# The Administration and Enforcement of Competition Policy in Canada, 1960 to 1975 :

## an application of performance measurement

Paul K. Gorecki

Consumer and Corporate Affairs Canada

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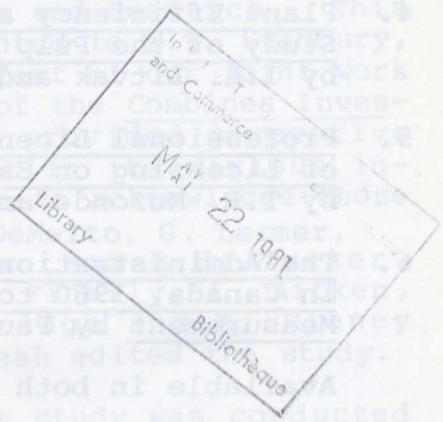
# THE ADMINISTRATION AND ENFORCEMENT OF COMPETITION POLICY IN CANADA, 1960 TO 1975: AN APPLICATION OF PERFORMANCE MEASUREMENT




Paul K. Gorecki

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The bulk of the work for this study was conducted while I was an employee of the Director of Investigation and Research. However, portions were written while I was a visitor at Simon Fraser University and, later, as an employee of the Economic Council of Canada.

Paul K. Gorecki.

# FOREWORD

A primary objective in the Research Branch, Bureau of Competition Policy is the preparation of policy-oriented research studies in the fields of industrial organization and competition policy, relating directly to the contents or administration of the Combines Investigation Act. Publication is intended first, to provide public access to results of individual studies and second to provide businessmen, academics, government officials and other interested parties an opportunity to form a view and comment on the direction and quality of the research. In addition, it is hoped that this monograph series will serve as a focal point for policy-oriented micro-economic research in Canada. Studies published in this series are prepared both by personnel employed in the Branch and by research consultants under external contract.

The federal government instituted a policy that all agencies and departments develop indices or measures of efficiency and effectiveness by 1980. Such indices are to be used to monitor performance. This monograph is, in part, an attempt to comply with this federal government policy. Indeed, it should be considered a challenge as well, in view of the measurement and conceptual difficulties encountered concerning competition policy. This monograph develops indices of efficiency and effectiveness of competition policy and applies them to the period 1960/61 to 1974/75, with suggestions for improving the operations of competition policy.

The depth of insight revealed in the study reflects both the high analytical capability of Paul Gorecki, the author, and a close familiarity with the operations of the Bureau resulting from his employment in enforcement and research.

As with all monographs published by the Bureau of Competition Policy, views expressed in this study are those of the author and do not necessarily reflect either those of the government or the Bureau of Competition Policy.

D.F. McKinley
Director
Research Branch

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# CHAPTER I

## SOME INTRODUCTORY ISSUES

### 1.1 A Question of Definition: What is Competition Policy?

Competition[1] refers to the degree of inter-firm rivalry among a group of sellers in a given market. This rivalry or competition has many dimensions of both a static and dynamic[2] nature: price, product differentiation, product quality and reliability, the new product. Rivalry refers to both the actual sellers of a product and the potential producer or competitor. The degree of competition will be a function of many variables: the number and size distribution of sellers and buyers, the stage in the product cycle, the supply of potential entrants, the size of the market, elasticity of demand, the importance of sales and product promotion; the rate of technological change.

Several attempts have been made to order these factors into a coherent theoretical framework to explain and predict the degree of competition.[3] This has led to the development of market categories which vary from monopoly (i.e., a single seller, which is usually characterized as devoid of competition) to perfect competition (i.e., a large number of sellers, none of which can significantly affect the price where the degree of competition is maximized). In Canada, the most common form of market is oligopolistic (i.e., a small group of large enterprises aware of their interdependence in pricing and output decisions). Such market forms are not noted for their competitive vigour.[4]

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1. The concept of competition is discussed in Scherer (1970, pp. 8-11) and Stigler (1968, pp. 5-28).

2. The dynamic aspect is stressed in Skeoch et al. (1976) report to the Federal Government on Canada's revision to competition policy law.

3. The most widely accepted model is the structure, conduct, performance framework. (See Scherer, 1970, pp. 3-6.) The applicability of this model has been tested for Canada by Jones et al. (1973) and McFetridge (1973). Their results are generally supportive of the model.

4. The most generally accepted model is the tariff protected oligopoly of Eastman & Stykolt (1967).

A large number of government policies and actions affect the degree of competition within an industry, both adversely and favourably. A few examples of each will serve to illustrate the point. Tax policies introduced in the early 1970's are said by Kierans (1975, p. 202) to "ensure big would get bigger and fewer". The policy in the 1970's of controlling all new foreign direct investment in Canada may reduce a potentially important stimulus to competition - the multinational enterprise.[5] Numerous non-tariff barriers to trade are erected by government, thus reducing international competition through imports.[6] Even within Canada there are barriers to the free flow of goods across provincial boundaries, such as agricultural products, beer and wine.[7] Finally, regulation in many areas completely stifles competition.[8]

On the other hand, some government policies encourage competition. The current revisions to the Bank Act are designed to allow much easier entry in order to stimulate competition.[9] Tariffs have been reduced through multilateral trade negotiations such as the Kennedy Round.[10] The recent creation of a Crown Corporation, Petro-Canada Ltd., in the field of petroleum exploration and refining may result in a competitive stimulus in the energy sector. However, to place this disparate set of policies, which are primarily concerned with such diverse issues as the nature of Canada's federal system and national sovereignty, under the rubric of competition policy would be to expand the term to include virtually all government activity. Such an all-encompassing definition is of little use in delimiting a project area capable of being tackled by a single researcher with limited funds and time.[11]

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5. See Gorecki (1976a) for details.

6. See Stegemann (1973).

7. This issue is discussed in Safarian (1974).

8. For a discussion of regulatory issues together with some specific examples see Stanbury (1978).

9. See Canada, Department of Finance (1976).

10. They still remain high, however, especially on manufactured goods. See Economic Council of Canada (1975).

11. One of the few attempts at a comprehensive all-encompassing study was Reynolds (1940).

A more usual, practical, manageable and sensible definition of competition policy[12] refers to the administration and enforcement of the Combines Investigation Act. This definition should not be construed as ignoring completely other government policies which affect competitive conditions. Indeed, the Act specifically recognizes and takes into account the potentially adverse effects that tariffs, patents, trademarks and, more recently, regulated industries, may have on competitive conditions in the marketplace. Hence these issues will be discussed. Although the scope of the study has been limited by narrowing the definition of competition policy, a problem remains in that the Combines Investigation Act has existed since 1910.[13] However, the series of papers and books which have examined competition policy in Canada have concentrated on the period up to 1960.[14] Hence, this date forms a conve-

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12. Moore (1970, p. 1) has noted:

> The term competition policy is used to replace the usual, cumbersome, descriptive phrase anticombines and restrictive trade practices policy. The former term has considerable currency in Britain and was adopted by the Economic Council of Canada in its Interim Report, on the government's reference concerning consumer affairs, patents, combines, mergers, and restrictive trade practices. Competition policy is preferable not only because it is shorter but also because it places the emphasis on the positive rather than the negative aspects of the problems of public regulation of business behaviour. (emphasis in original)

13. In fact competition policy dates from an 1889 statute.

14. A number of general books of reference exist which describe and analyze the various periods of the development of competition policy in Canada up to 1960. The major ones are:

| Source | Period Covered |
|---|---|
| Ball (1934) | 1889 - 1934 |
| Bladen (1956) | 1889 - 1956 |
| MacQuarrie Committee (1952) | 1889 - 1952 |
| Reynolds (1940) | 1889 - 1939 |
| Rosenbluth and Thorburn (1963) | 1952 - 1960 |
| Skeoch (1966a) | 1923 - 1964 |

The MacQuarrie Committee (1952) has been updated in Rea and McLeod (1976) and Canada, Department of Consumer and Corporate Affairs (1973) to events to the early 1970's. The best, short, general introduction to competition policy is the updated MacQuarrie Committee account in either of these two sources.

nient starting point.[15] The terminal date is the fiscal year ending March 31, 1975, since significant amendments to the Combines Investigation Act were enacted on January 1, 1976. These amendments and their importance are, however, remarked upon here. Having thus decided to study the administration and enforcement of competition policy in Canada between 1960/61 and 1974/75[16] the next issue to resolve was that of the appropriate methodology to employ.

## 1.2 A Question of Methodology: Approaches to Evaluating Competition Policy

A number of approaches to evaluating the administration and enforcement of competition policy have been or are capable of being utilized. Each of these methods reveals a different facet of competition policy. Hence, these approaches need not be regarded so much as substitutes,[17] but rather as complements which lead to a greater understanding and appreciation of the process and impact of administration and enforcement. Five different approaches are outlined below, of which one is selected and the reasons stated. The intent is to be brief and synoptic, not to present a detailed critical review.

Jones (1975) has studied the behaviour of the Director of Investigation and Research, Canada's chief

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15. This is not to say that no studies of competition policy have been made for the post 1960 period. However, most of the attention has been concentrated on the revisions to the Combines Investigation Act which started in 1966. (See Stanbury, 1977a, for details). Subsequent to this study being well underway, Goff and Reasons (1978) analysis of competition policy was published. However, this book adopts a different approach to that used here and hence can be regarded as complementary to this study.

16. 1960/61 and 1974/75 refer to the fiscal year ending March 31, 1961, and 1975, respectively. This is the fiscal year used by the Director of Investigation and Research.

17. Except insofar as the individual researcher's time and resources are constrained so that only one approach is usually feasible.

competition policy official, with regard to merger policy over the period 1960 to 1971. The methodology consisted of an application of a Downsian[18] framework for studying bureaucratic behaviour. This approach and the results were summarized as follows by Jones (1975, p. 269):

> This paper investigates the implications for public policy in general and merger sections of the Combines Act in particular of the hypothesis that bureaus, when carrying out their administrative duties, attempt to maximize their private utility functions rather than the social utility function expressed in the legislation. The analytical procedure, given alternative utility goals of power, prestige, convenience, and security and the appropriate constraints, is to predict the behaviour of the Combines Branch (from 1960-71) and to test these predictions against actual Branch behaviour. The evidence on the Branch's behaviour (all cases prosecuted and discontinued) suggests that its conduct can be better explained by security maximization than by any alternative private or altruistic goal. However, it is not clear that this was a bad thing for public policy because it can be argued that the Branch's behaviour brought public policy in this area closer to the social welfare function implied in the legislation than would have been the case if the government had successfully maximized its private utility function.

No subsequent attempts have been made to extend the analysis to include other sections of the Combines Investigation Act.

Competition policy, as remarked above, consists of the administration and enforcement of the Combines Investigation Act. This statute forms part of the criminal law of Canada.[19] Hence, one approach to studying competition policy is to employ the tools and analytical techniques of the criminologist. Goff and Reasons (1978) apply this

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18. See, in particular, Downs (1967). Another application of this approach has been to the Bank of Canada. (See Acheson and Chant, 1973, for details.)

19. Competition policy has been based on criminal law since its inception in 1889. However, as of January 1, 1976 some civil law provisions were introduced. These are outlined in Chapter III, section 3.7, below.

method to competition policy between 1889 to 1972. They are not impressed with what they find. For example, at one point in their study the following passage is found:

> It appears the government's legislation and enforcement concerning combines is not directed to prosecuting the greatest violators, i.e., the largest business corporations but, rather, is a response to the interests of such organizations, leading to a "pathetic and revealing commentary on government-industry collusion". No longer can we afford to believe that the government maintains a neutral stance. Rather than the various interest groups of society competing on equal grounds from various platforms, one group has emerged whose requirements are looked after first. "It would seem, then, that the Canadian social structure, rather than having a plurality of power centres, is dominated by a concentration of oligopolies which, to a considerable degree, control the economic life of the country." (Goff and Reasons, 1978, p. 89)[20]

However, some caution should be shown in interpreting their results and conclusions because Goff and Reasons would appear to have inadequate understanding of the process of inquiry, appraisal and prosecution which leads to the incorrect specification of certain indices, such as the incidence of the recidivist. Their results are discussed further in Chapter V, section 5.2 below.

A widely employed appraisal technique which attempts to see whether resources are properly allocated is cost-benefit analysis. This has not been applied to the administration and enforcement of competition policy in Canada. However, Weiss (1973) has applied this approach to evaluating the U.S. Antitrust Division of the Department of Justice for the 1968-1972 period. In particular, Weiss was mainly interested in the redistributive effects, with much less emphasis on the allocative effects. Weiss (1973, pp. 350-351) presented his conclusions in the following manner:

> Some tentative conclusions are possible on the basis of even these rough results, however.

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20. The quotations in this passage are both from Mitchell (1975, p. 176).

> First, the distributive gains per lawyer-year are much greater than costs in every line [i.e. there were ten lines, including conspiracy, different types of mergers and regulatory practices] of antitrust considered. Benefit-cost ratios would all be far more than 1.0 even if private legal expenses were included. It would take a drastic re-evaluation of consumer benefits from "strong" cases to reduce benefit-cost ratios to 1.0 in even the criminal collusion and leverage cases so long as distributive gains are accepted as benefits. By this criterion, then, the general antitrust program is easily justified.
>
> Even when distributive effects are ignored and only allocative gains are considered, "strong" cases in most of the main lines of antitrust policy would be worth their public and private costs. If all the efficiency effects could be estimated, this statement would be re-enforced.

Subsequently, Weiss's contribution was taken a step further in a series of articles in the Journal of Law and Economics[21] which attempted, using regression analysis, to determine whether U.S. cases in the postwar period were brought forward upon criteria of efficiency and income redistribution benefits. Their results proved inconclusive. For example, Asch (1975, pp. 580-581) concludes, "Simply stated, casebringing activity cannot be characterized as predominantly 'rational' or predominantly 'random' on the basis of the industry variables examined."

The penultimate approach considered here is that of directly measuring the impact of the administration and enforcement of the Combines Investigation Act on what is considered, a priori, to be an important determinant or indicator of the degree of competition: horizontal mergers, collusion, resale price maintenance, entry, price stability and cutting, concentration. This methodology has been employed by Skeoch (1971) with respect to the impact of the 1952 abolition of resale price maintenance in Canada. Analogous studies have been conducted for both the U.S. and

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21. See Long et al. (1973), Siegfried (1975) and Asch (1975). Their results are summarized in Allen (1976, pp. 19-20).

U.K. Further discussion of this work is postponed until Chapter V.

The administration and enforcement of competition policy in Canada has been exclusively a government activity, there being no provision for private enforcement until the January 1, 1976 amendment to the Combines Investigation Act.[22] Hence, the fifth approach mentioned here is performance measurement, a technique currently being applied by the Federal Government of Canada to its operations and programs, although not, as yet, to competition policy. The technique attempts to measure productivity or efficiency and effectiveness. The concept of effectiveness is broadly defined as the extent to which objectives are being achieved. While a well-developed literature exists on the measurement of productivity, no coherent methodological foundations exist for the measurement of effectiveness in the performance measurement literature. Instead, resort has to be made to a somewhat eclectic approach which could involve drawing upon all the above-mentioned approaches, especially the last three.

The approach used here to evaluate competition policy is performance measurement. The Federal Government of Canada has required all its agencies and departments to have measures of efficiency and effectiveness available by 1980. This study is part of the program of the Director of Investigation and Research to meet the 1980 deadline. The conclusions and recommendations relate to three principal areas: the productivity and effectiveness of competition policy in Canada for the period 1960/61 to 1974/75; the applicability of performance measurement to competition policy; recommendations for improving the administration and enforcement of competition policy.

## 1.3 Structure of Study

In order to apply performance measurement successfully to competition policy, three conditions must be satisfied: an understanding of both performance measurement and the actual mechanics of administration and enforcement of competition policy, as well as the data upon which to base such an application. These issues are discussed in

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22. Described and discussed in Chapter III, section 3.7 below.

Chapters II, III and Appendix A, respectively. Chapter IV and Appendix B are concerned with the measurement and specification of productivity and its two component parts, inputs and outputs. A variety of measures of effectiveness are presented and discussed in Chapter V. The next chapter is concerned with the way in which cases are selected for inquiry. In particular, the issue of what scope or discretion exists to select inquiries is discussed. The last chapter includes a summary of the main findings and conclusions relating to the applicability of performance measurement to competition policy and suggestions for improvement in the effectiveness of competition policy. Finally, Appendix C provides a description of the offence categories under the Combines Investigation Act and brief discussion of the jurisprudence.

In reading this study several important parameters should be remembered. First, the main focus concerns the period 1960/61-1974/75. However reference is made to the important changes in competition law and administration which either took place on January 1, 1976 (Stage I amendments) or are proposed (Stage II amendments). Second, the term "at present" refers to events as of March 31, 1978, unless otherwise indicated. Third, the study includes no consideration of the administration and enforcement of the misleading advertising provisions unless otherwise expressly stated. Fourth, all references to the Combines Investigation Act (hereinafter referred to as the Act or by its full title) are to the 1970 version.[23] The text contains a discussion of parameters one and three.

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23. Chapter C-23 of the Revised Statutes of Canada, 1970, as amended by C-10 (1st supp) and C-10 (2nd Supp). The 1970 version of the Act was essentially that which was in operation from 1960 to Jan. 1, 1976.

# CHAPTER II

# AN INTRODUCTION TO THE THEORY AND PRACTICE OF PERFORMANCE MEASUREMENT

## 2.1 Introduction

In the last 10 to 15 years several attempts to develop and apply techniques to permit responsible management of the Federal public service have taken place. In part, this reflects a response to the increasing size and importance of the public sector. For example, between 1962 and 1976 "federal expenditures rose from 17.4% to 21% of the GNP ... In constant dollars, the increase was 85%" (Canada, Royal Commission on Financial Management and Accountability, 1977, p. 16). One such technique is performance measurement, which, according to the Minister responsible for its introduction and application, "provides managers with information to monitor how well their programs are operating" (Andras, 1978, p. 6). In this chapter, an attempt is made in section 2.2 to put performance measurement into some sort of historical perspective and outline its relationship with other techniques for managing the public sector. The final section contains a brief definition of performance measurement and discusses its application, in particular, to competition policy.

## 2.2 Background to the Development and Introduction of Performance Measurement

In this section a brief account of the ways in which the Federal Government of Canada has attempted to monitor and control its expenditure is presented. This short introduction is intended to place performance measurement in perspective in two ways: first, as part of the continuing effort and evolution of Government policy toward expenditure control; second, the relationship of performance measurement to other tools currently employed in evaluating expenditure such as Program Planning and Budgeting Systems (hereinafter referred to as PPBS).

The watershed in the development of methods employed by the Federal Government in controlling and evaluating its expenditure was the Royal Commission on Government Organization, commonly referred to as the Glassco

Commission, after its chairman, J. Grant Glassco, which reported in the early 1960's. Prior to the Report of the Glassco Commission and the changes for which it provided the catalyst, government control of its expenditures was based on an input-oriented approach.[1] Items of expenditure, by department, were classified into various categories under the rubric "Standard Objects of Expenditure".[2] Attention was, therefore, concentrated by Parliament and the Federal Government, on spending items such as salaries and postage, with little attention devoted to the corresponding outputs. According to Siegel (1977, p. 46) this approach to monitoring government expenditure reflected the view that "the best government was the least government" and hence government would "surely not want to embark on any radical new programs, but rather should concentrate on holding the line on existing programs".

The Glassco Commission rejected the concentration of the input side of government expenditure and instead advocated that more attention be devoted to the outputs of government activity and the relationship of these outputs to desired objectives:

> The conclusion is inescapable that the present procedures in developing and reviewing the Estimates [i.e., proposed government expenditures] are wasteful and inefficient. The form of the Estimates does not permit intelligent criticism and, in placing the major emphasis on the nature of expenditure rather than on its real purpose,

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1. This account is based upon Gow (1973) and Canada, Royal Commission on Government Organization (1962, pp. 96-113). Other sources refer to this change in methods in passing. See, for example, Andras (1978, p. 6) and Siegel (1977, p. 46)

2. At the time Standard Objects of Expenditure were introduced, in the period 1947-1953, Gow (1973, pp. 11-12) says that there were 30 objects. When the Canada, Royal Commission on Government Organization (1962, p. 99) was studying the same system there were "twenty-two categories known as" standard objectives of expenditure; "in addition, eleven" special objects "were now in use".

> the matters coming under senior review are the less important details of administrative judgment. Any valid assessment of performance by departmental management is excluded, and it is virtually impossible to form any objective judgment from the Estimates as to the desirability of continuing, modifying, or enlarging specific programmes in the public interest. (Canada, Royal Commission on Government Organization, 1962, p. 100)

As a result of this analysis the Royal Commission on Government Organization (1962, p. 100) recommended that "Departmental estimates be prepared on the basis of programmes of activity and not by standards of objects of expenditure" and "More objective standards for analysis and comparison be developed and employed" in reviewing government expenditure. Sixteen years after the Glassco Commission had made the above recommendations the government Minister responsible for implementing many of Glassco's ideas wrote that the approach employed in monitoring government activity had swung "away from almost exclusive emphasis on departmental spending (inputs) to a much more balanced concern with program results (outputs) as well as expenditures" (Andras, 1978, p. 6).

It is clearly beyond the scope of a brief account of government expenditure control to go into a detailed discussion of the implementation of the Glassco Commission recommendations in the mid-1960's, and the subsequent acceleration they received in the late-1960's with the movement toward "greater capability for intelligent decision-making" (Doern, 1971, p. 243), advocated by the Science Council of Canada and the incoming Trudeau Administration of 1968.[3] This has largely been done elsewhere.[4] Attention here will be concentrated on the techniques and tools of expenditure control which were introduced subsequent to the Glassco Commission with little comment on the associated institutional structure.[5]

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3. For further discussion of those influences see Doern (1971).

4. See, for example, Canada, Royal Commission on Financial Management and Accountability (1977, pp. 19-30), Gow (1973, pp. 23-29, 55-60) and Steele (1977).

5. The actual mechanisms and institutions currently involved in the allocation process are fully detailed in Hartle (1978) and Kroeker (1978).

The emphasis of the Glassco Commission on goals and objectives rather than inputs was reflected in the formal adoption of PPBS in 1968 by the Federal Government.[6] This was the first coherent program to attempt the national overall allocation of resources expended by the Federal Government[7] and was firmly based on many of the changes Glassco had recommended and which were implemented in the mid-1960's.[8] A manual was released by the Federal Government in 1969 on PPBS (Government of Canada, 1969).[9]

The principal elements of PPBS[10] can be seen from the following list of "concepts common to all" such systems:

(1) the setting of specific objectives;

(2) the systematic analysis to clarify objectives and to assess alternative ways of meeting them;

(3) the framing of budgetary proposals in terms of programs directed toward the achievement of the objectives;

(4) the projection of the costs of these programs a number of years in the future;

(5) the formulation of plans of achievement year by year for each program; and

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6. Siegel (1977, p. 47).

7. PPBS had, of course, already been tried in the U.S. See references cited in Doern (1971, p. 253, footnote 35) and Economic Council of Canada (1971, pp. 38-41).

8. See Gow (1973, pp. 21-22).

9. The Ontario Provincial Government also released a manual at the same time, which had gone through four printings by September 1971. See Ontario, Treasury Board (1969).

10. PPBS as it has been applied by the Federal Government is discussed and described in a number of sources. See, for example, Doern (1971, pp. 253-257), Hartle (1978, pp. 59-85), Johnson (1971), Canada, Royal Commission on Financial Management and Accountability (1977, pp. 23-25) and Economic Council of Canada (1971, pp. 41-45).

(6) an information system for each program to supply data for the monitoring of achievement of program goals and to supply data for the reassessment of the program objectives and the appropriatness of the program itself (Government of Canada, 1969, p. 8).

Doern (1971, pp. 256-257) outlines the process whereby PPBS was implemented by the Federal Government in the following manner:

> The PPB system is rationalistic in its objectives. It relies on a centrally determined set of priorities which are communicated downward through the ranks in a disaggregative fashion. Ideally the cabinet, through the Cabinet Committee on Priorities and Planning (chaired by the prime minister) will express its priorities for any given year according to ... broad functional categories [e.g., protection of persons and property, foreign affairs, economic development]. The government will exercise its political judgment and declare its broad priorities for the given budget period. These will be sent to the Treasury Board as expenditure guidelines. For example, it may indicate that in the coming fiscal year the government will give priority to the broad functional categories of economic development and culture and recreation. It may also, in the expenditure guidelines, express which programs in the government, related to those broad functions, ought to be those rewarded with resources. Once the expenditure guidelines are communicated, however, it will still be necessary for the Treasury Board, in combination with the cabinet committees and the individual departments, to determine which of several programs would be rewarded within the given priority functional areas for that particular year. By thinking in these broad output-oriented terms, the government, it is hoped, will be able to obtain an overall view of different types of programs and their relationship to broad governmental functions. (emphasis in original)

A broadly similar approach is still in use.[11]

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11. See Hartle (1978) for details. On some of the practical problems of PPBS see Kirby & Kroeker (1978). Kirby was Assistant Principal Secretary to Prime Minister Trudeau, while Kroeker was Assistant Secretary to the Federal Cabinet Committee on Priorities and Planning.

The implementation and practice of PPBS from the late 1960's to the present has not been entirely free of criticism. Hartle (1978, p. 85), who served as Deputy Secretary of Treasury Board[12] from 1969 to 1973, pinpointed six reasons why PPBS has "not realized its earlier promise", including the fact that it "was naive to assume that agreement could be reached as to the goal of each program" (emphasis in original), and "How could the analyst take into account the difference between the public's perceptions of program and the 'real' effects?" On the first reason, Hartle received considerable support from another former public servant, Richard Gwyn, who made the following rather pointed comment:

> I was a civil servant during the years, 1970-73, when we had Harvard Business School textbooks stuffed down our throats. The theology then in vogue was Programming, Planning and Budgeting Systems (PPBS). In theory, you were supposed to define your objectives and work back from these to the staff and budget needed to fulfill them. In practice, since my objectives were indefinable ("Better communications?"; "To do good to Canadians?"), I, like everyone else, worked forward from the budget and staff I already had, to imaginary objectives wrapped in the jargon favored by treasury board gnomes.
>
> By managing scientifically (today's treasury board holy book is titled Performance Evaluation and Measurement), I was able to fulfill my real objective -- to double my staff and budget upon the size of which depended my own salary and status. Everyone else did the same. If you don't have to carry the can, you carry it carelessly. (Gwyn, 1977)

Although one might question the representativeness of the views of former public servants on PPBS, considerable confidence can be placed in them since the Royal Commission on Financial Management and Accountability (1977, pp. 23-24) echoed somewhat similar sentiments: "Overall, the application of PPBS as the central budgetary tool has met with mixed success".

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12. The Treasury Board is responsible for implementing the Glassco Commission recommendations and subsequently PPBS and performance measurement.

Perhaps it is not surprising that when the system of monitoring and evaluating government expenditure changed, in the space of approximately five years,[13] from an input-oriented bottom-up approach to an output-oriented top-down method, the expectations raised by PPBS were not entirely fulfilled. One commentator remarked that it would probably have taken a benevolent, omnipotent dictator to make such a system work.

The realisation that additional control and monitoring mechanisms were needed to supplement PPBS led to experimentation and the introduction of the Operational Performance Measurement System (hereinafter referred to as OPMS) in the late 1960's and 1970's. OPMS is now referred to as performance measurement.[14] It is government policy that all Federal government departments and agencies shall have performance measurement systems in operation by 1980 (see Andras, 1978, p. 5).[15] Hartle (1972, p. 5) sees the relationship between PPBS and OPMS in the following terms:

> Until 1970, the major advances in implementing PPBS involved the clarification of objectives for government programs and the specification of the major activities making up each program - its program-activity structure. There was no doubt from the outset that the development of measures of program effectiveness and operational performance was critical to ensuring that PPBS did not become merely a slightly improved vehicle for classifying expenditures. However, little direction was given to departments about what analytic techniques would prove most useful in developing such measures. At the same time, little effort was expended by most departments to identify measures of program effectiveness and operational performance. It became evident that a

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13. From the Glassco Commission to 1968, the formal adoption of PPBS.

14. The actual mechanics and discussion of performance measurement are presented in the next section.

15. It should be noted that two other techniques were introduced in addition to OPMS to make PPBS more effective. These were cost/benefit analysis and management by objectives. They are both fully described in Hartle (1978, pp. 86-89 and 91-93).

> more positive sort of impetus would have to be provided by Treasury Board if it was successfully to discharge its responsibilities for the complete implementation of PPBS.

Essentially the same view is held by Osbaldeston (1976, pp. 5-6) who was Secretary of the Treasury Board between 1973 and 1976.

Initial experimentation with OPMS began in the late 1960's at Treasury Board.[16] In the early 1970's, the methods and systems developed by Treasury Board were further refined and adapted by application to a small number of departments. In 1973 the Federal Government decided that the "performance measurement concept be implemented in all programs, where feasible, and that departments support their resource allocation requests, where appropriate, with performance data by no later than the 1977/78 Program Forecast" (Osbaldeston, 1976, pp. 6-7). In 1974, a two-volume manual on performance measurement was issued,[17] a manager's guide followed two years later,[18] while Treasury Board issued a circular a little earlier entitled "Measurement of the Performance of Government Operations".[19] This circular selected 1980 as the goal for full implementation of performance measurement. It specified that "Progress toward this goal will be reviewed periodically by Treasury Board Secretarial officers" (Canada, Treasury Board, 1976a, p. 5). In early 1978 the President of the Treasury Board presented a report to the House of Commons "on how performance measurement is actually being used in a select number of department programs in the Public Service of Canada" (Andras, 1978, p. 5).[20]

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16. This account is based upon Osbaldeston (1976). See also Canada, Public Service Staff Relations Board (1977, pp. 11-15).

17. Canada, Treasury Board (1974a and 1974b).

18. Canada, Treasury Board (1976b).

19. Canada, Treasury Board (1976a).

20. There would appear to be few studies of productivity of public sector outputs for Canada. Exceptions include Hettich's (1971) study of productivity in Canadian university education. Most of the application has been conducted in the United States. See, for example, Spann's (1977) work on productivity in local and state government, the Newland (1972) survey volume of papers on productivity in the U.S. government, and Ardolini and Hohenstein (1974) also on U.S. Federal Government

The most recent statement on the implementation of performance measurement reflects events to mid-1976. Osbaldeston (1976, p. 9) summarized the situation as follows:

> At mid-1976, out of forty-four departments and agencies concerned, thirty-two had systems under development. Of these thirty-two, twenty-one provided some performance data in support of the 1977/78 Program Forecast.
>
> In numerical terms, out of about 353,000 authorized staff-years, about 166,000 were covered to some extent by systems designed or installed. In support of the 1977/78 Program Forecast, data were provided concerning 113,000 staff-years. All these figures relate to applications in terms of efficiency. In terms of effectiveness and quality and level of service, data relating to 41,500 staff-years were provided.
>
> Increased coverage is still possible in terms of efficiency - we have a long way to go with coverage in terms of effectiveness, quality and level of service.
>
> Several factors should be borne in mind in considering these figures. Firstly, only about 68 per cent of authorized staff-years are considered coverable in terms of efficiency, so we are well past the mid-point in making a start on this aspect of performance measurement. Effectiveness, quality and level of service are aspects which should have wider application, but useful indicators are often more difficult to enunciate and even more difficult to quantify.

As part of the continuing effort to implement performance measurement, Treasury Board officers evaluate the progress of individual departments and agencies. Parks' (1977, p. 25) study of the Office of the Director of Investigation and Research concluded "With the exception of the Misleading Advertising Division, no performance measurement reporting exists for the responsibilities of" the Director. One of the objects of this study is to see whether performance measurement reporting is indeed possible for the Office of the Director.

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productivity. A convenient summary, from a Canadian perspective, of U.S. government efforts may be found in Canada, Public Service Staff Relations Board (1977, pp. 17-39). For an example of productivity measurement in a centrally planned economy see Haraszti (1977).

At the same time as Treasury Board's review procedure was being conducted, the Auditor General of Canada, as part of a programme started in 1976 entitled Study of Procedures in Cost Effectiveness, also examined and appraised the implementation of performance measurement within the Federal Government. The results appeared in the 1977/78 Annual Report of the Auditor General (1978, pp. 61-96) and referred to both efficiency and effectiveness measurement.

The report's findings concerning efficiency related to "12 departments and 16 major areas of activity involving about 100,000 man-years. Most major applications of performance measurement in operation in 1978 have been reviewed." The work "focused on process-type operations such as large clerical groups doing similar work where the productivity of labour should be a significant management concern" (ibid., p. 63). In other words attention was concentrated on the programs where efficiency is most easily measured, rather than in more difficult applications such as to competition policy. However, despite this bias in sample selection, the Auditor General (ibid., p. 65, emphasis in original) was only able to find "two systems that were considered satisfactory".[21] The effectiveness evaluation referred to "23 programs in 18 departments. These programs cover a wide range of social and economic government activities" (ibid., 1978, p. 80). Again the Auditor General's (ibid., p. 83, emphasis in original) conclusions are not encouraging with,

> few successful attempts to evaluate the effectiveness of programs. The scope and quality of effectiveness evaluation will have to be increased significantly before management, the Government and Parliament, each with its respective interests, can be reasonably informed of the achievements of public programs.

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21. In a small number of instances the Auditor General was able to compare actual productivity against "standards [which] ... have international acceptance and are not particularly demanding in terms of employee performance" (Canada, Auditor General, 1978, p. 67). The findings indicated that "efficiency levels average about 65%" of the international standard (ibid., p. 67). An acceptable level was set at 80% or greater. Hence substantial room would appear to exist for productivity improvement, albeit on the evidence of a small sample.

These findings suggest it is unlikely that the 1980 deadline set by Treasury Board for implementation of performance measurement will be met with adequate systems.

However, besides the mechanics of actually designing and implementing performance measurement systems, there is another problem which is likely to affect the impact, use and priority accorded such evaluations. This has been outlined by the Ontario Economic Council (1977, pp. 34-35), as follows:

> The lack of effective policy evaluation can, in part, be explained by the incentives and disincentives faced by government officials. Consider the following examples. ... Ministers often have little incentive to specify the precise criteria by which policies can be judged. ... The "real" objectives frequently cannot be publicly acknowledged without embarrassment. [See, for example, Blake, 1976]. ... Officials in charge of a government department have an incentive to satisfy their Minister rather than find "the truth". ... The time constraints on Ministers also have an effect. Ministers are captured by the problems of the "here and now" and are reluctant to spend time reviewing an evaluation of an existing policy that it not of immediate public concern.

The essence of the remarks of the Auditor General and the Ontario Economic Council is that expectations should not be raised too high that programs will experience sudden increases in efficiency and effectiveness. At best improvements are likely to be marginal and long term in nature.[22]

## 2.3 The Application of Performance Measurement to Competition Policy

### 2.3.1 Introduction

In this section the two main elements of performance measurement, efficiency and effectiveness, are defined and discussed. Particular attention is paid to those facets of performance measurement which are likely to be of significance with respect to competition policy. The issues

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22. See Doern and Maslove (1979) for an interesting collection of papers on the public evaluation of government spending.

raised below should therefore serve to place some perspective on the empirical evidence presented in Chapters IV through VI on performance measurement.

### 2.3.2 Performance Measurement: Efficiency

Efficiency is defined, rather mechanically, as follows:

> To measure the efficiency of an operation it is necessary to quantify what is being produced, or the results being achieved and to relate these to the associated costs. The ratio of these "outputs" to "inputs" is the efficiency of the program. (Canada, Treasury Board, 1976a, Appendix A, p. 1)

Several points should be noted concerning the scope or application of efficiency and the meaning or interpretation of the resulting efficiency indexes.

In terms of the activities most suited to the measurement of efficiency, Hartle (1978, p. 89) comments that application is conceptually straightforward:

> ... where the number and quality of the units produced are objectively measureable and their costs can be assigned to them unambiguously. This means, in effect, that it is applicable to high volume operations. Cheque issuance, mail sorting and some types of mass laboratory testing are examples of the kinds of operations where OPMS is applicable.

This view is confirmed by Andras' (1978, p. 7) remark in describing the application of performance measurement in the Canadian public service in the early 1970's: "the programs selected were of the repetitive, production or process-type of work ... [because] many government employees were involved in this work ... the measurement techniques were easily understood and implemented."

Unfortunately, competition policy does not fall into the category of government activities to which efficiency measurement can be readily applied, for a variety of reasons. For one thing, the volume of output is small.[23] For example, between 1960/61 and 1974/75 there

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23. This does not imply that it should have been larger, only that the absolute volume was relatively small.

were only 91 prosecutions.[24] Another complicating factor is that the output is not homogeneous. In Chapter IV, nine different outputs are presented varying from a prosecution to a research inquiry. Finally, changes in the interpretation of the law by the courts or amendments to the existing Act may cause the nature of the output to change, with the result that inter-temporal comparisons in productivity are difficult, if not impossible, to conduct. The Treasury Board assessment of measuring productivity for competition policy recognised these difficulties and concludes,

> The techniques of measuring efficiency in some areas of this [i.e., Office of the Director] operation ... do not have as much of a precedent in the public sector as the process-type of operation. Therefore, the state of the art as it now exists may require a certain amount of pioneering [work] ... in order to develop adequate measures of efficiency. (Parks, 1977, p. 25)

In Chapter IV below an attempt is made to resolve some of the problems of applying performance measurement to competition policy in order that efficiency measures can be estimated.

Another set of problems concerns the interpretation of the estimated productivity indexes, even if all of the measurement problems were to be resolved or at least the more intractable ones ameliorated. Here two problems or limitations of productivity indexes estimated for competition policy are discussed. In part these problems help explain why the 1960/61-1974/75 period was selected.

Trends vs. Levels. Productivity or efficiency[25] indexes are typically used to measure changes or trends in productivity relative to some base period and not to evaluate the absolute level of productivity at any particular point in time. In other words, attention is focussed on (for example) whether the ratio volume of prosecutions/number of man-years increases between ( for example) 1960/61 and 1970/71 and not whether the index is too high or too low in 1960/61 or 1970/71 relative to some absolute standard designed by management. The base year approach,

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24. This refers to the non-misleading advertising provision of the Act. For details see section 2.3.3 below.

25. The two terms are used interchangeably here.

> involves choosing a representative and 'normal' year, for which adequate performance data are available, as the base year, and measuring performance against that year. From this base, standards or performance targets can be set as required. (Canada, Treasury Board, 1976a, Appendix A, p. 6)

Hence the measurement of trends in productivity involves "relative, rather than optimum efficiency" (Frederiksen, 1975, p. 27).

The difficulty of evaluating the level of productivity in the base year makes comparisons over time and across agencies a little hazardous without extra information. Hartle (1978, p. 90) comments:

> Obviously it is easier to wring dramatic productivity increases from a fat operation than it is from one that is already lean. It is therefore difficult to interpret the productivity numbers which emerge, except in terms of interdepartmental or private sector-public sector comparisons of unit costs for similar kinds of output.

Because there are no outputs closely resembling those in competition policy, appropriate comparisons of this kind are difficult, if not impossible, to identify. However, the repeated reference in the Annual Report of the Director to a shortage of qualified personnel to fill vacancies,[26] combined with the continuing relatively small size of the Office of the Director, would suggest that the changes in productivity recorded in Chapter IV are not principally the result of an organization shedding its "fat" or taking up organizational "slack".

An index of efficiency for competition policy requires inter-temporal data and, further, that the nature (i.e. non-quantifiable) of the output remain relatively stable, so that comparisons over time are valid. These two requirements led to the selection of the 1960/61-1974/75 period: no major changes in legislation took place between

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26. See, for example, Annual Report of the Director of Investigation and Research for the Year Ended March 31, 1964 (p. 67). The Annual Reports are hereinafter referred to as Annual Report (date). In this instance the citation would be Annual Report 1963/64 (p. 67).

the 1960 amendments[27] and the introduction of Stage I on January 1, 1976[28] so that the range and type of outputs are likely to have remained relatively constant; the period was long enough, even taking into account the relatively small volume of output, to detect changes in productivity; there was a considerable degree of continuity in the persons controlling the direction of the administration and enforcement of competition policy such that sudden changes in direction and emphasis are not likely to have accounted for changes in productivity.

The "How Many Angels Can Fit On A Pinhead" Syndrome. The measures of efficiency, as conventionally estimated, say nothing about the usefulness or effectiveness of the activity whose productivity is being measured. As one public servant remarked, "You can do something useless very efficiently".[29] In a somewhat similar vein, Frederiksen (1975, pp. 27-28) commented:

> Without monitoring the degree to which goods and services produced do, in fact, meet operational goals or service standards, (for example, the extent to which family allowance cheques are issued in the appropriate amounts, to the persons entitled, and on time), it would be difficult to determine whether improvements in operational efficiency - cost per cheque issued - had been accomplished at the expense of lowering the levels of service or reducing the benefits provided to the Canadian public.

There are two ways in which this difficulty can be overcome. First, by attaching some weighting system to the output to reflect the extent to which program objectives are being satisfied. In Chapter IV, a system of designing such a set of "shadow prices" is introduced and applied to the disparate outputs of competition policy.[30] Second, by assessing

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27. See Rosenbluth and Thorburn (1963, Chapter 8, pp. 84-95) for an account.

28. Discussed and described in Chapter III, Section 3.7, below.

29. Cited in Scott (1977). The identity of the public servant was not revealed.

30. The Treasury Board manual recommends disparate outputs should be aggregated on the basis of input data. This was not possible for competition policy in the period 1960/61 to 1974/75 since the relevant data were not available. (See Canada, Treasury Board, 1974b, pp. 7-9.)

the productivity measures in conjunction with measures of effectiveness. In Chapter V several such indices are presented and estimated.[31]

### 2.3.3 Performance Measurement: Effectiveness

Effectiveness is defined as

> ... that aspect of performance which describes the extent to which objectives are being achieved. Given the many facets of the objectives of most government programs, it is obviously unlikely that any single or absolute measure of program effectiveness could be formulated. Hence the approach normally taken is to select appropriate quantifiable aspects of a program's objectives and use these as indicators of ongoing overall effectiveness. (Canada, Treasury Board, 1976a, Appendix A, p. 2)

The single most important goal of competition policy is taken to be the achievement of an efficient allocation of resources through the workings of a competitive market. Clearly, this specification does not provide a readily quantifiable set of benchmarks, the attainment of which would indicate the degree of effectiveness of the administration and enforcement of competition policy. However, in Chapter V, a variety of approaches to the measurement of effectiveness are discussed and some measures estimated. This should go some distance in filling the void noted by Treasury Board in its 1977 evaluation of competition policy: "Effectiveness indicators are not available" (Parks, 1977, p. 25).

Unfortunately, the available literature on performance measurement is largely confined to the study and estimation problems of efficiency, with comparatively little attention devoted to effectiveness. This is simply a reflection of the fact that measures of efficiency are much easier to estimate. Nevertheless, despite this comparative neglect, there are two problems which should be remembered when assessing and interpreting the measures presented in Chapter V. The second of these problems also applies to efficiency indicators.

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31. It should be noted that most of the measurement activities carried out so far in the public service refer to efficiency indices, not effectiveness.

Ex ante vs. ex post. This study of competition policy is a retrospective or ex post application of performance measurement. In other words, the behaviour and motivation of the agencies responsible for the administration and enforcement of competition policy between 1960/61 and 1974/75 will not have been influenced directly by the effectiveness indicators presented here and the presumed goal of competitive markets. Hence, these indicators may be inappropriate in the sense that public officials were trying to achieve a different objective than allocative efficiency through competitive markets. The outcome of this study is then, to draw an analogy, like applying modern standards and morals to the behaviour in the Dark Ages and being aghast that today's standards were not being well met! Fortunately, however, numerous statements by public officials during the 1960's and early 1970's reveal that they saw competitive markets and allocative efficiency as the major goal of competition policy.[32] Hence, the underlying assumption embodied in the measures of effectiveness would seem suitable to apply to the 1960/61-1974/75 period.

Complete vs. Partial Coverage. Although the major responsibility for competition policy in Canada rests with the Office of the Director, the procedures employed in the enforcement of the Combines Investigation Act directly involve, in varying degrees, the Attorney General of Canada, the Restrictive Trade Practices Commission, the judiciary and, to a much lesser extent, the Federal Cabinet.[33] The decision was taken to include all the relevant agencies for several reasons: the difference in costs of studying only the Office of the Director compared with all the agencies was quite small; a complete picture of the enforcement of competition policy is gained; measures of efficiency and effectiveness which refer to all of the agencies permit greater account of the quality of decision-making to be made.

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32. See the Introduction to Chapter IV and references cited therein. The only attempt to examine the motivation of the Director of Investigation and Research is to be found in Jones (1975), who applies a Downsian framework to Canadian merger policy between 1960 and 1971. Jones' findings would suggest that, at least for mergers, the motivation of the Office of the Director was consistent with encouraging a more competitive environment.

33. Full details of these agencies may be found in Chapter III.

Concentration on the Office of the Director could reveal, for example, that productivity is increasing but an indicator of effectiveness (e.g., number of cases prosecuted) is declining. Only if the Attorney General is included in the frame of reference is it possible to indicate if the decline in effectiveness is due to bad management by the Attorney General[34] or if the increased productivity of the Office of the Director has led to a fall in quality of output resulting in the decline in effectiveness, independent of the decision-making of the Attorney General.

Coverage of the decision-making units involved means such problems have a much greater chance of being resolved and remedial action recommended to improve the operation of competition policy in Canada. For this reason the inclusion of all the decision-making units carries with it the dual advantages of: (1) providing the breadth of analysis conducive to focussing on competition policy in its totality, rather than the more circumscribed kind of analysis that would result from confining the analysis to the Office of the Director alone; (2) making explicit the close links between the various organisations and the extent to which activities and decisions of one bear directly (indeed often critically) on the ostensible performance of another.

A second strand of the complete vs. partial coverage distinction concerns the breadth of coverage of the administration and enforcement of competition policy. The offence categories under the Act can be divided, broadly speaking, for the purposes of performance measurement, into misleading advertising and non-misleading advertising provisions.[35] Misleading advertising administration and enforcement is a high volume repetitious type operation,[36]

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34. Only the Attorney General has the authority to bring a prosecution.

35. Defined as conspiracy, resale price maintenance and/or refusal to sell, merger and/or monopoly and price discrimination.

36. For example, in a single year 1974/75 there were more prosecutions for misleading advertising (113) than for the entire non-misleading advertising provisions for the whole of the period 1960/61-1974/75. See Gorecki and Stanbury (1979b, Table 7, p. 188) for details of misleading advertising activities.

while the converse applies to the non-misleading advertising provisions. Combining these two disparate offence categories is clearly inappropriate. Hence, attention is confined in this study only to the administration and enforcement of the non-misleading advertising provisions of the Act unless expressly stated otherwise.[37]

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37. Time and resources did not permit a chapter which would apply performance measurement to the misleading advertising provisions of the Act. This may have proved a useful contrast to the material presented in this study. It should be noted that misleading advertising only became of any significance, in terms of the demands it made on the Office of the Director, in the late 1960's and 1970's. For example, in 1969/70, only approximately 10 per cent of the officers were employed in the misleading advertising operations. By 1974/75, the corresponding percentage, again approximate, was 25 per cent.

# CHAPTER III

# THE ADMINISTRATIVE MACHINERY OF COMPETITION POLICY IN CANADA: 1960/61 - 1974/75

## 3.1 Introduction

An evaluation of the efficiency and effectiveness of the administration and enforcement of competition policy requires an appreciation and knowledge of the machinery of investigation and prosecution. In this section the powers and functions of those bodies given responsibility under the Combines Investigation Act are detailed. The exercise of these powers is also presented. There are four major bodies charged with administration: the Director of Investigation and Research, the Restrictive Trade Practices Commission (RTPC), the Attorney General of Canada, and the judiciary. The importance of these bodies has varied considerably over time. However, attention here is confined to the period 1960/61 to 1974/75. Limited reference is made to developments before and after this period.

The chapter is arranged as follows: Sections 3.2 to 3.5 describe and discuss the powers of, respectively, the Director, RTPC, Attorney General and the judiciary. In section 3.6, a brief summary and overview of the machinery and the way in which the separate pieces interact is presented. Finally, the administrative developments associated with the recent actual or proposed legislative changes are briefly outlined in 3.7.

## 3.2 The Director of Investigation and Research

### 3.2.1 The Machinery

The only person or institution with authority to conduct investigations under the Combines Investigation Act is the Director of Investigation and Research. Section 5(1) of the Act provides for the appointment of the Director by the Governor in Council.[1] The tenure of any individual

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1. In other words, the Cabinet of the political party in power. The Director is appointed "at pleasure" which means that the government of the day can ask for, and receive, his resignation. This has not been the custom, however.

Director is left unspecified by the Act but in practise recent appointments have been for approximately a decade. T.D. MacDonald was the first Director from 1952 to 1960, but had held the equivalent position[2] between 1950 and 1952, prior to the 1952 Amendments to the Combines Investigation Act; D.H.W. Henry was Director between 1960 and 1973; the present holder of the office is R.J. Bertrand.[3] All three Directors had strong legal, rather than economic, backgrounds.[4] The Director has been responsible to Parliament through various ministers over time: Minister of Justice (1946 to end of 1965); President of the Privy Council (beginning of 1966-June 1966); Registrar General (June 1966-Dec. 1967); Minister of Consumer and Corporate Affairs (Dec. 1967 to the present). In other words the Director does not report to the Minister, but to Parliament.

The Act also provides that "One or more persons may be appointed Deputy Director of Investigation and Research" (Section 6(1)). The Deputy Director is a permanent civil servant. There are two statutory responsibilities that can be assigned to a Deputy Director. First, under section 6(2),

> The Governor in Council may authorize a Deputy Director to exercise the powers and perform the duties of the Director whenever the Director is absent or unable to act or whenever there is a vacancy in the Office of the Director.

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2. Commissioner, Combines Investigation Act.

3. See Annual Report 1959/60 (p. 3), Annual Report 1972/73 (p. 9), Annual Report 1973/74 (p. 9) and Rosenbluth and Thorburn (1963, p. 28, footnote 2).

4. For example, all three were made Queen's Counsels, although T.D. MacDonald and D.H.W. Henry were QCs prior to their respective appointments as Director. Both were employees of the Federal Department of Justice prior to this appointment as Director, while R.J. Bertrand was in private practice.

This power has been exercised only once for any length of time,[5] when J.J. Quinlan became Acting Director, between the departure of D.H.W. Henry in 1973 and the arrival of R.J. Bertrand in 1974. Second, under section 6(4),

> The Director may authorize a Deputy Director to make inquiry regarding any matter into which the Director has power to inquire, and when so authorized a Deputy Director shall perform the duties and may exercise the powers of the Director in respect of such matter.

A thorough examination of the files of the Office of the Director suggests this power has never been exercised in the period 1951/52 to the present.

No Deputy Directors were appointed while T.D. MacDonald was Director. However, on the same day that D.H.W. Henry was made Director in 1960, J.J. Quinlan was appointed Deputy Director[6] while a second Deputy Director, F. C. Gascoigne, was added in 1965.[7] These Deputy Directors advised and consulted with the Director, bringing, respectively, legal and economic expertise. This division of expertise has continued between the two Deputy Directors. J.J. Quinlan's successor in 1974 was R.J. Bertrand, a lawyer who almost immediately became Director, while W.P. McKeown, former General Counsel to Canadian General Electric Limited, was the holder of the post from 1974 to 1976. The post was vacant until J.C. Thivierge, a lawyer in private practice, was appointed in March, 1979. On the economic side,

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5. There is usually, however, an Order in Council authorizing the exercise of such powers when the Deputy Director is first apppointed. The power is exercised by the Deputy Director when the Director is ill, on holiday or otherwise absent. However, a separate Order in Council was issued authorizing J.J. Quinlan as Acting Director.

6. See Annual Report 1960/61 (p. 42).

7. See Annual Report 1964/65 (p. 78).

F.C. Gascoigne was succeeded by R.M. Davidson in 1974.[8,9]

Besides two Deputy Directors, the Office of the Director of Investigation and Research consists of a staff of permanent civil servants whose major function is to investigate actual or potential infractions of the Act. The staff of the Director's Office has grown considerably between March 31, 1960 and April 1, 1975, from 46 to 180, though it still remains comparatively small. Since 1969/70, virtually all members of the staff who carry out investigations (as opposed to clerical and support personnel) have a strong background in economics and commerce, rather than a legal training. Prior to 1969/70, a small number of lawyers formed part of the Office of the Director, as 4.3.2 below details. Hence while two of the top three positions are usually held by lawyers, the balance of the professional staff is dominated by persons with an economics background.

The Office of the Director of Investigation and Research is organized into a series of branches which in turn consist of several divisions. As can be seen from Figure 3-1, each branch corresponds to a section or sections of the Act. At the end of the period under consideration, April 1, 1975, the Office of the Director was thoroughly reorganized, with each branch given responsibility for all sections of the Act as they apply to groups of industries:

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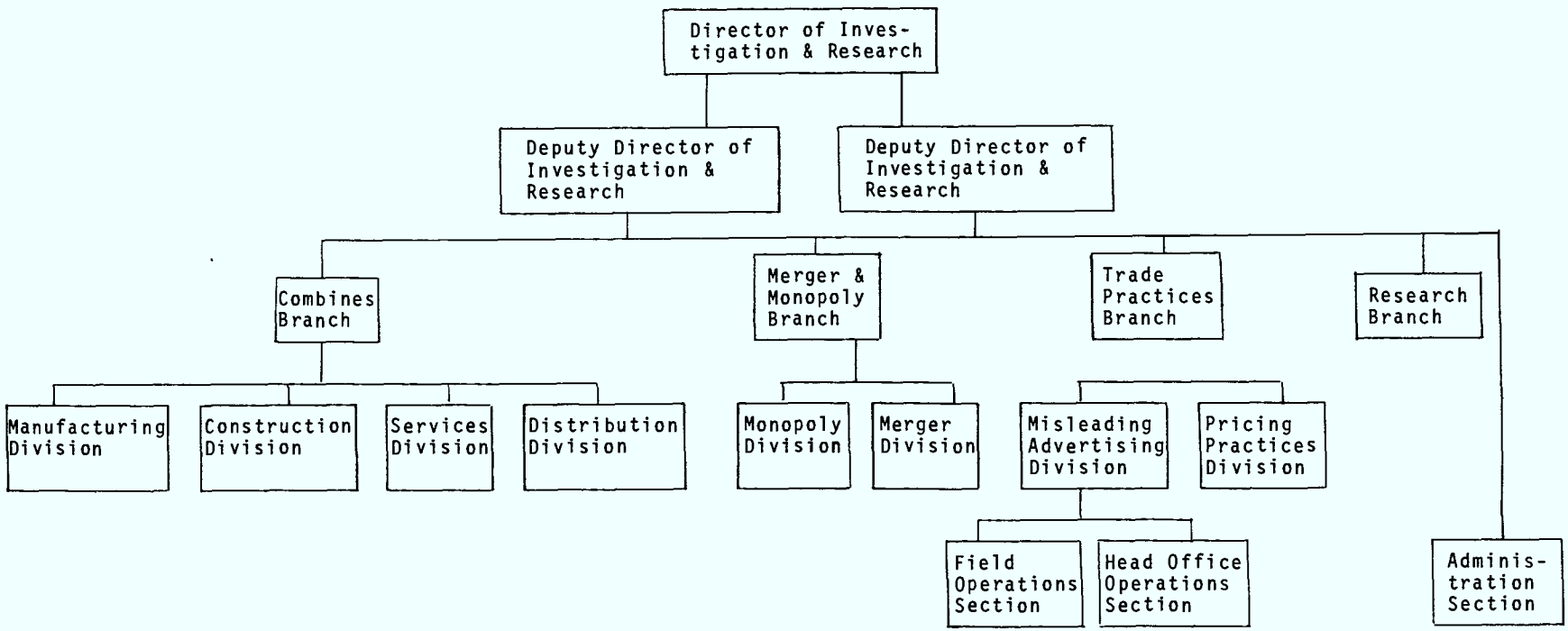
8. See Annual Report 1974/75 (pp. 53-54)

9. It should be noted that the Director is usually appointed from outside to Office of the Director although the first two were from within the Department of Justice, while the Deputy Directors, with the recent exception of W.P. McKeown and J.C. Thivierge, had almost 10 years within the Office of the Director prior to their appointment. It is difficult to generalize because there have been so few Directors and Deputy Directors in the period 1952 to the present. F.A. McGregor, who was neither a lawyer nor an economist, was the equivalent to the first Director between 1925 and 1949, with two short breaks.

FIGURE 3-1

THE ORGANIZATION OF THE OFFICE OF THE DIRECTOR OF INVESTIGATION AND RESEARCH[a]




a. The table refers to the organization of the Office of the Director as of March 31, 1970, but was similar throughout the 1960/61-1974/75 period. However, some changes did take place: the second Deputy Director was added in 1965; each branch became subdivided into a series of divisions as of June 1, 1970 as part of a reorganization to accommodate more staff and increase efficiency (see Annual Report 1969/70, pp. 78-79); subsequent to 1970, divisions were added to the Research Branch and the Misleading Advertising Division had three, not two, sections (see Annual Report 1973/74, p. 89).

SOURCE: Annual Report 1969/70, (p. 116).

resources, manufacturing, services.[10]

In sum, a permanent staff of civil servants answerable to the Director of Investigation and Research was responsible for the investigations conducted into alleged infractions of the Combines Investigation Act. But how was an investigation carried out? What legal powers did the Director possess? How often and in what order were these powers used? It is to these questions that attention is now directed.

### 3.2.2 Director's Use of Powers

Preliminary Inquiry. An inquiry usually begins following a complaint by an aggrieved businessman or consumer to the Director about the conduct of a firm(s) and/or individual(s).[11] Upon receipt of the complaint, preliminary investigation is conducted. This process consists of assembling all that information which is readily available; determining whether an alleged offence comes under the Combines Investigation Act (e.g., the complaint may concern a certain pricing practice by agricultural producers of milk which may or may not come under the authority of federal or provincial marketing boards); interviewing the complainant to clarify the exact nature of the offence and to examine any evidence the complainant may have (e.g., the bids submitted in a complaint against identical tenders); gathering data from trade journals and magazines, Statistics Canada publications, government departments and agencies, articles, books, existing combines files, past cases and reference to foreign, particularly U.S., cases. The preliminary inquiry involves the Director exercising none of the powers which he is granted under the Combines Investigation Act.

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10. For details see Annual Report 1974/75 (pp. 55-56, 87). The reorganization followed a management consultants report commissioned by Michael Pitfield, then the Deputy Minister of the Department of Consumer and Corporate Affairs.

11. The investigation process described here applies to all complaints of alleged offences under the Combines Investigation Act, no matter what the source of initiation. However, small differences do arise which are noted below. The origin of investigations is detailed and discussed in Chapter VI below.

On the basis of the preliminary inquiry, two possible recommendations can be made: (a) that further investigation is warranted because the available evidence gives the Director "reason to believe" an offence under the Act is likely to have been or is about to be committed; (b) the available evidence suggests that no offence has been committed. Not surprisingly, the overwhelming majority of preliminary inquiries fall into the latter category.

"Reason to Believe". When the Director has "reason to believe" an offence has been or is likely to have been committed under the Act, he can use certain formal powers given to him under the Act.[12] These are:

(1) enter premises where "There may be evidence relevant to the matters being inquired into" and "copy or take away for further examination or copying any book, paper, record or other document" considered relevant by the Director (section 10(1)). Any documents removed from the premises are initialed and given a code number and a serial number. The documents are usually photocopied and the originals returned to the owners within 40 days (section 10(4));

(2) the Director may require "a written return under oath showing in detail the information required" which may include "a full disclosure and production of all contracts or agreements which the person named in the notice may have at any time entered into with any other person, touching or concerning the business of the person named in the notice" (section 9);

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12. When the Director is required to commence an inquiry either because of a six-citizen declaration (section 7) or upon the direction of the Minister (section 8(c)) this does not necessarily result in the exercise of the formal powers. Obviously the power would not be used if the Director did not have jurisdiction or if he had sufficient knowledge about the industry in question to judge that the complaint had no basis.

(3) "The Director may, by notice in writing, require evidence upon affidavit or written affirmation, in every case in which it seems to him proper to do so" (section 12(1));

(4) oral examination of a witness under oath before a member of the Restrictive Trade Practices Commission or a hearing officer on an "ex parte application of the Director" pursuant to section 17. Witnesses are usually represented by counsel while the Director usually employs a member of his staff and counsel from the Legal Branch of the Department of Justice.

The Director does not have the authority to use these powers at will. To prevent abuse, in all instances an ex parte application to a member of the RTPC is made by the Director stating his grounds for "reason to believe" an offence has been or is likely to have been committed under the Combines Investigation Act. In practice the RTPC seldom questions an application made by the Director under sections 9, 10, 12 or 17 of the Act. In one case an application was rejected outright while from time to time an officer of the Director's staff has been advised to redraft the application since the member was not prepared to issue an order on the basis of the way the facts were presented. Overall the most frequently used powers are searching premises, oral examination of witnesses before the RTPC, and written returns, respectively.[13] Section 12 was never used between 1960/61 and 1974/75.[14]

The extent of the use of a particular power and the range of powers exercised by the Director varies considerably across different kinds of offences and even within inquiries under the same section of the Act. However, certain generalizations are possible. The first formal power exercised by the Director is usually that of searching the premises of the alleged offenders for documentary evidence.[15] On the basis of his evidence, which is

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13. Further details may be found in Gorecki and Stanbury (1979b, Table 2, p. 184).

14. This is because section 17 was used instead.

15. Sometimes more searches follow immediately if, for example, some hitherto unknown location of the firm is found or new conspirators are implicated by the documents.

brought back to Ottawa, copied and then evaluated, several potential choices are open to the Director. (a) If no evidence is found to warrant a prosecution under the Combines Investigation Act, the inquiry is therefore discontinued. (b) The evidence may be sufficient, in the Director's opinion, to warrant prosecution. (c) More information may be needed before a decision concerning prosecution is taken or before the case is ready for prosecution. Quite often in conspiracy and merger cases, written returns are used to solicit market share data, while in both these types of inquiries and others witnesses are often examined before the RTPC to clarify the exact meaning and usefulness of the documentary evidence seized under section 10 of the Act.

Discontinued Inquiries. During any of the stages of investigation outlined above, the Director "may discontinue the inquiry" pursuant to section 14(1) of the Act. In all instances "a report in writing to the Minister showing the information obtained and reasons for discontinuing the inquiry" is required by section 14(2). Further, the "written concurrence of the Commission" (section 14(1) is needed in those instances in which witnesses have been examined before the RTPC. Finally, in those rare instances in which an inquiry was started by formal application of six citizens, under section 7, the complainants are to be notified of the discontinuance and the reasons.[16] As a check on the exercise of the Director's discretion in discontinuing inquiries, the Minister under his own authority or "on written request of the applicants" who started a section 7 inquiry, can review the Director's decision and "instruct the Director to make further inquiry" under section 14(4). In the period 1960/61 to 1974/75, there is only one recorded instance of the Minister disagreeing with the decision of the Director to

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16. The Director usually notifies all those involved in an inquiry (i.e., complainant as well as those searched) of its termination. However, the reasons are not normally stated.

discontinue an inquiry and, at the same time, ask for further inquiries to be made.[17]

In discontinuing an investigation a problem has arisen over the interpretation of the word inquiry, since the Act does not define this term. In practice the Director has considered that all investigations of complaints which use any of the formal powers of the Act are to be discontinued by a letter to the Minister. These investigations are referred to as formal inquiries. The problem arises mainly in connection with informal inquiries which do not use the formal powers of the Act. The Director has acknowledged this problem:

> It ... is a matter of judgment on the part of the Director of Investigation and Research whether investigation without use of formal powers has progressed to the stage where it ought to be regarded as an inquiry of which the discontinuance should be reported to the Minister. (Annual Report 1968/69, p. 13)

The Director has adopted the policy that those informal inquiries which have involved considerable time and resources should be discontinued by a letter to the Minister, while those which involved only a small amount of resources (i.e., preliminary inquiries) require no such letter to the Minister. The former set of inquiries are often on an important public issue, especially actual and proposed mergers, in which the discontinuance serves to inform the Minister of the Director's view and reasoning.

The Director, in his annual report, usually gives a brief account of each discontinued inquiry in which a

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17. The Director informed two companies which wished to merge that he would not take any action under the Act if the merger was consummated. However, the Minister did not accept the discontinuance and under section 8(c) of the Act instructed the Director to commence an inquiry if the merger proceeded. The Director reopened his inquiry and gathered further evidence. The evidence gathered still suggested the merger should be allowed. A new letter of discontinuance was written which the Minister accepted. For details see Annual Report 1969/70 (p. 59) and Annual Report 1971/72 (p. 30).

letter to the Minister has been sent. However, neither the complainants nor alleged offenders are identified.[18] This is consistent with section 27 of the Act, which says, "All inquiries under this Act shall be conducted in private."[19] The Director considers that confidentiality is necessary,

> in the first place, in order that no premature assumptions be made by the public as to the facts; and in the second place to permit the process of investigation and analysis to proceed free of the atmosphere engendered by publicity except to the extent contemplated by the Act. (Annual Report 1962/63, p. 11)

However, in a few instances inquiries become public because of information related by the complainants (e.g., the Petroleum Inquiry)[20] and the companies under investigation, since securities legislation forces disclosure.

Prosecution. In those instances in which the Director considers that the evidence he has assembled warrants prosecution rather than discontinuance, he can follow either one of two paths. Pursuant to section 15(1)

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18. However, there are one or two exceptions. For example, D.H.W. Henry said,

> recently I felt obliged, in the public interest, to disclose the existence of a particular inquiry to a Committee of the House of Commons which was engaged in the consideration of legislation then before the House with respect to which the inquiry then in progress was directly relevant. This disclosure was made in very special circumstances and is not to be regarded as a precedent or in any way derogating from the general principle of non-disclosure that I have outlined (Henry, 1968a, p. 10).

19. Except that the Chairman of the RTPC may order that all or part of proceedings held before the Commission or any member thereof shall be conducted in public. This is discussed below under RTPC.

20. See Annual Report 1974/75 (p. 36).

> The Director may, at any stage of an inquiry, and in addition to or in lieu of continuing the inquiry, remit any records, returns or evidence to the Attorney General of Canada for consideration as to whether an offence has been or is about to be committed against this Act, and for such action as the Attorney General of Canada may be pleased to take.

Alternatively, the Director can, under section 18(1)(a),

> prepare a statement of evidence obtained in the inquiry which shall be submitted to the Commission and to each person against whom an allegation is made therein.

The RTPC then usually holds private hearings, evaluates the evidence, issuing a written report which is transmitted to the Minister and made public within 30 days.[21] The Attorney General then considers the RTPC report with a view to deciding whether legal proceedings should be instituted.

The Director has set out in his Annual Report the factors which are taken into account in deciding whether to go to the RTPC or directly to the Attorney General as follows:

(1) whether there exist in the context of the inquiry economic or other non-legal factors of which it is important that the public should be made aware in a published report and which would not necessarily emerge in proceedings in the courts;

(2) whether there exist unusual legal points that ought to be resolved in principle by the courts with a minimum of delay;

(3) the fact that the inquiry discloses an offence of a kind that has been the subject of previous reports of the Commission so that an additional report will add little new information to the public's knowledge of the class of activity under inquiry;

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21. Except if the RTPC "states in writing to the Minister it believes the public interest would be better served by withholding publication" in which case the Minister decides (section 19(5)). In the 1960/61-1974/75 period all RTPC reports have been published.

(4) in the case of misleading price advertising (section 33c) or advertising involving claims not based on an adequate and proper test (section 33D(2) the fact that a charge must be laid for this offence within six months after it was committed, which makes it virtually impossible to obtain a report from the Commission before the expiry of the period of limitation;

(5) the fact that in most other cases of misleading advertising the facts are essentially simple and self-evident so that reports of legal proceedings will sufficiently inform the public as to the direct impact of the impugned acts on the consumer or other purchaser;

(6) the desirability as a matter of sound administration of the Act of bringing the case to a final conclusion in the courts without protracting the matter by the additional time necessary to prepare a statement of evidence and to allow the Commission to hear the parties and write their report. (Annual Report 1969/1970, p. 31)[22]

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22. The criteria first appeared in the Annual Report 1964/65 (p. 10). At that stage there were only five criteria. The six criteria first appeared in the 1969/70 Annual Report and have been repeated in all subsequent Annual Reports up to and including 1974/75. The only difference between the five and six criteria is that the six criteria go into more detail concerning misleading advertising. However, after 1974/75 the criteria were not repeated. For details see text.

In the early part of the period 1960/61 to 1974/75 nearly all inquiries in which the Director considered that the evidence warranted prosecution, a statement of evidence was prepared and sent to the RTPC. However, by the end of the period the Director rarely sent a statement of evidence to the RTPC. Instead, nearly all cases in which the Director considered prosecution was warranted went straight to the Attorney General.[23] This change of procedure is recognized in the Annual Report 1975/76 (p. 17), in which it is remarked that "evidence gathered in an inquiry" is "normally" referred directly to the Attorney General rather than through the RTPC.

Summary. The main function of the Director under the Combines Investigation Act is to conduct investigations and decide whether the resultant investigation reveals a situation worthy of prosecution, in which case a reference is made either to the RTPC or the Attorney General of Canada. An important secondary function is to conduct research inquiries pursuant to section 47 of the Act into monopolistic situations. In order to collect evidence to determine whether an offence has been committed and for presentation in court in a subsequent prosecution, the Director is given certain statutory powers: search, returns of information, affidavit, oral examination before the RTPC. The exercise of these powers has to be approved by a member of the RTPC, while the Director's decision to discontinue an inquiry has to be approved by the Minister and, usually, the RTPC. It would appear that neither institution has exercised a significant influence over the conduct of the Director, although the RTPC has once refused an application for a search order, while the Minister has disagreed with the decision of the Director to discontinue an inquiry. Hence the Director, apparently, has considerable discretion in the conduct of an investigation and the decision of whether it should be discontinued or submitted for consideration for possible prosecution.

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23. Between 1960/61 and 1964/65, the Director sent 24 statements of evidence to the RTPC and referred 12 cases directly to the Attorney General. In the period 1970/71 to 1974/75, the corresponding numbers were, respectively, 1 and 43. (In three instances it was not possible to determine the date of referral to the Attorney General.)

## 3.3 The Restrictive Trade Practices Commission

### 3.3.1 The Machinery

The Restrictive Trade Practices Commission was created under the 1952 amendments to the Combines Investigation Act, following the recommendations of the MacQuarrie Report (1952). Between 1952 and 1970 the RTPC was required by section 16(1) of the Act to consist of

> not more than three members appointed by the Governor in Council.

