Canada

COMBINES INVESTIGATION ACT AMENDMENTS 1984

Clause-by-Clause Analysis

Consumer and Corporate Affairs Canada

Consommation et Corporations Canada

AMENDMENTS TO THE COMBINES INVESTIGATION ACT

Clause-by-Clause Analysis

Minister of Consumer and Corporate Affairs
The Honourable Judy Erola

1984

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A CLAUSE BY CLAUSE ANALYSIS

Clause 1:

Clause 1 repeals the present long title of the Act which is An Act to provide for the investigation of combines, monopolies, trusts and mergers and introduces a new long title.

The proposed title, "An Act to provide for the general regulation of trade and commerce in respect of combines, mergers and trade practices affecting competition" more accurately describes the purposes and contents of the Act. Prior amendments have extended the scope of the Act which are reflected in the proposed new title. In addition, it reflects, in part, the constitutional foundation of the legislation.

The present short title, Combines Investigation Act, as it appears in section 1, remains unchanged.

Clause 2:

This clause amends section 2 of the present Act by repealing the definitions "merger" and "monopoly".

Sub-clause 2(1) repeals the definition of "merger" in section 2 of the present Act. Merger is redefined in section 31.71 (clause 22).

Sub-clause 2(2) repeals the definition of "monopoly" in section 2 of the present Act. The term "monopoly" does not reappear in the amendments. In its place is the concept of the abuse of dominant position which is described in section 31.41 (clause 16).

Clause 3:

This clause introduces new section 2.1 dealing with the application of the Act to Crown corporations. The proposed section provides that, in certain circumstances, the Act is binding on agents of Her Majesty, federal or provincial, that are corporations engaged in commercial activities. This application to agent Crown corporations which are engaged in commercial activities is limited to those which are in competition, whether actual or potential, with other persons. Also, the Act will not apply to the commercial activities of agent Crown corporations when they are directly associated with any regulatory responsibility

with which the corporation is charged. Two additional points must be kept in mind. The proposed section does not deal with non-agent Crown corporations as there is no doubt that they do not enjoy Crown immunity. Secondly, the section does not bind agent Crown corporations in respect of non-commercial activities.

The provision responds to the view recently expressed by the Supreme Court of Canada in the Uranium case[1]. There, the majority of the court found that the two accused Crown corporations were not subject to the Combines Investigation Act since prima facie their alleged conduct was within the scope of the Crown purposes for which they were incorporated and there was no indication that in entering the allegedly unlawful agreements they acted for other than Crown purposes. In reaching this decision the majority were of the opinion that the doctrine of Crown immunity "seems to conflict with the basic notions of equality before the law". The private sector has also frequently expressed concern that such immunity meant that Crown corporations engaged in commercial activities in direct competition with privately-owned firms were not subject to the same laws as those which governed the affairs of privately-owned firms.

The Uranium case, combined with the increasing involvement of Crown corporations in commercial activity and often in direct competition with other firms in the private sector, has created the need for this provision. Section 2.1 is designed to avoid this inequality and will remove any uncertainty as to who is subject to the Act. While it will ensure an equal application of a general law throughout the economy it will not intrude upon a Crown corporation's validly mandated duties. Immunity will remain in respect of those commercial activities that are directly associated with the regulatory activities of a Crown corporation.

Clause 4:

Clauses 4 and 5 introduce amendments that are in part consequential on the proposed transfer of jurisdiction in respect of Part IV.1 (which deals with trade practices which are reviewable) from the Commission to the Federal

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1 Regina v. Uranium Canada Limited and Regina v. Eldorado Nuclear Limited, not yet reported, December 15, 1983 (S.C.C.); (1983), 39 O.R. (2d) 474 (C.A.); (1982), 38 O.R. (2d) 130 (H.C.).

Court and superior courts in the provinces and territories (section 31.11 in clause 11) and in part consequential on the proposed new powers of the Commission relating to specialization agreements.

Clause 4 repeals and re-enacts amended paragraphs 7(1)(a) and (b) of the present Act. The revised paragraphs 7(1)(a) and (b), because of the change in jurisdiction regarding Part IV.1 matters, extend the grounds upon which any six persons resident in Canada who are not less than eighteen years of age may make a formal application to the Director for an inquiry.

Revised paragraph 7(1)(a) adds to the grounds in the present provision the contravention or failure to comply with an order made pursuant to Part IV.1 (Matters Reviewable By Court). Part IV.1 will now include all those matters in present Part IV.1 (Reviewable by the Commission) and additional matters relating to mergers, abuse of dominant position and delivered pricing. The existing grounds will remain. That is, any six persons resident in Canada who are not less than eighteen years of age may still apply to the Director for an inquiry if they are of the opinion that a person has contravened or failed to comply with an order made pursuant to section 29 (Federal Court order in respect of patents or trademarks), section 29.1 (interim injunction by the Federal Court or a superior court of criminal jurisdiction) or section 30 (prohibition order).

Revised paragraph 7(1)(b) provides for a "six resident application" when grounds appear to exist for the making of an order under Part IV.1 (Matters Reviewable By Court) or subsection 31.95(6) (order directing the removal of a specialization agreement from the register maintained by the Commission).

Clause 5:

Sub-clause 5(1) repeals and re-enacts amended sub-paragraphs 8(b)(i) and (ii). The revised sub-paragraphs 8(b)(i) and (ii) introduce additional circumstances, the existence of which, require the Director to initiate an inquiry.

Revised sub-paragraph 8(b)(i) directs the initiation of an inquiry whenever the Director has reason to believe that a person has contravened or failed to comply with an order made pursuant to section 29 (Federal Court order in respect of patents or trademarks), section 29.1 (interim injunction by the Federal Court or a superior court

of criminal jurisdiction), section 30 (prohibition order) or Part IV.1 (Matters Reviewable By Court). Part IV.1 will now include all matters in present Part IV.1 (Reviewable by the Commission) and additional matters relating to mergers, abuse of dominant position and delivered pricing.

Revised sub-paragraph 8(b)(ii) directs the initiation of an inquiry whenever the Director has reason to believe grounds exist for making an order under Part IV.1 (Matters Reviewable By Court) or subsection 31.95(6) (order directing the removal of a specialization agreement from the register maintained by the Commission).

Sub-clause 5(2) amends section 8 of the present Act by adding thereto subsection 8(2). This proposed provision serves to broaden the disclosure requirements with respect to persons whose conduct is being inquired into under the Act by requiring the Director, upon the written request of any such person to inform that person or cause that person to be informed as to the progress of the inquiry.

Clause 6:

Clause 6 amends the present Act by adding, after section 10, new section 10.1. As in proposed subsection 8(2), this would also broaden the disclosure requirements by providing that the Director or his authorized representative, acting under section 10, on entering premises, shall inform the person in charge of the premises being entered, of the nature and scope of the inquiry.

Clause 6 also adds new section 10.2 which sets out the procedure to be followed in adjudicating claims of solicitor-client privilege raised in the course of on-premises examination of books, papers, records or other documents. In the past, such claims have sometimes occasioned uncertainty for the Director and parties under inquiry in the absence of a prescribed procedure.

Subsection 10.2(1) provides for the sealing, without further examination, of any such document for which solicitor-client privilege is claimed and its deposit with either a specified court official or a person mutually acceptable to both parties.

Subsection 10.2(2) provides for an *in camera* adjudication of the claim of privilege by a judge of the Federal Court or of the appropriate superior court in a province, upon application by the Director, owner or person

in whose possession the document was found made in accordance with the rules of the court and with notice to all other persons entitled to make application. Application under this subsection must be made within 10 days after the document is placed in custody under subsection 10.2(1).

By virtue of subsection 10.2(3), where no application is made in accordance with subsection 10.2(2) within the stipulated 10 day period, the appropriate judge must order the item delivered to the Director upon the latter's ex parte application.

Subsection 10.2(4) confers upon the appropriate judge the power to direct whatever he deems necessary to give effect to this section, including delivery up to him and inspection by him of any document in question.

Clause 7:

This clause effects a number of changes in existing section 16 respecting the organization of the Restrictive Trade Practices Commission.

Sub-clause 7(1) repeals present subsections 16(1) to (4) and substitutes therefor revised subsections 16(1), (2), (2.1), (2.2), (3), (3.1), (3.2) and (4).

Revised subsection 16(1) provides that in addition to not more than the four full-time members in the present subsection the Commission be enlarged to include not more than three part-time members. The provision for the appointment of part-time members will bring more flexibility to the composition of the Commission and will allow for a desirable wider range of expertise.

Revised subsection 16(2) provides necessary clarification of existing subsection 16(2) in light of the addition of part-time members by providing that one of the full-time members shall be appointed by the Governor in Council to be Chairman of the Commission. As such, he will be chief executive officer of the Commission and have supervision over and direction of the work and staff of the Commission.

New subsections 16(2.1) and (2.2) are safeguard mechanisms to avoid any hiatus in the Commission's operations caused by the absence of a Chairman. Subsection 16(2.1) provides that the Governor in Council may appoint one of the full-time members as Vice-Chairman of the Commission. As such, he would be empowered to act as

Chairman when the Chairman is absent, unable to act or his position is vacant. Further, under subsection 16(2.2) the Governor in Council may designate a full-time member to carry out the functions of the Chairman whenever the Chairman or Vice Chairman is absent, unable to act or when their offices are vacant.

Subsections (3), (3.1), (3.2) and (4) which are substituted for subsections 16(3) and (4) of the present Act introduce new provisions dealing with the tenure of Commission members, termination of membership, continuation of membership for limited purposes and re-appointment.

Revised subsection 16(3) provides that, subject to subsections 16(3.1) and (3.2), each full-time member holds office during good behaviour for a specified term not exceeding seven years from the date of appointment. With respect to part-time members, the subsection similarly provides for a specified term not exceeding three years. It further provides that a full-time or part-time member may be removed at any time by the Governor in Council for cause. The present provision, subsection 16(3), prescribes a 10 year term and does not provide for part-time members.

