986) (section 66, Competition (Amendment) Bill, 2007).
Competition Amendment Bill (2007). From this point on, unless otherwise clear from the context, references to the Competition Act should be assumed to be reference to the Act including the amendments.

The objective of the Competition Act is written in the Preamble, which describes the establishment of a Competition Commission, “… to prevent practices having adverse effect on competition, to promote and sustain competition in markets, to protect the interests of consumers and to ensure freedom of trade carried on by other participants in markets, in India…”. The key substantive provisions of the Act include section 3, which deals with anti-competitive agreements, section 4, which discusses abuse of dominance, sections 5 and 6, which deal with combinations (mergers). Further, section 7 creates the Competition Commission of India (CCI), the new national antitrust agency charged with both enforcement and advocacy functions.

It must be noted that the regulation of unfair trade practices was removed from the ambit of the Competition Act, as there has been a separate law covering this area since 1986, the Consumer Protection Act (COPRA). Let us then examine the key elements of the Competition Act (2002) following the amendment bill in more detail.

3.1 Anti-Competitive Agreements

The law prohibiting anti-competitive agreements is contained in section 3 of the Act. Section 3(1) of the Act states that “enterprises, persons or associations of enterprises or persons, including cartels, shall not enter into agreements in respect of production, supply, distribution, storage, acquisition or control of goods or provision of services, which cause or are likely to cause an “appreciable adverse effect on competition” (AAEC) in India. Section 3(2) prohibits such agreements. This section covers both horizontal and vertical agreements.

Section 3(3) states that for four types of horizontal agreements between enterprises involved in the same or similar manufacturing or trading of goods or services, something close to a “per-se illegal” rule would be applied. These agreements are those that:

(a) Directly or indirectly determine sale or purchase prices;
(b) Limit or control production, supply, markets, technical development, investment or provision of services;

Section 5, defines a combination to be an acquisition or a merger over a certain threshold limit, specified in terms of asset or turnover.

Section 3, Competition Act (2002)
(c) Share the market or source of production or provision of services by allocation of *inter alia* geographical area of market, nature of goods or number of customers or any other similar way;

(d) Directly or indirectly result in bid rigging or collusive bidding.

All the above four types of agreements “shall be presumed to have an appreciable adverse effect on competition”. It is not exactly a *per se* prohibition because there is a joint venture exception: “Provided that nothing in this sub-section shall apply to any agreement entered into by way of joint ventures if such agreement increases efficiency in production, supply, distribution, storage acquisition or control of goods or provision of services.”35 Presumably, this clause only reestablishes the need for the CCI to prove that the agreement had an AAEC in India, that is, it takes the agreement from evaluation on a *per se* basis to a rule of reason treatment.

Section 3(4) identifies a number of vertical agreements subject to review under the AAEC in India test: tied selling, exclusive supply/distribution agreements, refusal to deal and resale price maintenance.

Section 3(5) of the Act lays down certain exceptions from the applicability of the provisions relating to anti-competitive agreements. First, the provisions of the Act, will not restrict “the right of any person to restrain any infringement of, or to impose reasonable conditions, as may be necessary for protecting any of his rights which have been or may be conferred upon him” under the various intellectual property right statutes. The second is the exception allowed for export cartels.

Interestingly, omitted from the list of exemptions are agreements related to the collective bargaining activities of unions.36 The *MRTP Act* had contained such an exemption (in its Section 3), and similar exemptions are found in many other competition laws, including the Canadian Act at Section 4(1).

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35 Section 3(3). Of some significance is the fact that “joint venture” is not defined in the Act.
3.2 Abuse of Dominance

Abusive behavior by dominant firms is dealt with in section 4 of the Act. A dominant position is defined in terms of a ‘position of strength’ enjoyed by an enterprise in the relevant market in India.\(^{37}\) Interestingly, even the factors to be taken into account to consider what is a relevant product and geographic market of any good or service have been laid down in the Act. However, no mathematical or statistical formula is adopted to “measure” dominance – as was the case under the repealed provisions of the MRTP Act (as noted before in section 2.2, there it was 25 % of market share in any market).