In 1970, the maximum permissible size of the RTPC was increased to four members by "virtue of amendments to the Canada Corporations Act" which gave the RTPC some "additional duties". (Quinlan, 1975, p. 17)

The maximum permissible number of members was usually appointed to the RTPC by the Governor in Council between 1952 and 1970. However, between 1970 and May 1974, when the maximum permissible size of the RTPC was four, membership was restricted to only two persons, with only a single member between the end of 1973 and May 1974. This reflected two important factors: a lack of work for the RTPC because the Director ceased to send potential prosecution cases to the RTPC,[24] and second, the role and existence of the RTPC was placed in a state of considerable uncertainty because of the introduction of Bill C-256 on June 29, 1971, which proposed major amendments to the machinery of the Combines Investigation Act.

The Governor in Council is not only authorized by the Combines Investigation Act to appoint the members of the RTPC, but also to designate, under section 16(2), a

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24. However, the Director did refer one research inquiry, bid depositories and similar arrangements in the construction industry, to the RTPC shortly after March 31, 1974. (See Annual Report 1974/75, p. 49). Of course the Director could have ceased to use the RTPC because of the small number of members. Nevertheless the smallness of the RTPC would seem to be the result of the trend mentioned in footnote 23 above, not the cause.

> ... Chairman of the Commission; the Chairman is the chief executive officer of the Commission and has supervision over and direction of the work of the Commission.

There have been three Chairman of the RTPC: C.R. Smith, Nov. 1, 1952 - Oct. 31, 1962; R.S. MacLellan, Feb. 1, 1963 - May 31, 1970; J.J. Quinlan, May 8, 1974 - Oct. 1, 1977. L.A. Couture is presently Acting Chairman and was also Acting Chairman between the departure of R.S. MacLellan and the arrival of J.J. Quinlan.

The period of tenure or appointment of each member of the RTPC, including the Chairman, is "ten years from the date of the appointment" given "good behaviour" (section 16(3)). Four members resigned from the RTPC well before their full term of ten years had expired. For example, D. Eldon resigned "in order to resume his career as a university professor" (Canada, Department of the Registrar General, 1966). Although the period of tenure for a member of the RTPC is 10 years, section 16(4) provides that:

> A member on the expiration of his term of office is eligible for reappointment.

Of the 10 people who have been appointed to the RTPC two have been reappointed: A.S. Whiteley and L.A. Couture.[25]

In carrying out the functions assigned to the RTPC under the Act,

> A vacancy in the Commission does not impair the right of remaining members to act. (Section 16(7)).

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25. Under section 16(5) the Governor in Council has the authority to fix the salary of members. Also if a member of the RTPC

> by reason of any temporary incapacity is unable to perform the duties of his office, the Governor in Council may appoint a temporary substitute member, upon such terms and conditions as the Governor in Council may prescribe (section 16(6)).

During the period 1952-1975, it would appear that this section of the Act was not exercised.

A quorum is defined as

> Two members ... except where there are three vacancies in the Commission when one member constitutes a quorum (Section 16(8)).[26]

Hence, with a full complement of four members, it is possible for the RTPC to carry on two sets of different hearings simultaneously. However, this has not occurred. Prior to 1970, with a full complement of three members, the legislation did not permit a quorum of one member and hence it was not possible to conduct two sets of hearings at the same time.

The professional staff of the RTPC has always been very small, never exceeding three economists. Hence the members who are appointed to the RTPC are largely responsible for writing the reports issued by the Commission. The composition of the Commission has tended to reflect a pronounced legal bias, with the Chairman and at least one of the members having a strong legal background. Such a bias toward the legal profession is also found in other boards, commissions and tribunals. (See Andrew and Pelletier, 1978, p. 154)[27] Normally one of the members has a training in

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26. Prior to 1970, section 16(8) read:

> Where there is no vacancy in the Commission, or only one vacancy, two members constitute a quorum and where there are two vacancies, the member holding office may exercise and perform all the powers, duties and functions of the Commission under this Act.

27. The dominance of lawyers no doubt partly account for the observation of Skeoch (1966a, p. 94) that in many cases, RTPC reports are "first-rate examples of legal briefs" and of the Economic Council of Canada (1969, p. 71) that "the Commission has paid close attention to the interpretation of the Combines Act by the courts and, to a considerable extent, has assimilated its role to that of the courts."

economics. However, persons with business experience have not been appointed.

### 3.3.2 The Appraisal Powers of the RTPC[28]

The primary function of the RTPC is to appraise the results of inquiries of Director of Investigation and Research which are submitted, pursuant to section 18, to the RTPC and "to each person against whom an allegation is made" by the Director.[29] The results of an inquiry are contained in a document of some length, including the identity of those individuals and enterprises against which allegations have been made; the allegations themselves (offence, period over which committed, where committed); a detailed description of the industry; the argument, and supporting documentary and oral evidence, to be used against the accused. There is no corresponding responsibility on behalf of the defendants to make a detailed reply to the Director's allegations.

Hearings. The RTPC, upon receiving the Director's statement of evidence

> shall fix a place, time and date at which argument in support of such statement may be submitted by or on behalf of the Director, and at which such persons against whom an allegation has been made

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28. The best description of the powers and functions of the Restrictive Trade Practices Commission is to be found in Quinlan (1975).

29. The RTPC has three secondary functions. First, as noted in the previous section, a member of the RTPC authorizes the use by the Director of the formal powers of search, etc. Second, the written concurrence of the RTPC is required when the Director discontinues an inquiry in which "evidence has been brought before the Commission" (section 14(1)). Third, the RTPC, pursuant to section 47, can order the Director to undertake a research inquiry. This provision has never been used by the RTPC. However, under section 11 of the Shipping Conferences Exemption Act the RTPC ordered the Director to undertake a research inquiry in 1973/74 into certain freight practices in Eastern Canada. The resulting inquiry was not made public.

> in such statement shall be allowed full opportunity to be heard in person or by counsel. (Section 18(2)).

At the hearings the Director is usually represented by the officer-in-charge of the case and a member of the Legal Branch.[30] Those against whom allegations are made are usually represented by counsel. The Director may introduce additional evidence to that contained in the statement of evidence during the hearings but the Director has not "endeavoured to tender" such evidence "except by way of rebuttal" (Quinlan, 1975, p. 14). Before the hearings are completed the Director may withdraw his statement of evidence and discontinue the inquiry, pursuant to section 14, if it appears that he cannot sustain his case. This occurred only once during the 1960/61-1974/75 period.[31]

The hearings are usually held in private unless the Chairman of the RTPC considers it in the public interest to have public hearings. However, there are some exceptions. For example, in the Shipping Conference Arrangements and Practices case the RTPC "publicly invited representations from shippers, truckers, exporters and importers concerning the effects of shipping conference arrangements on Canadian trade" (RTPC, 1965a, p. 5).[32]

No person can be excused from giving evidence in response to an order of a member on the grounds that evidence given may be incriminating (Section 20(2)). On the other hand, oral evidence collected by the RTPC cannot be used in a subsequent prosecution against the individual concerned,[33] but could be used in examination of witnesses in a charge against a corporation.

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30. The Legal Branch of the Department of Consumer and Corporate Affairs is discussed further in the next section.

31. For details see Annual Report 1965/66 (p. 69).

32. Hearings concerning research or general inquiries, carried out pursuant to section 47 of the Act, are usually held in public. There have been only a small number of these referred to the Commission by the Director. These are discussed further in Chapter IV below.

33. " ... other than a prosecution for perjury in giving such evidence" before the RTPC (section 20(2)).

Reports. The RTPC, after hearing the oral evidence, considering the statement of evidence submitted by the Director and any briefs presented by those against whom the Director has made allegations, is required to write a report which shall

> review the evidence and material, appraise the effect on the public interest of arrangements and practices disclosed in the evidence and contain recommendations as to the application of remedies provided in this Act or other remedies. (Section 19(2)).[34]

In addition, the RTPC is required, pursuant to section 19(3), in conspiracy matters to

> ... include a finding whether the conspiracy relates only to one of the matters in section 32(2) which are not in themselves detrimental and if so whether it is likely to lessen competition unduly in respect of prices, markets, entry etc., set out in section 32(3) (Quinlan, 1975, p. 14)[35]

These statutory requirements follow very closely the language and intent of the MacQuarrie Committee's recommendations which stated, in part,

> The report should review the evidence, set out the facts of the conditions or practices complained of and inform the Minister and the public as to how in its opinion, the practices worked ... It should reach conclusions on whether or not competition has been restricted or lessened and whether in the opinion of the board the conditions or practices have operated or are likely to operate to the detriment of the public. (Canada, House of Commons, 1952, p. 34).

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34. The RTPC can, instead, submit an interim report to the Minister and then make further inquiries before submitting a final report (section 22). However, "[T]here has been no case since this provision was enacted in which the Commission found it necessary to submit an interim report." (Quinlan, 1975, p. 16).

35. This section was added to the Combines Investigation Act in 1960 and reflected changes made to the conspiracy provisions made at that time.

Hence, the RTPC's report would seem to have a fourfold function. First, to report the facts of the situation and comment on the competitive implications of the alleged practices. Second, to appraise the effect of the alleged infringements on the public interest. However, no statutory guide is provided as to what constitutes the public interest, which is left largely to the discretion of the RTPC. The RTPC have generally interpreted the effect on the public interest in the light of the provisions of the Combines Investigation Act. Eldon (1965, pp. 13-14), a member of the RTPC between February 1963 and July 1966, has stated this view as follows,

> In general the Restrictive Trade Practices Commission has accepted the courts' definition of "public interest" in considering cases before it whether there has been an offence. The economic philosophy of the Commission in its first ten years [i.e., 1952-1962] was well and explicitly stated in a number of its early reports. This philosophy might be reduced to four propositions: (1) that competition is the best and safest regulator of prices and is necessary for the effective functioning of a free economy; (2) that the public is entitled to the benefits of "free competition" in the sense in which the courts have used the term; (3) that price control, inasmuch as it is opposed by definition to a free economy, is justified only in an emergency or in special circumstances; and (4) that price control by private arrangement is likely to involve public detriment.[36]

Third, suggest remedies, which could include changes in tariffs, compulsory licensing and divestiture in a merger case. For example, in three reports since 1960, the RTPC

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36. Eldon's paper is an interesting comparison of the U.K. and Canadian approach to defining the public interest in competition policy. The U.K. approach to public interest is much more catholic than in Canada, including such diverse factors as safety of the public, countervailing power, exports and unemployment effects (Eldon, 1965, p. 48).

has recommended a change in tariffs,[37] none of which were implemented at the time. The most usual recommendation is for a prohibition order. Fourth, in the case of conspiracy, to determine whether competition has been or is likely to be lessened unduly with respect to section 32(3).

The RTPC in preparing its reports endeavours to follow two of the recommendations of the MacQuarrie Committee.[38] First, the Commission does not attempt to determine whether an offence has actually taken place. The MacQuarrie Committee said

> The board should not, however, be required or expected to determine specifically whether or not, in its opinion, an offence has been committed. (Canada, House of Commons, 1952, p. 34).

As a former Chairman of the RTPC has pointed out, this is not an easy recommendation to follow "in situations involving a per se offence, such as resale price maintenance, since in making a finding in such a situation, it [the RTPC] is necessarily expressing a view that an offence has been committed" (Quinlan, 1975, p. 15). However, the public interest finding in the light of the provisions of the Act usually amounts to the finding of an offence under the Act. Second, the MacQuarrie Committee thought that:

> ... the report should [not] recommend prosecution or non-prosecution. This should be left to the Minister's [of Justice] decision on the basis of the report and such advice as he may seek. We think the report has important functions other than that of furnishing a preliminary verdict as to whether or not the accused shall be prosecuted. (Canada, House of Commons, 1952, p. 34).

Quinlan (1975, p. 15) says that this recommendation "has

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37. See Restrictive Trade Practices Commission (1960a, 1962a, and 1971). The reports related to the sugar industry in eastern Canada, paperboard, shipping containers and containerboard, grades of paperboard and electric large lamps, respectively. (Note that RTPC, 1962b, 1962d, also recommended tariff reduction. However, these two short reports are really just extensions of RTPC, 1962a.) For further details of RTPC's recommendations see Chapter V, below.

38. See Quinlan (1975, pp. 14-15); Henry (1965, p. 8).

been followed meticulously by the Commission since its inception."[39]

The final report of the RTPC is submitted to the Minister[40] and

> ... within thirty days after its receipt by the Minister be made public, unless the Commission states in writing to the Minister it believes the public interest would be better served by withholding publication in which case the Minister may decide whether the report, either in whole or in part shall be made public. (Section 19(5)).

All the reports submitted by the RTPC to the Minister have been made public,[41] with none of the delay that marked the controversy that surrounded the Flour Milling Report in the late 1940's.[42] In general, these reports have not attracted a great deal of public attention, largely because, according to Rosenbluth and Thorburn (1963, p. 39) their "length, dullness and drab format" has "served to make them one of the most uninviting of all government documents". However, this is only a very partial explanation. Reports, no matter how expert and well-written on sections of the Act and their application to specific industries, are rarely likely to attract widespread public interest.

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39. Rosenbluth and Thorburn (1963, p. 103) remark, "Curiously enough, the Commission has adopted the practice of avoiding specific recommendations to the minister about prosecution." This is the explanation.

40. The Minister to whom the report should be submitted varied over the period; the Minister of Justice, 1952-1965; President of the Privy Council, beginning of 1966 to June 1966; Registrar General, between June 1966 and December 1967; Minister of Consumer and Corporate Affairs, December 1967 to the present. (Source: Annual Report, various issues.)

41. See Quinlan (1975, p. 16). A fairly comprehensive list of reports of the RTPC, their subject matter and recommendations can be found in Canada, Department of Consumer and Corporate Affairs (1973, Appendix B, pp. 1B-72B). The Appendix refers to reports published after 1957. For details of earlier reports see the Annual Reports of the Director.

42. See Rosenbluth and Thorburn (1963, pp. 10-16).

Summary. In sum, the RTPC consists of a small number of members (3 or 4) appointed by the Governor in Council for a 10 year term. Normally one of the members has an economics background, while the balance have legal training. A similar sized professional staff assists the members in performing the RTPC's primary function: appraising the public interest implications of statements of evidence forwarded by the Director. Public interest has been taken by the RTPC to be synonymous with the provisions of the Act. The results of the RTPC appraisal are published in a report, which is then submitted to the Attorney General for his consideration. In general, the reports have not attracted widespread public interest.

## 3.4 Attorney General of Canada[43]

### 3.4.1 The Machinery

The Attorney General of Canada is the chief legal officer of the Federal Government of Canada. It is normal to combine this post with that of the Minister of Justice. The range of responsibilities of the individual who holds these two posts is vast: drafting of all Bills presented to Parliament as the legislative program of the government; prosecution of infractions of federal statutes such as the Narcotic Control Act, Food and Drug Act, Combines Investigation Act, Customs Act, Excise Act, Immigration Act; enforcement of the criminal law in the Northwest Territories and the Yukon Territory; litigation arising under the Income Tax Act and the Estate Tax Act; providing legal advice and opinions to government departments, agencies, boards and Crown corporations and much else. In 1972 there was a staff of 280 lawyers in the Department of Justice to carry out these functions.

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43. There is relatively little publicly available information on the Minister of Justice and Attorney General. For example, no annual report is published. This account given below relies on C.C.H. Canadian (1975, paragraphs 22, 005-22, 145) and a Department of Justice pamphlet (Canada, Department of Justice, 1972).

Among this long list of responsibilities of the Attorney General are two which relate to the administration and enforcement of competition policy. First, the Attorney General provides legal advice and aid to the Department of Consumer and Corporate Affairs, of which the Office of the Director is but a small part, through a Legal Branch consisting at present of approximately 10 lawyers.[44] The Legal Branch not only provides advice on a case, usually in the early stages, but also represents the Director when witnesses are being examined before the RTPC pursuant to section 17 of the Act. Second, and of far more significance, the Attorney General decides whether a prosecution under the Act is warranted. Here attention is devoted to the second function of the Attorney General.

In the examination of a summary of evidence forwarded by the Director of Investigation and Research, or a report of the Restrictive Trade Practices Commission, the Attorney General is assisted by four officials: foremost, the Associate Deputy Minister (Criminal Law), who is presently D.H. Christie, Q.C.; the Director, Legal Branch, who is at present A. Rutherford; the Assistant Deputy Attorney General for Criminal Law, who is presently L.P. Landry, Q.C.; the Director, Legal Services, Criminal Law Section, who is currently R.P. Coderre. These officials are all permanent civil servants (except D.M. Christie who is employed "at pleasure"), only part of whose time is spent on prospective cases under the Combines Investigation Act.

In advising the Attorney General on a particular summary of evidence forwarded by the Director or report of the RTPC, the officials usually first secure a legal opinion. This opinion can either be rendered by a lawyer in private practice (outside counsel) or an employee of the Minister of Justice and Attorney General.[45] Opinions by employees of the Attorney General are sought from lawyers

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44. Note that prior to 1966, the Office of the Director was part of the Department of Justice and the lawyers were part of the Office of Director. It was only in 1969 that a separate Legal Branch for the Department of Consumer and Corporate Affairs was established.

45. Outside lawyers have to be approved by the Department of Justice. Inclusion on the list sometimes reflects political patronage in Canada. This can sometimes be disruptive. In 1957, a general election took place which resulted in a change in the political party in power. As a result, in the "Canadian Breweries case a Liberal lawyer was replaced by a Conservative ..." (Rosenbluth and Thornburn, 1963, p. 40). However, in the period under consideration, no similar disruption

in one of the eight regional offices of the Minister of Justice: Toronto; Winnipeg, Montreal, Halifax, Edmonton, Saskatoon, Yellowknife, Vancouver. These regional offices were established over the period 1966 to 1974. The regional office selected reflects the province in which the prosecution (if any) will be brought. Increasingly, the Attorney General has used these regional offices rather than outside counsel. For example, in the period 1960/61-1964/65 lawyers employed by the Attorney General were responsible for opinions in one out of 17 prosecutions undertaken, while in 1970/71 to 1974/75 the corresponding numbers were 26 and 48.

In contrast to most of the other officials who are concerned in the course of a case under the Combines Investigation Act, the Attorney General of Canada is not a civil servant. The holder of the joint appointment of the Minister of Justice and Attorney General is a Member of Parliament and the Cabinet. In terms of the hierarchy of positions within the Cabinet, the Minister of Justice and Attorney General would be one of the most prestigious.[46] Generally, the holder of the office is one of the senior members of the administration in power. Indeed, Pierre Trudeau was for a short time both Minister of Justice and Attorney General as well as Prime Minister of Canada.

### 3.4.2 The Decision-Making Process of the Attorney General

The Attorney General of Canada, during the period 1960/61-1974/75, had to appraise 127 separate cases under the Combines Investigation Act. Of these, 76, or 59.8 per cent, were referred directly to the Attorney General, pursuant to section 15(1) of the Act, by the

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occurred, chiefly because a Liberal administration was in power continuously from 1963. For details of the Ottawa patronage system, see Probyn and Proudfoot (1978). Specific mention of lawyers is made (p. 36).

46. A full list of those individuals who held the post of Attorney General and the length of tenure can be obtained very easily from Public Archives of Canada (1974, 1976). Between April 1, 1960 and March 31, 1975 there were nine different persons who held the post of Attorney General of Canada, an average for a period 1.67 years. One person was Minister of Justice and Attorney General for less than a week. Exclusion of this individual raises the average period of tenure from 1.7 years to 1.9 years.

Director of Investigation and Research. The remaining 51 cases were referred by the Director first to the Restrictive Trade Practices Commission and then the report of the RTPC, together with the statement of evidence of the Director, were forwarded to the Attorney General of Canada.

Legal Opinion. Once the Attorney General of Canada has received either the RTPC report or the Director's summary of evidence[47] pursuant to section 15, then it is usual for the Attorney General to seek a legal opinion as to whether legal proceedings are likely to be successful or not.[48] In a few instances a second legal opinion has been sought (e.g., in the meat packing inquiry).[49] However, in those instances in which the RTPC suggested no remedy because its findings strongly suggested that no offence under the Combines Investigation Act had taken place, then the Attorney General has not always sought a legal opinion. Of the ten instances in which the RTPC found no offence the Attorney General sought a legal opinion in only five instances.[50]

As mentioned above, the legal opinion sought by the Attorney General can be obtained in two ways: reference to the outside counsel or lawyers employed by the Department of Justice, either in Ottawa or one of the regional offices of the Department. In either case in preparing his legal opinion, the lawyer usually receives a letter of instruction which sets out his terms of reference, copies of the RTPC Report (where appropriate), the Director's summary or statement of evidence, and pertinent documentary evidence. Before his final opinion is given the lawyer may have several meetings with the officer-in-charge of the inquiry on the Director's staff and, in some instances, may ask the

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47. The summary of evidence is much shorter and less detailed than statement of evidence sent to the RTPC; the former just presents the "guts" of the Director's case.

48. In a small number of instances the Attorney General has also sought the advice/opinion of an expert economist.

49. See Annual Report 1963/64 (pp. 24-25).

50. No independent legal opinion was sought with respect to RTPC (1961a, 1962b, 1962d, 1965b, 1966a). The other five instances in which no offence was found were RTPC (1964a, 1964b, 1965c, 1967a, 1972).

Director to provide additional data[51] and/or recommend additional searches or hearings. An interim opinion is sometimes issued and then a discussion ensues between the staff of the Director, the Legal Branch of Department of Justice, and the lawyer responsible for the interim opinion.

When the final legal opinion of the lawyer is received by the Attorney General he then has a policy decision to make. In this decision he will be guided by the lawyer's recommendation for or against prosecution and the Director's reaction to the opinion. In those instances in which the Director strongly disagrees with the legal opinion, the Attorney General may seek a second legal opinion before making his final policy decision. However, as pointed out above, a second opinion is a rare occurrence. The Director usually accepts the opinion of the lawyer, albeit reluctantly in some instances. Another factor which is taken into consideration by the Attorney General is (where appropriate) the opinion of the RTPC as to the public interest implications of the allegations of the Director.

Insufficient Evidence. The Attorney General of Canada has several possible sources of possible action open to him. First, he can conclude that the evidence is not sufficient to warrant legal proceedings. In such instances, a letter to this effect is sent to the Director of Investigation and Research. Over the period 1960/61-1974/75, of the 127 cases considered by the Attorney General, in 34 instances the decision of the Attorney General was not to undertake any proceedings at all. In 19 of 51 RTPC reports, the decision was no action, while for cases referred directly to the Attorney General by the Director the percentage in which no action was taken was much lower - 15 out of 76 (19.7 per cent compared to 38.8 per cent).

Such a result is not surprising in view of the criteria set out by the Director (see section 3.2.2 above). For example, RTPC (1966a) was referred to the Commission so that the public would be aware that consignment selling was a device for evading the resale price maintenance provisions

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51. In the Toronto Telegram case (see Annual Report 1973/74, pp. 34-35) for example, in an interim report, the lawyer could not give his final opinion in the case until the officer-in-charge of the case had written a memorandum on the relevant definition of the market.

of the Act. A prosecution may not have been the result the Director was after, but rather a demonstration that the law needed changing. On the other hand, cases referred directly to the Attorney General are generally much more clear-cut examples of infractions of the law. The Director, in his annual report, mentions the Attorney General's decision not to institute proceedings.[52]

Legal Proceedings. If the Attorney General decides to undertake legal proceedings he has several choices. First, to institute a prosecution through the courts. Prosecutions can be divided into two categories: prohibition order per section 30(2) and a regular prosecution. Full details and discussion are to be found in sections 3.5.2 and 3.5.3., respectively, below. In the 1960/61 to 1974/75 period, there have been 22 prohibition orders per section 30(2) and 69 regular prosecutions. Second, to take certain special remedies relating to patent and trademark rights and the tariff. In the former instance, under section 29 of the Act, the Federal Court of Canada may,

> on the information of the Attorney General of Canada, make orders restraining the abuse of patent or trade mark rights, including the revocation of the patent and the cancellation of the registration of a trade mark where such rights have been used to restrain trade or injure competition in the manner described in that section. (Annual Report 1965/66, p. 12).

Only two cases have been brought before the Federal Court of Canada by way of an information concerning patents. Both concerned Union Carbide Canada Ltd. in the late 1960's and early 1970's relating to polyethelene. Tariff adjustment is covered by section 28 of the Act which

> ... empowers the Governor in Council to reduce or abolish the tariff on an article where it appears, as the result of an inquiry under the Act or from judicial proceedings taken pursuant to the Act, that a combine or monopoly to promote unduly the advantage of manufacturers or dealers at the expense of the public has existed and has been facilitated by the duties of customs imposed on the article.

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52. During the period 1960/61 to 1974/75, the Attorney General of Canada issued no annual report. This is still the case.

> This section makes it clear that in certain circumstances imported products must be looked to, to afford a significant degree of competition in the Canadian market. Indeed, in certain situations, such as where the domestic market is supplied by a single company or control of distribution rests with one or two companies, imports may be critical in giving consumers the protection of competition and in promoting improved industrial efficiency under the stimulus of international competition. (Annual Report 1965/66, p. 12)

This is not a prerogative of the Attorney General or the Courts but of the Minister of Finance. In practice what happens is that the Minister responsible for the Office of the Director would pursue the matter in Cabinet if officials of the Director were not able to persuade the Department of Finance that something should be done. Removal or reduction of customs duties has never been implemented pursuant to a case under the Act in the 1960/61-1974/75 period. This partly reflects the fact that it is not the Attorney General's decision but that of the Minister of Finance, who likes to use tariffs as a bargaining counter in multilateral negotiations, and not to reduce them unilaterally.

## 3.5 Legal Proceedings Under the Combines Investigation Act

### 3.5.1 The Machinery: The Courts

The judiciary, who are responsible for rendering verdicts in criminal cases such as rape, murder and arson, are also responsible for deciding whether the Crown has proved its case under the Combines Investigation Act. In other words, no special body exists to judge cases brought under the Combines Investigation Act. The only movement in this direction prior to the present proposed changes in competition policy was the establishment of procedures in 1960 under section 46(1) of the Act, whereby the Exchequer Court (subsequently renamed the Federal Court) was given "all the powers and jurisdiction of a superior court of criminal jurisdiction under the Criminal Code and under this Act". The effect of this amendment was that all offences under the Act could be tried before the Exchequer Court, with the exception of some of the misleading advertising provisions. The consent of all of the accused was necessary before the Exchequer Court could be used. However, in practice, only applications for a prohibition order per section 30(2) have been taken to the Federal Court.

EXHIBIT 3-1

An Example of a Prohibition Order Granted Pursuant to Section 30(2)[a] of the Combines Investigation Act (A Simple Prohibition Order)

"IN THE EXCHEQUER COURT OF CANADA"

Tuesday, the 19th day of April, A.D. 1966

JUDGMENT

UPON the application of the Attorney General of Canada for an Order pursuant to the provisions of section 31(2) of the Combines Investigation Act, Revised Statutes of Canada 1952, Chapter 314 and amendments thereto, the said Order being applied for by virtue of proceedings commenced by Information of the said Attorney General alleging that the said Continental Ski Imports Limited has done acts or things constituting or directed towards the commission of offences contrary to section 34(2) and section 34(3) of the said Act as set forth in the said Information:

AND upon hearing read the pleadings herein and the Consent on behalf of Continental Ski Imports Limited filed herein and what was alleged by Counsel for the Attorney General of Canada and for Continental Ski Imports Limited:

AND it appearing to this Honourable Court that Continental Ski Imports Limited has done acts or things constituting or directed towards the commission of offences under section 34(2) and section 34(3) of the said Combines Investigation Act;

1. THIS COURT DOTH PROHIBIT the commission of the said offences by the said Continental Ski Imports Limited.

2. THIS COURT DOTH FURTHER PROHIBIT the doing or continuation of any act or thing constituting or directed towards the commission of such offences by Continental Ski Imports Limited or by any of its directors, officers, servants or agents.

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a. The Prohibition Order refers to section 31(2) of the Act. In 1970 the section was changed to 30(2). This Prohibition Order was granted in 1966.

SOURCE: Annual Report 1965/66 (p. 69).

### 3.5.2 Legal Proceedings: The Prohibition Order

The prohibition order is a legal device introduced in 1952 following the recommendation of the MacQuarrie Report (Canada, House of Commons, 1952, p. 41). The Act provides two separate avenues by which a prohibition order can be issued: either, following a successful regular prosecution which is to be discussed below, or pursuant to section 30(2), in which case a regular prosecution is not required. Attention is paid to the latter avenue of obtaining a prohibition order in this section.

The relevant section, 30(2),[53] reads as follows:

> Where it appears to a superior court of criminal jurisdiction in proceedings commenced by information of the Attorney General of Canada or the attorney general of the province for the purposes of this section that a person has done, is about to do or is likely to do any act or thing constituting or directed toward the commission of an offence ... the court may prohibit the commission of the offence or the doing or continuation of any act or thing by that person or any other person constituting or directed toward the commission of such an offence, and, where the offence is with respect to a merger or monopoly, direct that person or any other person to do such acts or things as may be necessary to dissolve the merger or monopoly, in such manner as the court directs.[54]

Proceedings instituted in accordance with this section are often carried out with the consent of the accused. Hence in these instances the use of the prohibition order is analogous to the consent order widely used in the U.S.

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53. Changed from section 31(2) to 30(2) in 1970.

54. The power under section 30(2) to dissolve a merger was introduced in the 1960 amendments to the Combines Investigation Act. It has never been used. However, the power to dissolve a merger following a successful regular prosecution (i.e., conviction of one or more of the accused) has existed since 1952.

EXHIBIT 3-2

An Example of a Prohibition Order Granted Pursuant to Section 30(2) of the Combines Investigation Act (A Detailed Prohibiton Order)[a]

IN THE SUPREME COURT OF ALBERTA
TRIAL DIVISION
JUDICIAL DISTRICT OF CALGARY

BETWEEN:

HER MAJESTY THE QUEEN

Plaintiff

- and -

CANADA SAFEWAY LIMITED

Defendant

At the Court House, in the City of Calgary, in the Province of Alberta, MONDAY, the 17th day of September A.D., 1973.

ORDER OF PROHIBITION - CITY OF CALGARY

UPON THE APPLICATION of the Attorney General of Canada for an Order pursuant to the provisions of Subsection (2) of Section 30 of the Combines Investigation Act, R.S.C., 1970, Chapter C-23 and amendments thereto, the said Order being applied for by virtue of proceedings commenced by an Information of the Attorney General of Canada alleging that the Defendant has done acts or things directed toward the commission of an offence of monopoly under Section 33 of the said Combines Investigation Act, as set forth in the said Information.

AND UPON READING the pleadings herein, and upon reading the Consent on behalf of the Defendant, and upon hearing what was alleged by Counsel for the Attorney General of Canada and for the Defendant.

EXHIBIT 3-2 CONTINUED

AND IT APPEARING to this Honourable Court that the Defendant has done acts or things directed toward the commission of an offence under the provisions of Section 33 of the said Combines Investigation Act.

THIS COURT ORDERS THAT:---

1. For a period of six (6) years from the date of this Order, SAFEWAY shall not knowingly charge a price, for any grocery item in any one or more of its Calgary grocery stores, for the purpose of meeting or undercutting the price of a Calgary competitor, unless the price so charged by SAFEWAY is applied uniformly and simultaneously by it, for the identical grocery item, in all of its Calgary grocery stores.

2. (a) For a period of three and one-half (3½) years from the date of this Order, SAFEWAY shall not increase the total grocery store building square footage occupied by SAFEWAY in Calgary as of the date of this Order. During said period, and except as provided in subparagraph (b), SAFEWAY may replace any of that square footage which it ceases to occupy, only by expansion of grocery stores occupied as of the date of this Order, provided that this prohibition shall not apply to increases in such square footage resulting from enlargement of any such existing grocery stores by an aggregate of not more than fifteen thousand (15,000) square feet;

3. For a period of five (5) years from the date of this Order, SAFEWAY is prohibited from acquiring, or otherwise obtaining control of, the shares or Calgary food retailing assets of any competitor engaged in the retail grocery business in Calgary.

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a. Only extracts from the Order are presented here. See Annual Report 1973/74 (p. 91-94) for full text of the Order.

SOURCE: Annual Report 1973/74 (pp. 91-94).

The use of section 30(2) has been quite extensive over the 1960/61-1974/75 time period: there were 22 attempts to secure orders pursuant to section 30(2) and they were successful in all instances except two. Over half of the prohibition orders which were granted were of the type that simply prohibited the commission of a particular offence. Exhibit 3-1 provides a typical example. The remaining orders are what is referred to as a detailed prohibition order, which means that the order in some way specifically regulates the behaviour of alleged offenders. Exhibit 3-2 provides one such example, that of Canada Safeway Ltd., perhaps the most well known.[55]

The procedure for prohibition orders often involves considerable negotiations between the defendant and the Crown. (See Figure 3-2). In going before a court pursuant to section 30(2) the Crown usually presents three documents: a draft of the prohibition order sought; the information which specifies the sections of the Act which the accused were likely to breach; a statement of claim which outlines the actions which the accused have taken toward committing an offence. An attempt is usually made to get an agreed statement of facts between the Crown and defence since, once agreed, this obviates the need to call any witnesses. Sometimes negotiations also take place as to the precise wording and content of the draft prohibition order. Hence the use of section 30(2) can be much quicker and cheaper than a regular prosecution through the courts.

The initiative for a prohibition order, rather than a regular prosecution, can come either from the Crown or the defendant. The motives for seeking a prohibition order are many: the Crown or defence may have a weak case; neither side may want the publicity of a long and protracted trial; the alleged offence may have been a mistake committed by employees without the knowledge of senior management so that a regular prosecution may seem excessive; the RTPC may have recommended a prohibition order as the appropriate remedy; a government agency might be involved.

Summary. The Attorney General is the chief legal officer of the Federal Government and, in that capacity, is responsible for the drafting of Bills presented to Parliament, legal proceedings under federal statutes and providing legal advice to government agencies and

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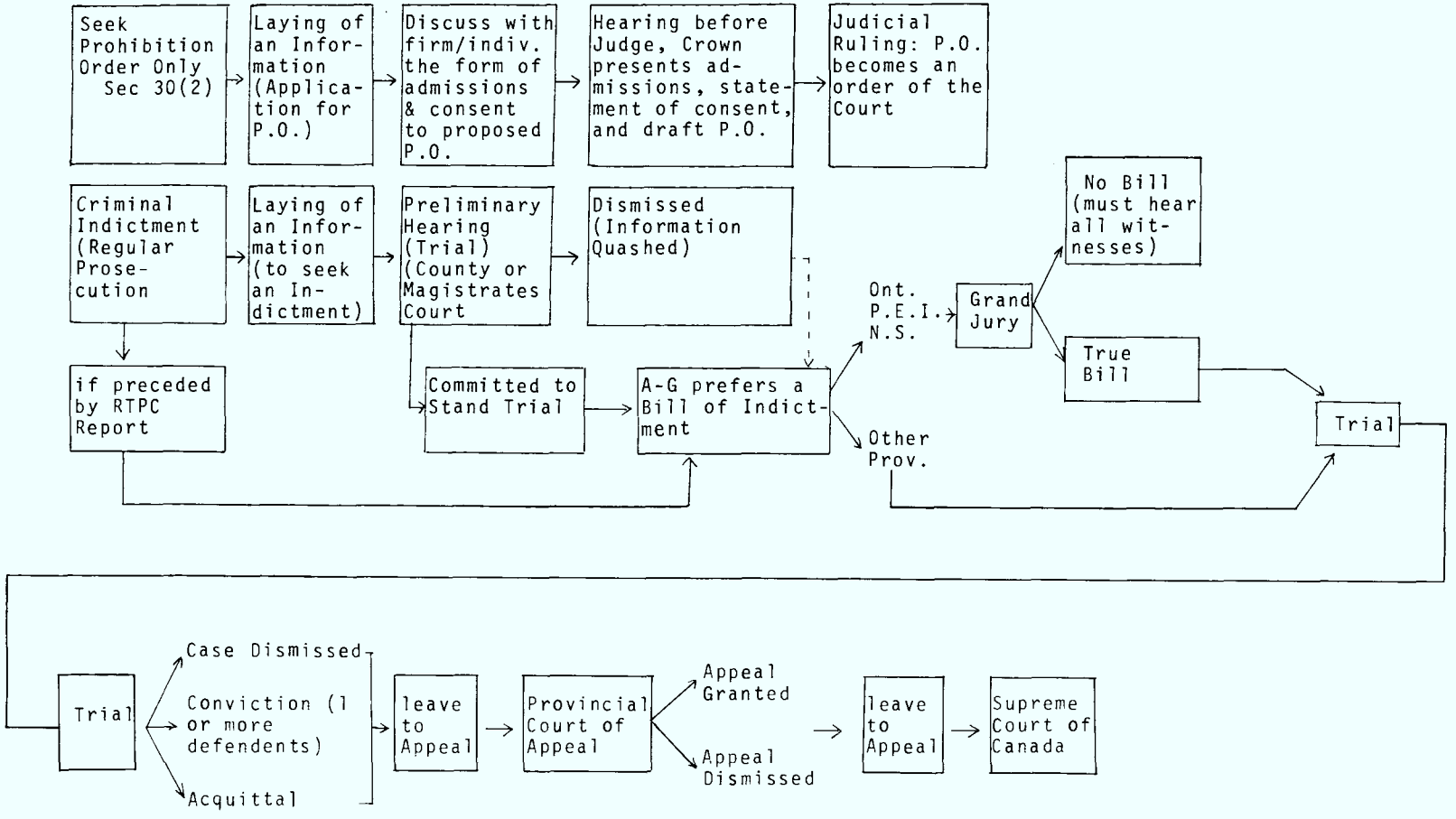
55. A similar order to that in Exhibit 3-2 was issued against Canada Safeway Ltd. for the City of Edmonton.

FIGURE 3-2

PROCEDURES FOR LEGAL PROCEEDINGS UNDER THE COMBINES INVESTIGATION ACT: 1960/61-1974/75



departments. In 1972 the Attorney General had a staff of 280 lawyers. The Attorney General has sole responsibility, under the Act, to decide whether legal proceedings shall be commenced or not. Upon the receipt of a summary of evidence from the Director or a statment of evidence and a RTPC report, the Attorney General usually obtains a legal opinion and then, if legal proceedings are undertaken, instructs counsel. Legal proceedings can take a number of different forms: a prohibition order under section 30(2) of the Act; a criminal prosecution for infringement of the Act (referred to as a regular prosecution and discussed in section 3.5.3 below); revocation or varying the terms of a patent or trademark; reduction or elimination of the tariff (which is the prerogative of the Minister of Finance). Finally, it should be noted that although the decision to undertake legal proceedings rests with the Attorney General, there is usually discussion between the Director, counsel and the Attorney General.

### 3.5.3 The Legal Proceedings: A Regular Prosecution

Laying of Information. The first step in the prosecution process, which is detailed in Figure 3-2, is the laying of information to seek an indictment. This is a relatively straightforward procedure. The information is a statement of the alleged offence, when and where it occurred, and the identity of those alleged to have broken the law. In those instances where several separate infringements of the Combines Investigation Act are being alleged, then the information will consist of a series of counts, each count referring to a particular infringement of the Act. For example, on the "15 March 1974 an Information containing two counts under section 32(1) [conspiracy] and one count under section 33 [monopoly] were laid in Vancouver" (Annual Report 1973/74, p. 33). Exhibit 3-3 details the first of these three counts.

Preliminary Hearing. After the information has been laid, but before the trial can begin a preliminary hearing is held, usually in a provincial or magistrates court. The preliminary hearing has two functions. First, the Crown presents witnesses and documents in order to satisfy the judge that there is sufficient evidence to commit the accused to stand trial. The defence does not usually call witnesses, but does cross-examine Crown witnesses. Hence, the preliminary hearing prevents the Crown from bringing unfounded or frivolous cases. Second, the preliminary hearing is designed to give the defence an outline of the Crown's case so that it is not taken completely by surprise at the trial.

At the conclusion of the preliminary hearing, the judge can either commit the accused to stand trial or discharge the accused. If the latter verdict is rendered, the Crown can either terminate the case at the preliminary hearing or go by way of preferred indictment.[56] In the period under consideration, the Crown had its case dismissed on several occasions at the preliminary hearing. In most instances, the Crown decided to terminate the case at the preliminary hearing. In the remaining instances, the Crown proceeded by way of preferred indictment.

All instances in which the Crown's case had been dismissed at the preliminary hearing occurred in the latter part of the 1960/61-1974/75 period, primarily because the cases were too complicated for the magistrates to decide. (See, for example, Stanbury and Reschenthaler, 1977, pp. 631-632, 658-659.) In the earlier part of the period, preliminary hearings were not usually held in cases under the Combines Investigation Act. The absence of preliminary hearings reflected the preference of the Director of Investigation and Research to refer all cases in which he thought legal proceedings were warranted to the Restrictive Trade Practices Commission, rather than direct to the Attorney General. The proceedings and report of the Commission were considered to perform to the same functions as the preliminary hearing. Indeed, the defence gained a much fuller picture of the Crown's arguments in proceedings before the Commission compared with a preliminary hearing. Hence, in order to avoid needless duplication in these instances in which an RTPC report was published, a preliminary hearing was often not held.

Trial. The next step after either the preliminary hearing has committed the accused to stand trial or it has been decided to institute a prosecution after an RTPC report, is for the Attorney General of Canada to prefer a Bill of Indictment before a superior court (in some provinces referred to as the Supreme Court and in others as Queen's Bench). The court then orders a trial. It has no discretion in this matter. The Bill of Indictment is based upon the charges in the Information or those which formed the substance of the RTPC report.

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56. Preferred indictment is explained below.

EXHIBIT 3-3

LAYING OF INFORMATION:
THE BRITISH COLUMBIA SULPHURIC ACID CASE

I N F O R M A T I O N[a]

CANADA: )
Province of British Columbia )
City of Vancouver )

This is the information of John K. Barker, a representative of The Director of Investigation and Research, Combines Investigation Act, of the City of Ottawa, Province of Ontario, hereinafter called the "informant".

The informant says that he has reasonable and probable grounds to believe and does believe that

Count 1

Allied Chemical Canada, Ltd. and Cominco Ltd. (formerly The Consolidated Mining and Smelting Company of Canada Limited), all incorporated under the laws of Canada, in the City of Vancouver, in the Province of British Columbia, and in the City of Montreal, in the Province of Quebec, and at divers other places in Canada, between the 1st day of January 1961 and the 15th day of March 1974, were parties to or privy to, or knowingly assisted in, or in the formation of, a monopoly, which monopoly consisted of Allied Chemical Canada, Ltd. and Cominco Ltd. (formerly The Consolidated Mining and Smelting Company of Canada Limited), during the said period, substantially or completely controlling throughout an area of Canada, namely that area of the Province of British Columbia comprising the Counties of Nanaimo, Victoria, Vancouver, and Westminster, the class or species of business in which they were engaged, to wit: the business of manufacturing, producing, purchasing, supplying, selling, or dealing in an article or commodity that may be the subject of trade or commerce, to wit: sulphuric acid, and have operated or are likely to operate such business to the detriment or against the interest of the public, whether consumers, producers, or others, and did thereby commit an indictable offence contrary to Section 33 of the Combines Investigation Act, R.S. 1970, Chapter C-23, as amended.

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a. The Information was laid on March 15, 1974.

SOURCE: Files of the Director for Investigation and Research.

However, in the provinces of Ontario, Nova Scotia and Prince Edward Island the Attorney General of Canada preferred the Indictment before a Grand Jury during most of the period 1960/61-1974/75. The Grand Jury, which consists of laymen, does have discretion in deciding whether to grant the Bill of Indictment (or returning a No Bill). The Grand Jury is presented with a list of witnesses that the Crown proposes to call at the trial and in Ontario the Crown counsel will provide the Grand Jury with a very short summary of evidence.[57] The Grand Jury, after considering the Bill of Indictment, the Crown counsel's statement and possibly calling the first witness,[58] will return a True Bill (i.e., if it is satisfied that the Crown has a case for adjudication). There is a considerable disincentive for the Grand Jury to return a No Bill, since this requires interviewing all the witnesses listed by the Crown.

The trial usually takes place in the province in whose jurisdiction the alleged offence was committed. If the prosecution relates to sections 32 (i.e., conspiracy) and/or 33 (i.e., merger and monopoly) of the Combines Investigation Act, then the trial must take place before a "superior court of criminal jurisdiction, as defined in the Criminal Code ..." (Section 44(2)). In Ontario, for example, this is the Supreme Court of Ontario. In the trial itself the prosecution presents its case first: documentary evidence is introduced; witnesses are called; in a few cases experts are called to testify. The defence follows a similar procedure. In the K.C. Irving case, for example, the defence called Professor Jesse Markham as an expert witness. Defence and prosecution may cross-examine each other's witnesses and may object to the introduction of documentary evidence.

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57. For most cases in which legal proceedings under the Act were involved, a Grand Jury took place in Ontario. There were no prosecutions in Prince Edward Island.

58. The first witness is usually the Combines officer-in-charge of the case, who has helped write the very brief statement which Crown counsel presents to the Grand Jury.

Those standing trial are usually corporations rather than individuals. One memorandum summarized the situation as follows:

> ... the tendency has been to charge corporations rather than individuals. Individuals have of course been charged where there was no corporate entity to be punished (accused individuals having carried on business under their own or trade names) ... Where corporate officials or officers of a trade association are thought to have initiated a combine or to have played a particularly active role in it, on occasion they have been prosecuted along with corporate conspirators. Other than in the above circumstances, individuals have rarely been charged. (Memorandum dated March 11, 1978).

In 1949, the Combines Investigation Act was amended such that corporations would be "Tried without the intervention of a jury" (Section 44(3)). The MacQuarrie Committee, in 1952, supported this amendment, despite some criticism, on the grounds that

> We consider, however, that the advantages of the non-jury trial in the case of corporations - to whom the principle of trial by one's peers plainly does not apply as it does in the case of individuals - outweigh any disadvantages that may exist. The trial of the combines offence involves considerations peculiar to the nature of the crime. To an unusual extent the evidence in these cases consists mainly of documents. The considerable volume of documentary evidence encountered in most of these cases and the complex nature of the case itself makes presentation before a jury less satisfactory than before a judge sitting alone. The length of a trial, often extending into many weeks, is such as to impose a heavy burden on a jury.
>
> In a jury trial all the documentary evidence is ordinarily read to the jury in extenso during the court hearings which, of course, lengthens the proceedings considerably. In a non-jury trial much of it may be entered on the record without being read at that time and the proceedings at trial accordingly shortened. The result is a more orderly arrangement of the documents and time for

> the prolonged study, necessary for a proper analysis of them, is afforded. (Canada, House of Commons, 1952, p. 40)

Individuals charged under the Act are entitled to elect for trial with or without a jury. If the individual elects trial by jury, then the trial of the corporations is usually held first. If this results in an acquittal then the charges against the individuals are usually dropped, and conversely.

The trial judge, after reviewing the documentary and oral evidence, can either dismiss, acquit or convict the accused. If a conviction is rendered then a penalty is fixed. Most cases instituted by the Attorney General under the Combines Investigation Act terminated at the trial court.

Appeal. In some instances, the Crown, defence or both decided to appeal the decision of the court. The defence can appeal a conviction from the trial court automatically on a question of law alone; on grounds of fact and mixed fact and law, leave for appeal must be sought from the full Court of Appeal, a single judge of the Court of Appeal[59] or upon certification of the trial judge. The defendant can appeal the sentence on questions of law automatically, on questions of fact by leave of the Court of Appeal. The grounds of appeal of the Crown are more restricted: an acquittal, on a question of law automatically; on sentence, on questions of law by leave of the Court of Appeal or a judge of the Court of Appeal. Of the 88 cases instituted and completed by the Attorney General in the period 1960/61-1974/75, 12 terminated at the Court of Appeal.

Finally, it is possible to appeal the decision of the Court of Appeal to the Supreme Court of Canada. The grounds for appealing to the Supreme Court of Canada are much more restricted, both for defence and prosecution, than those to the Court of Appeal. On questions of law in which at least one of the appeal judges dissented, there is an automatic right of appeal by both prosecution and defence. If no appeal judge dissented, leave to appeal for both prosecution and defence, on grounds of law only, has to be granted by a panel of three judges of the Supreme Court of Canada. An appeal to the Supreme Court can be directed only at acquittal or conviction and not sentence. However, the

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59. If the single judge refuses leave then the accused may go before the full Court of Appeal.

Supreme Court may vary the sentence or refer the case back to the Court of Appeal for sentencing. In the period 1960/61-1974/75, only seven cases reached the Supreme Court.

The Crown's decision as to whether to appeal, what to appeal and on what grounds, is clearly likely to be complex. Factors such as the precedent value of the case, the magnitude of the judges' "error", the likelihood of a stronger case under the same section of the Act appearing in the near future, and the implications for future combines cases of letting that particular decision stand, are taken into consideration. For example, the decision not to appeal either the Beer or the Sugar cases in the late 1950's and early 1960's effectively meant that most mergers were exempt from the Combines Investigation Act.[60]

The result of a regular prosecution instituted by

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60. For a discussion of these two cases and their implications see Borgsdorf (1973), Jones (1967) and Reschenthaler and Stanbury (1977). The reason for not appealing the Beer decision was the finding of fact by Justice McRuer that the price of beer was controlled by provincial Liquor Control Board and hence the Act did not apply. However, Jones "has severely challenged the idea that the Liquor Control Board of Ontario in fact effectively controlled the price structure. Rather, his evidence suggests that price increases were agreed upon by the major brewers and simply validated by the Board" (Reschenthaler and Stanbury, 1977, p. 142, emphasis in original). The reason for not appealing the Sugar Case is as follows:

> The Appeal Court called in Crown counsel in an unprecedented ex parte proceeding, and demanded that the notice of appeal be amended to remove a form of expression which Williams, J., had complained about to them as personnally insulting, and which none of the judges recognized as language lifted from a judgment of the Privy Council. It was the demonstrated hostility of the Appeal Court which made the difference in the decision not to appeal the case. (Reschenthaler and Stanbury, 1977, p. 145, footnote 51a).

However, it should be noted that the Director did not consider the question settled, despite these two cases (see Annual Report 1965/66, pp. 18-22).

the Attorney General under the Act can either be dismissal, conviction or acquittal of the accused. In the period 1960/61-1974/75, of the 88 regular prosecutions instituted and completed, in only 16 were all the accused acquitted or the case dismissed. In the remaining 72 cases some or all of the accused were convicted.

The Act lays down certain penalties for conviction under the Combines Investigation Act. First imprisonment, usually for a maximum of two years. No person has been imprisoned between 1960/61 and 1974/75 for infringing the provisions of the Act under discussion (i.e., excluding misleading advertising). Second, in a merger case, a divestiture may be ordered. Since only a small number of merger cases have been brought it is not altogether surprising that this remedy has never been used.[61] Third, the court may issue a prohibition order. It is normal for the court to issue an order which simply prohibits the repetition of the offence. Fourth, the court may impose fines which have no statutory maximum or minimum (although as of January 1, 1976, a maximum of $1 million was introduced in section 32(1), conspiracy). It is usual for a fine to be imposed. Finally, tariffs may be changed by order of the Cabinet, usually on the advice of the Department of Finance in consultation with the Office of the Director. However, in the period 1960/61 to 1974/75 this did not occur. In sum, the Crown is usually successful at prosecution. The question of the effectiveness of the penalties levied is left to Chapter V below.

## 3.6 Summary and Overview of Administrative Machinery

There were four major pieces of machinery involved in the administration and enforcement of competition policy in Canada during the period 1960/61 to 1974/75: the Director, the RTPC, the Attorney General of Canada, the judiciary. Figure 3-3 presents a highly simplified picture of the participation of each of the four pieces of machinery in the process of administering the Act. Over the period 1960/61-1974/75, the most important change in the relative significance of the four pieces of machinery has been the virtual elimination from the administrative process of the RTPC, as the Director sent prospective cases directly to the Attorney General rather than via the RTPC.

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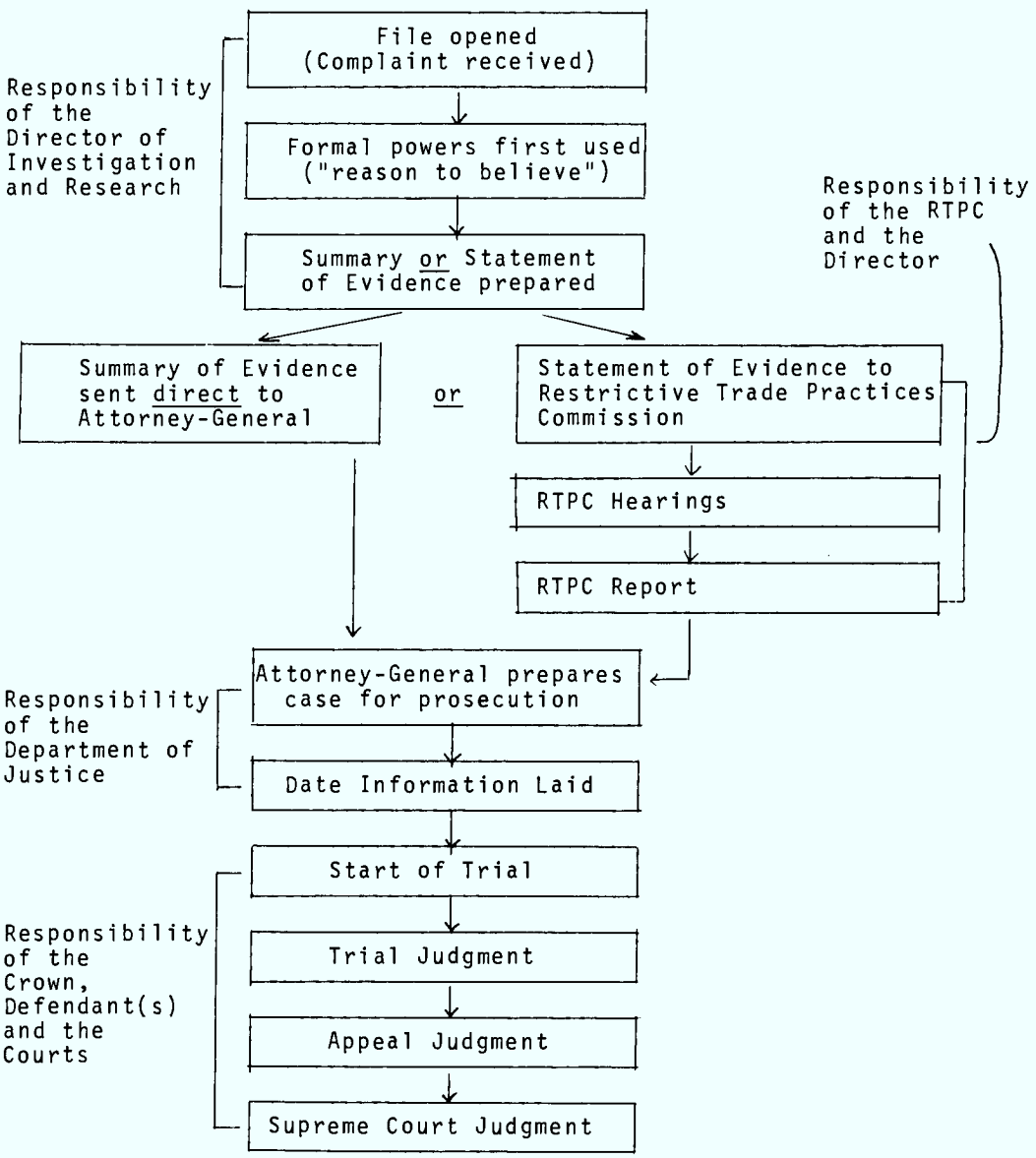
61. In one case, however, the trial judge ordered the enterprise to be broken up. This was reversed on appeal. For details see Reschenthaler and Stanbury (1977).

Figure 3-3

KEY POINTS FROM INVESTIGATION TO PROSECUTION



There are several characteristics of the four pieces of machinery which reflect certain similarities and differences. These deserve comment, at this stage, since they may be of use in accounting for/explaining the pattern of certain measures of effectiveness outlined in Chapter V below.

The Combines Investigation Act is part of the criminal law of Canada and, no doubt partly because of this, the administrative process is dominated by lawyers in every one of the four pieces of machinery. However, although the Director and one of the two Deputy Directors is always a lawyer, the staff of the Office of the Director is composed mainly of persons with a background in economics and/or commerce, not law. These individuals select those inquiries which are to be investigated. Hence it is possible that economic as well as legal criteria are used to select inquiries for investigation and reference to the Attorney General by the Office of the Director. However, differences of opinion between the Attorney General and the Director are likely to arise over the evidentiary and other legal aspects of a case, not the selection criteria employed. This reflects the fact that the Attorney General has no general policy with respect to the appropriate cases for prosecution, only that they generally have a high probability of a successful conclusion.

The commitment of the various pieces of machinery to competition policy differs considerably. The whole raison d'être of the Office of the Director and the RTPC is to administer and enforce competition policy. However, for both the Attorney General and the judiciary competition policy is but a very minor responsibility. Hence the priority and urgency given to competition policy is likely to be much higher in the Office of the Director than of the Attorney General.[62]

The periods of tenure at the level of the Director and the two Deputy Directors between 1960/61 and 1974/75,

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62. For example, even at the level of lawyers in the Department of Justice, who are required to give an opinion on a case under the Act, there is little incentive to process it quickly. Such cases are infrequent and complex. In the same amount of time, a number of much often easier cases could be processed. In addition, these other cases often have statutory time limits necessitating quick processing.

have been considerable - D.H.W. Henry was Director from 1960 to 1973. The tenure of members of the RTPC has tended to be for a long period of time. In contrast, nine different persons have held the post of Attorney General of Canada, on average for less than two years. This short period of tenure is hardly long enough for a minister to become fully conversant with the work of his department, let alone a small corner such as competition policy.[63] However, the Attorney General relies on the advice of civil servants who have usually been in the Department for a considerable period of time.

The administrative machinery can thus be summarized as follows. The Office of the Director is principally responsible for the administration and enforcement of competition policy in Canada in terms of both manpower and the ability to initiate and carry out investigations, then for determining whether the evidence uncovered is sufficient to be considered for legal proceedings under the Act.[64] Businessmen typically come to the Director for an opinion on a particular proposed course of action, not to the Attorney General of Canada or the RTPC. In the case of the RTPC, an opinion would be refused just as a court would decline, as the case may come before it later. However, before legal proceedings can take place the Director has to convince one and, in some instances, two bodies: the RTPC and the Attorney General. Only the latter has the power to institute legal proceedings, but if the RTPC report on a case has found no offence and made no specific recommendation then the Attorney General usually follows that advice. As noted above, however, the Director gradually has by-passed the RTPC, so that only the Attorney General has to be convinced that legal proceedings are warranted. For successful legal proceedings to take place, however, a valid case must

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63. No data are readily available on the average length of the tenure of the members of the judiciary. Nevertheless, given the relative infrequency with which any one individual sits on a prosecution under the Act length of tenure may not be a very significant factor. However, at the Appeal and Supreme Courts, where the important developments in law take place, a judge is likely to have more than one combines case to adjudicate upon.

64. Subject to certain safeguards which were outlined in section 3.2.2

be made to the judiciary. In sum, although the Director is primarily responsible for the administration and enforcement of competition policy he is constrained by the Attorney General who has the sole responsibility under the Act to decide whether or not legal proceedings are warranted.

## 3.7 Recent Developments in the Administrative Machinery

Recent developments in the administrative machinery of competition policy in Canada arise from the amendments to the Combines Investigation Act which became law on January 1, 1976 (hereinafter referred to as Stage I) and those proposed in a series of Bills of which the most recent was Bill C-13 introduced in Parliament in November 1977 (hereinafter referred to as Stage II). Broadly speaking, Stage I extended the reach of the Act to all services and dealt with areas such as misleading advertising and deceptive marketing practices as well as reviewable trade practices, including consignment selling. On the other hand Stage II is largely confined to mergers, monopolies and specialization agreements.[65] Here attention is focussed on changes in the administrative machinery necessitated by these reforms.[66]

Up until January 1, 1976 Canada's competition policy was expressed in a criminal statute, the Combines Investigation Act, enforced solely through the various public agencies described and analyzed in this chapter. There was no private enforcement, as is the case in the U.S., for example. It is against this background that

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65. On May 22, 1979 the Liberal Administration of Prime Minister Trudeau, which had been responsible for Stage I reforms and the Stage II proposals, was defeated in a general election. The new government of Progressive Conservative Prime Minister Joe Clark has not announced what, if any, of the Stage II proposals will be put before Parliament as government policy.

66. It is beyond the scope of this work to detail the Stage I and Stage II amendments. A very useful brief description of Stage I may be found in Annual Report 1975/76 (pp. 9-14) while a more extensive account can be found in Canada, Bureau of Competition Policy (1978) and Kaiser (1976). An evaluation of Stage II amendments may be found in Rowley and Stanbury (1978). On both Stage I and II see Pritchard et al. (1979) which also includes an extensive bibliography.

changes in the administration and enforcement will be considered: criminal, civil, private or public.

The administration and enforcement of the criminal provisions relating to public enforcement and administration remain substantially unchanged by both Stages I and II. There is a recognition of the Director's practice beginning in the mid/late 1960's to refer all cases directly to the Attorney General rather than via the RTPC, since this latter alternative is abolished under Stage II. Hence, when Stage II becomes law, the Director (to be renamed the Competition Policy Advocate) will refer all cases directly to the Attorney General.

Under Stage I, certain practices, called reviewable, were brought within the realm of competition policy under civil law provisions. This reflects the fact that these practices may under some circumstances be anti-competitive but under others neutral or pro-competitive. For a limited range of practices, the RTPC was given jurisdiction to hear cases and, where appropriate, make remedial orders. Such orders can be appealed under "section 28 of the Federal Court Act" on the grounds that the RTPC,

> failed to observe a principle of natural justice, acted beyond or refused to exercise its jurisdiction, erred in law in making a decision or based its decision on erroneous finding of facts that it made in a perverse or capricious manner. (Canada, Bureau of Competition Policy, 1976, p. 3)

In other words, appeals on a finding of fact are not permitted. The Director is the only person allowed to institute proceedings before the RTPC. Permission of the Attorney General is not required for the Director to appear before the RTPC in a reviewable practice case. However, what is not clear is whether the Director must use counsel provided by the Department of Justice. Although the Stage I amendments have been in force since January 1, 1976, no decision has been rendered by the RTPC at the present time under this section.

Stage II proposes the abolition of the RTPC and its replacement by the Competition Board. The Board will have an expanded jurisdiction, including mergers and specialization agreements. The appeal procedures are the same as those of the RTPC and Stage I, while only the

Director[67] can initiate a case before the Board, with the exception of a specialization agreement, where the parties may approach the Board. As with Stage I, although the Director can appear before the Board it is unclear whether, like criminal prosecutions, the Director has to use counsel provided by the Department of Justice.

Finally, there is provision for private enforcement under both Stages I and II. Under Stage I, if an individual or corporation has suffered damage because of the failure of another party or parties to comply with a remedial order of the RTPC or because the other party has contravened one of the criminal provisions of the Act, then single damages plus costs of investigation and proceedings may be recovered. Private action needs no prior clearance with the public law enforcement agencies. Such private action can use the proceedings of a previous court case brought by the Attorney General of Canada in recovering damages. Under Stage II the scope for private action is extended by the introduction of class actions. As yet no successful private suit for damages has been brought under the Stage I provisions.[68]

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67. Under Stage II the Director's title would change to Competition Policy Advocate. The Director under Stage I and Stage II, has the additional power to make representations before regulatory boards and agencies. The Director has already exercised this power. For details see Annual Report 1976/77 (pp. 9-11) and Annual Report 1977/78 (pp. 23-25, 36-38, 52-53).

68. However, there has been one successful claim for damages under the misleading advertising sections of the Act subsequent to January 1976. It was summarized as follows:

> The first successful conclusion of a civil action for damages under section 31.1 of the Combines Investigation Act occurred in June 1978. Midwest Motors of Regina, Saskatchewan had been convicted in July 1977 under section 36(1)(a) of the Combines Investigation Act for failing to supply a television set for $1.00 with the purchase of a car for more than $1,000 contrary to the representations contained in its advertising in May 1976. (Canada, Bureau of Competition Policy, 1978, p. 5)

The constitutionality of the private action damage suits has not been considered however.

These changes have the potential to shift the balance of administration and enforcement from public to private enforcement and from criminal to civil, hence diminishing the role of criminal public law enforcement. Under Stage I, the role of the RTPC is likely to increase in significance, while that of the Attorney General will decrease, since the Director is allowed to proceed on his own before the RTPC. To the extent that private enforcement replaces public, the Director's role will decline but, on the other hand, the role of the Director may increase if a successful public prosecution is a necessary condition for a private action, especially since the Director is allowed to make the decision as to whether or not to go before the RTPC. (However, in a private action on an order granted by the RTPC to be undertaken, the order must first have been breached.) The proposed Stage II amendments promise to have a similar effect.

In light of these potential changes it could be argued that the relevance of the analysis presented here of public law enforcement for the period 1960/61 to 1974/75 has limited implications for competition policy in the late 1970's and early 1980's. However, such an inference is likely to be incorrect for several reasons. First, as will be shown in Chapter IV, most criminal law enforcement has related to conspiracy and resale price maintenance. These will remain principally criminal offences. In addition, on January 1, 1976 the scope of the existing criminal provisions was extended under Stage I to include services. Second, given the considerable costs of proving an offence under the provisions of the Combines Investigation Act, private damage suits might only be brought after a successful public prosecution. This has been the pattern in the United States according to Elzinga and Breit (1976, p. 69). Hence, private enforcement might prove a valuable factor in increasing the significance of any given criminal prosecution undertaken by the Director. Third, while Stage I is law, Stage II is not yet on the statute books and is unlikely to be passed, at least before 1982.[69] Fourth, one of the objectives of the analysis presented here is to develop measures of efficiency and effectiveness. The results are likely to be applicable, with certain modifications, to the civil law provisions of competition policy.

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69. There remains, of course, the unsettled question of the constitutionality of the civil law provisions of Stage I and II. For contrasting views see Grange (1975) and Hogg and Grover (1976). See also footnote 68 above.

# CHAPTER IV

## OUTPUTS, INPUTS AND EFFICIENCY

### 4.1 Introduction

In this chapter an attempt is made to determine the efficiency with which competition policy has been administered in Canada over the period 1960/61 to 1974/75. In terms of the machinery responsible for administration and enforcement, the main focus will rest upon the Office of the Director. However, some attention will be directed at the Attorney General and the RTPC. Brief mention will also be made of recent developments and how they are likely to affect the measures of output, input and efficiency developed here.

Efficiency is defined, very crudely, as outputs divided by inputs. In section 4.2, the outputs of competition policy are detailed. An activity of the various agencies responsible for competition policy is listed as an output if it helps achieve the objectives of competition policy. A problem arises because competition policy has been perceived as meeting quite different objectives: preventing abuses of economic power and protecting consumers, maintaining "free competition", promoting economic efficiency, preserving the free enterprise system, handling political conflict, protecting small business. However, the single most important objective of competition policy is the attainment of an efficient allocation of resources through the workings of competitive markets. This goal has been articulated consistently over the 1960/61-1974/75 period by the Director,[1] by the Minister responsible

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1. Since 1961/62, the Annual Report of the Director has contained a statement to this effect. For example,

> The purpose of Canadian anti-combines legislation is to assist in maintaining free and open competition as a prime stimulus to the achievement of maximum production, distribution and employment in a system of free enterprise ... (Annual Report 1961/62, p. 8).

to Parliament for the Director's administration of the Act[2] and by a government-ordered inquiry by the Economic Council of Canada, which reported in 1969.[3] The preamble to Bill C-42[4], introduced on March 16, 1977, reaffirms the primacy of the efficiency objective of competition policy. Hence, in order to reduce the measurement problem to manageable proportions, attention is focussed exclusively on the efficiency objective. Section 4.3 details the inputs, mainly measured in terms of manpower, which are used to produce the various outputs of competition policy. Section 4.4 presents indicators of efficiency of the administration and enforcement of competition policy in Canada. Problems of measurement and interpretation receive considerable attention. The final section examines the recent developments in Canadian competition policy and how they affect outputs, inputs and efficiency indices.

## 4.2 The Outputs of Competition Policy

### 4.2.1 Introduction

The objective of competition policy - efficiency via competitive markets - is achieved through a variety of mechanisms used by the Director. These include securing compliance with the provisions of the Act,[5] giving advice and guidance to businessmen, disseminating information about the Act to the public through speeches and, finally, influencing government policy decisions through inter-departmental and Cabinet discussion.

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2. See, for example, Guy Favreau's classic 1966 statement in Parliament. (House of Commons Debates, May 30, 1966 p. 5688).

3. Economic Council of Canada (1969, pp. 19-20). A second major report commissioned by the Federal Government also stressed the importance of efficiency. See Skeoch et al (1976).

4. Bill C-42 is concerned with Stage II of the amendments to Canada's competition policy. This is discussed in section 3.7 above. See also Canada, Department of Consumer and Corporate Affairs (1977).

5. Of course, it must be remembered that the Attorney General has the final decision as to whether a case results in a prosecution. See 3.4.1

Not surprisingly, given this variety of mechanisms, a number of somewhat different outputs can be identified. Nine sets of output are discussed in this chapter. In most instances quantitative data are available on the volume of the output over the period 1960/61 to 1974/75. However, in a very small number of cases the volume of output is not available due to the difficulty of specifying the output for measurement purposes and actually collecting the data. These problems arose, for example, with respect to the participation in interdepartmental and Cabinet meetings and decisions.

In using the list of nine outputs described and detailed below as the numerator in the measurement of efficiency, three problems arise: the method by which all these disparate outputs can be combined into a single number; the treatment of those outputs for which data are currently unavailable; the correct set of weightings of outputs within any one of the nine categories (e.g., a conviction in a conspiracy case as against a resale price maintenance conviction). Although attention is paid to these problems here the main discussion is deferred until section 4.4 below.

### 4.2.2 Output: Prosecutions

One of the most important methods by which the Director achieves a more competitive environment is by detecting infringements of the Act. Subsequently, with the approval of the Attorney General, charges are laid, a verdict rendered, and, where appropriate, a penalty and remedy assessed. Such prosecutions are likely to be a deterrent to other potential offenders in the same industry (where the offence is local or regional, rather than national in scope) and, to a lesser extent, in the other sectors of the economy subject to the Act.[6] It should be remembered that in contrast to most of the activities of the Director, prosecutions are conducted before, and reported to, the public. For this reason alone, prosecutions are likely to have a greater impact in deterring other would-be offenders. Of course the impact of a prosecution will vary, depending upon factors such as its precedent value, the public profile of the industry[7] and whether those charged are found guilty and the penalty assessed.

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6. This is discussed further in Chapter V.