New subsection 16(3.1) provides, subject to subsection 16(3.2), for cessation of membership at age seventy and no one may be appointed as a member after attaining that age. This provision is comparable with provisions in other Acts providing for federal boards or commissions.

New subsection 16(3.2) provides for the continuation of membership, after expiration of term or upon attaining age seventy, in respect of any matter in which the member had become engaged during his term of office.

Revised subsection 16(4) essentially mirrors existing subsection 16(4) by providing that, subject to subsection 16(3.1), a member is eligible for re-appointment either as a full-time or part-time member.

Sub-clause 7(2) repeals subsection 16(8) of the present Act and introduces a new quorum provision. Revised subsection 16(8) increases the quorum requirement from two to three members of whom at least one is a full-time member.

Sub-clause 7(3) repeals subsection 16(11) of the present Act and enacts a new section 16.1 which provides that the principal office of the Commission shall be in the

National Capital Region; however, as at present, the Commission may conduct its sittings at such places as it may decide.

Sub-clause 7(3) also provides for new section 16.2 which empowers the Chairman to designate any three or more members, at least one of whom is a full-time member, to sit as a panel. The Chairman may appoint a full-time member so designated to chair the panel. Any such panel may exercise all the powers and perform all the duties of the Commission concerning any matter assigned to it by the Chairman.

Clause 8:

This clause amends section 27 of the present Act by adding thereto subsection (3) which expressly deals with the confidentiality of information obtained by the Director.

New subsection 27(3) prohibits persons performing duties or functions in administration or enforcement of the Act from disclosing, other than to a Canadian law enforcement agency or for the purposes of enforcement or administration of the Act, the identity of sources of information obtained pursuant to the Act, information obtained pursuant to sections 9 (written returns under oath or affirmation), 10 (searches), 12 (affidavits), 17 (oral examinations under oath), paragraph 22(2)(d)(written returns under oath or affirmation at the instance of the Commission), sections 31.81, 31.84 or 31.85 (notifiable transactions) or whether notice of a proposed transaction has been given or information supplied pursuant to sections 31.81, 31.84 or 31.85.

Clause 29 adds this subsection to Schedule II of the Access to Information Act thereby maintaining required confidentiality in respect of the information obtained under the Combines Investigation Act as specified in the subsection.

Clause 9:

Clause 9 repeals section 28 of the present Act providing for reduction or removal of customs duties by the Governor in Council and introduces a revised section 28 which reflects the role of the courts under the proposed civil law as well as the criminal law provisions and also the role of the Commission. This amendment is also, in part, consequential on the repeal of the present section 33, relating to merger or monopoly offences, proposed in clause 25.

Under the present section, the Governor in Council may reduce or remove tariffs if satisfied, as a result of an inquiry under the Act or a court judgment, that with regard to any article there is a conspiracy, combination, agreement, arrangement, merger or monopoly to promote unduly the advantage of manufacturers or dealers at the expense of the public and that such disadvantage to the public is being facilitated by the duties of customs imposed on the article, or on any like article.

Revised section 28 authorizes the Governor in Council to reduce or remove customs duties whenever, as a result of an inquiry, judgment of a court or a decision of the Commission it appears to its satisfaction that competition has been prevented or lessened significantly in respect of any article, and that this anti-competitive effect is facilitated by customs duties imposed on the specific article or any like article or can be reduced by a reduction or removal of such customs duties.

Clause 10:

Sub-clause 10(1) repeals and substitutes all that portion of the present subsection 30(1) following paragraph (b) thereof. The revised subsection 30(1) continues to provide for the issuance of a prohibition order by a court following conviction for an offence under Part V. Specific reference to mergers or monopolies, which are no longer criminal offences and hence no longer appear under Part V, is deleted in the amended provision. Orders of divestiture regarding abuse of dominant position or of dissolution or divestiture in respect of mergers are dealt with under proposed sections 31.41 (clause 16) and 31.72 (clause 22).

Sub-clause 10(2) repeals and replaces present subsection 30(2). The revised subsection 30(2) will continue to provide for the issuance of a prohibition order by a superior court of criminal jurisdiction without a conviction when it appears that a person has done, is about to do or is likely to do any act or thing constituting or directed towards the commission of an offence under Part V. For the same reasons as in revised subsection 30(1), reference to mergers and monopolies is deleted.

Clause 11:

This clause changes the heading of Part IV.1 from "Matters Reviewable by Commission" to "Matters Reviewable by Court". The practices now set out in Part IV.1 will become subject to the jurisdiction of the courts rather than to

that of the Commission as is the present case. Part IV.1 matters are dealt with under the civil law and will be extended to include abuse of dominant position, delivered pricing (sections 31.41 and 31.42, in clause 16) and mergers (sections 31.71 to 31.79, in clause 22). This clause also introduces a further heading "Interpretation" after the above heading and immediately preceding section 31.11.

Clause 11 also introduces section 31.11 which assigns concurrent jurisdiction in respect of Part IV.1 to the Federal Court - Trial Division and the superior trial courts in the provinces and territories as specified.

The section also defines the word "prescribed" for purposes of Part IV.1 (and which is used in paragraphs 31.8(1)(a) and (b), section 31.83, paragraphs 31.84(2)(a) and (b), 31.85(2)(a) and (b), 31.86(1)(a) and (b) and 31.87(a) and (i), all of which are contained in clause 22 and relate to notification of proposed transactions) as meaning prescribed by regulation made by the Governor in Council under this Act. Such regulation-making authority is contained in section 31.94, also contained in clause 22, and extends both to regulating the practice and procedure in respect of applications under Part IV.1 as well as prescribing anything that is to be prescribed by Part IV.1

Clause 11 also adds the heading "Refusal to Deal" immediately preceding section 31.2.

Clause 12:

To a substantial degree this clause and clauses 13 and 15 are consequential upon the transfer of jurisdiction regarding the matters set out in Part IV.1 from the Commission to the courts.

This clause repeals those portions of subsection 31.2(1) referring to the Commission and introduces an amended provision. Otherwise, there is no change in existing section 31.2 which provides for the issuance of remedial orders in respect of refusals to deal.

Sub-clause 12(1) transfers jurisdiction for section 31.2 from the Commission to the courts and deletes "and after affording every supplier against whom an order is sought a reasonable opportunity to be heard" since such a requirement is implicit in adversarial proceedings before the courts.

Sub-clause 12(2) repeals paragraphs 31.2(1)(a) and (b) of the French text and introduces revised paragraphs which remove certain inconsistencies in the existing wording. Otherwise, the import of the provision is not changed.

Consequential upon the transfer of jurisdiction effected by sub-clause 12(1), sub-clause 12(3) gives a court the powers now assigned to the Commission by existing paragraph 31.2(1) (f) and repeals paragraph 31.2(1)(e) providing for recommendations to the Minister of Finance respecting tariffs since it would not be appropriate for a court to make such recommendations in an adversarial proceeding. Under the new provision, a court will have the power to order one or more suppliers of a product to supply a person on usual trade terms unless, within a specified time in the case of an article, duties of customs are removed, reduced or remitted and the effect of such removal, reduction or remission is to place the person on an equal footing with other persons who are able to obtain adequate supplies of the article in Canada.

Clause 13:

This clause adds the heading "Consignment Selling" immediately preceding section 31.3 and makes consequential amendments to the section changing "Commission" to "court" because of the transfer of jurisdiction to the courts. Also, for the reasons set out in clause 12 above, the requirement relating to "reasonable opportunity to be heard" is deleted.

Clause 14:

This clause amends the existing Act by adding the heading "Exclusive Dealing, Tied Selling and Market Restriction" immediately preceding section 31.4.

Clause 15:

Sub-clauses 15(1) and (2) effect consequential amendments to existing subsections 31.4(2), (3) and (4). "Commission" becomes "court" and, as explained with respect to the amendments in clause 12, the requirement relating to "reasonable opportunity to be heard" in subsections (2) and (3) is deleted.

Sub-clause 15(3) repeals and substitutes subsection 31.4(6) clarifying when, for purposes of the section, a company is controlled by a person. This definition will also appear in proposed subsections 31.8(4) in clause 22 and 38(7.1) in clause 26.

The subsection provides, for purposes of the section, that a company is controlled by a person if that person holds, otherwise than by way of security only, directly or indirectly, either through subsidiaries or otherwise, securities to which are attached more than fifty per cent of the votes that may be cast to elect company directors or if these securities are held by or for the benefit of that person (paragraph [a]) and the votes attached to these securities, if exercised, are sufficient to elect a majority of the directors (paragraph [b]).

Clause 16:

Clause 16 introduces new section 31.41 under the heading "Abuse of Dominant Position". This section serves to replace the present monopoly provisions.

Subsection (1) provides for a civil law procedure whereby the Federal Court or a superior court in a province or the territories (section 31.11), upon application by the Director, may issue a prohibitory order where it finds that one or more persons, who substantially or completely control throughout Canada or any area thereof, a class or species of business, and have engaged or are engaging in a practice of anti-competitive acts that has had, is having or is likely to have the effect of preventing or lessening competition substantially in a market. The existing monopoly provision requires substantial or complete control as above and operation to the detriment or against the interest of the public.

This new approach is based on the view that high standards of competitive conduct are required of persons in control of substantial market power and that certain business practices which in other circumstances may not be seriously anti-competitive can, when engaged in by such persons, have the effect of preventing or lessening competition substantially. Flexible civil law procedures as opposed to the criminal law are required to deal with such conduct. The section proposes a movement away from the monopoly approach, which tends to be structural, and more toward the European approach which, being more behaviour oriented, is directed explicitly at abuses of dominant position. In so doing, there is no prohibition of dominant

positions as such. Rather, this approach reflects a recognition that, particularly in Canada, firms may indeed grow to dominate their markets. It is not then, however, permissible to abuse that position and thus lessen competition substantially.

Substantial control does not and is not intended to mean the virtual or complete control which has been required in some cases under the existing monopoly provision. Rather, in the sense of control, it would exist where a firm, or firms has or have sufficient market power to influence price or aggregate quantity in a market. Also, this recognition of shared dominance in section 31.41 is not new. The Supreme Court of Ontario in the Large Lamps case[2] decided that substantial or complete control can exist when possessed by more than one firm even when not affiliated.