Section 4(2) of the Act lists 5 categories of “abuse”:

(a) imposing unfair/discriminatory conditions in purchase or sale of goods, or imposing unfair/discriminatory price in purchase or sale (including predatory price) of goods or service;
(b) limiting or restricting the production of goods or services or of technical or scientific development relating to goods and services (to prejudice of consumers);
(c) adopting practices that deny market access;
(d) making conclusion of contracts subject to other parties accepting obligations having no connection with the subject of the contracts; and
(e) using a dominant position in one market to enter into or protect another market.

3.3 Combinations Regulation (Merger and Amalgamation)

Merger law returns to India in Sections 5 and 6 of the Act. “Combinations”, as defined in Section 5 of the Act, include mergers, amalgamations, acquisition of shares and acquisitions of control, when these are above specified size thresholds. Section 5 states that combination that exceeds the threshold limits specified in the Act in terms of assets or turnover, which causes or is likely to cause an appreciable adverse impact on competition within the relevant market in India, can be scrutinized by the CCI. The threshold limits are specified in terms of assets or turnover. However, the threshold limits set are fairly high.\(^{38}\)

\(^{37}\) This position of strength must allow the firm to “operate independently of competitive forces prevailing in the relevant market” or to “affect its competitors or consumers in the relevant market in its favour.”

\(^{38}\) Vinod Dhall, “Competition law in India” Antitrust, Spring 2007, Volume 21, Number 2.
The threshold limits are different according to whether the combination involves an enterprise or a group, and also whether the combination has assets or turnover only in India or worldwide. If the latter (i.e. worldwide), a “local nexus” clause is attached which adds a minimum asset value of the combination in India, in addition to existing global asset or turnover limits.

Section 6(1) declares any combination, which causes or is likely to cause an AAEC in India would not be permitted. Section 6(2), after the Amendment Bill (2007) makes it mandatory (it was voluntary in the 2002 Act) to the person or enterprise proposing to enter into a combination to give notice to the CCI of such intention, providing details of the combination. The CCI may, after due deliberation, approve the combination, or direct that the combination shall not take effect, or propose modifications. However, public financial institutions, foreign institutional investors, banks or venture capital funds which are contemplating share subscription financing or acquisition pursuant to any specific stipulation in a loan agreement or investor agreement are not required to approach the CCI for this purpose. Thus, the Amendment Bill (2007) makes merger notification mandatory for the companies (above the designated thresholds) to the CCI.

3.4. Enforcement

The Competition Commission of India (CCI) is the authority entrusted with the powers to enforce the provisions of the Competition Act. Section 7(1) of the Act establishes the CCI. Section 7(2) holds it as the competition authority entrusted with eliminating prohibited practices, and as a body corporate and independent entity possessing a common seal with the power to enter into contracts and to sue in its name. Section 8 declares the CCI will consist of a Chairperson and between 2 and 6 other full-time Members to be appointed by Central Government. In an important addition, Section 32 of the Act provides that the CCI has the authority to consider agreements, abuse of dominance or combinations when key parties are outside India, when “such agreement or dominant position or combination has, or is likely to have, an appreciable adverse effect on competition in the relevant market in India.”
While most of the new act has not been implemented, pending the resolution of the constitutional issues, the CCI has been created and a single member, Vinod Dhall, appointed. It has already begun its work in the area of competition advocacy.\textsuperscript{39}

Section 53A, which is a new section added in 2007 amendments, aims to provide for establishment of the Competition Appellate Tribunal (CAT), which shall be a three-member quasi-judicial body headed by a person who is or has been a retired Judge of the Supreme Court or the Chief Justice of a High Court. Selections of the Chairperson and other Members of CAT are to be made by a Selection Committee headed by the Chief Justice of the Supreme Court of India or his nominee, and having Secretaries of the Ministries of Company Affairs and Law as its members.