7. The laying of charges for an offence under the Act at the present time against, for example, the food processing industry would receive considerable coverage in the

TABLE 4 - 1

Prosecutions[a] under the Combines Investigation Act, Grouped by Period, Offence and Type: 1960/61 - 1974/75

| Period and Type of Prosecution | Total | | Average per year | OFFENCE CATEGORIES: Conspiracy | | RPM and/or Refusal to Sell | | Merger and/or Monopoly | | Price Discrimination[b] | | Multiple Offences | |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| | No. | % | | No. | % | No. | % | No. | % | No. | % | No. | % |
| 1960/61 - 1964/65 | | | | | | | | | | | | | |
| Sec. 30(2) P.O. | 4 | 23.5 | .8 | 1 | 14.3 | 3 | 33.3 | 0 | - | 0 | - | 0 | - |
| Regular Prosecution | 13 | 76.5 | 2.6 | 6 | 85.7 | 6 | 66.7 | 0 | - | 0 | - | 1[c] | 100 |
| T o t a l | 17 | 100.0 | 3.4 | 7 | 100.0 | 9 | 100.0 | 0 | - | 0 | - | 1[c] | 100 |
| 1965/66 - 1969/70 | | | | | | | | | | | | | |
| Sec. 30(2) P.O. | 5 | 19.2 | 1.0 | 2 | 12.5 | 3 | 42.9 | 0 | 0 | 0 | 0 | 0 | - |
| Regular Prosecution | 21 | 80.8 | 4.2 | 14 | 87.5 | 4 | 57.1 | 1 | 100 | 2 | 100 | 0 | - |
| T o t a l | 26 | 100.0 | 5.2 | 16 | 100.0 | 7 | 100.0 | 1 | 100 | 2 | 100 | 0 | - |
| 1970/71 - 1974/75 | | | | | | | | | | | | | |
| Sec. 30(2) P.O. | 13 | 27.1 | 2.6 | 6 | 33.3 | 3 | 15.0 | 3 | 75.0 | 1 | 50.0 | 0 | 0 |
| Regular Prosecution | 35 | 72.9 | 7.0 | 12 | 66.7 | 17 | 85.0 | 1 | 25.0 | 1 | 50.0 | 4[d] | 100 |
| T o t a l | 48 | 100.0 | 9.6 | 18 | 100.0 | 20 | 100.0 | 4 | 100.0 | 2 | 100.0 | 4[d] | 100 |
| 1960/61 - 1974/75 | | | | | | | | | | | | | |
| Sec. 30(2) P.O. | 22 | 24.2 | 1.5 | 9 | 22.0 | 9 | 25.0 | 3 | 60.0 | 1 | 25.0 | 0 | 0 |
| Regular Prosecution | 69 | 75.8 | 4.6 | 32 | 78.0 | 27 | 75.0 | 2 | 40.0 | 3 | 75.0 | 5 | 100 |
| T o t a l | 91 | 100.0 | 6.1 | 41 | 100.0 | 36 | 100.0 | 5 | 100.0 | 4 | 100.0 | 5 | 100 |

a. Prosecutions are dated by when the information was laid.
b. Price discrimination includes predatory pricing, unreasonably low prices, discriminatory advertising allowances, as well as price discrimination.
c. Conspiracy and monopoly.
d. Conspiracy and monopoly; R.P.M. and discriminatory advertising allowances; monopoly and predatory pricing; R.P.M. refusal to sell and discriminatory advertising allowances.

Source: Data gathered from the files of the Director of Investigation and Research by P.K. Gorecki and W.T. Stanbury. For further details see Appendix A below.

Prosecutions can be divided into two types.[8] First, those in which a charge is laid under one of the sections of the Act and, after a trial, a verdict rendered. This is referred to as a regular prosecution. Second, those instances in which the Crown asks for a prohibition order pursuant to section 30(2). As was remarked above, this is similar to the U.S. consent decree. Here the term "section 30(2) prohibition order" will be used.[9] In measuring output the issue arises over how to treat these two types of prosecutions. It is argued here that a prohibition order ought to carry less weight than a regular prosecution due to its lesser impact on the competitive environment. In particular two reasons may be cited. First, most successful regular prosecutions obtain a fine and a prohibition order. Hence the remedy in a regular prosecution is stronger than for a section 30(2) prohibition order. Second, the public profile and attention accorded a regular prosecution is usually greater than a prohibition order. Hence, the deterrent value is likely to be less for a section 30(2) prohibition order. However, this generalization should not be viewed as having no exceptions. In particular, a section 30(2) prohibition order may go much further in terms of specificity and providing information than an order granted by a court as the result of a regular prosecution. The most comprehensive prohibition order, reproduced as Exhibit 3-2 in Chapter III, was a section 30(2) order.[10]

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media, given the public concern over the alleged high cost of food.

8. An extensive discussion may be found in sections 3.5.2 and 3.5.3.

9. This is to avoid confusion with prohibition orders which may be granted after a successful regular prosecution.

10. If prohibition orders per 30(2) had been used in the period 1960/61 to 1974/75 to dissolve mergers, then clearly the relative importance of the two types of prosecution distinguished here would be somewhat different. However, no merger was dissolved nor even an attempt made in court. Finally, most prohibition orders per 30(2) were the type that simply forbade repetition of the offence (i.e., as in Exhibit 3-1 rather than 3-2 in Chapter III).

TABLE 4-2

Prosecutions[a] under the Combines Investigation Act Grouped by Period and Geographic Market: 1960/61 - 1974/75

| Period and Type of Geographic Market | Total | | Average per year | OFFENCE CATEGORIES: Conspiracy | | RPM and/or Refusal to Sell | | Merger and/or Monopoly | | Price Discrimination[b] | | Multiple Offences | |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| | No. | % | | No. | % | No. | % | No. | % | No. | % | No. | % |
| 1960/61 - 1964/65 | | | | | | | | | | | | | |
| Local | 8 | 47.1 | 1.6 | 5 | 71.4 | 2 | 22.2 | 0 | - | 0 | - | 1 | 100.0 |
| Regional | 2 | 11.8 | .4 | 1 | 14.3 | 1 | 11.1 | 0 | - | 0 | - | 0 | 0 |
| National | 7 | 41.1 | 1.4 | 1 | 14.3 | 6 | 66.7 | 0 | - | 0 | - | 0 | 0 |
| Total | 17 | 100.0 | 3.4 | 7 | 100.0 | 9 | 100.0 | 0 | - | 0 | - | 1[c] | 100.0 |
| 1965/66 - 1969/70 | | | | | | | | | | | | | |
| Local | 11 | 42.3 | 2.2 | 7 | 43.8 | 3 | 42.9 | 0 | 0 | 1 | 50.0 | 0 | - |
| Regional | 9 | 34.6 | 1.8 | 7 | 43.8 | 1 | 14.2 | 0 | 0 | 1 | 50.0 | 0 | - |
| National | 6 | 23.1 | 1.2 | 2 | 12.4 | 3 | 42.9 | 1 | 100.0 | 0 | 0 | 0 | - |
| T o t a l | 26 | 100.0 | 5.2 | 16 | 100.0 | 7 | 100.0 | 1 | 100.0 | 2 | 100.0 | 0 | - |
| 1970/71 - 1974/75 | | | | | | | | | | | | | |
| Local | 21 | 43.8 | 4.2 | 7 | 38.9 | 10 | 50.0 | 2 | 50 | 2 | 100.0 | 0 | 0 |
| Regional | 17 | 35.4 | 3.4 | 9 | 50.0 | 5 | 25.0 | 2 | 50 | 0 | 0 | 1 | 25.0 |
| National | 10 | 20.8 | 2.0 | 2 | 11.1 | 5 | 25.0 | 0 | 0 | 0 | 0 | 3 | 75.0 |
| Total | 48 | 100.0 | 9.6 | 18 | 100.0 | 20 | 100.0 | 4 | 100.0 | 2 | 100.0 | 4[d] | 100.0 |
| 1960/61 - 1974/75 | | | | | | | | | | | | | |
| local | 40 | 44.0 | 2.7 | 19 | 46.3 | 15 | 41.7 | 2 | 40.0 | 3 | 75.0 | 1 | 20.0 |
| Regional | 28 | 30.8 | 1.9 | 17 | 41.5 | 7 | 19.4 | 2 | 40.0 | 1 | 25.0 | 1 | 20.0 |
| National | 23 | 25.2 | 1.5 | 5 | 12.2 | 14 | 38.9 | 1 | 20.0 | 0 | 0 | 3 | 60.0 |
| T o t a l | 91 | 100.0 | 6.1 | 41 | 100.0 | 36 | 100.0 | 5 | 100.0 | 4 | 100.0 | 5 | 100.0 |

a. Prosecutions are dated by when the information was laid.
b. Price discrimination includes predatory pricing, unreasonably low prices, discriminatory advertising allowances, as well as price discrimination.
c. Conspiracy and monopoly.
d. Conspiracy and monopoly; R.P.M. and discriminatory advertising allowances: R.P.M. refusal to sell and discriminatory advertising allowances; monopoly and predatory pricing.

Source: Data gathered from the files of the Director of Investigation and Research by P.K. Gorecki and W.T. Stanbury. For further details see Appendix A below.

In order to be able to design appropriate weights for the prosecutions, it is desirable to have an overall picture of the main dimensions of prosecutional activity over the 1960/61-1974/75 period. Such information should enable attention to be concentrated where the problem of weighting is likely to be most important. For example, if all prosecutions result in convictions, the problem of how to weight an unsuccessful prosecution is of less relevance. In addition, the reasons for changes in the aggregate output of prosecutions can be gained by looking at the movement over time of the dimensions presented below.

Tables 4-1 to 4-3 present data on the following dimensions of prosecutional activity under the Combines Investigation Act: the type of prosecution (i.e., regular or section 30(2) prohibition order); whether the Crown won or lost; the type of offence (e.g., conspiracy, resale price maintenance (RPM ) etc.); the geographic extent of the offence (i.e., local, usually confined to a city; regional, defined as one or more provinces; national) which is used as a crude proxy for the economic impact of the prosecution, since sales and value-added information is typically not available. This method is particularly crude in comparing local and regional, since the former may be a major metropolitan centre such as Toronto, Montreal or Vancouver, yet the region may be a relatively small (economically) province such as Newfoundland or Manitoba. Due to the relatively small number of prosecutions undertaken during the period 1960/61-1974/75, approximately six per year on average, the data in the tables are presented for three five year periods. A prosecution is dated from when the information is laid.

The tables show that over the 1960/61-1974/75 period there were 91 prosecutions. The volume rose steadily throughout the period, from 17 in 1960/61-1964/65 to 48 in 1970/71-1974/75. Of the 91 prosecutions, 22 or 24.2 per cent were section 30(2) and 69 or 75.8 per cent regular prosecutions. There was no marked change over the period 1960/61-1974/75 in this pattern. In terms of offences prosecuted, the two most important were conspiracy and RPM and/or refusal-to-sell, which accounted for 45.1 per cent and 39.6 per cent of the 91 prosecutions. The growth in RPM and/or refusal-to-sell prosecutions was particularly noticeable between 1965/66-1969/70 and 1970/71-1974/75, when the number almost tripled. The prohibition order per section 30(2) was particularly important for price discrimination and merger and/or monopoly offences. Prosecutions tended to be concentrated at the local and regional level rather than national. Finally, as Table 4-3 shows, the usual outcome of a prosecution is a conviction,

TABLE 4-3

Prosecutions[a] under the Combines Investigation Act Grouped by Period, Outcome and Offence: 1960/61 - 1974/75

| Period and Type of Prosecution | Total | | Average per year | OFFENCE CATEGORIES | | | | | | | | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| | | | | Conspiracy | | | | RPM and/or Refusal to Sell | | | | Merger and/or Monopoly | | | | Price Discrimination[b] | | | | Multiple Offences | | | |
| | | | | Won | | Lost | | Won | | Lost | | Won | | Lost | | Won | | Lost | | Won | | Lost | |
| | No. | % | | No. | % | No. | % | No. | % | No. | % | No. | % | No. | % | No. | % | No. | % | No. | % | No. | % |
| 1960/61 - 1964/65 | | | | | | | | | | | | | | | | | | | | | | | |
| Sec. 30(2) P.O. | 4 | 23.5 | .8 | 1 | 14.3 | 0 | 0 | 3 | 37.5 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| Regular Prosecution | 13 | 76.5 | 2.6 | 6 | 85.7 | 0 | 0 | 5 | 62.5 | 1 | 100.0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 1 | 100.0 | 0 | 0 |
| T o t a l | 17 | 100.0 | 3.4 | 7 | 100.0 | 0 | 0 | 8 | 100.0 | 1 | 100.0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 1[c] | 100.0 | 0 | 0 |
| 1965/66 - 1969/70 | | | | | | | | | | | | | | | | | | | | | | | |
| Sec. 30(2) P.O. | 5 | 19.2 | 1.0 | 2 | 13.3 | 0 | 0 | 3 | 42.9 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| Regular Prosecution | 21 | 80.8 | 4.2 | 13 | 86.7 | 1 | 100 | 4 | 57.1 | 0 | 0 | 1 | 100.0 | 0 | 0 | 0 | 0 | 2 | 100.0 | 0 | 0 | 0 | 0 |
| T o t a l | 26 | 100.0 | 5.2 | 15 | 100.0 | 1 | 100 | 7 | 100.0 | 0 | 0 | 1 | 100.0 | 0 | 0 | 0 | 0 | 2 | 100.0 | 0 | 0 | 0 | 0 |
| 1970/71 - 1974/75 | | | | | | | | | | | | | | | | | | | | | | | |
| Sec. 30(2) P.O. | 13 | 28.9 | 2.6 | 4 | 40.0 | 2 | 28.6 | 3 | 17.6 | 0 | 0 | 3 | 100.0 | 0 | 0 | 1 | 100.0 | 0 | 0 | 0 | 0 | 0 | 0 |
| Regular Prosecution | 32 | 71.1 | 6.4 | 6 | 60.0 | 5 | 71.4 | 14 | 82.4 | 2 | 100.0 | 0 | 0 | 1 | 100.0 | 0 | 0 | 1 | 100.0 | 2 | 100.0 | 1 | 100.0 |
| T o t a l | 45 | 100.0 | 9.0 | 10 | 100.0 | 7 | 100.0 | 17 | 100.0 | 2 | 100.0 | 3 | 0 | 1 | 100.0 | 1 | 100.0 | 1 | 100.0 | 2[d] | 100.0 | 1[e] | 100.0 |
| Overall 1960/61 - 1974/75 | | | | | | | | | | | | | | | | | | | | | | | |
| Sec. 30(2) P.O. | 22 | 25.0 | 1.5 | 7 | 22.0 | 2 | 25.0 | 9 | 28.1 | 0 | 0 | 3 | 75.0 | 0 | 0 | 1 | 100·0 | 0 | 0 | 0 | 0 | 0 | 0 |
| Regular Prosecution | 66 | 75.0 | 4.4 | 25 | 78.0 | 6 | 75.0 | 23 | 71.9 | 3 | 100.0 | 1 | 25.0 | 1 | 100.0 | 0 | 0 | 3 | 100.0 | 3 | 100.0 | 1 | 100.0 |
| T o t a l | 88[f] | 100.0 | 5.9 | 32 | 100.0 | 8 | 100.0 | 32 | 100.0 | 3 | 100.0 | 4 | 100.0 | 1 | 100.0 | 1 | 100·0 | 3 | 100.0 | 3 | 100.0 | 1 | 100.0 |

a Prosecutions are dated by when the information was laid.
b Price discrimination includes predatory pricing, unreasonably low prices, discriminatory advertising allowances, as well as price discrimination.
c Conspiracy and monopoly.
d R.P.M. and discriminatory advertising allowances; R.P.M. refusal to sell and discriminatory advertising allowances.
e Conspiracy and monopoly.
f Total adds to 88 not 91 because 3 cases are still in process. These are all regular prosecutions.

Source: Data gathered from the files of the Director of Investigation and Research by P.K. Gorecki and W.T. Stanbury. For further details see Appendix A below.

especially for conspiracy and RPM and/or refusal to sell, but not for price discrimination. In sum, the typical prosecution is aimed at a regional/local market, with a conviction in a conspiracy and/or RPM (including refusal to sell) offence.

In terms of weighting the outputs, then, the important questions to be addressed involve the relative significance of a local or regional infringement, a conspiracy vs. a RPM offence, a conviction vs. an acquittal and, finally a prohibition order per 30(2) vs. a regular prosecution. For example, it could be argued that a regional conspiracy should rate higher than a local combine because, other things being equal, the economic impact of the regional level is greater. However, other things may not be equal. At the local level, the conspiracy may be much easier to enforce and more effective than at the regional level. The question of weighting, however, is deferred until section 4.4 below.

4.2.3 Output: Special Remedies

Special remedies are classified here as a reduction or removal of customs duties, declaring void in part or in whole or attaching conditions to the use of patent or trademark, and dissolving a merger or monopoly. In the period under consideration there is only one instance of the use of any of these special remedies, which concerned the conditions attached to the licensing provisions of certain patents.

On October 12, 1967, an information was laid concerning two sets of patents,

> three covering the air bubble extrusion process for producing polyethylene and other plastic films and two patents covering the corona discharge process used for treating polyethylene and other thermoplastic films or structures to make them ink adhesive for printing purposes. (Annual Report 1969/70, p. 54)

The Crown was attempting to have certain clauses in the licence agreement between the patent owner and the licensees declared void. The final result was two Minutes of Settlement reached between the Attorney General and the patent holder and certain of its licensees, which struck

down the restrictive clauses.[11] In both cases there was no admission that the clauses were unduly restricting competition, but nevertheless an agreement was reached and duly signed.[12]

### 4.2.4 Output: Reference to the Attorney General Not Prosecuted

At the conclusion of an investigation which the Director feels merits a prosecution before the courts without undue delay, a summary of evidence is forwarded directly to the Attorney General, pursuant to section 15(1) of the Act, rather than first to the RTPC.[13] In the period under consideration, of the 74 summaries of evidence forwarded to the Attorney General, in 15 or 20.3 per cent of the cases there was no subsequent prosecution instituted.[14] Table 4-4 details, by period and type of offence, the nature of these summaries of evidence. As can be readily observed these cases were concentrated exclusively in the period 1970/71 to 1974/75, with much greater emphasis upon merger and/or monopoly and price discrimination than cases going to prosecution.

The issue arises of the effectiveness of those instances where the Attorney General of Canada decides not to prosecute on receipt of a summary of evidence submitted by the Director of Investigation and Research, toward creating a more competitive environment. Several factors would seem relevant. First, such instances may reflect a

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11. The first Minute of Settlement was deposited in the Exchequer Court on December 12, 1969 and concerned the three extrusion patents. The second Minute of Settlement, deposited on June 19, 1971, related to the two corona discharge patents. The first Minute of Settlement involved only the patent holder, while the second involved the patent licensees as well.

12. The information contained in this paragraph is taken from Annual Report 1967/68 (p. 42), Annual Report 1969/70 (pp. 54-56), Annual Report 1971/72 (pp. 29-30) and Canada, Department of Consumer and Corporate Affairs (1973, pp. 57B-58B, 67B-68B). The latter two annual reports contain details of the Minutes of Settlement.

13. These criteria are detailed in section 3.2.2 above.

14. Or any other legal proceedings. Note this excludes the two Special Remedies.

TABLE 4-4

References to The Attorney General of Canada under The Combines Investigation Act which did not result in a Prosecution[a], Grouped by Period and Offence: 1960/61 - 1974/75

| Period | Total | | Average per year | OFFENCE CATEGORY | | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| | | | | Conspiracy | | R.P.M. and/or Refusal to Sell | | Merger and/or Monopoly | | Price Discrimination[b] | | Multiple | |
| | No. | % | | No. | % | No. | % | No. | % | No. | % | No. | % |
| 1960/61 - 1964/65 | - | - | - | - | - | - | - | - | - | - | - | - | - |
| 1965/66 - 1969/70 | - | - | - | - | - | - | - | - | - | - | - | - | - |
| 1970/71 - 1974/75 | 15 | 100 | 3.0 | 2 | 13.3 | 4 | 26.7 | 4 | 26.7 | 2 | 13.3 | 3[c] | 20.0 |
| 1960/61 - 1974/75 | 15 | 100 | 1.0 | 2 | 13.3 | 4 | 26.7 | 4 | 26.7 | 2 | 13.3 | 3 | 20.0 |

a. Dated by when decision made not to prosecute.

b. Price discrimination includes predatory pricing, unreasonably low prices, discriminatory advertising allowances, as well as price discrimination.

c. R.P.M. and conspiracy; monopoly and conspiracy (twice).

SOURCE: Data gathered from the files of the Director of Investigation and Research by P.K. Gorecki and W.T. Stanbury. For further details see Appendix A below.

difference between the opinion of the Director and the Attorney General over what constitutes proper evidence for prosecution. The Attorney General is likely to be more interested in winning cases and hence more risk averse than the Director. Second, and somewhat related to the first point, there may be no difference in opinion over the quality of the evidence, but the case may involve an attempt to test the limits or application of the law and, for reasons outlined above, the Director may be more prepared to bring such cases than the Attorney General. There may be some critical threshold which is required before the Attorney General will agree for a prosecution to proceed in a particular area of the law. Obviously it would be easier to solicit the opinion of the Attorney General prior to an investigation taking place. However, the point at issue may only occur during the investigation. Third, unlike an RTPC report, which does not result in a prosecution,[15] little public attention[16] or information surrounds a decision not to prosecute on the basis of a summary of evidence. Indeed, the concentration of cases in Table 4-4 in the period 1970/71-1974/75 and the inclusion of merger and monopoly offences concerning newspapers,[17] which hitherto had been sent to the RTPC suggests that the Director, in the latter part of the period under consideration, sent all cases to the Attorney General, even though before 1970/71 similar cases would have been referred to the RTPC first. These factors make it difficult to evaluate the appropriate weight to be attached to such an output. Tentatively, at least, a weight of less than a prosecution or special remedy but greater than a discontinued inquiry would seem justified.

#### 4.2.5 Output: Reports of the Restrictive Trade Practices Commission Which Result in No Prosecution

In the period 1960/61 to 1974/75, there were 51 RTPC reports published after the Director of Investigation and Research had referred a statement of evidence pursuant

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15. This is discussed in the next section.

16. A brief mention in the Director's Annual Report.

17. Concerning the Toronto Telegram and the acquisition of Le Soleil. See Annual Report 1973/74 (pp. 34-35) and Annual Report 1974/75 (pp. 32-33), respectively.

to section 18(1)(a) of the Act to the Commission. In most instances (62.8 per cent), subsequent to the report of the RTPC, a prosecution was undertaken.[18] However, in a significant minority (37.3 per cent) of reports, no prosecution resulted.[19] The question arises of how to treat such reports. In other words, given that the prime objective of competition policy is to bring about a more efficient economy via the workings of competitive markets, in what way(s) do RTPC reports which are not prosecuted aid in the achievement of this objective?

In order to throw light on this issue, reference must be made to the criteria laid down by the Director for sending cases to the RTPC rather than directly to the Attorney General (see Chapter III, section 3.2.2 above), the subject matter of the reports which did not result in a prosecution, and a comparison, by type of offence, of those RTPC reports which did and did not result in a prosecution (see Table 4-5 for details). An examination of these sources suggests that RTPC reports which did not result in a prosecution contributed to the goal of competition policy in the following ways:

(1) The reports bring to the attention of the public certain problems in the administration and enforcement of competition policy in Canada and hence provide a forum for discussion of these issues. Several subcategories exist. First, devices whereby companies avoid the spirit and intent of the Act, but the letter is not violated. For example, the RTPC report on gasoline retailing in Winnipeg discussed the issue of consignment selling as a method to bypass the RPM provisions of the Act (see RTPC, 1966a)[20] and eventually resulted in legislation. Second, reports are used to focus attention on the interface between the scope of the Act and areas where regulatory agencies have authority. For example, one RTPC report was concerned with the application of the Act to a restrictive clause in a contract between an employer(s) and a union (see RTPC 1965c) while another looked at the operations of an industry after de-regulation (see RTPC, 1972). Third, several reports discussed the application of new legislation introduced in 1960. In

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18. Discussed in 4.2.2

19. This total and discussion excludes research inquiries. See 4.2.8 below.

20. It could, of course, be argued that the courts are the proper place to explore the limits of the law.

TABLE 4-5

Reports[a] of the Restrictive Trade Practices Commission Grouped by Offence, Period and Outcome: 1960/61 - 1974/75

| Period and Outcome | Total | | Average per year | OFFENCE CATEGORIES: Conspiracy | | R.P.M. and/or Refusal to Sell | | Merger and/or Monopoly | | Price Discrimination[b] | | Multiple | |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| | No. | % | | No. | % | No. | % | No. | % | No. | % | No. | % |
| 1960/61 - 1964/65 | | | | | | | | | | | | | |
| Prosecuted | 16 | 100 | 3.2 | 9 | 56.3 | 5 | 31.3 | - | - | 2 | 12.5 | - | - |
| Not Prosecuted | 12 | 100 | 2.4 | 2 | 16.7 | - | - | 7 | 58.3 | 3 | 25.0 | 0 | 0.0 |
| T o t a l | 28 | 100 | 5.6 | 11 | 39.3 | 5 | 17.9 | 7 | 25.0 | 5 | 17.9 | 0 | 0.0 |
| 1965/66 - 1969/70 | | | | | | | | | | | | | |
| Prosecuted | 13 | 100 | 2.6 | 6 | 46.2 | 5 | 38.5 | 2 | 15.4 | - | - | - | - |
| Not Prosecuted | 4 | 100 | 0.8 | 3 | 75.0 | 1 | 25.0 | - | - | - | - | - | - |
| T o t a l | 17 | 100 | 3.4 | 9 | 52.9 | 6 | 35.3 | 2 | 11.8 | - | - | - | - |
| 1970/71 - 1974/75 | | | | | | | | | | | | | |
| Prosecuted | 3 | 100 | 0.6 | 2 | 66.7 | - | - | - | - | - | - | 1[c] | 33.3 |
| Not Prosecuted | 3 | 100 | 0.6 | 3 | 100.0 | - | - | - | - | - | - | - | - |
| T o t a l | 6 | 100 | 1.2 | 5 | 83.3 | - | - | - | - | - | - | 1 | 16.7 |
| 1960/61 - 1974/75 | | | | | | | | | | | | | |
| Prosecuted | 32 | 100 | 2.1 | 17 | 53.1 | 10 | 31.3 | 2 | 6.3 | 2 | 6.3 | 1 | 3.1 |
| Not Prosecuted | 19 | 100 | 1.3 | 8 | 42.1 | 1 | 5.3 | 7 | 36.8 | 3 | 15.8 | 0 | 0.0 |
| T o t a l | 51 | 100 | 3.4 | 25 | 49.0 | 11 | 21.6 | 9 | 17.6 | 5 | 9.8 | 1 | 2.0 |

a. Excluding research reports which are discussed in section 4.2.8. Reports are dated from the publication date of the report.

b. Price discrimination includes predatory pricing, unreasonably low prices, discriminatory advertising allowances as well as price discrimination.

c. Conspiracy and monopoly.

SOURCE: Data gathered from the files of the Director of Investigation and Research by P.K. Gorecki and W.T. Stanbury. For further details see Appendix A below.

particular three reports in the early 1960's discussed the price discrimination amendments in 1960 (see RTPC 1961a, 1961b, 1961c).

(2) The reports present information on topics that the Director considers are of interest to the public. In the period 1960/61-1974/75, the best three examples which fall into this category are a series of mergers and monopoly references concerning the newspaper industry (see RTPC, 1960b, 1964b, 1965b).

(3) In two instances the reports resulted in undertakings to the Director or specific amendments in legislation. The undertakings concerned the advertising policies of two Vancouver newspapers by a common owner[21] while the legislative change

> exempts certain ocean shipping conference practices from the provisions of the Combines Investigation Act and imposes upon conference members certain obligations concerning the form of contracts and filing of tariffs and agreements (Annual Report 1970/71, p. 10).

The RTPC report was published in 1965 and the legislative change was proclaimed on April 1, 1971. Bryan and Kotowitz (1978) have studied the exemption and recommended more competition than the present arrangements allow.

In sum, a report of the RTPC which did not lead to a prosecution can aid in achieving the objectives of competition policy in a number of ways which are quite different in their nature and impact. However, not all of the RTPC reports which did not lead to a prosecution can be considered to fall within categories (1) to (3),

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21. For full details see Canada, Department of Consumer and Corporate Affairs (1973, Appendix B, pp. 10B-11B). Following the merger of two newspapers in Vancouver, the Province and the Sun, a rule was instituted that all national advertisers had to advertise in both papers. As a result of the RTPC report this requirement was dropped and the newspapers undertook to inform the Director of changes in the new policy. Other matters such as editorial independence were also included in the undertakings.

especially some of the those published in the early part of the period.[22] These reports reflect the continuation of the tradition dating from 1910 when Mackenzie King introduced the first Combines Investigation Act and argued that "light is the sovereign antiseptic and the best of all policemen" (cited in Skeoch, 1966a, p. 20). However, the light that the reports have shed seems to have been somewhat restricted, as mentioned at the conclusion of section 3.3 above. RTPC reports not prosecuted should probably rank above references to the Attorney General not prosecuted but below a prosecution or special remedy.

### 4.2.6 Output: Discontinued Inquiries

The Director of Investigation and Research, after conducting an investigation, may decide that on the basis of the evidence collected there is insufficient grounds for a prosecution or that the inquiry does not raise issues and concerns which should be brought to the attention of a wider public through an RTPC report. In such instances the investigation is discontinued by a letter requesting the concurrence of the RTPC (where section 17 of the Act has been used) and the Minister responsible to Parliament for the administration of the Act. Such inquiries are referred to as discontinued inquiries.

Table 4-6 shows that over the period 1960/61 to 1974/75 there were 254 discontinued inquiries. There was a very slow proportionate increase in the number of discontinued inquiries over the period, from 77 in 1960/61-1964/65 to 95 in 1970/71-1974/75. Not surprisingly, the discontinued inquiries tend to be concentrated in those offence categories - merger and/or monopoly as well as price discrimination - where competition policy has had least success in securing convictions. Most of the discontinued inquiries involving price discrimination followed the 1960 amendments, dropping rapidly in frequency in the late 1960's and early 1970's. In sum, there was a fairly even distribution over time of discontinued inquiries, with 43.7 per cent falling in the areas where least success has been experienced in court.

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22. Since they would have been referred prior to 1960.

TABLE 4-6

Inquiries Discontinued[a] Under the Combines Investigation Act
Grouped by Period and Offence: 1960/61-1974/75

| Period | Total | | Average per year | OFFENCE CATEGORIES | | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| | | | | Conspiracy | | R.P.M. and/or Refusal to Sell | | Merger and/or Monopoly | | Price Discrimination[b] | | Multiple | |
| | No. | % | | No. | % | No. | % | No. | % | No. | % | No. | % |
| 1960/61 - 1964/65 | 77 | 100 | 15.4 | 13 | 16.9 | 4 | 5.2 | 11 | 14.7 | 28 | 36.4 | 21 | 27.3 |
| 1965/66 - 1969/70 | 82 | 100 | 16.4 | 15 | 18.3 | 9 | 11.0 | 41 | 50.0 | 2 | 2.4 | 15 | 18.3 |
| 1970/71 - 1974/75 | 95 | 100 | 19.0 | 22 | 23.2 | 24 | 25.3 | 21 | 22.1 | 9 | 9.5 | 19 | 20.0 |
| 1960/61 - 1974/75 | 254 | 100 | 16.9 | 50 | 19.7 | 37 | 14.6 | 73 | 28.7 | 39 | 15.4 | 55[c] | 21.7 |

a. Discontinued inquiries are dated when they are discontinued.

b. Price discrimination includes predatory pricing, unreasonably low prices, discriminatory advertising allowances as well as price discrimination.

c. Several of the more common multiple offences were conspiracy and RPM and/or refusal to sell (11); conspiracy monopoly and/or merger (8); RPM and/or refusal to sell and merger and/or monopoly (10).

Source: Data gathered from the files of the Director of Investigation and Research by P.K. Gorecki and W.T. Stanbury. For further details see Appendix A below.

Discontinued inquiries serve to create a more competitive environment in a similar way to preliminary inquiries (see 4.2.7 below), by making the businessman aware that an active and interested agency exists in anticompetitive practices and behaviour. It also has the desired effect of showing complainants[23] that the Director acts upon their information and hence is likely to stimulate further information concerning restrictive practices. Nevertheless, a discontinued inquiry would probably rank below a prosecution, special remedy, RTPC report not prosecuted and reference to the Attorney General not prosecuted.

### 4.2.7 Output: Preliminary Inquiries

Preliminary inquiries refer to brief investigations undertaken to see whether, on the basis of readily available information, the Director has reason to believe that an offence has been or is about to be committed.[24] The duration of a preliminary inquiry will usually be of a week or perhaps two. Such inquiries are usually started by a complaint from a consumer, businessman, trade association, elected officials, or a government agency/department.[25] A preliminary inquiry may result in a formal inquiry and subsequent prosecution or other legal proceedings.

Two reasons may be suggested to explain why a preliminary inquiry may lead to a more competitive environment, albeit on a lower level than a prosecution. First, preliminary inquiries insofar as they consist of interviewing businessmen, members of the public, officials from other government departments and agencies, as well as responding to the complainant, create an image of the presence of an agency interested in the competitive workings of the economy. In the words of Canada's chief competition policy official between 1923 and 1949, F.A. McGregor, preliminary inquiries,

> serve to remind the business public of the existence of an interested and active agency and of the bearing of the law upon the different types of restrictive activity. (McGregor, 1954, p. 368)

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23. Although the complainant is not told of the progress of an inquiry, nevertheless searches, requests for information and visits by the staff of the Director are likely to become common knowledge in the industry.

24. This is discussed in 3.2.2 above.

25. And the Director himself, although relatively unimportant when compared to these other sources.

This increased awareness of the Office of the Director is likely to make businessmen think twice before breaking the law. Second, most prosecutions are the result of complaints, especially from businessmen.[26] Hence, responding to complaints through preliminary inquiries can be seen as part of the process for increasing the flow of information to the Office of the Director and hence the likelihood of detecting restrictive practices. It is not possible to provide any quantitative index of the "welcome" which a complaint receives. However, the Director of Investigation and Research, particularly during D.H.W. Henry's tenure as Director between 1960 and 1973, publicly encouraged businessmen to come forward with complaints.[27] In addition, it has been, and is, the policy of the Office of the Director to give prompt replies to complaints.

Table 4-7 provides data on the volume of preliminary inquiries carried out over the period 1960/61 to 1974/75, by three five-year periods and several classes of offences. Preliminary inquiry totals are divided into gross and net, where the latter excludes preliminary inquiries which led to one of the other outputs discussed here in section 4.2. The table shows that over the period 1960/61 to 1974/75 there was a total of 2,581 preliminary inquiries on an average of 172.1 per year. After a considerable drop (i.e., 33.8 per cent) in the number of preliminary inquiries, between 1960/61-1964/65 and 1965/66-1969/70, a large increase was recorded (58.7 per cent) between 1965/66-1969/70 and 1970/71-1974 /75. The initial drop in the number of preliminary inquiries reflects the substantial fall in preliminary inquiries concerning price discrimination. As discussed in section 4.2.9 on the Program of Compliance, this decline may reflect the increasing familiarity with the 1960 amendments on price discrimination. The subsequent increase reflects a rise in preliminary inquiries concerning all offences. Similar findings are also found for the net number of preliminary inquiries.

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26. This is discussed in detail in Chapter VI.

27. The Program of Compliance is discussed in section 4.2.9 below.

TABLE 4-7

Preliminary Inquiries[a] Under the Combines Investigation Act
Grouped by Period and Offence: 1960/61-1974/75

| Period | Total No. of Preliminary Inquiries | | Average No. per year | OFFENCE CATEGORIES | | | | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| | | | | Conspiracy[b] | | R.P.M. and/ or Refusal to Sell | | Merger and/ or Monopoly | | Price Discrimination[c] | | Other[d] | | Unknown | |
| | No. | % | | No. | % | No. | % | No. | % | No. | % | No. | % | No. | % |
| 1960/61-1964/65 | | | | | | | | | | | | | | | |
| Gross | 951 | 100.0 | 190.2 | 183 | 19.2 | 184 | 19.3 | 50 | 5.3 | 238 | 25.0 | 163 | 17.1 | 133 | 14.0 |
| Net | 803 | 100.0 | 160.6 | 150 | 18.7 | 163 | 20.3 | 0 | 0.0 | 217 | 27.0 | 140 | 17.4 | 133 | 16.6 |
| 1965/66-1969/70 | | | | | | | | | | | | | | | |
| Gross | 630 | 100.0 | 126.0 | 200 | 31.7 | 153 | 24.3 | 91 | 14.4 | 61 | 9.7 | 115 | 18.3 | 10 | 1.6 |
| Net | 508 | 100.0 | 101.6 | 166 | 32.7 | 129 | 25.4 | 49 | 9.6 | 57 | 11.2 | 97 | 19.1 | 10 | 2.0 |
| 1970/71-1974/75 | | | | | | | | | | | | | | | |
| Gross | 1000 | 100.0 | 200.0 | 279 | 27.9 | 288 | 28.8 | 201 | 20.1 | 136 | 13.6 | 93 | 9.3 | 3 | 0.3 |
| Net | 905 | 100.0 | 181.0 | 260 | 28.7 | 262 | 29.0 | 184 | 20.3 | 121 | 13.4 | 75 | 8.3 | 3 | 0.3 |
| Overall Total 1960/61-1974/75 | | | | | | | | | | | | | | | |
| Gross | 2581 | 100.0 | 172.1 | 662 | 25.6 | 625 | 24.2 | 342 | 13.3 | 435 | 16.9 | 371 | 14.4 | 146 | 5.7 |
| Net | 2216 | 100.0 | 147.7 | 576 | 26.0 | 554 | 25.0 | 233 | 10.5 | 395 | 17.8 | 312 | 14.1 | 146 | 6.6 |

a. Preliminary inquiries are dated from the opening of the file.

b. Includes identical bids and tenders.

c. Includes predatory pricing, unreasonably low prices, discriminatory advertising allowances and price discrimination.

d. Multiple offences, not under Act.

Source: Data gathered from the files of the Director of Investigation and Research by P.K. Gorecki and W.T. Stanbury. For further details see Appendix A below.

The overall composition of preliminary inquiries, by type of offence, shows that approximately one-half concerned conspiracy and RPM, with merger and monopoly and price discrimination accounting for approximately 15 per cent each. An examination of the composition of inquiries over the three sub-periods shows a substantial increase in the significance of merger and monopoly preliminary inquiries, which probably reflects the increasing number of recorded mergers.[28] The changing relative importance of the price discrimination category has already been mentioned.

In sum, there has been a substantial number of preliminary inquiries over the period 1960/61-1974/75. The main foci of such inquiries have been conspiracy and RPM, with a significant increase over time in the relative importance of merger and monopoly inquiries and a decline in price discrimination section inquiries. The pattern over time and the composition were not unexpected in view of the increasing importance of mergers, and familiarity with the price discrimination provisions introduced in 1960, as well as the concentration of prosecutions on conspiracy and RPM offences, noted in section 4.2.2 above. It is difficult to decide whether a preliminary inquiry should be ranked higher or lower than a discontinued inquiry.

### 4.2.8 Output: Research Inquiries

Under section 47 of the Combines Investigation Act the Director of Investigation and Research can

> carry out an inquiry concerning the existence and effect of conditions or practices having relation to any commodity which may be the subject of trade or commerce and which conditions or practices are related to monopolistic situations or restraints of trade ... (Section 47(1))[29]

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28. See Canada, Royal Commission on Corporate Concentration (1978, Table 6.1, p. 141).

29. A research inquiry by the Director may also be started at the direction of the Minister or the RTPC. In the period 1960/61-1974/75, neither has exercised this power.

Such inquiries, which have been termed general or research inquiries, are not aimed at specific violations of the Act, but rather general or industry-wide practices. A specific power to conduct such inquiries was first placed in the Act in 1952 after the MacQuarrie Report (Canada, House of Commons, 1952, p. 43) recommendation that

> A sound programme of empirical research on this vast subject [i.e., monopolistic situations and practices in Canada] is much needed at present.

Prior to 1952 there was only one inquiry of a general or research nature, which was published in 1945, on international cartels. (See Canada, Commissioner, Combines Investigation Act, 1945.) Research inquiries conducted by the Director usually require the answering of questionnaires (i.e., written returns under section 9 of the Act) and sometimes hearings before the RTPC under section 17. At the conclusion of this process the Office of the Director forwards a "Green Book" to the RTPC containing a summary of the main findings and recommendations, together with the accompanying evidence. The RTPC then holds hearings and subsequently issues a report. The procedure followed by the RTPC is the same as that of a normal reference, except that the proceedings of the RTPC are usually in public.

In the period under consideration there were three research reports[30] which went through the above process. The subject areas were automobile insurance; distribution and sale of automotive oils, greases, antifreezes, batteries, tires, and accessories; manufacture, distribution and sale of drugs.[31] In terms of their effect on the competitive environment, such reports serve to focus attention on shortcomings in the existing law and ideally should lead to changes. However, only the latter two reports led to significant changes: the automotive products inquiry had considerable influence upon the referral of competition policy to the Economic Council of Canada in 1966 and upon the refusal to deal, tied selling, exclusive dealing and consignment selling provisions of Stage 1 described in section 3.7 above; the report on drugs led to

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30. Research reports are included here if the report was published in the period 1960/61-1974/75.

31. RTPC (1960c, 1962e, 1963 respectively).

much easier licensing policy and a reduction in prices.[32]

In addition to these three research reports, are two which provide general information on particular facets of Canada's industry structure and hence provide data with which to formulate policy. The first report, on mergers between 1945 and 1961, was based upon data gathered under section 8 of the Act but was co-authored by two academics and published by the Economic Council of Canada.[33] The second report, on concentration in Canadian manufacturing industries for the year 1965, was based upon information gathered from Statistics Canada and hence did not use the formal powers of the Act.[34] It was published by the Department of Consumer and Corporate Affairs. Both of these studies were major pieces of research. The concentration study, for example, represented the publication of the first set of concentration data since 1948. Research reports should receive a relatively high ranking.

### 4.2.9 Output: Program of Compliance

On the initiation of businessmen, lawyers and others, successive Directors charged with administering the Combines Investigation Act have followed a policy of discussing and providing an opinion concerning the application of the Act. However, it was D.H.W Henry, Director between 1960 and 1973, who made informal contacts between business and government into an important part of the administration and enforcement of competition policy. The procedure gained a formal title, the Program of Compliance, instead of the use of such terms as Informal Discussions[35] and Informal Conferences.[36] Henry's speeches

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32. For further details in automotive products see Canada, Department of Consumer and Corporate Affairs (1973, Appendix B, pp. 14B-15B), Economic Council of Canada (1969, pp. 124-126), and McQueen (1979); on drugs see Canada, Department of Consumer and Corporate Affairs (1973, Appendix B, pp. 20B-22B) and Lang (1974).

33. Reuber and Roseman (1969).

34. See Canada, Department of Consumer and Corporate Affairs (1971).

35. Annual Report 1951/52 (p. 10).

36. Annual Report 1957/58 (p. 31).

were copied and made available to the public. In contrast to previous Directors, D.H.W. Henry contributed widely to trade, law and marketing publications on the subject of competition policy and law.[37] The general aim of the program was set out in the early 1960's by Henry, as

> to promote wider knowledge of the provisions of the Combines Investigation Act with the view to lessening the possibility of offences being committed as the result of unfamiliarity with the Act and its application to the affairs of particular businesses. (Annual Report 1964/65, p. 15)

Similar statements were made in speeches and other annual reports of Henry.

The Program of Compliance was seen by Henry as aiding the administration and enforcement of competition policy in three ways. First,

> prevention is better than cure, that it is cheaper for both the Crown and for the individual businessman to avoid committing an offence rather than to become involved in one with subsequent enforcement activity which invariably is expensive to all concerned, not only financially but in terms of pressure on management. (Henry, 1971a, p. 34)

In other words, given the scarce resources of the Office of the Director,[38] a greater impact on the competitive environment may be gained through the Program of Compliance, since it is much cheaper to administer than the implied alternative - a prosecution. Second, Henry perceived that there was considerable ignorance among businessmen with respect to the provisions and application of the Act. Henry held this view during most of his period as Director. For example, in a speech in 1960, Henry stated,

> I must say that I have been greatly impressed by the apparent lack of understanding on the part of representatives of industry and trade generally as to the manner in which the Combines Branch functions and the attitude of the Director toward business practices generally. (Henry, 1960, p. 4)

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37. These are listed in Gorecki and Stanbury (1979a).

38. Resources are discussed in section 4.3 below.

Eight years later Henry found the level of knowledge had improved little,

> The businessman often tends to fear the legislation in an unreasoning way without knowing as much about it as he should. There is a good deal of folklore surrounding the Act and its enforcement and much information is peddled in the business community and erroneously accepted by those who do not take the trouble to ascertain the true facts. (Henry, 1968a, p. 2)

These observations, together with Henry's (1962, p. 12) view that "the vast majority of businessmen wish to conduct their affairs in accordance with the law, even at the price of some inconvenience to themselves", led Henry to conclude that the provision of information and guidance would, and indeed did, result in "a considerable number of businessmen ... avoiding committing an offence under the Combines Investigation Act" (Henry, 1961a, p. 4). Third, and somewhat related to the last point, is that the law and its judicial interpretation is not always unambiguous. The Director, therefore, has some discretion in deciding when to start an inquiry. For example, Henry (1970, p. 7) stated that

> the provisions of the Act are not in all respects simple or easy for the layman to understand, or even sometimes for his legal adviser. Indeed, there has been considerable jurisprudence arising out of proceedings in the courts which reflects the latitude for arguments and difference of view as to the meaning of some of the provisions.

The Program of Compliance provided the businessman with much greater certainty in conducting his affairs, since the Director would state his position with respect to a particular proposal, given the available facts.

The Program of Compliance has two measurable outputs which reflect the two strands of the program: one quite general, the other very specific. The former consists of the Director and senior officials addressing trade associations and various other bodies. The latter involves the Director giving advice to businessmen concerning the application of the Act to a particular situation. The Director has described this procedure as follows:

> The Director has encouraged businessmen to raise with him any questions they may have

> concerning the application of the Act in particular circumstances. In many cases, the Director undertakes to ascertain whether or not a particular business decision or course of conduct would, in his opinion, amount to an offence and give rise to an inquiry ... The result can be of very practical assistance to businessmen ... (Annual Report 1964/65, p. 15)

Such advice was not to be considered a substitute for a proper legal opinion, however. These outputs will be referred to as public appearances and compliance requests, respectively.

The number of public appearances by senior officials over the period 1960/61 to 1974/75 is not available. Instead attention is confined here to the 40 to 80 formal addresses that D.H.W. Henry gave between 1960 and 1970. A formal address is simply defined as a presentation or speech given by Henry which was printed in mimeograph form and made available, on request, to the public.[39] After 1970 Henry's attention was devoted largely to the difficulties and problems associated with introducing amendments to the Combines Investigation Act.[40] Table 4-8 summarizes and highlights various aspects of Henry's speeches such as the distribution of speeches by year, subject of the addresses and the nature of the audiences.

The addresses given by Henry varied considerably in such dimensions as length, subject matter, purpose and the audience. Some addresses were quite short (e.g., only nine pages) while others were of considerable length (e.g., as long as 70 pages). Henry rarely addressed the same audience more than once. The most notable exception was the Canadian Manufacturers' Association, which he addressed in

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39. For example, in a recent Annual Report the following appears:

> The former Director [i.e., D.H.W. Henry] ... publicly discussed virtually all important legal aspects of the legislation, and copies of his addresses are available upon request (Annual Report 1975/76, p. 15).

40. This process is discussed in detail in Stanbury (1977a).

1961, 1964 and 1966.[41] Generally, it would appear, Henry was the only speaker at most of the engagements, although sometimes his address formed part of a conference or panel discussion. Finally, the subject of the speech was often suggested by the group which invited D.H.W. Henry. Perhaps the best examples are speeches given to the Canadian Automotive Wholesalers' and Manufacturers' Association and the Canadian Paint, Varnish and Lacquer Association which consist largely of Henry's answers to detailed questions prepared by the two trade associations.

Most of the formal addresses Henry gave were concentrated in the early years of his tenure. For example, between 1960/61 and 1963/64, Henry delivered 31 of his 48 addresses, or 65 per cent. In contrast, during the period 1964/65 to 1970/71 Henry averaged less than three speeches a year. This pattern reflects two factors: the launching of the Program of Compliance by the Director upon his appointment in 1960; the desire by trade associations and others to know the Director's attitude and interpretation of the 1960 amendments to the Combines Investigation Act. [42]

Table 4-8 presents a three-way classification of the audiences which the Director addressed, as well as details of the main topics of such addresses. Not surprising, the Director addressed businessmen most frequently (61 per cent) followed by the professions (27 per cent) and a general category, labelled "Other" (12 per cent). In terms of the topics of the address, marked differences are observed between the three groups. Business was particularly concerned over the application of specific sections of the Act, especially price discrimination and conspiracy. In contrast, the category labelled "Other" was mainly concerned with the overall picture concerning the Act and its application. The professions were in a somewhat intermediate position.

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41. However, different branches and divisions of the same organization were addressed. For example, Henry made a speech to both the Montreal and British Columbia Chapters of the American Marketing Association.

42. These are described in Rosenbluth and Thorburn (1963, Chapter 8).

TABLE 4-8

The Nature of the Audience and the Subject Matter of Formal Addresses Given by D.H.W. Henry, Director of Investigation and Research: 1960/61-1974/75

| Audience | Number of Times Addressed | Subject Matter of Address[a] | | | | | |
|---|---|---|---|---|---|---|---|
| | | Conspiracy | Price Discrimination[b] | Resale Price Maintenance | Misleading Advertising[c] | Merger & Monopoly | General |
| 1. Business | | | | | | | |
| Trade Association | 20 | 4 | 12 | 3 | 1 | 0 | 2 |
| Canadian Manufacturers' Association | 3 | 1 | 1 | 1 | 1 | 0 | 1 |
| Trade Association Executives | 2 | 1 | 0 | 0 | 0 | 0 | 1 |
| Purchasing Agents | 3 | 3 | 1 | 0 | 0 | 0 | 0 |
| Other | 2 | 0 | 1 | 0 | 0 | 0 | 1 |
| TOTAL | 30 | 9 | 15 | 4 | 2 | 0 | 5 |
| 2. Professions | | | | | | | |
| Economists/ Financial Analysts | 2 | 1 | 0 | 0 | 0 | 2 | 0 |
| Marketing | 2 | 0 | 0 | 1 | 1 | 0 | 1 |
| Lawyers | 4 | 1 | 1 | 1 | 1 | 1 | 2 |
| Accountants | 1 | 0 | 0 | 0 | 0 | 0 | 1 |
| Surveyors | 1 | 1 | 0 | 0 | 0 | 0 | 0 |
| Patents & Trademark Institute | 1 | 1 | 0 | 0 | 0 | 1 | 0 |
| Media | 2 | 0 | 0 | 0 | 1 | 0 | 1 |
| TOTAL | 13 | 4 | 1 | 2 | 3 | 3 | 5 |
| 3. Other | | | | | | | |
| Clubs | 3 | 0 | 0 | 0 | 0 | 0 | 3 |
| University | 2 | 1 | 0 | 0 | 0 | 0 | 1 |
| Better Business Bureau | 1 | 0 | 0 | 0 | 1 | 0 | 0 |
| TOTAL | 6 | 1 | 0 | 0 | 1 | 0 | 4 |
| GRAND TOTAL[d] | 49[e] | 14 | 16 | 6 | 5 | 3 | 14 |

a. Refers to main subject of address. Most addresses made brief mention of administration of Act and its provisions.

b. Price discrimination includes predatory pricing, unreasonably low prices, discriminatory advertising allowances as well as price discrimination.

c. Although misleading advertising is excluded from consideration in this study, for the sake of completeness it was included in this table.

d. Since an address could devote itself to more than one topic the total number of "subject matter of address" can (and does) exceed the total number of groups addressed.

e. There were 48 addresses. However, the address delivered on Dec. 12, 1965 was jointly sponsored by two groups (Canadian Construction Association and Canadian Institute of Quantity Surveyors). Hence, although 48 addresses, there were 49 different audiences.

Source: Speeches of the Director of Investigation and Research.

The business organizations that Henry addressed are divided into five groups in Table 4-8: trade associations, the Canadian Manufacturers' Association, trade association executives, purchasing agents, and others. Reading across the rows of the table, certain differences can be detected in the subject matter of the Director's addresses to each group. Organizations which were representative of businessmen in a specific industry (i.e., trade associations) were extremely interested in the application of the 1960 amendments with respect to price discrimination. In contrast, those groups of businessmen with some common function, such as purchasing agents or trade association executives, were much more interested in the conspiracy provisions (i.e., section 32). For example, purchasing agents paid particular attention to the way in which the conspiracy provisions affected identical bids.[43] Finally, the subjects discussed in the addresses to the Canadian Manufacturers' Association reflected the interests of both trade associations and groups such as the purchasing agents. It is revealing, perhaps, that businessmen had no desire to be addressed upon the subject of the merger provisions, realizing that the implication of the Beer[44] and Sugar[45] decisions essentially meant the law was a dead letter. On the other hand, some groups in the professions, most notably the economists, were particularly interested in the Director's position and what action he intended to take with respect to clarifying or changing the merger law.

In sum, Henry's speeches were mainly confined to businessmen and largely delivered in the first few years of his 13-year term of office. The main function of the addresses was to explain to businessmen the Director's interpretation and attitude with respect to the application

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43. The Director also commented on this problem in his Annual Report several times. See Annual Report 1960/61 (pp. 23-24), 1963/64 (pp. 11-12) and 1967/68 (pp. 43-46). The concern over identical tenders led to a research inquiry. The RTPC report was published in late 1976.

44. R. v. Canadian Breweries [1960] O.R. 601; 33 C.R.I.; 126 C.C.C. 133.

45. R. v. British Columbia Sugar Refining Company Limited et al (1960) 32 W.W.R. (N.S.) 577; 129 C.C.C. 7; (1962) 38 C.P.R. 177. Both cases are reviewed in Reschenthaler and Stanbury (1977).

of the 1960 amendments of the Combines Investigation Act.[46] In particular, emphasis was given to the amendments with respect to price discrimination which, at the same time, had the potential to affect many business practices with no clear jurisprudence for guidance.[47] Hence, the formal address aspect of the Program of Compliance was probably highly functional, with the Director, in the main, reacting to the requests of businessmen for information on particular points concerning the 1960 amendments.[48]

The data on compliance requests by businessmen and others presented here are drawn from two sources. First, a study undertaken by the Office of the Director of Investigation and Research, which was published in the Director's Annual Report for 1968/69.[49] This study deals with the period 1960 to 1967 and the first nine months of 1968. The second source is a paper by Charles Stevenson of the Research Branch of the Bureau of Competition Policy.[50] This latter paper, which concentrates on the period 1968/69 to 1975/76, is far more detailed than the former study. According to Stevenson (1977, p. 2) both studies use the same basis for collecting data, so that comparisons between the studies are valid. However, while every effort is made to include data series which refer to the whole of the period 1960/61 to 1975/76, in some instances it may only be possible to refer to the 1968/69 to 1974/75 period covered by Stevenson. The unit of observation for statistical purposes is a compliance request,

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46. It should be mentioned that most addresses had an introductory description of the administrative machinery of the Act.

47. The price discrimination sections in the 1960 amendments were labelled 33A and 33B. The latter was completely new, while the former was an amended section from the Criminal Code, on which there was virtually no jurisprudence. For a discussion see Nozick (1976).

48. It might be noted that when the misleading advertising provisions of the Act began to be enforced with much vigour in the late 1960's, Henry started to give formal addresses on this subject.

49. For details see Annual Report 1968/69, (pp. 14-21).

50. Referred to as Stevenson (1977).

> made by businessmen or their agents regarding the application of the Act to their respective business activities ... (Annual Report 1968/69, p. 16)

Hence, if "a company has brought up several situations for discussion ... each one has been created as a separate entity" (Annual Report 1968/69, p. 16). This definition excludes general requests for information by the press or television, and compliance requests which were really complaints concerning alleged infringements of the Act. However, those compliance requests which led to an investigation by the Director are excluded from consideration in this section. Since their quantitative importance is slight (less than 4 per cent) this should not significantly affect the results presented here.[51]

Table 4-9 shows the total number of compliance requests grouped by three five-year periods, and offence categories for the period 1960/61 to 1974/75. The pattern of compliance requests over time shows a fall in the number of such requests from 1960/61-1964/65 to 1965/66-1969/70 and then a subsequent increase in the early 1970's.

This bimodal distribution of complaints over time can be easily explained. The initial increase in the 1960/61-1964/65 period was the result of two factors, "the 1960 amendments to the Act and the development of the Program of Compliance by the Director of Investigation and Research" (Annual Report 1968/69, p. 16). The second peak, which was concentrated in 1970/71 and 1971/72, within the 1970/71-1974/75 period, probably reflects the response to the proposed amendments, Bill C-256, introduced on June 29, 1971. The decline in compliance requests in the mid and late 1960's reflects the increasing familiarity and certainty concerning the 1960 amendments. In the early 1970's different factors were at work, the withdrawal of Bill C-256 and the departure in 1973 of D.H.W. Henry, who had been the creator of the Program of Compliance and had dealt with businessmen on a face-to-face basis.[52] It may take the new Director a little time to develop such a rapport.

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51. While Stevenson excludes such requests, it is unclear whether the earlier study does (see Annual Report 1968/69, p. 20).

52. The Director personally dealt with 58.1 per cent of all requests in 1968/69; in 1972/73 it fell to 18.4 per cent.

TABLE 4-9

Compliance Requests[a] Under the Combines Investigation Act
Grouped by Period and Offence: 1960/61-1974/75

| Period | Total | | Average per year | OFFENCE CATEGORIES | | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| | | | | Conspiracy | | R.P.M. and/or Refusal to Sell | | Merger and/or Monopoly[b] | | Price Discrimination[c] | | Multiple[d] | |
| | No. | % | | No. | % | No. | % | No. | % | No. | % | No. | % |
| 1960/61 - 1964/65 | 317 | 100 | 63.4 | 67 | 21.1 | 31 | 9.8 | 1 | 0.3 | 207 | 65.3 | 11 | 3.5 |
| 1965/66 - 1969/70 | 259 | 100 | 51.8 | 78 | 30.1 | 27 | 10.4 | 32 | 12.4 | 106 | 40.9 | 16 | 6.2 |
| 1970/71 - 1974/75 | 324 | 100 | 64.8 | 143 | 44.1 | 29 | 9.0 | 26 | 8.1 | 105 | 32.4 | 21 | 6.5 |
| 1960/61 - 1974/75 | 900 | 100 | 60.0 | 288 | 32.0 | 87 | 9.7 | 59 | 6.6 | 418 | 46.4 | 48 | 5.3 |

a. Compliance requests are dated when the file was opened (i.e., request received).

b. Merger and/or monopoly requests were not recorded for 1960/61 to 1963.

c. Price discrimination includes predatory pricing, unreasonably low prices, discriminatory advertising allowances as well as price discrimination.

d. Includes other.

Note: The data source recorded compliance requests for 1960/61 to 1967/68 on a calendar, not fiscal, year basis. To convert the data to a fiscal year basis it was assumed that compliance requests were distributed equally throughout the year. The resulting numbers were then rounded.

Source: Annual Report 1968/69 (Table 3, p. 17) and Stevenson (1977).

Table 4-9 shows that most compliance requests are concerned with the price discrimination provisions of the Combines Investigation Act. There have been few court cases to clarify the law in this area, either with respect to the 1960 amendments or the pre-1960 provisions relating to price discrimination. The wording of the Act itself is difficult to comprehend, with the result that

> Many businessmen have been uncertain about the application of the section to their operations. The particularly large number of inquiries in 1961 may have stemmed in part from the amendments of 1960. Many of the inquiries have resulted in a discussion of the scope of the phrase 'like quality or quantity'. (Annual Report 1968/69, p. 18)

Given the above and the widespread potential application of the price discrimination provisions, it is not surprising that it generates a high proportion of compliance requests. Such a finding is consistent with the importance of price discrimination in speeches given by Henry to businessmen (see Table 4-8.) D.H.W. Henry has publicly acknowledged that the Program of Compliance, and not the courts, had been used to administer the price discrimination sections of the Act. For example, he stated,

> Now in the area of trade practices enforcement, apart from resale price maintenance ... [they] have not been dealt with in a useful way before the courts, but have largely been enforced on the basis of what we call our Program of Compliance; namely, by discussions between businessmen and my staff when they come to find out if their proposed pricing procedures are likely to cause them trouble under the Act. (Henry, 1971b, p. 2)

In other words, a difficult section of the Act to interpret with little or no jurisprudence as guidance led Henry to become the arbiter of the meaning of the law.

The importance of conspiracy compliance requests reflects, to some extent, the 1960 amendments to the Combines Investigation Act. First, export agreements were exempted from the conspiracy provisions (Section 32) if they did not reduce the volume of exports or lessen competition unduly in the domestic market. However, export agreements were a relatively unimportant source of conspiracy compliance requests, as D.H.W. Henry has remarked,

> So far as I am aware, there is no wide-spread use of this provision. I know that some export agreements are in operation but, notwithstanding my stated intention to apply these provisions liberally in carrying out my duties as Director, I have had no significant number of inquiries with respect to the interpretation of this provision pursuant to our Program of Compliance. (Henry, 1968b, p. 8, emphasis added.)

For example, between 1968/69 and 1975/76 there were only 12 export agreement compliance requests out of 186 conspiracy compliance requests. Second, the 1960 amendments specifically allowed firms to cooperate in areas such as the exchange of statistics, defining product standards and the restriction of advertising if it did not lessen competition unduly with respect to such variables as price, quantity or quality. Hence, many trade associations or parties wishing to form a trade association may have wanted to gain the Director's opinion of how far such cooperation could go without causing an inquiry to be started. In both areas there was no jurisprudence, so that the Director's opinion was of some consequence and value.[53]

The relatively infrequent compliance requests concerning the merger provisions reflects the implications of the decisions in the Beer or Sugar cases. Despite this, the Director refused to concede that the merger provisions were without force.[54] Such an intepretation is consistent as well with the analysis of Table 4-8, which showed that the merger and monopoly provisions of the Act were never the major subject of an address given by Henry to a business audience between 1960 and 1970.

Finally, the relatively small number of compliance requests concerning resale price maintenance can be explained on different grounds. There were a significant number of resale price maintenance prosecutions under D.H.W. Henry which resulted in the law being reasonably well defined. The second reason may have been the existence of

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53. Compliance requests from the construction industry were chiefly concerned with Section 32. Given the construction industry's concern over identical bids, this is another source of compliance requests under the conspiracy section (See Stevenson, 1977, for details).

54. See Annual Report 1965/66 (pp. 18-22) "Position of Director on Merger Law".

devices such as consignment selling and voluntary resale price maintenance which made it possible to escape quite legally the intent of the law. However, no evidence is available on the use of these devices. Most of the resale price maintenance compliance requests in the 1960-1968 period were concerned with the following:

> A number of the inquiries received under this section appear to reflect a belief that refusal to sell per se is an offence. Some of the enquiries have posed difficulties because they amounted ostensibly to proposals to refuse to sell for lawful reasons, yet the basic motivation may have been resale price maintenance. There have been several inquiries about the legality of setting maximum resale prices, and some manufacturers wished to discuss the propriety of refusing to sell to retailers who were cutting prices. In the latter instance sometimes the manufacturer was under pressure from one of the discounter's large competitors whose sales were dropping as a result of this form of price competition. There have also been many discussions with manufacturers about the issuance of suggested price lists. (Annual Report 1968/69, p. 19, emphasis in original).

No corresponding comment is available for the period 1968/69-1974/75.

The subject matter of compliance requests closely parallels, in some important respects, the main topics of the formal addresses given by D.W.H. Henry. In both instances great emphasis is placed upon price discrimination. Indeed, it could be argued that one of, if not the main functions of the program was to administer the price discrimination provisions of the Combines Investigation Act. Supporting evidence comes from the large portion of preliminary inquiries concerned with price discrimination but the relatively small proportion of prosecutions under this section.

In weighting the outputs of competition policy to form a composite index, the significance attached to the Program of Compliance by D.H.W. Henry would clearly have been high compared with such other activities as prosecutions. For example, at one point Henry said,

> Effective enforcement of the legislation is to be accomplished as much by preventing the commission of offences as by discovering and prosecuting offenders after an offence has been committed (Annual Report 1968/69, p. 15).

However, the next Director, R.J. Bertrand, placed greater emphasis on prosecutions than the Program of Compliance. For example,

> While the enforcement of the Combines Investigation Act continues to depend largely upon investigation of complaints of violations received from consumers and businessmen and from press reports, careful attention is still given to the encouragement of voluntary compliance (Annual Report 1976/77, p. 11).

The weighting systems discussed in section 4.4.3 below accord varying weights to the Program of Compliance so that the implications of both views can be considered.

4.2.10 Output: Other

In addition to the above list of outputs the agencies responsible for the administration and enforcement of competition policy exert an influence on the competitive environment in a number of important respects. The placing of these outputs in the category "Other" is not meant to imply that they are relatively unimportant but rather that it is difficult, if not impossible to quantify their frequency and, in some instances, the output is of such a non-marginal nature that it is difficult, if not impossible, to compare with the aforementioned outputs.

Some of the more important activities[55] are ensuring that the competition policy viewpoint is adequately represented in the Cabinet and Interdepartmental Committees in areas such as industrial policy, trade boycotts, tariff policy (e.g., GATT negotiations), regulatory issues (e.g., communications, transport, agriculture), industrial property rights and multinational questions, including the Foreign Investment Review Agency (since April 1974); the attempt, partially successful, since 1970 to introduce new

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55. These are almost exclusively the responsibility of the Office of the Director.

legislation relating to Canada's competition policy;[56] co-operation with international agencies, particularly OECD, and to a lesser extent UNCTAD, to bring about uniform competition policy standards, and exchange information.[57] No attempt is made to quantify these outputs or discuss their effectiveness in Chapter V because of lack of data and an appropriate methodology.

4.2.11 Output: Summary

Table 4-10 presents a summary, by period and volume, of the eight outputs of competition policy which can be readily quantified and the individuals/bodies responsible for each of the eight outputs. Broadly speaking the outputs can be divided into three categories: research inquiries, compliance requests, and all the remaining outputs relate directly to detecting and prosecuting alleged infractions of the Combines Investigation Act. As can be seen from the table, responsibility for the outputs, apart from compliance requests and preliminary inquiries, involves an agency or individual other than the Director. Hence, in evaluating effectiveness and efficiency this factor should be remembered. Finally, the table shows greatly differing volumes depending on the output, from two cases involving special remedies to more than 2,000 preliminary inquiries. Over the period prosecutions showed a persistent increase which contrasted with only small changes in most of the other outputs except reports of the RTPC not prosecuted, which showed a steep decline. In section 4.4 the question of how to weight these outputs is addressed.

4.3 Inputs

4.3.1 Introduction

The inputs into competition policy can be divided into public and private expenditures. The public expenditures refer to payments for manpower, travel, court transcripts, consultants, and administration incurred by the Director, the RTPC, the Attorney General and, finally, the judiciary. The private expenditures refer to the costs

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56. This is discussed in 3.7

57. The Director's Annual Report details developments in this area on a continuing basis.

TABLE 4-10

Summary of Outputs of Competition Policy in Canada, Grouped by Period, 1960/61-1974/75

| Output | Bodies/Agencies Responsible[a] | Volume of Output | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|
| | | 1960/61-1964/65 | | 1965/66-1969/70 | | 1970/71-1974/75 | | 1960/61-1974/75 | |
| | | No. | % | No. | % | No. | % | No. | % |
| Prosecutions | Director, RTPC, Attorney General, Judiciary | 17 | 18.7 | 26 | 28.6 | 48 | 52.7 | 91 | 100 |
| Special Remedies | Director, RTPC, Attorney General, Minister of Finance, Judiciary | 0 | - | 2 | 100 | 0 | - | 2 | 100 |
| Reference to The Attorney General not Prosecuted | Director, Attorney General, RTPC | 0 | - | 0 | - | 15 | 100 | 15 | 100 |
| Report of the RPTC not Prosecuted | Director, RTPC, Attorney General | 12 | 63.2 | 4 | 21.1 | 3 | 15.8 | 19 | 100 |
| Discontinued Inquiries | Director, RTPC, Minister | 77 | 30.3 | 82 | 32.3 | 95 | 37.4 | 254 | 100 |
| Preliminary Inquiries | Director | 803 | 36.2 | 508 | 22.9 | 905 | 41.0 | 2216 | 100 |
| Research Inquiries | Director, RTPC | 3 | 60.0 | 1 | 20.0 | 1 | 20.0 | 5 | 100 |
| Compliance Requests | Director | 317 | 35.2 | 259 | 28.8 | 324 | 36.0 | 900 | 100 |

a. For further details see Chapter III

SOURCE: Tables 4-1 to 4-9 and text.

imposed on business because an investigation and prosecution are conducted. These costs include answering questionnaires, appearing at hearings and in court and having the normal course of business interrupted by searches.

Ideally, all these expenditures should be adjusted for changes in the quality of inputs and deflated by price indices of the various inputs. The resulting levels of expenditures would therefore reflect changes in "real" or "actual" resources used. For the period under consideration the only data which are available on a consistent, continuous basis concern the manpower of the Office of the Director.[58] Hence labour, not total factor (i.e., all inputs) productivity is being measured in section 4.4 below. Clearly this procedure omits certain important inputs from both private and, to a much lesser extent, public sources. In these circumstances it is assumed that these omitted inputs are proportional[59] to the manpower figures for the Office of the Director so that the trends in productivity recorded in section 4.4 are unaffected by these omissions.

### 4.3.2 Manpower Estimates for the Office of the Director

In estimating the manpower of the Office of the Director, certain adjustments and assumptions are made in order to derive a consistent data set of numbers because of organizational changes and methods of reporting. Indeed, because of these changes, several series of manpower figures are derived and presented in Table 4-11. The rest of this section discusses the problems and assumptions embodied in this table.

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58. Some other fragmentary costs are available, however. On public legal costs see Stanbury (1976, Table 3, pp. 623-625; Table 4, p. 626).

59. I.e., a fixed not varying proportion. It is not possible to test this proposition directly for both private and public expenditures. However, the limited evidence available for public expenditures is broadly consistent with the assumption. The annual government budget for the Office of the Director details various expenditures. Salaries (i.e., dollar counterpart to the manyear totals used below) increased significantly, from 51.7 per cent of all expenditures in 1955/56 to 76.0 in 1968/69. However, this relative increase is, in a large part, due to the fall in importance of an item titled "Fees and Expenses of Legal Counsel..." - 32.8 per cent in 1955/56 to 14.1 per cent in 1968/69. This decline reflects the direct provision of legal services by the Department of Justice rather than the exclusive use of outside counsel, as discussed in section 3.4.1. above. Comparision with later years is difficult because of changes in the budget estimates procedure.

