Consumer and Corporate Affairs Canada
Consommation et Corporations Canada

Bureau of Competition Policy

Competition Policy in Canada

The First Hundred Years

COMPETITION POLICY IN CANADA:
THE FIRST HUNDRED YEARS

Cette publication est également disponible en français

CCAC No. 189 10262 E 89-10

FOREWORD

The development of competition legislation in Canada is a fascinating story. The cornerstone of the law was set in place one hundred years ago in 1889 - one year before the enactment of the Sherman Act in the United States. Over the years, the legislation has undergone a number of important changes, reflecting differing views on both economic priorities and practical approaches to administering a framework law on competition. Today's policy, embodied in the Competition Act, has retained the flavour of its historical origins while also representing a modern approach to competition policy, law and economics.

A fuller appreciation of the form and substance of the Competition Act comes with an understanding of its origins and what comprises competition law in Canada today. This paper sets out to describe in a brief, non-technical manner both of these aspects. The paper was prepared under the direction of the Executive Committee of the Bureau of Competition Policy by Margaret F. Sanderson of the Economics and International Affairs Branch and Professor William T. Stanbury, UPS Foundation Professor, Regulation and Competition Policy of the Faculty of Commerce and Business Administration, University of British Columbia. It is being released in conjunction with the National Conference on the Centenary of Competition Policy in Canada.

It is hoped this paper will provide a basic understanding of the nature and role competition policy has taken within the Canadian environment, thereby encouraging additional interest in the field.

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1.0 INTRODUCTION

In May of 1889, An Act for the Prevention and Suppression of Combinations Formed in Restraint of Trade was enacted by the House of Commons, establishing the core of Canadian competition law.[1] Legislation governing competition within Canada has evolved significantly since that time.[2] Numerous amendments have been implemented in reaction to the changing political and economic environment. Notwithstanding these developments, the chief objectives of Canadian competition policy have remained remarkably consistent, being aimed at the removal of unreasonable or undue restraints on competition in the interests of protecting consumers and those businesses who wish to be free to act competitively.

1.1 NATURE OF COMPETITION

Competition is maintained in Canada not solely for its own sake, but to act as the prime stimulus to achievement of a number of objectives associated with enhancing the welfare of society. Competition is a process of allocating scarce resources. More strongly put, freely competitive forces are widely believed to result in the best allocation of society's economic resources, the lowest costs and prices, the highest quality, and the greatest incentives for product innovation and development while simultaneously preserving the democratic nature of Canada's political and social institutions.

In the first combines case to reach the Supreme Court of Canada in 1912, Mr. Justice Idington emphasized: "Destroy competition and you remove the force by which humanity has reached so far".[3] Twenty years later, another Canadian judge made much the same point when he said:

> "The incentive to struggle ... is one of the conditions of advance, not only in the realm of nature, but in the realm of industry. Without that incentive, as the naturalists point out, men would sink into indolence and the more gifted would not be more in the battle of life than the less gifted. It follows that there should be open competition for all men and that the most able should not be prevented from succeeding best."[4]

As a decentralized and efficient "discovery procedure", or information system, competitive markets overcome one of the most fundamental and difficult problems in any society, namely the coordination of economic activity in a world of imperfect knowledge and costly information. Individuals and firms discover mutually profitable opportunities for exchange through a decentralized system of information gathering, processing and decision making. In equilibrium, the market as a social process ceases, as there is no further opportunity for mutually beneficial exchange. Note that real markets never reach such an equilibrium state because they are constantly jolted off course by a variety of forces. The virtue of competitive markets lies in the process of moving towards long run equilibrium even if the end state is never reached. The gains are in the journey itself, not in arriving at the destination.

1.2 The Public Interest in Competition Policy

To the extent that competition policy protects the forces of competition, it results in the movement of prices to levels which more accurately reflect demand and cost conditions, facilitating the flow of resources toward their most productive use. By promoting the efficient use of resources, competition policy lessens the need for alternative, more interventionist, forms of control such as regulation and public ownership. No regulator, no matter how sophisticated, is able to "outperform" effective competition as a means of allocating scarce resources in what can be a structurally competitive market.