Prohibition orders under subsection 31.41(1) are supplemented by additional or alternative orders under subsection 31.41(2). This subsection provides that where a court finds that a practice of anti-competitive acts has had or is having the effect of preventing or lessening competition substantially in a market and that an order of prohibition under subsection (1) could be issued but such an order is not likely to restore competition in the relevant market, it may make an order directing such actions including the divestiture of assets or shares by any or all those against whom the order is sought. This order can be in addition to or in lieu of an order under subsection (1) and is available when the court considers it is reasonable and necessary to combat the effects of the practice.

Subsection 31.41(3) clarifies the law by setting out a non-exhaustive list of examples which are to be regarded as "anti-competitive acts" within the meaning of the section. The anti-competitive effects of these acts are elaborated in the list. In conjunction with subsection 31.41(1), these acts must also have had, be having or be likely to have the effect of lessening competition substantially in a market.

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2 Regina v. Canadian General Electric Co. Ltd. et al. (1976), 15 O.R. (2d)360; 34 C.C.C. (2d)489; 29 C.P.R. (2d)1; 75 D.L.R. (3d)664.

Subsection 31.41(4) introduces an efficiency defence. It provides that no order shall be made under the section where the actual or likely substantial prevention or lessening of competition is attributable to the superior economic efficiency of the person or persons against whom the order is sought. In this context, economic efficiency includes technical, allocative and dynamic efficiency. An efficiency defence is also provided in respect of mergers and will be found in proposed paragraph 31.73(c).

Subsection 31.41(5) provides that activities pursuant only to the exercise of any right or enjoyment of any interest derived under the Copyright, Industrial Design, Patent or Trade Mark Acts or any other Act of Parliament is not an anti-competitive act and hence, does not come within the purview of the section.

Subsection 31.41(6) establishes a limitation period for taking action under the section. It provides that no application may be made in respect of a practice of anti-competitive acts more than three years after the practice has ceased.

Clause 16 also introduces under the heading "Delivered Pricing" proposed new section 31.42 which creates a new civil provision in respect of certain types of delivered pricing.

Subsection 31.42(1) defines, for the purposes of the section, "delivered pricing" to be the practice of refusing a customer or a person seeking to become a customer delivery of an article at any locality where the supplier makes delivery of the article to any of his other customers, on the same terms and conditions as would be available to such first-named customer if his place of business were located in that locality.

Subsection 31.42(2) grants jurisdiction to the courts, upon application by the Director, to prohibit a supplier or suppliers from engaging in delivered pricing when the delivered pricing is engaged in by a major supplier of an article or is widespread in a market and the customer or would-be customer is denied an advantage that would otherwise be available to him.

New section 31.42 does not prohibit basing point systems or other forms of delivered pricing under which freight can be absorbed by suppliers. Rather, it gives choice to buyers who may be faced with a rigid industry-wide system of freight absorption coupled with identical

delivered prices from all suppliers to any particular location. The section would enable a buyer to take delivery at a regular delivery point even though he is not located at or near that point. He could then make his own transportation arrangements from that point. Giving buyers the option of choosing among delivery points in use would, in some circumstances, offer saving to the buyer, encourage more efficient plant location with lower transport costs and would tend to undermine overly rigid pricing systems.

Clause 17:

This clause adds immediately before section 31.5 the heading "Foreign Judgments and Laws". It will apply to both section 31.5 (foreign judgments) and section 31.6 (foreign laws and directives).

Clauses 18 and 19:

These clauses effect amendments, similar to those contained in clause 13, to sections 31.5 (foreign judgments) and 31.6 (foreign laws and directives) because of the transfer of jurisdiction in respect of Part IV.1 from the Commission to the courts (section 31.11 in clause 11).

Clause 20:

This clause adds the heading "Foreign Suppliers" immediately preceding section 31.7.

Clause 21:

Clause 21 effects consequential amendments, similar to those in clause 13, to section 31.7 (refusal to supply by foreign supplier) because of the transfer of jurisdiction in respect of Part IV.1 from the Commission to the courts (section 31.11 in clause 11).

Clause 22:

Clause 22 repeals sections 31.8 and 31.9 of the present Act.

The repeal of existing section 31.8 is consequential on the transfer of jurisdiction in respect of Part IV.1 from the Commission to the courts (section 31.11). It is unnecessary to provide for such matters (court of record, burden or proof, right to cross examine) in respect of adversarial proceedings before a court.

This clause introduces sections 31.71 to 31.94 dealing with mergers, notifiable transactions, general provisions applicable to Part IV.1 and adds Part IV.2 giving the Commission authority to register specialization agreements, thereby exempting them from the conspiracy and exclusive dealing provisions, sections 32 and 31.4, during the period in which such agreements remain registered.

Mergers are dealt with in new sections 31.71 to 31.791 inclusive. Being contained in Part IV.1, it is proposed that mergers be dealt with under a civil procedure rather than as a criminal offence in the existing Act. These sections grant jurisdiction to a court, as defined in section 31.11, to examine a merger or proposed merger brought before it by the Director and, where it finds that the merger or proposed merger prevents or lessens or is likely to prevent or lessen competition significantly, to issue prohibition orders, remedial orders including dissolution of a merger or disposition of assets or shares and consent orders requiring that any other action be taken. Provision is also made for the issue of an advance ruling certificate by the Director in respect of a proposed transaction.

Proposed section 31.71 establishes a new definition of merger. The present definition, which appears in section 2, is repealed by sub-clause 2(1). Section 33 which, inter alia, contains the present merger prohibition, is repealed by clause 25.

Section 31.71 defines "merger", for the purposes of sections 31.72 to 31.78, as meaning "the acquisition or establishment, direct or indirect, by one or more persons, whether by purchase or lease of shares or assets or by amalgamation or otherwise, of any control over or interest in the whole or any part of a business of a competitor, supplier, customer or other person". The definition is therefore broader than in the present legislation in that it specifies the establishment as well as acquisition, direct or indirect, of any control over another person's business. Also, amalgamation is specifically included.

Section 31.72 prescribes when a merger or proposed merger may be subject to an order of the court and the types of orders which can be made in respect thereof. The section applies to any merger or proposed merger that prevents or lessens, or is likely to prevent or lessen competition significantly in a trade, industry or profession, among the sources from which a trade, industry or profession obtains a product, among the outlets through which a trade, industry

or profession disposes of a product or otherwise. Paragraphs (a) to (d) in this section essentially mirror those paragraphs in the existing merger definition.

The "prevent or lessen competition significantly" test is new. It replaces the present test of lessening competition to the detriment or against the interest of the public as it appears in section 2 of the Act and which experience has shown to be ineffective.

Under section 31.72, the court, on application by the Director may, subject to sections 31.73, 31.75 and 31.76, make certain orders in respect of completed and proposed mergers. Paragraph 31.72(e) provides, in the case of a completed merger, that the court may order dissolution of the merger or disposition of assets or shares designated by the court. Provision is also made for an order with the consent of the Director and the persons against whom the order is directed requiring any other action to be taken in addition to or in lieu of dissolution or disposition of assets or shares.

Paragraph 31.72(f) sets out the orders which can be made in respect of proposed mergers. The court may make an order: i) prohibiting the merger or ii) prohibiting part thereof. Provision is also made for an order, in addition to or in lieu of (ii), either prohibiting the person against whom the order is directed, if the merger is completed, from doing any act or thing which the court determines is necessary to ensure that the merger does not prevent or lessen competition significantly or for a consent order, as in the case of a completed merger, requiring any other action or both.

Section 31.73 provides that the court shall not make an order in respect of a merger completed before the coming into force of the section or an amalgamation or proposed amalgamation under section 255 of the Bank Act where the Minister of Finance certifies to the Director the names of the parties thereto and that it is desirable in the interest of the financial system.

Provision is also made for an efficiency defence where the court finds that the merger or proposed merger has brought about or is likely to bring about gains in efficiency resulting in a substantial real net saving of resources for the Canadian economy and that such efficiency gains could not reasonably be expected to be attained if the order was made. Thus, even where competition is likely to be significantly lessened, the merger could still be

approved where, on balance, it is likely that the merger would give rise to a substantial real net saving of resources. This provision allows mergers where the gains in efficiency to the firm will result in resource savings to the economy that are substantially greater than the resource costs due to the lessening of competition. Purely pecuniary gains are not included. (As noted earlier, an efficiency defence is also provided in respect of abuse of dominant position in subsection 31.41(4), in clause 16).

The provision with respect to mergers under the Bank Act is consequent upon the transfer of the responsibility for competition policy as it relates to banks from the Bank Act to the Combines Investigation Act. Exemptions for agreements or arrangements between or among banks requested or approved by the Minister of Finance are dealt with in new paragraph 33(2)(h), in clause 25.

Subsection 31.74(1) sets out a non-exhaustive list of factors to be considered by the court in determining whether or not a merger or proposed merger prevents or lessens, or is likely to prevent or lessen, competition significantly.

Subsection 31.74(2) provides, for the purpose of section 31.72, guidance to the court by clarifying those instances where a merger or proposed merger shall not be considered to lessen or prevent competition significantly. The subsection states that unless the court finds the merger or proposed merger has, or is likely to have, a major and not insubstantial effect on competition it shall not find that a merger or proposed merger prevents or lessens, or is likely to prevent or lessen competition significantly. This will ensure that de minimis situations are not subject to an order under section 31.72.

Proposed section 31.75, like proposed section 31.41 (clause 16) prescribes a limitation period for applications brought by the Director. It requires the Director to bring any application under section 31.72 in respect of a merger no later than three years after the merger has been completed. The only other provision added to Part IV.1 by these amendments in which there is a limitation restriction is section 31.41 dealing with abuse of dominant position. Since that section relates to a practice of anti-competitive acts which has occurred or to a continuing practice, subsection (6) thereof provides a three year limitation within which an application may be made by the Director in regard to a practice which has ceased. No

such provision is required in respect of delivered pricing in proposed section 31.42 which relates to a practice which is being engaged in.