TABLE 4-11

The Staff of the Office of the Director of Investigation and Research, Combines Investigation Act: 1955/56-1974/75

| Period | Total Officer | Total Support | Misleading Advertising: Officers | Misleading Advertising: Support Staff | Lawyers: Officers | Lawyers: Support Staff | Adjusted Total Staff | Adjusted Total Officer |
|---|---|---|---|---|---|---|---|---|
| Column Number | 1 | 2 | 3 | 4 | 5 | 6 | 7 | 8 |
| 1955/56 | 16 | 25 | 0 | 0 | 2 | 3 | 41 | 16 |
| 1956/57 | 16 | 28 | 0 | 0 | 2 | 4 | 44 | 16 |
| 1957/58 | 16 | 30 | 0 | 0 | 2 | 4 | 46 | 16 |
| 1958/59 | 17 | 28 | 0 | 0 | 2 | 3 | 45 | 17 |
| 1959/60 | 17 | 28 | 0 | 0 | 2 | 3 | 45 | 17 |
| 1960/61 | 20 | 31 | 0 | 0 | 2 | 3 | 51 | 20 |
| 1961/62 | 21 | 31 | 0 | 0 | 2 | 3 | 52 | 21 |
| 1962/63 | 22 | 30 | 0 | 0 | 2 | 3 | 52 | 22 |
| 1963/64 | 25 | 34 | 0 | 0 | 2 | 3 | 59 | 25 |
| 1964/65 | 23 | 36 | 0 | 0 | 2 | 3 | 59 | 23 |
| 1965/66 | 26 | 37 | 0 | 0 | 3 | 4 | 63 | 26 |
| 1966/67 | 30 | 47 | 2 | 3 | 3(2) | 5 | 70 | 26 |
| 1967/68 | 44 | 46 | 2 | 2 | 4(4) | 4 | 82 | 38 |
| 1968/69 | 48 | 44 | 4 | 4 | 4(5) | 4 | 79 | 39 |
| 1969/70 | 50 | 40 | 5 | 4 | 4 | 3 | 88 | 49 |
| 1970/71 | 73 | 55 | 10 | 8 | 6 | 5 | 121 | 69 |
| 1971/72 | 100 | 62 | 16 | 10 | 8 | 5 | 147 | 92 |
| 1972/73 | 100 | 82 | 24 | 20 | 7 | 6 | 151 | 83 |
| 1973/74 | 117 | 67 | 29 | 17 | 8 | 5 | 151 | 96 |
| 1974/75 | 122 | 58 | 31 | 15 | 9 | 4 | 147 | 100 |

Note: The derivation of the numbers and their meaning is explained in the text.

Source: Annual Reports (various issues); Government of Canada Telephone Directory (various issues); internal documentation of the Office of the Director.

In the first two columns of Table 4-11 the total number of officers[60] and support staff employed by the Office of the Director, as recorded in the Annual Report of the Director, is presented. These totals have three shortcomings. First, staff employed in misleading advertising are included. Second, until 1969/70 the Legal Branch was part of the Office of the Director and hence included in these totals. Third, temporary staff such as summer students and consultants are excluded. Columns 3 and 4 attempted to take into account misleading advertising. The third column shows the actual number of misleading advertising officers, as recorded in the government telephone directory,[61] while the fourth estimates the support staff associated with misleading advertising, assuming that no difference exists between misleading advertising and all other parts of the Office of the Director with respect to ratio of support staff to total staff. The actual number of lawyers involved in case work is recorded for the period 1955/56 to 1966/67 in column 5. However, for the period 1967/68 to 1974/75 the legal staff is estimated by assuming that the average ratio of lawyers to all officers for the six-year period 1960/61 to 1965/66 also held between 1967/68 to 1974/75.[62] The ratio of support staff to lawyers (column 6) is estimated by the same procedure as used for misleading advertising support staff. Finally, in column 7, the adjusted total staff of the Office of the Director (i.e., officer and support) is presented excluding misleading advertising staff[63] but including legal staff, while in column 8 the total number of officers (including lawyers) excluding misleading advertising officers, is presented. More formally, column 7 = columns 1 + 2+5+6-3-4 while column 8 = columns 1 + 5-3.

The staff of the Director has grown considerably over the period 1955/56[64] to 1974/75 as the following manpower numbers, grouped by five-year averages, demonstrate.

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60. This includes research branch personnel which are classified as economists.

61. These numbers are also consistent with sources internal to the Office of the Director.

62. Although actual lawyer numbers are available for 1967/68 to 1969/70, these include lawyers dealing with misleading advertising. It should be noted these totalled 2 in 1966/67, 4 in 1967/68 and 5 in 1968/69. These have been netted out when estimating the adjusted totals in columns 7 and 8. In Table 4-11 these numbers are in parenthesis in column 5.

63. See previous footnote.

64. The reason for the use of 1955/56-1959/60 data will become clear in the next section.

| Period | Average Yearly Adjusted Total Staff (1) | Average Yearly Adjusted Total Officer (2) | (2)/(1) |
|---|---|---|---|
| 1955/56-1959/60 | 44.2 | 16.2 | 36.7 |
| 1960/61-1964/65 | 54.6 | 22.2 | 40.7 |
| 1965/66-1969/70 | 76.4 | 35.6 | 46.6 |
| 1970/71-1974/75 | 143.4 | 88.0 | 61.4 |

For example, between 1960/61-1964/65 to 1970/71-1974/75, average annual total staff employed rose from 54.6 to 143.4, an increase of 145.0 per cent, while the corresponding figures for officers were 22.2, 88.0 and 260.4 per cent respectively. This much larger increase in the number of officers is reflected in the increasing proportion of total staff which are officers, as indicated by the above table. This may suggest that the Office of the Director has experienced certain economies in administration and overhead in the process of growth.

In evaluating the quality of the manpower of the Office of the Director, one useful indicator is the turnover of officers. The greater the turnover of officers the more resources have to be devoted to training new officers in the methods of investigation and prosecution. In addition, cases are transferred from one officer to another, necessitating increased delay for the processing of the case. Table 4-12 presents five-year average turnover indices. The two indexes presented in the table differ only in their denominator: index A is based upon column 1 of Table 4-11 and index B is based upon column 8 of Table 4-11. This was to take into account the fact that a few misleading advertising personnel may not have been eliminated from the numerator, which was the same for index A and index B (i.e., the number of officers, including lawyers, to leave the Office of the Director in a given year). The indexes vary from zero when no officer leaves to 100 when all the officers leave. The table shows that there has been very little change in turnover, using either index A or B, over the period 1955/56 to 1974/75, so that no change is required in the manpower figures presented in Table 4-11.

TABLE 4-12

Turnover in the Officers Employed in the Office of the Director of Investigation and Research, Combines Investigation Act, 1955/56-1974/75

| Period | Turnover Index A | Turnover Index B |
|---|---|---|
| 1955/56-1959/60 | 14.7 | 14.7 |
| 1960/61-1964/65 | 14.8 | 14.8 |
| 1965/66-1969/70 | 14.6 | 16.4 |
| 1970/71-1974/75 | 12.0 | 13.8 |
| 1955/56-1974/75 | 12.7 | 14.7 |

Note: Turnover is defined as the number of officers (including lawyers) to leave the Office of the Director in a given fiscal year divided by the average of the total number officers at the beginning and end of the fiscal year, expressed as a percentage. For index A the total number of officers is based upon column 1 of Table 4-12, for index B column 8 of Table 4-12. No figures on lawyer turnover were available after 1968/69. Since there was no recorded turnover in lawyers for the period 1955/56-1968/69 a zero turnover rate was assumed for 1969/70-1974/75. An attempt was made to exclude misleading advertising personnel, which it is believed was largely successful. Index A is introduced to check the sensitivity of the results since the denominator contains misleading advertising personnel. The numbers in the table refer to this index averaged over various periods.

Source: Table 4-11, Government of Canada, Telephone Directory (various issues), internal documentation of the Office of the Director.

Ideally, in order to determine whether these turnover indices are too high or too low, turnover indices are needed for similar sized agencies with duties of a nature and character akin to these of the Office of the Director. However, no comparable agency was available. Instead, turnover indices are presented in Table 4-13 for the public service of Canada, the only conveniently available data source. Since the turnover index presented in the table refers to all federal public service employees, taken as a group, the index does not take into account inter-department or inter-agency moves of government employees. Hence, other things equal, if the Office of the Director was a typical government agency, the turnover indices in Table 4-12 would exceed these of Table 4-13, by some indeterminate amount (i.e., inter-agency/department movement for which data are presently unavailable). As expected the turnover indices for the Office of the Director are usually greater than these of the public service as a whole. However, the difference narrowed considerably from approximately five percentage points difference over the period 1965/66-1969/70 to almost no difference in the period 1970/71-1974/75. Hence, on the basis of these admittedly crude comparisons of turnover indices it would appear that the turnover in the Office of the Director has fallen in relation to that of the public service as a whole, so that in the early 1970's it was probably below the average government agency and departmental turnover.

Although turnover may have been constant, the growth rate of the Office of the Director has not. In both of the periods 1955/56-1959/60 and 1960/61-1964/65, increases in adjusted total staff or adjusted total officers (columns 7 and 8 of Table 4-11) have been modest - less than 16 per cent. However, for the periods 1965/66-1969/70 and 1970/71- 1974/75, the overall growth (i.e., end divided by beginning year) were much higher, especially for adjusted total officers which increased from 26 to 49, or 88.5 per cent between 1965/66 and 1969/70. Hence a substantial portion of the resources of the Office of the Director was devoted to training new personnel, typically recent graduates in economics and business administration.[65]

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65. Based on casual observation, since the author was one such employee for the period 1969/70. This is reflected in a much younger population for the Office of the Director than the other agencies which form part of the Department of Consumer and Corporate Affairs. See Canada, Department of Consumer and Corporate Affairs (1978).

Table 4-13

Turnover for the Federal Public Service[a] of Canada: 1963/64-1974/75

| Period | Turnover Index[b] |
|---|---|
| 1963/64[c]-1964/65 | 8.8 |
| 1965/66-1969/70 | 9.2 |
| 1970/71-1974/75 | 12.2 |
| 1963/64-1974/75 | 10.4 |

a. Defined as full-time and term employees under the Public Service Employment Act.

b. The data source records the number of employees as of September of any given year. Assuming employment grows at a steady rate within any given fiscal year ending March 31, the September total is equivalent to the average number employees at the beginning and end of a fiscal year. Hence, the September number is the same as the denominator used in the turnover indexes in Table 4-13 above. The number of separations (i.e., persons leaving the employemnt of the public service) would appear to refer to the year ending March 31. The turnover index for a given year is this latter number divided by total public service employment in September, expressed as a percentage. The table refers to this yearly index averaged over various periods.

c. Data not available for previous years with which to estimate the index.

Source: Various Public Service of Canada and Civil Service Commission of Canada Annual Reports.

It is difficult to make allowance or adjustment to the man-year totals presented in Table 4-11 because of the large influx of new recruits discussed above. It could be argued that the quality of the human capital embodied in the average officer with respect to competition policy is likely to have declined in the later, compared to the earlier, part of the period, other things equal. Hence the manpower numbers need to be adjusted downward. However, members of the Office of the Director state that experience has shown that new recruits have become productive much more quickly if they have previously received specialized training in industrial organization. This criterion for selection of new recruits was in place at the time of the large influx. This is likely to offset to some extent the suggested short-term decline in human capital. Since no adjustment was made, the actual manpower numbers used to estimate efficiency may be biased upward; as a result, the efficiency indices may contain a downward bias for the periods 1965/66-1969/70 and 1970/71-1974/75.

## 4.4 The Measurement of Efficiency

### 4.4.1 Introduction

In this section an attempt is made to measure the efficiency of the administration and enforcement of competition policy in Canada. Measures are introduced which examine the efficiency of individual agencies, such as the Office of the Director, as well as all agencies combined. Measures of efficiency are defined, rather mechanically, as to the relation of outputs to inputs. In the previous two sections (i.e., 4.2 and 4.3) the volume of outputs and inputs were presented. Estimating efficiency would therefore seem a simple exercise in division. However before that can take place two problems need to be resolved: the specification of inputs and the timing of inputs relative to outputs; a method of combining the disparate outputs detailed in 4.2 into a single aggregate. These two problems are discussed in 4.4.2 and 4.4.3 respectively. Two methods measuring productivity are presented in sections 4.4.4 and 4.4.5.

### 4.4.2 Measurement Problems: Timing of Inputs vis-à-vis Outputs

The measures of efficiency must relate outputs to the set of inputs which were responsible for their production. This poses a problem in the sense that the man-years expended in (say) 1960/61-1964/65 yield some immediate outputs (i.e., compliance requests and preliminary

inquiries) and a series of intermediate or incompleted outputs such as 100,000 documents seized under section 10 of the Act, or a half-completed summary or statement of evidence. These incomplete outputs are unlikely to be recorded as a final output until the lapse of some years. For example, in a conspiracy case the average time from the opening of a file to the final disposition of the case is approximately six and a half years. Hence, inputs expended in time period t (where t refers to a five-year time interval such as 1960/61-1964/65) should be related to some outputs in t and some in t+1 (where this refers to the next five-year period, 1965/66-1969/70). Although it is to some extent arbitrary the following conventions with respect to timing have been adopted: inputs in period t are related to compliance requests, preliminary and discontinued inquiries completed in period t, prosecutions, special remedies, references to the Attorney General not prosecuted, reports of the RTPC not prosecuted and research inquiries completed in period t+1.[66]

Inputs are measured in terms of the number of man-years as recorded in Table 4-11. For a five-year period total inputs are the simple addition of the number of adjusted total staff or officers recorded for each of the constituent years. As remarked above, no account could be taken of the large growth rate of the Office of the Director in the late 1960's and early 1970's and the differing human capital within the Director's staff. However, a limited attempt was made by measuring efficiency using adjusted total staff and adjusted total officers (columns 7 and 8 respectively of Table 4-11). The high growth rate of the Office of the Director may have the effect of imposing a downward bias on measured efficiency for the 1965/66-1969/70 and 1970/71-1974/75 periods.

### 4.4.3 Measurement Problems: Weighting Outputs

The various outputs of competition policy, as discussed in the earlier part of this chapter, are likely to

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66. Should the reader think an alternative allocation between t and t+1 is more appropriate, the data presented here permit him to estimate his own productivity indexes. In any event, in the discussion of productivity indexes below some attempt is made to test the sensitivity of the results to the allocation of output between t and t+1.

vary considerably in their impact on competition. This gives rise to the problem of how to aggregate these disparate outputs into a single number when such a global index of output is required for productivity analysis. Clearly, solving this problem involves assigning weights to each of the outputs. For most of the output of the economy this poses no problem since relative prices are assumed to represent society's valuation of an apple as against an orange. However, for competition policy the problem is not quite so simple, since there is no market for monopolies, conspiracies and/or resale price maintenance.[67]

In the absence of such a set of market prices, the approach adopted here is to assign weights to competition policy outputs on the basis of the question to what extent does output x help to improve and maintain the competition environment. Unfortunately the available information on the outputs does not permit a satisfactory method of scientifically (i.e., objectively) determining a set of weights. Hence, as an alternative, a small group of "experts" were asked for their evaluation of the various outputs. This is an application of the Delphi technique. The methodology and test results are fully described and discussed in Appendix B below.

Two points might be noted here concerning the results presented in Appendix B, which should be of use in interpreting the productivity indexes estimated and discussed in sections 4.4.4 and 4.4.5, below. First, the number of outputs the panel of experts was asked to rank was finer than that presented in summary Table 4-10 above: prosecutions were divided into four categories: a regular prosecution "win"; a regular prosecution "loss"; a per 30(2) prohibition order "win"; a per 30(2) prohibition order "loss". Similarly special remedy was divided into a "win" and a "loss" category. The term "win" refers to a situation where the Crown secures a conviction or prohibition order per 30(2) against one or more enterprises. As a result the number of outputs increases from the eight shown in Table 4-11 to 12. Second, only the group of experts who were requested to assign weights to the various outputs discussed in this chapter and former officials of the Office of the

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67. In some areas, however, rights to produce and enter an industry are sold and bought - milk quotas, taxi cab licenses, egg quotas, imported cheese quotas and importation of textile and clothing quotas, to name but a few recent examples in Canada.

Director of Investigation and Research were present.[68]

Table 4.14 presents the trend in the global or overall output of competition policy implicit in the weighting system of each of the respondents in the sample of experts mentioned above, except "G" who did not assign weights due to time constraints. The level of output is estimated[69] for each respondent's weights for the three-year periods into which 1960/61-1974/75 is divided. The trend in output is derived by setting output in 1960/61-1964/65 equal to 100 and relating output in 1965/66-1969/70 and 1970/71-1974/75 to the base period.[70] Levels of output are not recorded as no purpose or meaning could be served by their inclusion.

The trend in output recorded in Table 4-14 by applying the weights of each of the seven respondents is broadly the same: a drop in output between 1960/61-1964/65 and 1965/66-1969/70 for all seven respondents, which varied from -31.2 per cent to -19.8 per cent, with an average decline of 24 per cent; an increase for all respondents weighting systems between 1965/66-1969/70 and 1970/71-1974/75 to above the level of output recorded for the base period. The increase varied from 63.5 per cent to 48.1 per cent with an average increase of 52.7 per cent. Hence, although the overall pattern of output trend was the same across all the respondents, there was considerable difference in the magnitude of the change among the respondents.

The greatest similarity between the trend overall output and the 12 individual outputs, recorded in the earlier part of this chapter, is compliance requests and preliminary inquiries, both of which show a decline and subsequent increase. Most of the other individual outputs of competition policy showed a continuous increase for the

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68. No bias, systematic or otherwise, could be detected in weights assigned by the group of experts. However, should the reader feel that such a bias does exist, then the information contained in Appendix B and this chapter should permit the correction of the perceived bias.

69. The level is estimated simply by multiplying the weight assigned by the respondent to each individual output by the volume of output for that year, then summed across the 12 outputs to derive the global output for that particular respondent's set of weights.

70. For example, the trend in output for 1965/66-1969/70 relative to the base period is equal to (level of output 1965/66-1969/70 / level of output 1960/61-1964/65) x 100.

Table 4-14

The Trend in the Overall or Global Output[a] of Competition Policy in Canada: 1960/61-1974/75

| Period | Application of Respondent's Weighting System | | | | | | |
|---|---|---|---|---|---|---|---|
| | A | B | C | D | E | F | H |
| 1960/61-1964/65 | 100.0 | 100.0 | 100.0 | 100.0 | 100.0 | 100.0 | 100.0 |
| 1965/66-1969/70 | 80.2 | 79.9 | 72.1 | 79.7 | 68.8[b] | 74.9 | 76.5 |
| 1970/71-1974/75 | 123.4 | 118.3 | 108.1 | 116.1 | 112.5 | 116.0 | 117.1 |

a. In estimating overall or global output a problem arose because three regular prosecutions were in process. It was assumed for the purposes of this table that the Crown won all three. This assumption does not materially affect the results in the table. For example, respondent A's index for 1970/71-1974/75 becomes 122.2 instead of 123.4.

b. In respondents E's weighting system no weight was assigned to a successful or unsuccessful special remedy. Since there were none of the latter this posed no problem. However, two successful special remedies were included in 1965/66-1969/70. If the respondent had assigned a weight of 0 then the index = 68.6, if a maximum of 10, then the index = 68.9. The index 68.8 is the mid-point.

Note: Respondents D, and F are consistent with the remarks made by the author in the text with respect to the appropriate set of weights.

See text for method of estimating output trend.

Source: Tables 4-3, 4-10, above and B-1 below.

period 1960/61-1974/75. Hence, those respondents which placed relatively a great deal of weight on compliance requests and preliminary inquiries would have exhibited the largest drop and, to a lesser extent, subsequent increase. (Respondents C and E fall into this category.) On the other hand, respondent A, who attached the lowest weight to preliminary inquiries and compliance requests but the maximum to a successful regular prosecution, per 30(2) prohibition order and special remedy, showed the smallest decline between 1960/61-1964/65 and 1965/66-1969/70 and the largest gain in output over the period 1960/61-1964/65 to 1970/71-1974/75. Hence, if those responsible for the administration and enforcement of competition can agree on a set of weights and have discretion in planning outputs (and perhaps more accurately outcomes) then global output could be maximized. However, as Appendix B shows, the weighting systems do vary somewhat from respondent E (much greater emphasis RTPC not prosecuted, preliminary inquiries, research inquiries and compliance request, than other respondents) to respondent A (great emphasis on successful court cases, with relatively low weights assigned to everything else except research inquiries). In addition, as will be shown below, discretion does exist, but subject to certain quite important constraints.[71] In other words, measuring and planning total output of competition policy in Canada is not likely to be an easy and straightforward exercise.

In estimating the measure of global and overall output in Table 4-14, no account was taken of the composition of offences across (say) prosecutions or discontinued inquiries. Throughout this chapter four offence categories have been distinguished: conspiracy; RPM and/or refusal to sell; merger and/or monopoly; price discrimination.[72] In Appendix B the sample of experts mentioned above were asked to weight these four offence categories. The results indicated substantial agreement among the respondents: conspiracy and merger/monopoly were always given a high weight but price discrimination and RPM and/or refusal to sell a much lower weight. (See Table B-2 below for details.) Although such differences in weights occur, no adjustment to the trend in output in Table 4.14 would be required if the offence composition by individual output were uniform. However, this is not the case. For example, compliance requests are dominated by price

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71. This is discussed extensively in Chapter VI.

72. Plus a fifth category which was labelled multiple offence (i.e., a combination of two or more of these four categories).

discrimination (46.4 per cent) and conspiracy (32.0 per cent)[73] while prosecutions[74] consist largely of conspiracies (45.1 per cent) and RPM and/or refusal to sell (39.6 per cent). Despite the difference in the relative weights assigned by the respondents to various offence categories, and the varying significance of these categories within an individual output grouping, no attempt was made to adjust the trend in output presented in Table 4-14, since no practical adjustment method was available. However, this shortcoming is of little consequence if one is prepared to make the not unreasonable assumption that the difference in importance between (say) a prosecution and preliminary inquiry is so large, relative to whether the prosecution is a conspiracy and the preliminary inquiry price discrimination, that the latter difference can be ignored in estimating the trend in output presented in Table 4-14.

One final point should be remembered in interpreting the results in Table 4-14. The group of experts, in weighting one output against another, were asked to do so on a scale of 0-10 with one other category titled "cannot assign weight". The trend in output recorded in Table 4-14 reflects the response to the 0-10 scale. However, respondent B felt that the 0-10 scale was too narrow,

> The average prosecution is much more than ten times as important as the average preliminary inquiry. I would find the table [Table 1 of Exhibit B-1, below] closer to acceptability if it was sketched out to twenty classes ranging from preliminary inquiries given the weight of 1, and winning prosecutions the weights of 20.

In view of this, the respondent was asked to weight the various outputs of competition policy on a 0-20 scale. The resulting trend in output and that by the same respondent on the 0-10 scale is as follows:

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73. See Table 4-9 above for details. The percentages refer to the period 1960/61-1974/75.

74. Includes regular prosecution win or loss as well per 30(2) prohibition order win or loss. All percentages refer to the period 1960/61-1974/75. For details see Table 4.1 above.

| Period | Scale | |
|---|---|---|
| | 0-10 | 0-20 |
| 1960/61 - 1964/65 | 100 | 100 |
| 1965/66 - 1969/70 | 79.9 | 83.9 |
| 1970/71 - 1974/75 | 118.3 | 125.6 |

As can be readily observed the trend in output is much the same whether respondent B weights the constituent outputs of competition policy on a 0-10 or a 0-20 scale. However, preferences recorded on the 0-20 scale result in consistently higher trend values than application of the 0-10 scale. This difference is accounted for by respondent B's doubling the weight attached to a successful per 30(2) prohibition order (8 to 15) and a regular prosecution conviction (10 to 20) which, taken together, showed a strong upward trend over the period 1960/61 to 1974/75, while leaving unchanged the absolute weight attached to preliminary inquiries (1), discontinued inquiries (2) and compliance requests (2). Such insensitivity and robustness of the trend and magnitude of changes in output over the period 1960/61-1974/75 to the scale against which outputs are weighted (i.e. 0-10 and 0-20) adds to the confidence that can be placed in the trends in output recorded in Table 4-14.

### 4.4.4 Some Partial Indexes of Productivity

The measurement of productivity is most straightforward where there is a standard input and a homogeneous output, both of which are easily estimated. Under such conditions no problem arises as to the correct weighting of output - there is only a single output. The earlier discussion in this chapter demonstrates that such a situation does not apply to competition policy *in toto*. However, such is not the case when considering the individual agencies charged with responsibility for administering and enforcing the Act - particularly the Director and Attorney General. Hence, one method of measuring productivity examines these two agencies attempting to select a standard unit of output.[75] As such the indexes should be regarded as partial and tentative.

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75. It should be noted that this is the measurement approach favoured by the Treasury Board (1974a, pp. 19-23).

The standard output of the Director is taken to be a summary or statement of evidence,[76] which, as detailed in Chapter III, can lead to several outputs such as a prosecution or RTPC report not prosecuted. It is recognized that this is a somewhat heuristic approach, ignoring as it does such outputs of the Director as compliance requests and preliminary inquiries. In this context, these outputs can best be viewed as inputs in the process of detecting infringements of the Combines Investigation Act.

The volume of summary and statements of evidence is the numerator in the Director's Index while the denominator is either adjusted total staff or adjusted total officers. As with output, and for reasons explained in Chapter II, interest centres here in the trend in productivity, not the level. Hence, the base period is set equal to 100 and productivity in subsequent periods measured relative to the base period. Table 4-15 presents the Director's Index in two ways: first, any summary or statement of evidence is treated as one unit in deriving the numerator of the productivity index[77] (the unweighted Director's Index); each summary and statement of evidence is concerned with a particular offence under the Act. The panel of experts discussed in the previous section (i.e. 4.4.3) were asked to attach a weight by offence, holding output constant.[78] Hence, the second method of estimating the Director's Index is, for each respondent, to multiply the offence category of the summary or statement of evidence by the weight assigned to that offence category by the respondent (the weighted Director's Index). This results in a series of estimates of the weighted Director's Index, one for each respondent. Rather than displaying all eight of these, Table 4-15 presents the maximum, minimum and average trend values.

The unweighted and weighted Director's Index are both expressed with adjusted total officer and adjusted

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76. It is realized that these are not exactly equivalent. The two special remedies are included here.

77. Hence the numerator of the index is total summary and statements of evidence of the Director in period t + 1, while the denominator is adjusted total man-years (either staff or officer) expended in the period t. The reason for the lag is discussed in section 4.4.2 above.

78. Full details may be found in Appendix B below.

Table 4-15

Measures of the Trend in Productivity of the Administration and Enforcement of Competition Policy in Canada: 1955/56-1969/70

| Productivity Index[b] | Unweighted | | Weighted[a] | |
|---|---|---|---|---|
| | Adjusted Total Staff (Manyears)[c] | Adjusted Total Officer (Manyears)[c] | Adjusted Total Staff (Manyears)[c] | Adjusted Total Officer (Manyears)[c] |
| Director's Index | | | | |
| 1955/56-1959/60 | 100.0 | 100.0 | 100.0 | 100.0 |
| 1960/61-1964/65 | 89.3 | 81.5 | 102.5 (91.9-128.4) | 93.5 (83.8-117.2) |
| 1965/66-1969/70 | 131.7 | 104.9 | 135.2 (120.4-158.0) | 107.7 (95.9-125.8) |
| Director/AG Index[d] | | | | |
| 1955/56-1959/60 | 100.0 | 100.0 | 100.0 | 100.0 |
| 1960/61-1964/65 | 126.5 | 115.4 | 144.9 (134.3-161.9) | 132.2 (122.6-147.8) |
| 1965/66-1969/70[d] | 130.1 | 103.6 | 119.5 (110.7-126.0) | 95.2 (88.2-100.4) |

a. A summary or statement of evidence (Director's Index) and a successful prosecution (Director/AG Index) in some instances were placed in the offence category "Multiple Offences" in the data presented earlier in this chapter. However, weights were assigned by the group of experts (see Table B-2, below) to only four offence categories - conspiracy, R.P.M and/or refusal to sell, price discrimination, merger and/or monopoly. In the estimation of the weighted productivity indexes a multiple offence was assigned to one of these four offence categories depending which of the constituent multiple offences was assigned the highest weight by the experts. For example, if the multiple offence consisted of R.P.M. and/or refusal to sell and price discrimination it would be allocated to the former of the two constituent offences.

There is a weighted Director's Index and Director/AG Index for each of the group of eight experts who assigned weights to the four offence categories. (See Table B-2 below for details.) Rather than display all eight, the table records the average trend and, in parentheses, the minimum and maximum trend.

b. See text for definition.

c. Refers to the denominator in the productivity index.

d. In estimating this index for 1965/66-1969/70 it was assumed that the three prosecutions which, at the time of writing were unresolved, all resulted in Crown victories. If however the opposite assumption is made (i.e., lost all three) then 130.1 falls to 119.3, 103.6 to 95.0, 110.7 to 102.8, 126.0 to 114.7, 88.2 to 81.1 and, finally, 100.4 to 91.3.

Source: Table 4-3, 4-4, 4-5, 4-10, 4-11 above and Table B-2 below.

total staff as the denominator of the productivity index. The use of the total staff is an overestimate of the resources allocated to competition policy since a combines officer receives the same weight as a typist, while the use of total officers is an underestimate because ancillary workers are excluded. Hence the "actual" trend in productivity will lie in between the officer and staff trends. Finally, since the rate of growth of adjusted total officer man-years was much greater than adjusted total staff man-years, the trend in recorded productivity will always be lower for the indices estimated with adjusted total officer man-years as the denominator. This is confirmed by the results in Table 4.15.

The trend in productivity presented in Table 4.15 for the unweighted Director's Index, after an initial decline (10-20 per cent) between 1955/56 - 1959/60 and 1960/61 - 1964/65, showed a substantial increase (28.7 - 47.5 per cent) between 1960/61 - 1964/65 and 1965/66 - 1969/70, to exceed the level of productivity in the base period. This result holds irrespective of whether adjusted total staff man-years or adjusted total officer man-years are used as the denominator in the productivity index. Hence, in terms of the number of summary or statements of evidence produced for man-years expended, the Office of the Director experienced a substantial increase over the period 1955/56 - 1959/60 to 1964/65 - 1969/70, albeit after an initial decline.

This decline is readily explicable in terms of two factors. First, the 1960 amendments which led to an increase in preliminary inquiries and compliance requests[79] meant that considerable resources were likely shifted toward these activities and away from producing summary or statements of evidence. Second, 1960 saw the arrival of a new Director, D.H.W. Henry, who, initially at least, placed great emphasis on the Program of Compliance, which also probably resulted in less resources being devoted to summaries and statements of evidence than otherwise would have been the case.[80]

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79. Although no data were collected on compliance requests prior to 1960/61, data were available for preliminary inquiries. This showed that such inquiries increased from 525 in 1955/56 - 1959/60 to 803 in 1960/61 - 1964/65.

80. For information on the Program of Compliance see 4.2.9 above.

The results for the weighted Director's Index reveals a somewhat different picture in the productivity trend. Instead of a decline between 1955/56 - 1959/60 and 1960/61 - 1964/65, the average weighted Director's Index shows little change in productivity. The difference between the trend in the weighted and unweighted Director's Index can be explained as follows: the number of summary and statements of evidence between 1955/56 - 1959/60, and 1960/61 - 1964/65 showed a slight increase of 10.3 per cent,[81] but the composition of such summaries or statements shifted from offences with relatively low weights to higher weights. For example, the two highest weighted offence categories accounted for 58.6 per cent of all summaries or statements of evidence in 1955/56 - 1959/60 but 68.8 per cent in 1960/61 - 1964/65. Although the percentage accounted for by these offence categories fell in 1965/66 - 1969/70 to 54.5 per cent, the general upward trend in summaries and statements of evidence (more than doubling) was sufficient to lead to an increase in productivity for both the weighted and unweighted Director's Index. The difference between the unweighted and weighted Director's Index shows that correct weighting of the output can affect the results considerably and suggests that where practical, such systems should be used.

Some activities of competition policy are the joint responsibility of the Office of the Director and the Attorney General of Canada. Of these, the most important, as identified by the group of experts whose opinions are presented in Appendix B below, is a successful prosecution.[82] Hence, the Director/A.G. Index refers to the trend in the number of successful prosecutions per man-year expended. As for the Director's Index, an unweighted and weighted index trend in productivity is presented, for both adjusted total staff (man-years) and adjusted total officer (man-years). The resulting trends are presented in Table 4-15.

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81. The number of summaries and statements produced by resources expended in 1955/56 - 1959/60 is taken to be the number produced in the next five-year period, 1960/61 - 1964/65. It should be noted that summaries and statements are dated as in the source tables indicated in Table 4-15.

82. A successful prosecution for this index includes a per 30(2) prohibition order, a regular prosecution and the two special remedies.

The weighted and unweighted Director/AG Indexes both show an increase in productivity between 1955/56 - 1959/60 and 1960/61 - 1964/65 with a subsequent decline in 1965/66 - 1969/70 (except for unweighted adjusted total staff man-years) to a level above base year productivity (except for average weighted adjusted total officer man-years). However, the increase and subsequent decrease was larger for the weighted than unweighted Director/AG Index. This difference can be explained by the substantial shift between 1955/56 - 1959/60 and 1960/61 - 1964/65 from successful prosecutions concerning offences with low weights to those with much higher weights and a subsequent decline in the importance of high weight offences in 1965/66 - 1969/70. For example, the percentage of successful prosecutions concerned with merger and/or monopoly and conspiracy, the two highest scoring offence categories, was 50 per cent, 72 per cent and 41.7 per cent respectively. Finally, concerning the overall pattern of the Director/AG Index (whether weighted or unweighted) the decline in productivity in 1965/66 - 1969/70 compared with 1960/61 - 1964/65 reflects, in part, the increasing percentage of prosecutions which were unsuccessful, 10 per cent to 27 per cent, in these two periods, respectively. This change is discussed more fully in section 5.3.2 below.

Summary. The Director's Index has paid attention to the productivity of an intermediate output of competition policy (i.e., a summary and statement of evidence) which is a final output of the Office of the Director but an input to the Attorney General and/or the RTPC. In contrast, the Director/AG Index has concentrated on a final output of competition policy (i.e., a successful prosecution) which is a joint output of the Office of the Director and the Attorney General of Canada.[83] The inferences which can be drawn from these indices are as follows:

(1) The Office of the Director of Investigation and Research over the period 1955/56 - 1959/60 to 1965/66 - 1969/70 has definitely maintained and possibly substantially increased the level of output of summary and statements of evidence per man-year expended compared with the base period. Hence despite a large increase in the size of the Office of the Director and an increase in investigations, productivity, which might have been expected to decline, did not. Similar inferences with respect to the trend in productivity also hold for the Director/AG Index.

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83. And, to a much lesser extent of course, the RTPC.

(2) The overall direction of the trend in productivity for both the Director's Index and the Director/AG Index is the same, whether consideration of the nature of the relative importance of the offence under the Act is taken into account or not. However, important differences in magnitude of change do occur, as for example between the Director's Index in 1960/61 - 1964/65 and the change in the Director/AG Index between 1960/61 - 1964/65 and 1965/66 - 1969/70. Hence, across any given output[84] it is important to take into account the nature of the offences with which that output is concerned.

### 4.4.5 A More Complete Measure of Productivity

The activities of competition policy have been described, analysed and categorised into a set of outputs which ranged from a successful prosecution to a discontinued inquiry. However, the trend in productivity has only been estimated for two important outputs[85] which are related to the two most important agencies[86] charged with administering and enforcing the Combines Investigation Act. In this section the trend in productivity for all the quantifiable outputs of competition policy, considered together, is estimated. It is a kind of total or global productivity index of competition policy.

The group of experts mentioned in section 4.4.3 above were each responsible for assigning their own set of weights to the 12 different outputs of competition policy.[87] These weights are treated the same as prices in

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84. Admittedly the Director/AG Index combines outputs which are considered separately in the weighting system employed in the next section and the earlier parts of the Chapter. Nevertheless, as remarked above, some heuristic assumptions have to be made or no productivity indexes could be estimated with presently available data.

85. In contrast to all of the other outputs considered here, one of these, a summary or statement of evidence, is an intermediate, not a final output.

86. The Director and the Attorney General.

87. See Table B.1 for the 12 outputs and each respondent's weighting systems.

Table 4-16

The Trend in Productivity[a] for all Activities of Competition Policy in Canada: 1955/56-1969/70

| Period | Application of Respondent's Weighing System | | | | | | | Average |
|---|---|---|---|---|---|---|---|---|
| | A | B | C | D | E | F | H | |
| 1955/56-1959/60 | | | | | | | | |
| Adjusted Total Staff (Manyears)[b] | 100.0 | 100.0 | 100.0 | 100.0 | 100.0 | 100.0 | 100.0 | 100.0 |
| Adjusted Total Officer (Manyears)[b] | 100.0 | 100.0 | 100.0 | 100.0 | 100.0 | 100.0 | 100.0 | 100.0 |
| 1960/61-1964/65 | | | | | | | | |
| Adjusted Total Staff (Manyears)[b] | 118.7 | 124.6 | 136.3 | 125.9 | 128.4[c] | 131.3 | 126.8 | 127.4 |
| Adjusted Total Officer (Manyears)[b] | 108.3 | 113.7 | 124.3 | 114.9 | 117.2[c] | 119.8 | 115.7 | 116.3 |
| 1965/66-1969/70[d] | | | | | | | | |
| Adjusted Total Staff (Manyears)[b] | 75.4 | 77.2 | 71.7 | 75.4 | 65.3 | 74.6 | 74.5 | 73.4 |
| Adjusted Total Officer (Manyears)[b] | 60.0 | 61.4 | 57.1 | 60.1 | 52.0 | 59.4 | 59.3 | 58.5 |

NOTES TO TABLE 4-16 (continued)

a. The productivity index for any five-year period relates the inputs expended in that period (i.e., adjusted total staff or adjusted total officer) to the volume of preliminary inquiries, discontinued inquiries and compliance requests recorded for that five-year period and the volume of prosecutions, special remedies, RTPC reports not prosecuted, references to the Attorney General not prosecuted and research inquiries recorded for the next five-year period. (This lag structure is discussed in Section 4.4.3 above.) For the period 1955/56-1959/60, no data has been presented for the volume of preliminary inquiries, discontined inquiries and compliance requests. The number of preliminary inquiries, 525, was taken from the same source as used to derive the numbers recorded in Table 4-7 above and hence is consistent with this series. However, for compliance requests and discontinued inquiries approximations had to be made which probably resulted in a slight upward bias in both instances. The growth in discontinued inquiries between 1960/61-1964/65 and 1964/65-1969/70 was 6.49 per cent, between 1964/65-1969/70 and 1970/71-1974/75 was 15.85 per cent. Here it is assumed that the lower of these two percentages applied to the growth rate of discontinued inquiries between 1955/56-1959/60 and 1960/61-1964/65, yielding an estimate of 72 discontinued inquiries for 1955/56-1959/60. Compliance requests were approximated by taking the ratio of adjusted total staff (manyears) for 1955/56-1959/60 to 1964/65-1969/70 and multiplying it by the number of compliance requests recorded for that period. The result is 150. The period 1960/61-1964/65 was not selected because the program of compliance started in this period and hence, the volume is likely to be too "high" compared to a "normal" year. The ratio consisted of total staff rather than total officers since this yielded a higher ratio and hence, did not inflate the trend in productivity by biasing the base period output/input ratio downwards.

b. Refers to denominator in the productivity index.

c. In respondent E's weighting system no weight was assigned to a successful or unsuccessful special remedy. Since there were none of the latter in the whole period this posed no problem However, two successful special remedies were part of the numerator for 1960/61-1964/65. In estimating the trend in productivity for the respondent E, a weight of 5 was assumed for a successful special remedy. Had either 0 or 10 been used the change in the trend for 1960/61-1964/65 would have been insignificant. (For example, if 0 weight is used the trend for adjusted total officer (manyears) falls from 128.4 to 128.2.)

d. In estimating the trend in productivity for 1965/66-1969/70 it was assumed that three prosecutions which, at the time of writing were unresolved, all resulted in Crown victories. However, if the opposite assumption is made (i.e., lost all three) little significant change is observed in the trend. For example, using respondent B as an illustration, adjusted total staff (manyears) falls from 77.2 to 76.2, adjusted total officer (manyears) 61.4 to 60.6. For respondent E, whose trend in productivity showed the largest decline between 1955/56-1959/60 and 1965/66-1969/70, adjusted total staff (manyears) for 1965/66-1979/70 falls from 65.3 to 65.2, for adjusted total officer (manyears) 52.0 to 51.9.

Source: Tables 4-3, 4-4, 4-5, 4-6, 4-7, 4-9, 4-10 and 4-11 above, Table B-2 below and documentation of the Office of the Director.

conventional productivity analysis. The quantities which are required in order to generate the measure of overall output of competition policy and the inputs for the denominator of the productivity index are detailed earlier in this chapter. The trend in productivity for all of the activities of competition policy (or total output) is recorded in Table 4.16. Since no two respondents had the same weighting system a separate trend is presented for each respondent. The productivity trend is presented with adjusted total staff and officer man-years as the denominator. As noted above the "actual" trend in productivity will lie between the trend yielded by the use of these two denominators, with adjusted total officer providing the lower limit.

In considering the productivity of competition policy as a whole, Table 4.16 shows that, irrespective of the respondents whose weights or shadow prices are applied, the trend during the period 1955/56 to 1969/70 is uniform and unambiguous: a considerable increase in productivity from 1955/56 - 1959/60 to 1960/61 - 1964/65 of between, on average, 16.3 per cent (adjusted total officer man-years) and 27.4 per cent (adjusted total staff man-years); a subsequent decline in productivity in 1965/66 - 1969/70 to a level of, on average, between 0.73 (adjusted total staff man-years) and 0.58 (adjusted total officer man-years) of that recorded in the base period, 1955/56 - 1959/60.[88] Such a trend in productivity raises several issues which need to be addressed here. First, an explanation for the changes in productivity, which are quite dramatic. Indeed, a skeptic of the idea of the measurement of government productivity in non-repetitive process-type operations such as competition

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88. These results reflect the weighting of the 12 outputs in order to estimate the numerator of the productivity index by the respondents on a 0-10 scale. As reported above, respondent B felt that a 0-20 scale was more appropriate. The application of this set of weights, however, does not change respondent B's trend in productivity significantly from that in Table 4.16. The relevant numbers are as follows for the 0-20 scale:

| Period | Adjusted Total Man-years Staff | Adjusted Total Man-years Officer |
|---|---|---|
| 1955/56 - 1959/60 | 100 | 100 |
| 1960/61 - 1964/65 | 119.1 | 108.7 |
| 1965/66 - 1969/70 | 81.7 | 65.0 |

The major difference, compared with the 0-10 scale, is that the increase and subsequent decrease in productivity is less using the 0-20 scale.

policy may point to a decline in the index of productivity from 127.4 to 73.4 over two five-year periods as confirmation of such skepticism, unless, of course, an adequate explanation is forthcoming.[89] The second issue is the observed disparate trends in the Director's and Director/AG Indexes (which showed an increase in productivity from 1955/56 - 1959/60 to 1965/66 - 1969/70) with that recorded in Table 4-16 for all the outputs of competition policy (which showed a substantial decline over the same period). Both of these issues will be addressed at the same time.

The primary reason for the divergence in the productivity trends recorded in Table 4.15 and Table 4.16 is that the Director's and Director/AG Index do not take into account compliance requests or preliminary inquiries, whereas the productivity index reflecting all the activities of competition policy does. This also accounts for the larger changes in productivity of the index reflecting all the activities of competition policy. The weighting system of the respondents from the group of experts typically attached a low weight to preliminary inquiries and a somewhat higher weight to compliance requests.[90] Although the weights attached to these outputs were not usually high, their volume was large in relation to any other of the outputs to which the respondents attached weights on the 0-10 scale, and they had a very significant influence on the total output of competition policy[91] and hence the trend in productivity. For example, the volume of these two outputs and successful regular prosecutions, which typically recorded a weight of 10, was as follows:

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89. The Director's Index and Director/AG Index showed large changes in productivity, although typically not of such a magnitude. These indexes referred to only some of the outputs of competition policy. The index in Table 4.16 refers to all the outputs of competition policy and hence one would expect, a priori, the changes of productivity to be more gradual.

90. For details see Appendix B, Table B-1, below.

91. Taking respondent H as an example, compliance requests and preliminary inquiries always accounted for 70 per cent or greater of total output.

| Period Manpower Resources Expended | Resultant Output: Compliance Requests | Preliminary Inquiries | Successful Regular Prosecutions |
|---|---|---|---|
| 1955/56 - 1959/60 | 150 | 525 | 12 |
| 1960/61 - 1964/65 | 317 | 803 | 18 |
| 1965/60 - 1969/70 | 259 | 508 | 25 |

A measure of the sensitivity of the productivity trend for all the activities of competition policy to compliance requests and preliminary inquiries may be gained by estimating respondent H's[92] productivity index for 1965/66 - 1969/70 on the assumption that the volume of preliminary inquiries and compliance requests remained unchanged at the 1960/61 - 1964/65 level. The results were 97.1 (adjusted total staff man-years) instead of 74.1 and 77.3 (adjusted total officer man-years) instead of 59.3. Alternatively the sensitivity could be tested for respondent H by excluding compliance requests and preliminary inquiries completely, in which case the resulting trend in productivity is:

| Period | Adjusted Total Officer (Man-years) | Adjusted Total Staff (Man-years) |
|---|---|---|
| 1955/56 - 1959/60 | 100 | 100 |
| 1960/61 - 1964/65 | 82.3 | 90.1 |
| 1965/66 - 1969/70 | 75.8 | 92.0 |

This is a much more gradual change in productivity than is recorded when preliminary inquiries and compliance requests are included in the numerator of the productivity measure. Such a trend accords much more with *a priori* expectations, the decline reflecting the influx of new officers and staff in the late 1960's and early 1970's which, as remarked above, is likely to bias measured productivity downwards. In addition, the category "Other" was probably of more importance in the period 1965/66 - 1969/70, with preparations for the new competition bill beginning after the Economic Council's 1969 *Interim Report on Competition Policy* and the growth of interdepartment committees with the incoming 1968

92. Respondent H was selected because his productivity trend in Table 4.16 came closest to the average. This also applies to the previous footnote.

Trudeau administration. Also, it should be remembered, the bilingual language training program instituted in the late 1960's/early 1970's would have required many in positions of responsibility in the Office of the Director to divert their attention from investigation and research to learning French. Finally, prosecutions, particularly for conspiracies, have been of increasing sophistication, thus more resources are devoted to producing a given output, because of a change in quality.[93] The large difference in the trend productivity depending upon whether or not compliance requests and preliminary inquiries are included suggests that productivity for all activities should, at a minimum, be estimated including and excluding these two outputs.

Summary. The use of an index of productivity reflecting all the activities[94] of competition policy shows a large increase from 1955/56 - 1959/60 to 1960/61 - 1964/65 and then a much larger decline in the next five-year period. This pattern of productivity change is explained by the large upsurge in compliance requests and preliminary inquiries in the 1960/61 - 1964/65 period and the subsequent decline. This is the result of two factors: the 1960 amendments to the Combines Investigation Act, especially with respect to price discrimination, and the introduction of defences against the former per se ban on resale price maintenance; and the launching of the Program of Compliance in 1960 by the new Director, D.H.W. Henry. The decline in 1965/66 - 1969/70 was not the result of the Office of the Director discouraging compliance requests and preliminary inquiries but rather a reflection of the fact that preliminary inquiries and compliance requests are observed to increase when new legislation is introduced. For example, in 1970/71 - 1974/75 the number of compliance requests and preliminary inquiries, as recorded in Table 4-10, showed a substantial increase over the 1965/66 - 1969/70 period, no doubt reflecting the introduction of Bill C-256 in 1971 and subsequent versions of this Bill.[95] As

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93. For details see p. 5-16 and p. 5-21 below.

94. "All activities" refers to those 12 which are quantifiable and which have been assigned weights by the group of experts in Table B-1 below.

95. There was an increase in the number of files opened on receipt of complaints or inquiries of the nature of complaints, a category similar to preliminary inquiries, in the period of the 1952 amendments to the Combines Investigation Act. (See Annual Report 1959/60, p. 28, for details).

a result it is very probable that if the productivity for all activities of competition policy were estimated for 1970/71 - 1974/75, a significant increase in productivity over 1965/66 - 1969/70 would be recorded.

An index which is primarily a reflection of attempts to change the legislation relating to competition policy presents problems of interpretation. An attempt was therefore made to exclude this influence. The result was that measured productivity declined between 1955/56 - 1959/60 and 1960/61 - 1964/65 and then probably remained unchanged or declined slightly. This pattern was explained by a number of factors: the growth in the staff of the Director in the late 1960's and early 1970's; bilingual language training; increasing sophistication of those individuals committing actual or potential infringements of the Act.

Two directions for future research in productivity measurement for competition policy outputs may be suggested. First, attempt to remove the influence of legislative change generating preliminary inquiries and compliance requests. This can be thought of as analogous to producing a seasonally adjusted unemployment rate and consumer price index. Such a task is not likely to be easy and may require the examination of individual complaints, which may be prohibitively expensive. Second, of more significance and certainly more feasible, is to direct attention to better measures of productivity for those outputs to which the Director allocates most of his resources and which are likely to have the greatest impact on the competitive environment. Obvious examples are successful regular prosecutions and per 30(2) prohibition orders.

## 4.5 Future Prospects for Productivity Measurement of Competition Policy

Several changes have taken place under Stage I or are proposed under Stage II which are likely to result in new outputs and redefinition of old outputs as well as the nature and scope of the offence categories under any given output heading.[96] Under Stage I, for example, at least two new important "outputs" can easily be identified: appearances by the Director before regulatory tribunals and agencies; reviewable practices before the RTPC. The proposed Stage II amendments are likely to define some new

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96. For more information see Appendix C below.

offences such as monopolization and joint monopolization, while existing offence categories, such as merger, are likely to be redefined. No longer will competition policy be exclusively public enforcement of a criminal statute, but rather joint public and private enforcement of a mixed civil and criminal statute. When these changes are fully effected, probably not until the early 1980's, the matrix of outputs by offence categories is likely to be much greater than the 12 by four[97] developed here in measuring productivity for 1955/56 - 1969/70. In other words productivity measurement is likely to get more, not less, difficult.

However, not everything is on the debit side. The principal item on the credit side[98] is the establishment in 1976/77 of a system of measuring the allocation of officer man-days to an inquiry in the Office of the Director. Officers are required to report the allocation of their time, on a monthly basis across the inquiries in which they are involved. The results are tabulated on a quarterly basis and presented to senior management. The system is formally entitled Quarterly Project Reporting System (QPRS). The availability of such a system should provide the future researcher with a much better link between inputs expended in a given period and the resultant outputs than was possible for the productivity indexes constructed here. This should improve productivity measurement. Nevertheless, given that QPRS started in 1976/77 and that the average time from start to completion of a regular prosecution, over the period 1960/61 - 1974/75, was 68.8 months,[99] 1980/81 or or 1981/82 is the earliest that much more reliable productivity indexes than those presented here will begin to appear for competition policy in Canada.[100]

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97. Five if the Multiple Offence Category is included.

98. Of comparatively minor significance is the disappearance of one output: RTPC report not prosecuted.

99. See Table 5-3 below.

100. The productivity indexes will relate, however, only to these outputs which existed as of Stage I. It will take an additional few years before Stage II outputs can be included.

# CHAPTER V

# THE EFFECTIVENESS OF CANADIAN COMPETITION POLICY: 1960/61-1974/75

## 5.1 Introduction

The effectiveness of competition policy is defined as the degree to which its objectives are being achieved. As detailed at the beginning of Chapter IV, the major aim of competition policy is the efficient allocation of resources through competitive markets. There are various ways in which it is possible, theoretically and empirically, to measure the effectiveness of competition policy. These are discussed in section 5.2. The next two sections detail, respectively, the effectiveness of investigations and prosecutions and the Program of Compliance. The final section, 5.5, discusses changes and modifications of the measures of effectiveness presented, in view of the recent changes in competition law.

## 5.2 Approaches to the Measurement of Effectiveness of Competition Policy

Theoretically, at least, the measurement of effectiveness is relatively straightforward. Several pieces of information or data are required. First is a commonly agreed upon set of indices of optimum resource allocation, both in a static and dynamic sense. Such indices would include the relationship between marginal cost and price, the degree of technical progressiveness and efficiency, and the relationship between private and social costs.[1] Second, the value of these indices under the following conditions: (i) with the presence of competition policy as it existed over the period 1960/61-1974/75; (ii) without the existence of competition policy over the period 1960/61-1974/75 or any substitute social mechanism to achieve the same objective; (iii) the optimum allocation of resources for maximum efficiency. A comparison of states (i) and (ii) shows the effectiveness of competition policy in bringing about more efficient allocation of resources, while a comparison of states (i) and (iii) demonstrates how much remains to be achieved in order to allocate resources in the most efficient manner. Unfortunately the type of controlled experiment required to generate states (ii) and (iii) is not possible for a variety of reasons, most of which are obvious and need not be dwelt upon here. Needless to say no previous study has attempted such an experiment.

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1. These issues are discussed in Ferguson and Gould (1975, pp. 452-477) and Scherer (1970, pp. 37-38).

In the absence of such data on states of the economy under various assumed and actual conditions, researchers have attempted to measure the effectiveness of competition policy in a much more limited way. The methodology employed has been to compare various attributes of those industries which have been the subject of competition policy enforcement activity (e.g., a prosecution) and a control sample of industries where no such activity has been observed or recorded. A comparison of the two sets of observations is used to draw inferences about the effect and/or impact of competition policy. There have been only a very few studies which have applied this methodology to competition policy enforcement in either Canada, the U.K. or U.S. Mention of all these studies will be made so that the reader may have some insight into the various methods used by researchers to evaluate the effectiveness of competition policy.

For Canada, Skeoch (1971) has examined the effect of the abolition of resale price maintenance in 1952. The traditional argument against RPM suggests inflated margins due to factors such as the prevalence of non-price rather than price competition and the protection of the inefficient by the lack of incentive to introduce new, lower cost forms of retailing and distribution.[2] Hence, the abolition of RPM should lead to a narrowing of the margins on goods where RPM had been practiced prior to 1952 compared with margins on goods where RPM had not been employed. This is precisely what Skeoch (1971, p. 25) finds: "gross margins in the former price-maintained trades had increased by only about 1 per cent [between 1950-51 and 1956-57], whereas in the former non-price-maintained trades they had increased by about 10 per cent". The effects of the 1952 abolition seems to have worked itself out by 1956-57, since between 1964-66 and 1956-57 margins moved in parallel (about 4 per cent) across the two samples indicating "both categories responded in much the same way to the prevailing market influences"

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2. For these and other arguments see Scherer (1970, pp. 512-515) and references cited therein.

(Skeoch, 1971, p. 259).[3] No other study has attempted to measure the direct impact of the administration and enforcement of competition policy in Canada. This would seem to reflect two factors. First, the effort required is often considerable as some of the U.K. studies detailed below show and, second, data to conduct some of the exercises are either not available or only recently became available (e.g., concentration data were not published for Canada between 1948 and 1971).

In the United Kingdom, Swann et al. (1974) building on the earlier work of Heath (1961), have attempted to evaluate the effectiveness of the 1956 Restrictive Trade

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3. During the period 1956-57 to 1964-65 amendments to the Combines Investigation Act were introduced which were designed to provide defences against persons or enterprises accused of RPM. (For full details see Rosenbluth and Thorburn, 1963, Chapter 8, pp. 84-95.) However, it was not until a court decision at the Supreme Court of Canada level in 1968 that the defences were shown to be of little practical effect (see Annual Report 1968/69, p. 61). In the meantime Sunbeam Corporation (Canada) Ltd. had reimposed RPM on certain electrical products: floor polishers, frying pans and electric shavers. It is therefore of interest to note that the pattern of margins for radio and electrical appliance stores:

> fell from 27.8 per cent in 1950-51 to 25.62 per cent in 1956-57, followed by an abrupt increase of almost 18 per cent to 30.16 per cent in 1964-66. It is persuasive to consider that the loss-leading defence enacted in 1960 played a significant role in accounting for this increase. Were this trade to be omitted from the calculations, the former price-maintained trades would show an average increase in gross margin from 1956-57 to 1964-66 of only about 1.6 per cent. (Skeoch, 1971, p. 259)

Other enterprises manufacturing electrical appliances beside Sunbeam Corporation (Canada) Ltd. were convicted of RPM in the period after the 1960 amendments, including Philips Electronics Industries Ltd. and Philips Appliances Ltd. (See Canada, Department of Consumer and Corporate Affairs, 1973, p. 42B) and Magnasonic Canada Ltd. (ibid., p. 68B). (The Magnasonic Canada Ltd. offence concerned stereo equipment.)

Practices Act. This Act placed a per se ban on all restrictive agreements unless the agreement could be shown to be beneficial (there were several "gateways" or criteria) and on balance outweighed the presumed anticompetitive effect of the agreement. The gateways include, that

> ...the restriction is reasonably necessary ... to protect the public against injury ... in connection with the consumption, installation or use of these goods; that the removal of the restriction would deny to the public as purchasers, consumers or users of any goods other specific and substantial benefits or advantages enjoyed or likely to be enjoyed ...; that having regard to the conditions actually obtaining or reasonably foreseen the removal of the restriction would be likely to have a serious and persistent adverse effect on the general level of unemployment in an area ... in which a substantial proportion of the trade or industry to which the agreement relates is situated; ... (Swann et al., 1974, pp. 65-66).

The "balancing" act is the responsibility of a special court, the Restrictive Practices Court, which is composed of "lay members qualified by their knowledge of, or experience in, industry, commerce or public affairs, as well as High Court judges" (Swann et al., 1974, p. 67). The Court has tended to strike down agreements, although a much greater number would appear to have been abandoned without contest before the Court.[4]

Swann et al. (1974, p. 145) selected a sample of 40 industries which either had agreements allowed, disallowed or abandoned without coming before the Court.[5] Given the size and diversity of the sample, Swann et al. (1974, p. 145) felt that their findings were "broadly indicative of what happened" with respect to events during the period 1956-1971. In evaluating the resource allocation

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4. Swann et al. (1974, p. 156).

5. Under the 1956 Act, all agreements had to be registered with the Registrar of Restrictive Trading Agreements who then took them before the Court. However, sometimes where a particular agreement was disallowed many similar agreements were abandoned (i.e., taken off the registry).

effects of the 1956 Act[6] the authors used three criteria: static efficiency, X-efficiency, dynamic efficiency. On the basis of the 40-industry sample the following conclusion was reached:

> ...it seems clear that the 1956 Act has had a significant effect on resource allocation, and that this effect has been almost entirely for the better. In the cases of only very few industries, mainly those with agreement upheld by the Court, can it be said that the Act has been far outweighed in relation to all three kinds of efficiency ... (Swann et al., 1974, p. 193)

No comparable studies exist for Canada or the U.S. on conspiracies.[7]

Nevertheless, the Federal Trade Commission's (1969, pp. 135-138) analysis of the successful conspiracy to fix the price of bread in the State of Washington over the period 1954-1964, is instructive, both with respect to the magnitude of the price increase and its absorption in higher costs. In the years prior to 1954, the price of bread in Seattle, Washington, was close to the average for the U.S. However, "commencing in mid-1954 Seattle bread prices rose sharply, and over the 10-year period 1955-1964 averaged between 15 per cent and 20 per cent above the national average" (U.S., Federal Trade Commission, 1969, p. 136). The lack of price competition led to non-price competition, with the result that "Seattle wholesale bakers ... selling costs averaged about 40 per cent above those in other cities" (U.S., Federal Trade Commission, 1969, p. 138). Hence, price increases led to economic waste in the form of "excessive" costs, not a redistribution of income from consumers to producers.

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6. The evaluation procedure was conducted on an individual industry case study approach. The 40 industries were divided into two sub-samples: 18 major and 22 minor case studies.

7. However, in the U.S., other aspects of conspiracies have been studied, such as the conditions under which they occur. (See, for example, Hay and Kelly, 1974.)

For the United States, Stigler has attempted to evaluate the effectiveness of competition laws by posing the following question: "The basic test of the effectiveness of our policies to prevent monopoly and high concentration must of course be: has it made concentration in American industry lower than it would otherwise be?" (Stigler, 1966, p. 262). The approach used to answer the question was threefold: a comparison of concentration in seven industries[8] in the United States which were subject to the competition laws with the corresponding industries in the United Kingdom, which, according to Stigler (1966, p. 263), had "no public policy against concentration of control"; the impact of the 1950 anti-merger amendments to the Clayton Act;[9] a comparison of concentration trends in industries subject to and exempt from the competition laws.[10] On the basis of these tests Stigler (1966, p. 270) concluded that the "Sherman Act appears to have had only a very modest effect in reducing concentration", while the 1950 anti-merger amendments "has had a very strong adverse effect upon horizontal mergers by large companies".[11]

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8. Automobiles, cement, cigarettes, flat glass, soap, steel, and tires (see Stigler, 1966, pp. 230-231). The comparisons usually referred to the period 1890's/1900's to the 1950's/early 1960's.

9. Stigler (1966, Table 21-2, p. 266) shows a substantial decline in the proportion of mergers which were horizontal in nature after the amendment was introduced.

10. The results were inconclusive since the exempt industries were often "subject to regulation ... and presumably have economic characteristics which distinguish them from non-exempt unregulated industries". (Stigler, 1966, p. 266).

11. Mueller (1967) also conducted an evaluation of the effectiveness of the first 16 years of enforcement of the 1950 anti-merger amendments by examining both the general trends in mergers and the competitive implications in five industries (shoes, steel, dairy, food retailing and cement). Mueller's (1967, p. 37) conclusion, similar to Stigler's, is, "when measured by its effects, it has had a fundamental and widespread procompetitive impact on the organization and performance of our economy." Mueller (1978) subsequently conducted a 27-year review and concluded, "Although the developments of the past decade have not changed my general view of the act's importance, it is now clear that the act has dealt successfully only with horizontal mergers and partially with vertical ones" (p. 89).

Stigler also measured the effectivenes of the Sherman Act with respect to its impact on conspiracies in restraint of trade. A priori certain methods of collusion are very efficient from the viewpoint of the conspirator (e.g., a joint selling agency compared with conscious parallelism). However, the most efficient method of collusion is more easily detected and prosecuted. The evidence for a sample of approximately 30 cases is consistent with this prediction. Hence Stigler's (1966, p. 271) conclusion that the "Sherman Act has reduced the availability of the most efficient methods of collusion and thereby reduced the amount and effects of collusion".

A third approach to measuring the effectiveness of competition does not look at the direct impact of the legislation as did Skeoch (1971), Stigler (1966) and Swann et al. (1974) but rather uses an indirect approach as a proxy for the direct method. The indirect approach is as follows: the objective of competition policy is to bring about a more efficient allocation of resources through the operation of competitive markets. The mechanism for achieving a competitive market in Canada is securing compliance with the Combines Investigation Act. Hence, the greater the compliance with the provisions of the Act, the more competitive the environment and the efficiency with which resources are allocated. The indirect approach seeks to measure the effectiveness of competition policy by developing indicators of the compliance with the various competition policy statutes. There also should be a judgement on the effectiveness of each provision of the legislation. For example, practically all enterprises comply with the merger provisions of the Act but it is for all practical purposes a useless provision. Equally, price leadership without collusion does not involve non-compliance with the Act, but may be just as effective as collusion, which is a contravention of the Act. (See Appendix C for details.)

This approach is particularly prevalent in the U.S. where the pioneering work of Posner (1970) best represents the approach. For Canada, Goff and Reasons (1978, pp. 77-115) and Rosenbluth and Thorburn (1963, pp. 57-83) fall, more or less, within this category. For example, Rosenbluth and Thorburn's approach is to divide antitrust enforcement activity into two parts. First, monopolistic situations effectively handled by the machinery of administration and enforcement. The authors include 21 such instances over the period 1952-1960, which accounted for $36.6 per $1,000 of GNP in 1956. (See Rosenbluth and Thorburn, 1963, Tables VIA, VIB, and VIC, pp. 60-61). A successful prosecution was usually taken by Rosenbluth and

Thorburn as sufficient demonstration that the monopolistic situation had been remedied.[12] The second category consisted of monopolistic situations which were not adequately handled by the Director of Investigation and Research, the Department of Justice and the judiciary.[13] These situations were divided into the following categories: reports of the RTPC but no effective action was taken; discontinued inquiries in the annual report of the Director; industries which show high concentration and exhibit business policies which should be investigated, according to the authors. These industries accounted for $209.1 per $1,000 of GNP in 1956, much greater than the situations effectively handled. This result is not surprising, given that the resources of the Director during 1952-1960 were quite small (less than 20 officers) and that by far the largest component of the $209.1 per $1,000 of GNP was from industries where concentration is high and business policies should be investigated ($169.00). Goff and Reasons' contribution (1978) is discussed further below. No comparable studies to those for the U.S. and Canada have been conducted for the U.K. This may reflect their non-criminal law approach to competition policy, however.

There is a fourth approach to evaluating competition policy which may be termed the "casual empiricist" or "informed observer" method. This approach consists of examining all the readily available information on the development of the legislation, the jurisprudence, the number of prosecutions brought, the political attitude

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12. It is arguable whether eight years is a long enough time span to judge whether a successful prosecution is a sufficient deterrent to the enterprise not to commit the offence again, given the data presented below in Table 5.3, which show that over the period 1960/61 - 1974/75, the average period from the opening of the file to final court judgement was 77.2 months in a conspiracy case and 54.1 months for a refusal to sell and/or RPM. For example, Rosenbluth and Thorburn (1963, Table VIA, p. 60) list metal culverts as a monopolistic situation effectively remedied - yet largely the same companies were found guilty again of the same offence. (See Annual Report 1959/60 p. 13, 1974/75, p. 25).

13. See Rosenbluth and Thorburn (1963, Tables VIIA, VIIB, VIIC, pp. 61-63).

to competition policy and the size of the budget allocated to competition administration and enforcement. On the basis of this information an evaluation of competition policy is made. Stigler (1966, p. 259) has commented on this procedure and some of its implications, as follows:

> Many students have undertaken our task, and diverse estimates of the effects of our antitrust laws may be found in the literature. These estimates have invariably been made by one procedure. The scholar studies the history of our policy and in the light of his knowledge of our economy - and perhaps of other economies - he makes a summary judgment. The defect of the procedure is that the link between the survey of experience and the conclusion is not explicit, so different scholars reach different conclusions. Yet it should be the fundamental attribute of a measurement procedure that different men can use it to achieve similar results. Until such procedures are available, there is no tendency for the measurements to improve - each man's work remains independent of all others' work.

Like the U.S., most of the studies of Canadian competition policy fall in the category of the "informed observer" or "casual empiricist".

These four approaches to the measurement of the effectiveness of competition policy should not be regarded as mutually exclusive, but rather as complementary. With the possible exception of the fourth approach, each approach deals with a different facet of competition policy and answers separate questions. The first approach provides a broad, macro indication of the effectiveness of competition policy, while the second and third methodologies offer different, more micro measures of effectiveness. For example, although the third approach might show that enterprises are complying with the law, the second approach might suggest that further changes are necessary in the law in order to secure a more efficient allocation of resources. Hence, a comprehensive study of the effectiveness of competition policy should utilize all these three approaches. However, here attention is concentrated primarily on the third approach to measuring effectiveness. Although this falls short of a comprehensive study it at least provides a starting point in assessing the

effectiveness of the legislation.[14]

## 5.3 Effectiveness: Investigation and Prosecution

### 5.3.1 Introduction

In this section, four sets of indicators or measures of the effectiveness of Canadian competition policy are introduced. These are concerned with the process of investigation, prosecution and subsequent compliance with the law. The indicators are concerned with the efficaciousness of the selection of cases for prosecution, the length of cases, the detection of offences, penalties and remedies and the economic scope of enforcement activities. The meaning and usefulness of each indicator will be discussed together with an examination of the movement of the indicator over the 1960/61 to 1974/75 period.

### 5.3.2 Selection of Cases

In this section, attention is focussed on the quality of decisions taken by two of the agencies responsible for the administration and enforcement of competition policy: the Director of Investigation and Research and the Attorney General of Canada.[15] The better the quality of these decisions, the more efficient the allocation of the resources devoted to competition policy enforcement by the government. The greater the efficiency, the more likely it is, other things equal, that enterprises

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14. As suggested in the text above, it is impractical to utilize the first approach, while the addition of another "casual empiricist" study seems of doubtful value. In other words, by following the third approach an attempt is being made to provide a more "scientific" basis upon which to evaluate the effectiveness of competition. As a result, recommendations for increasing the effectiveness where problems or difficulties are detected will rest on a firmer foundation. The second approach could not be utilized, mainly because of resource and time contraints. However, the third approach may suggest questions and issues which could be addressed in a study using the second approach.

15. The other two agencies, the RTPC and the judiciary have no selection roles, their chief functions being appraisal of material presented by the Director and the Attorney General, respectively.

will comply with the provisions of the Combines Investigation Act.

The first measure is the percentage of all formal inquiries started by the Director which led either to a direct reference to the Attorney General of Canada or a reference to the RTPC. The measure will vary from a minimum of zero to a maximum of 100. The greater the value of the index, the more efficient is the allocation of the resources of the Office of the Director. The measure reflects on the nature of the research undertaken before an inquiry becomes formal (i.e., the Director "has reason to believe") and quality of the judgement by those making the decision to investigate. This measure will be referred to as the inquiry index.

The second measure is the percentage of all legal proceedings instituted by the Attorney General that were successful. Like the previous measure the maximum and minimum are 100 and zero, respectively. This measure reflects the view of the judiciary on the cases selected by the Attorney General as well as the originality, quality and skills of the counsel in argument. The higher the value of the index the better the selection and preparation of cases including the input of the Department of Justice. This measure will be referred to as the prosecution index.

Table 5-1 presents data for the prosecution and inquiry index by type of offence and for three five-year periods. The five-year periods were selected since the number of inquiries and prosecutions in any given year is too small to attach much meaning.[16] The classification by offence was introduced in view of preliminary work, which showed different values of the indexes, depending upon the offence. It must be emphasized in interpreting the data presented in Table 5-1 that no optimum level of the inquiry or prosecution index, which took into account factors such as changes in ease of detection, evidentiary problems and precedent value, was estimated to compare with the recorded values of the indices. Hence, in the absence of additional outside information, some caution should be shown in drawing strong inferences and conclusions relying only on Table 5-1.