In principle, it should only be necessary to ensure that market structure and conduct are such as to provide an acceptable degree of competition. The attainment of efficient industry performance can then be left to market forces without the need for detailed intervention by government. To this end, Canadian competition legislation seeks to prohibit certain practices in restraint of trade which serve to prevent the nation's scarce resources from being most effectively utilized. Parliament's intention throughout the past century has been to create an atmosphere

in which those who are willing to compete for economic gain on a fair and equitable basis are free to do so.

1.3 Nature of the Canadian Economy

The nature of the Canadian economy has necessitated such an approach. In many cases Canadian markets are small relative to the efficient scale of production and distribution. This imposes cost disadvantages on Canadian firms competing in international markets. This, in combination with the geographic dispersion of domestic markets, has resulted in oligopolistic industry structures and consequently high levels of market concentration. In such an environment, competition cannot be pursued solely as an end in itself, but rather as the vehicle to increase economic welfare.

Perhaps because they have recognized these facts, Canadians have generally not been inherently distrustful of large-scale enterprise, or even of the combination of otherwise independent firms. Certainly, the framers and supporters of the first competition legislation took this view, believing that Canada had much to gain from "large aggregations of capital". The original legislation, and its successors are not regarded as "anti-combination" but rather as "anti-combine" where the word "combine" has been defined as a combination that operates to the detriment of the public (see Canada, 1888; Bliss, 1973).

Thus, Canadian competition legislation has never regarded large firm size as adverse to competition.[5] Rather, by focusing on prevention of abuse of market power, Canadian competition legislation has ensured that firms achieve desired efficiencies and compete with one another on a fair basis, while also providing customers with product and quality choices at the lowest prices possible.

2.0 Objectives of Canadian Competition Policy

Historically, three major objectives of Canadian competition policy have been identified by the Courts,

Ministers of the Crown, interested officials and academic analysts. These include maintaining free competition; preventing abuses of market power (including the protection of consumers); and achieving economic efficiency. In addition, a number of supplementary objectives for Canadian competition policy have been identified. These include codifying the common law doctrine of restraint of trade; fighting inflation; protecting small business; preserving the free enterprise system; and ensuring fairness and honesty in the marketplace (see Gorecki and Stanbury, 1984).

Throughout the 1970s there was vigorous debate over the primacy of these objectives in government, business and academic circles.[6] A consensus emerged that the fundamental goal of fostering economic efficiency should take precedence over the various supplementary goals. By working towards achievement of economic efficiency the legislation would seek to achieve the optimal use of socio-economic resources to meet society's wants and needs, the production of goods and services at the lowest possible costs consistent with desired quality standards and the optimal rate of investment in technological innovation.

The emphasis on economic efficiency as the primary objective of competition policy in Canada further evolved to emphasize concerns about international competitiveness. Increased efficiency is widely acknowledged as the key to improved Canadian participation and performance in world markets. The role of imports in limiting the potential for abuse of domestic market power in certain sectors has also been recognized.

The objectives of today's competition policy, as embodied in the purpose clause of the Competition Act, reflect this diversity of concerns:

> "The purpose of this Act is to maintain and encourage competition in Canada in order to promote the efficiency and adaptability of the Canadian economy, in order to expand opportunities for Canadian participation in world markets while at the same time recognizing the role of foreign competition in Canada, in order to ensure that small and medium-sized enterprises have an

equitable opportunity to participate in the Canadian economy and in order to provide consumers with competitive prices and product choices."[7]

3.0 EVOLUTION OF CANADIAN COMPETITION POLICY, 1889-1986

3.01 ORIGINS OF THE FIRST LEGISLATION

Public pressure to enact competition legislation arose towards the end of the 19th century when both Canada and the United States witnessed a rise in concentrated business interests.[8] Sir John A. MacDonald's National Policy of tariff protection for domestic manufacturing aggravated existing tendencies toward higher prices by severely restricting foreign competition. Tariff protection encouraged the growth of domestic firms and the creation of branch plants of foreign enterprises. Some producers sought relief from the resulting competitive pressures in consolidations. Fears were raised that increased concentration would result in greater opportunities for explicit or tacit collusion and hence higher prices. Consumers demanded greater protection than the existing common law appeared to offer.