Subsection 31.76 must be read in conjunction with section 32.01 (clause 24). The subsection provides that no application may be made by the Director for an order under section 31.72 against a person where proceedings have been commenced under section 32 against that person based on the same or substantially the same facts as would be alleged in the application under section 31.72. Section 32.01 ensures the converse.

Section 31.77 provides for conditional orders directing dissolution of a merger. Paragraphs 31.77(1)(a) and (b) empower the court to provide in an order made under section 31.72 directing a person to dissolve a merger or to dispose of assets or shares, that such order may be rescinded or varied if within a specified and reasonable period of time there has occurred a reduction or removal of any relevant customs duties or of specified legislative barriers to trade or when action specified pursuant to the order has been taken by the person named in the order or any other person, and that the requirements specified in paragraph (a) or (b) will, in the opinion of the court, prevent the merger from preventing or lessening competition significantly. [The parties to the merger may choose to obey the dissolution or divestiture order rather than take the action specified pursuant to paragraph (b) or await the occurrence of the matters specified in paragraph (a)].

Subsection 31.77(2) provides that a conditional order may be rescinded or varied if the court is satisfied by the parties to a merger that the requirements in the order made pursuant to paragraph 31.77(1)(a) or (b), have been met.

Section 31.78 deals with interim orders made by the court in respect of proposed mergers where no application has been made by the Director for an order under section 31.72 or previously under this section.

Subsection 31.78(1) empowers the court, on application by the Director to issue an interim order against any person named in the application when, as provided in paragraph 31.78(1)(a), two requirements have been met. First, the Director must satisfy the court that the proposed merger is reasonably likely to prevent or lessen competition significantly. Second, the court must be of the opinion that without an interim order a party to the

proposed merger or any other person is likely to take an action that would substantially impair the court's ability ultimately to remedy the effect on competition under section 31.72 because that action would be difficult to reverse. Also, the court may issue an interim order, as provided in paragraph 31.78(1)(b) if there has been failure to comply with section 31.81, 31.84 or 31.85 (notice of proposed acquisition, amalgamation, or combination, as the case may be).

Subsection 31.78(2) requires the Director to give at least forty-eight hours notice of his application for an interim order. Notice must be given to each person against whom the order is sought.

By subsection 31.78(3) this notice requirement may, in specific circumstances, be abrogated. Thus, when the court is satisfied that the requirement provided in subsection (2) cannot reasonably be complied with or the situation is sufficiently urgent so that the compliance would not be in the public interest, the court may proceed with the Director's application ex parte. The maximum duration of an interim order obtained ex parte is set out in subsection (5) below.

Subsection 31.78(4) directs that an interim order issued under subsection (1) shall be on such terms as the court considers necessary and sufficient to meet the circumstances of the case. The subsection also requires that the duration of the order be specified but for no longer period than provided in subsection (5).

Subsection (5) provides that an interim order issued under subsection (1) shall cease to have effect no later than ten days after it comes into effect in the case where it is issued on an ex parte application or, in any other case, no later than twenty-one days thereafter. In the case of an interim order arising out of failure to comply with section 31.81, 31.84 or 31.85, as the case may be, in the circumstances referred to in paragraph (1)(b), however, the interim order shall cease to have effect after the particular section has been complied with.

Subsection 31.78(6) requires the Director, where an interim order issued under paragraph 31.78(1)(a) is in effect, to proceed as expeditiously as possible to commence and complete proceedings under section 31.72 in respect of the proposed merger.

Punishment by the court for disobedience of an interim order is provided for in subsection 31.78(7). This subsection makes any person who contravenes or fails to comply with an interim order issued under this section subject to a fine in the discretion of the court or to imprisonment for up to two years.

Finally, by virtue of section 31.79 the attorney general of a province may intervene in any proceedings before the court under section 31.72. This is to enable representations to be made in the proceedings on behalf of the province.

Section 31.791 provides for advance ruling certificates. Subsection 31.791(1) provides that where the Director is satisfied by a party or parties to a proposed transaction that there are insufficient grounds for an application under section 31.72, he may issue a certificate to the effect that he is so satisfied.

Subsection 31.791(2) provides that where the Director issues such a certificate, if the transaction to which the certificate relates is completed within one year thereafter, he is prohibited from making an application under section 31.72 in respect of the transaction if the application is based solely on information which is substantially the same as the information on the basis of which the certificate was issued.

Clause 22 also introduces under the new heading "Notifiable Transactions" new proposed sections 31.8 to 31.896 which, inter alia, will require the parties to certain proposed transactions to notify the Director before proceeding with the transaction and supply him with certain information.

The term "merger", which is defined in section 31.71, does not appear in these sections. Instead, the terms "acquisition", "amalgamation" and "combination", each a subset of merger, are used in their ordinary meaning and determine whether a particular transaction comes within the requirements of these sections. The clause also introduces definitions of "operating business", "person", "voting share", "affiliated corporation", "subsidiary corporation", "control", "wholly-owned affiliate", "wholly-owning affiliate", and also, sets out certain threshold values on the transaction size and provides an exemption for certain joint ventures.

Proposed section 31.8 contains the above definitions all of which apply only to sections 31.81 to 31.894 unless otherwise stated therein.

Subsection 31.8(1) sets out the definition of "operating business" and thereby prescribes the underlying business activity which, if present in certain types of transactions, will cause the prenotification requirements to apply. The subsection states that "operating business" means a business undertaking in Canada to which employees ordinarily report for work and the undertaking has assets in Canada in excess of ten million dollars or had gross revenues from sales in or from Canada in excess of ten million dollars. Provision is also made in the subsection for increasing (but not decreasing) the aggregate value of either of these thresholds by regulation made by the Governor in Council (section 31.11, in clause 11).

The subsection also defines "person" as meaning an individual, body corporate, unincorporated syndicate or organization, trustee, executor, administrator or other legal representative but not including a bare trustee.

"Voting share" is defined in the subsection as any share carrying voting rights under all circumstances or because of an event that is continuing.

Subsection 31.8(2) specifies those instances when corporations will be deemed to be affiliated . The provision is similar to that which appears in the Canada Business Corporation Act[3]. Paragraph 31.8(2)(a) states that two corporations are deemed to be affiliated if one is a subsidiary of the other, both are subsidiaries of the same corporation or each is controlled by the same person. Paragraph 31.8(2)(b) deems two corporations to be affiliated with each other if, at the same time, they are affiliated with the same corporation.

Subsection 31.8(3) provides, for the purposes of this section as well as sections 31.81 to 31.894, that a corporation is a subsidiary of another corporation if it is controlled by that corporation.

Subsection 31.8(4) for purposes of this section as well as section 31.81 to 31.894 clarifies the meaning of the term "control". It is in identical language to the definition of "control" in subsection 31.4(6) (exclusive dealing, tied selling and market restriction in clause 15) and subsection 38(7.1) (price maintenance, in clause 26). An explanation of the meaning of the term appears in the notes pertaining to subsection 31.4(6).

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3 S.C. 1974-75-76, c.33 as amended.

Subsections 31.8(5) and 31.8(6) respectively define the meaning of the terms "wholly-owned affiliate" and "wholly-owning affiliate" for the purposes of paragraphs 31.892(c) and (d) (prenotification information requirements) and section 31.894 (an exception to the information requirements). Subsection (5) provides that a "wholly-owned affiliate" is a corporation all of the outstanding voting shares of which are beneficially owned by another corporation directly, or indirectly through one or more affiliates where all the outstanding voting shares of the affiliates are beneficially owned by that other corporation or each other. The converse, that is, the definition of "wholly-owning corporation", is provided for in subsection (6).

Sections 31.81 (proposed acquisition), 31.84 (proposed amalgamation) and 31.85 (proposed combination) create the prenotification obligations and also call for submission of information in accordance with section 31.89.

With respect to section 31.81, prenotification is required only when percentage limits for share acquisitions or a valuation limit for asset acquisitions set out in sections 31.82 and 31.83 respectively are surpassed. The requirements in sections 31.81, 31.84 and 31.85 are, in each case, subject to sections 31.86 and 31.87. The former provides that the prenotification requirement does not apply unless the parties to the proposed transaction have in excess of the total assets in Canada or gross revenues from sales in, from or into Canada specified therein. Section 31.87 exempts the classes of transaction specified therein from the prenotification requirements. Thus, when the percentage limits in section 31.82 or dollar limits in section 31.83, applicable only to section 31.81 and dollar limits in section 31.86 are exceeded and when section 31.87 does not apply to the particular transaction, the person or persons proposing to enter into a transaction as provided in section 31.81, 31.84 or 31.85, as the case may be, must notify the Director of the proposed transaction and supply him with information in accordance with section 31.89.

Section 31.81 provides that a person or persons proposing to acquire voting shares of a corporation that operates or controls a corporation that operates an operating business or proposing to acquire all or part of the assets of an operating business, before doing so, whenever a limit in section 31.82 (for share acquisitions) or section 31.83 (for asset acquisitions) would be exceeded shall notify the Director that the acquisition is proposed

and supply him with information in accordance with section 31.89. As mentioned above, these obligations are also subject to the exemptions in sections 31.86 and 31.87.

Proposed section 31.82 prescribes the threshold on share acquisitions which will trigger the prenotification requirements set out in section 31.81. Certain exemptions are provided and there are allowances for proposed further or future acquisitions.

Subsection 31.82(1) establishes the threshold limits for voting share acquisitions. Paragraph (a) thereof provides, for the purposes of paragraph 31.81(a) (voting share acquisition), that a limit would be exceeded whenever, as a result of the proposed acquisition, the acquirors, including their affiliates, would own more than twenty percent or fifty percent of all outstanding voting shares of a corporation where any of its voting shares are publicly traded.

Similarly, limits are set on the proposed acquisition of voting shares in a corporation when none of the voting shares of that corporation are publicly traded. In such cases, paragraph 31.82(1)(b) sets the limit on ownership at thirty-five percent or fifty percent of all outstanding voting shares.