The CAT has two main functions: (a) provide for hearing and disposing of appeals against any direction issued or decision made or order passed by the CCI; and (b) to adjudicate claims on compensation and passing of orders for the recovery of compensation from any enterprise for any loss or damage suffered as a result of any contravention of the provisions of the \textit{Act}.

Other than the CCI members, the central government may appoint a director general -- and as many other persons as required -- for the purpose of assisting the CCI in conducting an inquiry into the contravention of any of the provisions of this \textit{Act}, for the conduct of cases before the Commission, and for performing any other functions under this \textit{Act}.\textsuperscript{40}

The CCI may enquire into possibly anticompetitive agreements or abuse of dominance on receipt of a complaint or information from any person, consumer or their association or a trade association. The CCI may also act on a reference made to it in this regard by the central government, state government, or a statutory authority.\textsuperscript{41}

In the case of any combination, the CCI may inquire, upon its own knowledge or information, whether an acquisition, acquiring of control or a merger has caused or is likely to cause an AAEC within the relevant market in India. Further, as stated before, any combination with assets or turnovers above threshold limits must notify the CCI. After notification is given,

\textsuperscript{39} See, for example, the CCI’s website at \url{www.competition-commission-india.nic.in/}.

\textsuperscript{40} Section 16

\textsuperscript{41} Section 2(W) `statutory authority' means any authority, board, cooperation, council, institute, university or any other body corporate, established by or under any Central, State or Provincial Act for the purposes of regulating production or supply of good or provision of any services or markets therefore or any matter connected therewith or incidental thereto;
the CCI must review the combination within 210 days or else the combination shall be considered approved.\textsuperscript{42} Moreover, the CCI is not permitted to initiate any inquiry under the subsection after the expiry of one year from the date on which such combination had taken effect. It may also commence an inquiry on receipt of a notice from any person proposing to enter into a combination or a reference from a statutory authority.\textsuperscript{43}

3.5 Remedies

The CCI can issue “cease and desist” orders and impose a penalties not exceeding 10\% of the average turnover during the preceding three years in case of an anti-competitive practice or abuse of dominance. In case of a cartel, the CCI can also penalize up to three times the illegal profits if this is more than 10\% of the turnover.\textsuperscript{44} The CCI can also order the break up of a dominant firm.\textsuperscript{45} Finally, the CCI also has the power to provide temporary injunctions if during an enquiry it feels an act contravening any of the sections 3, 4 or 6 of the law has been committed till the conclusion of such enquiry or further order.\textsuperscript{46}

Contravention of the CCI’s orders for the first time shall lead to imposition of monetary penalties. If non-compliance continues or the person does not pay the monetary penalties then it shall be treated as criminal offence, and it may be punishable with imprisonment up to three years, or a very steep monetary penalty or both, as the Chief Metropolitan Magistrate of Delhi deems fit.\textsuperscript{47}

As mentioned before, anyone aggrieved by the decision of the CCI can appeal to the Competition Appellate Tribunal (CAT). Complaints against the ruling of the CAT have to be made directly to the Supreme Court, the highest judicial court in India.\textsuperscript{48} The CAT will also adjudicate claims on compensation and pass orders for the recovery of compensation from any

\begin{itemize}
  \item Section 31(11)
  \item Section 21(2)
  \item Section 27
  \item Section 28(1), added in the 2007 amendment; earlier the CCI could only recommend such break-ups to the central government, which the latter had the power to overrule.
  \item Section 33
  \item Section 42 (1) Earlier, the Commission itself has been given the power to imprison in the event of non-compliance with the orders of the Commission
  \item Section 53A(1)(a)
\end{itemize}
enterprise for any loss or damage suffered as a result of any contravention of the provisions of the Act.\textsuperscript{49}

To facilitate cooperation with cartel investigations, section 46 of the Act allows the CCI to impose a reduced penalty on any firm (not just the first) that provides vital information up to such time that the Director-General submits his/her report to the CCI. However, the amount of reduction given to the disclosing parties is discretionary.

