Canada

COMBINES INVESTIGATION ACT AMENDMENTS 1984

Background Information and Explanatory Notes

Consumer and Corporate Affairs Canada

Consommation et Corporations Canada

AMENDMENTS TO THE COMBINES INVESTIGATION ACT

Background Information and Explanatory Notes

Minister of Consumer and Corporate Affairs
The Honourable Judy Erola

1984

TABLE OF CONTENTS

Page

INTRODUCTION 1

Chapter I - THE PROCESS OF CONSULTATION 5

Chapter II - SUMMARY OF MAIN POINTS IN THE BILL 7

Chapter III - DISCUSSION OF THE BILL'S CONTENTS

AGREEMENTS IN RESTRAINT OF TRADE 9
The Main Changes 9
The Need to Amend Section 32 9
Clarifying Recent Interpretations by the Courts 10
Export Agreements 11
Fines 12

BANKS 12

MERGERS 13
Overview 14
The Need for New Legislation 14
The Key Provisions 16

ABUSE OF DOMINANT POSITION 19
Overview 19
The Need for New Legislation 19

DELIVERED PRICING 22

SPECIALIZATION AGREEMENTS 23

CROWN CORPORATIONS 25

ADMINISTRATIVE AND ADJUDICATIVE MATTERS 27
Changes in Adjudication 27
Investigatory Procedures of the Director 28

Chapter IV - CONCLUSION 31

INTRODUCTION

This Bill which amends the Combines Investigation Act is the culmination of almost four years of effort by the federal government. It reflects the government's long-standing commitment to reform of competition law for the benefit of all Canadians. The amendments are confined to the essential areas of competition policy most urgently in need of reform.

The Combines Investigation Act seeks to eliminate a variety of restrictive and deceptive trade practices sometimes effected by private firms, that reduce efficiency in the allocation of our scarce national resources. In doing so, the Act is an important instrument of public policy in stimulating and maintaining competitive markets and in promoting honesty and fair dealing in the marketplace.

The federal government believes that competition should be fostered not as an end in itself, but because it constitutes the best means to achieve both efficiency and fairness in the production and distribution of the nation's resources.

The Combines Investigation Act is not a regulatory statute but a general law of general application. The Act is concerned with the performance of firms and industries in the Canadian economy rather than with a particular normative view of market structure. The Act does not tell businessmen how to run their business or what prices to charge. Rather, it sets broad parameters within which business can operate free of interference. The business community, consumers and the government all share the same object: a free market economy.

The offences under the Act and the civil reviewable matters deal largely with the conduct of firms vis-à-vis their rivals. By setting the legal framework within which the process of competition occurs, the Act tries to ensure that the economic performance of firms and industries meets the high expectations of Canadians.

The Act is being amended to strengthen it and thereby increase its effectiveness in light of a number of developments. First, there is a need to more clearly delineate certain exemptions. For example, for a nation as dependent on foreign trade as Canada (30 percent of GNP), it is important that the law facilitate export consortia. In addition, there will be a new exemption to the conspiracy section for specialization agreements to allow Canadian firms to adapt to meet increasing foreign competition. Second, recent jurisprudence in respect of the merger and conspiracy provisions have left the Act in an undesirable state of ambiguity. The amendments in the Bill will clarify the law and at the same time improve it.

Third, long-standing weaknesses in the basic structure of the legislation and its method of adjudication will be remedied. For example, the merger provisions will be transferred from criminal to civil law. Fourth, specific gaps encountered in the statutory tools of competition policy will be filled with carefully-crafted provisions suited to the 1980s and beyond. For example, a new civil "abuse of dominant position" section will replace the outmoded section dealing with monopoly in the criminal law. Fifth, coverage of the Act will be broadened to include banks and Crown corporations. Sixth, there is a need to refine administration and enforcement procedures under the Act. In doing so, the federal government is responding, in part, to suggestions made by those subject to the Act as well as drawing on its years of experience in applying the Act to individual situations.

Three Principles

In drafting the Bill, the government has sought to embody three principles in its provisions. First, the need for price (and cost) restraint to help ensure that double-digit inflation does not reoccur and that the recovery from the recent severe recession produces a period of sustained economic growth. Second, the government has sought to ensure that these amendments foster dynamic growth and efficiency through reliance on market forces. In particular, it is essential that Canada's international competitiveness be strengthened to meet the competition of our trading rivals. Third, the Bill is concerned with fairness in the functioning of markets -- fairness between producers and consumers, fairness between businesses and their suppliers, and suppliers and their customers, as well as fairness between large and small producers.

It seeks to ensure that success in the marketplace reflects superior efficiency, greater responsiveness to consumer needs, and a capacity to innovate and harness the forces of technological change. This will make the Canadian economy more dynamically efficient. It will also discourage the use of restrictive trade practices stemming from the possession of market power which would thwart that dynamism.

The Role of Competition Policy

There are two main ways in which we can increase the real income of all Canadians. One is to improve the efficiency with which we utilize our existing scarce resources. The other is to foster technological change and innovation in the way we make existing goods and services and in the creation of new goods and services. In other words, we can increase real incomes by improvements in productivity. Increased reliance on competitive market forces can help raise the real incomes of Canadians which have lagged in recent years. An effective competition policy provides a framework within which market forces can operate freely on a decentralized basis. But such a competition policy also strikes at restraints of trade that seek to inhibit the process of economic change by which new products and methods of production are introduced.

Canadians want an economy that allocates our scarce resources in the most efficient way possible at any moment of time. The value of competition as a social process is that it is the greatest spur to efficiency. It has been suggested that the best of all monopoly profits is "a quiet life". But, consumers who pay the price for the monopolist's quiet life will strongly disagree. Failure to adopt the lowest cost methods of production inevitably results in economic waste and in higher prices for consumers. An efficient economy is also one that is highly responsive to the preferences of consumers. To slow the rate of increase in prices the federal government wants to reinvigorate competitive market forces. The proposed amendments will do that by strengthening society's hand in striking at price fixing, market sharing and similar types of agreements that lessen competition unduly. There is no more fundamental threat to a mixed enterprise economy than the existence of such agreements among would-be competitors.

Canadians also want a dynamically efficient economy -- one that can meet the challenges of economic and social change. Indeed, the only economic certainty is that of change itself. Pressures for change take a variety of forms: import competition; the growth of potential export markets in both industrialized and developing countries; technological and organizational innovation; and changes in the size and composition of the labour force.

A dynamic economy not only responds to the forces of change, it actively seeks to generate change capable of enhancing our material well-being in the broad sense. Imagine the economy of 1984 without transistors and the silicon chip; without the jet engine; inexpensive photocopying; the electronic computer; plastics of all kinds; synthetic fibres; and without television. The statistics of Gross National Product cannot possibly do justice to the contribution of these technological innovations. The Skeoch-McDonald report on Competition Policy in 1976, for example, emphasized the importance of dynamic forces in producing the high rate of economic growth that the market system has achieved. It is competition that provides the best assurance that dynamic forces are able to operate to best effect.

Canadians also want a fair economy. Obviously, this is a value-laden term, but by a fair economy we mean one where the economic success of business firms is based on their responsiveness to consumers' needs, wants and hopes. We want an economy where firms prosper by offering better quality, lower prices (reflecting lower costs in most cases) and new goods and services that consumers find attractive. A fair economy is one where restrictive trade practices are minimized. In a fair economy, above-average economic rewards for producers reflect superior economic performance and are not the by-product of anti-competitive practices. Put another way, where competition is fair, efficient and responsive, firms -- even though they may be small -- are not the victims of the abuses of their rivals. Instead, consumers' demand will decide if firms flourish, not the harsh actions of rivals unrelated to their superior capability to meet the needs of the market.

An abundance of opportunity is also a hallmark of a fair economy. Subject to basic technological and economic constraints, entry into both product and labour markets must be as free as possible. Sellers must be free to try to sell new products or services in new ways to new customers. They must be free to experiment with new pricing policies subject only to the forces of competition and the requirement not to engage in predatory behaviour.