Inquiry Index. Overall, for the inquiry index, Table 5-1 shows that the number of formal inquiries increased from 106 in 1960/61-1964/65 to 161 in 1970/71-

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16. The number in parenthesis in Table 5-1 refers to the number of inquiries or prosecutions.

TABLE 5-1

The Selection of Cases for Prosecution and Investigation Under the Combines Investigation Act Grouped by Offence and Period: 1960/61-1974/75

| Period | Total | | OFFENCE CATEGORIES | | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|---|---|---|
| | | | Conspiracy | | R.P.M. And/ Or Refusal To Sell | | Merger And/ Or Monopoly | | Price Discrimination[c] | | Multiple Offences[d] | |
| 1960/61-1964/65 | | | | | | | | | | | | |
| Inquiry Index[a] | 27.4 | (106) | 40.9 | (22) | 69.2 | (13) | 26.7 | (15) | 9.7 | (31) | 16.0 | (25) |
| Prosecution Index[b] | 94.1 | (17) | 100 | (7) | 88.9 | (9) | - | (0) | - | (0) | 100 | (1) |
| 1965/66-1969/70 | | | | | | | | | | | | |
| Inquiry Index | 28.1 | (114) | 55.9 | (34) | 47.1 | (17) | 2.4 | (42) | 50.0 | (4) | 11.8 | (17) |
| Prosecution Index | 89.3 | (28) | 93.8 | (16) | 100 | (7) | 100 | (1) | 0.0 | (2) | 100 | (2) |
| 1970/71-1974/75 | | | | | | | | | | | | |
| Inquiry Index | 41.0 | (161) | 51.1 | (45) | 50.0 | (48) | 27.6 | (29) | 30.8 | (13) | 26.9 | (26) |
| Prosecution Index | 73.3 | (45) | 58.8 | (17) | 89.5 | (19) | 75.0 | (4) | 50.0 | (2) | 66.7 | (3) |
| 1960/61-1974/75 | | | | | | | | | | | | |
| Inquiry Index | 33.3 | (381) | 50.5 | (101) | 52.6 | (78) | 15.1 | (86) | 20.8 | (48) | 19.1 | (68) |
| Prosecution Index | 82.2 | (90) | 80.0 | (40) | 91.4 | (35) | 80.0 | (5) | 25.0 | (4) | 83.3 | (6) |

a. The inquiry index is defined as the percentage of formal inquiries which referred to the Attorney General either directly or via the RTPC.

b. The prosecution index is the percentage of all prosecutions undertaken which were successful. Note that for the purposes of this index the two special remedy cases (see Section 4.2.3) were included in prosecutions. Hence the total is 90 not 88.

c. Price discrimination includes predatory pricing, unreasonably low prices, discriminatory advertising allowances, as well as price discrimination.

d. See source tables for multiple offences.

Note: For dates used see source tables. Numbers in parenthesis refer to total number of prosecutions or formal inquiries.

Source: Tables 4-1, 4-3, 4-4, 4-5 and 4-6.

1974/75, an increase of 52 per cent. (The numbers in brackets in Table 5-1 represent the total number of formal inquiries.) Other things equal, as the volume of inquiries increases and hence, more marginal cases are investigated, the inquiry index should fall in value. However, despite the increasing volume of inquiries, Table 5-1 shows that there has been an increase in the inquiry index from 27.4 per cent to 41.0 per cent between 1960/61-1964/65 and 1970/71-1974/75. An examination by offence category shows that the inquiry index is highest for the two large volume sources of inquiries - RPM and conspiracy. On the other hand, merger and/or monopoly as well as price discrimination have much lower inquiry indices, with the lowest recorded for merger and/or monopoly of 2.4 per cent in 1965/66-1969/70. These low values are not at all surprising in view of jurisprudence in the Beer and Sugar cases and the difficulty of enforcing the 1960 price discrimination amendments. What is more difficult to understand, at first glance, is the high volume of formal merger and/or monopoly inquiries in the 1965/66-1969/70 period, when the chances of securing a successful prosecution were very low. This can be explained by reference to a policy statement by the Director of Investigation and Research in his 1965/66 Annual Report under the rubric "Position of Director on Merger Law,"

> In previous years, in reference to the merger provisions of the Combines Investigation Act, the views of the Restrictive Trade Practices Commission as expressed in the Paperboard Shipping Containers Report have been quoted in the Annual Report for the purpose of presenting their view of the state of the law. It has also been noted in the past that conflicting views as to the application of the merger provision have apparently persisted. Counsel to business firms in many cases are of the opinion that as the result of acquittals in two important merger cases, the Beer case and the Western Sugar case, in order to succeed in demonstrating a merger to be unlawful, the Crown must show that the merger has resulted in a virtual monopoly in the industry concerned. The Director does not consider this question to be settled as yet.
>
> In considering questions of this nature [i.e., mergers], as a matter of responsible administration of the Act, the Director must be prepared to explore situations that, on the best judgment he can form as to the interpretation of the words of

> the Statute, are likely to raise a proper issue for the appellate courts and particularly the Supreme Court of Canada to determine. (Annual Report 1965/66, pp. 18-22).

In other words, the Director refused to accept that Beer-Sugar was the last word on merger law in Canada;[17] that could only come from the Supreme Court of Canada, which delivered its interpretation of the merger law in the K.C. Irving judgement of 1977.[18] In contrast to merger and/or monopoly, after an initial surge of price discrimination inquiries, probably explained by the 1960 amendments, the frequency dropped with the realization that under this section it was a difficult, if not impossible, task to secure a conviction.

In sum, the inquiry index suggests that the Director improved his allocation of resources over time by better case selection,[19] with the noticeable exception of

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17. On the other hand, the decisions by the Attorney General not to proceed with the Meat Packing case may be taken to indicate that the government of the day accepted Beer-Sugar as the last word on merger law. Indeed, one senior official commenting upon an earlier draft of this study remarked, "The decline to 2.4 [in Table 5.1] reflects the decisions taken up to five years earlier not to commence inquiries in the face of the attitude of the Government of the day (Conservative) which refused to appeal the Beer and Sugar cases and to proceed with the Meat Packing." In other words a difference of opinion existed between the political authority (government of the day) and the Director over the meaning of Beer-Sugar. For an analysis of merger policy see Jones (1975), on Beer-Sugar see Appendix C below.

18. This largely agreed with the Beer-Sugar view of merger law. For a discussion see Reschenthaler and Stanbury (1977) and Appendix C, sections C.4 and C.5, below.

19. This assumes that uniform standards were applied throughout the period. No independent check was possible. However, the same person was Director throughout most of the period and many of the same people were amongst the senior personnel. One indirect test of the quality was to calculate the ratio of all references, either indirect or direct which led to a prosecution. Over the period 1960/61-1974/75, this showed an upward trend which would suggest that the Director was not sending a large number of marginal cases, indicating that the rise in the inquiry index is unlikely to be spurious.

the large number of merger inquiries undertaken (especially in the mid and late 1960's) when the chance of a successful reference to the Attorney General seemed very small because of the Beer and Sugar decisions in the early 1960's plus the decision not to prosecute in the Meat Packing case, despite a strong recommendation to that effect from the RTPC.[20] However, this was the result of a conscious policy decision, which seemed to have a two-fold objective: to show the large number of mergers, many of which had adverse competitive affects, which were outside the ambit of existing competition policy legislation; to find a case, given the interpretation of the Beer and Sugar decisions, which would be strong enough to result in a more "liberal" interpretation of the merger provisions of the Combines Investigation Act.

Prosecution Index. As with formal inquiries, the volume of prosecutions has increased substantially over the period 1960/61 to 1974/75, from 17 in the first five-year period to 45 in the last five-year period, an increase of 164.7 per cent. (The numbers in brackets in Table 5-1 represent the total number of prosecutions.) Again, other things being equal, the expectation is that the prosecution index will decline in value over time. Table 5-1 shows that, unlike the inquiry index, there is a fall in the prosecution index from 94.1 per cent in 1960/61-1964/65 to 73.3 in 1970/71-1974/75. However, given the small absolute volume of the prosecutions, this decline cannot be explained wholly in terms of more marginal cases. For example, RPM cases went from 9 to 19 over the period yet the prosecution index remained virtually unchanged in the high 80's. In terms of individual prosecutions, the prosecution index is consistently very high for RPM (88 per cent or greater) while for conspiracy the prosecution index falls quite dramatically from 100.0 to 58.8 per cent. As expected, price discrimination shows a typically low prosecution index, while the high index for merger and/or monopoly reflects the small number of cases brought (5) and the careful selection of only those few cases which could have any hope of success.

In sum, it would appear that the selection process of the Attorney General has become less efficient over time. This is largely a reflection of a decline in the number of successful prosecutions for conspiracy offences, since the overall prosecution index for 1970/71-1974/75 would have

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20. See RTPC (1961d, pp. 428-430).

been 88.9 per cent had these prosecutions been successful instead of the observed 73.3. One explanation offered by a senior official of the Office of the Director for the lack of success by the Crown in these seven[21] cases is that,

> I don't believe that a decline in the number of successful prosecutions for conspiracy indicates less efficiency in the selection process. Over the years we have learned by comparison of the schemes that are undertaken, that when enforcement is vigorous, conspiracies go underground. Consequently more and more such cases must be inferential conspiracies. (In such instances it is much more difficult to secure a conviction.)

This explanation is consistent with several of the conspiracy cases in which the Crown was unsuccessful.[22] In the remaining instances, a variety of ad hoc explanations seem in order. A close examination of the Crown's record in conspiracy cases should be kept to see whether the results for 1970/71-1974/75 are a mere aberration or part of a trend, in which case resources should be devoted to evaluating the problem and suggesting solutions.[23]

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21. The seven cases involve: fire insurance in Nova Scotia (see Annual Report 1976/77 p. 33 and Annual Report 1977/78 pp. 16-19); extruded aluminium, Montreal (see Annual Report 1976/77, p. 20); medical gases, Montreal (see Annual Report 1974/75, p. 26); business forms, Ontario (see Annual Report 1976/77, p. 29); pesticides (see Annual Report 1974/75, p. 25); cement, Ontario (see Annual Report 1973/74, pp. 24-25); milk, Sudbury (see Annual Report 1973/74, p. 27).

22. The problem of inferential conspiracies has acquired the label of conscious parallelism. For a discussion of the issue involved see Stanbury and Reschenthaler (1977) who discuss two of the seven cases mentioned in the previous footnote, cement, Ontario (pp.631-632) and extruded aluminium, Montreal (pp. 658-665).

23. For example, one such solution in the case of inferential conspiracies would be an amendment to the present legislation. Stage II proposes such a change. For a discussion see Stanbury and Reschenthaler (1977, pp. 689-691).

This section has shown how two indices, both of which are relatively simple to estimate, can be used to make inferences about the efficiency and effectiveness of the allocation of resources in investigation and prosecution activity under the Combines Investigation Act. The indexes have served to raise questions and highlight certain policy decisions. Hence, these indicators are likely to be useful to those administering and enforcing competition policy. However, a potentially important problem arises with the use of the indices by an outside central government agency to monitor the performance of the Director and Attorney General.[24] Such an agency must have a thorough understanding and appreciation of the operation of, and problems involved in the administration and enforcement of competition policy. The lack of such an understanding may result in an adverse impact on the performance of the agencies monitored. For example, if the monitoring agency decides the prosecution index should reach (say) 0.95 then the more marginal[25] cases, which may be necessary to clarify the law or to demonstrate changes in the law are needed, are less likely to be brought before the courts. Case selection with a 0.95 constraint will become much more conservative. Hence, the monitors must be very careful when setting standards or targets to fully consider the potential reactions of decision-makers. Such comments also apply the measures presented in the next three sections.

### 5.3.3 Detection of Offences

When an enterprise or group of enterprises commit an infringement of the Act such as a conspiracy or refusal to sell, then it is assumed that the enterprises derive some benefit (by the very fact that enterprises undertake such activities) and society suffers a loss, because the market mechanism for allocating resources does not work as well as it would otherwise. The sooner an offence is detected, other things equal, the less the loss to society and the greater the incentive for enterprises not to commit an

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24. The central agency is the Treasury Board. See Chapter II above for details.

25. Marginal in the sense that the probability of securing a conviction is "low".

offence because the prospective gains are thereby reduced by quicker detection.[26]

Here the detection of an offence is measured by the date of the first use of formal powers by the Director of Investigation and Research. The beginning of the offence is measured by an examination of the information laid, since this contains the period over which the offence is supposed to have been committed.[27] The beginning of this period is taken as a proxy for the start of the offence. The difference between these two dates, measured in months, is referred to here as the detection period index. This index, together with the total period during which the offence took place as recorded in the information laid in the charge, is presented in Table 5-2, grouped by period and offence. The table only refers to prosecutions, no matter whether the Crown secured a conviction or not.

A priori the expectation is that the detection period will decline over time for several reasons. First,

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26. However, this inference depends critically on how the penalty system works. If the penalties imposed by the courts are related directly to the length of the offence, then although the gains from an infringement may be less by virtue of quicker detection, so will the penalty (i.e., fine). It is commonly felt that the penalties imposed by the courts are so "low" in relation to the potential benefits to the accused that even if there was some relationship between length of offence and penalty imposed, this factor is likely to have little influence on offsetting any gains from infringements of the Act. See Stanbury (1977a) for a discussion of the factors determining penalties and remedies. Length of offence does not feature prominently.

27. This statement is subject to some qualifications, particularly for RPM and/or refusal-to-sell cases, where the offence may have taken place in three or four different provinces at different times. Clearly it would be of doubtful usefulness to institute four prosecutions, so possibly the "best" two or three offences in one province may be selected as the basis for court proceedings. These examples of infringement may have been several months later in time than the non-selected instances. However, there is no reason to assume that such a method of selecting those instances in which to prosecute will bias systematically the indices presented in Table 5-2.

TABLE 5-2

The Detection of Offences[a] Under the
Combines Investigation Act; 1960/61-1974/75

| Period | Total | | OFFENCE CATEGORIES | | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|---|---|---|
| | | | Conspiracy | | R.P.M. And/ Or Refusal To Sell | | Merger And/ Or Monopoly | | Price Discrimination[e] | | Multiple Offences | |
| | Time intervals measured in months (Numbers in parenthesis refer to cell sizes) | | | | | | | | | | | |
| 1960/61-1964/65 | | | | | | | | | | | | |
| Length of offence[b] | 27.1 | (17) | 43.7 | (7) | 15.6 | (9) | - | (0) | - | (0) | 14.0 | (1) |
| Detection period[c] | 26.5 | (16) | 38.0 | (7) | 17.8 | (8)[d] | - | (0) | - | (0) | 16.0 | (1) |
| 1965/66-1969/70 | | | | | | | | | | | | |
| Length of offence[b] | 59.9 | (26) | 80.3 | (16) | 20.6 | (7) | 120.0 | (1) | 4.5 | (2) | - | (0) |
| Detection period[c] | 54.0 | (25) | 70.2 | (15)[d] | 31.9 | (7) | 64.0 | (1) | 4.5 | (2) | - | (0) |
| 1970/71-1974/75 | | | | | | | | | | | | |
| Length of offence[b] | 59.5 | (48) | 91.7 | (18) | 12.6 | (20) | 148.3 | (4) | 11.0 | (2) | 84.3 | (4) |
| Detection period[c] | 53.4 | (46) | 80.0 | (18) | 15.3 | (18)[d] | 126.8 | (4) | 7.5 | (2) | 50.8 | (4) |
| 1960/61-1974/75 | | | | | | | | | | | | |
| Length of offence[b] | 53.6 | (91) | 79.1 | (41) | 14.9 | (36) | 142.6 | (5) | 7.8 | (4) | 70.2 | (5) |
| Detection period[c] | 48.6 | (87) | 69.3 | (40) | 19.4 | (33) | 114.2 | (5) | 6.0 | (4) | 43.8 | (5) |

a. Refers to prosecutions, which are dated by when the information is laid.
b. Total length of the offence as recorded in the information laid in the charge.
c. Date first formal power used by Director minus beginning of the offence.
d. No formal powers used in some prosecutions so the cell sizes drop from length of offence to detection period.
e. Price discrimination includes predatory pricing, unreasonably low prices, discriminatory advertising allowances as well as price discrimination.

SOURCE: Data gathered from the files of the Director of Investigation and Research by P.K. Gorecki and W.T. Stanbury. For further details see Appendix A below.

the advantages and spirit of co-operation fostered by the price setting and order allocations functions of trade associations during the Second World War are likely to have continued during the post-war period. However, the economic growth in the 1950's is likely to have lessened the incentive in many industries to indulge in restrictive agreements and practices. Hence, offences in which the information was laid in the early 1960's are likely to have a much longer detection period than offences in which information was laid in the 1970's.

Second, as the volume of prosecutions increases over time, the more marginal cases are likely to be detected. For such cases the infringement is likely to be intermittent, since the offence may break down. In Table 5-2, where there is a long break (i.e, a year or more) then the beginning date used in the detection period refers to the start of the most recent period for which the charge is laid.[28] Third, in a small number of instances, enterprises have been charged on separate occasions in the post-war period with the same offence (e.g., sugar companies in eastern Canada). In the first instance the detection period has no lower bound, but in the second charge there is a lower bound because of the first case. This is likely to bias the detection period downwards over time in a small number of instances. For these three reasons it is expected that the detection period will decline.

The data presented in Table 5-2 show that the observed values for the detection period index for RPM and/or refusal to sell, over the period 1960/61-1974/75, tends to accord broadly with a priori expectation. In the first two periods, 1960/61-1964/65 and 1965/66-1969/70, with relatively low volumes, there is a marked increase in the detection period index. However, for the last period there is both a substantial increase in volume of cases and a decline in the detection period to 15.3 months. In sharp contrast, despite an increase in the volume of the number of cases, the detection period for conspiracy offences more than doubles over the period, from 38.0 months in 1960/61-1964/65 to 80.0 months in 1970/71-1974/75.[29] The

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28. This only occurred a small number of times, usually for RPM and/or refusal to sell offences.

29. Because of the relatively small sample sizes, it could be argued that a few extreme observations could heavily influence the outcome. To test for this the two highest values of the detection period index for 1960/61-1964/65

cell sizes for the remaining cases are too small to draw any inferences.

In sum, the detection period index suggests that the effectiveness of competition policy has increased for RPM and/or refusal to sell offences, but decreased significantly for conspiracies. One explanation suggested by two senior officials of the Office of the Director for the increasing length of the detection index for conspiracy cases concerns the increasing difficulty of detection and the lack of extensive documentation. The first official observed that, "the increase...reflects the fact that conspiracies have gone underground" while the second commented,

> Conspiracies now, for the most part are far more sophisticated than 20-25 years ago. While then they had to be pieced together from a mass of documents there was plenty of material to work with, e.g., Western Bread, Flat Glass, Fine Papers. On the other hand the recent B.C. Cement case was based almost entirely on oral evidence.[30]

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and the four highest for the period 1969/70-1974/75 were omitted. The average value of the detection period index was then re-estimated for these two periods. The resulting averages, although showing a fall, did not change the conclusions drawn in the text. For example, for conspiracies the index increases from 21.2 to 47.2, for RPM and/or refusal-to-sell, 14.3 to 10.8.

30. This official also offered an explanation for the reduction in the detection period index for the RPM and the refusal-to-sell category which was as follows:

> It is difficult to conduct an extensive RPM scheme without there being some correspondence (internal or external)- also I think complainants are more prepared "to stand up and be counted."

Unlike conspiracies, RPM and/or refusal-to-sell usually requires the complicity of some unwilling partner (either the manufacturer or a recalcitrant retailer) who has a considerable incentive to report matters to the Director.

These explanations are consistent with a recent examination of conspiracy cases which was concerned with the emergence of inferential conspiracies or the practice of conscious parallelism.[31] Hence, although the detection period index for conspiracies has increased over the period 1960/61-1974/75 this may, ironically, be an indication of a more effective competition policy. Past enforcement activities have been successful, forcing would-be conspirators to be much more careful and hence concealing their offence for a longer period than would otherwise be the case.[32]

### 5.3.4 Length of Inquiry, Appraisal and Prosecution[33]

The length of time[34] for the Director to conduct an inquiry, for the RTPC to appraise a Statement of Evidence, for the Attorney General to decide whether or not to institute legal proceedings and, finally, for the courts to render a final judgement, can have a very significant influence on the effectiveness of the administration and enforcement of competition policy. The shorter the time taken in each of these stages, the more effective the Combines Investigation Act, for at least five reasons. First, the supply of complaints will increase, since the complainant has a greater incentive to complain because of prompt action. In the words of two U.S. commentators:

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31. See Stanbury and Reschenthaler (1977) for details and a discussion.

32. This example of the interpretation of the detection index for the conspiracy demonstrates how considerable care must be taken in interpreting such indices. Hence it emphasizes the point made at the end of the previous section on the Selection of Cases.

33. Attention is confined here to an evaluation of trends over the 1960/61-1974/75 period. For a longer-term perspective which compares 1960/61-1974/75 with two earlier periods, 1923/24-1939/40 and 1946/47-1953/54, see Gorecki and Stanbury (1979a).

34. Also of importance is the amount of time (i.e., man years) devoted to the inquiry, appraisal and prosecution functions. An attempt to quantify this is presented in Chapter IV above.

> ...the complaint responds to its welcome, if met with silence or indifference it comes intermittently; if the hope flares that something will come of it the stream flows full and fast. (Hamilton and Till, 1940, p. 36)

As will be shown in Chapter VI, the main source of prosecutions under the Combines Investigation Act is based upon complaints, chiefly from businessmen. Second, length matters because, other things equal, the longer the case takes to complete the greater the cost of the case. The evidence may get "stale", necessitating additional searches with the resultant increase in frustration by those conducting the investigation.[35] Third, the length of inquiry and obtaining a legal opinion from the Department of Justice can be so long after an offence has been detected that no trial takes place. For example, in one RPM case, the "unconscionable delay"[36] by the Department of Justice in Toronto led to the proposed prosecution being dropped, while in another two cases, a conspiracy and an RPM, where the major evidence in both instances was the oral testimony of witnesses, the long delay made suspect their ability to recall events.[37] Fourth, the long delays mean that the

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35. An important consequence of such multiple searches is to antagonize business, which may then seek curtailment of the Director's powers of search, etc.

36. Memorandum from the Deputy Director (Legal) to the Director dated March 17, 1975. The summary of evidence was given to the Department of Justice in Toronto in February 1973 and an opinion was forthcoming in April 1974. (It should be pointed out that the Director of the Legal Office in Toronto apologized for this "inordinate delay".)

37. This is based upon an examination of the evidence of the files of the Office of the Director. In one case the delay was acknowledged in the Annual Report of the Director - "An important reason for this decision [i.e., not to prosecute] was that oral evidence given by major witnesses during the course of investigation could not be duplicated" (Annual Report 1972/73, pp. 39-40). The inquiries concerned hearing aid batteries and stereos and TVs. All occurred in the period 1970/71-1974/75.

evidence brought before the Court is "stale", "old" or "dated", which is likely to result in the judge assessing a lower penalty,[38] the Crown settling for a prohibition order per 30(2) rather than a regular prosecution[39] and, in certain instances, acquittal of the accused. Acquittal is most likely in those cases concerning inferential conspiracies and the more subtle forms of RPM, where the Crown has little documentary evidence and hence relies heavily on oral testimony. The passage of time results in the "loss" or "lapse" of memory and hence makes it much easier for the defence to win the case.[40] Fifth, long delays may result in inadequate remedies, particularly in merger and RPM cases. In merger cases divestiture is sometimes considered an appropriate remedy. However, with the passage of time the acquired and acquiring enterprises become integrated into a single corporate whole.[41] Hence, breaking up the enterprise

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38. See, for example, R. v. William E. Coutts Company Limited (1969) 52 C.P.R. 21 (Trial) and R. v. Philips Appliances Ltd. (1969) 52 C.P.R. 30 (Trial): 41 (Sentence). In the first of the above two cases the judge remarked, in part,

> In view of the fact that the offence in Count Number 3 is to use the words of counsel, one that is "stale", my findings in respect of the other counts have not been that a practice has persisted. I think that a fine of $500.00 payable on or before November 1st, 1966, would be a suitable sentence and I so sentence the accused on that count.

39. See, for example, Gorecki and Stanbury (1979a) concerning the Safeway case.

40. This would appear to be the case. R. v. Aluminium Company of Canada Limited (1976), 29 C.P.R. (2d) 183. For details see Stanbury and Reschenthaler (1977, pp. 658-665).

41. These remarks concern horizontal mergers and apply with much less force to conglomerate mergers.

is likely to entail considerable costs, which a judge would be reluctant to entertain.[42] In RPM cases the manufacturer or wholesaler who refuses to supply may eventually drive the price cutter bankrupt, so any remedy is likely to be less ineffective.[43] Hence, for these reasons, throughput time is likely to be an important determinant of the effectiveness of competition policy.

In Chapter III the various stages in the process of investigation, appraisal and legal proceedings were detailed and discussed. In order to make the analysis of

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42. In the meat packing inquiry, Canada Packers Limited acquired both Wilsil Limited and Calgary Packers Limited, major competitors in Quebec and Western Canada, respectively, in 1955. The RTPC report was dated August 3, 1961 and recommended,

> In the circumstances the Commission recommends that the possibility of seeking a court order under section 31(2) [subsequently changed to 30(2)] of the present Combines Investigation Act be fully explored for the purpose of dissolving the mergers of Calgary Packers Limited and Wilsil Limited with Canada Packers. In the event that it is determined that such a remedy cannot be sought the Commission would recommend that the possibility of seeking a court order under section 31(2) be fully explored for the purpose of prohibiting Canada Packers from making any further acquisitions which would lessen competition in the meat packing industry. (RTPC, 1961d, p. 430)

43. This is acknowledged by the Director with respect to predatory practices in general. For example,

> Although efforts continue to be made to expedite any inquiry of this nature the time required to complete it and proceed against the violation in the courts may be too long to assist such complainants with their immediate problems. (Annual Report 1970/71, p. 10)

throughput time manageable, a small number of critical periods are identified. In particular, attention is paid to the following:

T1: the time from the opening of a file upon receipt of a complaint to the decision to institute a formal inquiry (taken to be the use of a formal power).

T2: the time between the decision to conduct a formal inquiry and the sending of the summary of evidence to the Attorney General (T2AG) or the statement of evidence to the RTPC (T2RC).

T3: the time between the receipt of the statement of evidence by the RTPC and the publication of the RTPC report.

T4: the time between the receipt by the Attorney General of either a summary of evidence from the Director (T4DIR) or the RTPC report (T4RC)and the laying of information.

T5: the time between the laying of information and the final disposition of the case. The final disposition refers to the highest court reached (i.e., preliminary hearing, trial, appeal, supreme court).

T6: the time between the opening of the file to the final disposition of the case.

T1 to T6 refer to periods when different individuals control the process of investigation and prosecution and hence justify separate time profiles. The association of time intervals and responsibility is as follows:[44]

T1, T2: Director of Investigation and Research
T3: RTPC
T4: Attorney General
T5: Judiciary
T6: Director, RTPC, AG, judiciary, defendants

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44. It is, of course, recognized that the individual or institution identified has primary responsibility and his decision, as made explicit in Chapter III, is usually influenced by the other actors in the process.

A schematic diagram of the process of investigation and prosecution is presented in Chapter III, Figure 3-3. All intervals are measured in months.

A priori there is an expectation that the critical periods in a prosecution are likely to get longer for two reasons. First, as the volume of prosecutions increases, the more marginal cases will be investigated. These are likely to be harder to prove and hence require greater preparation and effort. Second, as recorded in Chapter IV, the influx of new inexperienced staff is likely to reduce throughput time as training is required. As concerns length of cases by offence, it is to be expected that, other things equal, conspiracy cases will be longer than RPM cases since the former cover a greater number of enterprises and market share data usually have to be collected and introduced in court.

Table 5-3 presents the critical periods, T1 to T6, for three five-year periods, grouped by offence. The critical periods are expressed in averages and the cell sizes are indicated in the table. Over the period 1960/61 to 1974/75, the average prosecution took 68.8 months or approximately 5.7 years from the opening of the file on receipt of a complaint to the final disposition (T6). The corresponding number in each of the three sub-periods were quite close to 68.8 months. In terms of the individual offences, overall, the longest were merger and/or monopoly (94.2 months) followed by multiple (90.8 months), conspiracies (77.2 months), price discrimination (59.5 months) and RPM (54.1 months).

The number of prosecutions by period and offence for each of the three sub-periods is too small to infer anything about trends in T6 except for conspiracy and RPM. For conspiracy offences there is small decline in T6 from 80.3 months in 1960/61-1964/65 to 76-77 months in each of the subsequent two five year periods. The decline in T6 for RPM is much more dramatic, from 63.0 months in 1960/61-1964/65 to 48.0 months in 1970/71-1974/75, a 30 per cent decrease. Hence, in "overall" terms (T6) the length of a case has shown no marked increase or decrease with the notable exception of RPM, which fell significantly and, to a much lesser extent, conspiracies. Given the a priori expectation of an increase in the length of a case over the period 1960/61-1974/75, these trends probably show that, as measured by throughput time, the effectiveness of competition policy administration and enforcement has increased.

In the discussion in Chapter III, the one major change which took place in the relative importance of the

TABLE 5-3

Critical Periods[a] in Prosecutions[b] Under the Combines Investigation Act, Grouped by Period and Offence, 1960/61 - 1974/75

| Period and Index | Total | | OFFENCE CATEGORIES | | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|---|---|---|
| | | | Conspiracy | | R.P.M. And/or Refusal to Sell | | Merger And/or Monopoly | | Price Discrimination[c] | | Multiple Offences | |
| 1960/61 - 1964/65 | Ave.[e] | No. | Ave. | No. | Ave. | No. | Ave. | No. | Ave. | No. | Ave. | No. |
| T1 | 8.1 | 17 | 13.1 | 7 | 4.9 | 9 | - | 0 | - | 0 | 2.0 | 1 |
| T2 | 20.3 | 17 | 27.9 | 7 | 16.0 | 9 | - | 0 | - | 0 | 6.0 | 1 |
| T2AG | 26.4 | 7 | 28.0 | 2 | 26.3 | 4 | - | 0 | - | 0 | 6.0 | 1 |
| T2RC | 20.2 | 10 | 27.8 | 5 | 12.6 | 5 | - | 0 | - | 0 | - | 0 |
| T3 | 12.0 | 10 | 16.8 | 5 | 7.2 | 5 | - | 0 | - | 0 | - | 0 |
| T4 | 16.5 | 17 | 15.7 | 7 | 18.0 | 9 | - | 0 | - | 0 | 9.0 | 1 |
| T4DIR | 11.4 | 7 | 10.5 | 2 | 12.5 | 4 | - | 0 | - | 0 | 9.0 | 1 |
| T4RC | 20.1 | 10 | 17.8 | 5 | 22.4 | 5 | - | 0 | - | 0 | - | 0 |
| T5 | 17.2 | 17 | 11.6 | 7 | 20.1 | 9 | - | 0 | - | 0 | 30.0 | 1 |
| T6 | 69.2 | 17 | 80.3 | 7 | 63.0 | 9 | - | 0 | - | 0 | 47.0 | 1 |
| 1965/66 - 1969/70 | | | | | | | | | | | | |
| T1 | 5.1 | 26 | 5.1 | 16 | 5.3 | 7 | 8.0 | 1 | 3.0 | 2 | - | 0 |
| T2 | 29.5 | 26 | 33.4 | 16 | 22.7 | 7 | 40.0 | 1 | 16.5 | 2 | - | 0 |
| T2AG | 30.6 | 11 | 40.3 | 7 | 13.8 | 4 | - | 0 | - | 0 | - | 0 |
| T2RC | 28.7 | 15 | 28.1 | 9 | 34.7 | 3 | 40.0 | 1 | 16.5 | 2 | - | 0 |
| T3 | 12.9 | 15 | 12.7 | 9 | 9.3 | 3 | 27.0 | 1 | 12.5 | 2 | - | 0 |
| T4 | 17.7 | 26 | 17.1 | 16 | 16.7 | 7 | 11.0 | 1 | 30.0 | 2 | - | 0 |
| T4DIR | 18.5 | 11 | 22.9 | 7 | 11.0 | 4 | - | 0 | - | 0 | - | 0 |
| T4RC | 17.1 | 15 | 12.6 | 9 | 24.3 | 3 | 11.0 | 1 | 30.0 | 2 | - | 0 |
| T5 | 12.8 | 26 | 13.7 | 16 | 10.7 | 7 | 27.0 | 1 | 5.5 | 2 | - | 0 |
| T6 | 72.5 | 26 | 76.4 | 16 | 59.4 | 7 | 113.0 | 1 | 67.5 | 2 | - | 0 |
| 1970/71 - 1974/75[d] | | | | | | | | | | | | |
| T1 | 8.9 | 45 | 8.9 | 17 | 5.6 | 18 | 19.3 | 4 | 5.5 | 2 | 15.8 | 4 |
| T2 | 23.0 | 45 | 29.9 | 17 | 14.9 | 18 | 16.5 | 4 | 13.0 | 2 | 42.0 | 4 |
| T2AG | 21.2 | 38 | 29.6 | 14 | 13.9 | 76 | 13.3 | 3 | 13.0 | 2 | 33.7 | 3 |
| T2RC | 33.3 | 7 | 31.3 | 3 | 23.0 | 2 | 26.0 | 1 | - | 0 | 67.0 | 1 |
| T3 | 18.6 | 7 | 16.0 | 3 | 24.0 | 2 | 18 | 1 | - | 0 | 16.0 | 1 |
| T4 | 17.0 | 48 | 18.9 | 18 | 15.5 | 20 | 30.5 | 4 | 16.5 | 2 | 15.8 | 4 |
| T4DIR | 13.5 | 41 | 15.3 | 15 | 10.3 | 18 | 19.3 | 3 | 16.5 | 2 | 15.7 | 3 |
| T4RC | 45.0 | 7 | 37.0 | 3 | 62.0 | 2 | 64.0 | 1 | - | 0 | 16.0 | 1 |
| T5 | 15.2 | 45 | 17.6 | 17 | 10.9 | 19 | 18.8 | 4 | 16.5 | 2 | 23.7 | 3 |
| T6 | 66.5 | 45 | 76.8 | 17 | 48.0 | 19 | 89.5 | 4 | 51.5 | 2 | 105.3 | 3 |
| Total Period 1960/61 - 1974/75 | | | | | | | | | | | | |
| T1 | 7.6 | 88 | 8.1 | 40 | 5.3 | 34 | 17.0 | 5 | 4.3 | 4 | 13.0 | 5 |
| T2 | 24.4 | 88 | 31.0 | 40 | 16.8 | 34 | 21.2 | 5 | 14.8 | 4 | 34.8 | 5 |
| T2AG | 22.9 | 56 | 32.7 | 23 | 14.9 | 24 | 13.3 | 3 | 13.0 | 2 | 26.8 | 4 |
| T2RC | 27.0 | 32 | 28.6 | 17 | 21.3 | 10 | 33.0 | 2 | 16.5 | 2 | 67.0 | 1 |
| T3 | 13.9 | 32 | 14.5 | 17 | 11.2 | 10 | 22.5 | 2 | 12.5 | 2 | 16.0 | 1 |
| T4 | 17.7 | 91 | 17.7 | 41 | 16.4 | 36 | 26.6 | 5 | 23.3 | 4 | 14.4 | 5 |
| T4DIR | 14.2 | 59 | 17.1 | 24 | 10.8 | 26 | 19.3 | 3 | 16.5 | 2 | 14.0 | 4 |
| T4RC | 24.2 | 32 | 18.4 | 17 | 30.9 | 10 | 37.5 | 2 | 30.0 | 2 | 16.0 | 1 |
| T5 | 14.9 | 88 | 15.0 | 40 | 13.2 | 35 | 20.4 | 5 | 11.0 | 4 | 25.3 | 4 |
| T6 | 68.8 | 88 | 77.2 | 40 | 54.1 | 35 | 94.2 | 5 | 59.5 | 4 | 90.8 | 4 |

a. See text for definition of T1 to T6.

b. Dated by date of information laid.

c. Price discrimination includes predatory pricing, unreasonably low prices, discriminatory advertising allowances as well as price discrimination.

d. In this period in three cases no formal powers were used and the final disposition of three cases is still not know.

e. Ave. = average, measured in months.

SOURCE: Data gathered from the files of the Director of Investigation and Research by P.K. Gorecki and W.T. Stanbury. For further details see Appendix A below.

various bodies responsible for the administration and enforcement of the Act, which may account for the reduction in throughput time, is the gradual elimination of the RTPC. In all instances in Table 5-3, T3 is a non-trivial period of time. Taking the 1960/61-1974/75 period, as a whole, T6 for cases going via the RTPC and directly to the Attorney General is as follows:

| T6 | Total | | Conspiracy | | RPM and/or Refusal to Sell | | Merger and/or Monopoly | | Price Discrimination | | Multiple Offences | |
|---|---|---|---|---|---|---|---|---|---|---|---|---|
| | ave. | no. | ave. | no. | ave. | no. | ave. | no. | ave. | no. | ave. | no. |
| RTPC | 89.6 | 32 | 84.5 | 17 | 91.1 | 10 | 114.0 | 2 | 67.5 | 2 | 157.0 | 1 |
| A.G. | 56.9 | 56 | 71.9 | 23 | 39.4 | 25 | 81.0 | 3 | 51.5 | 2 | 68.7 | 3 |

where 'ave.' is the average throughput time in months and 'no.' is number of cases in each cell. In all instances, T6 is considerably shorter in cases which are sent directly to the Attorney General, rather than via the RTPC. However, the difference is much greater for RPM than conspiracy cases. This factor, together with the slightly greater relative decline in the importance of the RTPC in RPM compared with conspiracy cases,[45] is largely responsible for the greater reduction in T6 for RPM compared to conspiracy cases.[46]

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45. For example, in the period 1960/61-1964/65, 44.4 per cent of RPM cases went via the RTPC while in 1970/71-1974/75, this had dropped to 10.5 per cent. The corresponding percentages for conspiracy were 71.4 and 17.6, respectively.

46. The term prosecution refers to regular prosecution and a per 30(2) prohibition order. Over the period 1960/61-1974/75, the relative importance of per 30(2) prohibition order increased considerably for conspiracies (14.3 per cent of prosecutions in 1960/61-1964/65 to 35.3 per cent in 1970/71-1974/75) while the converse applied to RPM cases (33.3 per cent of all prosecutions in 1960/61-1964/65, 15.8 per cent in 1970/71-1974/75). T6 for conspiracy cases per 30(2) prohibition order took longer than regular prosecutions. (This applied whether the RTPC was used or not and for all the three five-year periods). On the other hand, T6 for RPM per 30(2) prohibition orders was usually shorter than a regular prosecution, except for the period 1970/71-1974/75. This greater use of the per 30(2) prohibition order in conspiracy cases than RPM cases is a factor which, to some degree, offsets the reduction in T6 expected because of the bypassing of the RTPC in conspiracy cases.

The potential for further reductions in throughput time depends critically upon the relative importance of the various pieces of machinery involved in the administration and enforcement as well as the potential for streamlining or reforming the procedure. Since the Director has effectively ceased to send statements of evidence pursuant to section 18(1)(a) to the RTPC, attention is concentrated only on cases which were sent directly to the Attorney General pursuant to section 15 of the Act. In such instances, only the Director, Attorney General and the judiciary are involved. The relative importance of these three actors over the period 1960/61-1974/75 can be expressed as follows:

| Percentage of T6 Accounted for by | Total | | Conspiracy | | RPM and/ or Refusal to Sell | | Merger and/ or Monopoly | | Price Discrim- ination | | Multiple Offences | |
|---|---|---|---|---|---|---|---|---|---|---|---|---|
| | % | months | % | months | % | months | % | months | % | months | % | months |
| Director (T1, T2) | 52.6 | 30.5 | 56.2 | 41.2 | 48.8 | 19.8 | 45.2 | 36.6 | 35.9 | 18.5 | 50.8 | 41.6 |
| Attorney General (T4) | 24.5 | 14.2 | 23.3 | 17.1 | 26.6 | 10.8 | 23.9 | 19.3 | 32.0 | 16.5 | 17.1 | 14.0 |
| Judiciary (T5) | 22.9 | 13.3 | 20.1 | 14.7 | 24.8 | 10.0 | 30.9 | 25.0 | 32.0 | 16.5 | 32.1 | 26.3 |

(All numbers are averages and refer to cases referred directly to the Attorney General).

In all instances, the Director is the most important element, accounting respectively for 56 and 49 per cent of total throughput time, in conspiracy and RPM cases, the two high volume categories. However, also of substantial significance is the Attorney General and the judiciary. For example, in RPM cases, the Attorney General accounts for 27 per cent total throughput time, the judiciary 25 per cent. Hence, the potential for further reductions in throughput would appear to be most significant with respect to the operations of the Director, followed by the Attorney General and the judiciary.[47]

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47. This inference changes little if prosecutions are divided into prohibition orders per 30(2) and regular prosecutions. For example, in RPM, prohibition orders per 30(2), the Director, Attorney General and judiciary account for 55.9, 35.3 and 8.8 per cent of total throughput time, respectively. The corresponding percentages for a regular RPM prosecution are 48.2, 25.5 and 26.3. The increase in the relative importance of the Attorney General and corresponding decline of the judiciary, for prohibition orders per 30(2), reflects the negotiation which is conducted by the defence and prosecution prior to an agreement being reached, which is presented to the court.

The evidence available does not suggest or support any major changes in the machinery of administration and enforcement of competition policy in order to reduce throughput time. Major changes usually entail considerable costs and hence require compelling evidence before they are considered, let alone undertaken. However, a number of marginal changes can be introduced, which may nevertheless lead to considerable reduction in throughput time. First, the Director, for a given resource constraint, may wish to restrict the number of inquiries in order to reduce throughput time. In other words, a trade-off exists between the volume of inquiries and the speed of processing.[48] The recent introduction of a monitoring system which records the throughput time for inquiries in the Office of the Director is a step in the right direction.[49] In the final analysis, the trade-off between volume of inquiries and their throughput time is the responsibility of the Director. Second, the Attorney General could place a higher priority on cases under the Act so that throughput time can be reduced. At the present time such cases would appear to receive a very low priority. For example, in RPM cases, the time from the use of the first formal power to the reference to the Attorney General was 14.9 months, but it took the Attorney General almost as long to lay charges (10.8).[50] This seems too long a period.

The third suggestion requires a change in the existing assignment of responsibility between the Director and Attorney General.[51] At present the latter has little incentive to process cases under the Act quickly, which are

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48. It should be remembered that the recent reorganization of the Office of the Director was designed to improve its effectiveness and efficiency. It is too early to judge its success so that any recommendations for change in operations of the Director would be premature. See Annual Report 1974/75, (pp. 55-56, 87).

49. For details see Chapter IV, section 4.5, above.

50. Note that these comparisons refer only to prosecutions, not to summaries of evidence forwarded to the Attorney General which did not lead to a prosecution.

51. No suggestion is made concerning how throughput time at the level of the judiciary might be decreased.

infrequent, often complicated, and less glamorous than drug or narcotic cases. Hence, little expertise is built up in the area, which undoubtedly adds to the delay.[52] The problem is therefore to create an incentive for faster processing of cases by the Attorney General. It is suggested that one option which should be seriously considered is the delegation by the Attorney General to the Director of the responsibility to select and seek an opinion of counsel in a case. The Director would clearly have the incentive for faster throughput time and could, as well, attempt to develop a specialized bar in competititon policy. This could be done in several ways. For example, lawyers could be hired by the Director on a short-term basis, while the Director could select from a pool of lawyers, possibly jointly selected together with the Attorney General, so that they have an incentive to maintain interest in the Act. The Attorney General would still retain the sole right to lay charges under the Combines Investigation Act.[53]

Skeoch et al (1976, pp. 318-319) in their report to the Minister of Consumer and Corporate Affairs concerning

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52. Somewhat similar points are also made by Stanbury (1977b, p. 49).

53. Consideration was given to assigning responsibility to prosecute to the Director from the Attorney General. However, it was rejected. There was a consensus amongst senior officials of the Office of the Director and others familiar with competition policy that this option would not be considered, let alone taken seriously by policy-makers. The right to prosecute should be made by a Minister responsible directly to Parliament, not a public servant. Sufficiently cogent reasons are not available to justify competion policy, being the exception rather than the rule with respect to laws administered by the Federal Government.

the Stage II amendments, consider, "whether it would be desirable to authorize the Director to perform the critical functions of instituting criminal prosecutions selecting and instructing counsel himself" (p. 318). The authors are well aware of the advantage of giving the Director these functions,

> Certainly his [i.e., the Director's] office has an intimate knowledge of the facts and evidence in each case, which are frequently voluminous and complex, as well as a thorough knowledge of the jurisprudence, which is necessary to perform the statutory responsibilities. The Director only submits a case to the Attorney General after concluding that an offence has been disclosed by the evidence. Further, the length of time required to investigate and consider a case properly is frequently very extensive and further delays while the Attorney General's office duplicates the consideration of the evidence might seem difficult to justify, quite apart from the potential for frustration and damage to morale if conservative judgments are made in an area of the law the Director has concluded should be tested or clarified in the courts for the general benefit of his enforcement program and the deployment of resources. In short, untimely or overly conservative decisions by the Attorney General can interfere with effective policy implementation. (Skeoch et al., 1976, p. 318)

However, Skeoch et al. (1976, p. 319) reject the suggestion that the Director be authorized to instruct counsel and institute prosecutions because "criminal prosecution itself is so serious that an independent check on the single-minded enthusiasm of the investigators and policy makers might on rare occasion be a useful safeguard." This conclusion is perhaps not surprising, since Skeoch et al. saw the choice as between the Director or the Attorney General for exclusive jurisdiction to retain and instruct counsel as well as to conduct prosecutions. The compromise suggested here, which could be included in the Stage II amendments, would seem to meet the concerns of Skeoch et al. about single-minded enthusiasm and, at the same time, result in faster throughput time for prosecutions.

In sum, over the period 1960/61-1974/75, the time taken from the opening of a file to the final disposition of the case, in front of a court, has been reduced considerably

for RPM cases and, marginally, for conspiracy cases. In other offence categories the cell sizes were too small to infer any trend. The major reason for the reduction in throughput time was the gradual elimination of the RTPC from the administration and enforcement procedure insofar as it relates to appraising statements of evidence forwarded by the Director. In terms of possible measures to further reduce throughput time, a recommendation is made that the Director be granted the power to hire and instruct legal counsel. A pool or group of lawyers from which counsel is selected might be designated jointly by the Director and the Attorney General. In all other areas the Attorney General would retain exclusive jurisdiction.

### 5.3.5 Penalties and Remedies

The method used here to evaluate the effectiveness of the penalties and remedies imposed under the Combines Investigation Act is to compare those recommended by the RTPC, the Attorney General, the Director of Investigation and Research[54] as well as some rules of thumb developed in the literature with the actual remedy or penalty secured. Where there are significant differences between the actual and recommended, an attempt will be made to explain why such differences occur and, where appropriate, suggest changes in the machinery of administration and enforcement. In some instances a direct attempt will be made to test the effectiveness of the penalty imposed. Each of the penalties and remedies will be considered separately. However, important interconnections will be noted.

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54. This, of course, implicitly assumes that the penalties and remedies recommended by these bodies are "optimal" in some sense. That other penalties or remedies grounded on models developed using "rational economic criteria", such as those of Stigler (1970), based upon the earlier work of Becker (1968), may be more appropriate, is not at issue. The bodies making decisions as to the appropriate penalty or remedy only had recommendations from the RTPC or Attorney General before them. Models developed by Stigler (1970) are useful, however, as a guide to the future enforcement of the Act and as a method of thinking and framing appropriate penalties and remedies. Indeed, as indicated, some rules of thumb based on economic criteria are considered here.

a) Tariffs

Since the advent of the National Policy in 1879[55] the Canadian manufacturing sector has received considerable tariff protection. However, the overall level of tariffs has been declining in recent years. For example, nominal tariffs in the manufacturing sector averaged 13.6 per cent in 1961, but by 1970 had declined to 10.3 per cent.[56] Nevertheless, tariffs still remain high enough in many industries within the manufacturing sector to effectively protect domestic manufacturers from foreign competition, while the overall decline masks a rise in tariff protection for some manufacturing industries.[57]

The tariff, combined with the small market size, has led to a Canadian manufacturing sector which can be characterized as oligopolistic in nature, with plants and production runs often substantially less than those necessary to realize available economies of scale. Hence, prices and costs tend to be high and productivity lower when compared with the United States.[58] Such conditions of fewness fostered and protected by the tariff facilitate the formation of monopolies and oligopolistic co-ordination (either tacit or overt), not a vigorous competitive environment.[59] Indeed, the tariff is often referred to as the "mother of trusts".

Competition policy recognizes the significance of the tariff as a potential support to conspiracies and a protector of monopolists in section 28 of the Combines Investigation Act which reads as follows:

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55. See Bliss (1974, pp. 95-113) and Economic Council of Canada (1975, pp. 1-8).

56. See Economic Council of Canada (1975, Table 2-4, p. 15) for details. Effective tariffs also declined over this period - from 22.5 per cent to 16.4 per cent.

57. See Economic Council of Canada (1975, Table 2-5, p. 15).

58. On these issues see Bloch (1974) Eastman and Stykolt (1967) and Gorecki (1976a).

59. The term Eastman and Stykolt use to characterize this situation is the "tariff-protected oligopoly model".

> 28. Whenever, from or as a result of an inquiry under this Act, or from or as a result of a judgment of the Supreme Court or Federal Court of Canada or of any superior, district or county court in Canada, it appears to the satisfaction of the Governor in Council that with regard to any article there has existed any conspiracy, combination, agreement, arrangement, merger or monopoly to promote unduly the advantage of manufacturers or dealers at the expense of the public, and if it appears to the Governor in Council that such disadvantage to the public is presently being facilitated by the duties of customs imposed on the article, or on any like article, the Governor in Council may direct either that such article be admitted into Canada free of duty, or that the duty thereon be reduced to such amount or rate as will, in the opinion of the Governor in Council, give the public the benefit of reasonable competition.

This provision has existed, in one form or another, since 1897. Several things should be noted about section 28. First, in order to reduce tariffs, no conviction for an offence under the Combines Investigation Act has to be secured in court by the Crown. Second, the Governor in Council is given authority to order a reduction in the tariff. In practice, the Office of the Director makes its case for a reduction to the Department of Finance.[60] The matter is usually reviewed in Cabinet, however, with the Minister representing the Director's position. Third, the Governor in Council must be satisfied that the tariff has facilitated the promotion of undue advantage to the manufacturer or dealer, at the expense of the public, before a tariff reduction can occur. This standard is easier to satisfy than that competition has been lessened unduly or to the detriment of consumers, producers or others - the tests which have to be met under the conspiracy and merger/monopoly sections, respectively, of the Act. Hence, potentially at least, the tariff could be an important tool in the arsenal of competition policy to combat conspiracies and monopolies.

One of the main functions of the RTPC report is to make "recommendations as to the application of remedies

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60. The department primarily responsible for commercial policy.

provided in this Act or other remedies." [Section 19(2)]. The MacQuarrie Report (1952, p. 42), in considering tariffs and the role of the RTPC, went a step further, in making the following comment:

> To reduce or even abolish the tariff on a temporary basis will constitute a very effective remedy in some monopoly cases, provided that it is viewed in its proper perspective and that adequate administrative arrangements to initiate action are worked out. That is why we propose that the board [i.e., RTPC] should envisage the possible effectiveness of tariff action in every case presented to it and report its findings in this respect. (emphasis added)

While the RTPC has not always followed this proposal,[61] nevertheless, a small number of reports do suggest that tariff reductions be made. Hence the RTPC's views, which largely centre upon the competitive implications of a particular recommendation,[62] can be taken as a reasonable approximation of those instances where tariff adjustments are warranted.

Table 5-4 details the six instances over the period 1952-1975,[63] in which the RTPC has recommended that tariffs should be reduced, or at least that serious considerations not be given to such reduction. In making these recommendations, the RTPC took into account the influence of tariffs on the economic viability of the industry. This consideration probably led to the recommendation that the

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61. In many instances the tariff is not relevant, particularly for offences such as resale price maintenance and price discrimination. In other instances the tariff was considered as a policy option but rejected. See, for example, RTPC (1966b, p. 95; 1967b, p. 84).

62. See Chapter III, 3.3.2, above, for the RTPC's view of the "public interest".

63. In view of the small number of times the RTPC has made tariff reduction recommendations, all such instances were included. In the period after 1975, the RTPC has not made tariff reduction suggestions, although it did consider the possibility in the research inquiry into ophthalmic products. (See RTPC, 1978, p. 247, for details).

TABLE 5-4

Reports of the Restrictive Trade Practices Commission

Which Recommended Tariff Reductions: 1952-1975

| Date of Report | Product | Concentration[a] | Tariff Level[b] | Offence | Tariff Recommendation | Action Subsequent to Report's Publication |
|---|---|---|---|---|---|---|
| June 20, 1956 | Boxboard Grades of Paperboard | 50/4 in 1954 | M.F.N. 22½% | Conspiracy (All of Canada except B.C., Saskatchewan and Alberta.) | "Consideration could be given to the reduction or removal of import duties" if a reasonable degree of competition not restored. | No tariff reduction. Conviction on Conspiracy charge obtained. |
| July 3, 1958 | Zinc Oxide | 94/2, 80/1 in 1956 | M.F.N. 12.5% | Merger, Price Discrimination (Canada) | "That consideration be given to the removal of the customs duties on refined zinc." | No tariff reduction, no court proceedings, no undertakings given by industry. |
| Feb., 3, 1959 | Ammunition | 95/1 in 1958 | M.F.N. 22½% | Monopoly (Canada) | "The Commission recommends that the continuance of a protection tariff ... should be conditional upon Canadian Industries Ltd. giving an undertaking that it will abandon the restrictive distribution policy it has followed in limiting the number of direct accounts." | No tariff reduction since C.I.L. advised Department of Finance it was revising its distribution policy in a manner which met R.T.P.C.'s recommendations. Effective Jan. 1, 1961. (Note: C.I.L. had changed its sales policy in response to a similar inquiry dated Sept. 3, 1940.) |
| Feb., 3, 1960 | Sugar | 90+/3 in 1954 | Effective Protection of $1.22 per cwt of Refined Sugar | Conspiracy (Eastern Canada) | "Tariff clearly impacts adversely on competition. In future trade negotiations this factor should be considered." | No tariff reduction, three sugar refineries convicted of conspiracy. |

| | | | | | | |
|---|---|---|---|---|---|---|
| August 2, 1962 | Container Board[c] | 81/4 in 1960 | M.F.N. 22½% (In 1962 raised to 27½%.) | Conspiracy and Merger (Canada) | "The foregoing analysis leads the Commission to the conclusion that the most effective way to restore competitive conditions to ... this industry, from which the public would derive benefit in the form of lower prices, would be the removal of customs duties...." | No tariff reduction. Conviction on a conspiracy charge obtained. (Note: A similar conviction was secured in 1940.) |
| Jan. 14, 1971 | Electric Large Lamps | 90-95/3 in 1965 | M.F.N. 30% | Conspiracy, Monopoly and Resale Price Maintenance (Canada) | "The protective tariff has made it possible for the Canadian manufacturers to delay price reductions and even to make advances in prices when prices in foreign countries have been moving downward. The Canadian Customs Tariff on electric large lamps should be carefully reviewed and reductions in rates of duty should be considered to encourage competition in the supply of lamps to Canadian users." | No tariff reduction. Conviction on a conspiracy charge obtained. (Note: The leader of the conspiracy, Canadian General Electric, had already been convicted in a previous conspiracy case in 1955 involving electric wire and cable.) |

a. Should be read (say, for electric large lamps) the largest three enterprises account for between 90-95 per cent of domestic consumption. The column headed "Offence" contains, in parenthesis, the relevant geographic market.

b. A range of tariffs applies to any item. The most relevant one is presented in the table.

c. The Report related to both containerboard and paperboard shipping containers. The tariff recommendations applied to both markets. Many of the same enterprises were involved in both markets (i.e., vertically integrated).

SOURCE: Annual Report (various years), R.T.P.C. (1956, 1958a, 1959, 1960a, 1962a, 1971) and Skeoch (1966a, pp. 97-145).

lowering of the tariff should only be used as a last resort in the case of ammunition. However, in not one single instance was the tariff removed or lowered as a result of an RTPC recommendation, despite the oligopolistic or monopolistic nature of the industries, previous infringements of the Act in several instances, the national, not regional, characteristic of most reports,[64] and strong evidence that the tariff had been used by the industry to raise prices and/or maintain the conspiracy or monopoly.[65] Instead, the Crown usually conducted a regular prosecution, with the accused often pleading guilty. In other words the essentially structural features of the industry(i.e., tariff and high concentration) which promoted the anti-competitive behaviour remained unchanged.[66] It is therefore not surprising to find the sugar enterprises in eastern Canada had legal proceedings instituted against them, again, on May 31, 1973, by the Crown.[67] In sum, tariff as a remedy or penalty is essentially a dead letter.

The following explanation for the lack of use of the tariff should be regarded as tentative only. Nevertheless, it is believed to have considerable merit. It is instructive to examine the only instance in which a tariff reduction occurred as a result of an inquiry into anti-competitive behaviour. In 1902, the Minister of

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64. In other words a tariff reduction would hurt no "innocent" party since the RTPC's report would have referred to all manufacturers in Canada. Note in the case of sugar, which in Table 5-4 refers only to eastern Canada, the RTPC (1957) had issued an earlier report on the western Canadian sugar industry, so was fully aware of the implications of its recommendation. (Western Canada was dominated by a monopoly supplier).

65. See, for example, electric large lamps, (RTPC, 1971, pp. 70-74).

66. An alternative to the tariff reduction is a lowering of the level of concentration, according to the analysis of Bloch (1974). However, in their prohibition orders judges in Canada have not demonstrated the ingenuity of their brothers in the U.S., who have specified conduct rules to lower the level of concentration. (See Baldwin, 1969, for details.)

67. See Annual Report 1976/77 (pp. 29-30).

Finance, W.S. Fielding, recommended to the Governor in Council, "that the duty on news printing paper in sheets...be reduced from 25% ad valorem to 15% ad valorem" (Ball, 1934, p. 15). The essential reason for the reduction, according to Ball (p. 16), was the nature and power of the original complainant, the Canadian Press Association - well organized, ample resources, and with the newspaper columns of its members to give the cause more than adequate publicity.[68] In the six cases in Table 5-4, no organization with the power and influence of the Canadian Press Association was present to argue and pressure for lower tariffs, at least judging by the RTPC reports. The only influential interests were those which had benefited from the existing tariff levels and were the subject of the RTPC report. It would appear that these interests in favour of the status quo were able to exert greater pressure on the Minister of Finance and the Cabinet than either the force of the RTPC recommendations or the efforts of the Director.[69] This view of the failure of the tariff as a tool of

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68. The Canadian Press Association complaint resulted in a Commissioners' report which found the combination of paper manufacturers had come within the conspiracy section of the Criminal Code. The Combines Investigation Act did not come into existence until 1910. (See Ball, 1934, pp. 14-15, for details).

69. One senior official of the Office of the Director suggested the following explanation to me:

> The problem with tariff recommendations is that Canada is not normally prepared to 'give away' tariff concessions unilaterally. These RTPC recommendations are usually put on the "list" for consideration when the next tariff negotiations come up.

However, this is a somewhat specious reason, unless, of course, the RTPC had recommended literally dozens of reductions, which it did not. Tariff reductions which occur several years after the RTPC recommendation as part of multinational tariff reductions are not likely to be perceived by the industry as a response to the earlier recommendation. Small tariff reductions, particularly for electric large lamps and containerboard in Table 5-4, are likely to give competition policy teeth and place Canada at no great disadvantage at multinational trade negotiations where its bargaining power, in any event, is not great compared to the EEC, Japan and the U.S.A.

competition policy is consistent with Caves' (1975, p. 25) explanation of the structure of Canada's tariffs - an "interest-group model [which] concentrates on the factors determining the benefits and costs for various industries of organizing to secure tariff protection..."

In terms of policy recommendations, if the tariff is to be seriously considered as a remedy, then changes in the institutional structure of the administration and enforcement of competition policy is needed to neutralize the influence of tariff protected oligopolists. The solution suggested here is that after a finding that a tariff should be lowered or eliminated by the RTPC or under Stage II its successor, the Competition Board, the Minister of Finance would be required to reduce the tariff unless following the issuance of a show-cause order to the enterprises concerned, they were able to justify, in public hearings, a departure from the Commission's recommendation. It might also be advisable to extend the right of being heard to any enterpreneur having a direct interest (e.g., wholesaler or retailer) and suppliers not involved in the restriction. The hearings could be conducted before the Minister or an appointed officer. However, the final decision would remain with the Minister of Finance. There is no reason to assume that the Competition Board would be any more or less sparing in its use of the tariff than the RTPC - six times in 23 years. Canada's tariff-protected oligopolies are not about to disappear.

b) Fines

The Combines Investigation Act provided during the period 1952-1976 that upon conviction for conspiracy, RPM and/or refusal to sell, merger and/or monopoly or price discrimination, an individual or corporation[70] was subject to a fine at the discretion of the court, with no maximum. In contrast, the Act imposed an upper limit of $25,000 in 1951 and $1 million as of January 1, 1976, under the Stage I amendments, for conspiracy offences only. In order to assess the effectiveness of the fines imposed under the Act three "models" which predict the "appropriate" or "optimum" level of fines are presented. A comparison of the predicted and actual level is presented in tabular form (Table 5-5) and an attempt is made to explain the differences, if any. Finally, suggestions are made for future policy and an evaluation of the $1 million maximum introduced in 1976 is presented.

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70. As remarked in Chapter III, section 3.5.3, corporations rather than individuals were usually charged under the Act, so no reference to individuals will be made in the discussion of fines.

The first, and somewhat crude, model as to the appropriate level of fines is that suggested by the Crown upon the sentencing of the accused. The Crown has made such presentations since the late 1960's, as Henry (1968c, p. 26, emphasis added) explains:

> Enforcement of the anticombines legislation is continuing as vigorously as our resources permit. In this respect the size of the fines is important. There exists judicial comment to the effect that they amount to a 'mere licence fee'. There is no limit on the amount of the fine that the court may impose. Until quite recently it has not been the general policy of the Crown to ask for specific fines, but quite recently the policy has been adopted that after obtaining and considering the recommendation of Crown Counsel, he is instructed to submit to the court a minimum amount by way of a fine where the court invites him to make a specific representation.

In other words, the Crown makes a submission as to the minimum fines only when invited to make a specific representation by the Court. More recently the Crown has suggested a range of fines. There would appear to be no rules of thumb or overall framework which the Crown has developed to guide it in deciding the level of fines to request - save that the fine requested should be larger than that for similar offences in the recent past.[71] Nevertheless, it is interesting to observe the reaction of judges to the Crown's conception as to the appropriate fine.

The second model for setting the level of fines is that suggested by Ralph Nader's Study Group Report on Antitrust Enforcement in the U.S. as part of a list of remedies which can be implemented separately or together. The specific rule suggested by Green et al. (1972, p. 175) is as follows:

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71. This view is based upon the memorandum prepared as to sentence by the Office of the Director and, in some instances, the Department of Justice. Note that final say and authority for the fine requested in Court rests with the Attorney General not the Director. While it is obvious that in considering what fine to ask for, factors such as size of enterprise, duration of offence and previous convictions are considered, no systematic thought is given to the best way to link together these various factors to predict the correct fine.

> Corporate fines should be increased so that up to 10% of the corporation's sales receipts for the years of the indictment could be assessed. A minimum fine of 1% or $100,000, whichever is the higher, would be levied, so as to strip judges of some of their historic abuse of discretion. The minimum would increase to 5% or $500,000 for a corporation convicted of a second offence within a five-year period. With serious financial penalties built into the fabric of enforcement, the profit motive itself should be adequate incentive to self-regulate the system into compliance.

What is not clear is whether the whole of the enterprise's sales or just that portion in the market where the offence took place, should be used as the base for estimating the appropriate level of fines. Two reasons may be cited for favouring the use of enterprise sales only in the industry or market where the offence has been detected and a conviction obtained. First, on grounds of equity it would seem unreasonable not to assess the same fine against two enterprises when both are the same in every respect concerning a conspiracy in a market but one enterprise, because of its diversified nature, is 20 times the size of the other. Second, on grounds of economics by assessing the same fine on a large diversified enterprise whether it is conducting (say) resale price maintenance in one or 20 markets means that the marginal cost, in terms of fines, of additional offences is essentially zero.[72] Hence, the convention adopted here is to apply Green's rule only to the sales of the enterprise in the market affected by the offence.[73]

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72. On the other hand, it does raise the probability of detection in at least one market.

73. The application of Green's rule to all of the enterprises' sales could lead to results no government would countenance - bankruptcies of large diversified enterprises. Suppose a diversified enterprise was found guilty of conspiracy and RPM in each of two markets for 10 years, then the minimum fine would be 40 per cent of current sales, the maximum 400 per cent. (This assumes, for the sake of convenience, that annual sales have remained constant over the 10-year period.)

The third model or rule for assessing the level of fines is drawn from the extensive work of Elzinga and Breit (1976, pp. 134-135) in the U.S.[74] who recommended:

> Specifically, we suggest that antitrust violations be penalized by a mandatory fine of 25 percent of the firm's pretax profits for every year of anticompetitive activity. The 25 percent figure is not to be taken as either an estimate of the firm's profits attributable to its antitrust violation or an estimate of the misallocative damage done to society by the firm's anticompetitive activity. Rather than being concerned with compensations, our proposal is directed toward deterrence. The 25 percent figure is not sacrosanct, but it does represent our judgment of a penalty that would deter in an evenhanded fashion. Even a management relatively isolated from its firm's owners would feel the impact from a fine of this magnitude. The experience of lower stock prices, greater difficulties in attracting funds, and an increased probability of a takeover bid would be unpleasant consequences of such a fine. The figure of 25 percent would, on the other hand, not seem so high as to cause violators to go out of business, not so onerous as to offend most persons' sense of equity. If experience with this percentage finds the antitrust authorities still uncovering frequent violations, Congress could increase it until anti-competitive behaviour became rare.

Several things should be noted about this proposed rule. First, unlike the Green et al. (1972) rule, Elzinga and Breit see the 25 per cent profit rule as replacing all public and private penalties and remedies that exist in the U.S.[75] Second, Elzinga and Breit see their rule applying to total enterprise profits, even though only a portion

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74. One could question the usefulness of considering rules for the appropriate level of fines which have been developed based on the U.S. experience. However, a comparison of Stanbury (1976) and Green et al. (1972 pp. 169-171) shows considerable similarities in the experience of Canada and the U.S. with respect to fines.

75. The introduction of private damage suits in Canada under Stage I on January 1, 1976, makes U.S. and Canadian penalties and remedies more comparable than in the period 1960/61-1974/75.

of the enterprise's sales may be involved in a violation of the Act. Given the problems of trying to allocate enterprise profits by activity there is probably little practical alternative but to apply the 25 per cent rule to total profits. However, for reasons set out in the previous paragraph, using total enterprise characteristics as a base to set levels of fines has disadvantages in terms of equity and incentive effects. Third, the profit may have perverse effects, in that enterprises committing an infringement of the Act will have an incentive to understate their profits or, as detailed in the case of Seattle bread in section 5.2 above, absorb the profits in higher costs. No such disadvantage exists with respect to sales.[76] These considerations, particularly the first, should be borne in mind when comparing the different rules for defining the appropriate level of fines.

Table 5-2 above presents details concerning the length of offence as specified in the information laid for all prosecutions (i.e., regular and prohibition order per 30(2), whether lost or won) over the period 1960/61-1974/75. Using these data, estimates can be derived of the level of fines predicted as optimal by the Green and Elzinga/Breit rules. For the period 1960/61-1974/75, the appropriate fines are as follows for any individual enterprise:[77]

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76. The major disadvantage with sales, according to Elzinga and Breit (1976, p. 134) is the

> disproportionately heavy impact that a fine on sales would have upon some firms. Firms with low profits/sales ratios would be hurt far more than those with high profits/sales ratios. In fact, a percentage fine in the range of 1 to 5 percent of sales, which could cause a retailing firm with a high inventory turnover to go out of business, might be easily endured by many manufacturing firms.

One method of overcoming this objection is to use value added as the base for estimating the appropriate level of fines.

77. These data are presented primarily for illustrative purposes. It is realized, of course, that for prohibition orders per 30(2) no fines are imposed. However, to the extent that a prohibition order per 30(2) is a substitute for a regular prosecution then the data presented are of relevance. It should be remembered that breach of an order can result in a substantial fine or jail term in the case of an individual.

| | Total | Conspiracy | RPM and/or refusal to sell | Merger and/or Monopoly | Price Discrimination | Multiple Offences |
|---|---|---|---|---|---|---|
| Length of Offence (in months) | 53.6 | 79.1 | 14.9 | 142.6 | 7.8 | 70.2 |
| Green Rule (% of Sales, Min-Max) | 4.5-44.7 | 6.6-65.9 | 1.2-12.4 | 11.9-118.8 | 0.7-6.5 | 5.9-58.5 |
| Elzinga/Breit Rule (% of Pre-Tax Profits) | 111.7 | 164.8 | 31.0 | 297.1 | 16.3 | 146.3 |

Of the two high-volume offence categories, the Green and Elzinga/Breit rules suggest a much higher level of fines for conspiracy than RPM offences. This result is not surprising in view of the difference in the length of offences as recorded in line 1. While fine levels of 164.8 per cent of pre-tax profits or 65.9 per cent of sales, as recorded during the period of the offence, may seem "high" in relation to existing fines, this can only be established by estimating the dollar amounts.

Table 5-5 presents for conspiracies[78] the fine requested by the Crown, that awarded by the Court and finally, that implied by the application of the Green rule.[79] Profit figures were generally not available so that the Elzinga/Breit rule is not applied. The conspiracy cases in Table 5-5 can be divided into two categories, when considering the difference between the fine requested by the Crown and that granted by the Court. The first category consists of those instances where the accused pleaded guilty. In all cases the Crown received the fine it requested, which, in general, was small in absolute

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78. A similar table for RPM and/or refusal to sell would show corporations pleading guilty and the Court awarding fines agreed upon between the Crown and the defendant. Such fines are usually small in absolute magnitude (i.e., less than $25,000). Conspiracies are presented because of the greater number of not guilty pleas and the contrast between guilty/not guilty pleas with respect to fines.

79. Note that the Green rule is applied only to the sales of corporations in the markets mentioned in the charge, not to the corporations' total sales where it is diversified. In estimating the level of fines for repeat offenders no five-year limit is used as suggested by Green. As Table 5-5 details, this is of relevance in only a small number of cases.