3.6 Competition Advocacy
Section 49 of the Act authorizes the CCI to participate in the formulation of the country's economic policies and to participate in the reviewing of laws related to competition at the request of Indian governments. The Central Government or any state government can make a reference to the CCI for its opinion on the possible effect of a policy under formulation or of an existing law related to competition. The CCI is mandated to provide its opinion to the Government within 60 days of receiving the reference. The Government however, is not bound to abide by the opinion of the CCI.

In addition to the requirement that it respond to government references, the CCI is also instructed to “take suitable measures … for the promotion of competition advocacy, creating awareness and imparting training about competition issues.”

4.0 Provisions of Particular Interest to Canadians

In this section we discuss aspects of the new Indian law that we think will be particularly interesting to Canadians. This interest could be due to the fact that they relate to controversial questions in our own law about which we are debating, or they may just be strikingly different from the Canadian provisions and thus provide a reason for us to step back to reconsider our own approach.

We begin briefly by mentioning the goals of the Indian Act as described in what we might call a purpose clause, which follows the title but precedes any numbered sections. We have

\textsuperscript{49} Section 53A(1)(b)
come to recognize that the Canadian Act’s purpose clause has created some uncertainty as to the primacy of efficiency considerations in a case in which there are also implications for (for example) small and medium sized businesses or when consumer interests might be harmed. Similarly, the Indian Act may confuse adjudicators. While apparently attacking practices “having an adverse effect on competition”, this is to be done “keeping in view of the economic development of the country”. The “development qualification” appears in a number of places in the Indian Act and has generated some concern among Indian scholars that it could open the door to abusive and anticompetitive behavior by firms that are seen to be encouraging development.\(^\text{50}\)

### 4.1 Competition Test
Throughout the Indian Act there is only one specified competition test; it requires that to be condemned an action or agreement must have an “appreciable adverse effect on competition” (AAEC).\(^\text{51}\) By contrast, in Canada we are familiar with the “undueness” tests in S.45, the substantial lessening or prevention of competition (SLC) tests applying to most of the civil provisions and the “adverse effect on competition” test added to S.75 (refusal to deal) in 2002. In both India and Canada there are \textit{per se} (or closer to \textit{per se}) offenses where none of these tests apply. It will be very interesting to see how the CCI, CAT and (possibly) the Supreme Court define an AAEC: that is, how large must an effect be to be deemed “appreciable”?\(^\text{50}\)

### 4.2 Horizontal Agreements (Section 3 parts 1-3)
There has been much debate in Canada about S.45 of the Canadian Competition Act and whether it is overly broad or too narrow in its reach. A view shared by some is that the “undueness” test in S.45 makes it unnecessarily difficult to convict hard-core price-fixers, while at the same time the rather general prohibitions in the section might be seen to put efficiency-enhancing strategic alliances and joint ventures at risk of criminal prosecution. These concerns have led to calls for reform of S.45 creating a two-track system: a criminal track for the review of what is essentially


\(^{51}\)In most sections the AAEC language is followed with “in India” though not in the section 3(3) on \textit{per se} horizontal agreements.
hard core cartel behaviour (with perhaps no undueness test), and a civil track for the review of other horizontal agreements.\textsuperscript{52}

Critics of the undueness test have noted that Canada may be unique among countries with modern antitrust laws in this requirement. As indicated, the new Indian law applies an “appreciable adverse effect on competition within India” (AAEC) test to horizontal agreements, a test that may not be much different in practice than the substantial lessening of competition (SLC) test with which we are more familiar from the civil side of the Canadian Competition Act. Importantly, however, for a certain set of agreements listed in Section 3(3) – essentially the hard core cartel tactics of price-fixing, bid-rigging etc. – any agreement is deemed to have such an adverse effect, hence these are in effect treated in something like a \textit{per se} fashion. Not exactly \textit{per se} however: a clause provides that if these actions are taken by a joint venture that increases “efficiency in production, supply distribution, storage, acquisition or control of goods or provision of services”, they will not be presumed to have the AAEC. In our reading, this is not a complete efficiency exemption or defense – demonstrating efficiencies merely restores the government’s obligation to establish the AAEC.