Thus, in 1888 a House of Commons Select Committee was established to examine the nature, extent and effect of business combinations in Canada. The Committee, after three months' deliberation, reported price-fixing combinations in a wide variety of industries (Canada, 1888). Immediately after filing the Committee's report, its chairman, Mr. N. Clarke Wallace, introduced a strongly worded private member's bill "for the prevention and suppression of combinations formed in restraint of trade". The difficulty Mr. Wallace had in passing this bill provides an early illustration of the obstacles which Canadian competition legislation would encounter during the subsequent reform process.

Mr. Wallace's bill was given only mild support in the House of Commons.[9] Extensive business opposition resulted in the measure being referred back to committee, this time to the Committee on Banking and Commerce. Amendments were made by both the House and Senate resulting in a greatly

weakened version of the original bill. Eventually, An Act for the Prevention and Suppression of Combinations Formed in Restraint of Trade was passed in 1889, making it a misdemeanor to unlawfully conspire, combine, agree or arrange to prevent or lessen competition unduly or to unreasonably enhance prices. The Act was incorporated in the first Criminal Code in the general codification of the criminal law in 1892 at which time the offence became an indictable one.

With the insertion of "unlawfully" and the additional qualifiers "unduly" and "unreasonably" the Act of 1889 was regarded as little more than declaratory of existing common law. Yet, by the end of the 19th century, British common law was extremely lenient in the area of restraint on trade. As long as restrictions were reasonable from the view of the participating parties they were held to be legal. Participation in a conspiracy to fix price or allocate markets was not in and of itself unlawful. It became an offence only by having an unlawful objective or by employing unlawful means. Furthermore, contracts declared void owing to restraint of trade were not necessarily criminal (see Dunlop et al., 1987; Gosse, 1962).

Mr. Wallace introduced bills to delete the words "unduly" and "unreasonably" from the Act in 1890 and 1891, both of which failed to pass the House and Senate. Senator Read made a similar attempt in 1894, but failed to go beyond First Reading in the House of Commons. The next year, the Liberal Member of Parliament, Mr. T. Sproule, tried again and failed to get the Commons to delete "unduly". He also failed in similar attempts in 1896 and 1898. Finally in 1899, Mr. Sproule was successful. His private member's bill to delete "unduly" and "unreasonably" was passed by both the House and the Senate as the Criminal Code Amendments Act, 1899. Nevertheless, a year later both "unduly" and "unreasonably" were restored to the Criminal Code sections in the Criminal Code Amendment Act, 1900. The Senate did, however, delete the word "unlawfully".

Despite this change, enforcement remained difficult due to cumbersome administrative procedures. The Act relied on individuals registering complaints with the relevant

provincial Attorney-General who was then expected to undertake a prosecution under the federal law. While granting private citizen access to the legislation is laudable, consumers rarely possessed the time, finances and influence required to file a forceful complaint. Yet a total of nine combines prosecutions were conducted between 1900 and 1910. Seven convictions were obtained.

The first successful prosecution was obtained in the case of R. v. Elliot in April 1903. The case involved the Ontario Coal Dealers' Association, an organization designed to maintain retail prices and to prevent direct sales to consumers by producers through establishment of a virtual monopoly of coal distribution throughout Ontario. The conviction was upheld on appeal.[10] In delivering the findings of the Ontario Court of Appeal Osler, J.A. stated:

> "The right of competition is the right of everyone, and Parliament has now shown that its intention is to prevent oppressive and unreasonable restrictions upon the exercise of this right; that whatever may hitherto have been its full extent, it is no longer to be exercised by some to the injury of others."[11]