These amendments to the Combines Investigation Act are part of a long tradition. The framers and supporters of the first competition legislation in 1889, An Act for the Prevention and Suppression of Combinations Formed in Restraint of Trade, were also concerned with fairness in economic life. That piece of legislation was designed to prevent agreements among competitors that raised prices (or debased the quality of products) and "rooked" the consumer. Then, as now, the law was designed to ensure that those businessmen who sought to restrain trade were not able to coerce their competitors who wished to remain free of agreements to curb competition by such means as predatory pricing, refusal to deal, or similar "disciplinary" practices.

A fair economy requires government to establish and enforce the "rules of the game". Unfortunately, the competitive process is not always self-sustaining. Through a wide variety of stratagems and trade practices, business firms seek to strengthen their advantages and obtain at least some degree of market power. However, some limits must be placed on this natural tendency by an effective competition policy if the market system is to work for the benefit of all rather than for a self-chosen few. These limits actually act to protect the market by rewarding efficiency and productivity and by promoting innovation, dynamism and the adaptability of the Canadian market economy. In other words, competition policy is part of the general framework of rules within which market forces will operate most effectively.

If competition policy is effective, then the market will allocate resources efficiently and fairly. If the market operates efficiently and fairly then there is less need for direct government intervention in the economy. An effective Combines Investigation Act is not a regulatory statute itself, but rather an alternative to regulation.

Chapter I

THE PROCESS OF CONSULTATION

This Bill has been introduced only after a lengthy, thorough, and valuable process of consultation with the provincial governments as well as the business, consumer, legal and academic communities and with other interested groups. Some of the groups consulted include the following: the Business Council on National Issues, the Canadian Labour Congress, the Consumers' Association of Canada, the Canadian Federation of Independent Business, the Canadian Manufacturers' Association, the Canadian Federation of Independent Petroleum Marketers, the Canadian Bar Association and the Canadian Chamber of Commerce.

As the Speech from the Throne (December 7, 1983) made clear, the government is committed to developing "new partnerships among business, labour, government and other groups so that together we will build a better future." Moreover, the government intends to introduce more permanent mechanisms of consultation that will build upon the very extensive consultative processes that have characterized macro-economic policy making since late 1981.

With respect to this Bill to reform our competition policy the consultative process began in October 1980 when the then Minister of Consumer and Corporate Affairs, the Honourable André Ouellet, met with his provincial counterparts to discuss needed changes in the Combines Investigation Act.

In a speech to the Montreal Chamber of Commerce on March 31, 1981 the Minister outlined the major elements that were subsequently contained in his document "Proposals for Amending the Combines Investigation Act: A Framework for Discussion" which was released a month later. That document was distributed to trade associations, individual firms, lawyers, academics, provincial ministers of Consumer and Corporate Affairs, and former federal ministers of Consumer and Corporate Affairs. Each was invited to submit written comments. Many did. The Minister received 70 briefs and numerous letters over the next six months. Of the 70 briefs, 17 came from individual firms, 39 came from industry associations and 13 came from academics. The Business Council on National Issues, for example, prepared a complete set of draft amendments along with a commentary on the principles to be embodied in the legislation. These briefs and letters contained many thoughtful and constructive suggestions. The present package of proposed amendments owes much to the legitimate consultation process of the past years.

In addition, the Minister met personally with the representatives of almost three dozen groups or firms from the private sector. Senior departmental officials were also party to extensive discussions with business and other groups including a day-long meeting with some 15 academics in July 1981. The Minister met with his provincial counterparts in September 1981. While not all agreed with the proposals, as they were then, for amending the legislation, there was general support for the idea that reform was necessary.

The paper "Economic Development for Canada in the 1980s" which accompanied the November 1981 Budget emphasized that, "we must ... ensure that our laws which govern mergers, investment, competition and commerce are in tune with modern business practice, so that they facilitate economic expansion rather than burden initiative." The paper also emphasized that the performance of markets and their ability to adapt to changing conditions would be enhanced by reforming competition policy. Yet, the government decided in the Spring of 1982 to consult further with the business community and the provinces on some of the proposed changes in the draft bill.

Commencing in the spring of 1983 the Minister and senior departmental officials held meetings with important trade associations. In September 1983, the Minister of Consumer and Corporate Affairs, the Honourable Judy Erola met with a number of associations and with the provincial ministers of Consumer and Corporate Affairs to discuss the main elements of the draft legislation.

The Minister and officials met with many trade associations, in particular, the Business Council on National Issues, Canadian Manufacturers' Association and the Canadian Chamber of Commerce and the Consumers' Association to obtain their views on the proposed changes.

The whole process of studying and trying to revise Canada's competition legislation has been a protracted one. For example, the Economic Council proposed a long list of changes to the Act in 1969. Since that time, the issue has been extensively studied and debated in public, with many proposals made to and by the federal government. The present package of proposed amendments represent a finely-tuned package of proposals to reflect the unique requirements of the Canadian economy. The consultation has been extended, intensive and genuine. This package of proposals represents the optimal competition policy for Canada at this time.

Chapter II

SUMMARY OF MAIN POINTS IN THE BILL

1. Section 32 of the Combines Investigation Act dealing with agreements in restraint of trade will be amended to strengthen it and remove from it a number of ambiguous interpretations contained in recent jurisprudence.

2. For the first time, agreements among banks will become subject to the Act. Section 309 of the Bank Act will, with minor changes, be moved into the Combines Investigation Act.

3. The present criminal merger section is repealed and an entirely new civil law provision regarding mergers is included in the Bill. Those mergers challenged by the Director of Investigation and Research will be adjudicated by the regular federal and provincial civil courts. Only those mergers which are likely to lessen competition significantly and which are not likely to bring about gains in efficiency which result in a substantial real net savings of resources for the Canadian economy may be prohibited by the courts. There will also be a requirement for unusually large mergers to be prenotified to the Director.

4. The present criminal law section dealing with monopoly is to be repealed and replaced with a civil law section concerning abuse of dominant position. Cases under this section will be adjudicated by the civil courts. A court may make an order against a firm or group of firms where three conditions are satisfied. First, that the firm or firms involved substantially or completely control the market in question. Second, the firm or firms must have engaged in a practice of anti-competitive acts, examples of which are given in the section. And third, the practices complained of must have had, be having, or be likely to have the effect of lessening competition substantially. An efficiency defence is provided.

5. The Bill contains a new civil law provision which exempts certain specialization agreements dealing with articles from the conspiracy and exclusive dealing sections of the Combines Investigation Act. The Restrictive Trade Practices Commission may register a specialization agreement where it is likely to bring about gains in efficiency resulting in a substantial real net saving of resources for the Canadian economy.

6. A new civil law section concerning delivered pricing is to be enacted. The courts may order a supplier to provide one of his customers with the opportunity to take delivery of articles at any locality at which the supplier already makes delivery to any other customer on the same terms and conditions. Therefore, the section is intended to inhibit the use of delivered pricing schemes where they are used to establish uniform prices among competitors.

7. The Combines Investigation Act is to be made binding on federal and provincial agent Crown corporations in respect to their commercial activities that are conducted in actual or potential competition with other firms. Such Crown corporations will not be bound by the Act in respect to commercial activities that are directly associated with their regulatory activities.

8. In order to successfully implement the substantive provisions outlined above, a number of changes are to be made in adjudication under the Act.

   - All civil reviewable matters presently adjudicated by the RTPC will be transferred to the regular courts. This part of the Combines Investigation Act includes refusal to deal, tied selling, exclusive dealing and market restriction, for example.

   - The courts will adjudicate the new civil merger, delivered pricing and abuse of dominant position sections as well as all the criminal law sections.