TABLE 5-5

The Level of Fines Levied in Selected[a] Conspiracy Cases
Under the Combines Investigation Act
1967/68 - 1976/77

| Case (Date of Trial Judgement) | Plea of Accused | Offence (Period, Location) | Fines Levied by Court | Crown's Request For Minimum Fine | GREEN'S RULE | |
|---|---|---|---|---|---|---|
| | | | | | Min.[b] (1% Sales) | Max. (10% Sales) |
| Mandarin Oranges[c] (Nov. 20, 1967) | Not Guilty | Conspiracy (1947-1964, Western Canada) | $98,500 total on 10 corporations with the largest single fine of $18,000. | $490,000 with the largest single fine of $75,000. | $500,000 in total | $5 million in total |
| Resilient Flooring[d] (Sept. 8, 1969) | Guilty | Conspiracy (1960-1963, Metro-Toronto) | $20,000 total on 11 corporations with the largest single fine of $2,500. | $20,000 total on 11 corporations with the largest single fine of $2,500 | $90,000 in total | $900,000 in total |
| Lathing & Plastering[e] (Nov. 20, 1969) | Guilty | Conspiracy (1963-1966, Metro-Toronto) | $75,000 total on 11 corporations with the largest single fine of $10,000. | $75,000 total on 11 corporations with the largest single fine of $10,000. | $189,000 in total | $1.9 million in total |
| Ready-Mix Concrete[f] (April 17, 1972) | Guilty | Conspiracy (1961-1968, Metro-Toronto) | $245,000 total on 12 corporations with the largest single fine of $35,000. | $245,000 total on 12 corporations with the largest single fine of $35,000. | $467,000 in total | $4.6 million in total |
| Toronto Lumber Dealers[g] (June 26, 1974) | Guilty | Conspiracy (1965-1968, Ontario) | $144,000 total on 13 corporations with the largest single fine of $25,000. | $144,000 total on 13 corporations with the largest single fine of $25,000. | $600,000 in total[h] | $6.0 million in total[h] |
| Fire Insurance[i] (May 28, 1974) | Not Guilty | Conspiracy (1960-1970, Nova Scotia) | $339,700 total on 73 corporations with the largest single fine of $15,000. | $8,235,000 total on 73 corporations with the largest single fine of $200,000. | $700,000 in total | $6.7 million in total |

| | | | | | | |
|---|---|---|---|---|---|---|
| Metal Culverts[j] (Sept. 19, 1974) | Not Guilty | Conspiracy (1962-1967, Ontario & Quebec) | $515,000 total on 10 corporations with the largest single fine of $125,000.[k] | $620,000 total on 10 corporations with the largest single fine of $200,000. | $2.5 million in total[l] | $5.0 million in total |
| Sugar[m] (Dec. 19, 1975) | Not Guilty | Conspiracy (1960-1973, Eastern Canada) | $2.25 million total, 3 corporations each fined $750,000. | $3 million total, each of 3 corporations to be fined $1 million. | $27.3 million in total[n] | $54.6 million in total |
| Electric Large Lamps[o] (Sept. 2, 1976) | Not Guilty | Conspiracy (1959-1967, Canada) | $550,000 total on 3 corporations, (300,000, 150,000 & 100,000). | $2 million total on 3 corporations, ($1 million, $600,000, $400,000). | $8.9 million in total[p] | $29.5 million in total |

a. Selective because in not all prosecutions did the Crown present its view of the minimum fine, either because the judge did not request it or else the accused were acquitted. Cases are dated by when trial judgement delivered.

b. Green's rule specified that the minimum fine should be 1% of sales or $100,000, whichever is the higher. In the table only the 1% number is presented. The reader can easily multiple the number of corporations convicted by $100,000 to estimate this minimum fine.

c. See Annual Report 1967/68, (pp. 41-42).

d. See Annual Report 1969/70, (p. 40).

e. See Annual Report 1969/70, (p. 45).

f. See Annual Report 1971/72, (pp. 20-21).

g. See Annual Report 1974/75, (p. 26).

h. Although the charge related to Ontario the main focus of the conspiracy was Metro-Toronto. Hence the Green rule is applied to this latter area only.

i. See Annual Report 1974/75, (p, 26). The Crown lost at the trial but was successful at the appeal. (See Annual Report 1975/76, pp. 35-36.) Hence the numbers in the table refer to the appeal court judgement. Note that the decision was subsequently appealed to Supreme Court of Canada, which reversed the lower court's decision, acquitting the accused. (See Annual Report 1977/78, pp. 16-19.)

j. See Annual Report 1974/75, (p. 25).

k. The figures refer to the trial judgement. On appeal some minor changes were made by the judge, reducing the total fines to $447,000 on seven corporations with a maximum of $125,000. See Annual Report 1975/76, (p. 35).

l. The corporations involved had already pleaded guilty to a similar offence in 1959, hence the minimum fine is 5% of sales not 1%.

## NOTES TO TABLE 5-5 (continued)

m. At the trial court the accused were acquitted. (See Annual Report 1976/77, pp. 29-30.) The Crown appealed the trial court ruling and secured a conviction. (See Annual Report 1977/78, p. 43.) The case is currently being appealed by the accused to the Supreme Court of Canada. The numbers in the table refer to the trial judge to whom the appeal court referred back the case for imposition of fines.

n. All the accused had been convicted of a similar charge in 1963 so the minimum fine is 5% not 1%. (See Annual Report 1962/63, p. 16.)

o. See Annual Report 1976/77, (pp. 32-33).

p. One of the three corporations, Canadian General Electric Co. Ltd., had a previous conviction in a conspiracy case concerning electric wire and cable. (See Annual Report 1957/58, p. 18.) Hence the minimum fine is 5% not 1% for this corporation only.

SOURCE: Annual Reports (various issues) data gathered from the files of the Director of Investigation & Research by P.K. Gorecki and W.T. Stanbury, judgements and personnel communications from the officer-in-charge of the case in the Office of the Director.

magnitude (i.e., less than $35,000 per corporation).[80] This reflects pre-trial bargaining between the Crown and the accused. In effect the defendants plead guilty in return for an agreed-upon fine.[81] The second category is where the accused pleads not guilty. In such instances the Crown requests a much larger absolute fine, but the Court always imposes something less. Nevertheless this fine is substantially above those granted when the accused pleaded guilty (in one instance the Court imposed $750,000 on each of the three corporations). The difference in the fine requested by the Crown in the guilty/not guilty categories seems to reflect[82] the small, short, localized nature of the guilty plea conspiracies,[83] in contrast to the regional or nationwide, lengthy conspiracies which involve repeat offences where the accused pleaded not guilty. Finally, the fine requested by the Crown, no matter whether the accused pleaded guilty or not guilty, is less, usually by at least one-third, of that suggested by the Green rule minimum. Th notable exception is fire insurance where the Crown's $8.2 million exceeded the Green rule maximum.

The evidence in Table 5-5 demonstrates that, to the extent the level of fines suggested by the Crown and the Green rule are optimal, then the current fines imposed by the Courts are woefully inadequate to act as a deterrent.

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80. In the Gypsum Wallboard case, in which the trial judgement was May 3, 1978 and does not fall in the sample 91 prosecutions used here, the accused pleaded guilty and the fine requested and received was substantially higher than $35,000 - $100,000 for two corporations and $75,000 for the third. See Annual Report 1977/78 (pp. 48-49).

81. In Court, the Crown requests the fine of $X and the accused will agree that $X is reasonable under the circumstances. The judge then imposes $X on the accused. However, there is no guarantee the Court will do so.

82. This, it should be noted, is an inference based upon Table 5-5, not any documentation setting out policy in the Office of the Director.

83. An exception is Gypsum Wallboard which lasted from 1966 to 1974 and covered western Canada, but as noted in footnote 80 above, this prosecution is not in the 1960/61-1974/75 sample.

This is confirmed by one study which showed that many of Canada's largest enterprises have been investigated on more than one occasion over the period 1952-1972.[84] In Table 5-5 alone, the metal culverts, sugar and electric large lamp cases each contained enterprises which had previous convictions for conspiracy offences.

The major reason for the inadequate level of fines would appear to be societal attitudes and perception of white collar crime. Stanbury (1977a, p. 608) has summarized the situation as follows:

> Although offences against the Combines Investigation Act have always been criminal offences they carry little of the social stigma associated with the notion of a crime as a morally blameworthy act...is price fixing...morally equivalent to theft? It is apparent that most people simply do not equate the two. (emphasis in original)

This attitude or perception was graphically illustrated in the recent trial of dredging corporations and executives on charges of fixing the price and contracts for dredging tenders (i.e., bid-rigging). The outcome of the trial and subsequent sentencing was that five executives were jailed for periods of two to five years and fines of $6.7 million were levied, two each of $1 million.[85] However, the accused were charged with fraud and not under the Act. Had the latter option been taken it is likely no individuals would have been charged, only corporations which, after pleading guilty, would have agreed to fines not exceeding $250,000 per corporation.

In view of the findings detailed in Table 5-5 and the aforementioned public attitude to offences under the Act, two recommendations are made. First, the maximum fine of $1 million in conspiracy cases introduced in Stage I should be abolished. The purpose of the $1 million maximum, according to one senior official, was, "to impress upon the Courts that Parliament regarded the offence as serious". As shown in Table 5-5 the $1 million maximum seems to have gone

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84. See Goff and Reasons (1978, pp. 79-81). Note, by "investigated" Goff and Reasons refer to all instances where the Director referred a case to the RTPC or directly to the Attorney General.

85. See, for example, Gazette News Services (1979, pp. 1-2).

some way to achieving this objective.[86] A rule, such as Green's maximum, could be substituted, as part of the Stage II amendments. This should be applied to all offence categories. Second, consideration could be given to a minimum fine, along the lines of the Green rule. However this latter approach has several problems which should be borne in mind before a final decision is made. In some instances, a "maverick" enterprise may be "coerced" into participating in an offence under the Act. This does not affect the guilt of the enterprise but would affect sentence. The Courts have considered a guilty plea, obviating the need for a long and costly trial, in sentencing the accused. A minimum fine would reduce the discretion of the Court in both instances. The level of fine refers only to regular prosecutions. If it is perceived that the application of Green's minimum rule raises fines to levels considered too high by the Attorney General, then enterprises would endeavor to negotiate with the Crown to obtain a charge over a smaller or reduced number of years in return for a plea of guilty. Alternatively, there might be an increase in the use of section 30(2) prohibition orders. The "price" for such an order could be detailed specification and control of enterprise conduct, which probably would be expensive to enforce and of doubtful effectiveness. Hence caution should be shown in the use of minimum fines.

c) Dissolution and Divestiture

The traditional paradigm of industrial organization is the structure/conduct/performance model, as discussed in, for example, Scherer (1970, pp. 3-6). The underlying reasoning behind the model is that the structural characteristics of the industry, such as the number and relative size of the enterprises, product differentiation and barriers to entry, largely determine the level of performance achieved by the industry. Performance includes the relationship between cost and prices, the level

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86. In an unreported judgment on sentence (R. v. Atlantic Sugar Refineries Co. Ltd. et al.) delivered on October 6, 1978 in the Quebec Superior Court, the Judge, in assessing the fine remarked:

> In 1976 the Act was again amended and Parliament increased the maximum term of imprisonment for individual offenders to 5 years and fixed the maximum fine at one million dollars. This amendment does not apply to the present accused who committed the offence prior to 1976, but it does reflect the gravity with which Parliament views a conspiracy to lessen trade unduly and so it is helpful in assessing the fines that ought properly to be levied.

of costs (X-efficiency and technical efficiency) and technical progressiveness (research and development). At the risk of considerable oversimplification, the more concentrated the industry the higher the barriers to entry, the more likely it is that prices will exceed costs, costs will not be the minimum attainable, and the introduction of new technology will lag behind foreign industry. This model has been tested by Jones et al. (1973) and McFetridge (1973) whose results are generally supportive. As is commonly recognized, the level of industry concentration in Canada is high, both in absolute terms and in comparison with the United States.[87] Hence, further increases in concentration without any offsetting gains in economies of scale,[88] are likely to affect performance adversely.

The Combines Investigation Act provides three ways in which changes to the structure of the industry can be achieved. First, on conviction for a merger and/or monopoly offence the court can dissolve the merger and/or monopoly. Second, a prohibition order can be issued either per 30(2) or in addition to a regular prosecution, specifying that the enterprises will make no further acquisitions over a given period or specifying rules of conduct re the use of monopoly power. Third, the Crown can apply for an injunction preventing a merger. Hence, potentially at least, these provisions provide the opportunity for both ex post and ex ante review of mergers as well as placing constraints on the future behaviour of monopolies or quasi-monopolists.

Over the period 1952-1975[89] the RTPC considered the question of merger and/or monopoly in 16[90] reports.

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87. For details see Canada, Department of Consumer and Corporate Affairs (1971, Table A-13, pp. 210-228).

88. See Gorecki (1976a, pp. 64-74) for a discussion of the scale/concentration trade-off.

89. In view of the small number of instances in which the RTPC recommended dissolution prior to 1960/61 these were included for completeness.

90. See RTPC (1955, 1957, 1958a, 1958b, 1959, 1960b, 1961d, 1962a, 1962b, 1962d, 1964b, 1965b, 1965d, 1965e, 1966b, 1967b). For details see summaries presented in Canada, Department of Consumer and Corporate Affairs (1977, Appendix B, pp. 1B-72B), Skeoch (1966a, pp. 117-145) as well as Annual Reports. Note RTPC (1962a, 1962b and 1962c) could all be considered part of the same inquiry into paperboard shipping containers.

However, in only three instances did the RTPC recommend divestiture or dissolution as the appropriate remedy.[91] Such a sparing use of the divestiture recommendation is consistent with the work of Elzinga and Breit (1976, pp. 97-111) who, after examining the U.S. antitrust experience, which has included the use of divestiture and dissolution, concluded,

> Even granted the existence of large welfare losses due to concentrated market structures, the economic, judicial and administrative difficulties pursuant to corporate dissolution...weigh against the widespread use of this antitrust instrument (p. 111).

A similar conclusion was reached by the Stage II committee report, which examined merger and monopoly questions,

> there may be situations that call for dissolution of a firm possessing a high level of market power (or, at least, divestiture of some parts of it), as we do propose, but, for reasons that impress us as being conclusive, such a policy is of very limited value in the arsenal of [competition] policy measures. (Skeoch et al., 1976, p. 148)

Hence, the use of the divestiture remedy as envisaged by the RTPC would seem judicious.

Table 5-6 presents details of those instances in which the RTPC recommended divestiture or dissolution. In no instance was the RTPC recommendation implemented as a result of subsequent legal proceedings by the Crown, because these proceedings were unsuccessful, not undertaken or there was voluntary divestiture.[92] It should also be noted that in those instances where the RTPC stopped short of suggesting divestiture and recommended a prohibition order

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91. In RTPC (1978, p. 250), a research or general inquiry, the RTPC also recommended limited divestiture. All examples considered here refer to inquiries under the merger and/or monopoly sections of the Act.

92. In the general or research inquiry recommendation noted in the previous footnote no action by the Crown is anticipated. See Teasdale (1979).

TABLE 5-6

Reports of the RTPC Which Recommended Dissolution or Divestiture: 1952-1975

| Product | Date of Report | Concentration Level[a] | RTPC Recommendation | Action Taken |
|---|---|---|---|---|
| Sugar (Western Canada) | Jan. 7, 1957 | 100/2 before merger of 1955, 100/1 after. | "... we consider that it would not be in the public interest for B.C.S.R. [the British Columbia Sugar Refining Company Limited] to have an interest in or control over Manitoba Sugar. ... Therefore it is our opinion that the proposed merger should be renounced." | The Crown instituted a regular prosecution under the merger and monopoly section. Accused were acquitted at trial on Aug. 8, 1960. No appeal was launched by the Crown. |
| Meat Packing (Canada) | Aug. 3, 1961 | Canada Packers Ltd. acquired in 1955 the fourth and tenth largest meat packers. 53/3 prior to 1955, 60/3 in 1959. | "In the circumstances the Commission recommends the possibility of seeking a court order under section 31(2) of the present Combines Investigation Act be fully explored for the purpose of dissolving the mergers of Calgary Packers Limited and Wilsil Limited with Canada Packers." | None, since legal proceedings would be unlikely to succeed. |
| Cast Iron Soil Pipe (Prairies & B.C.) | Oct. 10, 1967 | "Anthes is the sole major supplier of cast iron soil pipe and fittings in the Prairie market region. Its purchase of a 20 per cent share interest in Associated in May 1963 and December 1964, with representation on the Board of Directors of Associated extended Anthes' influence into the British Columbia market and eliminated possible competition between the two companies in British Columbia and in the Prairie market." | "The Commission recommends that Anthes be required to divest itself of all interest in Associated ...." | Anthes voluntarily divested itself of the 20% ownership of Associated following the publication of the Report. On Feb. 22, 1973 a prohibition order per 30(2) was issued prohibiting Anthes from acquiring any control over or interest in Associated. |

a. Should be read (say for Sugar) as the largest two enterprises accounted for 100 per cent of the market in 1955, before the merger, but only a single enterprise accounted for the 100 per cent after the merger. The relevant geographic market is found in parenthesis in the column headed Product.

SOURCE: Annual Report 1970/71, (p. 48), 1972/73, (pp. 46-47) Canada, Department of Consumer and Corporate Affairs (1973. pp. 13B-14B, 44B-47B) RTPC (1957, 1961d, 1967b), Skeoch (1966a, pp. 124, 136).

per 30(2) preventing further acquisitions[93] or tariff reductions because unscrambling the mergers would be too difficult a task,[94] the Crown did not, generally, institute any legal or other action[95] to implement the recommendation. A similar situation obtained with respect to other rules of conduct which the RTPC recommended the enterprises involved in merger/monopoly should follow.[96] Hence, to all intents and purposes, the RTPC's recommendations on mergers and monopolies, like those on tariffs, have remained essentially a dead letter.

The RTPC, in two particularly important reports in the early 1960's,[97] suggested the reason for the lack of impact of their recommendations - the state of the jurisprudence on mergers. The Beer and Sugar decisions of 1960 were the first concerning the meaning of the merger provisions of the Act.[98] In both instances the accused were

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93. See RTPC (1955, p. 103; 1958b, p. 79; 1961d, p. 430). Note in RTPC (1958b) the Commission does not say per 30(2) explicitly but nevertheless the recommendation can be cast in this light for the purposes of exposition. In RTPC (1955) the Crown prosecuted the Beer case unsuccessfully.

94. See RTPC (1962a, p. 657) which is repeated in RTPC (1962b, p. 14; 1962d, pp. 8-19).

95. In the case of tariffs it is, as remarked in a) above, the Department of Finance and the Governor in Council, not the Crown via legal proceedings.

96. See RTPC (1958a, p. 137; 1959, p. 108; 1960b, p. 178). All these rules of conduct would be enforced by a prohibition order per 30(2). (Note in RTPC (1958a, p. 138) a recommendation for a tariff reduction was also made.) In two instances the RTPC's recommendations were adopted voluntarily by the enterprises. (See Skeoch, 1966a, pp. 127-128, 132-133.)

97. RTPC (1961b, 1962) which were concerned with meat packing and paperboard shipping containers, respectively.

98. There had been two more decisions in 1933 and 1940. See Reschenthaler and Stanbury (1977, pp. 138-139) for details. See also Appendix C, section C-4, below for a discussion of the Beer and Sugar cases.

acquitted and the decision not appealed. The Act stated that a proposed merger was an offence if "competition...is or is likely to be lessened to the detriment...of the public" (Section 33). The RTPC interpreted the two decisions as meaning,

> 1. that in order to prove that a merger has operated or is likely to operate to the detriment or against the interest of the public it must be shown that its effect or likely effect is the virtual elimination of competition i.e., a virtual monopoly, and
>
> 2. that this detrimental effect must flow from the merger itself and not from any collateral agreement or acts which might have been entered into or done by the acquiring company entirely without reference to the merger.... (RTPC, 1962a, p. 651).

The RTPC felt that if the Beer and Sugar decisions were the last word on the question of mergers then

> it will be very difficult indeed for the Crown ever to secure a conviction in a merger case, unless, as a result of and flowing from the transaction, the merger constitutes a complete or virtually complete monopoly in the industry. (RTPC, 1962a, p. 652)

Nevertheless, there was still some uncertainty in the Commission's mind as to the exact interpretation of the merger provisions which would remain "pending clarification by the Supreme Court of Canada or by statute" (RTPC, 1962a, p. 652). The Director of Investigation and Research took a somewhat similar view in his Annual Report 1965/66 (p. 21), remarking that "the law...requires clarification either by the Supreme Court of Canada or by legislation".

Amazing as it may seem, despite the shared view of both the Director and the RTPC, as well as a number of Commission reports which provided grounds for clarifying the merger provisions,[99] it was not until the 1976 K.C. Irving

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99. For example, RTPC (1961d, 1962a, 1966b and 1967b). In the RTPC (1966b) the accused pleaded guilty, which was of little use in terms of jurisprudence.

decision that the Supreme Court of Canada finally ruled on its first merger case.[100] The judgement was consistent with the RTPC's interpretation of the Beer and Sugar decisions. Therefore, the lack of effectiveness of the merger provisions and hence the non-use of divestiture or dissolution, must firmly be placed at the door of the Attorney General of Canada, who has final authority to bring prosecutions under the Combines Investigation Act and the Supreme Court of Canada. Attempts to amend the legislation regarding mergers started in 1966, with a reference to the Economic Council of Canada by the Prime Minister. However, 13 years later, the Stage II proposals are still not law. The whole history of the delay in clarification by the laws of the merger provisions and by introducing new legislation represents a lack of political will to conduct an effective competition policy in Canada. In the case of the legislative attempts, Stanbury (1977a) has documented the case sufficiently to support the above generalization.[101]

d) Other

Little attention is paid here to the effectiveness of the three remaining penalties and remedies (i.e., imprisonment of individuals, prohibition orders and patent and trademark adjustments) because there is no standard of comparison which can be used for the purposes of evaluation. Nevertheless, brief mention of each of the three will be included together with some indication of their incidence over the period 1960/61-1974/75 and prospects for the future under Stages I and II.

Under the Combines Investigation Act, an individual can be imprisoned for a period of up to two years if found guilty of conspiracy, RPM and for refusal to sell, price discrimination, merger and/or monopoly.[102] However, as

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100. See Reschenthaler and Stanbury (1977, pp. 152-168) and Appendix C, section C-4 below.

101. In this section no consideration has been given to the effectiveness of preventing a specific merger by issuing injunctions, since, given the length of time that an RTPC report takes, this recommendation is clearly not one the RTPC can make. In any event no use of this provision of the Act has ever been made.

102. A fine and/or prohibition order can also be imposed against an individual.

indicated in Chapter III, section 3.5.3 above, it has been the policy of those responsible for the administration and enforcement of competition policy to charge corporations, rather than individuals. In the small number of instances in which individuals have been charged, the Crown has not requested imprisonment. However, this policy shows signs of changing. The Director, for example, stated,

> Until recently, only corporations and not the individual directors or officers have been charged....The present policy is to recommend that individual directors and officers who breach the Act will be sentenced to jail terms as well as fines. (Annual Report 1975/76, p. 15)[103]

Although the Attorney General, not the Director, is responsible for deciding which cases are prosecuted and who is charged, in a recent conspiracy case, an individual executive was charged.[104] Hence, the Attorney General would appear to be paying some attention to the views of the Director.[105]

The use and effectiveness of the prohibition order, either following a conviction or per section 30(2), has largely been discussed elsewhere in this study. (See, in particular, section 5.3.5(c) and Chapter III, section 3.5.2 above.)[106] In terms of effectiveness there are

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103. Interestingly enough it was not repeated in the next Annual Report.

104. For details see Annual Report 1976/77, (pp. 33-34).

105. For a discussion of the case for charging individuals see Geis (1973) and Stanbury (1976, pp. 607-616). However, Elzinga and Breit's (1976, pp. 30-43) review of the material in the U.S., where individuals have been jailed, concludes, "The existence of this penalty in the antitrust arsenal is not a realistic deterrent to corporate criminality" (p. 43).

106. Section 3.5.2 above discussed, in part, the extent to which the RTPC recommendations for prohibition order per 30(2) had been followed in merger and/or monopoly cases by the Crown. The results of a similar exercise for the other offence categories are as follows. For RPM and/or refusal-to-sell (RTPC 1960g, 1961e, 1961f, 1962f) and conspiracy (RTPC 1960f, 1964c, 1964e, 1969) the Crown usually followed the RTPC's recommendation

grounds for doubt, since in some recent cases enterprises previously subject to a prohibition order have been convicted of a similar offence.[107]

Finally, the patent and trademark remedy has been used only twice, as detailed in Chapter IV, section 4.2.3. Again some doubt must be thrown on the effectiveness of the remedy because "the proceedings were so protracted" (Gorecki and Stanbury, 1979b, p. 167).

### 5.3.6 Economic Scope of Enforcement Activities

A number of commentators[108] have questioned the effectiveness of the administration and enforcement of competition policy because enforcement activities are directed toward:

(1) offences which are local, rather than regional or national, in geographic scope or coverage;

(2) unconcentrated, rather than concentrated, industries;

(3) small, not large, enterprises.

The evidence for these three generalizations relies heavily upon Rosenbluth and Thorburn's (1963) study of the 1952-1960 period, which is summarized in section 5.2 above. Of

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and was successful in securing a prohibition order either by way of section 30(2) or as a result of a regular prosecution. (Remember that the RTPC does not have the mandate to recommend for or against a regular prosecution.) Finally, for price discrimination, the Crown commenced legal proceedings in only one of three instances (RTPC 1961b, 1961c, 1962c) and was unsuccessful in securing a regular prosecution conviction. Hence, no prohibition order was issued.

107. The two cases are metal culverts and electric large lamps. See Annual Report 1970/71, (pp. 53-56).

108. See Goff and Reasons (1978, pp. 78-89), Mitchell (1975, pp. 175-176), Rosenbluth and Thorburn (1963, pp. 57-79, 99-100), Stykolt (1956, pp. 42-43) and Young (1974, pp. 77-81). The generalizations are, needless to say, somewhat stylized.

particular relevance to (a) is Goff and Reasons (1978, Table 6.2, p. 82) which shows, that over the period 1952-1972, the number of decisions against[109] large enterprises[110] declined both in absolute terms and relative to decisions against all enterprises.[111]

The issues raised by generalizations (a) to (c) have considerable significance not only for the effectiveness of the administration and enforcement of competition policy, but also for the method by which resources are allocated within the Office of the Director. Hence, an attempt to determine the extent to which the three generalizations (a) to (c) apply to the 1960/61-1974/75 period will be conducted. Attention will be confined to those investigations which the Director thought warranted prosecution or raised issues of wider public policy concern: prosecutions, special remedies, references to the Attorney General not prosecuted, reports of the RTPC which resulted in no prosecution. This set of major investigations (hereinafter in this section referred to as investigations) was selected because it most closely corresponded to the set selected by Goff and Reasons (1978) and Rosenbluth and

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109. It is not clear what a "decision against a corporation" involves since Goff and Reasons (1978, pp. 78-79) exhibit some misunderstanding of the process of administration and enforcement outlined in Chapter III above. However, the phrase seems to imply conviction upon an offence in court [both regular prosecution and prohibition order per 30(2)] and a finding against the public interest by the RTPC in reports which did not result in a prosecution.

110. Goff and Reasons (1978, p. 78) do not say whether it is the largest (say) 100 or 200 industrial or manufacturing enterprises. Their reliance on the Financial Post suggests that at least the 100 largest enterprises are included.

111. In the period 1952-1958, the annual average number of decisions against large enterprises was 6.6, in 1966-1972, 2.7. The percentage of all decisions which were against large enterprises declined from 19.5 to 5.9 over the same two periods, respectively. Note Table 6.2 of Goff and Reasons (1978) is used since it does not refer to misleading advertising offences.

Thorburn (1963)[112] as well as representing the major thrust of enforcement activity in competition policy.

a) Local vs. National

The geographic extent of an investigation can be divided into three categories:[113] local (usually city-wide); regional (one or more provinces); national (Canada-wide).[114] Table 5-7 classifies investigations by period, offence and geographic market. Over the period 1960/61-1974/75, 42.9 per cent of all investigations were local in nature, 31.0 per cent regional and 26.2 per cent national. The importance of local investigations decreased over the period from 48.3 per cent of all investigations in 1960/61-1964/65 to 40.0 in 1970/71-1974/75. A similar trend is reflected in conspiracy investigations, although for RPM and/or refusal to sell, local investigations increase over time in relative importance.[115]

In sum, local investigations are of substantial but not overwhelming importance in terms of the overall

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112. Small differences do arise, however. Goff and Reasons (1978) did not include references to the Attorney General not prosecuted, while Rosenbluth and Thorburn (1963, Table VIIB, p. 62) included a selected number of discontinued inquiries.

113. The sources for the geographic market are as follows: prosecutions and special remedies, the information laid; RTPC reports not prosecuted, the Director's statement of evidence to the RTPC in which allegations are made; references to the Attorney General not prosecuted, the Director's summary of evidence in which the allegations are made.

114. See p. 4-7 above for some of the shortcomings of the local/regional/national breakdown as a measure of economic impact.

115. It should be noted that an RPM and/or refusal-to-sell investigation usually refers to specific incidents of an enterprise imposing RPM. However, these incidents are often only examples of a national policy. In such instances the geographic extent of the investigation is defined as national.

TABLE 5-7

Major Investigations[a] Under the Combines Investigation Act Grouped by Period and Geographic Market: 1960/61 - 1974/75

| Period and Type of Geographic Market | Total | | Average per Year | OFFENCE CATEGORIES | | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| | | | | Conspiracy | | RPM and/or Refusal to Sell[b] | | Merger and/or Monopoly | | Price Discrimination[c] | | Multiple Offences[d] | |
| | No. | % | | No. | % | No. | % | No. | % | No. | % | No. | % |
| 1960/61 - 1964/65 | | | | | | | | | | | | | |
| Local | 14 | 48.3 | 2.8 | 5 | 55.5 | 2 | 22.2 | 3 | 42.9 | 3 | 100.0 | 1 | 100.0 |
| Regional | 6 | 20.7 | 1.2 | 1 | 11.1 | 1 | 11.1 | 4 | 57.1 | 0 | 0.0 | 0 | 0.0 |
| National | 9 | 31.0 | 1.8 | 3 | 33.3 | 6 | 66.6 | 0 | 0.0 | 0 | 0.0 | 0 | 0.0 |
| T O T A L | 29 | 100.0 | 5.8 | 9 | 100.0 | 9 | 100.0 | 7 | 100.0 | 3 | 100.0 | 1 | 100.0 |
| 1965/66 - 1969/70 | | | | | | | | | | | | | |
| Local | 14 | 43.8 | 2.8 | 9 | 47.4 | 4 | 50.0 | 0 | 0.0 | 1 | 50.0 | 0 | 0.0 |
| Regional | 10 | 31.3 | 2.0 | 8 | 42.1 | 1 | 12.5 | 0 | 0.0 | 1 | 50.0 | 0 | 0.0 |
| National | 8 | 25.0 | 1.6 | 2 | 10.5 | 3 | 37.5 | 1 | 100.0 | 0 | 0.0 | 2 | 100.0 |
| T O T A L | 32 | 100.0 | 6.4 | 19 | 100.0 | 8 | 100.0 | 1 | 100.0 | 2 | 100.0 | 2 | 100.0 |
| 1970/71 - 1974/75 | | | | | | | | | | | | | |
| Local | 26 | 40.0 | 5.2 | 9 | 39.1 | 11 | 47.8 | 3 | 37.5 | 2 | 50.0 | 1 | 14.3 |
| Regional | 23 | 35.4 | 4.6 | 11 | 47.8 | 5 | 21.7 | 4 | 50.0 | 1 | 25.0 | 2 | 28.6 |
| National | 16 | 24.6 | 3.2 | 3 | 13.0 | 7 | 30.4 | 1 | 12.5 | 1 | 25.0 | 4 | 57.1 |
| T O T A L | 65 | 100.0 | 13.0 | 23 | 100.0 | 23 | 100.0 | 8 | 100.0 | 4 | 100.0 | 7 | 100.0 |
| 1960/61 - 1974/75 | | | | | | | | | | | | | |
| Local | 54 | 42.9 | 3.6 | 23 | 45.1 | 17 | 42.5 | 6 | 37.5 | 6 | 66.6 | 2 | 20.0 |
| Regional | 39 | 31.0 | 2.6 | 20 | 39.2 | 7 | 17.5 | 8 | 50.0 | 2 | 22.2 | 2 | 20.0 |
| National | 33 | 26.2 | 2.2 | 8 | 15.7 | 16 | 40.0 | 2 | 12.5 | 1 | 11.1 | 6 | 60.0 |
| T O T A L | 126 | 100.0 | 8.4 | 51 | 100.0 | 40 | 100.0 | 16 | 100.0 | 9 | 100.0 | 10 | 100.0 |

a. Defined as: Prosecutions; RTPC reports not prosecuted; special remedies; reference to the Attorney General not prosecuted. See Tables 4-2, 4-4 and 4-5 above for dating procedures.

b. It was not possible to allocate one R.P.M. investigation in 1970/71 - 1974/75 to any of the three geographic markets, hence overall total is 126 not 127.

c. Price discrimination includes predatory pricing, unreasonably low prices, discriminatory advertising allowances, as well as price discrimination.

d. See Tables 4-2, 4-4 and 4-5 above for details of multiple offences. The two special remedies were allocated to the multiple offence category.

SOURCE; Data gathered from the files of the Director of Investigation and Research by P.K. Gorecki and W.T. Stanbury. For further details see Appendix A below.

number of investigations.[116] Further, the evidence indicates, overall at least, a decline in the relative importance in local investigations. Hence, generalization (a) would appear to contain more than just an element of truth, but nevertheless overstates the case.[117]

b) Concentration

The most frequently used measure of concentration is the percentage of industry output accounted for by a small number of the largest enterprises, usually four. This is referred to as the concentration ratio. The four enterprise concentration ratio has been divided into four categories, to which Bain (1967, p. 124) has attached the following labels,

| | |
|---|---|
| 75 - 100 | highly concentrated oligopoly, |
| 50 - 75 | moderately concentrated oligopoly, |
| 25 - 50 | slightly concentrated oligopoly, |
| 0 - 25 | atomism. |

The top two classes are considered here as "high", the bottom two as "low" concentration.

Table 5-8 classifies investigations by period, offence, and concentration level in the geographic market corresponding to that recorded in Table 5-7. Over the period 1960/61-1974/75, 72.7 per cent of investigations were in high concentration industries.[118] The significance of investigations in high concentration industries showed a decline from 1960/61-1964/65 to 1965/66-1969/70, with little subsequent change, both for total and conspiracy investigations. Not surprisingly, given the state of

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116. National and regional investigations are likely to require more resources than local investigations. Hence, in terms of resources expended by the machinery of administration and enforcement on local investigations the numbers in Table 5-7 are likely overestimates.

117. Previous researchers, referred to in footnote 108 above, did not present their material in such a way that it can be compared with Tables 5-7 to 5-9.

118. This refers to those investigations for which data were available.

TABLE 5-8

Major Investigations[a] Under the Combines Investigation Act Grouped by Period and Concentration Level: 1960/61 - 1974/75

| Period and Level of Concentration[b] | Total | | Average per Year | OFFENCE CATEGORIES | | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| | | | | Conspiracy | | RPM and/or Refusal to Sell | | Merger and/or Monopoly | | Price Discrimination[c] | | Multiple Offences[d] | |
| | No | % | | No | % | No | % | No | % | No | % | No | % |
| 1960/61 - 1964/65 | | | | | | | | | | | | | |
| 75-100 | 12 | 57.1 | 2.4 | 3 | 42.9 | 0 | 0.0 | 6 | 85.7 | 3 | 100.0 | 0 | 0.0 |
| 50-75 | 6 | 28.6 | 1.2 | 2 | 28.6 | 3 | 75.0 | 1 | 14.3 | 0 | 0.0 | 0 | 0.0 |
| 25-50 | 1 | 4.8 | 0.2 | 1 | 14.3 | 0 | 0.0 | 0 | 0.0 | 0 | 0.0 | 0 | 0.0 |
| 0-25 | 2 | 9.5 | 0.4 | 1 | 14.3 | 1 | 25.0 | 0 | 0.0 | 0 | 0.0 | 0 | 0.0 |
| TOTAL | 21 | 100.0 | 4.2 | 7 | 100.0 | 4 | 100.0 | 7 | 100.0 | 3 | 100.0 | 0 | 0.0 |
| (n.d.)[e] | (8) | | | (2) | | (5) | | (0) | | (0) | | (1) | |
| 1965/66 - 1969/70 | | | | | | | | | | | | | |
| 75-100 | 9 | 40.9 | 1.8 | 6 | 35.3 | 1 | 33.3 | 1 | 100.0 | 1 | 100.0 | 0 | - |
| 50-75 | 6 | 27.3 | 1.2 | 4 | 23.5 | 2 | 66.7 | 0 | 0.0 | 0 | 0.0 | 0 | - |
| 25-50 | 4 | 18.2 | 0.8 | 4 | 23.5 | 0 | 0.0 | 0 | 0.0 | 0 | 0.0 | 0 | - |
| 0-25 | 3 | 13.6 | 0.6 | 3 | 17.6 | 0 | 0.0 | 0 | 0.0 | 0 | 0.0 | 0 | - |
| TOTAL | 22 | 100.0 | 4.4 | 17 | 100.0 | 3 | 100.0 | 1 | 100.0 | 1 | 100.0 | 0 | - |
| (n.d.)[e] | (10) | | | (2) | | (5) | | (0) | | (1) | | (2) | |
| 1970/71 - 1974/75 | | | | | | | | | | | | | |
| 75-100 | 27 | 60.0 | 5.4 | 11 | 52.4 | 2 | 28.6 | 7 | 87.5 | 2 | 66.6 | 5 | 83.3 |
| 50-75 | 4 | 8.9 | 0.8 | 2 | 9.5 | 0 | 0.0 | 1 | 12.5 | 1 | 33.3 | 0 | 0.0 |
| 25-50 | 7 | 15.6 | 1.4 | 4 | 19.0 | 2 | 28.6 | 0 | 0.0 | 0 | 0.0 | 1 | 16.7 |
| 0-25 | 7 | 15.6 | 1.4 | 4 | 19.0 | 3 | 42.9 | 0 | 0.0 | 0 | 0.0 | 0 | 0.0 |
| TOTAL | 45 | 100.0 | 9.0 | 21 | 100.0 | 7 | 100.0 | 8 | 100.0 | 3 | 100.0 | 6 | 100.0 |
| (n.d.)[e] | (21) | | | (2) | | (17) | | (0) | | (1) | | (1) | |
| 1960/61 - 1974/75 | | | | | | | | | | | | | |
| 75-100 | 48 | 54.5 | 3.2 | 20 | 44.4 | 3 | 21.4 | 14 | 87.5 | 6 | 85.7 | 5 | 83.3 |
| 50-75 | 16 | 18.2 | 1.1 | 8 | 17.8 | 5 | 35.7 | 2 | 12.5 | 1 | 14.3 | 0 | 0.0 |
| 25-50 | 12 | 13.6 | 0.8 | 9 | 20.0 | 2 | 14.3 | 0 | 0.0 | 0 | 0.0 | 1 | 16.7 |
| 0-25 | 12 | 13.6 | 0.8 | 8 | 17.8 | 4 | 28.6 | 0 | 0.0 | 0 | 0.0 | 0 | 0.0 |
| TOTAL | 88 | 100.0 | 5.9 | 45 | 100.0 | 14 | 100.0 | 16 | 100.0 | 7 | 100.0 | 6 | 100.0 |
| (n.d.)[e] | (39) | | | (6) | | (27) | | (0) | | (2) | | (4) | |

a. Defined as: prosecutions; RTPC reports not prosecuted; special remedies; reference to the Attorney General not prosecuted. See Tables 4-2, 4-4 and 4-5 above for dating procedures.

b. Measured as the percentage of output, in the relevant geographic market under investigation, accounted for by the four largest enterprises.

c. Price discrimination includes predatory pricing, unreasonably low prices, discriminatory advertising allowances as well as price discrimination.

d. See Tables 4-2, 4-4, and 4-5 above for details of multiple offences, the two special remedies were allocated to the multiple offence category.

e. In some instances concentration data was not available, the frequency of which is indicated in parenthesis.

SOURCE: Data gathered from the files of the Director of Investigation and Research by P.K. Gorecki and W.T. Stanbury. See Appendix A below for details.

Canadian jurisprudence, merger and/or monopoly investigations are exclusively in the high concentration category. Finally, the paucity of data makes discussion of RPM and/or refusal-to-sell of doubtful value.[119] Hence, the generalization that the machinery of administration and enforcement devotes its attention largely to industries characterized by low levels of concentration is not consistent with the data: only one in four investigations over the period 1960/61-1974/75 were in the low concentration category.[120]

c) Large vs. Small Enterprises

There is a considerable paucity of data on the ranking and identity of the largest enterprises in Canada. For the period 1960/61-1974/75 there are only two sources: the Financial Post, which details the largest 100, and, more recently, 200 industrial enterprises (i.e., enterprises with greater than 50 per cent of sales in manufacturing, utility or transport operations); Canadian Business, which, since the early 1970's has published the largest 200 and, for 1975 onwards, 400 (i.e., manufacturing, resource, utility, and construction). These two sources are not entirely comparable, although both use sales to rank enterprises. Given the problems and difficulties, the following somewhat arbitrary rule of thumb was adopted: an enterprise was classified as large if it was listed on the Canadian Business top 400 for 1975, with all remaining enterprises classified as

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119. The lack of data reflects the lack of relevance of concentration data in RPM and/or refusal-to-sell cases in securing a conviction in Court.

120. A comparison of the concentration levels recorded in Table 5-7 for all investigations with those for 154 3-digit manufacturing industries for 1965 shows that the investigations are disproportionately aimed at high concentration industries. (The percentage of the 154 industries in the high concentration category was 50 per cent. See Canada, Department of Consumer and Corporate Affairs, 1971, Table 11-7, p. 23.) However, this comparison should be regarded as very crude, due to differences in time, definition of industry and geographic market.

small. In view of the problems[121] encountered in such an approach, the results should be viewed with at least some caution.

Table 5-9 presents the percentage of investigations which involved one or more of the largest 100 or 400 enterprises in Canada, by time period and offence category. Over the period 1960/61-1974/75, 20.8 per cent of all investigations involved one or more of the largest 100

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121. No problem arose in those instances where the enterprise named in the Director's summary or statement of evidence or the information laid by the Crown was the same as that in the top 400. (Most of the large enterprises investigated by the machinery of administration and enforcement fell into this category.) A problem arises, however, over whether to include as investigated a top 400 enterprise whose subsidiary was subject to an investigation. The following approach was used. First, if the subsidiary was acquired after the period during which the alleged offence took place, the top 400 parent enterprise was classified as not having been investigated. However, in two or three instances the subsidiary enterprise would have merited inclusion in the top 400 on the basis of its own sales. (E.g., Anthes Imperial Limited had sales in 1975 of $115,783,000, which would have placed it 185th, but it was not included in the top 400 as it was a subsidiary of Molson Companies Limited. For details see Hughes, 1976 and Perreault, 1976, p. 71.) In such instances the subsidiary is included in the top 400 and hence classified as a large enterprise which was investigated. Second, if the subsidiary was owned by the top 400 enterprise during the period of the alleged offence the top 400 enterprise is classified as having been investigated. This occurred on a small number of occasions (e.g., Thompson Newspapers Ltd. owned several newspapers which were involved in merger and/or monopoly investigations in 1960/61-1964/65). (Note, however, that if both the subsidiary and the parent enterprise are listed in the top 400 then only the enterprise actually subject to the investigation is included in estimating Table 5-9. This eliminates double counting and an upward bias to the estimates.) The above rules of thumb result in what is considered the minimum defensible list of the enterprises among the top 400 which were investigated.

TABLE 5-9

Major Investigations[a] Under the Combines Investigation Act Grouped by Period and Size of Enterprise: 1960/61 - 1974/75

| Period and Size of Enterprise | Total | OFFENCE CATEGORIES | | | | |
|---|---|---|---|---|---|---|
| | | Conspiracy | RPM and/or Refusal to Sell | Merger and/or Monopoly | Price Discrimination[b] | Multiple Offences[c] |
| | PERCENTAGE OF INVESTIGATIONS INVOLVING ONE OR MORE OF THE LARGEST 100 OR 400 ENTERPRISES[d] | | | | | |
| 1960/61 - 1964/65 | | | | | | |
| Top 100 | 31.0 (9/29) | 22.2 (2/9) | 0.0 (0/9) | 42.9 (3/7) | 100.0 (3/3) | 100.0 (1/1) |
| Top 400 | 51.7 (15/29) | 33.3 (3/9) | 33.3 (3/9) | 71.4 (5/7) | 100.0 (3/3) | 100.0 (1/1) |
| 1965/66 - 1969/70 | | | | | | |
| Top 100 | 15.6 (5/32) | 10.5 (2/19) | 12.5 (1/8) | 0.0 (0/1) | 0.0 (0/2) | 100.0 (2/2) |
| Top 400 | 28.1 (9/32) | 21.0 (4/19) | 12.5 (1/8) | 100.0 (1/1) | 50.0 (1/2) | 100.0 (2/2) |
| 1970/71 - 1974/75 | | | | | | |
| Top 100 | 20.3 (13/64) | 31.8 (7/22) | 8.3 (2/24) | 14.3 (1/7) | 25.0 (1/4) | 14.3 (1/7) |
| Top 400 | 39.1 (25/64) | 45.5 (10/22) | 25.0 (6/24) | 57.1 (4/7) | 50.0 (2/4) | 42.9 (3/7) |
| 1960/61 - 1974/75 | | | | | | |
| Top 100 | 20.8 (26/125) | 22.0 (11/50) | 7.3 (3/41) | 26.7 (4/15) | 44.4 (4/9) | 40.0 (4/10) |
| Top 400 | 39.2 (49/125) | 34.0 (17/50) | 24.4 (10/41) | 66.7 (10/15) | 66.7 (6/9) | 60.0 (6/10) |

a. Defined as: prosecutions; RTPC reports not prosecuted; special remedies; reference to the Attorney General not prosecuted. See Tables 4-2, 4-4 and 4-5 above for dating procedures.

b. Price discrimination includes predatory pricing, unreasonably low prices, discriminatory advertising allowances as well as price discrimination.

c. See Tables 4-2, 4-4 and 4-5 above for details of multiple offences. The two special remedies were allocated to the multiple offence category.

d. Note: If an investigation involves several enterprises in the largest 400 only the highest ranked is selected. (In only a small number of instances did an investigation involve enterprises in the top 100 and 101-400 ranked.) The numbers in parenthesis represent number investigations involving one or more of the largest 100 or 400 enterprises divided by the total number of investigations; the sample of enterprises refer to industrials, not merchandising and financial concerns, ranked by sales for 1975. Two investigations in the period 1970/71 - 1974/75 were confined to the merchandising and financial sectors so that these are excluded from the table. Hence the total number of investigations is 125, not 127.

SOURCE: Annual Reports (various issues), Canada, Department of Consumer and Corporate Affairs (1973, Appendix B, (pp. 1B-72B), data gathered from the files of the Director of Investigation by P.K. Gorecki and W.T. Stanbury (see Appendix A below for details), Hughes (1976), RTCP Reports (various).

enterprises, while 39.2 per cent involved the largest 400. No clear overall trend emerges, with a decline between 1960/61-1964/65 and 1965/66-1969/70, then a subsequent increase in 1970/71-1974/75, in the percentage of all investigations involving large enterprises. A similar pattern is observed for both conspiracy and RPM and/or refusal-to-sell investigations, except that the percentage of conspiracy investigations involving large enterprises was higher in 1970/71-1974/75 than 1960/61-1964/65. Perhaps, not surprisingly, merger and/or monopoly investigations are typically concerned with larger enterprises.

In sum, investigations involving large enterprises form a significant subset of the total number of investigations undertaken between 1960/61-1974/75: four out of every ten. Two caveats should be considered in the interpretation of these results. First, conspiracy, merger and/or monopoly and multiple offence investigations take longer[122] than RPM and/or refusal-to-sell investigations and are likely to consume more resources and involve a higher percentage of large enterprises. Hence, four out of ten underestimate the percentage of resources directed to investigations of larger enterprises. Second, the Canadian Business top 400 exclude substantial enterprises, such as K.C. Irving Limited and Hoffman-LaRoche Limited, both of which have been investigated (and prosecuted), since they are private enterprises and hence not required by law to file annual financial statements. Hence, generalization (c), that enforcement efforts are aimed primarily at small, not large, enterprises, although it contains a substantial element of truth, requires more research before a final verdict can be rendered.

An alternative method of presenting the data in Table 5-9 is to consider the number of large enterprises investigated. The results of such an exercise are as follows, for the period 1960/61-1974/75:

| Large Enterprise Set | Total Number of Enterprises Investigated | Total Number of Times Enterprises were Investigated |
|---|---|---|
| Top 100 | 24 | 34 |
| Top 400 | 56 | 72 |

122. See Table 5-3 above, which refers only to prosecutions. Prosecutions form 71.7 per cent of all investigations.

In other words, 24 of the top 100 enterprises were investigated, on average, 1.42 times (i.e., 34/24) during the period 1960/61-1974/75. The results indicate that, within the top 400 enterprises, investigations were disproportionately centered on the largest 100 enterprises.[123]

d) Overview

This summary has attempted to examine the validity of three generalizations about the type of industries and enterprises toward which investigative efforts by the machinery of administration and enforcement were directed: local, not regional or national offence; unconcentrated, rather than concentrated, industries; small not large enterprises. The evidence introduced here, and summarized in Tables 5-7 to 5-9, suggests that the first and, to a lesser extent, third generalizations contain a substantial element of truth, while the second is inconsistent with the available data. It should be noted that the second generalization was based more upon observation[124] than a thorough examination of concentration ratio data, as presented in Table 5-8.

On a more general level, the issue raised by discussion of the economic scope of enforcement activities is what factors determine the characteristics of industries which are investigated. Two factors seem relevant. First, the merger and monopoly provisions of the Combines Investigation Act have been interpreted by the Courts in such a way that securing a conviction is a very onerous task.[125] Hence, these offences are largely excluded from the purview of investigations. Undoubtedly if the standard required to secure a conviction were lowered, given the selection "criteria" in the Office of the Director,[126]

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123. It was not possible to compare these results with those of Goff and Reasons (1978, Table 6-2, p. 82), since these authors do not specify fully enough the basis for their estimation procedure.

124. See Mitchell (1975, p. 175) and Rosenbluth and Thorburn (1963, pp. 99-100).

125. See Appendix C below and Reschenthaler and Stanbury (1977).

126. See p. 246 below for details.

an increase in the number of investigations of large enterprises in national markets would occur. Second, as discussed extensively in Chapter VI below, most investigations conducted by the Office of the Director are initiated upon receipt of a complaint, usually from a businessman.[127] This pattern reflects various legal and and non-legal constraints, discussed in Chapter VI, which, combined with a relatively small staff in the Office of the Director, considerably restricts the type and range of industries which can be investigated. Hence, if the constraints are changed, the type of industries investigated may also change.

Finally, it might be mentioned that, given the constraints detailed in Chapter VI, the pattern of enforcement activity revealed by Tables 5-7 to 5-9 may be the optimum (i.e., yield greatest increase in competition, given the available resources). Pursuit of large enterprises operating in national markets in which concentration is high - the enforcement option implicit in the writing of such critics as Goff and Reasons (1978, p. 89) and Mitchell (1975, pp. 175-176) - fails to take into account any kind of cost/benefit analysis. A tightly knit local conspiracy of some years duration, with strong documentary evidence, may yield, for a small expenditure of resources, a very high return. On the other hand, pursuit of national oligopolies, in which evidence is difficult to assemble,[128] may require substantial resources to mount, with a much lower probability of a successful conviction in Court. This is not to argue that enforcement should exclude investigations of national oligopolies, but rather that attention should be paid to the constraints which affect the selection of investigations and the institutional framework within which the constraints operate.

### 5.3.7 Summary

In sum, then, the measures of the effectiveness of competition policy do not present a uniform picture of increasing or decreasing effectiveness. Hence, any overall

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127. See Table 6-1, below. Note the table breaks out prosecutions as a separate category, not all investigations, with which Tables 5-7 to 5-9 are concerned.

128. See Stanbury and Reschenthaler (1977) on conscious parallelism.

judgement of the effectiveness must, implicitly or explicitly, involve an assessment of the various indices of effectiveness developed here and their relative values over the period 1960/61-1974/75. In this regard the lack of effectiveness of penalties and remedies is probably most significant. There seems little point in the Director detecting offences more quickly and with greater frequency, the Attorney General securing more convictions as a percentage of cases taken to court as well as prohibition orders per section 30(2) and the administrative machinery processing cases more quickly, if the penalties and remedies are demonstrably inadequate. Hence, overall, despite some improvements in the administrative machinery, the effectiveness of competition policy falls well short of the potential, given the existing penalties and remedies under the Combines Investigation Act.

## 5.4 Effectiveness: Program of Compliance

In order to evaluate the effectiveness of the Program of Compliance, which is administered exclusively by the Director of Investigation and Research, attention is focussed here on the influence of this program on businessmen's decisions. The more effective the Program, the more likely it is that the businessman will heed the Director's opinion, where this conflicts with the company's or trade association's proposed course of action. It is also more likely that businessmen will seek the Director's opinion.

The individual unit of observation is the compliance request. The Director's response to such a request can be divided into three groups: approval, disapproval, no opinion given. These categories can, in turn, be further subdivided. In those instances in which the Director approves a proposed course of action suggested by a firm or a trade association, he can give it either his unqualified approval or alternatively, only qualified approval. This latter term is defined as,

> . . . while there does not appear to be a likelihood of a violation, there are dangers present that may lead to problems under the Act if not carefully avoided. (Stevenson, 1977, pp. 42-43).

Over the period 1960-68,[129] Table 5-10 shows that 44.6 per cent of all compliance requests were approved; between

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129. The data for this period were collected on a calendar year, not fiscal year, basis.

TABLE 5-10

THE RESPONSE OF THE DIRECTOR OF INVESTIGATION & RESEARCH TO COMPLIANCE REQUESTS[a] GROUPED BY OFFENCE, 1960[b] - 1974/75

| Offence Category | Approved | | | Not Approved Initially | | | | Opinion | | Total |
|---|---|---|---|---|---|---|---|---|---|---|
| | Total | Unqualified | Qualified | Total | Possible Violation | Possible Complaint | Revised And Approved | General | Other[e] | |
| | | | | Number of Compliance Requests | | | | | | |
| Conspiracy | | | | | | | | | | |
| 1960-1968 | 52 | n.a. | n.a. | 45 | n.a. | n.a. | n.a. | 12 | 6 | 115 |
| 1968/69-1974/75 | 92 | 26 | 66 | 54 | 34 | 16 | 4 | 15 | 25 | 186 |
| R.P.M. and/or Refusal to Sell | | | | | | | | | | |
| 1960-1968 | 24 | n.a. | n.a. | 15 | n.a. | n.a. | n.a. | 8 | 3 | 50 |
| 1968/69-1974/75 | 22 | 13 | 9 | 13 | 7 | 6 | 0 | 2 | 3 | 40 |
| Merger and/or Monopoly | | | | | | | | | | |
| 1964[c]-1968 | 11 | n.a. | n.a. | 6 | n.a. | n.a. | n.a. | 0 | 4 | 21 |
| 1968/69-1974/75 | 16 | 6 | 10 | 6 | 2 | 3 | 1 | 9 | 12 | 43 |
| Price Discrimination[d] | | | | | | | | | | |
| 1960-1968 | 138 | n.a. | n.a. | 99 | n.a. | n.a. | n.a. | 60 | 6 | 303 |
| 1968/69-1974/75 | 67 | 26 | 41 | 35 | 14 | 21 | 0 | 23 | 8 | 133 |
| Other[e] | | | | | | | | | | |
| 1960-1968 | 4 | n.a. | n.a. | 9 | n.a. | n.a. | n.a. | 9 | 2 | 24 |
| 1968/69-1974/75 | 1 | 0 | 1 | 0 | 0 | 0 | 0 | 6 | 22 | 29 |
| TOTAL | | | | | | | | | | |
| 1960-1968 | 229 | n.a. | n.a. | 174 | n.a. | n.a. | n.a. | 89 | 21 | 513 |
| 1968/69-1974/75 | 198 | 71 | 127 | 108 | 57 | 46 | 5 | 55 | 70 | 431 |

a. Compliance requests are dated by when file was opened (i.e., request received).

b. Data available for 1960 to 1968 on a calendar year basis only.

c. No information recorded prior to 1964.

d. Price discrimination includes predatory pricing, unreasonably low prices, discriminatory advertising allowances as well as price discrimination.

e. See text for definition.

n.a. This breakdown for 1960-1968 period is not available.

NOTE: There is some double counting in the table concerning compliance requests in the period April 1, 1968 to December 31, 1968. Reference to Table 4-9, above suggests 4.9 per cent maximum.

SOURCE: Annual Report 1968/69 (Table 6, p. 20) and Stevenson (1977).

1968/69 and 1975/76 the corresponding percentage was 45.9 per cent, of which 64.1 per cent received qualified approval and 35.8 percent received unqualified approval.[130]

In those instances in which the Director disapproved a certain course of proposed action, Stevenson (1977) has subdivided the Director's reaction into two categories: first, the Director states the proposed course of action would give him "reason to believe" an offence has been committed; second, the Director "would anticipate complaints arising thereby compelling him to launch an investigation" (Stevenson, 1977, p. 43). The rationale for this distinction is as follows: in many situations an infringement of the Act would be unlikely to come to the Director's attention except by complaint (if a person disagreed with the Director's view and went ahead anyway); in others such as merger, the Director would soon become aware if a firm decided not to go ahead, notwithstanding the Director's view that it would give him reason to believe. Although the initial reaction of the Director might be adverse, in some instances the companies may revise their proposed course of action so that it meets the approval of the Director.

In the period 1960 to 1968, in 33.9 per cent of all compliance requests the Director's initial reaction was adverse, while between 1968/69 and 1974/75 the percentage fell somewhat to 25.1 per cent. In the period 1968/69-1974/75, in 52.7 per cent of the disapproved category the Director said a possible violation was likely to be incurred; in 42.6 per cent the proposed courses of action were likely to generate complaints resulting in an inquiry; in 4.6 per cent of the cases although the Director's initial response was adverse, subsequent revision elicited a favourable opinion.[131]

The final category are those instances in which the Director did not specifically approve or disapprove the proposed course of action implicit in the compliance program request. This occurred for a variety of reasons: the compliance request took the form of a general discussion about a particular section of the Act; there was lack of

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130. No breakdown between qualified and unqualified approval was available prior to 1968/69.

131. No corresponding figures for 1960-68, except for the odd example, which will be noted in the text below.

information; "a similar course of action was before the courts, or the proposal was not within the jurisdiction of the Act" (Stevenson, 1977, p. 43). Between 1960 and 1968 the category for which no specific opinion was given accounted for 21.4 per cent of all compliance requests, with an increase in the period 1968/69-1974/75 - 29.0 per cent.

It should be remembered that the terms "approval" and "disapproval" refer to the Director's opinion as to whether or not, on the basis of the facts before him, he would commence an inquiry. If circumstances change, or a new Director assumes office, the opinion may require re-examination. D.H.W. Henry was always careful to caution those parties seeking advice pursuant to the Program of Compliance with the following paragraph:

> You will appreciate that I have no authority under the Act to either approve or disapprove any contemplated course of action. I can only express an opinion as to what I would or would not do in response to the statutory duty placed upon me by section 8(b) of the Act if at some time in the future a particular set of facts should be brought to my attention. (Cited in Stevenson, 1977, p. 40)

Table 5-10 shows the pattern of the Director's response both in overall terms and by section of the Act. Of particular interest is the reaction of firms to an initially adverse response of the Director. The firms have essentially three alternatives: submit a revised plan; go ahead with the proposed course of action; abandon the proposed course of action. The greater the incidence of alternatives one and three, the more effective the Program of Compliance.

Table 5-10 shows that between 1968/69 and 1975/76, of the 108 compliance requests in which the Director's initial reaction was adverse, in five instances the parties to the compliance request submitted a revised proposal which was acceptable.[132] However, there were no revised requests in RPM and/or refusal to deal, or price discrimination, and only one and four respectively in merger and/or monopoly and conspiracy sections. No comparable data exist for the 1960-68 period, although it appears that a minimum

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132. It is not clear where those revised plans, which were unacceptable, were placed. Perhaps there were none.

of nine proposals and a maximum of 21 were revised successfully after an initially adverse opinion was given. Hence, over the period 1960/61 to 1974/75, of the 282 requests in which the Director's initial reaction was unfavourable, between 14 and 26 resulted in revised plans being resubmitted and approved.

The second alternative available to a firm is to go ahead with the proposed course of action with the result that the Director would commence an inquiry. Stevenson does not address himself to this question, while the data for 1960-68 only indicate that

> In three instances, businessmen decided to proceed with practices although the Director had advised that he might launch enquiries if he received complaints about the matters. Two of these instances became subjects of formal investigations and a third is currently being reviewed. (Annual Report 1968/69, p. 20)

Part of the reason why no data are available is because the Program of Compliance files do not contain any. However, it is known (see Chapter VI) that between 1960/61 and 1974/75, 31 complaint files were opened concerning a compliance request, 38 inquiries were discontinued by the Director based on compliance requests, while the Attorney General of Canada decided against instituting a prosecution with respect to the one case forwarded to him by the Director. In one case a successful prosecution resulted against a group of enterprises which had disregarded the Director's opinion (R. vs. Armco et al.). Hence, 40 would appear to be the maximum number of times in which the Director was forced to institute an inquiry following an adverse compliance request reply.[133]

The third alternative is that the persons seeking the compliance request, on receipt of an adverse reply from the Director, simply abandon the proposed course of action. No direct information is available to quantify the extent of this alternative. If one assumes that given a total of 282

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133. It is clearly a maximum since merger proposals which the Director said "no" to and were not consummated are included in the 38. (See, for example, Annual Report 1968/69, p. 46.)

compliance requests receiving adverse opinions between 1960/61 and 1975/76, alternatives one and two accounted for barely 70 at a maximum, then it would appear that most of the remaining 280-odd adverse opinions probably caused the businessmen to abandon their proposed course of action. Such a finding would suggest that the Program had some influence over the decisions of businessmen who had sought the opinion of the Director and therefore was effective. However, this conclusion should be regarded as tentative, since the files of the Director reveal that there was no attempt to check whether a proposed course of action which had been disapproved by the Director, had, in fact, been carried out. This does not apply to mergers where the implementation of the proposed action is public knowledge. Finally, a proposed course of action may be abandoned for other reasons than the Director's disapproval. In sum, the available information suggests that the Program of Compliance has had an effect, particularly in the areas of price discrimination and conspiracy. The finding with respect to price discrimination is consistent with the remarks of the Director.[134]

## 5.5 Recent Developments in Competition Policy and the Measurement of Effectiveness

The measures of effectiveness which have been developed and applied to the period 1960/61-1974/75 in this chapter can be applied, with suitable modification where appropriate, to the recent actual or proposed changes in competition law, administration and enforcement. The resources required by the Office of the Director to estimate the effectiveness measures is likely to be quite small.[135] However, for the outside observer the costs of estimation are likely too high.[136] Hence, the Director should give serious consideration to publishing information, such as the

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134. See, for example, Annual Report 1967/68, (pp. 57-58) and the discussion in section 4.2.9 above.

135. Most of the data are known to the officer-in-charge of the case or inquiry. All that is required is a systematic collection at the termination of each inquiry or case.

136. For example, the fine which the Crown requests in Court is often not in the judgement, so that either the Crown or defense must be contacted directly for such information.

fine requested, the length of the offence, the geographic market, the level of concentration, and when the investigation started. The Annual Report is the obvious vehicle for such a presentation.

Two comments are made with respect to the Stage I and II amendments. First, the range of penalties and remedies has substantially increased with the introduction of single private damage suits and the proposed class actions. In other words, while deterrence was the primary motive behind the penalty system prior to 1976, Stage I and proposed Stage II introduce the additional motive of compensation. The net result will be a system very similar to that currently in place in the U.S. It is therefore instructive that the most thorough examination of the U.S. penalty and remedy system, Elzinga and Breit (1976), has suggested reliance on only one penalty or remedy - a non-discretionary fine.[137] Their case is summarized as follows,

> In contrast to a multipronged attempt to improve the private damage suit, we have suggested a simpler proposal for deterring monopolistic behaviour: an optimal fine without compensation. This proposal squares with the public goods nature of antitrust enforcement and recognizes the reciprocal nature of monopoly damages. It also bypasses the enormous difficulties in equitably compensating injured parties and dovetails with recent developments in welfare economics that question compensation itself on efficiency grounds. Moreover, the costs stemming from perverse incentives and misinformation effects would be obviated and reparations costs excised. Thus a fine could accomplish skillfully and adroitly what a host of instruments could achieve at best only imperfectly. Such pruning is imperative if our antitrust penalties are to bear the full fruit of their potential (Elzinga and Breit, 1976, pp. 152-153).

There is little reason to assume that a similar experience will not result in Canada. Hence, some thought should be given in the Stage II amendments to the appropriate penalty and remedy system. Second, the Stage I amendments introduced competition policy into many heavily regulated sectors, particularly the professions. The impact and effectiveness of these amendments on prices, incomes, range and type of service as well as entry is an obvious area to study in the future.

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137. See section 5.3.5b above.

# CHAPTER VI

## ON THE NATURE OF THE OUTPUT OF COMPETITION POLICY: DISCRETIONARY OR NON-DISCRETIONARY

### 6.1 Introduction

The term "discretionary" is defined here as "an output, the nature, magnitude and timing of which are largely determined by management", while non-discretionary is "an output, the nature, magnitude and timing of which are largely determined by external demand" (Canada, Treasury Board, 1974b, p. 6). Treasury Board, in its technical manual on performance measurement, discusses the difference between these two types of output in the following terms,

> When the volume of output is largely determined by external demand, the manager responsible for the output has little control over the volume which must be produced. External volume determinants may include such factors as size of population, changes in legislation, the state of the economy, etc. ...
>
> On the other hand, the manager responsible for a discretionary output will be able to influence the volume. An example of a discretionary output is income tax audits. While conducting audits is non-discretionary, the number of audits actually carried out is decided internally and, to that extent, can be considered discretionary. The clear identification of volume determinants and the classification of outputs according to the nature of such determinants is important because it affects the manner in which volumes will be forecast and, therefore, the determination of resource requirements. (Canada, Treasury Board, 1974b, p. 6)

However, as Treasury Board (1974b, p. 6) points out "the distinction can rarely be made in black and white terms, and a decision has to be made about the predominant determinant of demand in each case".

The significance of whether, for example, the decision to prosecute or discontinue an inquiry is discretionary or non- discretionary has several important

dimensions for competition policy. Discretion implies that resources can be channelled toward those inquiries which are likely to have the greatest impact (i.e., effectiveness), and that near-and medium-term planning can be undertaken.[1] At a much broader level of generality, discretion suggests that the Director has the potential to be a "regulator" of business practices. D.H.W. Henry, Director between 1960 and 1973, was well aware of this implication of a competition policy with a large discretionary element and firmly rejected the view that such regulation was at all possible. For example, in addressing the Montreal Economics Association, the former Director said,

> Now, it is very important that it be understood that the Combines Investigation Act is of necessity part of the criminal law of Canada. I have the impression that a great many discussions by economists about the manner in which the Act is enforced, its effectiveness, the reasonableness of its provisions and the philosophy that it reflects are due to a failure to understand or accept this fact. Because the Act is criminal law, it becomes necessary in any prosecution for the Crown to prove guilt beyond a reasonable doubt. ...
>
> Now, Mr. Chairman, this state of affairs is one of the facts which we have to take for granted in dealing with anti-combines law and anti-combines enforcement policy. This is, I know, somewhat frustrating to the professional economist who would like to see a greater degree of flexibility in the machinery for enforcing the Act. A number of theories have been expressed about the desirability of allowing particular industries to combine or merge or otherwise become more concentrated or rationalized, and, alternatively, that the administrators of the Act should exercise more economic judgment in applying the Act, perhaps adopting a particular policy in times of depression and a different policy in boom periods - a sort of cyclical enforcement policy.

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1. Clearly this need not necessarily be the case. If output is non-discretionary but related systematically to a set of factors which can be predicted with great accuracy, then this facilitates planning.

> What I have said about criminal law makes it improper in my view, for the Director to exercise this degree of discretion. The Act makes it an offence for businessmen to engage in certain kinds of conduct and it does not appear to me that the Director should set himself up as a regulator of industry with a discretionary attitude towards such offences (which, as I have indicated, are described in general terms and designed to have universal coverage) and to decide that on one occasion conduct falling within the Act will give rise to an inquiry and on another occasion, because he considers the state of the economy to be different, such conduct, though similar, should escape the statutory net. (Henry, 1961b, pp. 2-4)

Clearly then, the issue of discretion vs. non-discretion has potentially very important implications for the nature and scope of competition policy.

In order to facilitate the analysis of discretion when considering competition policy in relation to the various outputs discussed and described in Chapter IV, a twofold distinction is drawn between inquiries,[2] whether formal or preliminary, and the impact or effect of such inquiries. The effect of an inquiry is measured by reference to the five possible outcomes introduced in Chapter IV: discontinued inquiry; prosecution; special remedy; reference to the Attorney General not prosecuted; reports of the RTPC not prosecuted.[3] In the context of these distinctions, discretion can be considered on two planes or levels. First, the scope available to the Director to decide when and under what conditions to commence an inquiry. Discretion here implies that different criteria and rules can be used to select inquiries, such as

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2. Here attention is only concentrated on those inquiries which relate to specific infringements of the Combines Investigation Act. Under section 47 of the Act, the Director can conduct a general or research inquiry on his own initiative. This is discussed further in Chapter IV, section 4.2.8.

3. In this discussion of discretion, no reference is made to the other outputs of competition policy listed in Chapter IV (i.e., research inquiries, compliance requests and other).

the economists' welfare loss model.[4] Second, the degree to which the various agencies responsible for the administration and enforcement of competition policy can decide the result of an inquiry in terms of the five outcomes listed above. Discretion here refers to the latitude in decisions, for example to prosecute or seek a special remedy. This chapter concentrates almost exclusively on the first issue. The second is largely addressed in Chapter III above, where the power and responsibility of each of the agencies involved in administration and enforcement of competition policy is discussed and analyzed.