3.02 Combines Investigation Act, 1910

At the peak of another merger boom, the Combines Investigation Act of 1910 was introduced by the then Minister of Labour, William Lyon MacKenzie King. As the name of the legislation indicates, the Act provided a means to undertake investigations of alleged combines in restraint of trade and hence was intended to facilitate administration of the earlier Act. Any six British citizens could apply to a provincial superior court judge who could order an investigation if they felt sufficient evidence existed. Investigations were carried out by a board of three commissioners, appointed by the Minister of Labour, with wide powers of report. Reports were transmitted to the Minister at the conclusion of an inquiry, to be later published in the Canada Gazette. In the event of a Board finding of a combine, the accused had to cease and desist within 10 days of publication of the finding in the Canada Gazette (Gorecki and Stanbury, 1989).

A combine was defined very broadly in the Act of 1910 to mean:

> "any contract, agreement, arrangement or combination which has, or is designed to have, the effect of increasing or fixing the price or rental of any article of trade or commerce or the cost of the storage or transportation thereof, or of restricting competition in or of controlling the production, manufacture, transportation, sale or supply thereof, to the detriment of consumers or producers of such article of trade or commerce ... and also includes what is known as a trust, monopoly or merger."

Thus, the legislation was not aimed at combination as such but at what King labelled the "possible inimical effects of combination". Because the 1910 Act was criminal law, only those restraints on competition whose harmful effects could be proven beyond a reasonable doubt were made illegal. Indeed, today the basic conspiracy provisions (although amended several times) remain as criminal law.

Mr. King's comments at the time demonstrate his view that the Act of 1910 was primarily a vehicle of investigation and publicity. In this regard, the legislation was modelled after King's Industrial Disputes Investigation Act of 1907. Mr. King "recognized that there are certain evils in the prevention and removal of which publicity is more effective than penalty" (King, 1912, p. 154). Once the public is fully apprised of the nature and extent of the crime it was expected to devise some means of protecting itself against continued injustice and wrong. According to King, "where public confidence and approval is an essential to business success, the fear of exposure is the real deterrent of wrong" (King, 1912, p. 154).

Mr. King's expectation that investigations followed by a public report would greatly deter parties from engaging in anticompetitive activities -- without the need for criminal prosecution -- was not fulfilled, however. Applicants for an investigation were reluctant to incur the considerable expense and publicity of initiating investigations. In addition, because the board was formed on an ad hoc basis,

there existed no body to provide continuity in the administration of the Act, or to ensure that the reports' recommendations were being fulfilled.

Only one investigation was undertaken under the 1910 Act and although a combine was found, no prosecution was attempted. In November of 1910, an application for a Board of Investigation was made in the matter of the leasing system of the United Shoe Machinery Company. The complaint filed by the manufacturers of boots and shoes was much the same as earlier litigation on the matter in 1905 which was finally decided in favour of the Company by the Privy Council in 1909. The Company fought the application for an investigation unsuccessfully at trial and upon appeal, but did succeed in greatly delaying proceedings (see Ball, 1934). The Board did not begin its investigation until November of 1911, submitting their final report to the Minister a year later. The majority of the three-man Board found a combine, ordering the Company to alter its leasing arrangements within six months. The Board was disbanded upon release of its report.

3.03 New Legislation, 1919

A period of unprecedented inflation during World War I prompted the appointment of a House of Commons Committee to inquire into the reasons for the high cost of living (Canada, 1915). Allegations of widespread profiteering and unreasonable profit margins focused part of the Committee's attention to an examination of combines legislation. However, the Committee found no evidence of unreasonable profit margins nor of profiteering, finding the rise in prices was due primarily to excess demand and to an increase in the supply of money, notably currency. Regardless, the Committee recommended the creation of:

> "a tribunal with power to investigate mergers, trusts, monopolies ... also with regulative power in connection with discriminations in price between purchasers of commodities, exclusive purchase and sale arrangements, inter-corporate shareholding and interlocking directorates, and unfair methods in Commerce."