   - In the case of the refusal of a specialization agreement by the RTPC, the Governor in Council, on his own motion, may review such cases and order the registration of the proposed specialization agreement.

   - Membership in the Restrictive Trade Practices Commission too is to be altered and the Commission's mandate changed so it may deal with specialization agreements.

9. Finally, a number of amendments are to be introduced that will clarify some of the responsibilities of the Director of Investigation and Research. For example, Section 8 is to be amended to provide that, following a written request, the Director of Investigation and Research shall inform any person whose conduct is being inquired into as to the progress of the inquiry. Sections will be added to provide that the Director shall inform the person obliged to provide documents of the "nature and scope" of the inquiry.

Chapter III

DISCUSSION OF THE BILL'S CONTENTS

This section describes the major amendments to the Combines Investigation Act that are contained in the Bill. In each case various aspects of the changes to be made are reviewed and the reasoning underlying the amendments is discussed.

AGREEMENTS IN RESTRAINT OF TRADE

The Main Changes. The main changes in section 32 are the following. First, a new subsection provides that the court may infer the existence of a conspiracy "from all the surrounding circumstances, with or without evidence of communication between or among the alleged parties" provided that those circumstances are consistent with proof beyond a reasonable doubt of the existence of such a conspiracy. Second, a new subsection states that the Crown need only prove the accused intended to and did enter into a conspiracy, but not that the parties intended that the conspiracy have the effect of lessening competition unduly. Third, subsection 32(5) is amended to broaden the export agreement defence. The section will provide that such agreements can result in a reduction or limitation in the volume of exports but not in their real value. In addition, the present paragraph 32(5)(d) is to be eliminated. That paragraph now provides that where an export agreement has the effect of lessening competition unduly in the domestic market it is not exempt from the general prohibition on conspiracies in subsection 32(1). Hence the export exemption is widened. Fourth, and finally, the maximum fine that can be imposed by a court following a conviction is to be raised from $1 million to $2 million.

The Need to Amend Section 32. Why must Canada strengthen its legislation relating to conspiracies in restraint of trade? The reasons are clear. The prohibition of agreements in restraint of trade such as those designed to fix prices and divide up markets represents the most fundamental element of antitrust or competition policy legislation. Such agreements contradict the most basic tenets of the free market system. Thus, their prohibition is the cornerstone of the Combines Investigation Act. One authority on antitrust law, Professor (now Justice) Richard Posner, states that horizontal price fixing or market sharing agreements "serve no socially beneficial purpose". He continues, "they are pernicious at

worst, innocuous at best; so far as economic science has been able to determine, they are rarely if ever beneficial in the sense of increasing economic efficiency or welfare."

Unless Canada adopts a strong rule on horizontal agreements to fix prices or share markets, cartelization is too easy to effect. Market forces will be subjugated to administrative arrangements among firms. Prices, the most important "signalling device" in a market economy, will deliver distorted or incorrect information. Moreover, cartel-like agreements involuntarily redistribute income from consumers, or other buyers, to sellers. In effect, the parties to a collusive agreement to fix prices are imposing a "tax" on the buyers of their goods or services. Agreements among competitors to fix prices or share markets also relax the pressure for firms to be efficient. The great benefit of competition is that by keeping prices down it also keeps costs down to the lowest attainable level. Therefore, both fairness and efficiency require that Canada have a tough and practicable conspiracy law.

Clarifying Recent Interpretations by the Courts. Recent interpretations of section 32 by the Supreme Court of Canada have introduced some ambiguity into what was quite well-defined jurisprudence. In respect of the central test -- that is, what constitutes an undue lessening of competition -- in the Aetna Insurance and Atlantic Sugar cases, (1977 and 1980 respectively), the Court appears to have relied, at least in part, on a meaning of an undue lessening of competition as one that would have "the effect of virtually relieving the conspirators from the influence of competition." However, subsection 1.1 of section 32 did not apply to the Aetna and Sugar cases because the period of the indictment in those cases preceded the coming into force of the subsection. Indeed, subsection 1.1 has yet to be tested in a court case. Moreover, over the course of the past two years, there have been four major convictions that demonstrate the section does indeed work. Therefore, the basic test in subsection 32(1) is, for the time being, to remain unchanged -- namely that the agreement, if put into effect, must lessen competition unduly.

Parliament will strengthen the section by clarifying for the courts its views as to how the section should be interpreted. The new subsection is designed to dispel the ambiguity created by the interpretation of the majority of the Supreme Court of Canada in the Atlantic Sugar case. The majority held that a "tacit agreement," in the absence of communication, did not constitute an agreement in the sense required by section 32 of the Combines Investigation Act. However, the principle that in conspiracy cases the courts may infer the existence of an agreement from the surrounding circumstances is an old one in English common law. What is of particular importance here is that in modern cases involving conspiracies in restraint of trade the evidence of agreement is seldom only direct evidence of communication among the alleged parties. Communication, in the context of an oligopoly, need not take a written or oral form. Finally, judges in previous cases (e.g., Armco and Large Lamps) inferred the existence of an agreement from circumstantial evidence. Therefore,

one of the new subsections provides that the court may infer the existence of a conspiracy "from all the surrounding circumstances, with or without evidence of communication between or among the alleged parties" provided, of course, that those circumstances are consistent with proof beyond a reasonable doubt of the existence of such an agreement.

The other new subsection of section 32 deals with the matter of intent. It states that the Crown must prove only that the accused intended to enter the agreement, not that the parties to the agreement intended to lessen competition unduly. This provision is desirable because of the ambiguity of certain parts of the judgments of the Supreme Court of Canada in the Aetna Insurance and Atlantic Sugar cases.

It has been argued by defence counsel in subsequent conspiracy cases that the majority of the Supreme Court of Canada decided that the Crown must prove beyond a reasonable doubt that the accused entered into the alleged agreement with the intention of lessening competition unduly. Previously, it was readily assumed that the element of mens rea (or intent) was met "when it was shown that the [accused] intended to enter, and did enter, into the very arrangement found to exist..." Moreover, in his dissenting opinion in the Atlantic Sugar case, Mr. Justice Estey held that the Crown need not prove the agreement among the accused was arrived at with the intention of lessening competition unduly. Thus, it is essential to state clearly, in the Act, that intent which it is necessary to prove as part of the conspiracy offence.

Export Agreements. Exports are of particular significance to the Canadian economy. They account for some 30 percent of our GNP. Reflecting this fact, since 1960 the Combines Investigation Act has provided a specific exemption for export agreements. This exemption applies if the agreement "relates only to the export of products [articles or services] from Canada." An export agreement is exempt, however, only so long as it does not result in a reduction in the volume of exports. This provision is to be changed in the Bill by replacing the word "volume" with "real value." A number of firms and trade associations have suggested that such changes be made. With the change to "real value" in paragraph 32(5)(a), export agreements would be exempt if they succeeded in raising the value of their products sold abroad, net of inflationary price increases, even though the physical volume of exports from Canada declined somewhat in response to higher real prices.

In addition, and most importantly, paragraph 32(5)(d) is to be deleted from the Combines Investigation Act. It provides that where an export agreement has the effect of lessening competition unduly in the domestic market, it is not exempt from the general prohibition on conspiracies in restraint of trade in subsection 32(1). Deletion of paragraph (d) will remove a good deal of uncertainty and, at the same time, widen the export exemption . This will make the export exemption more useful to firms combining their efforts to penetrate foreign markets.

A new subsection provides that the export exemption does not apply to agreements that, if carried into effect, would or would be likely to lessen competition unduly in the supply of services facilitating the export of products from Canada. Such services include transportation and insurance. Agreements in these sectors could inhibit the ability of Canadian companies to get their products to markets abroad at competitive prices.