By reference to subsection 31.82(3) it will be noted that the fifty percent threshold in each of paragraphs (a) and (b) above applies where the person or persons making a voting share acquisition have first acquired more than twenty percent of such shares and are proposing a further acquisition of such shares whereby the fifty percent threshold would be exceeded. Similarly, the fifty percent threshold would apply where such person or persons already are the owner of more than twenty percent of the voting shares.

Subsection 31.82(2) grants a prenotification exemption to a proposal that would otherwise exceed a limit set out in subsection 31.82(1) if, within the immediately preceding three years the parties had, in relation to the same limit, complied with the prenotification requirements. The effect of this provision is to grant exemption from prenotification where, within a three year period following prenotification with respect to a limit set out in subsection (1), a similar limit is again reached. For example, the subsection would apply if a person acquired voting shares in excess of the twenty percent limit in respect of which prenotification was given and sufficient

shares were subsequently disposed of to bring the holding to twenty percent or less and, thereafter but within three years following the above prenotification, further shares are acquired to bring the holding over the twenty percent limit. Similarly, it would apply where, following prenotification, additional voting shares are issued which brings the holding to twenty percent or less and, within the three year period, additional shares are acquired to bring the holding to the same percentage as before.

Similarly subsection 31.82(3) recognizes the possibility of future acquisitions by enabling the acquirors to voluntarily prenotify the Director of a proposed further acquisition of such voting shares. When a voting share acquisition immediately exceeds the twenty or thirty-five percent thresholds in paragraphs 31.82(1)(a) or (b) respectively, the acquiror may, at the same time as prenotifying and supplying the required information with respect to the immediate proposal, voluntarily prenotify with respect to a proposed further acquisition of the voting shares that would result in the exceeding of the fifty percent limit set out in those two paragraphs and supply the Director with a detailed description, in writing, of the steps to be carried out in such further acquisition.

Subsection 31.82(4) sets out an exemption from compliance with paragraph 31.81(a) (acquisition of voting shares) where voluntary prenotification of a planned subsequent acquisition has been given under subsection 31.82(3). The exemption is available when the acquisition is carried out in accordance with the description supplied to the Director under subsection 31.82(3) and an additional written notice of the further acquisition is given to the Director at the time of the further acquisition.

By subsection 31.82(5), there is a loss of the exemption available under subsection (4) unless the further acquisition is completed within one year after notice is given under subsection (3).

The threshold for proposed asset acquisitions, as described in paragraph 31.81(b), is set out in section 31.83. This section states, for the purpose of paragraph 31.81(b) (asset acquisition), that a limit would be exceeded and hence trigger the prenotification requirements if the aggregate value of the assets to be acquired, determined as at such time and in such manner as may be prescribed, or the gross revenues from the sales generated from such assets, determined for such annual period and in such manner as may be prescribed, would exceed thirty-five million dollars or

such greater amount as may be prescribed. The determination of time or annual period, as the case may be, and manner of asset or revenue valuation including any increase (but not decrease) in the limit of thirty-five million dollars set out in the section may all be prescribed by regulation of the Governor in Council pursuant to section 31.11 (clause 11).

While section 31.81 will invoke the notice and information requirements in respect of proposed acquisitions, proposed section 31.84 will invoke these requirements in respect of amalgamations. As such, the section prescribes notification to the Director and compliance with section 31.89 (information to be supplied) whenever two or more corporations propose to amalgamate and one or more of them operates or controls a corporation that operates an operating business. While the notice and information obligation applies to each corporation that proposes to amalgamate, it arises only when a limit set out in subsection 31.84(2) is exceeded. Further, these obligations are expressly subject to the exemptions contained in sections 31.86 and 31.87.

Subsection 31.84(2) prescribes the limits referred to in subsection (1) which, if exceeded, will create the prenotification obligation. Paragraph (2)(a) provides, for the purpose of subsection (1), that a limit would be exceeded if the aggregate value of the assets in Canada that would be owned by the continuing corporation or by corporations controlled by the continuing corporation resulting from the amalgamation would exceed seventy million dollars or such greater amount as may be prescribed by regulation of the Governor in Council pursuant to section 31.11. The timing and method of asset valuation may be prescribed by regulation of the Governor in Council, as above.

An alternative limit, established by paragraph (2)(b), is seventy million dollars in annual gross revenues from sales in or from Canada generated from the assets referred to in paragraph (2)(a). The relevant time frame and method of valuation or any increase in the dollar limit may be prescribed by regulation of the Governor in Council, as above.

Proposed section 31.85 introduces a third prenotification provision dealing with combinations. It provides, subject to sections 31.86 and 31.87, as referred to in respect of acquisitions and amalgamations, for notification to the Director and compliance with section

31.89 (information to be supplied) whenever two or more persons propose to form a combination to carry on business other than through a corporation and one or more of those persons propose to contribute to the combination assets of an operating business. The notice and information requirements apply to each person who proposes to form the combination whenever a limit set out in subsection (2) is exceeded.

Subsection 31.85(2) sets out the limits referred to in subsection (1). Paragraph (2)(a) provides, for the purpose of subsection (1), that a limit would be exceeded if the aggregate value of the assets in Canada that are the subject matter of the combination would exceed thirty-five million dollars or such greater amount as may be prescribed by regulation of the Governor in Council pursuant to section 31.11. The timing and method of valuation may also be prescribed by such regulation.

An alternative limit is set out in paragraph (2)(b) which provides, for the purpose of subsection (1), that a limit would be exceeded if the gross revenue from sales in or from Canada generated from the assets referred to in paragraph (2)(a) exceeds thirty-five million dollars or such greater (but not lesser) amount as may be prescribed by regulation of the Governor in Council, as above. The time frame for and method of valuation may also be prescribed by such regulation.

Proposed subsection 31.85(3) introduces an exemption to the notice and information requirements in subsection (1) for joint ventures meeting the requirements of the subsection. The exemption is provided if all the persons who propose to form the combination (joint venture) are parties to a written agreement or one intended to be put in writing that imposes on them an obligation to contribute assets and which governs a continuing relationship between those parties. A further stipulation is that there can be no resulting change in control over any party to the combination and the agreement contains provisions restricting the range of activities to be carried on pursuant to the combination. There must also be provision in the agreement that would allow for its orderly termination.

New section 31.86 grants an exemption for certain proposed transactions from the application of the notice and information requirements in sections 31.81 (acquisitions), 31.84 (amalgamations) and 31.85 (combinations).

Paragraphs (1)(a) and (b) thereof state that those sections do not apply unless the parties to the proposed transaction and their affiliates have assets in Canada that exceed five hundred million dollars in aggregate value or had annual gross revenues from sales in, from or into Canada that exceed five hundred million dollars in aggregate value. The annual period for which and manner by which gross revenues are to be determined and any increase in the dollar limit in both paragraphs (a) and (b) may be prescribed by regulation of the Governor in Council pursuant to section 31.11.

Subsection (2) clarifies for the purpose of subsection (1) who may be parties to a proposed acquisition of shares by providing that the parties to the transaction are the person or persons who propose to acquire the shares and the corporation whose shares are to be acquired.

Proposed section 31.87 grants an exemption from the application of sections 31.81 (acquisitions), 31.84 (amalgamations) and 31.85 (combinations) for certain classes of transactions. Accordingly, there is an exemption from those sections when the transaction: is an acquisition of voting shares of a corporation if the aggregate value of all the outstanding shares of such corporation does not exceed seventy million dollars. The time and method of such valuation of the shares and any increase in the dollar limit specified may be prescribed by regulation of the Governor in Council pursuant to section 31.11. The exemption also applies if the transaction is an acquisition: of real property or goods in the ordinary course of business if the proposed acquiror or acquirors would not, as a result of the acquisition, hold all or substantially all the assets of a business or of an operating segment of a business; of voting shares solely for the purpose of underwriting the shares within the meaning of subsection 4.1(2); of voting shares or assets that would result from a gift, intestate succession or testamentary disposition; by a creditor, of collateral or receivables or attributed to foreclosure or default or forming part of a debt work-out in a credit transaction entered into in good faith in the ordinary course of business. Further, the exemption applies to a transaction: to which all of the parties are affiliates; in respect of which the Director has issued an advance ruling certificate under subsection 31.791(1); or pursuant to an agreement entered into before the section came into force and completed within one year after the section comes into force. Finally, exemption may be granted in respect of any other classes of transactions as may be prescribed by regulation of the Governor in Council, as above.

Proposed section 31.88 describes by whom notice may be given and information supplied in accordance with the proposed transaction requirements. It accordingly provides that when more than one person is required to give notice and supply information under sections 31.81 (acquisition), 31.84 (amalgamation) or 31.85 (combination) in respect of the same transaction, any of those persons who is duly authorized to do so may give notice or supply information on behalf of and in lieu of any of the others. Provision is also made for notice and supply of information to be given jointly. This provision serves to avoid duplication of effort.

Proposed section 31.89 prescribes, as part of the prenotification process, the information required in respect of transactions under sections 31.81 (acquisitions), 31.84 (amalgamations) or 31.85 (combinations) and establishes the time limits within which a transaction must not be completed. All such information must be certified under section 31.895 set out below.

Subsection 31.89(1) grants an option to the person or persons who are required to supply information to the Director. The person supplying the information may choose to supply the information set out in section 31.891 (short form filing) or section 31.892 (long form filing). However, where that person chooses to use section 31.891 the Director may, within seven days of his receiving that information, give notice that additional information as set out in section 31.892 is also required.

Subsection 31.89(2) prescribes certain maximum time limits within which a proposed transaction must not be completed depending upon whether the short or long form filing is used or the proposed transaction is an acquisition of shares through the facilities of a stock exchange in Canada. These limits must be adhered to unless the Director, before the expiration of the relevant time period, notifies the persons who are required to give notice and supply information that, at that time, he does not intend to proceed under section 31.72 (mergers).

Paragraph (2)(a) states that where the information, properly certified, is supplied to the Director in accordance with paragraph 31.89(1)(a) (short form) the proposed transaction is not to be completed before the expiration of seven days after the receipt of that information by the Director unless within that seven day period, the Director has required information referred to in paragraph (1)(b) (long form).