Consequently, the Board of Commerce Act and the Combines and Fair Prices Act were passed in July 1919. The functions of the Board of Commerce were extensive. Investigation and restraint of combinations, monopolies, trusts and mergers constituting a combine was turned over to their jurisdiction. In addition, the Board had power to control the withholding of commodities and/or the enhancement of prices.[12] The Board of Commerce was to be a permanent administration and enforcement body, having the power to issue civil cease and desist orders for violations of the Combines and Fair Prices Act. It could on its own initiative start an investigation under the Combines and Fair Prices Act. Appeal to the courts from the Board's decisions could be made only on matters of law (see Ball, 1934).

The new legislation was to be short-lived, however, as the Board's powers were called into question on a constitutional reference to the courts in 1920. In 1921, the Judicial Committee of the Privy Council declared parts of both the Board of Commerce Act and the Combines and Fair Prices Act ultra vires the Parliament of Canada.[13] Part of the Court's decision held that the criminalization of the "hoarding of undue profits" was clearly a matter of "property and civil rights" and hence within the provincial sphere of power set out in section 92 of the British North America Act.

3.04 Combines Investigation Act, 1923

The second Combines Investigation Act, which came into effect in June 1923, replaced both the Board of Commerce Act and the Combines and Fair Prices Act. When introducing this legislation into the House of Commons, Mr. King, now Prime Minister, reiterated that like the Act of 1910 this legislation was designed to detect and publicize undesirable combinations in restraint of trade (see Skeoch, 1966a).

To facilitate this process, the lodging of a complaint was made easier and cheaper. A permanent Registrar was established to administer the Act under the Minister of

Labour. The first Registrar appointed was Mr. Harry Hereford, Industrial Engineer of the Department of Labour. Mr. Hereford held the office until September 1925, at which time Mr. F.A. McGregor began his long-standing career in the position.[14]

Under the 1923 Act, the application for initiation of a combines inquiry could be made to the Registrar by six citizens, by the Minister, or be initiated by the Registrar himself. The results of the Registrar's inquiry were reported to the Minister who, in turn, decided whether a further, more formal investigation was needed. Formal investigations were conducted by the Registrar or by a Commissioner appointed by the Minister on an ad hoc basis. Formal reports were transmitted to the Minister and, in the case of a Commissioner's report, published within fifteen days of the Minister's receipt of the report (see Gorecki and Stanbury, 1989).

The separation of investigatory and judicial powers was what differentiated this Act from the earlier Combines and Fair Prices Act. Investigations were carried out by the Registrar while adjudication rested with the courts. Like the 1910 Act, prosecutions under the 1923 Act were to be undertaken by a provincial Attorney-General to whom the report of the Registrar or Special Commissioner had been referred by the federal government. The federal government would proceed with prosecution only if the province did not and an individual laid an information to this effect which was approved for prosecution by Cabinet.[15]

In addition, the central offence of conspiracy was altered. Under the 1910 Act, the crime had consisted of the continuation of a combine judged to be a violation of the law, but with the Act of 1923 the offence lay in agreeing or assisting in the formation of a combine. Hence, a prosecution could be conducted even if the combine had ceased its unlawful activities in light of the investigation. The number of prosecutions increased as a result (see Table 4 and Gorecki and Stanbury, 1989).

3.05 New Legislation in the Depression, 1935-1937

In reaction to the widespread economic distress caused by the Great Depression, the Conservative government of Mr. R.B. Bennett appointed the Royal Commission on Price Spreads and Mass Buying to review combines legislation as part of a larger inquiry into price spreads and trade practices. The Minister of Trade and Commerce, Mr. H.H. Stevens, was made chairman. Mr. Stevens dominated the Committee's hearings, denouncing unfair trade practices and what he felt were flagrant abuses of economic power by department stores, meat packers and other mass buyers. Stevens' exuberant attack on big business considerably strained Conservative party unity at the time, ending with Stevens' resignation from Cabinet but continued membership on the Royal Commission (Forster, 1962).