Fines. Finally, section 32 is to be amended so that the maximum fine for price fixing, market sharing or related agreements is raised from $1 million to $2 million. Fines have to be large enough, in the words of Mr. Justice Brooke, "to assure that there is no profit in the criminal conduct in question." The learned judge went on to say, "The court must do its best to see to it that the fine is of sufficient quantum to take away any profit earned by reason of the criminal marketing ... and, in addition, and of importance, to be a strong deterrent."

To date, the largest single fine paid by a corporation in a conspiracy case was $300,000 in the Large Lamps case in 1976. By way of contrast, in the famous Hamilton Dredging case, which was conducted under the Criminal Code, the fines levied on eight corporations ranged between $450,000 and $2 million. Three corporations were fined $1 million and one was fined $2 million. The fines totalled $7.1 million in a case in which the Crown alleged the accused defrauded the public sector of about $4.2 million. In addition to these high fines, it should be noted that five executives were sentenced from two to five years imprisonment.

The $300,000 fine in the Large Lamps case also stands in sharp contrast to the $1 million fine imposed on Simpsons-Sears Ltd. for a number of counts of misleading advertising in July 1983. If the fine is sustained upon appeal, it will serve as a warning as to the seriousness with which the courts view breaches of the Combines Investigation Act.

In doubling the size of the maximum fine that may be imposed on a corporation from $1 million to $2 million, Parliament will be clearly indicating the seriousness with which it views conspiracies in restraint of trade. Along with strengthening the words of section 32 it will also increase the severity of the potential economic penalty for a violation, thereby potentially increasing the deterrent effects of such a penalty.

BANKS

It is obvious that the chartered banks in this country can have a tremendous impact on the performance of the economy. The assets of the five largest exceed $350 billion. Indeed, the assets of the five largest account for over three-quarters of the assets of the 50 largest financial institutions in Canada. With the new Bank Act of December 1980 which permitted the entry of foreign bank subsidiaries into Canada, the number of chartered banks has grown to more than 75.

Between October 1971 and October 1981, the total assets of the chartered banks grew at an average of 20.9 percent per year. This is far greater than the economy as a whole. In particular, the banks have become critically important in financing corporations as inflation has severely limited the role of equity markets. Therefore, it is essential that the banks be subject to competition policy legislation to ensure they operate independently and efficiently and that the rates they charge borrowers and pay to lenders are determined fairly by the forces of competition.

The Bill contains provisions which bring the chartered banks within the purview of the Combines Investigation Act. Section 309 of the Bank Act dealing with various types of agreements among banks, is to be repealed and enacted with minor changes as a section of the Combines Investigation Act. Hence, the Director of Investigation and Research rather than the Inspector General of Banks, will assume the responsibility for enforcing the prohibition against horizontal agreements among banks. A subsection exempts certain agreements among banks from the application of the charging subsection. It should be noted that the new section makes a variety of agreements among banks illegal per se. These include agreements or arrangements in respect to:

- the rate of interest on a deposit,
- the rate of interest or the charges on a loan,
- the amount of any charge for a service provided to a customer, and
- the amount or kind of a loan or service to be provided.

Moreover, the section applies to every director, officer or employee of the bank who knowingly enters into such an agreement on behalf of the bank.

The transfer of responsibility for competition policy among banks is in line with the federal government's policy of maintaining the Combines Investigation Act as a general law of general application.

In addition, the merger section of the Act will apply to bank amalgamations. However, provision is made for the provision not to apply if the Minister of Finance certifies to the Director that the merger is desireable in the interest of the financial system.

MERGERS

The Bill incorporates an entirely new set of provisions regarding mergers.

Overview. The main elements of these sections are as follows. First, mergers are to become a civil reviewable matter adjudicated by the regular provincial and federal courts. One of the principal problems with the present legislation is that it is part of the criminal law and hence ill-suited to the task of assessing mergers. Second, the test for the courts to apply in determining if it will grant an order to prevent or dissolve the merger is whether or not the merger "prevents or lessens, or is likely to prevent or lessen competition significantly." A significant lessening of competition would be defined to be one that has a "major and not insubstantial" effect on competition.

Third, in determining whether or not a merger lessens competition significantly, the courts are given a list of specific factors that it shall consider. These include the degree to which acceptable substitutes (including imports) are available, the nature of barriers to entry, the likelihood of the removal of a vigorous competitor, the nature and extent of change and innovation in a relevant market, and whether one of the firms involved has failed or is about to fail. Fourth, the courts will be empowered to prohibit proposed mergers, and in the case of completed mergers, to order dissolution, partial divestiture, and, in certain circumstances, to take such other action as they deem necessary to ensure that the merger does not lessen competition significantly. The latter order would be conditional on the parties choosing not to dissolve the merger.

Fifth, a court may make its order dissolving a merger or requiring partial divestiture subject to recision or variation if tariffs are reduced in a specified fashion or there is a specified reduction in import controls that will prevent the merger from lessening competition significantly. Sixth, an efficiency defence is provided. A court shall not make an order concerning a merger where it finds that the merger or proposed merger 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, if that order were made, it would prevent the gains in efficiency.

The Need for New Legislation. Why is it important that Parliament enact new and appropriate legislation by which economically significant mergers can be reviewed in the public interest? The main reason is that the existing provisions are embodied in the criminal law. As such, they are an inappropriate instrument to do the task assigned. Not surprisingly, the present law has been of limited success in its application. Although Canada has had some form of legislation on the subject of mergers since 1910, we have been employing the wrong tool. What is required is legislation to provide for a careful review of a relatively small number of mergers that are likely to have a significantly adverse effect on competition. That is why, for example, the federal government proposes to require parties to most mergers that would result in an entity with Canadian assets or annual sales exceeding $500 million to notify the Director of Investigation and Research a fixed period in advance of the

proposed merger. Furthermore, the acquiring party will have to provide him with certain information set out in the legislation that will permit him to make, at least a preliminary assessment of the likely effect of the merger. There will also be a list of exemptions provided.

Because Canada has been working with a criminal law that is quite ill-adapted to the task, there has never been a conviction in a contested merger case. In just one instance the defendants pleaded guilty, and in one case the Crown obtained an order prohibiting a firm from acquiring an interest in one of its smaller competitors. Indeed, because criminal law in this context is so difficult to apply, the Crown has brought only eight cases involving a charge of illegal merger before the courts over the past seven decades.

There has, however, been a large number of mergers in Canada, particularly in recent years. For example, between 1969 and 1980 there were more mergers or takeovers in Canada than in the preceding seven decades. In Canada during the period 1977-1981 there was a yearly average of over 430 mergers. By way of contrast, in the 1960s, the yearly average was only 253. What has been striking about the record of the past few years is the large number of large mergers.

The biggest mergers have been big indeed. If we look at the largest mergers in Canada during the merger boom between 1978 and 1981 and compare them to the largest mergers in the United States in 1981, we find those in the U.S. were only 35 percent to 85 percent larger than those in Canada (as measured by the value of the merger transaction). Yet, in terms of sales, the average size of the 50 largest firms in the U.S. was more than five times as large as those in Canada. In other words, the largest mergers in Canada were, in proportionate terms, much larger than those in the United States in recent years.

However, the number or size of mergers provide little indication of their economic or social significance. What we need to know is their effect on the nature and intensity of competition in individual markets. That is a complicated task requiring economic analysis and judgment. However, Canada presently has no effective basis for judging the desirability or undesirability of mergers except for some involving foreign firms. As has been said before, the criminal law is the wrong approach. There is a need, however, to examine the anticipated consequences of these mergers by a court.

In terms of their effects on competition, mergers may have no effect, an adverse effect, or they may strengthen competitive market forces. A merger can be like the Curate's egg: part of it may be desirable and part may be very undesirable. For example -- and this is particularly relevant in the Canadian context -- a merger may promise increased efficiency by achieving greater economies of scale while at the same time lessening competition in an industry whereby price and/or non-price competition is

attenuated. Therefore, until a detailed assessment is made of the specific economic circumstances surrounding a particular merger or proposed merger, it is not possible to make a reasoned judgment whether it is adverse to the public interest.