Interestingly, there is, in Section 19(3), an additional “efficiency” protection for all agreements (horizontal and vertical) that promise static or dynamic efficiencies. In this subsection, the CCI is directed to have “due regard” to a list of factors when it is considering whether the agreement has an AAEC in India. This list includes:

“(d) accrual of benefits to consumers;

(e) improvements in production or distribution of goods or provisions of services;

(f) promotion of technical, scientific and economic development by means of production or distribution of goods or provision of services.”

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While it is certainly not obvious to us how this general efficiency provision might apply to what would otherwise be (nearly) per se prohibitions in Section 3(3), we are of the view that it will not apply. Since Section 19(3) provides a list of factors the CCI is to keep in mind when it considers whether the agreement has an AAEC, the agreements listed in Section 3(3) are presumed to involve an AAEC – to our minds, rendering unnecessary any further consideration by the CCI.  

4.3 Vertical Agreements (Section 3, parts 1, 2, 4)

In the new law vertical agreements are all subject to the AAEC test. The Act specifically mentions tied selling, exclusive supply/distribution arrangements and refusal to deal. The treatment of these kinds of cases may therefore not be very different from their treatment under Canadian law. However, in contrast the Canadian approach, this section also lists resale price maintenance (RPM) and treats it as the others. Hence, RPM is not subject to per se condemnation, as is the case in Canada. In this regard, the Indian law is more consistent with current economic thinking on RPM than is the Canadian.

4.4 Abuse of Dominant Position (Section 4)

The abuse provisions look very different from those in the Canadian Act, though they are clearly intended to strike at many of the same behaviours by dominant enterprises. There are a number of restrictions placed on an enterprise in a dominant position. As reported earlier, such a firm cannot impose “unfair or discriminatory” conditions in (i) purchase or sales of goods/services or (ii) prices in purchases or sales (including specific reference to predatory pricing) of goods/services. Significantly, the terms “unfair” and “discriminatory” are not defined in the Act. Recall from above that other actions that are banned for dominant firms include: (i) limiting production of goods or services; (ii) limiting technical or scientific development that hurts consumers; (iii) practices that deny market access; (iv) making conclusion of contracts subject to other parties accepting other obligations which may have no connection with the subject of the

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54 The recent decision of the U.S. Supreme Court in the case Leegin Creative Products Inc. v. PSKS Inc. (decision June 28, 2007) has moved the U.S. away from per se treatment of minimum resale price maintenance as well.

55 The original Act in 2002 did not contemplate “joint dominance” and only referred to an “enterprise” in a dominant position. The amendments in 2007 however changed the reference to “enterprise or group”.

21
contracts (e.g. tied selling); and (v) using its dominant position in one market to enter into or protect another market.

A potentially troubling feature of these provisions is that there does not appear to be a competitive effects test here. Once a firm is determined to be in a dominant position, these actions are per se condemned. This could involve considerable overreach as many innocent or pro-efficient actions by dominant firms might be found to fall into this list.

Interestingly, the Act defines “predatory” as involving pricing below cost “with a view to reduce competition or eliminate the competitors”. In Canada and elsewhere, while we have struggled with this at times, a consensus seems to have developed that competition policy generally, and abuse provisions (including those related to predation) specifically, should seek to protect competition, not competitors. Nevertheless, the Indian law provides, as does S. 50 of the Canadian Act, for the protection of competitors.

4.5 Combinations (Mergers) (Sections 5-6).

Section 5 of the new Act contains a number of subsections spelling out the kinds of transactions that are covered. Importantly, this includes size thresholds. Unless transactions are large enough in total value, they are not covered by the merger regulations, regardless of how large the shares of the relevant markets involved might be. More specifically, the threshold limits for notifications for acquisitions, mergers and amalgamations are the following:

(i) For an individual firm acquiring an enterprise: Combined assets of the firm more than INR 10,000 million (approximately $250 million CDN) or turnover of INR 30,000 million ($750 million CDN). These limits are US $500 million and US $1500 million in case one of the firms is situated outside India. In the latter case, their business in India should have combined assets of INR 5000 million ($125 million CDN), or turnover of INR 15,000 million ($375 million CDN).