An important part of Bennett's "New Deal" proposals was action to implement the recommendations of the Price Spreads Commission which were delivered to Parliament in 1935 (Canada, 1935). Among their recommendations was the creation of a federal Trade and Industry Commission to undertake the administration of the Combines Investigation Act. The Commission was to have full power to receive complaints, initiate and conduct investigations, and to make recommendations concerning prosecutions to the Attorney General of Canada. It was also proposed that the Commission be empowered to prohibit unfair trade practices such as discriminatory discounts, rebates and allowances for goods of like quality and quantity, territorial price discrimination, and predatory price cutting.

It should be noted that the Royal Commission's emphasis was on pricing practices rather than on monopolies and combines. Indeed, one provision of the proposed legislation was designed to prevent the ruin of competitors by providing for approval of certain price and production agreements among horizontal competitors where the Commission believed that "wasteful or demoralizing" competition existed in an industry, and that agreements among industry participants would not unduly restrain trade or operate against the public interest.

As a result of the Commission's report, the Dominion Trade and Industry Commission Act was passed by Parliament effective July 5, 1935. It established the Dominion Trade and Industry Commission to administer the Combines Investigation Act, and to authorize combines prosecutions under the Criminal Code. Members of the existing Tariff Board formed the Commission which, administratively, came under the Department of Trade and Industry. Additional legislation was added to the Criminal Code at this time, prohibiting discriminatory discounts, rebates and allowances, regional price discrimination and predatory price cutting (see Figure 1). These provisions (as amended) now constitute section 50 of the Competition Act.[16] In addition, the Combines Investigation Act was amended to provide an operational definition of monopoly (Stanbury, 1978a).

Bennett's government was subsequently defeated in the 1936 election. Immediately upon taking office MacKenzie King referred the Dominion Trade and Industry Commission Act to the Supreme Court for an opinion regarding its constitutional validity. The Supreme Court declared the Dominion Trade and Industry Commission Act provision allowing for price and production agreements to be ultra vires the federal government's power.[17] Consequently, the sections dealing with approval of price and production agreements were repealed by the Combines Investigation Amendment Act of 1937. The 1937 Act also replaced the Registrar with the Commissioner giving the Commissioner shared jurisdiction over combines with the Board of Commerce. In point of fact, however, the Board did not exercise any functions in respect of the Combines Investigation Act. The Commissioner's ability to initiate investigations on his own accord was deleted. The Act was also changed to permit the Attorney-General of Canada to bring cases on his own accord under the Act or the Criminal Code (see Gorecki and Stanbury, 1989).

3.06 World War II and its Aftermath

Throughout most of the Second World War, resource allocation, production and prices were all subject to direct

government control. Commissioner F.A. McGregor (former private secretary to MacKenzie King, Registrar between 1925 and 1935 and Commissioner since 1937), was appointed as an Enforcement Administrator of the Wartime Prices and Trade Board (McGregor, 1945). The enforcement of the combines legislation was effectively suspended, but not with Parliament's consent. Price ceilings on a wide range of commodities were not suspended until January 1947 (Magwood, 1981; Stanbury, 1981a).

Several administrative amendments were made to the Act during this time. In 1945 the Minister of Justice was made responsible for the Combines Branch rather than the Minister of Labour who had held the responsibility since 1910. The amendments also provided for the appointment of up to three Deputy-Commissioners. By regulation, the Commissioner was authorized to make studies of cartels or other monopolistic conditions and report to the Minister of Justice. The Commissioner was also permitted, on his own, to initiate preliminary inquiries, a power which had been in the 1923 Act, but was deleted in the 1937 amendments (see Gorecki and Stanbury, 1989).

According to the Minister of Justice at the time, Mr. L.B. St. Laurent, the principal substantive change resulting from the 1946 amendments was a section which authorized the Exchequer Court (now the Federal Court) to issue an order revising or cancelling a patent licence or pooling agreement or trade mark agreement where such agreements had been used to the detriment of the public. The Act was also amended in 1949 to permit the Attorney-General of Canada to prosecute without waiting three months after a provincial Attorney-General had received a report of the Commissioner recommending prosecution..