There is virtually unanimous support for the idea of placing more of competition policy, and mergers in particular, in civil law. As the Economic Council of Canada remarked in 1969, this change would "improve its relevance to economic goals, its effectiveness, and its acceptability to the general public". The Skeoch-MacDonald report in 1976 reached the same conclusion as has every academic writing on the subject in Canada.

Applying criminal law to mergers casts a stigma on a form of business behaviour that, in advance, cannot be said to be inherently against the public interest. Each economically significant merger must be analyzed in light of a number of factors to determine, if on balance, it is in the public interest. This cannot be done in the context of the criminal law. This point is amply reinforced by a review of the judicial decisions in the leading merger cases: Canadian Breweries (1960), B.C. Sugar (1960), and K.C. Irving (1976).

Under the existing law the crucial question is what constitutes public detriment flowing from the lessening of competition? It is evident that the courts have taken a narrow view of detriment. They have concentrated on such specific adverse effects as prices and profits and have been unwilling to consider larger issues of public policy. Then the existence of detriment to the public must be proved beyond a reasonable doubt. Moreover, the lessening of competition, even if it has resulted in a monopoly or near monopoly does not itself constitute an offence.

Second, the interpretation of the courts has focused largely on the effects of mergers after the fact. They have declined to try to anticipate the likely consequences of mergers. Yet, merger policy must be essentially forward-looking, that is, it must try to anticipate the likely consequences of legally combining two or more firms. In fairness to the courts, however, it should be noted that in two of the three cases discussed above, the mergers had been effected some years earlier. Therefore, even if the courts had declared Canadian Breweries Ltd. or K.C. Irving Ltd. to be guilty, they would be faced with the very difficult task of "unscrambling the eggs" to effect a satisfactory structural remedy. Had Canada prenotification provisions at the time like those embodied in the proposed legislation, the Director might have been able to challenge the mergers before they went into effect.

The Key Provisions. We move now to a discussion of some of the key provisions of the proposed merger sections. How are the courts to determine the effects of a merger on competition?

In their briefs in response to the Minister's "Framework for Discussion" paper of April 1981, a number of firms and trade associations urged that takeovers involving a failing firm required special consideration under the merger provisions. The Bill provides that this is one of the factors the courts shall consider in assessing the impact of the proposed merger on competition.

In Canada import competition is important in many industries. If a merger gives a domestic producer a very large share of the market, Canadian consumers need not be adversely affected if imports offer strong competition because of low tariff barriers and if transport costs are unimportant.

The Bill provides that the courts "shall have regard" to a number of factors as specified in the law. These include the following:

- any likelihood that the business of a party to the merger or proposed merger has failed or is about to fail;
- the degree to which acceptable substitutes, whether produced in Canada or imported, for products supplied by the parties to the merger or proposed merger are or are likely to be available;
- the size differentials between the relevant businesses of the parties to the merger or proposed merger and any remaining competitors;
- any barriers to entry into a market and the effect of the merger or proposed merger on such barriers; and
- any likelihood that the merger or proposed merger will result in the removal of a vigorous and effective competitor.

The need for an "efficiency defence" or gateway in Canadian merger policy has been endorsed by the Economic Council of Canada, the Skeoch-McDonald report, and virtually every other commentator on merger policy. There has, however, been debate about just how efficiency considerations should be incorporated into the decision-making process.

The Bill provides that a court shall not make an order in respect of a merger where it finds that the merger 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, if the order were made, it would prevent the gains in efficiency. It must be emphasized that the concept of efficiency gains in this section refers to savings in costs to society rather than simply to pecuniary gains to a firm which are attributable to a redistribution of income brought about by the merger. For example, if a merger permits two firms producing several products to rationalize their production processes and thereby obtain longer runs that reduce average costs, this would be a saving in resource costs to Canada as a whole. If,

on the other hand, the merger merely gives the new firm greater bargaining power with its suppliers, then what the new firm gains (a pecuniary gain), its suppliers lose. There has simply been a redistribution of income as a result of the merger and no saving in resources.

If a court finds that a merger is likely to lessen competition significantly, and that there is no "efficiency defence", what remedies are available? In the case of a proposed merger the court may prohibit the merger. In the case of a completed merger the court may dissolve the merger or require a partial divestiture of shares or assets if that is sufficient to prevent the merger from lessening competition significantly. It should be noted that under the present legislation (section 30) a similar power exists. In addition, the courts are given the general power to make orders requiring the parties to the merger to take such action that it finds necessary to ensure that the merger does not lessen competition significantly if the parties choose not to dissolve the merger to the satisfaction of the court. A court may order partial divestiture or dissolution of a merger subject to recision or variation if, within a specified period of time, there has occurred a reduction or removal of customs duties or import controls that will prevent the merger from lessening competition significantly.

At the outset of the discussion of the new merger provisions it was pointed out that most prospective mergers resulting in a business with total annual revenues or total assets of over $500 million would be required to give the Director of Investigation and Research advance notice of the proposed merger and wait a fixed period of time before completing it. There will be a list of exemptions for certain notifications. The prenotification provision is designed to give the Director sufficient time and information with which to assess whether he will challenge the proposed merger before the courts.

Three points regarding the proposed advance notice requirements should be noted. First, from looking at a list of the largest companies in Canada, it is clear that the section would apply to a limited number of companies and mergers. Second, the requirement is far less onerous than those imposed in the United States. There, all mergers must be notified where the acquiring firm has total assets or annual sales of $100 million or more and, where the acquired firm is engaged in manufacturing, it has total assets or annual sales of $10 million or more. Third, because information obtained by the Director under the Act is to be confidential, large firms contemplating a merger may be confident that the information they provide to the Director will not be disclosed and jeopardize their plans.

ABUSE OF DOMINANT POSITION

Overview. The present criminal law section 33 dealing with monopoly is to be repealed and a new section dealing with a civil reviewable matter is to be enacted. Its main elements are as follows. First, this civil reviewable matter is to be adjudicated by the courts. The Director may institute proceedings in the Federal Court of Canada, or in a provincial court of superior jurisdiction. Second, there are three elements to be proven (on the balance of probabilities) before a court may make an order following an application by the Director of Investigation and Research:

- the respondent(s) must "substantially or completely control" a class or species of business in Canada or any area thereof;
- the firm(s) must have been engaging in a practice of anti-competitive acts, a number of which are listed in the section.
- the practice of anti-competitive acts must have had, be having or likely to have the effect of preventing or lessening competition substantially in a market.

Third, a sample list of anti-competitive trade practices is provided in the Bill. It includes, but is not limited to, the following: squeezing, by a vertically integrated supplier, of the margin available to an unintegrated customer who competes with the supplier for the purpose of impeding the entry or expansion of that customer in a market; the acquisition of customers by a supplier or suppliers by a customer for the purpose of impeding or preventing a competitor's entry into or eliminating him from a market; freight equalization for the purpose of impeding or preventing entry of a competitor; the selective, temporary use of fighting brands to discipline or eliminate a competitor; and the pre-emption of scarce facilities or resources with the object of withholding them from the market. It must be emphasized that these practices must have had, be having or be likely to have the effect of preventing or lessening competition substantially.

Fourth, the court shall not issue an order if competition has been lessened substantially as a result of superior economic efficiency. Fifth, if a court finds the respondent has engaged in an abuse of dominant position it may prohibit the anti-competitive practice. If the practice has had or is having the effect of lessening competition substantially, the court may order partial divestiture of assets, or any other requirement necessary to overcome the effects of the anti-competitive practice or to restore competition in that market.

The Need for New Legislation. The position of the existing legislation and jurisprudence concerning monopoly has been unsatisfactory for a number of reasons. First, like the merger provisions, those dealing with monopoly have been embedded in the criminal law. Except for quite extreme

cases involving the abuse of monopoly power, the behaviour that competition policy seeks to circumscribe is not generally accepted as criminal in character. There is, for example, generally no moral stigma associated with such economic behaviour.