## 6.2 The Constraints on the Selection of Inquiries

### 6.2.1 The Legal Constraints: An Introduction

The legal constraints on the situations selected by the Director for potential inquiry operate in three quite distinct ways. First, the offences specified in the statute, their interpretation by the judiciary and the range of available penalties and remedies which can be assessed. These factors delimit the types of cases which are likely to conclude in a successful prosecution. A well-developed body of literature exists which describes the nature of such constraints and their implication for competition policy.[5] For example, because of recent court decisions[6] the Director has little incentive to commence a merger inquiry since the outcome is almost certainly going to be a discontinued inquiry. As noted in Chapter II, section 2.3.2, there were no major changes in legislation relating to competition policy and the jurisprudence over the period 1960/61 - 1974/75.

Second, the words of the statute limit the application of the Combines Investigation Act to certain sectors of the economy. In the period 1960/61-1974/75, manufacturing, resources, distribution and transportation were included.[7] However, within such sectors a jurisdic-

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4. See, for example, the discussion in Scherer (1970, pp. 400-411).

5. See, for example, Gosse (1962), Appendix C below, and references in Gorecki and Stanbury (1979b).

6. See Reschenthaler and Stanbury (1977) for details.

7. As of January 1, 1976, all remaining services were covered by the Act.

tional problem arises when a regulatory agency, either federal or provincial, is empowered, for example, to fix prices, limit entry, allocate output, prevent imports and specify the nature of the inputs in the production process-activities which clearly would be offences under the Combines Investigation Act. Many marketing boards for agricultural products fall into this category.[8] In such situations the Director has taken the view, established by the jurisprudence, that the Act "does not apply" when an industry is regulated pursuant to "valid special legislation" (Annual Report 1966/67, p. 8).[9]

The third way in which the law constrains selection of inquiries is by limiting the discretion of the Director to initiate an inquiry into a situation in which violations may be taking place, both in the sense that he can be required to undertake an inquiry and/or must have "reason to believe". In this chapter, attention is concentrated primarily on the third constraint with some mention of the first. The first two constraints are treated here as largely exogeneous.

### 6.2.2 The Legal Constraints: Methods of Initiating An Inquiry

There are three methods by which an inquiry may be initiated under the Combines Investigation Act. In two instances the Act gives the Director no discretion other than to undertake an inquiry. However, the remaining method contained in the Act would appear to give the Director some discretion in deciding whether to commence an inquiry.

The Director is required to commence an investigation under section 8(1) of the Combines Investigation Act when,

> Any six persons, Canadian citizens, resident in Canada, of the full age of twenty-one years, who are of the opinion that an offence ... has been or is about to be committed may apply to the Director for an inquiry into such matter.

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8. See, for example, Schwindt and Grubel (1977) on British Columbia milk marketing and production.

9. However, it should be noted that only those activities and decisions which are within the purview of the regulatory agency are exempt from the application of the Combines Investigation Act. Other non-regulated decisions are subject to the provisions of the Act.

The six persons should make a statutory declaration detailing the alleged infringement of the Act and those responsible. The second instance in which the Director is specifically required to conduct an inquiry is,

> Whenever he [the Director] is directed by the Minister to inquire whether any provision ... has been or is about to be violated. (Section 8(c))

The Minister referred to in the Act is that Minister responsible to Parliament for the administration of the Combines Investigation Act.[10] In sum the Director has to conduct an inquiry as the result of a formal political decision by the Minister or at the behest of six citizens, who, unlike the Minister, have to provide some details concerning the alleged infringement of the Act.

The provision of the Act which has the potential to grant the Director a degree of discretion in the selection of those instances in which an inquiry should be undertaken says that whenever there is

> reason to believe any provision [of the Act] has been or is about to be violated (8(c))

an inquiry "shall" be commenced. One former senior official commented that "this section is clearly mandatory",[11] a view shared by D.H.W. Henry,

> If I, as Director, have reason to believe that an offence is or is about to be committed, Parliament requires me to commence an inquiry. If I do not have reason to believe that an offence is committed by the conduct of an industry, I am not empowered to commence an inquiry against that industry or firm (except general inquiries ...). (Henry, 1961b, p. 3)

Hence, reason to believe is both a mandatory and a necessary and sufficient condition for the Director to commence an inquiry. The issue as to the degree of discretion clearly revolves around the phrase "reason to

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10. See Chapter III, section 3.2.1 for details.

11. This comment was offered by the official in reading and remarking on an earlier version of this study. Another senior official remarked,

> I would argue that it has been only in the area of mergers, monopolization and price discrimination that there has been much discretion. Where the law is clear as in

believe" which is discussed further below. In other words, what is the basis of "reason to believe"?

In the period 1960/61-1974/75, the overwhelming proportion of inquiries were started by the Director on the grounds of "reason to believe". No ministerial direction was received and only 26 citizen applications were made. In contrast the Director was responsible for in excess of 2000 inquiries.[12] The reason for the relative unimportance of the Minister and six-citizens is readily explainable. In the case of a six-citizen application a letter or visit to the Director is an equally efficient and much less costly method of starting an inquiry, especially given that the Director must start an inquiry if the complaint gives him reason to believe.[13] Equally, the Minister would have no reason to cause the Director to commence an inquiry unless this official was remiss in some way.[14] Hence, six-citizen applications and ministerial directions, as methods of starting investigations, can be viewed as essentially checks on the Director. In the words of D.H.W. Henry,

> By these provisions Parliament has ensured that if members of the public or the government consider

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> conspiracy and in price maintenance, I do not believe the Director has any significant discretion - he must act when the information provides him with reason to believe there is an offence.

12. This includes both preliminary and formal inquiries. See Chapter III and IV for details.

13. It is difficult to generalize as to why six-citizen applications were made. In some instances it was undoubtedly a play to gain public attention and put pressure on the Director since the applicants made their complaint public. (See, for example, Annual Report 1975/76, p. 33, p. 39.) In others the applicants had written a previous letter of complaint and the Director had concluded that he did not have "reason to believe". Then a six-citizen application was made to put further pressure on the Director. In these cases, however, the application was not made public.

14. Although in the period 1960/61 to 1974/75, no ministerial direction was given it did occur subsequently. However, the circumstances were unique. The inquiry concerned an international uranium cartel of which the Federal Government of Canada was a part and hence an inquiry by the Director would be politically very sensitive. (For details see Annual Report 1977/78, p. 46.)

> that the [Director is] not properly carrying out his duties with respect to a particular matter that may involve an offense, [he] can be compelled to do so. (Henry, 1965, p. 6)

Hence, most inquiries are started by the Director when he has "reason to believe" an offence has or is likely to be committed and not on the instructions of the Minister and/or six citizens.

### 6.2.3 Sources of "Reason to Believe ..."

The previous section demonstrated that in the recent past legal constraints were not binding in limiting the discretion of the Director in selecting cases for investigation, since most inquiries started when the Director has "reason to believe" an offence had or was about to be committed. This suggests that considerable discretion may have been exercised by the Director in selecting inquiries.

However, before any such sweeping conclusion or inference can be drawn, an examination of the basis for "reason to believe"[15] is needed. At one end of the spectrum the Director may rely solely upon complaints from members of the public for the basis of "reason to believe". On the other end, an attempt may be made by the Director to study the conditions under which (say) conspiracies are likely to be found[16] and successfully prosecuted, with the result used as the basis for selecting possible instances in which an inquiry is justified. In the former situation it may appear that the Director is exercising little discretion in selecting inquiries,[17] acting merely as an agency investigating grievances of businessmen, consumers and others,

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15. It should be pointed out that it is more than just relying on complaints, since the Director still has to conduct a preliminary inquiry in order to satisfy himself that there is "reason to believe".

16. For example, Hay and Kelly (1974, pp. 14-16) list the following conditions as conducive to conspiracy: fewness in numbers, concentration, product homogeneity, demand inelasticity, sealed bidding, industry social structure.

17. Discretion may be involved, however, if the complaints are so numerous relative to resources of the Office of the Director that it is not possible to conduct preliminary inquiries for all complaints. This is explored further in 6.2.5 below.

while in the latter instance, considerable discretion would appear to be employed, for no complaint would have triggered the inquiry. In other words, both complaints and industry conditions can give the Director "reason to believe", but the Director would only be exercising discretion if he relies on the latter method of selecting inquiries. The relative importance of the above two methods in initiating inquiries is clearly likely to be of significance in discovering further constraints on the selection of cases and the scope for adopting various rules to select inquiries.

The Director has several sources from which information can be generated such that "reason to believe" an offence has or is about to take place can be satisfied. In particular, three separate categories can be identified: complaints, Program of Compliance, the initiative of the Director. In order to determine the relative importance of each source of "reason to believe", an examination of the files of the Office of the Director was undertaken for the period 1960/61 to 1974/75. The results are presented in Table 6-1 and commented upon below.

Complaints refer to letters, telephone calls and personal visits to the Director which either allege specific violations of the Combines Investigation Act or raise general issues concerning phenomena with which competition policy may be concerned. Table 6-1 indicates that approximately 82.3 per cent of all preliminary inquiries conducted by the Director on the basis of "reason to believe" were complaint-based.[18] The corresponding percentages for formal inquiries and prosecutions were 72.7 and and 87.6, respectively. Complaints can be subdivided into several categories: businessmen either individually or collectively through a trade association, consumers, elected officials, government departments and agencies. The data in Table 6-1 show that businessmen are the single most important source

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18. Preliminary inquiries based upon complaints were concerned with conspiracy (27.7 per cent), RPM and/or refusal-to-sell (28.7 per cent), monopoly (9.4 per cent), merger (2.5 per cent), price discrimination (16.0 per cent), multiple offences (1.6 per cent) and other (14.2 per cent).

TABLE 6-1

The Sources of "Reason to Believe" in the Initiation of Inquiries and Prosecutions[a] in Canada Under the Combines Investigation Act: 1960/61-1974/75

| Sources of "Reason to Believe" | Inquiries | | | | Prosecutions | |
|---|---|---|---|---|---|---|
| | Preliminary[b] | | Formal[c] | | | |
| | Number | % | Number | % | Number | % |
| 1. Complaints: | | | | | | |
| - Businessmen | 1205 | 52.0 | 197 | 54.9 | 55[d] | 61.8 |
| - Trade Association | 77 | 3.3 | 18 | 5.0 | 6 | 6.7 |
| - Consumers | 426 | 18.4 | 12 | 3.3 | 4[e] | 4.5 |
| - Elected Officials[f] | 47 | 2.0 | 3 | 0.8 | 1 | 1.1 |
| - Gov't Dept./Agency[g] | 153 | 6.6 | 31 | 8.6 | 12[h] | 13.5 |
| SUB-TOTAL | 1908 | 82.3 | 261 | 72.6 | 78 | 87.6 |
| 2. Director of Investigation and Research | 132 | 5.7 | 36 | 10.0 | 7 | 7.9 |
| 3. Program of Compliance | 28 | 1.2 | 39 | 10.9 | 0 | 0.0 |
| 4. Other[i] | 250 | 10.8 | 23 | 6.5 | 4 | 4.5 |
| TOTAL | 2318 | 100.0[j] | 359 | 100.0[j] | 89 | 100.0[j] |

a. The table refers to inquiries and prosecutions which were started when the Director of Investigation and Research had "reason to believe" an offence had or was about to be committed. In other words it excludes six citizen inquiries, of which there were 20 in the period 1960/61-1974/75.

b. The figure 2318 covers the period 1961/62-1974/75. For a number of preliminary inquiries conducted during 1960/61 it was not possible to detect the basis of "reason to believe". There was no a priori reason to assume that 1960/61 is that different from 1961/62-1974/75 results. Preliminary inquiries are dated when the file was opened.

c. Refers to all formal inquiries no matter what their outcome: discontinued (dated by letter of discontinuance), not prosecuted (dated by decision not to prosecute) or prosecuted (dated by when charges were laid).

d. In three instances there was a second complainant: businessman, consumer, director - in one instance a third complainant: six citizens.

e. In one instance there was a second complainant: a consumer. In one instance a third complainant: a consumer.

f. In one instance there was a second complainant: a provincial government agency.

g. Federal, provincial or local government officials, included when complain in their official capacity.

h. Federal, provincial or local government department or agency (e.g., hospitals) excludes Director of Investigation and Research.

i. Include anonymous and not known.

j. May not add to 100 due to rounding.

Note: A more detailed breakdown of this table may be found in Gorecki and Stanbury (1979b, Table 1, p. 183).

SOURCE: Data gathered from the files of the Director of Investigation and Research by P.K. Gorecki and W.T. Stanbury. For further details see Appendix A below.

of preliminary and formal inquiries as well as prosecutions.[19] However, the relative importance of the remaining groups varies across these three categories.[20]

The second source of attempts to initiate inquiries is based upon the research and observation undertaken by the Director. Table 6-1 shows that the quantitative significance of the Director in starting inquiries which may or may not have resulted in prosecutions is relatively insignificant. Examination of the files showed that inquiries started by the Director were not based upon a priori theory of the type mentioned above concerning the detection of price-fixing offences. Instead, the Director based his inquiries upon a careful study of newspaper reports, trade papers and financial weeklies. The most important single category of inquiries undertaken by the Director was concerned with mergers.[21]

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19. It is interesting to note that a similar pattern occurs with respect to U.S. competition policy. For example, Stone (1977, pp. 64-65) comments:

> Most of the matters the agency [i.e., Federal Trade Commission] deals with are brought to its attention by what is ambiguously termed "the public". To pinpoint the exact percentage of matters drawn to its notice by the mailbag route is difficult; one estimate puts the figure as high as 90 percent, and almost everyone who is or has been associated with the agency, I among them, agrees that the proportion is large, probably between 80 and 90 percent. Of this number, a high proportion seems, in my experience and that of other observers, to come directly or indirectly from competitors or other businessmen affected by the practice complained of. The proportion of these complaints which ultimately results in formal action is even higher. The pattern holds equally in the areas of fraud and what the agency terms antimonopoly practices.

20. See Gorecki and Stanbury (1979b) for further discussion of these percentages.

21. Preliminary inquiries based upon the Director's own initiative were concerned with conspiracy (22.7 per cent), RPM and/or refusal-to-sell (20.5 per cent), monopoly (2.3 per cent), merger (28.8 per cent), price discrimination (5.3 per cent), multiple offences (0.8 per cent) and other (19.7 per cent).

The third way in which the Director may have "reason to believe" an offence has been or is about to be committed is through information received under the Program of Compliance. Under this program, as discussed in section 4.2.9 above, businessmen discuss with the Director, informally, plans or strategies which they intend to undertake. The Director then offers an opinion as to whether an investigation would be conducted, on the basis of the information disclosed. In some instances businessmen disregard the adverse opinion of the Director, forcing the latter to commence an inquiry. However, as a source of either inquiries or prosecutions, the Program of Compliance is relatively insignificant. Most of the Program of Compliance preliminary inquiries were concerned with mergers (89.3 per cent).

In sum, while the Director would appear to have considerable discretion in selecting those instances to institute an inquiry, by virtue of the "reason to believe" provision of the legislation, the evidence cited in this section suggests that this discretion may not be exercised. Most inquiries are based upon complaints from businessmen about the workings of the competitive system. The role of the Director can, therefore, be seen chiefly as investigating these complaints and, when the evidence is sufficient, undertaking an inquiry and recommending a prosecution to the Attorney General. An explanation for this pattern of behaviour by the Director is required in order to delimit additional constraints on selecting inquiries. This is the object of the next section.

### 6.2.4 Non-Legal Constraints

The behaviour of the Director in relying primarily on complaints from businessmen as the method of finding "reason to believe" can be seen as a function of two factors or constraints: the development of Canadian jurisprudence, especially as it relates to the merger and monopoly provisions of the legislation and the need to respond to complaints. These factors should not be seen as a set of independent constraints but rather as part of a series of interconnected observations which need to be taken as a whole.

The Director must act upon information brought to his attention by a member of the public, be he a businessman or consumer. The Director would not be carrying out his statutory duty if, despite very strong prima facie evidence that an infringement of the law was taking place,

no inquiry was undertaken. Continual failure to investigate these attempts by the public to initiate an inquiry would lead to consequences that no official would regard as desired objectives. First, the supply of information relating to infringements provided by businessmen and consumers is likely to decline. The output of the Director (i.e., in the final analysis, prosecutions), in the absence of an alternative for selecting potential cases for inquiry, is likely to decline. Questions about the efficiency and size of the Office of the Director are then likely to be raised. Second, there will be an increase in the number of formal requests to institute an inquiry by both the Minister and six citizens. A former Director has implied that a high incidence of such requests indicates a "reluctant or delinquent" Director.[22] Third, there will be a representation to the Minister that the Director and his officials are not carrying out their duties and functions adequately or correctly. This may result in the removal of the Director and/or legislation giving the Minister more control over the day-to-day administration of competition policy.[23] Hence, the Director has no alternative but to act upon information which gives reasonable and probable grounds for believing that an infringement of the statute has taken place.

In order to evaluate the significance of this constraint, data are needed on the source of complaints. In particular, is the Director responsible for a significant number of complaints? For Canada, the supply of complaints is primarily related to attempts to change the Combines Investigation Act cases and to legal proceedings,[24] neither

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22. Henry (1964, p. 7). See also footnotes 13 and 14 in this chapter.

23. At present, as pointed out in Chapter III, the Director decides in which cases to start an inquiry with no reference to the Minister for approval or disapproval.

24. An examination of the number of files opened on receipt of complaints in the postwar period, on an annual basis, reveals substantial peaks around 1951/52-1960/61 and 1970/71-1971/72, when important amendments were passed or considered by Parliament. Data on the numbers by year may be found in the Annual Reports of the Director.

of which can be sensibly[25] altered by the Director. However, it could be argued that some complaints are generated by the Director's active promotion of the Program of Compliance.[26] This argument seems less than satisfactory, however, since the program is as likely to generate complaints as it is to cause businessmen to take courses of action which do not contravene the Act and hence result in a decline in the number of complaints. A priori it cannot be specified which is the most significant effect of the Program of Compliance with respect to complaint generation.

Although the Director would appear to have little discretion in investigating complaints received from the public, this is not a sufficient explanation of why the Director relies primarily upon such complaints as the major source from which to start an inquiry. In particular, anticompetitive mergers and monopolies are illegal under the Combines Investigation Act.[27] The number of mergers which are likely to raise issues for competition policy is probably much greater in Canada than in the U.S., due to the smaller market size and generally higher level of industry concentration.[28] One study has estimated that over the period 1945-1961, between one in five, to one in twelve or thirteen of all mergers "might have qualified for public interest examination".[29] Mergers of significance are usually reported in the press which is monitored by the Office of

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25. Sensible in the sense that no legal proceedings would be brought before the courts or attempts made to amend laws which had clear shortcomings.

26. The Program of Compliance is discussed and described in Chapter IV, 4.2.9, above.

27. For details see discussion in Reschenthaler and Stanbury (1977) and references cited therein.

28. A comparison of U.S. and Canadian concentration ratios may be found in Canada, Department of Consumer and Corporate Affairs (1971, Table A-73, pp. 210-227).

29. See Economic Council of Canada (1969, p. 86).

the Director.[30] In the period 1961/62-1974/75 there were 4226 "reported mergers in industries subject to the Combines Investigation Act" (Annual Report 1976/77, p. 38).

Assuming that between one-fifth and one-thirteenth would have qualified for public interest examination, then the Director should have accounted for at least[31] between 14.0 per cent and 36.5 per cent of the 2318 preliminary inquiries undertaken between 1961/62-1974/75 instead of less than six per cent. This disparity can be explained by the interpretation placed upon the merger provisions by the judiciary, such that it is almost impossible to secure conviction without the merged enterprises accounting for in excess of 90 per cent of the market and guilty of specific results which are of detriment to consumers, producers or others.[32] Hence, although the Director is the principal source of reason to believe in merger preliminary inquiries,[33] such inquiries only account for 5.4 per cent of all preliminary inquiries conducted. Most preliminary inquiries are concerned with, respectively, conspiracy, RPM/refusal-to sell and price discrimination as Table 4-7 shows. In these areas, not surprisingly, it is the businessman who is likely to have the relevant information, not the Director. Hence, most of the "reason to believe" originates from complaints.

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30. The Director publishes annual data on the number of mergers which fall under the Act. See Annual Report 1976/77 (pp. 38-39). Note that the Annual Report cited uses a calendar year while the fiscal year ending March 31 is used here. To convert calendar to fiscal year data, it was assumed that the mergers in any calendar year were spread equally throughout that year.

31. "At least" because the Director would presumably have been responsible for inquiries in areas other than merger. In fact during the period 1961/62-1974/75 the Director initiated preliminary inquiries in the following areas other than mergers: conspiracy (30), RPM/refusal-to-sell (27), monopoly (3), price discrimination (7), multiple offences (1), and not-known (26).

32. For details see discussion in Reschenthaler and Stanbury (1977) and references cited therein.

33. Of the 125 preliminary inquiries concerning mergers over the period 1960/61-1974/75, the Director either directly or through the Program of Compliance accounted for 50.4 per cent.

### 6.2.5 Discretion and Resources

The previous sections have demonstrated that within the two exogenously determined constraints imposed by the scope of application of competition policy legislation to the economy and the judicial interpretation of the provisions of the Combines Investigation Act, the Director has relied upon complaints as the prime basis or catalyst from which to start inquiries. In other words, the universe of possible or potential situations from which an inquiry, whether preliminary or formal, can be selected and conducted is largely determined for the Director by the supply of complaints. The Director, however, has some influence over the supply of complaints by the speeches and public appearances he and his officials make as well as the speed and attention complainants receive from the Office of the Director.[34] No systematic attempt was made to determine whether, by these types of activities, the Director had generated a substantial number of complaints. Nevertheless, no policy or strategy was formulated by the Director for complaint generation, while an examination of the files of the Director[35] indicated only a few instances in which the Director was directly[36] responsible for the complaint. Hence, the Director would seem to be a relatively unimportant source of complaint generation.

Although the Director may have little influence over the universe from which the inquiries he conducts are selected this does not necessarily imply that no discretion exists in the area of inquiry selection. The relevant factor to consider is the ratio of the number of complaints, more specifically, substantive complaints[37] relative to the resources available to the Office of the Director. Suppose

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34. Although not the Director's responsibility, the fine or other penalty imposed may affect the willingness of individuals to complain.

35. Carried out in assembling much of the data presented in this study by Gorecki and Stanbury.

36. I.e., the Director's speech or other activity was mentioned in the letter of complaint.

37. I.e., where the Director has "reason to believe".

that there exists some optimum value of this ratio, x[38], whereby the Director is able, to his own satisfaction, to adequately conduct inquiries in relation to the supply of complaints. As soon as this ratio is exceeded by some nontrivial amount then the Director has a choice: either he can exercise no discretion and proceed to investigate all complaints with consequent lowering of resources expended on each case, per unit of time, or he can exercise discretion and place a higher priority on some inquiries than on others. The question which has to be addressed here is whether the ratio x has been exceeded and if so, what the Director's reaction has been. The answer to this question is not easy and the tentative answer given below is based on three sources of information: the author's experience as a combines officer in 1970/71, the knowledge gained examining the files in the course of selecting the data upon which this study is based, and the opinions and experience of senior officials of the Office of the Director, present and former.

This evidence, taken together, strongly suggests that the ratio of substantive complaints to resources available to the Director is such that it exceeds x by an amount sufficient that the Director is able to exercise discretion in selecting which inquiries receive priority and which do not. Further, the evidence suggests that such discretion is, in fact, exercised. The relevant question is by whom and in what way. In order to address this issue the actual process whereby cases are selected needs to be briefly outlined. At the stage of initiating an inquiry, the responsible official is the economist employed by the Office of the Director. Whether the case gets to the prosecution stage largely depends upon legal criteria such as evidence. Hence, it would not seem unreasonable to suggest that economic criteria play an important part in the exercise of discretion by the Office of the Director. However, reference to the files of the Director in the late 1950's through to the early/mid 1970's reveals little evidence of economic criteria and information in judging whether an inquiry should be started and prosecuted, with a few exceptions. Hence, it would appear, somewhat paradoxically, that economic criteria have little input in the discretion exercised by the Director.

The suggested absence of economic criteria drew considerable criticism from the reviewers of this study in

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38. Clearly this ratio is likely to vary with the size and organization as well as other factors.

the Office of the Director. There seemed to be a consensus that such considerations were taken into account, although in no formal way. For example, one senior official, recently employed in the Office of the Director, said that "it is my policy in case selection to value the importance of the industry in GNP..." Another longer serving senior official commented that,

> the statement ... that the files reveal an almost total absence of economic criteria and information in judging whether an inquiry should be started and prosecuted, ignores I believe the lengthy experience of some of the Directors and Chiefs[39] who have been involved. Some at least of the Directors have a good deal of knowledge about the relative performance of different sectors of the economy and about whether anti-trust could be expected to improve performance in a particular sector. In these circumstances it is a relatively simple task to give priority to those complaints which appear to provide the best opportunity to open up a promising sector for effective review.

The absence of a formal method of choosing which complaints are given priority is explained by one former senior official in the following terms,[40]

> I agree that we [i.e., the Office of the Director] seldom used a formal framework ... partly because resources were not ever available in 1970-1977 period to even develop it and get the information necessary to implement it - let alone put it into play.

In addition, it should be remembered that the Office of the Director was relatively small during most of the period 1960/61 to 1974/75, as Table 4-11 shows. Hence, there was much less need to develop any formal system of selecting the complaints to which resources should be devoted. Now that the Office of the Director has increased considerably, there is much greater interest in designing a formal system of guiding in the selection of cases. This study forms part of that process.

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39. I.e., senior officials of the Office of the Director.

40. Again, this comment was received in response to an earlier version of this study.

## 6.3 Summary and Scope for Discretion in the Future

This chapter has attempted to examine the legal and non-legal constraints which determine the discretion of the Director in deciding in which instances to conduct an inquiry. The discussion of the legal constraints showed that the Director had, potentially at least, great discretion in deciding in which cases to initiate an inquiry. This reflected the provision allowing an inquiry to be commenced by the Director whenever there existed "reason to believe" an offence had been committed. Examination of the record showed that most inquiries were started on the initiation of the Director.

However, an examination of the basis of "reason to believe" over the period 1960/61 to 1974/75, demonstrated that most inquiries were started after a complaint had been received from a member of the public. This was explained in terms of the jurisprudence on mergers and the difficulty of the Director in refusing to act on information received from the public. Hence, the existence of the "reason to believe" grounds for starting an inquiry have never been fully exploited due to the reliance on complaints as the starter for inquiries.

Nevertheless, despite the reliance on complaints, the volume is sufficiently large relative to the resources of the Office of the Director that discretion is exercised in terms of the priority accorded cases based on rough-and-ready economic considerations. In other words, discretion does exist and has been used. This implies that studies of performance measurement, such as this, which identify those outputs which are more effective in realizing the goals of competition policy, may be of use in directing the resources of the Office of the Director toward outputs with the greatest impact. This is likely to be especially important in the future in view of the recent announced cutbacks in government expenditure[41] and the discretion given the Director in the Stage I amendments to go before regulatory agencies at his own discretion.

The question which naturally arises from this analysis and discussion is whether a more formal system of ranking those situations in which the Director has "reason to believe" can be devised at reasonable cost than

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41. In late 1978, the Federal Government announced a reduction of approximately 10 per cent of positions allocated to the Office of the Director effective April 1, 1979.

the present somewhat ad hoc approach. The object here is only to sketch the type of factors which should be taken into account. Three subsets of factors can be considered: economic, public profile, legal.

The economic subsets would include the size of the industry, its geographical scope (local,regional, national), changes which are taking place in the industry independent of an inquiry and prosecution, the available remedies (i.e., fine, prohibition order, tariff, divestiture, revocation and/or licensing of a patent) in relation to the particular competitive problem and the potential welfare loss. In the United Kingdom, for example, the Office of Fair Trading has designed a sophisticated structure/conduct and performance "model" for predicting those instances where monopolistic situations should be referred for inquiry, investigation and a report to the Monopolies and Mergers Commission.[43] The use of economic criteria has also received considerable attention in the U.S. as part of a more general concern over competition policy planning.[44]

The public profile subset is much more nebulous to define. It could be argued that if the Office of the Director selected those industries which had and would attract a considerable amount of attention then, in the words of one senior official,

> The procompetitive message is disseminated through the media and by political lines of communication. Some cases take on a priority because the issues carry a very high level of visibility. A cynic

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43. A brief description of the U.K. system may be found in Trade and Industry (1974).

44. There is considerable literature in the U.S. on the issue of the use of economic criteria in competition policy planning and enforcement. While this would appear to date from at least the mid-1950's (Grether, 1959, 1973), the debate gathered considerable momentum in the 1970's. Particularly important are the thinking and views of the Federal Trade Commission, which may be found in several published memoranda and papers. (See, for example, U.S. Federal Trade Commission, 1974, 1975 and Mann and Meehan, 1973). These papers consider the applicability of cost/benefit analysis to competition policy enforcement procedures. The Antitrust Division of the Department of Justice is also experimenting with the use of economic criteria. A useful general source of debate over U.S. competition policy enforcement is Antitrust Law and Economics Review (See, for example, Scanlon, 1972).

> might say that the Bureau's[45] independence is being compromised when it reacts to such pressures, but insofar as the Bureau's impact is primarily pre-emptory and we can never expect to gather evidence of a major share of the restrictive practices that occur, it is my opinion that the public profile of the Bureau is an important aspect of its work. By way of analogy, the Bureau contributes towards attaining its objective by being visible in society in the same way as police prevent more crime by cruising neighbourhoods and sponsoring boys clubs than they do through criminal investigation. Attendance at industry conferences, speeches by the Director and senior officials, making informal inquiries, even when the probability of developing reason to believe are low may be valid uses of resources if some discrimination is used with respect to the circumstances attending each situation.

Clearly public profile is a factor which requires judgement and awareness of current affairs. It cannot be reduced to a set of numbers.

The final set of factors relate to legal considerations such as quality of the evidence, legal precedence, number of times (if any) the firm has been investigated and/or prosecuted and the chances of a successful prosecution, given the existing jurisprudence. Any formal method of inquiry selection is likely to be a complex combination of legal, economic and public profile factors. Stykolt (1956, p. 42) recognized this some years ago when he wrote,

> It would be naive to press for the use of economic criteria pure and simple. The initiation of inquiries is, and ought to be, an exercise in political economy: complaints must be heeded, and the impact of publicity must be taken into account.

In these circumstances the best practical approach to the issue of inquiry selection is that a checklist of factors, such as those listed above, be addressed before an inquiry

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45. I.e. Office of the Director. In more recent times the name has changed to the Bureau of Competition Policy. This memorandum was written in April 1978 in response to an earlier version of this study.

is started. The system could be formalized by meetings once every quarter to discuss potential inquiries across the whole of the Office of the Director.

In sum, complex models weighting a multitude of legal, economic and public profile factors, some of which may not be quantifiable, such as precedence value, does not seem a feasible option for inquiry selection. Much better to accept that the real world is a complicated and difficult place and start with small beginnings. A checklist of factors that would a priori be important may seem an unimpressive start but at least those taking decisions are likely to consider all the relevant factors and maybe some better decisions will be made. The cost is likely to be minimal. After some experimentation with such a procedure a more formalized model may emerge.

# CHAPTER VII

## SUMMARY AND CONCLUSIONS

### 7.1 Introduction

This final chapter is intended to present a summary of the major findings of the study (section 7.2) as well as the recommendations for improving the efficiency and effectiveness with which competition policy is administered and enforced in Canada (section 7.3). An important secondary objective is to discuss the applicability of performance measurement to competition policy (section 7.4).

### 7.2 Summary of Main Findings

#### 7.2.1. Introduction

This study has examined the administration and enforcement of competition policy in Canada over the period 1960/61-1974/75, although reference is made to both the Stage I amendments which came into effect January 1,1976, and the proposed Stage II amendments. The term "competition policy", although quite broad in scope, is taken to be synonymous with the provisions of the Combines Investigation Act. Attention has been paid in the study to the four bodies responsible for administering the Act:[1] the Director of Investigation and Research, the RTPC, the Attorney General, and the judiciary. The inclusion of all four bodies reflects the fact that each is responsible for an important part in the process of investigation, appraisal, and prosecution. To neglect one body is to give only a very partial picture of competition policy.

An indication of the activities of these administrative agencies over the period 1960/61-1974/75 can be gained from the following figures. The Director of Investigation and Research answered 900 compliance requests, undertook five research inquiries, instituted 2,581 preliminary inquiries of which 381 resulted in formal inquiries and, finally, completed 127 summaries (forwarded directly to the Attorney General) or statements (forwarded

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1. No attention is paid, however, to the misleading advertising provisions of the Combines Investigation Act.

to the RTPC) of evidence. The RTPC processed and caused to be published 51 reports concerning alleged offences by the Director and three research studies. Of the 127 summaries or statements of evidence received by the Attorney General, in 93 instances legal proceedings before the courts were commenced (69 regular prosecutions, 22 prohibition orders per 30(2) and two special remedies). The Crown was almost always successful in securing a conviction, usually after a plea of guilty.

The major change in the relative importance of the various pieces of machinery involved in administration and enforcement has been the reduced significance of the RTPC, since the Director no longer forwards statements of evidence to the RTPC but instead refers summaries of evidence directly to the Attorney General. However, the new duties given to the RTPC under the Stage I amendments are likely to increase the significance of the Commission. The purpose of this study has been to evaluate the efficiency and effectiveness of these activities.

### 7.2.2. Productivity

In measuring the efficiency of competition policy nine separate outputs were identified: prosecutions; special remedies; reference to the Attorney General not prosecuted; reports of the RTPC not prosecuted; discontinued inquiries; preliminary inquiries; research inquiries; compliance requests; "other", including international work; and interdepartment and Cabinet representation. Data on the frequency of these outputs were presented for the first eight, no data being available for the category "other". Inputs were measured in terms of man-years in the Office of the Director, no corresponding data being available for the Attorney General of Canada or the judiciary. Hence, the measures of efficiency refer to labour, not total factor (i.e., all inputs) productivity. The size of the Office of the Director has grown considerably over the period 1960/61-1974/75, from a total staff of 51 in 1960/61 to 147 in 1974/75. The growth was not even, however, being concentrated in the latter part of the period. Turnover remained constant over the period.

Various measures of productivity were designed and estimated for three five-year periods rather than annually because of the small number of observations. The main focus was on the trend in productivity, rather than the absolute level, since there existed no norm or absolute standard of

comparison. In order to assess the relative importance of the individual outputs of competition policy,[2] and hence derive a figure for "total output", a group of eight "experts" were asked to assign weights or shadow prices. Usable replies were received from seven. Several problems were encountered in estimating the productivity indices, including the fact that resources expended in period t did not result in a defined output until t + 1. Hence, for this and other reasons outlined in Chapter IV, the productivity indices should be viewed as tentative.

Overall or total productivity for competition policy, after exhibiting an increase between the first five-year period and the second, showed a subsequent decline to considerably below the base period. This finding held irrespective of which of the seven experts' weights were applied to estimate the numerator of the productivity index (i.e., total output) or of the denominator (i.e., total staff or officers). This trend is explained primarily by two factors: first, the expected downward bias in measured productivity because of the increase in staff, which had to be trained, in the late 1960's/early 1970's; second, and of much more significance, the rise and subsequent decline in the number of compliance requests and preliminary inquiries. This reflected the launching of the Program of Compliance after the 1960 amendments.

An index which is primarily a reflection of attempts to change the legislation relating to competition policy presents problems of interpretation. An attempt was therefore made to exclude the influence of these two outputs. The result was that measured productivity declined between 1955/56-1959/60 and 1960/61-1964/65 and then probably remained unchanged or declined slightly. This pattern was explained by a number of factors: the growth in the staff of the Director in the late 1960's and early 1970's; bilingual language training; increasing sophistication of those individuals committing actual or potential infringements of the Act.

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2. Note that several of the eight outputs were subdivided for the purposes of this exercise so the actual number of categories to be weighted was 12. For example, prosecutions were divided into regular and prohibition order per 30(2). Each in turn was subdivided into a win and loss class.

### 7.2.3. Effectiveness

In terms of effectiveness, five sets of measures were estimated which related to investigation and prosecution: selection of cases, detection of offences, length of cases, penalties and remedies. Finally, an attempt was made to appraise the effectiveness of the Program of Compliance.

Selection of Cases. As with the measurement of productivity discussed in the previous section, attention is concentrated on the trend rather than the absolute values of the measured indexes. Case selection was considered for both the Director and the Attorney General, with opposite results. For the Director, case selection, measured by the percentage of all formal inquiries which were referred to the Attorney General either directly or via the RTPC, increased from 27.4 per cent in 1960/61-1964/65 to 41.0 per cent in 1970/71-1974/75. In other words, the Director was better able to select those instances where the evidence was sufficient to substantiate his a priori expectations (found in "reason to believe") and hence warrant a reference to the Attorney General either directly or indirectly via the RTPC. On the other hand, the case selection of the Attorney General, where this is measured by the percentage of all cases in which legal proceedings were successful, showed a marked decline from 94.1 per cent in 1960/61-1964/65 to 73.3 per cent in 1970/71-1974/75. The decline reflected an increase in the number of conspiracy cases in which the defendants were acquitted. These were mainly in the difficult area of "conscious parallelism" and hence the decline is due to the Attorney General exploring and extending the boundaries of the conspiracy provisions, not administration shortcomings.

Detection of Offences. The sooner an offence is detected, the more effective is the administration and enforcement of competition policy. The detection period, or lag, is measured by the difference between the start of the offence (as contained in the information laid)[3] and the discovery or detection of the offence by the Director (the use of the first formal power). Over the period 1960/61-1974/75, the detection period has almost doubled: 26.5 months 1960/61-1964/65; 54.0 months, 1965/66-1969/70; 53.4 months,

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3. In other words the index is estimated only for prosecutions, whether the Crown is successful or not.

1970/71-1974/75. The main reason for this overall increase is that the detection period for conspiracies increased from 38.0 months in 1960/61-1964/65 to 80.8 months in 1970/71-1974/75. In contrast, the detection period declined slightly for RPM and/or refusal-to-sell over the same period. This increase in the detection period for conspiracies is attributable to past enforcement efforts which has resulted in greater attempts by conspirators to conceal their activity.

Length of Cases. The length of time taken by the agencies responsible for the administration and enforcement of competition policy from the receipt of a complaint to the final disposition of the case in the courts[4] can have an important bearing upon effectiveness. Shorter throughput times will increase the supply of complaints, since the complainant has a greater incentive to complain due to prompt action. In addition, the probability of success in court for the Crown, measured in terms of receiving the fine or prohibition order requested or even securing a conviction, decreases as the case increases in length - the evidence becomes stale, memories fade. Over the period 1960/61-1974/75, there was little change in total throughput: 69.2 months 1960/61-1964/65; 72.5 months 1965/66-1969/70; 66.5 months 1970/71-1974/75. However, this disguises a marked reduction for RPM and/or refusal to sell, from 63.0 months in 1960/61-1964/65 to 48.0 in 1970/71-1974/75. Hence, in terms in total length taken to process a case, effectiveness has remained unchanged overall, except for RPM and/or refusal-to-sell, which showed a substantial increase.

Penalties and Remedies. The methodology employed in evaluating the effectiveness of penalties and remedies was to compare proxies of the "optimum" with that actually granted by the courts or the Governor in Council. An attempt was made to explain any differences which might occur. Attention was confined to three penalties and remedies: fines, tariff reductions, divestiture or dissolution of mergers and/or monopolies. No tariff reduction or divestiture (dissolution) took place as a result of the enforcement activities of the various administrative agencies, despite the prediction that such actions should have been taken. Also, the level of fines requested by the Crown were never granted by the court, except when the accused pleaded guilty (i.e., in return for a plea of guilty there was an agreed fine between the

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4. Only prosecutions are considered.

defence and the Crown). Without exception the level of fines never reached one per cent of sales for each year of the offence. Nevertheless, the level of fines has been increasing, in absolute terms at least, in the recent past. The lack of effectiveness, as evidenced by the gap between "optimum" and actual penalty or remedy, is explained by the public good nature of the benefits of competition policy, with the incidence of the "costs" falling on oligopolist industries, which are able to exert pressure and influence to prevent tariff reductions or dissolution proceedings.

Economic Scope of Enforcement Activities. Critics of competition policy administration and enforcement have alleged that the type of industries and enterprises toward which investigative efforts by the machinery of administration and enforcement were directed can be characterized as follows: local, not regional or national, offences; unconcentrated, not concentrated, industries; small, not large, enterprises. The first, and, to a much lesser extent, third generalization, contain substantial elements of truth, while the second is inconsistent with the pattern of enforcement activities over the 1960/61-1974/75 period. The pattern reflects the jurisprudence on the merger and/or monopoly provisions of the Act as well as the legal and non-legal constraints analyzed in Chapter VI.

Program of Compliance. Evaluating this program is particularly difficult in view of the shortcomings in the available data. However, a few tentative inferences can be drawn. In particular, the Program increased public awareness of the provisions and nature of competition policy which undoubtedly led to the generation of some complaints and to businessmen taking courses of conduct to comply with the provisions of the Act. In terms of compliance requests made to the Director, the record suggests that the Program of Compliance has had an effect, particularly in the areas of price discrimination and conspiracy.

In sum, then, the measures of the effectiveness of competition policy do not present a uniform picture of increasing or decreasing effectiveness. Hence, any overall judgement of the effectiveness must, implicitly or explicitly, involve an assessment of the various indices of effectiveness developed here and their relative values over the period 1960/61-1974/75. In this regard the lack of effectiveness of penalties and remedies is probably most significant. There seems little point in the Director detecting offences more quickly and with greater frequency, the Attorney General securing more convictions as a percentage of cases taken to court and the administrative machinery processing cases more quickly, if, as shown in Chapter V, the penalties and remedies are demonstrably

inadequate. Hence, overall then, despite some improvements in the administrative machinery, the effectiveness of competition policy falls well short of the potential, given the existing penalties and remedies under the Combines Investigation Act.

### 7.2.4. Discretion of the Director

The discretion of the Director of Investigation and Research in determining in which instances to conduct an inquiry, by examining both the legal and non-legal constraints, was discussed. The purpose was to assess the potential and scope for the use of economic criteria in the selection of inquiries. The examination of the legal constraints showed that the Director had, potentially at least, great discretion in deciding in which cases to initiate an inquiry. This reflected the provision allowing an inquiry to be commenced by the Director whenever there existed "reason to believe" that an offence had been committed. Examination of the record showed that most inquiries were started on the initiation of the Director.

However, an examination of the basis of "reason to believe" over the period 1960/61 to 1974/75, demonstrated that most inquiries were started after a complaint had been received from a member of the public. This was explained in terms of the jurisprudence on mergers and the difficulty of the Director in refusing to act on information received from the public. Hence, the existence of the "reason to believe" grounds for starting an inquiry has never been fully exploited due to the reliance on complaints as the starter for inquiries.

Nevertheless, despite the reliance on complaints, the volume is sufficiently large relative to the resources of the Office of the Director, that discretion is exercised in terms of the priority accorded cases based on rough-and-ready economic considerations. In other words discretion does exist and has been used. This implies that scope exists, albeit constrained, for the use of economic criteria in the selection of inquiries by the Director.

## 7.3. Summary of Recommendations

A number of recommendations have been made in the course of the study. The intention here is to summarize the more important ones. Reference to the main body of the study provides the underlying rationale for these recommendations. It should be noted that although the examination of competition policy undertaken here refers to the period 1960/61-1974/75, the recommendations take into

account the Stage I amendments of 1976 and the proposed Stage II reforms.

Fines. The $1 million maximum fine introduced in the Stage I amendments for conspiracies should be abolished and replaced with a higher maximum. The rule suggested here is 10 per cent of sales of the enterprise for each year of the offence, with a minimum of one year. Serious consideration should also be given to the establishment of a minimum fine, such as one per cent of enterprise sales. The minimum fine, however, has a number of shortcomings and hence the suggestion is tentative. Both the minimum and maximum would apply to all offence categories under the Act. Only the sales of the enterprise in the market subject to prosecution would be included (i.e., for a diversified enterprise not all of its sales would be used to assess the appropriate maximum fine). Sales would refer to those made during the period of the offence, not current sales multiplied by the length of the offence. This provides an incentive for prompt enforcement.

Tariffs. The responsibility for deciding whether a tariff should be reduced under the existing provisions of the Act and the proposed Stage II amendments rests with the Governor in Council (i.e., the government of the day). The change recommended is that after a finding that a tariff should be reduced or eliminated by the RTPC (or the specialized tribunal which will succeed the RTPC under the proposed Stage II amendments), the Minister of Finance would be required to implement the tariff reduction unless following the issuance of a show-cause order to the enterprises concerned, they were able to justify, in public hearings, a departure from the Commission's views. It might also be advisable to extend the right of being heard to any enterpreneur having a direct interest (e.g., wholesaler or retailer) and to suppliers not involved in the restriction.

Authority to Instruct Counsel. The arrangements with respect to criminal prosecutions,[5] which remain essentially unchanged under Stage I and II compared with the period of 1960/61 to 1974/75, should be revised. The Attorney General has, at present, the exclusive right and responsibility to: (a) institute legal proceedings under the Act; (b) appoint and instruct Crown Counsel. The right

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5. Of course, with respect to the civil law provisions of Stage I and II, the Director has the power to go before the RTPC or its successor on his own authority as well as to instruct counsel.

to appoint and instruct Counsel should be delegated by the Attorney General to the Director.[6] A pool of lawyers from which counsel is selected might be designated jointly by the Director and the Attorney General. The right to institute proceedings would remain with the Attorney General of Canada.

Guidelines for Changes in the Machinery of Administration and Enforcement. The changes in responsibility recommended under the two headings "tariffs" and "authority to instruct counsel" are consistent with a general rule of thumb which should guide policy makers in considering changes in the administrative machinery of competition policy: reduce the responsibilities and power of the Governor in Council (i.e., government of the day) and the Attorney General. As has been demonstrated above, these two particular institutions have considerably hampered the efficient and effective administration of competition policy with respect to tariffs and legal proceedings, respectively. Part of the reason is that these two institutions face pressures by those groups affected adversely by a potential tariff reduction, divestiture or prosecution. This pressure is likely to increase under Stages I and II, which provide for private damage suits and class actions, respectively, both of which are likely to be brought only after a successful public prosecution. Hence, by shifting some responsibility for these decisions to the Director and the RTPC (or the specialized tribunal which will succeed it under Stage II), the government of the day and the Attorney General would neutralize and insulate themselves at least partially from such influences.

Selection of Inquiries by the Director. Complex models weighing a multitude of legal, economic and public profile factors, some of which may not be quantifiable, such as precedence value, do not seem feasible options for inquiry selection. Much better to accept that the real world is a complicated and difficult place and to start with small beginnings. A checklist of legal, economic and public profile factors that would *a priori* be important may seem an unimpressive start but at least those taking decisions are likely to consider *all* the relevant factors and maybe some better decisions will be made. The cost is likely to be minimal. After some experimentation with such a procedure a more formalized model may emerge.

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6. One possible arrangement, which worked well in British Columbia, would be for the Director to recruit and instruct the lawyers but for the Attorney General to pay. (See Neilson, 1977, p. 174, for details.)

Productivity Improvements. No specific suggestions for productivity improvements are made here. However, the recommendations made under the heading "authority to instruct counsel" are likely to reduce duplication between the Office of the Director and the Attorney General and avoid unnecessary delay in the processing of cases, which has been experienced to date. Since the Director would have the authority to hire and instruct counsel, this would provide an incentive for lawyers employed by the Attorney General to provide adequate service, for the Director has the alternative of the private sector. On a more general plane, the greater responsibility that the Office of the Director would obtain under the recommendations made here is likely to increase individual incentives to produce, since a greater involvement and commitment could easily develop.

The above recommendations are put forward as a modest set of proposals for increasing the effectiveness and efficiency of the administration and enforcement of competition policy in Canada. The proposals are made upon the basis of a careful evaluation and sifting of the evidence. No major reorganization of agencies is envisaged in order to achieve compliance with the proposals, just a slight rearrangement of responsibility between the various pieces of administrative machinery.

## 7.4 Applicability of Performance Measurement to Competition Policy

In attempting to assess the applicability of performance measurement on the basis of this study, two important caveats should be considered. First, this study was conducted on an ex post basis, not ex ante. In other words, the behaviour and decisions of those agencies responsible for the administration and enforcement of competition policy were not influenced by the measures of efficiency and effectiveness presented here. Any such set of measures which is designed and put in place now, for the purposes of allocating resources by the Government, is likely to influence the behaviour of the Director and the Attorney General, although the judiciary and the RTPC are unlikely to be affected. Clearly this is as it should be. However, an ill-thought or partial set of measures could easily result in much more harm than good. One example suffices to make the point. An indicator of effectiveness used here is the percentage of formal inquiries conducted by the Director which resulted in a reference to either the RTPC or the Attorney General. The higher this percentage

the more effective is the selection procedure by the Director. However, uncritical application of this criteria could lead to an "excessively" cautious policy in selecting cases. Only those inquiries which are absolutely certain to succeed may be actually carried out or, alternatively, more inquiries than should be are referred to the Attorney General, so that friction increases between the Director and the Attorney General. Hence the measures suggested should be such that the implications of one indicator are seen in terms of the other. It therefore seems unlikely any one measure will be able to indicate overall productivity or effectiveness.

Secondly, the period over which performance measurement was applied, 1960/61-1974/75, was relatively stable both in terms of the institutional framework and the range/scope of the Combines Investigation Act. In the recent past a number of important non-marginal changes have taken place in both the institutional framework and the scope of the Combines Investigation Act. For example, services are now covered completely by the Act, a specialized tribunal replacing the RTPC under Stage II would have powers to adjudicate in the areas of reviewable practices[7] to which it is proposed to add under Stage II mergers, specialisation agreements and monopolization. Until definitive judgments are made in these areas, novel inquiries and cases will consume a greater amount of resources than an equal number of inquiries and cases concerning settled sections of the Act. The Office of the Director has been completely reorganized. Hence, the application of performance measurement at this time is likely to be particularly difficult and any results should be interpreted with great care.

On a more general level, this study has shown that there is a considerable difference between the time at which resources are expensed and the time the final output appears. For example, a merger and/or monopoly prosecution takes, on average, almost eight years from the opening of the file on receipt of a complaint to the final judgement by the judiciary. Hence inputs expensed today result in measurable outputs several years in the future. This study has also shown that the annual output of some of the more important items, such as prosecutions, grouped by offence, is quite small (i.e., 10). Given these small cell sizes, it is clearly very difficult to generalize about the efficiency and effectiveness of competition policy on an annual basis.

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7. Under Stage I the RTPC has the power to adjudicate on reviewable practices.

One method to get around this problem is to estimate five-year moving averages.

In sum, many of the measures of efficiency and effectiveness which have been developed here for the administration and enforcement of competition policy over the period 1960/61-1974/75, can be applied to the present and future operations of competition policy. However, the interpretation of these indices, in view of a number of non-marginal changes either proposed in Stage II or introduced on January 1, 1976 in Stage I, is likely to be difficult in the near future. The measures would seem to be most useful in suggesting questions about the efficiency and effectiveness of competition policy, not necessarily answering them. Finally, as a method of allocating resources, performance measurement would seem to be of use on a longer-term (say three to five years) basis because of the small annual number of outputs and the difference between the expensing of inputs and the resulting outputs.

# APPENDIX A

## THE COLLECTION AND SELECTION OF DATA ON COMPETITION POLICY

### A.1 Introduction

The source note of most of the tables presented in this study reads, in part, as follows: "Data gathered from the files of the Director of Investigation and Research by P.K. Gorecki and W.T. Stanbury."[1] The purpose of this appendix is to provide some details of the data and the method of collection. Section A.2 describes the organization and selection of data while section A.3 refers to the individual data basis.

In gathering the data invaluable assistance was received from several individuals. Barbara Dench guided us through the quirks and idiosyncrasies of the filing system, as well as connecting the reference to a discontinued inquiry[2] in the Directors' Annual Report with the corresponding set of files. Considerable help was rendered by Bruce Kendall, who was temporarily re-assigned from the enforcement activities of the Office of the Director, in

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1. The Office of the Director began a project on resource allocation in the fall of 1975 involving P. Gorecki and J. Whybrow. Contemporaneously, W.T. Stanbury of the University of British Columbia arrived in Ottawa to do a study for the Canadian Consumer Research Council on the administration and enforcement of competition policy in Canada. In order to complete this study, W.T. Stanbury requested and was granted access to the confidential files of the Office of the Director. Almost immediately discussions took place between Gorecki, Stanbury, and Whybrow which resulted in the decision to work jointly on the formation of a common data base. However, before any work on the data base began J. Whybrow was assigned to other work in the Office of the Director.

2. Discontinued inquiries are usually referred to in the Annual Report in such a way that it is difficult, if not impossible, to identify the industry and enterprises concerned. This is because of the confidentiality of the Director's work.

transferring information from the files to coding forms. Finally, Jim Sator ably arranged the data upon a computer tape.

## A.2 Organization and Selection of Data

The scope of the collection of information on the activities of the Office of the Director was selected by asking the following question: once a file has been opened either on the receipt of a complaint, a six-citizen declaration, by the Minister, or at the behest of a member of the staff of the Director, what are the possible outcomes of such a step? Five possible outcomes were identified for the purposes of collecting data: a preliminary inquiry; a discontinued inquiry; a Restrictive Trade Commission Report which the Attorney General decided did not warrant a prosecution; a direct reference to the Attorney General by the Director which did not warrant a prosecution; a prosecution.[3] The soundness of this approach was confirmed as the data collection procedure commenced since both the availability and nature of the data differed systematically by outcome. The rest of this appendix largely consists of the description of the data collected, organized by the above listed five outcomes.

It should be noted that not all the activities of the Director of Investigation and Research relating to the administration and enforcement of competition policy in Canada are covered by the information presented in this appendix.[4] The omitted activities fall into three categories. First, those activities for which there are only a

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3. One problem regards that of deciding whether a particular outcome (e.g., discontinued inquiry X) falls within the period selected for study (i.e., 1960/61-1974/75). No problem arises for preliminary inquiries, which are of a very short duration. However, for most of the other outcomes, there is a considerable time difference between the start and finish. The convention adopted here is to date an outcome by when a final decision had been made by either the Director or the Attorney General, the two major officials responsible for administration and enforcement.

4. In terms of Table 4-11 above the specific outputs not considered in this appendix are special remedies, research inquiries and compliance requests.

small number of observations, all of which are a matter of public record. Research inquiries fall into this category. Second, those activities which were being studied by other researchers. In this regard, Charles Stevenson's work on the Program of Compliance meant that this topic is omitted from consideration in this appendix. Third, those activities of the Director, such as participation in international agencies (e.g., OECD, UNCTAD) and Interdepartment Committees which it is difficult, if not impossible, to quantify, are not included. These omissions make it apparent that the data basis presented here relates to those activities of the Director of Investigation and Research which are concerned directly with the administration and enforcement of the Combines Investigation Act.[5]

## A.3 Individual Data Basis

### A.3.1 Prosecutions

A prosecution is defined as a prohibition order per section 30(2) of the Combines Investigation Act or a criminal charge (referred to as a regular prosecution) under the Act. In both instances, attention is confined exclusively to the conspiracy, RPM and/or refusal-to-sell, merger and/or monopoly and price discrimination provisions.[6] In other words, no reference is made to the misleading advertising provisions of the Combines Investigation Act. This applies to all the data collected. Special remedies such as patent revocation, are also excluded from the definition of prosecution. A prosecution is dated by when the information is laid. Table A-1 provides a listing of the 91 prosecutions undertaken during the period 1960/61-1974/75.

### A.3.2 Reports of the RTPC which Resulted in no Prosecution

Reports of the RTPC not prosecuted are defined as those instances in which a report of the RTPC was published and the Attorney General decided not to institute a prosecution (i.e., regular or prohibition order per 30(2)).

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5. The only exception to this statement is special remedies.

6. Price discrimination is defined to include predatory pricing, unreasonably low prices, discriminatory advertising allowances, as well as price discrimination itself.

RTPC reports not prosecuted are dated by when the report was published. To all intents and purposes this is usually when the Attorney General decides not to prosecute. Table A-2 details the 19 instances, over the 1960/61-1974/75 period, which fall into the RTPC not prosecuted category.

A.3.3 Reference to the Attorney General not Prosecuted

Reference to the Attorney General not prosecuted refers to these instances in which the Director of Investigation and Research, pursuant to section 15(1) of the Act, sends a summary of evidence directly to the Attorney General, who then decides that no prosecution is warranted. Such instances are dated by when the Attorney General took the decision not to prosecute. Table A-3 provides details of the 15 instances, over the period 1960/61-1974/75, which fall into the category reference to the Attorney General not prosecuted.

A.3.4 Discontinued Inquiry

The Director of Investigation and Research, after conducting an investigation, may decide that on the basis of the evidence collected, there are insufficient grounds for a prosecution or that the inquiry does not raise issues and concerns which should be brought to the attention of a wider public through an RTPC report. In such instances, the investigation is discontinued by a letter to the Minister responsible to Parliament for the administration of the Act and, usually, by an application for concurrence in the discontinuance, where provided for by the Act, to the RTPC. Such inquiries are referred to as discontinued inquiries. Discontinued inquiries are dated when the decision to discontinue the inquiry has been taken. A listing of discontinued inquiries may be found in the Directors' Annual Reports for the years 1960/61-1974/75.[7]

A.3.5 Preliminary Inquiry

Preliminary inquiries refer to brief investigations undertaken to see whether, on the basis of

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7. In a small number of instances, however, there will be discrepancies between the totals in the Annual Report and those reported in Table 4-6, above: five in 1960/61-1964/65; five in 1965/66-1969/70; 18 in 1970/71-1974/75. This reflects the inclusion here of several discontinued inquiries which were not mentioned in the Directors' Annual Report.

readily available information, the Director has reason to believe that an offence has or is about to be committed. The duration of a preliminary inquiry will usually be a week or perhaps two. Such inquiries are usually started by a complaint from a consumer, businessman, trade association, elected officials, or a government agency/department. In some instances a preliminary inquiry results in a formal inquiry and subsequent prosecution. A preliminary inquiry is dated by the date of the opening of the file. No data are presented on the 2581 preliminary inquiries conducted over the period 1960/61-1974/75, in this appendix.

TABLE A-1

Prosecutions Under the Combines Investigation Act:

1960/61 - 1974/75

| I.D.[a] | Reference in Annual Report[b] | TITLE (as per Annual Report) | Procedure[d] | Type of Prosecution[e] | Outcome[f] | Offence Category[g] | Geographic Category[h] | Large Enterprise Involvement[i] | Concentration Category[j] | Period[k] |
|---|---|---|---|---|---|---|---|---|---|---|
| 1 | 1965/66, pp. 68-69 | Skis | 2 | 1 | 1 | 10 | 1 | 0 | 9 | 2 |
| 2 | 1974/75, p. 44 | Hartz Mountain Pet Supplies Limited | 2 | 2 | 2 | 6 | 3 | 0 | 1 | 3 |
| 3 | 1976/77, p. 22 | Fairmont Plating (Alta) Ltd. - Replated Automobile Bumpers | 2 | 2 | 4 | 4 | 1 | 21 | 1 | 3 |
| 4 | 1975/76, p. 23 | Kito Canada Ltd. and Little Hoky Sales - Carpet Sweepers (Kito Canada Ltd.)[c] | 2 | 2 | 3 | 6 | 3 | 0 | 9 | 3 |
| 5 | 1974/75, p. 44 | Rubbermaid (Canada) Limited and C.E. Springer & Company Limited - Housewares (C.E. Springer & Company Limited)[c] | 2 | 2 | 2 | 6 | 1 | 0 | 9 | 3 |
| 6 | 1976/77, p. 20 | Extruded Aluminium - Montreal | 2 | 2 | 4 | 1 | 3 | 11 | 1 | 3 |
| 7 | 1969/70, p. 45 | Prosecution - Import Pool Car Consolidators - Vancouver | 2 | 2 | 3 | 1 | 2 | 0 | 1 | 2 |
| 8 | 1967/68, p. 39 | Prosecution - Road Surfacing Materials - Ontario | 1 | 2 | 4 | 1 | 2 | 0 | 3 | 2 |
| 9 | 1969/70, pp. 51-53 | Prosecution - Phosphorous Products & Sodium Chlorate | 1 | 2 | 2 | 11 | 3 | 21 | 1 | 2 |
| 10 | 1975/76, p. 22 | Sulphuric Acid - British Columbia | 2 | 2 | 4 | 12 | 2 | 21, 11 | 1 | 3 |
| 11 | 1974/75, p. 44 | LePage's Limited - Waterproofing & Sealing Materials | 2 | 2 | 2 | 6 | 1 | 0 | 9 | 3 |
| 12 | 1968/69, p. 36 | Prosecution - Montreal Plumbing | 1 | 2 | 2 | 1 | 2 | 21 | 4 | 2 |
| 13 | 1968/69, p. 62 | Prosecution - Perfume (Lentheric) | 2 | 2 | 2 | 6 | 3 | 0 | 9 | 2 |
| 14 | 1968/69, pp. 38-39 | Prosecution - Meat Packing - New Brunswick | 2 | 2 | 2 | 1 | 1 | 13 | 1 | 2 |
| 15 | 1977/78, p. 43 | Sugar - Eastern | 2 | 2 | 5 | 1 | 2 | 11 | 1 | 3 |
| 16 | 1967/68, pp. 39-40 | Prosecution - Paperboard Shipping Containers | 1 | 2 | 2 | 1 | 3 | 13 | 1 | 1 |
| 17 | 1974/75, p. 44 | Rubbermaid (Canada) Limited and C.E. Springer & Company Limited - Housewares. [Rubbermaid (Canada) Limited][c] | 2 | 2 | 2 | 13 | 3 | 0 | 9 | 3 |
| 18 | 1973/74, p. 46 | Pfizer Company Limited - Soil Fumigant | 2 | 2 | 2 | 6 | 2 | 0 | 9 | 3 |
| 19 | 1977/78, pp. 29-30 | H.D. Lee of Canada, Ltd. - Men's Clothing | 2 | 2 | 5 | 10 | 3 | 0 | 3 | 3 |
| 20 | 1968/69, p. 62 | Prosecution - Skis and Ski Poles | 2 | 2 | 2 | 10 | 3 | 0 | 9 | 2 |

TABLE A-1 Continued

| I.D.[a] | Reference in Annual Report[b] | TITLE (as per Annual Report) | Procedure[d] | Type of Prosecution[e] | Outcome[f] | Offence Category[g] | Geographic Category[h] | Large Enterprise Involvement[i] | Concentration Category[j] | Period[k] |
|---|---|---|---|---|---|---|---|---|---|---|
| 21 | 1971/72, p. 21 | Building Supplies - Toronto | 2 | 1 | 1 | 1 | 1 | 0 | 3 | 3 |
| 22 | 1969/70, p. 71 | Prosecution - Thomas Products Corporation Limited | 2 | 2 | 2 | 6 | 2 | 0 | 9 | 2 |
| 23 | 1970/71, p. 65 | Prosecution - Herdt and Charton Inc. | 2 | 2 | 2 | 10 | 1 | 0 | 9 | 3 |
| 24 | 1975/76, pp. 34-35 | Metal Culverts - Ontario and Quebec | 1 | 2 | 3 | 1 | 2 | 21 | 1 | 3 |
| 25 | 1971/72, p. 22 | Gasoline - Nova Scotia | 2 | 1 | 1 | 1 | 2 | 0 | 9 | 3 |
| 26 | 1972/73, p. 61 | Film Processing - Guelph, Ontario | 2 | 1 | 1 | 4 | 1 | 0 | 9 | 3 |
| 27 | 1977/78, p. 29 | Hoffman - LaRoche Limited - Drugs | 2 | 2 | 5 | 14 | 3 | 0 | 1 | 3 |
| 28 | 1974/75, p. 26 | Lumber - Toronto | 2 | 2 | 2 | 1 | 2 | 0 | 3 | 3 |
| 29 | 1969/70, pp. 46-49 | French Language Books - Province of Quebec | 2 | 1 | 1 | 1 | 2 | 0 | 2 | 2 |
| 30 | 1971/72, p. 46 | Supply of Eggs, Kingston and Collins Bay Ontario | 1 | 1 | 1 | 6 | 1 | 0 | 2 | 2 |
| 31 | 1970/71, pp. 48-49 | Monopoly - Babies' Cotton Diapers - Montreal Area | 2 | 1 | 1 | 3 | 1 | 0 | 1 | 3 |
| 32 | 1973/74, p. 47 | Lange Canada, Inc. - St. Jerome, P.Q. | 2 | 1 | 1 | 7 | 1 | 0 | 3 | 3 |
| 33 | 1966/67, pp. 31-32 | Prosecution - Ready-Mixed Concrete | 1 | 2 | 2 | 1 | 1 | 0 | 1 | 2 |
| 34 | 1972/73, pp. 46-47 | Cast Iron Soil Pipe and Fittings | 1 | 1 | 1 | 11 | 2 | 21 | 1 | 3 |
| 35 | 1974/75, p. 43 | Browning Arms Company of Canada Limited - Toronto - Firearms | 2 | 2 | 2 | 6 | 2 | 0 | 9 | 3 |
| 36 | 1969/70, p. 44 | Prosecution - Resilient Flooring | 1 | 2 | 2 | 1 | 1 | 0 | 3 | 2 |
| 37 | 1970/71, p. 43 | Prosecution - Prescription Drugs, B.C. - Vancouver | 2 | 2 | 3 | 1 | 2 | 0 | 9 | 2 |
| 38 | 1971/72, pp. 20-21 | Prosecution - Ready Mixed Concrete - Toronto | 2 | 2 | 2 | 1 | 1 | 0 | 2 | 3 |
| 39 | 1971/72, p. 22 | Roofs and Roofing Materials - Vancouver | 2 | 1 | 1 | 1 | 1 | 0 | 3 | 3 |
| 40 | 1973/74, p. 27 | Milk - Sudbury | 2 | 2 | 7 | 1 | 1 | 21 | 1 | 3 |
| 41 | 1976/77, pp. 32-33 | Electric Large Lamps | 1 | 2 | 2 | 12 | 3 | 12, 21 | 1 | 3 |
| 42 | 1974/75, p. 26 | Cement - B.C. | 2 | 2 | 2 | 1 | 2 | 11 | 1 | 3 |
| 43 | 1973/74, pp. 24-25 | Cement - Ontario | 2 | 2 | 7 | 1 | 2 | 11, 21 | 1 | 3 |
| 44 | 1972/73, p. 36 | Pesticides (Sherwin-Williams Company of Canada Limited)[c] | 1 | 1 | 1 | 16 | 3 | 21 | 9 | 3 |
| 45 | 1972/73, p. 36 | Pesticides (Chipman Chemicals Limited)[c] | 1 | 1 | 1 | 16 | 2 | 11 | 9 | 3 |
| 46 | 1974/75, p. 25 | Pesticides (F.M.C. Machinery & Chemicals Ltd.)[c] | 1 | 1 | 6 | 1 | 2 | 0 | 9 | 3 |
| 47 | 1976/77, p. 29 | Business Forms | 1 | 2 | 4 | 1 | 2 | 11, 23 | 1 | 3 |
| 48 | 1976/77, pp. 34-35 | Newspapers - New Brunswick | 2 | 2 | 4 | 11 | 2 | 0 | 1 | 3 |
| 49 | 1976/77, p. 33 | Fire Insurance - Insurance on Property - Nova Scotia | 2 | 2 | 4 | 1 | 2 | 0 | 4 | 3 |
| 50 | 1974/75, p. 44 | Croydon Manufacturing Co. Limited - Coats | 2 | 2 | 2 | 7 | 1 | 0 | 4 | 3 |
| 51 | 1975/76, pp. 20-21 | Automobile Body Parts - Newfoundland | 2 | 2 | 2 | 1 | 1 | 0 | 1 | 3 |

TABLE A-1 Continued

| I.D.[a] | Reference in Annual Report[b] | TITLE (as per Annual Report) | Procedure[d] | Type of Prosecution[e] | Outcome[f] | Offence Category[g] | Geographic Category[h] | Large Enterprise Involvement[i] | Concentration Category[j] | Period[k] |
|---|---|---|---|---|---|---|---|---|---|---|
| 52 | 1974/75, p. 26 | Medical Gases - Montreal | 2 | 1 | 4 | 1 | 3 | 12, 22 | 1 | 3 |
| 53 | 1973/74, pp. 32-33 | Groceries (Retailing) - Calgary and Edmonton, Alberta | 2 | 1 | 1 | 3 | 1 | 0 | 2 | 3 |
| 54 | 1964/65, p. 33 | Prosecution - Sewers and Water Mains (Town of Duvernay) | 1 | 2 | 2 | 1 | 1 | 0 | 9 | 1 |
| 55 | 1966/67, p. 57 | Prosecution - Ottawa Milk | 1 | 2 | 4 | 5 | 1 | 0 | 9 | 2 |
| 56 | 1966/67, pp. 35-36 | Prosecution - Sand and Gravel Trucking - Brantford | 2 | 2 | 3 | 1 | 1 | 0 | 9 | 1 |
| 57 | 1974/75, p. 43 | Black and Decker Manufacturing Company, Limited - Tools | 2 | 2 | 2 | 10 | 1 | 21 | 9 | 3 |
| 58 | 1971/72, pp. 22-23 | Stove Oil - Salmon Arm, B.C. | 2 | 1 | 1 | 1 | 1 | 0 | 1 | 3 |
| 59 | 1966/67, p. 30 | Prosecution - Hull Paving | 1 | 2 | 2 | 1 | 1 | 0 | 9 | 2 |
| 60 | 1969/70, p. 44 | Dairy Products, Montreal | 1 | 1 | 1 | 1 | 1 | 21 | 3 | 2 |
| 61 | 1967/68, p. 40 | Prosecution - Laminated Timbers | 1 | 2 | 2 | 1 | 2 | 0 | 1 | 2 |
| 62 | 1969/70, pp. 45-46 | Prosecution - Lathing and Plastering | 2 | 2 | 2 | 1 | 1 | 0 | 2 | 2 |
| 63 | 1974/75, pp. 43-44 | Petrofina Canada Ltd. - Gasoline | 2 | 2 | 2 | 6 | 1 | 11 | 9 | 3 |
| 64 | 1972/73, p. 64 | Arrow Petroleums Limited - Windsor, Ontario | 2 | 2 | 3 | 6 | 1 | 0 | 9 | 3 |
| 65 | 1967/68, p. 65 | Prosecution - Greeting Cards | 2 | 2 | 3 | 15 | 1 | 0 | 9 | 1 |
| 67 | 1972/73, pp. 63/64 | Corning Glass Works of Canada Ltd. | 1 | 2 | 3 | 6 | 1 | 0 | 9 | 2 |
| 68 | 1971/72, p. 46 | Prosecution - Maxda Motors of Canada Ltd. | 2 | 2 | 7 | 10 | 2 | 0 | 4 | 3 |
| 69 | 1972/73, p. 64 | B.D. Wait Co. Limited | 2 | 2 | 7 | 6 | 1 | 0 | 9 | 3 |
| 70 | 1973/74, p. 26 | Beer-Tavern Keepers - Quebec City | 2 | 2 | 2 | 1 | 1 | 0 | 4 | 3 |
| 71 | 1971/72, pp. 46-47 | Prosecution - Magnasonic Canada Limited | 2 | 2 | 2 | 6 | 1 | 21 | 9 | 3 |
| 72 | 1967/68, p0. 41-42 | Prosecution - Mandarin Oranges - Vancouver | 2 | 2 | 3 | 1 | 3 | 0 | 1 | 2 |
| 73 | 1974/75, p. 45 | Kito Canada Ltd. and Little Hoky Sales - Carpet Sweepers (A.T. Radies)[c] | 2 | 2 | 3 | 6 | 3 | 0 | 9 | 3 |
| 75 | 1960/61, p. 36 | Gasoline, Toronto Case | 1 | 2 | 4 | 6 | 1 | 0 | 4 | 1 |
| 76 | 1968/69, p. 61 | Prosecution - Electric Appliances Sunbeam Corporation (Canada) Limited | 1 | 2 | 3 | 6 | 3 | 21 | 2 | 1 |
| 77 | 1962/63, p. 40 | Oil Filters - Kralinator Limited | 2 | 2 | 3 | 10 | 1 | 0 | 9 | 1 |
| 78 | 1961/62, pp. 13-14 | Coal Case, Sault Ste. Marie | 1 | 2 | 3 | 1 | 1 | 0 | 1 | 1 |
| 79 | 1963/64, pp. 25-26 | Prosecution - Belts | 1 | 2 | 2 | 1 | 1 | 0 | 3 | 1 |
| 80 | 1965/66, pp. 37-38 | Prosecution - Pencils | 1 | 2 | 2 | 1 | 3 | 0 | 1 | 2 |
| 81 | 1966/67, pp. 34-35 | Prosecution - Linen Supply - Island of Montreal | 2 | 2 | 2 | 1 | 1 | 0 | 3 | 2 |
| 82 | 1964/65, pp. 66-68 | Gasoline - (Irving Oil) | 2 | 1 | 1 | 6 | 2 | 0 | 9 | 1 |
| 83 | 1968/69, pp. 51-52 | Prosecution - Evaporated Milk | 1 | 2 | 4 | 4 | 2 | 21 | 1 | 2 |
| 84 | 1968/69, p. 35 | Prosecution - Alberta Plumbing Supplies | 1 | 2 | 2 | 1 | 2 | 22 | 2 | 2 |

TABLE A-1 Continued

| I.D.[a] | Reference in Annual Report[b] | TITLE (as per Annual Report) | Procedure[d] | Type of Prosecution[e] | Outcome[f] | Offence Category[g] | Geographic Category[h] | Large Enterprise Involvement[i] | Concentration Category[j] | Period[k] |
|---|---|---|---|---|---|---|---|---|---|---|
| 85 | 1968/69, p. 62 | Prosecution - Electric Razors (Philips) (Toronto)[c] | 2 | 2 | 3 | 6 | 3 | 21 | 2 | 1 |
| 86 | 1967/68, p. 66 | Prosecution - Electric Razors (Philips) (Montreal)[c] | 2 | 2 | 2 | 10 | 3 | 21 | 2 | 1 |
| 87 | 1967/68, p. 39 | Prosecution - Eastern Sugar | 1 | 2 | 2 | 1 | 2 | 11 | 1 | 1 |
| 88 | 1965/66, p. 67 | Prosecution - Surgical Supplies | 1 | 2 | 3 | 6 | 3 | 0 | 9 | 1 |
| 89 | 1963/64, pp. 58-59 | Cameras and Related Products (Arrow Photographic Equipment Limited)[c] | 1 | 1 | 1 | 10 | 3 | 0 | 9 | 1 |
| 90 | 1963/64, pp. 58-59 | Cameras and Related Products (Garlick Films Ltd.)[c] | 1 | 1 | 1 | 10 | 3 | 0 | 9 | 1 |
| 91 | 1975/76, p. 23 | Glenayr-Knit Limited - Ladies' Ready-To-Wear Clothing | 2 | 2 | 2 | 10 | 2 | 0 | 4 | 3 |
| 92 | 1964/65, pp. 33-35 | Ice Cream - Vancouver | 2 | 1 | 1 | 1 | 1 | 21 | 2 | 1 |
| 93 | 1967/68, p. 58 | Mary Maxim Knitting Wool | 1 | 1 | 1 | 10 | 3 | 0 | 2 | 2 |

a. Identification number used for purposes of coding.

b. A number of references will typically be found to each prosecution in various Annual Reports of the Director. The final reference is the one listed in the table.

c. In several instances the same heading in the Annual Report refers to more than one prosecution. The title in parenthesis refers to the particular prosecution.

d. 1 = via RTPC; 2 = direct to the Attorney General.

e. 1 = prohibition order per section 30(2); 2 = regular prosecution.

f. 1 = Crown secure prohibition order; 2 = Crown secures conviction after guilty plea; 3 = Crown secures conviction after trial; 4 = all firms/individuals acquitted; 5 = in process as of March 31, 1978; 6 = charges dropped; 7 = Crown lost at preliminary hearing. (Note conviction implies one or more of the defendants were convicted.)

g. 1 = conspiracy; 2 = merger; 3 = monopoly; 4 = price discrimination; 5 = predatory pricing; 6 = resale price maintenance; 7 = refusal to sell; 8 = discriminatory advertising allowances; 10 = resale price maintenance and refusal to sell; 11 = merger and monopoly; 12 = conspiracy and monopoly; 13 = resale price maintenance and discriminatory advertising allowances; 14 = monopoly and predatory pricing; 15 = resale price maintenance and refusal to supply; 16 = resale price maintenance and conspiracy.

h. 1 = local; 2 = regional (i.e.,one or more provinces); 3 = national (i.e.,Canada wide).

i. 11 = one enterprise from top 100; 12 = two enterprises from top 100; 13 = three enterprises from top 100; 21 = one enterprise ranked from 101 to 400; 22 = two enterprises ranked from 101 to 400; 23 = three enterprises ranked from 101 to 400; 0 = no enterprises from the top 400 involved.