Paragraph 2(b) provides that when the information, properly certified, is supplied, by choice or requirement, pursuant to paragraph (1)(b) (long form), the proposed transaction is not to be completed before the expiration of twenty-one days of the receipt of the information by the Director. This provision is expressly subject to paragraph (2)(c).

Paragraph (2)(c) recognizes that in proposed acquisitions by take-over bids to be effected through the facilities of a stock exchange in Canada, time frames are provided in exchange rules and that in the interest of uniformity an endeavour should be made to operate within such time frames to the extent possible. In these cases and when the information supplied, properly certified, is information referred to in paragraph (1)(b), the transaction is not to be completed before the expiration of ten trading days from the date of receipt of the information by the Director or such longer period from such date, not exceeding twenty-one days, as may be allowed by the rules of the stock exchange before shares must be taken up.

Section 31.891 provides that the information to be supplied as required by paragraph 31.89(1)(a) (short form) includes a description of the proposed transaction and the business objectives intended to be achieved as a result thereof as well as copies of legal documents, or latest drafts, if the documents have not been executed, that are to be used to implement the proposed transaction. The following information required to be supplied under this section applies not only in respect of each person required to supply the information but also, in the case of an acquisition under section 31.81, with respect to the corporation the shares of which or the person the assets of whom are proposed to be acquired: these information requirements include, inter alia, their full names, addresses, a listing and description of affiliates having significant assets in Canada or significant gross revenues from sales in, from or into Canada, principal businesses, principal suppliers and customers, annual volume of purchases from and sales to those suppliers and customers; so far as available copy of every proxy solicitation circular, prospectus and other information filed with a securities commission or other similar authority or otherwise made available to shareholders in the last two years, and financial statements of the acquiring party, continuing corporation or combination, as the case may be prepared on a pro forma basis as if the proposed transaction had occurred and other financial data.

Proposed section 31.892 sets out the prenotification information required to be supplied by paragraph 31.89(1)(b) (long form). The information requirements are more extensive than those under section 31.891 consequently, the time limit specified in paragraph 31.89(2)(b) within which the proposed transaction is not to be completed is twenty-one days.

Like section 31.891 the information to be supplied under section 31.892 includes a description of the proposed transaction and the business objectives intended to be achieved as a result thereof as well as copies of legal documents or latest drafts, if the documents have not been executed, that are to be used to implement the proposed transaction.

The following information required to be supplied under this section applies not only in respect of each person required to supply the information but also in respect of each of their wholly-owned or wholly-owning affiliates that have significant assets in Canada or significant sales in, from or into Canada and, in the case of an acquisition under section 31.81, with respect to the corporation the shares of which or the person the assets of whom are proposed to be acquired. These information requirements include, inter alia, their names, addresses, names and business addresses of directors and officers; description of principal businesses with, to the extent available, financial statements relating thereto; statements identifying principal suppliers and customers and annual purchases from and sales to them; principal categories of products produced, supplied, distributed, purchased or acquired, number of votes attached to voting shares in a corporation carrying on an operating business held directly or indirectly when the total of such votes so held exceeds twenty per cent of the votes attached to all outstanding voting shares of the corporation. Also required is a copy of every proxy solicitation, prospectus etc., filed with a securities commission or other similar authority or made available to shareholders in the last two years; any financial or statistical data prepared to assist directors or officers in analyzing the proposed transaction, financial statements to the extent available of the acquiring party, continuing corporation or combination, as the case may be, prepared on a pro forma basis as if the transaction had occurred; and a summary description of any decision, commitment or undertaking to make significant changes in any business to which the proposed transaction relates.

Paragraph 31.892(d) requires that certain of the above information, so far as it is known or reasonably available, must be supplied in respect of any affiliate of each person who is required to supply the information, other than a wholly-owned affiliate or wholly-owning affiliate. Such affiliate must have significant assets in or significant gross revenues from sales in, from or into Canada before the requirement in paragraph (d) applies.

Proposed section 31.893 is a saving provision dealing with unobtainable, specific confidential or irrelevant information which, otherwise, would be required under section 31.81 (acquisition), 31.84 (amalgamation) or 31.85 (combination).

Subsection 31.893(1) provides that if any of the information required under sections 31.81, 31.84 or 31.85 is not reasonably obtainable or cannot be obtained without breaching a confidentiality requirement established by law or creating a risk that confidential information will be improperly disclosed, the person who is supplying the information, may in lieu of supplying the information, inform the Director under oath or affirmation of the matters in respect of which the information has not been supplied and why it has not been obtained.

Subsection 31.893(2) deals with the situation where information otherwise required under sections 31.81, 31.84 or 31.85 is irrelevant. The subsection provides that if any of the information required under those sections could not, on any reasonable basis, be considered to be relevant to an assessment by the Director as to whether the proposed transaction would or would be likely to prevent or lessen competition significantly, the person supplying the information may, instead of supplying the information, inform the Director under oath or affirmation, of the matters in respect of which the information was not supplied and why it was not considered relevant.

Proposed section 31.894 introduces an additional saving provision from the information requirements in sections 31.89 to 31.892. It provides that those sections do not require any director of a corporation to supply information that is known to him only because of his position as director of an affiliate of the corporation that is neither a wholly-owned nor wholly-owning affiliate of the corporation.

Proposed section 31.895 requires that information supplied to the Director under sections 31.81 (acquisitions), 31.84 (amalgamations) or 31.85 (combinations) shall be certified under oath or affirmation. Paragraph (a) provides that when a corporation is supplying the information, that information must be certified under oath or affirmation by an officer of that corporation or some other person duly authorized by the board of directors or other governing body of the corporation. Paragraph (b) provides that in the case of any other person supplying the information it must be certified by that person. In each case the deponent must state that he has examined the information and that to the best of his knowledge and belief it is correct and complete in all material respects.

Proposed section 31.896 provides for the situation where the prenotification provisions have been complied with but the proposed transaction is not completed within one year after the requisite notice and information has been given and supplied, or within such longer period as the Director may specify in a particular case. In such situations, the obligations under sections 31.81, 31.84 or 31.85, as the case may be, to notify and supply information in effect are renewed if it is intended to proceed with the proposed transaction after expiration of the stated period.

As referred to in respect of clause 8, the confidentiality requirements of the Act are reinforced by the addition of subsection 27(3) which, inter alia applies specifically to prenotification of proposed transactions and information supplied in respect thereof.

Clause 22 also introduces the heading "General" immediately preceding section 31.9 as applying to sections 31.9 to 31.94 which deal with general matters such as procedure, interim orders, evidence and the making and publication of regulations relating to proceedings under Part IV.1 of the Act.

Existing section 31.9 of the Act, as pointed out earlier, is repealed by clause 22. New section 31.9 sets out the manner in which applications are to be brought before the courts under Part IV.1. It states that an application to the court may be made by originating notice of motion, writ of summons, statement of claim or otherwise as the court rules may provide.

Interim orders, except interim orders dealing with proposed mergers under section 31.78 prior to an application under section 31.72, are provided for in proposed section 31.91. Subsection (1) enables the court already seized of a Part IV.1 matter, and upon application of the Director, to issue such interim order as it considers appropriate having regard to the principles ordinarily considered when granting interlocutory or injunctive relief. This, of course, is a different test than that specified in section 31.78.

Subsection 31.91(2) provides that an interim order issued under subsection (1) shall be on such terms and of such duration as the court considers necessary and sufficient to meet the circumstances of the case.

Where an interim order under subsection (1) is in effect, the Director is required, by subsection (3) to proceed as expeditiously as possible to complete the proceedings under Part IV.1 arising out of the conduct in respect of which the order was issued.

Subsection 31.91(4) provides that the court which issues an interim order under subsection (1) may punish any person who contravenes or fails to comply with the order by a fine in the court's discretion or by imprisonment for a term not exceeding two years. This provision is identical to subsection 31.78(7) (failure to comply with an interim order in respect of a proposed merger). Both of these provisions reflect the importance of interim orders when required in dealing with mergers or anti-competitive conduct under Part IV.1.

New section 31.92, which provides for the rescission or variation of an order under Part IV.1, replaces existing section 31.9 of the Act. The existing section provides for such action when the circumstances have changed and the order would not have been made or now is ineffective to achieve its intended purpose. While this in substance is retained in paragraph (a), the new section reflects the transfer in jurisdiction of Part IV.1 matters from the Commission to the Court. Paragraph (b) adds an additional ground for rescission or variation of an order in that it enables the court to rescind or vary the original order when the Director and the person against whom an order has been made have consented to an alternative order.

Proposed section 31.93 provides that in determining whether or not to make an order under Part IV.1, the court shall not exclude evidence from consideration only because it might be evidence of conduct which might be dealt

with as such under the civil or criminal provisions elsewhere in the Act. On occasion in the past, such evidence has been excluded from consideration, as for example in the Beer case[4]. Because of the behavioural nature of this Part it is considered that such evidence may be clearly relevant to the issue and should not be excluded from consideration.

Proposed section 31.94 deals with the making of regulations which shall apply to proceedings and other matters under Part IV.1. The section also deals with the publication of proposed regulations enabling interested persons to respond to them and recognizes the authority of a court to make rules and orders not inconsistent with this Part and regulations thereunder.

Subsection 31.94(1) empowers the Governor in Council to make regulations regulating the practice and procedure in respect of applications made under Part IV.1 and prescribing anything required by this Part to be prescribed (such as the time and manner for determination of aggregate value of assets in paragraph 31.84(2)(a)).

Subsection 31.94(2) requires, subject to subsection (3), that any regulation proposed under subsection (1) be published in the Canada Gazette at least 60 days before the proposed effective date of the regulation. In addition, a reasonable opportunity must be afforded to interested persons to make representations with respect to the proposed regulation.

By way of exception to the requirements in subsection (2), subsection (3) provides that once a proposed regulation has been published under subsection (2) then it need not be published again even though it has been amended as a result of representations received under subsection (2). This provision is necessary in order to avoid undue delays in the introduction of regulations under Part IV.1 while, at the same time, respecting the contributions of persons making representations.