Second, the primary objections to monopoly relate to the conduct or behaviour of the monopolist and its effect on various aspects of economic performance. However, the types of behaviour that may produce consequences adverse to competition and undesirable economic performance may, in different circumstances, be pro-competitive. In other words, one cannot define, in advance, with suitable precision certain types of trade practices, which are almost always against the public interest and hence suitable for criminal prohibition.

Third, although the Crown obtained a conviction in the Eddy Match case in the 1950s, the existing provisions are not well suited to deal with the process of monopolization. Therefore, a new civil provision will have greater scope in dealing with the heart of the problem -- abuses by a firm or group of firms occupying a dominant position. The government recognizes that in the Canadian context, firms must be allowed to grow large and perhaps dominate their market. However, they should not be able to abuse that dominant position and lessen competition substantially.

Given the federal government's objective to improve efficiency in the allocation of resources, it would be inappropriate to attack firms which obtain a position of substantial market power by means of superior efficiency (i.e., lower costs), or because they offer new products that are highly valued by consumers. There is a strong case, however, for attacking forms of economic behaviour that impose artificial restraints on competition, the purpose of which is to achieve or entrench a position of monopoly, or at least great market power.

Fundamental to understanding this section is the fact that the Director must prove, on the balance of probabilities, three elements before a court may make an order concerning abuse of dominant position. These are: (i) "substantial or complete control" of the class or species of business in Canada or any area thereof; (ii) that the dominant firm has engaged or is engaging in a practice of anti-competitive acts; and (iii) that the practice has had, is having or likely to have the effect of "preventing or lessening competition substantially."

A number of the briefs responding to the Minister's "Framework for Discussion" document of April 1981 argued that many of the practices on the list of abusive or anti-competitive trade practices were, in certain circumstances, pro-competitive. To ensure that confusion does not exist, the list of practices has been shortened and revised.

It is true, that the squeezing of margins in a dual distribution system, and freight equalization, by themselves, can be means by which firms engage in active competition. However, when they are practised by a dominant firm or a group of firms which dominate the market, they can also be used to restrict competition and exclude competitors. Therefore, this section requires not only that the firm(s) engaging in certain trade practices substantially or completely control the market in question, but that the practice must have had, be having or be likely to have the effect of preventing or lessening competition substantially. Moreover, the listed practices have further restrictions placed on them to limit their application to more clearly anti-competitive circumstances.

Not only must the three elements described above be proven by the Director before a court may make an order in respect of abuse of dominant position, but also there is an efficiency defence which ensures that the court will not make an order if the lessening of competition results from superior economic efficiency. This provision is consistent with the view espoused in the Skeoch-McDonald report, namely that "public policy in this area is to assure so far as possible that monopoly power is not used in such ways as to interfere with dynamic change and with the achievement of real cost economies."

It was also argued by some of those commenting on the "Framework for Discussion" paper that because many industries in Canada are highly concentrated, the firms in those industries, would be deemed to be in substantial control of their market, hence open to an application by the Director concerning abuse of dominant position. The Bill provides that the Director must prove that the respondents do in fact substantially or completely control the business in question. Moreover, some of those submitting briefs were worried that simple conscious parallelism, where there was no agreement, would be prohibited or made a civil reviewable matter. These concerns were taken into account in the drafting of the provision so that the section does not deal with mere conscious parallelism. Rather, the section incorporates the definition of dominance used in the present monopoly section and requires proof of the effect on competition.

The objective of the new section is to protect the public interest in competition, not to protect particular competitors. If, because of lower costs, a firm or a small number of firms gradually acquire the bulk of a market, they will not thereby violate the provisions concerning abuse of dominant position. Canada's competition policy is designed to promote the efficient allocation of our scarce resources, and also to ensure that the competitive process is fair.

The courts are to be given powers to remedy cases of abuse of dominant position. In the first instance they may simply prohibit continuation of the conduct in respect of which the Director has made an application. While such a remedy may be effective, in certain circumstances it would not address the underlying causes giving rise to

the undesirable forms of behaviour. Therefore, in circumstances where there has already been a substantial lessening of competition, provision is made for orders requiring partial divestiture or any other act or thing that, the court finds is necessary to overcome the effects of the anti-competitive practice or to restore competition in that market. In some circumstances, mandatory or prohibitionary orders may be important because it is the only form of relief that can effectively eliminate the source of the abuses, namely substantial market power.

Finally, it should be emphasized that the abuse of dominant position section will be adjudicated by the courts, hence a full right of appeal on both facts and law is available as is the case under the civil law in general.

DELIVERED PRICING

A new civil law section of the Combines Investigation Act will deal with delivered pricing. Under the new section a supplier may be ordered not to refuse one of his customers the opportunity to take delivery of an article at any locality at which the supplier makes delivery to any other of his customers on the same terms and conditions that would be available to that customer if his place of business was in that locality. This section only applies when the practice is engaged in by a major supplier or is widespread in an industry and when the customer is denied an advantage that could otherwise be available to him. In effect, an existing customer can obtain the same f.o.b. terms at any of a supplier's outlets as are given to any other customer. The section applies only to articles and not to services.

Under delivered pricing, the suppliers of a product, for example, may divide the overall market into two zones, each with a different price. The price for one zone may be higher than the price for the other because of the addition of arbitrary "phantom" freight. If a buyer from the higher-price zone could take delivery in the other zone at the prices in effect there, he could save money by arranging his own transportation. In some circumstances, the suppliers will not permit this because it would tend to break down their oligopolistic pricing system. The practice is not being outlawed. Rather, in seeking relief from this manifestation of market power, an attempt is being made to dispel some of the rigidities of oligopolistic behaviour.

The pricing of articles on a delivered-to-the-customer basis is widespread in Canada. However, this section does not seek to prohibit basing point or other delivered pricing schemes. Rather it seeks to ensure that all customers of a supplier are treated fairly and to ensure that goods move from suppliers to their customers in the least costly manner.

Delivered pricing constitutes something of a conundrum for competition policy because it can be used to adversely affect competition or, through freight absorption, to increase competition. Differences in the cost of transportation arising from suppliers being located at varying distances from their customers can be a source of competitive advantage for those customers attempting to minimize their costs. In the case of oligopolies in which the competitive process is vigorous, companies may use freight absorption as a means of either extending the geographic scope of their markets or as a device to secretly cut prices. Therefore, unsystematic freight absorption can be used to increase competition.

Industry-wide systems of freight absorption, however, do provide grounds for concern where heavy industrial materials are involved and transport is a substantial element of cost. They may involve excessive cross-hauling and even lead to the location of consuming industries too far from their sources of supply. Therefore, this section will permit the optimal location of industrial development in Canada reflecting costs of production and transportation.

Of particular concern for competition policy is that delivered pricing systems have been found to facilitate close coordination of pricing, particularly where there are only a few suppliers. For example, in the Armco case in 1974 which dealt with metal culverts, Mr. Justice Lerner, in his judgment, emphasized that a delivered pricing scheme was instrumental in effecting uniform prices among 10 suppliers for almost four years.

It must be made clear that the proposed section does not prohibit basing-point systems or other forms of delivered pricing under which freight may be absorbed by suppliers. Rather, it seeks to strengthen the position of buyers by permitting them to choose among established delivery points, and to weaken the ability of an industry to maintain uniform prices to customers by such systems. Only to that extent does the law limit the suppliers' ability to set his own pricing policy.

SPECIALIZATION AGREEMENTS

In its paper Economic Development for Canada in the 1980s released in November 1981, and in subsequent statements, the federal government has made it clear that it is committed to an industrial strategy that will revitalize the economy. In particular, the government wishes to strengthen Canada's manufacturing industries. Because of the small size of our domestic market relative to potential economies of scale, it is essential that the rationalization of manufacturing output be facilitated. Hence, the Bill will introduce a provision in the Combines Investigation Act to exempt certain specialization agreements from the

conspiracy and exclusive dealing sections of the Act. The essence of such an agreement is that each of the parties discontinues producing one or more articles. In this way both producers reduce their costs through greater specialization and longer production runs.