(ii) For a group acquiring an enterprise: The limits are more than INR 40,000 million (approximately $1 billion CDN) or 120,000 million ($3 billion CDN) and US $2 billion.

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56 According to exchange rates as of this writing in October, 2007, one Canadian dollar equals approximately INR 40.
and $6 billion according as the group is in India or outside India respectively; if the latter, their Indian business having a combined asset base of INR 5000 million or turnover of INR 15,000 million.

Recall from section 3.3 that in the 2007 amendments a mandatory notification requirement was inserted into the law. This will apply to all combinations satisfying the size thresholds as described in Section 5. Thus, all transactions against which merger law could be applied are obligated to notify, and the combination may not come into effect until the earlier of (in most cases) 210 days from notification or receipt of the (CCI)’s approval.

Section 6 indicates that a combination which causes, or which is likely to cause, an AAEC in India are void. While Section 92 of the Canadian Act permits the Competition Tribunal to intervene when a merger threatens to lessen competition, it grants this power as well for cases in which a merger “prevents” or likely to prevent competition. This “prevent” provision is generally viewed as permitting the Tribunal to take action when, for example, a firm acquires a potential competitor poised to enter the relevant market and increase competition. In such a case, it might be argued that the transaction does not lead to a lessening of competition in the sense that it does not reduce competition below the level that existed before the merger. However, it is clear that such a merger can have harmful effects by reducing competition below the future levels that would have been observed but for the transaction. The new Indian law does not make so explicit a reference to these kinds of competitive effects, thus it is not clear to us whether the CCI will be able to bring “prevent” cases. This said, we see nothing in the law that would prevent the CCI, CAT or Supreme Court of India from employing a forward-looking “but for” test in such cases and finding that they may lead to an AAEC in India.

Unlike under the Canadian Act, there is no explicit efficiency defense for combinations. However, efficiencies should not be totally ignored. Section 20(4) lists a number of “factors” to which the CCI “shall have due regard” in determining whether a combination would lead to, or likely lead to, an AAEC in India. Many of these are familiar from S.93 of the Canadian Act, however item (n) in the Indian list is: “whether the benefits of the combination outweigh the adverse impact of the combination, if any.” It is not clear what may constitute “benefits” here (or whose benefits “count”), that is we do not know if they are efficiencies as we would normally define them in Canadian cases or possibly something broader.
Finally, we note that the Indian Act grants the CCI the power to investigate a combination only up to one year after “such combination has taken effect”.\textsuperscript{57} In Canada, the Competition Bureau may make an application to the Tribunal regarding a merger up to three years after the merger has been “substantially completed”.\textsuperscript{58}

### 4.6 The Enforcement Machinery and Remedies

With its new law, India has opted for the “Commission” model, with obvious similarities to the European approach. The new CCI will combine investigation, prosecution and most first level adjudication functions for all types of competition cases. The Chairperson of the CCI (and any other member) need not be a judge or even a lawyer; he or she could be someone with “special knowledge of, and professional experience of not less than fifteen years in international trade, economics, business, commerce, law, finance, accountancy, management, industry, public affairs administration or in any other matter which, in the opinion of the Central Government, may be useful to the Commission.” All members are “whole-time” (i.e. full-time), there is no provision for part-time members as in Canada.

This is all effectively civil law, even with respect to hard-core cartel behaviour. While criminal sanctions are therefore not available, the CCI has the power to order a number of remedies against firms and individuals, including cease and desist orders and monetary penalties – and these may be applied in abuse of dominance cases as well as in cases involving horizontal and vertical agreements (as stated above in Section 3.5). The CCI can also give orders that certain dominant enterprises be broken up. Prison terms may be applied for failure to comply with Commission orders.