Proposed subsection 31.94(4) recognizes the inherent authority of a court or the judges of a court to be masters of their own procedure. As such, this subsection provides that nothing in Part IV.1 restricts their authority to make such rules and orders not inconsistent with Part

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4 Regina v. Canadian Breweries Ltd., [1960] O.R. 601; 33 C.R. 1; 126 C.C.C. 133 (H.C.)

IV.1 and any regulations made pursuant to paragraph 31.94(1)(a), that is, relating to practice and procedure in respect of applications.

Clause 22 also introduces new Part IV.2 containing sections 31.95 to 31.991 dealing with specialization agreements and their review, approval, modification or rejection by the Restrictive Trade Practices Commission. The addition to the Act of provisions dealing with and encouraging specialization agreements and their scrutiny by the Commission is in accord with the conclusion of the 1969 Report of the Economic Council of Canada and the Skeoch-McDonald Report in 1976.

The headings, "Part IV.2", "Matters Reviewable By Commission" and "Specialization Agreements" in that order, are added immediately preceding section 31.95 of the Act.

For the purposes of sections 31.95 and 31.96 the definition in subsection 31.95(1) of "article" includes each separate type, size, weight and quality in which an article, within the meaning assigned by section 2, is produced. Thus, the meaning of "article" in section 2 is further clarified for purposes of these two sections.

Subsection 31.95(1) also defines a specialization agreement essentially as a reciprocal agreement among two or more firms in an industry. Under such an agreement, each party agrees to discontinue production of one or more articles he is then producing on condition that each other party gives a similar undertaking. Such an agreement may also contain an undertaking that the parties will buy exclusively from each other the articles that are the subject of the agreement.

The rationale for these agreements is to permit members of an industry who have locked themselves into a situation where each is producing comparatively short and costly runs of several articles to achieve longer and more efficient runs of a particular article or articles. Freed for a reasonable time by a specialization agreement from the burden of short and costly production runs, each party should then be able to stand independently on the basis of the individual efficiencies he has attained.

Subsection 31.95(2) provides that an application for registration of a specialization agreement may be made to the Commission by any person who has entered into or is about to enter into such an agreement. If, after affording the Director a reasonable opportunity to be heard, the

Commission finds that the agreement is a specialization agreement and its implementation is likely to bring about gains in efficiency that will result in a substantial real net saving of resources for the Canadian economy and that such gains could not reasonably be expected to be attained without implementation of the agreement and that no attempts have been made to coerce anyone to participate in the agreement, it may order that the agreement be registered. Subsection (3) requires that in considering whether these efficiency gains are likely to be brought about by the agreement, the Commission shall consider whether the gains will lead to a significant increase in the real value of exports or a significant substitution of domestic for imported products.

Subsection 31.95(4) empowers the Commission, in allowing a specialization agreement, to make its order conditional. Thus where, on an application under subsection 31.95(2), it finds that an agreement meets the conditions prescribed therein but also finds that, as a result of its implementation, there is not likely to be substantial competition remaining in the market or markets to which the agreement relates, the Commission may provide that its order directing registration of the agreement shall take effect only if, within a specified reasonable time, there have occurred certain preventive or ameliorative measures specified in the order. These measures include any one or more of: the divestiture of assets; a wider licensing of patents; or a reduction in import trade barriers.

Subsection 31.95(5) empowers the Commission to allow a modification of a registered agreement on application by the parties thereto and after affording the Director a reasonable opportunity to be heard. Any such approved modification is likewise required to be registered.

Subsection 31.95(6) provides that, where on application by the Director, and after affording the parties to a registered specialization agreement a reasonable opportunity to be heard, the Commission finds that such agreement or a modification thereof has ceased to meet the conditions prescribed in subsection 31.95(2) or is not being implemented, it may make an order directing that the agreement or modification be removed from the register. Such an order in effect, revokes the prior approval.

Subsection 31.95(7) requires the maintenance at the Commission's principal office of a register of specialization agreements and modifications thereof that the Commission under this section or which the Governor in

Council, under subsection 31.991(1), has directed to be registered. Any such agreements, modifications thereof and orders of the Commission or the Governor in Council in respect thereof are to be included in the register for the periods specified in the orders.

Subsection 31.95(8) directs that the register maintained under subsection (7) be open to inspection by the public during normal business hours.

Since a specialization agreement may, otherwise, contravene the conspiracy provision (section 32) or give rise to an order under the exclusive dealing provision (section 31.4), section 31.96 establishes an exemption by providing that they do not apply if the agreement or modification thereof is registered under section 31.95.

Sections 31.97, 31.98, 31.99 and 31.991 introduce general provisions relating to proceedings of the Commission under Part IV.2, to orders which it is authorized to make thereunder and to review by the Governor in Council of refusals by the Commission to order registration of specialization agreements or modifications thereof.

Section 31.97, which is new, allows for "consent orders". It provides that where an application has been made to the Commission for an order under Part IV.2 and the Director and the person in respect of whom the order is sought agree on the terms of the order, the Commission may make the order on those terms without hearing such evidence as would ordinarily be placed before it had the application been contested.

Subsection 31.98(1) is derived from repealed subsection 31.8(1) of the existing Act and provides that, for the purposes of Part IV.2, the Commission is a court of record and shall have an official seal which shall be judicially noticed.

Subsection 31.98(2), which is new, provides that the Commission is not bound by legal or technical rules of evidence in conducting a hearing notwithstanding its status as a court of record. It also provides that all proceedings before it shall be dealt with as informally and expeditiously as the circumstances and considerations of fairness permit.

Subsection 31.98(3), which is new, provides that material which is inadmissible in a court by reason of any privilege under the law of evidence is similarly inadmissible in proceedings before the Commission.

Subsection 31.98(4) provides that the Commission shall give written reasons for its decisions under Part IV.2. A similar requirement is contained in the existing Commission Rules applying to Part IV.1, jurisdiction over which is being transferred to the courts.

Subsection 31.98(5) which is derived from repealed subsection 31.8(2) provides that the burden of proof is on the person making an application to the Commission under Part IV.2.

Subsection 31.98(6), which is new, provides that the attorney general of a province may intervene in any proceedings before the Commission under Part IV.2 for the purpose of making representations on behalf of the province. This is similar to section 31.79 in respect of proceedings before a court under section 31.72 concerning mergers.

Section 31.99 provides that where an application by the Director or a person in respect of whom an order has been made under Part IV.2 and after affording the Director and that person a reasonable opportunity to be heard, the Commission finds that circumstances which led to the making of the order have changed and that in present circumstances the order would not have been made or would have been ineffective to achieve its purpose, it may rescind or vary the order. This section replaces section 31.9 in existing Part IV.1 and is in substantially the same form as that section. Proposed section 31.92 will deal with the rescission or variation of orders made by a court under Part IV.1.

Section 31.991 empowers the Governor in Council to review refusals of the Commission to order registration of specialization agreements or modifications thereof.

Subsection 31.991(1) provides for the review by the Governor in Council of a refusal by the Commission, following an application under section 31.95, to order registration of a specialization agreement or a modification thereof. It prescribes that where the Commission refuses to direct such registration, the Governor in Council may, at any time within sixty days after the Commission gives written reasons for refusing to make the order, make an order directing that the specialization agreement or modification thereof be registered for a period specified therein.

Subsection 31.991(2) provides that subsection 31.95(4) (conditional orders in respect of specialization agreements) applies, with such modifications as the circumstances require, in respect of orders made by the Governor in Council under subsection (1).

Subsection 31.991(3) provides that every order made by the Governor in Council under this section shall be communicated forthwith to the Director and to the Commission. Such an order is to be filed by the Commission in its record of the matter in respect of which the order was made and also in the register maintained pursuant to subsection 31.95(7).

Clause 23:

This clause effects revisions to existing section 32 which is the important section that prohibits conspiracies, combinations, agreements and arrangements to restrain competition unduly.

Sub-clause 23(1) repeals all that portion of existing subsection 32(1) following paragraph (d) thereof and substitutes a new charging provision. While the offence remains an indictable one and liability to imprisonment remains at a maximum of five years, the maximum fine is increased from one to two million dollars. This increase is intended to further emphasize the serious harm to the public which can result from conspiracies in restraint of trade.

Sub-clause 23(2) introduces new subsections 32(1.2) and (1.3).

Subsection 32(1.2) removes the uncertainty regarding the type of evidence necessary to establish the existence of a conspiracy, combination, agreement or arrangement. This uncertainty arises out of a dictum in a recent decision of the Supreme Court of Canada which appears to differ from principles set out in an earlier oft-quoted judgment of the Court, concerning the manner in which an agreement, which is the gist of a conspiracy case, may be established. This recent decision was to the effect that even in a tacit agreement there must not only be a course of conduct from which an acceptance of an offer may be inferred, but there must also be communication of the offer. In the earlier judgment[5], it was pointed out that only in very rare cases would it be possible to prove an

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5 Paradis v. R. [1934], S.C.R. 165.

agreement by direct evidence and that therefore, it must be gathered from several isolated doings from whose cumulative effect an agreement may be inferred. Thus, new subsection (1.2) in essence codifies what is considered as accepted conspiracy law by specifying that in a prosecution under subsection 32(1), the existence of a conspiracy, combination, agreement or arrangement may be inferred from all the surrounding circumstances with or without evidence of communication among the alleged parties. This in no way affects the onus on the prosecution to prove the existence of an agreement beyond a reasonable doubt and, for greater certainty, this is specified in the subsection.