Specialization agreements will be exempt from the conspiracy and exclusive dealing sections provided such agreements are approved and registered by the Restrictive Trade Practices Commission. The RTPC may order the registration of a proposed specialization agreement where it finds that:

- its implementation is likely to bring about gains in efficiency resulting in real savings in resources for the Canadian economy substantially greater than the resource costs due to the lessening of competition; and

- the parties to the agreement have not tried to coerce anyone to be a party to the agreement.

It is left up to the Commission to determine the time period covered by the order as no limit is specified in the Act. This provision is consistent with the representations made in many of the briefs submitted in response to the Minister's "Framework for Discussion" paper of April 1981.

If the necessary efficiency gains are likely to occur but, if as a result of the implementation of the agreement, "there is not likely to be substantial competition remaining in the market or markets" affected, the RTPC may make its order registering the agreement conditional upon such things as a partial divestiture of assets, wider licensing of patents, a reduction of tariffs, or a removal of import quotas. Proposed and approved agreements are to be recorded in a public register maintained by the RTPC.

It is noteworthy that this provision in the Bill applies only to articles (not services) already being produced and sold in Canada. Specialization agreements that propose to include articles not yet being manufactured by the parties may not be registered. This limitation is necessary to prevent the cartelization of an industry. It allows for specialization once the article has passed the market test. It is also necessary to reflect the fundamental purpose of allowing such agreements, that is, to solve the problem of inefficiencies in production already embedded in the economy. Specialization agreements are a form of assistance to permit the rationalization of industrial output based on previous decisions.

Many studies of the structure of the Canadian economy have found that a significant fraction of our output is produced and distributed less efficiently than, for example, in the United States. Many Canadian industries suffer from a lack of economies of scale in production. These

include poor economies in production due to plants that are too small, the high cost of short production runs, and the potentially avoidable costs of multiple designs and styling. The evidence suggests that it is the small size of plants and the lack of specialization that are primary factors resulting in high cost manufacturing operations in Canada.

Specialization agreements cannot, themselves, effect the rationalization of Canadian manufacturing industries. As some analysts point out, they provide a means of reducing the transaction's costs of adapting to change, especially the changes associated with declining markets and increasing competition.

The Economic Council in 1969, the Skeoch-McDonald report in 1976, and previous bills proposed that provision be made to approve and register specialization agreements. Moreover, in response to representations by the business community, no term for such agreements is specified in the Bill. The RTPC shall determine what period is appropriate on a case by case basis.

The most important criterion to be used by the RTPC in determining whether it will register a proposed specialization agreement is whether it will produce efficiency gains resulting in substantially greater savings than the resource costs attributable to the lessening of competition. Essentially, as discussed in the merger section, this means that cost reductions which result in only "pecuniary" savings but not savings of resources to Canada as a whole, will not be recognized. In addition, because a specialization agreement will have the effect of reducing competition among the parties to it, the RTPC must be assured that, on balance, the real efficiency gains attributable to greater specialization and longer production runs substantially outweigh any possible loss in efficiency attributable to the reduction in competitive pressures which are a spur to efficient operations.

The Commission, in considering whether an agreement is likely to bring about the efficiencies discussed above, shall consider whether the gains will result in an increase in exports or import substitution.

Finally, it should be noted that if the RTPC refuses to register a proposed specialization agreement, the Governor in Council, on his own motion, may review the decision. The Governor in Council may, within 60 days, make an order directing that the specialization agreement be registered.

CROWN CORPORATIONS

Federal and provincial Crown corporations are important suppliers and purchasers of goods and services in the Canadian economy. For instance, they account for well over one-half of domestic passenger air travel, almost one-half the rail freight transported, and one-third of the expenditures of all radio and television broadcasters in Canada, and are

major actors in the petroleum, financing and manufacturing industries. Indeed, in terms of revenues, 17 of the 27 largest federal and provincial Crown corporations ranked in the top 200 non-financial corporations in Canada in 1980.

The number of federal public corporations has increased greatly in the last two decades. While not all these federal Crown corporations are engaged in commercial activities in actual or potential competition with privately-owned businesses, a great many are.

"Many of the Crown-owned corporations, large and small, have monopolistic or significant position in a segment of the economy," notes the Auditor General. If such economically important entities are in a position to exercise considerable market power, their adherence to the Combines Investigation Act is of great importance to the performance, as well as the equitableness of the Canadian economy. The same proposition applies to provincial Crown corporations. Both logic and fairness suggest that where such entities are engaged in commercial activities, they should be subject to the same laws of general application as are privately-owned firms.

It was the recent Eldorado Nuclear/Uranium Canada case, in which two of the six firms charged with violating subsection 32(1) of the Act were federal Crown corporations, that has brought the matter to public prominence. Uranium Canada Limited and Eldorado Nuclear Limited, two federal Crown corporations, argued before the Supreme Court of Canada that as an agent or servant of the Crown they were immune from prosecution under the Combines Investigation Act.

In December 1983 the Supreme Court of Canada ruled that, unless otherwise specified, even Crown corporations that are agents of Her Majesty, engaged in commercial activities in direct competition with privately-owned enterprises are not subject to the Combines Investigation Act, although their privately-owned competitors are subject to it. The majority judgment concluded that this "seems to conflict with the basic notions of equality before the law" but held that the court "is not entitled to question the basic concept of Crown immunity". It should be noted, however, that the majority also held that agent Crown corporations have immunity from the Combines Investigation Act only so long as their activities occur within their legislative mandates.

Therefore, to make such Crown corporations subject to the Act, it is necessary to amend it to specifically state that federal and provincial Crown corporations, that are agents of Her Majesty, engaging in commercial activities, in actual or potential competition with privately-owned enterprises are so bound.

Presently, there is no dispute as to the application of the Act to Crown corporations that are not agents of Her Majesty. The proposed section will make it clear that both federal and provincial agent Crown corporations, that are engaged in commercial activity in actual or

potential competition with privately-owned firms or other Crown corporations are subject to the Combines Investigation Act. However, the Act will not be binding in respect of the commercial activities of such Crown corporations that are directly associated with the corporations' regulatory activities. This will confirm that the Combines Investigation Act is a general law of general application.

ADMINISTRATIVE AND ADJUDICATIVE MATTERS

Changes in Adjudication. The Bill provides that adjudication under the Combines Investigation Act be divided between the courts and the Restrictive Trade Practices Commission. The regular courts are to have jurisdiction over the civil reviewable matters in the present Part IV.1 of the Act (sections 31.2 through 31.7). These deal with refusal to deal; consignment selling; exclusive dealing, tied selling, and market restriction; foreign judgments etc.; foreign laws and directives; and refusal to supply by a foreign supplier.

The courts will also have jurisdiction over the three new civil law sections dealing with abuse of dominant position, mergers, and delivered pricing. They will also continue to have jurisdiction over all the present criminal provisions, except section 33 which is to be repealed, and will continue to have jurisdiction over the new criminal prohibition against agreements by banks. (The criminal law sections are all contained in Part V of the Combines Investigation Act.) Note that proceedings involving civil reviewable matters may be initiated in the Federal Court of Canada - Trial Division or in the Supreme Court/Superior Court/Court of Queen's Bench of a province or territory, as the case may be.

The Restrictive Trade Practices Commission is to be enlarged from four full-time members to permit the appointment of three part-time members. The Commission may operate in panels of three provided one member of the panel is a full-time member. The chairman of a panel is so designated by the chairman of the Commission. The new adjudicative responsibilities of the RTPC relate to specialization agreements.