The CCI has also been given an important advocacy function (Section 49) that involves both responding to references on competition matters coming from the Central and State governments and taking suitable measures “for the promotion of competition advocacy, creating awareness and imparting training about competition issues.”

While the Chairperson of the Competition Appellate Tribunal (CAT) must be a person who is, or who has been, a Judge of the Supreme Court or the Chief Justice of a High Court,

\textsuperscript{57} Section 20 (1)
\textsuperscript{58} \textit{Competition Act} (Canada), Section 97.
other members (there are to be not more than two other members) may be lay members with not
less than twenty-five years experience in competition matters. There are no general provisions
for private actions under the Indian Act, but applications to the CAT for compensation can follow
on cases decided by the CCI or CAT, where one of these bodies found violations of the Act,
including sections on horizontal agreements, abuse of dominance and combinations. Applicants
will be required to pay “such fees as may be prescribed” to have their case for compensation
heard. There is provision for a form of class action in which one individual can make (with the
permission of the CAT) a request for compensation on behalf of “numerous persons having the
same interest”.

5.0 Concluding Remarks

These are clearly interesting times for competition policy in much of Asia, with new laws
emerging recently (or expected soon) in, among others, China, Hong Kong, Singapore and
Vietnam; and heightened levels of enforcement activity in established antitrust regimes in South
Korea and Japan. Among all these developments, we have argued that Canadians may be
particularly interested in the recently passed Competition Act of India. Even beyond its status as
an emerging economic power, the Indian experience is interesting to Canadians because of the
more direct parallels in culture, language and institutions between our countries. We have seen
that, after a great deal of study and debate, Indian legislators have opted for a model that, at the
same time: (i) shares many features with the current Canadian model (in particular in the types of
arrangements and actions it targets and in its economic orientation); (ii) contains provisions that
have been suggested for a revised Canadian model (e.g. closer to per se treatment of cartel
conduct, no per se treatment for resale price maintenance); and (iii) contains provisions quite
distinct from those found in Canada (e.g. the Commission structure, civil treatment of even hard-
core cartel conduct).

The success of the new Indian model will now, of course, turn on its implementation. In
this regard, a number of questions have been raised that will continue to draw our attention –
interest in some of these arising from our own experience in Canada.59

59 Others have expressed some of the same concerns. See, e.g., Bhattacharjea, Aditya “Potential Problems in the
Implementation of the Competition Act”, in Jaivir Singh (ed), Understanding Regulation: Institutional and Legal
will the CCI and CAT be able to attract the level of expertise required to allow it to successfully conduct its business when dealing with, as we would expect, frequently well-financed firms appearing before them?;

related to the previous point, will the CCI be adequately funded to allow it to support high quality work by insiders and (as is contemplated by the Act) outside advisors. The funding levels of the previous MRTP Commission were not generally viewed as adequate (as discussed in section 2.4 above), so this is a cause for concern;^60

will the CCI and Appellate Tribunal have the independence from government now considered essential to the proper conduct of competition policy?;

how, and where, will efficiencies be balanced against anticompetitive effects? The law appears to allow for the consideration of efficiencies for virtually any competition matter (this is not quite clear), but provides little guidance as to how tradeoffs are to be conducted – this will presumably be determined through case law;

will economic efficiency clearly emerge as the central objective of the law or will it be compromised in some ways in the interest of furthering some “development” objectives?; and

finally, what kind of private access will emerge here – what damages will be recognized, how open will the CAT be to their award, and what fees will be charged to applicants, and how difficult will it be to bring group or class actions?

We will be following these developments closely for the reasons listed in our introduction: first, India promises to become an increasingly important economic partner and rival, hence an understanding of Indian domestic policies that affect Canadian interests is of obvious value; and second, we may have things to learn about our own approach to antitrust from watching India work to create a modern antitrust regime based on current thinking in competition law and economics.

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