TABLE A-1 Footnotes Continued

j. 1 = 75/4-100/4; 2 = 50/4-75/4; 3 = 25/4-50/4; 4 = 0/4-25/4; 9 = not known, insufficient information.

k. 1 = 1960/61 - 1964/65; 2 = 1965/66 - 1969/70; 3 = 1970/71 - 1974/75.

SOURCE: Annual Report (various issues), data gathered from the files of the Director of Investigation and Research by P.K. Gorecki and W.T. Stanbury, and Hughes (1976).

Table A-2

Reports of the Restrictive Trade Practices Commission[a] Which Did Not Lead to a Prosecution: 1960/61 - 1974/75

| I.D.[b] | Report Citation[c] (RTPC, ...) | Offence Category[d] | Geographic Category[e] | Large Enterprise Involvement[f] | Concentration Category[g] | Period[h] |
|---|---|---|---|---|---|---|
| 401 | 1960c | 1 | 3 | 0 | 2 | 1 |
| 402 | 1960d | 1 | 3 | 0 | 4 | 1 |
| 403 | 1965 | 1 | 2 | 11 | 2 | 2 |
| 404 | 1961b | 4 | 1 | 11 | 1 | 1 |
| 405 | 1965d | 11 | 2 | 11 | 1 | 1 |
| 406 | 1961c | 2 | 2 | 0 | 2 | 1 |
| 407 | 1964a | 3 | 1 | 21 | 1 | 1 |
| 408 | 1965a | 11 | 1 | 21 | 1 | 1 |
| 409 | 1965b | 1 | 1 | 0 | 9 | 2 |
| 410 | 1966 | 6 | 1 | 11 | 1 | 2 |
| 411 | 1970 | 1 | 2 | 0 | 1 | 3 |
| 412 | 1972 | 1 | 1 | 0 | 4 | 3 |
| 413 | 1961 | 4 | 1 | 0 | 1 | 1 |
| 414 | 1961a | 4 | 1 | 11 | 1 | 1 |
| 415 | 1960a | 11 | 1 | 0 | 1 | 1 |
| 416 | 1962a | 2 | 2 | 11 | 1 | 1 |
| 417 | 1962c | 2 | 2 | 0 | 1 | 1 |
| 418 | 1969 | 1 | 1 | 0 | 4 | 2 |
| 419 | 1970a | 1 | 2 | 0 | 4 | 3 |

a. Excluding RTPC reports of a general or research nature. (Section 47 of the Act.)

b. Identification number used for purposes of coding.

c. See references for full title of report.

d. 1 = conspiracy; 2 = merger; 3 = monopoly; 4 = price discrimination; 6 = resale price maintenance; 11 = merger and monopoly.

e. 1 = local; 2 = regional (i.e., one or more provinces); 3 = national (i.e. Canada wide)

f. 11 = one enterprise from the top 100; 21 = one enterprise ranked from 101 to 400; 0 = no enterprises in top 400.

g. 1 = 75/4-100/4; 2 = 50/4-75/4; 3 = 25/4-50/4; 4 = 0/4-25/4; 9 = no data.

h. 1 = 1960/61 - 1964/65; 2 = 1965/66 - 1969/70; 3 = 1970/71-1974/75.

SOURCE: Data gathered from the files of the Director of Investigation and Research by P.K. Gorecki and W.T. Stanbury, Hughes (1976) and RTPC Reports (various).

TABLE A-3

References to the Attorney General of Canada by the Director of Investigation and Research Which Did Not Result in a Prosecution: 1960/61 - 1974/75

| I.D.[a] | Reference in Annual Report | Title[b] | Offence Category[c] | Geographic Category[d] | Large Enterprise Involvement[e] | Concentration Category[f] | Period[g] |
|---|---|---|---|---|---|---|---|
| 701 | 1971/72, p. 47 | Radio-Photographic Combinations | 6 | 9 | 0 | 9 | 3 |
| 702 | 1971/72, pp. 45-46 | Confectionery | 8 | 3 | 0 | 9 | 3 |
| 703 | 1972/73, p. 47 | Merger-Cement - Canada | 2 | 3 | 11 | 1 | 3 |
| 704 | 1972/73, pp. 39-40 | Hearing and Batteries - Calgary | 16 | 1 | 0 | 3 | 3 |
| 705 | 1972/73, p. 66 | Stereos and Television Sets | 6 | 3 | 21 | 9 | 3 |
| 706 | 1972/73, pp. 61-63 | Steel Pipe - Western Canada | 4 | 2 | 11 | 1 | 3 |
| 707 | 1972/73, pp. 65-66 | Gasoline - Winnipeg | 6 | 1 | 0 | 1 | 3 |
| 708 | 1973/74, pp. 33-34 | Distributional and Rental of Motion Picture Film | 12 | 2 | 21 | 1 | 3 |
| 709 | 1973/74, pp. 34-35 | Newspapers - Merger - Toronto | 2 | 1 | 21 | 1 | 3 |
| 710 | 1973/74, p. 27 | Imported Motor Vehicles - Montreal | 1 | 1 | 0 | 3 | 3 |
| 711 | 1973/74, p. 34 | Transparent Sheet Glass | 12 | 3 | 21 | 1 | 3 |
| 712 | 1973/74, p. 34 | Transportation | 3 | 2 | 21 | 1 | 3 |
| 713 | 1973/74, pp. 27-28 | Sulphur - Western Canada | 1 | 3 | 14, 25 | 2 | 3 |
| 714 | 1974/75, p. 45 | Skis and Ski Equipment | 6 | 3 | 0 | 9 | 3 |
| 715 | 1974/75, pp. 32-33 | Newspaper - Quebec City | 2 | 2 | 0 | 1 | 3 |

a. Identification number used for purposes of coding.

b. As found in Annual Report.

c. 1 = conspiracy; 2 = merger; 3 = monopoly; 4 = price discrimination; 6 = R.P.M.; 8 = discriminatory advertising allowances; 12 = conspiracy and monopoly; 16 = R.P.M. and monopoly.

d. 1 = local; 2 = regional (i.e. one or more provinces); 3 = national (i.e. Canada Wide); 9 = not known, insufficient information.

e. 11 = one enterprise from top 100; 14 = four enterprises from top 100; 21 = one enterprise ranked from 101 to 400; 25 = five enterprises ranked from 101 to 400; 0 = no enterprises from the top 400 involved.

f. 1 = 75/4-100/4; 2 = 50/4-75/4; 3 = 25/4-50/4; 4 = 0/4-25/4; 9 = not known, insufficient information.

g. 3 = 1970/71 - 1974/75.

SOURCE: Annual Report (various years), data gathered from the files of the Director of Investigation and Research by P.K. Gorecki and W.T. Stanbury, and Hughes (1976).

# APPENDIX B

## DESIGNING AND APPLYING AN APPROPRIATE METHODOLOGY FOR AGGREGATING THE OUTPUTS OF COMPETITION POLICY

### B.1 Introduction

In Chapter IV of this study, nine outputs of competition policy are identified and discussed: prosecutions; special remedies; reference to the Attorney General not prosecuted; reports of the Restrictive Trade Practices Commission which result in no prosecution; discontinued inquiries; preliminary inquiries; research inquiries; compliance requests; other. All of these outputs were quantifiable with the exception of "other". In measuring the productivity of the resources devoted to competition policy administration and enforcement, a problem arose over how to combine these disparate outputs into a single number, such that an overall productivity measure could be derived. Ideally, each output should be weighted by reference to its contribution to the objective of competition policy - a more efficient allocation of resources achieved via competitive markets. However, in the absence of a great deal more empirical information than is presently available, and likely to be collected, any direct estimation of the impact of the nine outputs on the competitive environment is not possible. An allocation method(s) had therefore to be considered in order to solve the resource problem.

The technique adopted here is commonly referred to as the Delphi method. This approach involves using the opinions of "experts" to form weights or "shadow" prices for the various outputs described in Chapter IV. In section B-2 the application of the technique is described, while section B-3 analyzes the "expert" opinions' evaluation of the outputs of competition policy.

### B.2 The Application of the Delphi Technique

Exhibit B-1 is the questionnaire and explanatory note which was circulated to solicit expert opinion on the outputs of competition policy. In addition there was a covering memorandum which read, in part,[1]

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1. The rest of the memorandum was concerned with matters not related to the Delphi technique's application.

In order to design better measures of productivity please could you fill in the attached questionnaire and return it to me as soon as possible. The questionnaire should be filled in after you have read Chapter IV, pp. 4-1 to 4-49 [i.e., sections 4.1 and 4.2 of the present study] and not in consultation with anybody else, if it is to be of any use. All replies should not identify the person who fills out the questionnaire.

Exhibit B-1

Questionnaire Used to Solicit 'Expert' Opinion on the Weighting of the Outputs and Offences Under the Combines Investigation Act

Designing Appropriate Measures of Productivity: The Weighting of Outputs

One of the problems in designing measures of productivity is the weighting of essentially disparate outputs. One technique which goes someway to solving this problem is the Delphi technique. This technique makes use of expert opinion in order to derive a set of weights. The purpose of the following exercise is to develop such a set of weights.

The main objective of competition policy is taken to be the achievement of the efficient allocation of resources through the creation of competitive markets. Here we are concerned with the extent to which competitive markets are achieved through compliance with the provisions of the Combines Investigation Act.

Table 1 presents various outputs of competition policy and Table 2 refers to the ranking of offences. Only four offence categories are included since that is where virtually all enforcement activity is concentrated. You are requested to attach weights to the outputs in Table 1 and, holding outputs constant, a weight to the offence categories. In attaching a weight it should be remembered that the period to which these weights will be applied is 1960/61 to 1974/75.

Any written comments on the subject would be most welcome.

Exhibit B-1 cont'd

TABLE 1

Ranking of Outputs

(Please tick appropriate box, a higher number indicates a higher ranking)

| Output | 0 | 1 | 2 | 3 | 4 | 5 | 6 | 7 | 8 | 9 | 10 | Cannot assign weight |
|---|---|---|---|---|---|---|---|---|---|---|---|---|
| Prosecution Per 30(2)[a] win | | | | | | | | | | | | |
| Per 30(2)[a] loss | | | | | | | | | | | | |
| Regular[b] win | | | | | | | | | | | | |
| Regular[b] loss | | | | | | | | | | | | |
| Special Remedy[c] Win | | | | | | | | | | | | |
| Loss | | | | | | | | | | | | |
| Reference to Attorney General not Prosecuted | | | | | | | | | | | | |
| Report of the RTPC not Prosecuted | | | | | | | | | | | | |
| Discontinued Inquiries | | | | | | | | | | | | |
| Preliminary Inquiries | | | | | | | | | | | | |
| Research Inquiries | | | | | | | | | | | | |
| Compliance Requests | | | | | | | | | | | | |

a. Only a prohibition order pursuant to section 30(2).

b. A criminal charge is laid under the Combines Investigation Act.

c. Refers here only to compulsory licensing of a patent.

Note: (i) Win means that one or more of those charged is convicted on one or more of the counts.

(ii) The terms are defined in detail in Chapter IV, section 4.2.

Exhibit B-1 cont'd

TABLE 2

Ranking of Offences

(Please tick appropriate box, a higher number indicates a higher ranking)

| Offence | 0 | 1 | 2 | 3 | 4 | 5 | 6 | 7 | 8 | 9 | 10 | Cannot assign weight |
|---|---|---|---|---|---|---|---|---|---|---|---|---|
| Conspiracy | | | | | | | | | | | | |
| RPM and/or Refusal to Sell | | | | | | | | | | | | |
| Merger and/or Monopoly | | | | | | | | | | | | |
| Price Discrimination | | | | | | | | | | | | |

Several points concerning the questionnaire should be noted. First, the output prosecution was divided into four sub-categories: regular prosecution win or loss; per 30(2) win or loss. Similarly special remedy was divided into win or loss. Second, the experts were asked to read the equivalent of sections 4.1 and 4.2 of Chapter IV[2] prior to filling in the questionnaire. This should result in a common understanding of the definition and meaning of the terms used in Exhibit B-1. Third, the experts were asked, specifically, to relate their weighting of the outputs to the period 1960/61-1974/75. This was done simply because the study presented here refers to this period. Had this specification not been included then the completion of the questionnaire would have been carried out in somewhat of a vacuum. Fourth, the questionnaire, in addition to soliciting data on the various outputs, also requested a weighting by type of offence: conspiracy, RPM and/or refusal-to-sell, merger and/or monopoly, price discrimination. This was the only piece of information which was available for all of the outputs listed in Table 1 of Exhibit B-1.

The experts selected to answer the questionnaires were present and former senior officials responsible for the administration and enforcement of competition policy in the Office of the Director: K. Decker, the Director R.J. Bertrand, R.M. Davidson, D.P. DeMelto, G. Lermer, T.D. MacDonald, J.J. Quinlan, M.P. O'Farrell, G.D. Orr. Of these nine officials, replies were received from eight which are detailed in Tables B-1 and B-2. These are discussed in the next section.

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2. There is little, if any, substantive difference between the final product presented here and the draft the "experts" were asked to read.

Only one of the eight replies commented upon the form of the questionnaire detailed in Exhibit B-1. The relevant comment was as follows:

> It is not clear whether Table 1 [of Exhibit B-1] is intended to present ten classes of equal size.[3] If so, a proper assessment of weights is not possible. The average prosecution is much more than ten times as important as the average preliminary inquiry. I would find the table closer to acceptability if it was sketched out to twenty classes ranging from preliminary inquiries given a weight of 1, and winning prosecutions the weight of 20.

These remarks can be interpreted in the following way: the questionnaire provides enough room for the ordinal ranking (i.e., the average prosecution is of more importance in achieving competition than a preliminary inquiry) but not for cardinal ranking (i.e., the average prosecution is, say, seven times more important than a preliminary inquiry).[4] Hence, to the extent that this criticism is valid more attention and confidence should be placed in the ordinal rather than cardinal rankings.[5]

Finally, although the evidence is somewhat impressionistic, those responding to the questionnaire seem to have taken the exercise seriously. This is based upon two pieces of evidence: most of the questionnaires had numerous check marks erased, which demonstrated some experimentation in determining the rankings; some of the respondents asked questions concerning the questionnaire.

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3. They are meant to be of equal size.

4. For a discussion of cardinal and ordinal ranking with reference to utility functions see Hirshleifer (1976, pp. 58-66). Note the rankings discussed and presented here can be interpreted as utility or preference functions.

5. The respondent who raised this point was contacted and asked to assign weights on the 1-20 scale for outputs. The results were as follows: per 30(2) prohibition order win, 15; per 30(2) prohibition order loss, 5; regular prosecution win, 20; regular prosecution loss, 10; special remedy win, 15; special remedy loss, 5; reference to the Attorney General not prosecuted, 3; report of the RTPC not prosecuted, 10; discontinued inquiries, 2; preliminary inquiries, 1; research inquiries, 20; compliance requests, 2.

B.3 Analysis of Responses

The discussion and analysis of the responses received can be divided into those respecting outcomes of an inquiry or prosecution (Table B-1) and the nature of an offence (Table B-2). It should be noted that the eight respondents are identified by the letters A, B, ...H, so that (say) respondent A in Table B-1 is the same as respondent A in Table B-2. All the respondents were able to rank offences but some difficulties arose over outcomes in two instances. Respondent E could not assign a weight to special remedy win or loss. This, in terms of the productivity indices developed in Chapter IV, should prove of little concern since there were only two special remedies (see Chapter IV, section 4.2.3) in the period 1960/61-1974/75. Respondent G could not assign weights to the outputs in Table B-1 in the time available. However, he did have some comments on the difficulties of weighting the various outcomes which are as follows:

> Due to time constraints I have not been able to devote the time to dealing with some of the problems to which you refer, but I do have some general comments on the question of weights to be assigned to different procedures and to offences.
> . . .
>
> Considering a subsection 30(2) proceeding, for example, the ranking of the issuing of an order varies with the type of situation being proceeded against; for example, in the case of a substantial merger, an order of prohibition or dissolution in my view would rate every bit as high as a conviction in a substantial conspiracy, as I don't consider anything too significant is achieved in only convicting for a merger offence, the important remedy is dissolution or prohibition if caught beforehand and of course Bill C-13 recognizes this, as have the Americans with Section 7 of the Clayton Act, there being few prosecutions in recent years under the Sherman Act.
>
> Again, the acquittal of the dental supply firms in the early post-World War II period was thought to be a serious blow to stepped-up enforcement of the legislation. However, it turned out to be simply the loss of a battle which had much greater significance in the overall picture in that it

> showed the necessity for amended evidentiary rules in such prosecutions which were achieved in 1949 with the passage of what is now section 45. Enactment of this would have been much more difficult without the acquittal in the Dental case.
>
> Consequently it can be seen that there is a problem in assigning weights to these procedures in view of the variables and I would want to give a lot more thought to this aspect.
>
> In regard to special remedy referring only to compulsory licensing of a patent, it seems to me that some other important areas are being disregarded; for example the licensing may have been fairly liberal but the licenses are highly restrictive.
>
> I would be inclined to include reference to A.G. or report of R.T.P.C. not prosecuted as simply one matter, as they both involve referral to the A.G. and no prosecution and the forms in which it reaches the A.G. are not too significant. (memorandum to author September 14, 1978)

In other words, the ranking of the outcomes in Table B-1 is difficult, even for persons with considerable experience in administering and enforcing the Combines Investigation Act.

In terms of the four offence categories in Table B-2, there was a considerable degree of uniformity in the ordinal ranking by the eight respondents.[6] Price discrimination was always ranked fourth while RPM and/or refusal to sell is ranked third with one exception. The only disagreement and, at that, a minor one, is the ranking of a conspiracy compared with a merger and/or monopoly. In six out of eight instances conspiracy is ranked one; twice it is ranked second. In contrast, merger and/or monopoly is ranked first three times,[7] second four times and third once. Hence, overall, the consensus to the ranking of offences would appear to be,

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6. Tables B-1 and B-2 are the cardinal rankings of the eight respondents. The text refers to their ordinal rankings, which are easily derived from these two tables.

7. Respondent G attached a weight of 8 to both conspiracy and merger and/or monopoly so two offence categories ranked one for G.

1. conspiracy
2. merger and/or monopoly
3. RPM and/or refusal to deal
4. price discrimination

Attention now turns to the more difficult task of the analysis of Table B-1.

There are three separate methods by which the authorities in Canada, under the Combines Investigation Act, can bring enterprises and individuals before the courts; a regular prosecution; a per 30(2) prohibition order; a special remedy.[8] The respondents, with one exception, ranked a successful regular prosecution as the outcome most likely to lead to a more competitive environment. A successful special remedy ranked above or (in two instances) co-equal with a successful prohibition order per 30(2) in five out of six instances. Not surprisingly an unsuccessful outcome of any of these is ranked below the corresponding successful outcome. Of the ranking of the remaining outcomes (output) it is of interest to note that discontinued inquiries and references to the Attorney General not prosecuted are both ranked approximately co-equal by most of the respondents and usually quite low (rank 8 to 10), only marginally above a preliminary inquiry or compliance request, for most respondents. Reports of the RTPC which did not result in a prosecution were generally ranked above these four outputs by the respondents. Finally, research inquiries were rated very highly by three respondents (rank 1 to 3) with the lowest rank recorded 7. This discussion suggests a greater degree of uniformity than perhaps exists. However, the reader is free to draw his own conclusions from Table B-1.

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8. These terms are defined in Chapter IV, sections 4.2.2 and 4.2.3 above.

Table B-1

Weights Assigned to Various Outputs Under the Combines Investigation Act by a Panel of 'Experts'

| Output \ Respondent | A | B | C | D | E | F | G | H |
|---|---|---|---|---|---|---|---|---|
| Prosecution | | | | | | | | |
| Per 30(2)[a] win | 10 | 8 | 8 | 4 | 6 | 8 | * | 7 |
| Per 30(2)[a] loss | 3 | 3 | 5 | 1 | 4 | 3 | * | 1 |
| Regular[b] win | 10 | 10 | 10 | 10 | 8 | 10 | * | 10 |
| Regular[b] loss | 4 | 3 | 5 | 2 | 7 | 5 | * | 7 |
| Special Remedy[c] | | | | | | | | |
| Win | 10 | 9 | 9 | 8 | * | 2 | * | 7 |
| Loss | 3 | 3 | 5 | 1 | * | 1 | * | 1 |
| Reference to Attorney General not Prosecuted | 2 | 2 | 0 | 1 | 3 | 1 | * | 4 |
| Report of the RTPC not Prosecuted | 5 | 5 | 5 | 5 | 8 | 4 | * | 6 |
| Discontinued Inquiries | 2 | 2 | 0 | 2 | 1 | 1 | * | 3 |
| Preliminary Inquiries | 1 | 1 | 5 | 1 | 7 | 2 | * | 2 |
| Research Inquiries | 8 | 10 | 5 | 5 | 9 | 2 | * | 5 |
| Compliance Requests | 1 | 2 | 8 | 2 | 5 | 3 | * | 3 |

a. Only a prohibition order pursuant to section 30(2).

b. A criminal charge is laid under the Combines Investigation Act.

c. Refers here only to compulsory licensing of a patent.

* Could not assign weight.

Note: (i) Win means that one or more of those charged is convicted on one or more of the counts.
(ii) The terms are defined in detail in Chapter IV, section 4.2.

SOURCE: See text.

Table B-2

Weights Assigned to Four Offence Categories Under the Combines Investigation Act by a Panel of 'Experts'

| Offence \ Respondent | A | B | C | D | E | F | G | H |
|---|---|---|---|---|---|---|---|---|
| Conspiracy | 9 | 8 | 10 | 9 | 9 | 10 | 8 | 10 |
| RPM and/or Refusal to Sell | 7 | 2 | 6 | 3 | 4 | 4 | 6 | 4 |
| Merger and/or Monopoly | 10 | 10 | 8 | 7 | 8 | 2 | 8 | 6 |
| Price Discrimination | 2 | 1 | 4 | 2 | 3 | 1 | 4 | 2 |

SOURCE: See text.

# APPENDIX C[1]

## DEFINITION AND JUDICIAL INTERPRETATION OF OFFENCES CONTAINED IN THE COMBINES INVESTIGATION ACT

### C.1 Introduction

The purpose of this appendix is to define the offence categories which have been used throughout the main body of the paper, together with their judicial interpretation. The statutory definition refers to the Act as of 1970.[2] In some instances important changes took place in the Stage I amendments which came into force on January 1, 1976. These are noted. The judicial interpretation refers to the period from the enactment of the provision to the present time.

### C.2 Conspiracy

Agreements, overt or tacit, to prevent or lessen competition unduly are proscribed by the conspiracy provisions in section 32 of the Combines Investigation Act. The conspiracy offence is as follows:

> (1) Every one who conspires, combines, agrees or arranges with another person
>
> (a) to limit unduly the facilities for transporting, producing, manufacturing, supplying, storing or dealing in any article,[3]
>
> (b) to prevent, limit or lessen, unduly, the manufacture or production of an article, or to enhance unreasonably the price thereof,

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1. The appendix is largely excerpted from R.J. Bertrand, (1978, pp. 26-43). I should like to thank R.J. Bertrand for permission to use this material.

2. Chapter C-23 of the Revised Statutes of Canada, 1970 as amended by C.10 (1st supp.) and C.10 (2nd supp.).

3. An article is defined in the Act as a "commodity that may be the subject of trade or commerce". In Stage I, the coverage was extended to include all services. (Some services were included under the 1970 Act as 32(1)(c) details.) The word "article" was replaced by "product".

(c) to prevent, or lessen, unduly, competition in the production, manufacture, purchase, barter, sale, storage, rental, transportation or supply of an article, or in the price of insurance upon persons or property, or

(d) to restrain or injure trade or commerce in relation to any article is guilty of an indictable offence and is liable to imprisonment for two years.[4]

As in any criminal offence, the Crown must prove the conspiracy beyond a reasonable doubt. The necessary element of agreement, however, is not restricted to an overt agreement; a tacit agreement, arrangement or even an understanding is sufficient. Once an agreement of this kind has been entered into by the parties, the conspiracy is complete even if no subsequent acts are carried out and the purposes of the conspirators fail.

Agreements and arrangements covered by the prohibition certainly include price-fixing, market sharing, customer allocation, group boycotts, profit sharing, and production control. Certain types of cost-saving agreements such as co-operation in research and development are specifically exempted, provided they do not or are not likely to lessen competition unduly in matters such as prices, production, markets or distribution. Export agreements, which are discussed below, are also exempted. Prosecutions under the section have usually, but not always, involved a price-fixing agreement among those supplying an article to a market.

An extensive jurisprudence has been developed in relation to combination offences, particularly in regard to paragraph 32(1)(c), the wording of which has been carried forward almost unchanged from the original provision of 1889 which was in the Criminal Code for many years.

This subsection, which establishes that it is illegal to combine "to prevent, or lessen, unduly, competition in the production, manufacture, purchase, ... " depends on the qualifying word "unduly" and thus does not prohibit all agreements or arrangements which lessen

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4. And an unlimited fine. Under the Stage I amendments the penalties were changed to four years and/or a fine up to $1 million.

competition. In other words, "unduly" is in effect a rule of reason which serves to distinguish permitted agreements from those which would interfere with competition to an extent that is injurious to the public. The courts have interpreted "unduly" so as to emphasize the share of the market accounted for by the conspirators. In so doing, however, some judgments have given consideration to the nature of the remaining competition in determining the likely effect of the agreement. Moreover, they have consistently refused to entertain defence arguments that apart from the limitation on competition no other specific public detriment has been demonstrated, or arguments that the agreements had beneficial effects.

The reluctance of the courts to consider evidence of an economic nature that goes beyond the limitation of competition covered by agreements was clearly expressed by the trial judge in the Fine Papers case. Spence, J. stated:

> ...Surely the determination of whether or not an agreement to lessen competition was "undue" by a survey of one industry's profits against profits of industry generally, and a survey of the movement of the prices in that one industry against the movement of the prices generally, would put the Court to the essentially non-judicial task of judging between conflicting theories of economy and conflicting political theories. It would entail the Court being required to conjecture - and by a Court it would be nothing more than mere conjecture since a Court is not trained to act as an arbitrator of economics - whether better or worse results would have occurred to the public if free and untrammelled competition had been permitted to run its course.[5]

The net effect of the jurisprudence is that undueness is measured by the effect or likely effect of the agreement on competition and it is unnecessary to prove specific detriment to the public, such as unreasonable prices. The extent of control of the market by the parties to the agreement is an important element in deciding whether the agreement, if carried into effect, would prevent or lessen competition unduly.

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5. Regina v. Howard Smith Paper Mills, Limited et al., (1954) O.R. 543 at 571.

Over the years the courts have differed in their interpretation of the "market share" test. In some cases the expression "unduly" was interpreted to mean the complete or virtual elimination of competition in the relevant market, while in other cases, courts, in considering the extent of the competition of those outside the agreement, held that the limitation of competition was undue where the conspirators accounted for as little as 56 per cent of the market. As a result of the Stage I amendments to the Combines Investigation Act which came into force in 1976, the legislation now explicitly provides that the stringent test of complete or virtual elimination of competition need not be proven in order to establish guilt.

While interpretation of the conspiracy provisions was considered to be substantially settled by recent decisions and the amendment to the Act dealing with the "virtual monopoly" concept, a decision by the Supreme Court of Canada in the Fire Insurance case[6] in 1977 has raised some doubt as to existing jurisprudence. Seventy-three companies, all members of the Nova Scotia Board of Insurance Underwriters, were charged with conspiracy to prevent or lessen competition unduly. During the 11-year period of the conspiracy, the Board members accounted for between 63 and 83.7 per cent of fire insurance premiums in the Province and the agreement related to uniform premium rates. Following the trial[7] the accused were acquitted. On appeal[8] by the Crown, the trial judgment was reversed and a conviction entered by the Supreme Court of Nova Scotia, Appeal Division, whereupon the accused companies appealed to the Supreme Court of Canada.

In a decision from which three of the eight members of the court sitting on the appeal dissented, the court reversed the decision of the appellate court and acquitted the accused. Some evidence had been tendered at trial by witnesses for the defence, of benefits received by the public because of the agreement, but the majority was of

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6. Aetna Insurance Company and 72 other Corporations v. The Queen, (1977) 30 C.P.R. (2d) 193.

7. Regina v. Aetna Insurance Company et al., (1975), 19 C.C.C. (2d) 449.

8. Regina v. Aetna Insurance Company and 72 other Corporations, (1975), 22 C.C.C. (2d) 513.

the view that the trial judge had not accepted it in this sense, but rather as a measure of competition evidenced in the business during the period of the alleged conspiracy, for the purpose of satisfying himself on the question of whether the object of the agreement was to lessen competition unduly. The majority found that his conclusion was arrived at on this basis and that since the charge related to the fire insurance industry as a whole within the province, it was not made out by proving that a particular group had agreed to charge common rates.

The judgment of the minority was delivered by the Chief Justice who delivered a vigorous dissent. In addition to finding that the disputed evidence was designed to show public benefit in what the accused had conspired to do and should not have been admitted, the minority judgment considered that the trial judge had misconstrued previous decisions on the nature of the offence and that there were three obvious faults in the judgment:

1. Proof of the offence does not require the conspiracy to have the effect of lessening competition unduly. The offence is completed if there is a conspiracy which had as its object the undue lessening of competition.

2. The finding that the accused did not intend their agreement to have the effect of virtually relieving them from the influence of competition. This is not the meaning of the section; while mens rea is necessary such a requirement is met when it is shown that the accused intended to and did enter into the agreement found to exist.

3. The finding that the market was all the fire insurance business throughout Nova Scotia and requiring the Crown to prove a virtual monopoly was not what is called for. The undisputed proportion of the market in the hands of Board members made it unnecessary to consider what the situation would have been if they had a very small portion, that is, the Crown had shown that a meaningful segment had been encompassed by the agreement.

As the Chief Justice pointed out, the issues in the appeal raise basic questions respecting competition legislation and have ramifications going beyond the particular facts of the case. The finding that evidence going to the question of public benefit aspects of the agreement for the purpose of showing the measure of competition during the period, with respect, seems to overlook that the offence is in the agreement not in its

specific result. Similarly, the finding that the market covered by the agreement must encompass the whole of the business in such a market, could seriously affect enforcement of the conspiracy provision, although this now may be covered by the 1976 amendment to the Act relating to the virtual monopoly concept.

The characteristic of "conscious parallelism" in oligopoly has received judicial interpretation in recent years. "Conscious parallelism" can be viewed as pricing interdependence in which oligopolists base their pricing and other business decisions partly on anticipated reactions to them by their competitors. The Metal Culverts case indicates that price leadership by one of the industry leaders and "conscious parallelism" by the other members of the industry, although it might result in the undue lessening of competition, would not offend the combination provisions of the Combines Investigation Act where the essential ingredient of an agreement or arrangement was missing.

Although Lermer, J. stated that his reasons for judgment were not intended to lay down any definitive pronouncement on whether "conscious parallelism" is contrary to the Combines Investigation Act, he went on to say by way of obiter that:

> ... economists to the contrary, I fail to see on a common-sense basis how "conscious parallelism" could be achieved without a conspiracy on the part of the accused to come to an agreement or arrangement beforehand. That occurred in this case notwithstanding that the ideal characteristics of an oligopoly were present.

and quoted the following extract from a letter from the then Director of Investigation and Research, D.H.W. Henry:

> It is one thing for such oligopoly characteristics to develop of themselves without collusion; it is quite another matter for members of an industry to make a conscious effort collectively to bring them about.[9]

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9. Regina v. Armco Canada Ltd. et al., 21 C.C.C. (2d) at 188; 6 O.R. (2d) at 580. The trial court conviction was subsequently affirmed by the Ontario Court of Appeal.

C.3 Conspiracy - "Bid-Rigging"

As indicated above, the general prohibition of combinations in the Combines Investigation Act places the onus on the Crown to establish that the agreement if carried into effect would lessen competition "unduly". This rests largely upon showing substantial market control. Experience with collusive tendering situations, however, has shown that they sometimes involve local firms which may not loom large in the total picture if the market is considered as encompassing a large area. Hence the definition of relevant market and acceptance of such definition by a court as explained below, becomes of major importance.

The difficulty in proving "undueness" in regard to construction bids, for example, is well illustrated in the Beamish case.[10] A report by the Restrictive Trade Practices Commission (1964d) found that on tender calls by government authorities in Ontario for the surface treatment of roads and highways, some 13 contractors had agreed upon who would be the successful bidder on each contract and ensured that other higher tenders were submitted by members of the scheme so as to assure the selected firm the award of the contract.

In the subsequent prosecution under paragraph 32(1)(c) of the Act, the trial court found that although the alleged agreement was proved, it was not an agreement to lessen competition "unduly" since the companies in question did not have a virtual monopoly[11] in the province of Ontario over the articles being supplied, and there were other companies in the province engaged in the same kind of work. While the acquittal was upheld by a majority decision of the Ontario Court of Appeal on other grounds, it also dismissed the concept of market that the Crown had attempted to develop, that is, that the accused corporations constituted the only relevant market because they were virtually the only contractors to respond to the requests for tenders by

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10. Regina v. J.J. Beamish Construction Co. Ltd., (1966) 2 O.R. 867; (1967) 1 C.C.C. 301; 50 C.P.R. 97; 59 D.L.R. (2d) 6 (Trial); (1968) 1 O.R. 5; (1969) 2 C.C.C. 5; 53 C.P.R. 43; 65 D.L.R. (2d) 260 (Appeal).

11. As indicated above, the legislation now explicitly states that a less stringent test of undue lessening of competition should be applied.

the authorities. The court was extremely critical, however, of the system of rigging tenders and found them to be practices "completely devoid of business ethics". As Schroeder, J.A. said:

> ... greatly as one must deplore the conduct of the respondents in hood winking the Department of Highways and the municipalities with which they dealt, the offence charged has not been proven and, not without some reluctance, I would dismiss the appeal.

The Stage I amendments to the Combines Investigation Act, which came into force in 1976, added a section which explicitly outlaws bid-rigging without any requirement to prove undue lessening of competition.

Bid-rigging is defined in the statute, section 32.2, as:

> a) an agreement or arrangement between or among two or more persons whereby one or more of such persons agrees or undertakes not to submit a bid in response to a call or request for bids or tenders, and
>
> b) the submission, in response to a call or request for bids or tenders, of bids or tenders that are arrived at by agreement or arrangement between or among two or more bidders or tenderers,
>
> where the agreement or arrangement is not made known to the person calling for or requesting the bids or tenders at or before the time when any bid or tender is made by any person who is a party to the agreement or arrangement.

This is an indictable offence. Penalties are a fine in the discretion of the court or maximum imprisonment for five years or both. Agreements on bids by affiliated companies are exempted.

C.4 Mergers

Mergers, which lessen or are likely to lessen competition to the public detriment, are prohibited under

the criminal provisions of the Act.[12] In addition, the Act contains a provision for the granting of orders of prohibition or dissolution by a court, on or after conviction, which directs a convicted person or any other person to do such acts or things as may be necessary to dissolve the merger. Such an order may also be obtained by proceedings in lieu of prosecution.

Chartered bank mergers are exempted from the Combines Investigation Act but require the agreement of the Minister of Finance and approval by the Governor in Council, i.e., the Cabinet.

There have been no successful prosecutions of contested mergers under the Act, but in one instance there was a guilty plea and in another a conviction at trial which was reversed on appeal. The criminal nature of the offence makes the courts hesitant to find the formation of a merger to be illegal even when it has marked adverse effects on the competitive environment. Particular difficulties in obtaining a conviction have arisen in regard to the requirement for proof, beyond a reasonable doubt, that a merger has lessened or is likely to lessen competition "to the detriment or against the interest of the public, whether consumers, producers or others".

The problems in this regard are epitomized in two leading merger cases, Canadian Breweries and B.C. Sugar, both of which were decided in 1960. Both cases stated, inter alia, that in order to succeed in demonstrating that a merger is unlawful, the Crown must establish that the merger would result in a virtual monopoly or a virtual stifling of competition. Although the cases resulted in acquittal by trial courts, the jurisprudence established by them was not definitive since neither was taken to an appellate court.

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12. Section 33 provides that:

> "Every person who is a party or privy to or knowingly assists in, or in the formation of, a merger or monopoly is guilty of an indictable offence and is liable to imprisonment for two years." The term "merger" is defined as acquisition of control which lessens or is likely to lessen competition to the detriment or against the interest of the public, whether consumers, producers or others. (Emphasis added.)

Moreover, the rulings in both cases do not deal with the present merger definition, but rather with a similar phrase which formed part of a general "combine" definition and referred to a "combination, merger, trust or monopoly". As a result of amendments to the Act which came into force in 1960, the phrase was removed from this context and placed in a separate merger definition. (A separate definition was also established for "monopoly" and the references to a "combine" and a "trust" were eliminated.) However, the current definition has not been given any more helpful interpretation by the courts.

The Canadian Breweries case concerned a series of mergers by Canadian Breweries Limited during a 30-year period, which provided it with a market share in excess of 60 per cent of beer sales in the province of Ontario and half of sales throughout Canada. Although not the main determining factor in the acquittal, the trial judge concluded that the words "has operated or is likely to operate to the detriment or against the interest of the public" have substantially the same meaning as the word "unduly" as used in the conspiracy provision (then section 411 of the Criminal Code), and was of the view that jurisprudence developed in relation to combination cases which interpreted the word "unduly" as requiring a virtual monopoly could be applied to the merger provisions. McRuer, C.J.H.C., stated the "virtual monopoly" test in the following terms:

> ... under the Act it must be demonstrated beyond a reasonable doubt that the merging of competitive corporations is likely to put it within the power of the merger to so extinguish competition as to affect prices by monopolistic control.[13]

The trial judge also was of the view that collateral agreements entered into by the accused which may have violated other provisions of the Act or the Criminal Code were not relevant to prove the offence and that the evil constituting the offence must be shown to flow from the merger. Moreover, he did not consider that it was an offence against the Act for one company to acquire the business of another simply because it wishes to extinguish the other as a competitor; that is, motive is not a factor

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13. Regina v. Canadian Breweries Ltd., (1960) O.R. 601 at 624.

of significance. In acquitting the accused, the court held first, that it had not been proved beyond a reasonable doubt that the merger had conferred on the accused the power to carry on its activities without or substantially without competition. Second, and this was the main basis for acquittal, the court found as a fact that the provincial liquor control board, an agency of the government of Ontario, had regulated beer prices during the entire period in question and that similar agencies in other provinces had also exercised control over beer sale and prices.

While the B.C. Sugar case [14] concerned charges of merger and monopoly, the court pointed out that the Crown's case was based entirely on merger. Prior to the merger which was the subject of the charge the accused had a monopoly of the sugar business in the western provinces of British Columbia and Alberta and at least in the western part of Saskatchewan. By the acquisition of the Manitoba Sugar Co., the accused obtained the major share of the Manitoba market and increased its share of the eastern Saskatchewan market. Sugar prices in Canada are determined on the basing point system, Montreal being one of the basing points and prices in Manitoba and eastern Saskatchewan are the Montreal price plus freight. However, there is a price differential in both these areas, among others, in favour of beet sugar over cane sugar. Thus, while eastern Canadian refiners were able to sell in this area because of the basing point system, since Manitoba Sugar was a beet sugar refiner, their sales were not large.

In his judgment, the trial Judge Williams, C.J.Q.B. agreed with the analogy drawn by Chief Justice McRuer in the Canadian Breweries case between "unduly" and "public detriment", but then in effect extended the onus on the Crown by holding that under the Act only those combines are illegal "that have operated unduly, or are likely to operate unduly to the detriment or against the interest of the public". He, in effect, also agreed with the "virtual monopoly" test in holding that the "Crown must establish a virtual stifling of competition". He also agreed with and adopted the views of Chief Justice McRuer regarding the irrelevancy of collateral agreements, stating he could not see that the merger had any effect on continuance of practices existing before and continuing after it was

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14. Regina v. The British Columbia Sugar Refining Company Limited et al., (1960) 32 W.W.R. (N.S.) 577; 129 C.C.C. 7; (1962) 38 C.P.R. 177.

formed. Chief Justice Williams quoted with approval and adopted his remarks, that the motive of a merger is not the important aspect, stating that in his opinion the intent of the accused in forming the merger was irrelevant.

Chief Justice Williams also held that in this case the Crown must not only establish that as a result of the merger the accused acquired the power to carry on its activities without or substantially without competition but that it must also establish exorbitant profits and prices. In acquitting the accused he concluded that while they were the only refiners of sugar in Manitoba, this had not operated to the detriment of the public or was so likely to operate; and went on to state he was satisfied there had always been and still was competition even in the limited area in western Canada supplied from the eastern refiners; and finally that the Crown had not satisfied him beyond a reasonable doubt that the merger destroyed or even limited competition.

The limited application of the merger (and monopoly) provisions of the Act has been confirmed in the Irving Newspapers case.[15] Although the accused were convicted by the trial court, they were acquitted by the appeal court and the acquittal was upheld by the Supreme Court of Canada.

Over a period of years, K.C. Irving Limited and affiliated companies acquired control of all five English language newpapers in the province of New Brunswick. The companies were charged with one count of merger relating to

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15. Regina v. K.C. Irving Ltd. et al., (1974) 16 C.C.C. 2(d) 49; 1 C.P.R 115; 7 N.B.R. (2d) 360; 45 D.L.R. (3d) 45 (Trial).

    Regina v. K.C. Irving Ltd. et al., (No. 2) (1974) 22 C.C.C. (2d) 281 C.P.R (2d) 256; 61 D.L.R. (3d) 11 (Sentence).

    Regina v. K.C. Irving Ltd. et al., (1975) 23 C.C.C. (2d) 479; 20 C.P.R 193; 62 D.L.R. (3d) 157; 11 N.B.R. (2d) 181 (Appeal).

    Regina v. K.C. Irving Ltd. et al., (1976) 32 C.C.C. (2d) 1; 12 N.R. 45 D.L.R. (3d) 82; 29 C.P.R. (2d) 83 (Supreme Court of Canada).

the period prior to the 1960 amendments, and two counts of monopoly covering the pre- and post-1960 period. K.C. Irving Limited was charged with one count of merger covering the post-1960 period.

In his judgment at trial, Mr. Justice Robichaud of the New Brunswick Supreme Court, while concluding that there was no attempt to influence the editors and publishers of the newspapers in publication of news or editorial direction, found that by virtue of ownership the acquiring company nonetheless had control. In concluding that there was no actual detriment to the public by reason of the acquisitions he found however, that by such acquisitions, a complete monopoly was established and that certainly in regard to the period subsequent to 1960, detriment in law resulted by virtue of the actual or likely detrimental effect on competition. In regard to the period prior to 1960, he found that since in that period complete control of four of the newspapers and a significant interest in the remaining paper had been obtained, the line of illegality also had been crossed.

The Irving company was convicted on all four counts and the remaining companies on one or more counts each. In addition to imposing fines, the court also granted an order requiring divestiture of certain of the newspapers.

The Court of Appeal for New Brunswick quashed the conviction, fines and prohibition order of the trial court.

The Crown appealed to the Supreme Court of Canada with the argument:

> (1) that there can be no competition among subsidiaries of a parent company, all engaged in the same business over which control has been acquired, or that it is likely, as a matter of necessary inference, that competition will be lessened as a result of the acquisition of such control; (2) that detriment results from the prevention or lessening of competition; (3) that the interference with competition in the present case was "undue" so as to raise a presumption of detriment or likely detriment and that, moreover, such detriment had been proved apart from any presumption.

On November 16, 1976 the Supreme Court of Canada rejected the Crown's argument and indicated that detriment had not been proved apart from any presumption. The court

held that the definition of "merger" in the Act did not state that acquisition of entire control over a business in a market area is sufficient to mean the lessening or likely lessening of competition or that such lessening by reason of such control was to the detriment of the public. The court also held that even if the acquisition of entire control would support an inference of lessening or likely lessening of competition, such an inference could not be drawn in the present case because the lower courts found that ownership by K.C. Irving did not result in lessening of competition. With this decision there is now no question that for all practical purposes the merger provision is of no effect.

C.5 Monopoly

It is an offence to be a party or privy to or knowingly assist in, or in the formation of, a monopoly as defined in the Act. Monopoly is defined essentially as a situation where one or more persons substantially or completely control a class or species of business in any area of Canada, and have operated or are likely to operate it to the detriment or against the interest of the public, whether consumers, producers or others.

While the prohibition presents some of the same legal difficulties as the one on mergers, there have been some successful prosecutions under it and the jurisprudence offers hope of further useful development.

The Eddy Match case[16] brought the first conviction in 1954. The abuses found in that case were so flagrant, however, that the jurisprudence created by it did not have wide application. In 1927, the three companies engaged in the manufacture of wooden matches merged into the Eddy Match group. Independent match companies were established in succeeding years but each in turn was acquired by the group, so that the monopoly was always re-established after a

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16. Rex v. Eddy Match Company Limited et al., (1952) 13 C.R. 217; 104 C.C.C. 39; 17 C.P.R. 17 (Trial).

Eddy Match Company Limited et al. v. The Queen (1954) 18 C.R. 357; 109 C.C.C. 1; 20 C.P.R. 107 (Appeal). (Leave to appeal to the Supreme Court of Canada refused.)

period of competition. To eliminate rivals the group used practices such as preferred pricing, special discounts, "fighting brands" and flooding a competitor's market with matches.

The judgment of the Quebec Court of Queen's Bench (in appeal), discusses in general terms, however, the issue of the public interest. Casey, J. stated that:

> ... Such a condition (viz., complete control of a business) creates a presumption that the public is being deprived of all the benefits of free competition and this deprivation, being the negation of the public right, is necessarily to the detriment or against the interest of the public.
>
> This presumption however may be rebutted and it does not seem unreasonable to suggest that some "controls" might in exceptional circumstances be more advantageous to the public than if the business had been left free. But when faced with facts which disclose the systematic elimination of competition, the presumption of detriment becomes violent. In these circumstances, the burden of showing absence of detriment must surely rest on the shoulders of those against whom the presumption plays...[17]

Moreover, Casey, J. considered that the predatory practices used by the monopolist were relevant in this regard in that they:

> ... testify with great eloquence as to the power which appellants could and did exercise, as to their determination to be alone in the field, as to the helpless position of the public and, in short, as to the inevitability of the very evil which the Act seeks to prevent. Thus even if one cannot infer from the fact of complete control that there existed the likelihood of detriment to the public, this inference can and must be drawn

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17. Eddy Match Company Limited v. The Queen (1954) 18 C.R. 357 at 375.

> from the acts that were done during the acquisition, development and exercise of that control...[18]

Several recent cases have involved monopoly situations which are less blatantly abusive than were present in the Eddy Match case. While in some of these cases the accused were acquitted, in others there was a guilty plea or the Crown sought and obtained orders of prohibition in lieu of prosecution. Judicial interpretation by the Supreme Court of Canada in the Irving case, indicates that the operation of a monopoly "to the detriment or against the interest of the public" must be proved and cannot be presumed merely by showing control of a business.

The Supreme Court of the Province of Ontario has ruled in regard to the "shared monopoly" (or "joint monopoly") concept, i.e., essentially a situation where a very few large companies control a monopoly share of a particular industry and work together as if they were a monopoly. In the Large Lamps case,[19] the court convicted three corporations for conspiring to lessen competition unduly in the large lamp industry and imposed fines totalling $550,000, including a $300,000 fine levied against Canadian General Electric Company Limited.

The companies (Canadian General Electric Ltd., Westinghouse Canada Ltd. and GTE Sylvania Canada Limited) were also charged with being parties to an illegal monopoly. The court accepted the Crown's contention that the statutory definition of an illegal monopoly as "a situation where one or more persons either substantially or completely control ... the ... business in which they are engaged and have operated such business or are likely to operate it to the detriment or against the interest of the public ..." encompasses a shared or joint monopoly situation. It rejected the defence argument that it would be necessary to show a proprietary or contractual relationship among the parties to the monopoly.

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18. Eddy Match Company Limited v. The Queen, (1958) 18 C.R. 357 at 376.

19. Regina v. Canadian General Electric Company Limited et al. (1976) 15 (2d) 360; 29 C.P.R. (2d) 1.

The court, however, followed the judicial interpretation in the Canadian Breweries case in making its findings on the question of detriment. Holding that detriment "...must be shown to flow from the operation of the shared monopoly and not from collateral acts which might be the subject of another charge", the court ruled that evidence which went towards proving the conspiracy and the substantial control by the parties to the monopoly, was inadmissible as proof of detriment. Restricting its consideration to evidence of detriment flowing from the behaviour of the parties towards others, the court found that detriment had not been proved beyond a reasonable doubt and acquitted the accused on the monopoly counts.

An important case in which the Crown sought and obtained an order of prohibition in lieu of prosecution is the Canada Safeway Limited case.[20] The defendant company operated a chain of retail grocery stores and was the dominant grocery retailer in the cities of Calgary and Edmonton. Approximately half of the population of the province of Alberta live in these two cities. In 1972, an information was laid against Canada Safeway Limited charging, in separate counts, that the company had been a party to a monopoly in the grocery retailing industry in Calgary and Edmonton. When the preliminary hearing was scheduled to begin (September 1973), the Crown applied, pursuant to section 30(2) of the Act, to the Supreme Court of Alberta for orders of prohibition to prohibit those policies and practices of Canada Safeway Limited which would have been the subject of a trial. The orders were granted and the information withdrawn.

Moore, J. noted in his judgment that the Crown had emphasized:

> ... that the acts admitted by the Defendant did not involve evidence relating to excessive profits or prices, but actions of a type directed towards its competitors which limited the expansion of its competitors and created barriers to entry of other competitors to the market. Further it was indicated that the orders of Prohibition sought would afford immediate and effective relief in Calgary and Edmonton whereas a trial would involve some 800 witnesses, and approximately 9000

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20. Regina v. Canada Safeway Ltd., (1974) 1 W.W.R. 210; 12 C.P.R. (2d) 3.

documents, with the prospect that final determination might not be known until perhaps 1975.[21]

In response to a lowering of prices by smaller competitors, Canada Safeway could consistently meet this competition by immediately lowering prices in stores adjacent to the competitor's outlets rather than on a city-wide basis. The orders prohibit Canada Safeway from engaging in this practice for a period of six years but allow price competition where the price is the same in all Safeway stores in a city.

To allow for the development of competition, which had been inhibited by the expansion of Canada Safeway and in particular by the pre-emption of prime sites for retail outlets, the orders prohibited the company from increasing significantly over the next three and one-half years the total square footage which it operated as retail outlets in each of the two cities, and restricted the opening of new outlets to one of a maximum specified size in each city during this period. Moreover, the company was restricted from acquiring new sites for retail outlets during the first two and one-half years of the period and was restricted, during the year following the end of the period, from opening more than two new stores in each of the two cities on sites acquired during the last year of the period.

An additional prohibition was designed to prevent Canada Safeway from entering into any restrictive clauses in its leasing arrangements, or enforcing such existing arrangements in leases designed to prevent competitors from opening stores in the vicinity of Canada Safeway outlets, or of specifying the size of competing outlets and the conditions for food sales by competitors in shopping centre sites. The orders prohibited Safeway from enforcing these restrictive lessor agreements for a period of six years.

To inhibit Canada Safeway from using acquisitions to compensate for the effects of the orders, the company was prohibited for a period of five years from acquiring, or otherwise obtaining control of, the shares or assets of any competitor engaged in the retail grocery business in the two cities.

The orders also placed restrictions on Canada Safeway advertising in metropolitan centres.

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21. Regina v. Canada Safeway Ltd., (1974) 12 C.P.R. (2d) 3 at 7.

The Combines Investigation Act includes provision for orders to correct abuse of patent or trade mark rights. Anti-competitive use of such rights and privileges, which is defined in terms similar to those used tp specify the combination offence in section 32, may be remedied by orders to revoke a patent or cancel the registration of a trade mark or prescribe lesser remedies, including:

- declaring void, in whole or in part, any agreement, arrangement or license relating to such use;

- restraining any person from carrying out or exercising any or all of the terms or provisions of such agreement, arrangement or license;

- directing the granting of licenses under any such patent to such persons and on such terms and conditions as the court may deem proper; and

- amending the registration of a trade mark.

Proceedings have been instituted under this provision in only two related cases, both of which involved patents owned by Union Carbide Canada Limited. Two groups of patents were involved in which it was alleged, inter alia, that certain license restrictions unduly prevented or lessened competition. One group covered an air bubble extrusion process for producing polyethylene and other plastic films. In 1969, the Attorney General of Canada filed an information in the Federal Court of Canada pursuant to what is now section 29 of the Act. Shortly after institution of the action two of the three patents in issue expired and at the same time certain of the licenses terminated, but those licenses relating to all three patents continued in force. At the end of the year, Minutes of Settlement were filed under which the company dedicated the third patent to the public and, with respect to the license agreements still in force, offered to terminate existing agreements with each manufacturer and grant a royalty-free license under the remaining patent or grant such royalty-free license to any manufacturer in Canada engaged in the manufacture of

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22. Section 29. Such orders could be made by the Federal Court on the Information of the Attorney General of Canada.

polyethylene film by extrusion from resin. The effect of these steps was to permit free use of the patent in Canada by any licensed or other manufacturer. In agreeing to do these things the company did not admit that any of its actions were contrary to section 29 of the Act.

The second group of patents covered a process for treating thermoplastic films to make them suitable for printing. The information filed by the Attorney General of Canada also covered this aspect and minutes of settlement were filed in June 1971, Union Carbide denying the allegations contained therein. The principle points in the settlement were incorporated in a revised license to be employed by Union Carbide whereby (a) reasonable terms as to royalty replaced what was regarded by the Crown as a discriminatory scale of royalties, (b) non-discrimination among licensees as to products to which the process could be applied replaced what the Crown considered to be discriminatory licensing based on particular types or qualities of end-use products, and (c) provisions on cross-licensing and termination of contract were rendered non-discriminatory. In addition Union Carbide agreed to file a copy of all executed license agreements with the Director of Investigation and Research on a confidential basis. Furthermore a licensee may at his option purchase a fully paid-up license for use during the life of the patents for a consideration taking account of a lump sum payment, exchange of technology or a cross-licensing arrangement.

## C.6 Price Discrimination, Predatory Pricing, Unreasonably Low Prices and Discriminatory Advertising Promotional Allowances.

Prohibitions of price discrimination and predatory pricing have been in force since 1935.

The price discrimination provisions[23] prohibit the practice of selling articles at different prices to

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23. Paragraph 34(1)(a) provides that everyone engaged in a business who "is a party or privy to, or assists in, any sale that discriminates to his knowledge, directly or indirectly, against competitors of a purchaser of articles from him in that any discount, rebate allowance, price concession or other advantage is granted to the purchaser over and above any discount rebate, allowance, price concession or other advantage that, at the time the articles are sold to such purchaser is available to such competitors in respect of

competing customers who are buying like quantity and quality. Special prices, however, can be used for purposes such as meeting spot competition, stock clearance or opening specials since such conduct does not amount to a practice. A scale of discounts based on quantity or volume is acceptable, provided the same discount is available to all competing purchasers of the same quantity and quality. Also acceptable are year-end rebates on a similarly equitable basis. Conditional and functional discounts, however, could fall within the ambit of the prohibition.

The application of the price discrimination provision is fairly narrow since it only applies to sales of like quantity and quality, and there have been no decided cases under it. Nevertheless, the provision has quite wide support among small businessmen. Moreover, judging from inquiries received under the Program of Compliance, sellers take it into account in their merchandizing strategies. Also, a number of cases have been brought before the Restrictive Trade Practices Commission for appraisal and report to the responsible Minister.

A study which was conducted in the 1950's[24] found that large retail grocery chains were obtaining significant preferential treatment from suppliers in the form of promotional allowances. The allowances were in payment for such activities of the chains as advertising and favourable displays of the sellers' products. Such allowances were frequently not offered to small independent retailers.

This led to the enactment in 1960 of section 35 of the Combines Investigation Act. Essentially, the section prohibits the granting of an allowance by a supplier to a customer for advertising or display of a product where a similar allowance on proportionate terms is not offered to competing purchasers. This is a per se prohibition and

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a sale of articles of like quality and quantity;" is guilty of an indictable offence and is liable to imprisonment for two years. This section also provides, however, that the prohibition applies only where such discrimination is part of a practice of discriminating.

24. See RTPC (1958c).

proof of a practice is not required; a single occurrence of failure to offer a promotional allowance on proportionate terms violates the provision. Only one conviction has been registered under the section and it was not contested.

There are two predatory pricing prohibitions. The "regional price discrimination" provision[25] is directed against the use of regional price differentials by a broadly based company to eliminate or discipline a local competitor. The prohibition, however, applies only where the company is engaged in a policy of selling products in one area of Canada at prices lower than those at which the company sells in other areas, and this policy must have the effect or tendency of substantially lessening competition or eliminating a competitor. As drafted, the prohibition presents a number of difficulties and there have been no convictions under it.

The second predatory pricing prohibition has the same elements as the first except that the Crown is required to prove a policy of selling at unreasonably low prices rather than a policy of regional price discrimination. Again, the policy must have the effect, tendency or intent of lessening competition or eliminating a competitor. The legislation does not define "unreasonably low". Although a sale below cost could be regarded as some evidence of an unreasonably low price, it is recognized that there are situations where such sales are made for reasons which have nothing to do with an attempt to discipline or eliminate competition. There have been no successful prosecutions under the provision.

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25. Paragraph 34(1)(b) provides that everyone engaged in a business who "engages in a policy of selling products in any area of Canada at prices lower than those exacted by him elsewhere in Canada, having the effect or tendency of substantially lessening competition or eliminating a competitor in such part of Canada, or designed to have such effect" is guilty of an indictable offence and is liable to imprisonment for two years. Paragraph 34(1)(c) is a similar offence, but refers to everyone engaged in a business who "engages in a policy of selling products at prices unreasonably low, having the effect or tendency of substantially lessening competition or eliminating a competitor or designed to have such effect".

C.7 Resale Price Maintenance and/or Refusal to Sell

An outright prohibition of resale price maintenance has existed in Canada since 1951.

A large number of successful prosecutions were undertaken in the quarter century following enactment of the prohibition and it had considerable impact in improving competition in distribution. This experience, however, also demonstrated that the prohibition had some deficiencies that amendments which came into force in 1976 were designed to remedy.

Prior to 1976 Stage I amendments, the prohibition applied to a person engaged in manufacturing, supplying or selling an article, who required or induced (or attempted to do so) another person to resell the article at a specified price, a price not less than a specified minimum price, a specified markup or discount, a markup not less than the specified markup, or a discount not more than the specified discount. The prohibition also applied to the denial of supplies to a person because the person had refused to maintain the established resale price.

A person prosecuted for refusal to supply a person with a low pricing policy can use one of several defences.[26] Of the possible defences, however, only "loss-leader" selling has been of significance. The defence that a reseller was not providing an adequate level of servicing

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26. "(a) that the other person was making a practice of using articles supplied by the person charged as loss-leaders, that is to say, not for the purpose of making a profit thereon but for purposes of advertising;

(b) that the other person was making a practice of using products supplied by the person charged not for the purpose of selling such products at a profit but for the purpose of attracting customers to his store in the hope of selling them other products;

(c) that the other person was making a practice of engaging in misleading advertising in respect of products supplied by the person charged; or

(d) that the other person made a practice of not providing the level of servicing that purchasers of such products might reasonably expect from such other person."

These amendments were introduced in 1960. For details see Rosenbluth and Thorburn (1963, Chapter 8, pp. 84-95).

is becoming less relevant because most manufacturers now service their own products.

Even the "loss-leader" defence has been used in very few instances. The Combines Investigation Act does not define "loss-leader" other than to refer to the use of products by a reseller "not for the purpose of making a profit thereon but for purposes of advertising". Moreover, in the business community there are many different views as to what constitutes a "loss-leader". In a few cases the courts have dealt with the "loss-leader" defence. In the Sunbeam case the point was established that a distributor cannot set arbitrary resale prices designed to yield a profit and state that any sales below such prices will be considered as practicing loss-leading or loss-leader selling. In the Coutts case the courts held that the holding of two sales of short duration at different times and places could constitute a practice of using the articles in question as loss-leaders. In the Philips case a "loss-leader" was held to be something sold at less than invoice cost price to the retailer.[27]

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27. The "Sunbeam" case:

Regina v. Sunbeam Corporation (Canada) Limited (1967) 1 O.R. 23; 1 C.C.C. 110; 59 D.L.R. (2d) 321; 50 C.P.R. 5 (Trial). (1967) 1.O.R. 661, 3 C.C.C. 149; 62 D.L.R. (2d) 75; 53 C.P.R. 102, 1 C.R.N.S. 183 (Appeal).

Sunbeam Corporation (Canada) Limited v. The Queen (1969) S.C.R. 221; 2 C.C.C. 189, 1 D.L.R. (3d) 161; 56 C.P.R. 242 (Supreme Court of Canada).

The "Coutts" case:

Regina v. William E. Coutts Company Limited (1968) 52 C.P.R. 21 (Trial); (1968) 2 C.C.C. 221; 54 C.P.R. 60 (Appeal); 1 O.R. 549; 67 D.L.R. (2d) 87 (includes Trial and Appeal judgements).

The "Philips" case:

Regina v. Philips Electronics Industries Ltd. - and Philips Appliances Limited (1966) 52 C.P.R. 224 (Trial). [1969] 1 O.R. 386; 2 C.C.C. 328; 2 D.L.R. (3d) 558; 57 C.P.R. 45 (Appeal).

As a result of the Stage I amendments to the Combines Investigation Act which came into force in 1976, the scope of the prohibition was substantially extended. The resale price maintenance provisions, section 38 of the Act, now prohibit an "attempt to influence upward, or to discourage the reduction of" a price rather than the setting of a specific resale price. This brings within the orbit of the prohibition the activities of suppliers who avoid references to specific resale prices when inducing their customers to raise prices. Refusal to supply a product and other discrimination against resellers for a low pricing policy is also prohibited. This could be in the form of delay in deliveries or incomplete filling of orders rather than outright refusal to supply. The revised price maintenance provisions also apply to persons who extend credit by way of credit cards or otherwise engage in a business that relates to credit cards. Holders of exclusive rights under a patent, trade mark, copyright or industrial design are also subject to the prohibition. Finally, the prohibitions apply not only to suppliers, but also to persons not directly involved in the supplier-dealer relationship for the product.

The price maintenance provisions include prohibition of suggestion of a resale price, unless the suggestion is accompanied by a clear indication that the retailer will not suffer for failing to accept it. The advertising of a resale price by a supplier is also forbidden unless the advertisement makes it clear that the product advertised can be sold at lower than the advertised price. Prices affixed by a supplier to a product or its package or container are exempted. Finally, the prohibition includes attempts by anyone, including competing retailers, as a condition of doing business with a supplier, to induce such supplier to refuse to supply a product to a person or class of persons with a low pricing policy. This includes supplies from outside Canada.

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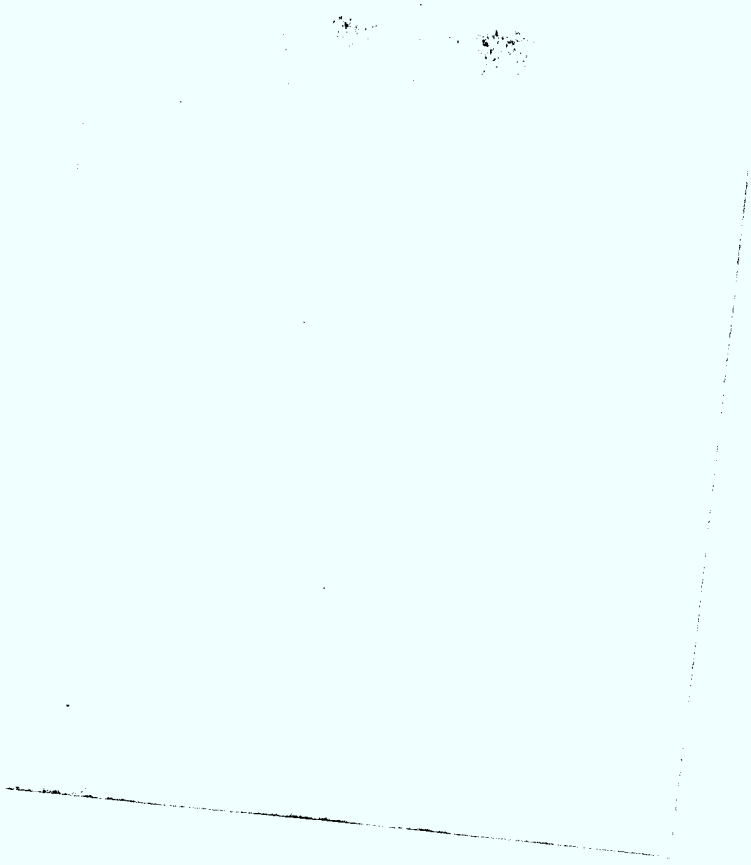

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