The RTPC will lose its present jurisdiction over the civil reviewable matters in the present Part IV.1 of the Act. However, individual members of the RTPC will continue to:

- exercise their role of authorizing written returns of information, searches, and affidavits requested by the Director (sections 9, 10, and 12); and

- authorize and preside over examination of witnesses under oath by the Director in the course of an inquiry (section 17).

The Commission as a body will continue to:

- hold hearings and make reports on statements of evidence or general inquiries submitted by the Director (sections 18 and 47 respectively).

Another section provides that all quasi-judicial hearings by the RTPC are to be dealt with as informally and as expeditiously as the circumstances and conditions of fairness will permit. Although the RTPC is a court of record, for limited purposes it is not to be bound by traditional legal or technical rules of evidence except as they relate to solicitor-client privilege.

With respect to the matter of appeals from the court or the RTPC or to review by Cabinet, essentially there are two sets of procedures. First, where the courts are the adjudicatory body, whether the case involves a criminal offence or a civil reviewable matter under Part IV.1 as amended, the usual appeal provisions would apply. Following a trial court's judgment, the route of appeal would be to either the provincial Appeal Court or the Federal Court of Appeal depending upon which court was originally chosen by the Crown in initiating the case. Any subsequent appeal would be to the Supreme Court of Canada.

Second, in the case of specialization agreements there is both a limited right of appeal from the decision of the RTPC and provision for review by the Governor in Council. The judicial review provision relates to section 28 of the Federal Court Act which provides that in respect to any federal board, commission or other tribunal, the Federal Court of Appeal has jurisdiction to "hear and determine an application to review and set aside a decision or order..." where that board, commission or tribunal, "(a) failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction; (b) erred in law in making its decision or order, whether or not the error appears on the face of the record; or (c) based its decision or order on an erroneous finding of fact that it made in a perverse or capricious manner or without regard to the material before it".

Provision is also made for a review of RTPC decisions concerning specialization agreements by the Governor in Council on his own motion. The Governor in Council can order the registration of the proposed specialization agreement where the RTPC has refused to do so.

Investigatory Procedures of the Director. As was indicated above, the Bill incorporates several changes in the investigatory procedures under the Combines Investigation Act. Section 8 is to be amended to provide that, following a written request, the Director of Investigation and Research shall inform any person subject to inquiry as to the progress of the inquiry. When the Director exercises compulsory powers he will be obliged to inform the person subject to the powers of the nature and scope of the inquiry.

A new section will define the procedures to be followed where claims of solicitor-client privilege are made in the course of the exercise of the Director's compulsory powers. Finally, a new subsection ensures that persons carrying out duties or functions under the Act shall not disclose to any person, other than a Canadian law enforcement agency: (a) the identity of sources of information; and (b) information obtained pursuant to sections 9, 10, 12, 17 and the section dealing with the prenotification of mergers.

The powers of the Director are essential to determining both whether and to what extent offences have been committed under the Act and whether certain restrictive or predatory practices are being engaged in which should be prohibited or whether an anti-competitive merger should be remedied. It has been suggested, for example, that the Director's power to undertake searches, call oral evidence, and require returns of information should be amended to provide that such actions must be authorized by a court of criminal jurisdiction rather than by a member of the Restrictive Trade Practices Commission, as is the case at present.

This suggestion fails to appreciate the nature of offences being investigated under the Act. The justification for requiring the Director to proceed via the criminal courts is sometimes supported on the grounds that such a requirement exists in the case of the administration of the Income Tax Act. What is often forgotten, however, is that officials in the Department of National Revenue are authorized to audit the books and records of an individual or firm at any time without the necessity of obtaining a search order. Having determined what evidence they wish to secure through such an audit, a subsequent court-ordered search becomes more easily obtained.

It has also been argued that the Director's application for the use of his formal powers should be supported with sufficiently detailed information with regard to the scope or nature of an investigation to enable both the court and the party being investigated to form an opinion as to whether the evidence being sought is material to the inquiry at hand. This proposal is being met by a new provision under which the Director's staff shall inform the person under inquiry of the nature and the scope of the inquiry. It is the administrative practice of the Director to do this at the present time.

It is also contended that the Director should only be authorized to enter premises and seize documents in the course of investigating possible criminal offences, as opposed to civil matters, with those involved being given an opportunity to examine and copy documents before their removal. With respect to the first point, there is a particular problem in investigating alleged competition policy infractions. The Skeoch-McDonald report put it this way: "When the Director conducts an inquiry and uses his compulsory investigative powers, he may not know, although he would

usually have a good idea, whether any proceedings instituted as a result would be criminal or civil." In any event, it was the view of the Skeoch-McDonald report that search and seizure powers were justified for both civil and criminal proceedings.

The new section lays down, for the first time, the procedure to be followed in dealing with claims of solicitor-client privilege that are made during the course of an investigation by the Director. The Federal Court of Appeal in the Shell Canada case, has held that Parliament did not intend to undermine the solicitor-client relationship of confidentiality in section 10 of the Combines Investigation Act. The Court stated, however, that this ruling applied only to bona fide communications between solicitor and client. Therefore, what the new section does is establish the procedure by which claims of solicitor-client privilege will be adjudicated by the courts.

Chapter IV

CONCLUSION

In the June 1982 Budget the Government of Canada committed itself to a broadly-based strategy of voluntary restraints on wages and prices so that both the rate of inflation and unemployment may be sharply reduced. The Minister of Finance made it clear that expectations must be changed and productivity increased if Canada is to avoid "further slide into recession or a controlled society".

One way to avoid this most undesirable state of affairs is to strengthen the competitive process. Hence the need to strike down artificial restraints on competition. Three provisions in the Bill deal with this matter directly. First, it is proposed to clarify and thereby strengthen the conspiracy provision which prohibits agreements which lessen competition unduly. Second, delivered pricing will be subject to a new civil law provision. Third, a new civil law provision will deal firmly with anti-competitive trade practices of a firm or a number of firms occupying a dominant position in a market where such practice has a substantial adverse effect on competition.

At the same time, it must be possible for Canadian firms to rationalize their production processes so that they can be more efficient. The Bill contains two major elements relevant to this issue. New civil law provisions regarding mergers will prohibit only those mergers which lessen competition significantly and which mergers also do not result in real efficiency gains. Second, specialization agreements will be permitted where the real efficiency gains substantially outweigh the efficiency losses attributable to the lessening of competition. It should be apparent, therefore, that through these provisions in the Combines Investigation Act, only those mergers and specialization agreements that provide little or no efficiency benefits while lessening competition significantly, will be subject to prohibition.

In November 1981 in the Document Economic Development for Canada in the 1980s the federal government recommitted itself to achieving the enormous potential of the Canadian economy. By reforming competition policy we can see to it that we will have the framework in which market forces can assist in producing "national economic renewal." The economic development plan emphasized that we, "must ... ensure that our laws which govern mergers, investment, competition and commerce are in tune with modern business practice, so that they facilitate economic expansion rather than burden initiative." This Bill does precisely that.

It has taken many years to obtain the much-needed reforms to Canada's competition legislation. The Economic Council of Canada, in a report requested by the government, recommended in 1969 almost all of the changes embodied in this Bill. The federal government introduced new legislation in 1971 and in 1977 to deal with mergers, specialization agreements, abuse of dominant position, delivered pricing and agreements among banks. It did not pass. Some reforms were enacted in 1975 but they dealt with different matters including, inter alia, the application of the Act to services, misleading advertising, representations before federal regulatory tribunals, and a number of civil reviewable matters.

The amendments to the Combines Investigation Act contained in the Bill have been preceded by years of debate and discussion in Parliament and in the public arena generally. They have been carefully crafted to help with the fight against inflation by reinvigorating market forces. They will help to ensure that competitive processes will be fair as well as efficient. They will also prevent restraints on the dynamic forces that bring the economy the benefits of innovation and technological change.