Subsection 32(1.3) is intended to clarify another uncertainty regarding the interpretation of the offence. Until recently, the requirement to prove mens rea, or criminal intention, was generally satisfied when the Crown established beyond a reasonable doubt that the parties intended to and did enter into the agreement found to exist. Recent jurisprudence seems to suggest it is necessary to prove that the parties must also have intended to prevent or lessen competition unduly. Such a requirement would place an almost impossible onus on the Crown. For greater certainty, the new subsection provides that in order to establish a contravention of subsection 32(1), it must be proved that the parties intended to and did enter into the conspiracy, combination, agreement or arrangement but it is not necessary to prove that they intended it to have an effect referred to in subsection (1), that is, in broad terms, preventing or lessening competition unduly. In other words, where parties enter into a restrictive agreement they are presumed to intend the natural consequences thereof. This follows the approach of Mr. Justice Anderson of the Supreme Court of Ontario in the motion for non-suit in the Newspapers[6] prosecution. After hearing argument on this question and reviewing recent jurisprudence he, in effect, decided to follow the test set out in this proposed subsection.

Sub-clause 23(3) repeals existing subsection 32(4) and replaces it with subsections 32(4) and (4.1). These provisions deal with what has commonly been referred to as the export exemption.

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6 Regina v. Thomson Newspapers Limited et al (October 28, 1983-unreported).

Existing subsection 32(4) provides that, subject to subsection (5), in a prosecution under subsection (1) the court shall not convict the accused if the agreement relates only to the export of products from Canada. Proposed subsection 32(4) would make this provision subject not only to subsection (5) (as amended below) but also to proposed subsection (4.1).

Subsection 32(4.1) is new and introduces an important exception to the exemption contained in subsection 32(4); that is, the exemption does not apply where an agreement has prevented or lessened or is likely to prevent or lessen competition unduly in the supply of services facilitating the export of products from Canada. This narrower restriction replaces paragraph 32(5)(d) as explained below. For example, if insurance companies or transportation companies agree on the premiums or tariffs to be levied in respect of goods being exported from Canada and if such agreement in either case was likely to prevent or lessen competition unduly, the exemption under subsection (4) would not apply and the agreement would come within the purview of subsection 32(1).

Sub-clauses 23(4) and (5) amend subsection 32(5). Subsection (5), as amended, provides that the export exemption shall not apply if the conspiracy, combination, agreement or arrangement: (a) has resulted in or is likely to result in a reduction or limitation in the real value of exports of a product; (b) has restrained or injured or is likely to restrain or injure the export business of any domestic competitor who is not a party to the conspiracy, combination, agreement or arrangement; or (c) has restricted or is likely to restrict any person from entering into the business of exporting products from Canada.

The amendment to paragraph (a), in substituting "real value" in place of "volume" as now provided, has the effect of broadening the exemption. Thus, if an export agreement has the effect of increasing prices and lowering the volume of exports, it can still be desirable if the real value of exports is, nevertheless, increased. Also, paragraph (d) which contains the substance of the charging subsection 32(1), is dropped and is replaced by the narrower restriction in subsection 32(4.1). Paragraph (d) apparently had introduced uncertainty as to the application of the export exemption since it caught unintended spillover effects in the domestic market. If, however, there is an ancillary agreement in respect of the domestic market then the export exemption does not apply.

Sub-clause 23(6) would make technical changes to the French version of paragraph 32(6)(a).

Sub-clause 23(7) introduces new subsection 32(6.1) dealing with agreements or arrangements between banks and is consequential on the repeal of section 309 of the Bank Act and its proposed replacement in section 33 of this Act (Clauses 25 and 31). This subsection provides that subsection 32(1) does not apply in respect of an agreement or an arrangement between banks with respect to any of the matters described in and made an offence by new subsection 33(1).

Clause 24:

This clause introduces new section 32.01 which should be read in conjunction with section 31.76. Section 32.01 prohibits duplicate proceedings under the merger and general conspiracy provisions. It provides that no proceedings may be commenced under subsection 32(1) against a person against whom an order is sought under section 31.72 on the basis of substantially the same facts as would be alleged in proceedings under that subsection.

Clause 25:

This clause introduces proposed new section 33 of the Act to replace section 309 of the Bank Act which is repealed by clause 31. In conjunction with paragraph 31.73(b) (clause 22), subsection 32(6.1) (sub-clause 23(7)) and clauses 30 and 31, this clause completes the transfer to the Director of the responsibility for the application of competition policy to banks.

By virtue of amendments to the Combines Investigation Act in 1976, which brought most services and service industries within its ambit, and to the Bank Act in 1980, banks became subject to the Combines Investigation Act except with respect to mergers and agreements between or among banks. It has become apparent that this divided responsibility for competition policy enforcement is inconsistent with the Government's intent to promote competition by a strengthened Combines Investigation Act and is unlikely to be efficient. Thus the amendments propose to bring the activities of banks completely within the purview of the Combines Investigation Act.

There will remain two exceptions to this transfer of jurisdiction. First, there will be an exception for amalgamations of banks in respect of which the Minister of

Finance has certified to the Director the names of the parties thereto and that the amalgamation is desirable in the interest of the financial system (paragraph 31.73(6)). Secondly, there will be an exception for agreements or arrangements between or among banks certified to the Director by that Minister as to the names of the parties thereto and that they have been requested or approved by him for the purposes of financial policy (paragraph 33(2)(h)).

Subsection 33(1) describes certain agreements or arrangements between or among banks that are prohibited. These are per se offences and are the same as those specified in paragraphs 309(1)(a) to (f) of the Bank Act and include such matters as interest rates on deposits or loans and charges for services. The offence remains an indictable one, but the penalty provision on conviction is changed to a fine of two million dollars or to imprisonment for five years or to both as in subsection 32(1) (sub-clause 23(1)), the general conspiracy provision.

Subsection 33(2) provides eight exemptions to a prosecution under subsection 33(1). Seven of these are the same as those specified in subsection 309(2) of the Bank Act and include such matters as agreements on deposits or loans made or payable outside Canada, agreements concerning a joint customer and the underwriting of securities. The eighth, as mentioned above, is contained in proposed paragraph 33(2)(h) whereby the Minister of Finance must certify to the Director the names of the parties to the agreement and that he has requested or approved it for the purposes of financial policy.

Subsection 33(3) introduces, for the purpose of section 33, the definition of "bank". Subsection 33(3) states that, in section 33 a "bank" shall be a bank as defined in subsection 2(1) of the Bank Act.

Clause 26:

This clause repeals existing subsection 38(7.1) defining when a company is deemed to be controlled for purposes of the section and re-enacts it, for purposes of uniformity, in the same language as contained in subsection 31.4(6), in sub-clause 15(3) (exclusive dealing, market restriction and tied selling) and in subsection 31.8(4), in clause 22 (notification of proposed acquisitions, amalgamations or combinations). The contents of the subsection are set out in the discussion of sub-clause 15(3), above.

Clause 27:

This clause repeals existing subsection 42(2) which creates an offence and provides penalties in respect of a refusal, neglect or failure to comply with a notice requiring a written return under section 9 or subsection 22(2). The clause re-enacts the subsection, which, while retaining the existing provisions, adds as an offence, the failure to comply with the requirement contained in new sections 31.81, 31.84 or 31.85 relating to notification of and furnishing information to the Director in respect of proposed acquisitions, amalgamations or combinations.

Clause 28:

Existing section 46.1 creates an offence and provides penalties for contravention of or failure to comply with Commission orders. Consequential on the transfer of jurisdiction in respect of matters relating to Part IV.1 from the Commission to the courts, this clause would amend the section to apply to orders of the courts under Part IV.1. Orders by the Commission will now relate to registration of specialization agreements and modifications thereof or removal of registration. Since the register is maintained by the Commission, no question of failure of the parties to an agreement to comply with any such orders would arise.

Consequential amendments are contained in clauses 29 to 32.

Clause 29:

This clause introduces a consequential amendment to the Access to Information Act. It adds to Schedule II of that act a reference to new subsection 27(3) (clause 8) of the Combines Investigation Act which will serve to maintain required confidentiality in respect of certain information obtained under the Combines Investigation Act as specified in that subsection.

Clause 30:

This clause repeals subsection 255(5) of the Bank Act and substitutes therefor an amended provision.

This clause is consequent upon the decision to bring banks completely within the purview of the Combines Investigation Act (with two exceptions referred to in the discussion of clause 25, above) and the proposed repeal of

section 33 of the existing Act which relates to mergers and monopolies. Given this transfer to the Director of the responsibility for the application of competition policy to banks, and since the provisions of the Bank Act presently apply to amalgamations under section 255 of that Act in lieu of section 33 of the Combines Investigation Act, any reference to the Combines Investigation Act and section 33 thereof would be deleted from the revised subsection 255(5). Thus, the proposed merger provision in revised Part IV.1 of the Combines Investigation Act, along with other provisions of the Act, will apply to banks.

Clause 31:

This clause repeals the heading immediately preceding section 309 and section 309 of the Bank Act and is consequent upon the decision to bring banks within the purview of the Combines Investigation Act and the enactment of section 33 (clause 25) dealing with agreements or arrangements between or among banks.

As discussed under clause 25 above, section 309 of the Bank Act sets out prohibited agreements between or among banks, creates the offence and penalty for breach of the provision and provides that certain specified agreements do not come within this provision.

Clause 32:

This clause introduces a consequential amendment to the National Transportation Act. Since the criminal offence of merger appearing in existing section 33 is to be repealed and replaced with the new civil reviewable matter of merger, it is necessary to add subsection 27(6) to the National Transportation Act to reflect the replacement of existing section 33 by civil procedures. Thus, the subsection provides that nothing in the section affects the operation of any other Act of Parliament that applies in respect of any acquisition of an interest in the business or any part thereof of any company. Subsection 27(5) of that Act already deals with mergers prohibited by other Acts of Parliament in providing that the section is not to be construed to authorize any acquisition of an interest in any other company that is prohibited by any Act of Parliament.

Clause 33:

This clause introduces a transitional provision in respect of proceedings pending before the Commission. It provides that any proceedings instituted before the

Commission under sections 31.2 to 31.7 prior to the coming into force of these revisions to the Act (at which time jurisdiction in respect of these sections will be transferred to the courts) shall be continued and completed as if this amending Act had not come into force. Thus, the Commission will be able to complete these cases before it rather than the Director having to re-commence them before the courts.

Clause 34:

This clause provides that the provisions of this amending Act or any individual provision thereof shall come into force on a day or days to be fixed by proclamation.