3.07 MacQuarrie Committee: Major Amendments in 1951 and 1952

In December 1948, Commissioner McGregor submitted the results of his inquiry into the flour milling industry to the Minister of Justice. In his report, Mr. McGregor

concluded that price-fixing agreements amongst the leading flour milling companies had been in force since 1936, having been maintained throughout the period when the millers' production and prices were subject to federal government scrutiny through the Wartime Prices and Trade Board. Release of the report was subsequently delayed until November 1949 despite the Act's provision that the Minister must publish all Commissioners' reports within fifteen days of receipt. Mr. McGregor resigned in protest on October 29, calling for a firmer commitment by the government to stronger enforcement of the Act.

As a consequence of the resulting widespread public criticism of the government's handling of the flour milling report, the MacQuarrie Committee was appointed in June 1950 to study the purposes and methods of the Combines Investigation Act and related competition statutes as well as those of other countries (Rosenbluth and Thorburn, 1963; Skeoch, 1966b).

The Committee's Interim Report on Resale Price Maintenance was released in October 1951. The Committee concluded that, on the whole, resale price maintenance was not justified, having taken into account both freedom of contract and the objective of economic efficiency (Canada, 1952). Parliament subsequently made the practices of fixing minimum resale prices and refusal to deal illegal per se, effective December 29, 1951. Hence, Canada was made the first country to ban such behaviour outright. This legislation (as amended) is now section 61 of the Competition Act.[18]

The final report of the MacQuarrie Committee was tabled in the House in March 1952 (Canada, 1952). The legislative changes resulting from the MacQuarrie Report were introduced to the House shortly thereafter by the Minister of Justice, Mr. Garson. The legislative amendments announced, while not materially changing existing provisions regarding combines and restraints of trade, did result in fundamental reform in procedural and administrative matters (see Rosenbluth and Thorburn, 1963). At the time Mr. Garson emphasized the innovative and efficiency-enhancing pressures competition exerts on business (Gorecki and Stanbury, 1984).

On an administrative level, the functions of the Commissioner were divided between two new entities: the Director of Investigation and Research (DIR) and the Restrictive Trade Practices Commission (RTPC). Administration and enforcement functions of the former Commissioner were incorporated into the office of the DIR. Mr. T.D. McDonald was appointed Director of Investigation and Research at that time. The DIR was granted numerous investigatory powers including search, affidavits, testimony under oath and sworn returns of information. Note, however, that the Director could only exercise these powers after authorization by a member of the RTPC. Functions of appraisal and public report were given to the RTPC. All prosecutions, upon the recommendation of the DIR, were henceforth to be conducted by the Department of Justice (see Rosenbluth and Thorburn, 1963).

Provision was made for Orders of Prohibition and other remedies as a sole remedy to offences or to be used in conjunction with fines. An additional amendment permitted dissolution of a merger, trust or monopoly. Thus, the legislation was allowing for structural remedies for the first time. The Act was also amended to provide for general inquiries into monopolistic situations or restraints of trade.[19] The number of prosecutions subsequently rose (see Table 4).

3.08 Amendments throughout the 1960's: Consolidating Competition Legislation

On May 6, 1960, the Conservative government of Mr. John Diefenbaker introduced a set of amendments to the Combines Investigation Act which became effective August 10. Mr. Davie Fulton, the Minister of Justice, argued that the amendments were intended to consolidate and clarify the legislation (see Rosenbluth and Thorburn, 1963).

Undoubtedly one of the more significant changes at this time was the incorporation of a provision prohibiting the misrepresentation of the ordinary selling price. This change resulted not from consumers' concern but rather pressure from business. Business was concerned that

misleading regular price comparisons were making genuine sale advertising less credible to consumers, and that these misrepresentations were giving an unfair advantage to those businesses misguiding the public.

The general prohibitions relating to false and misleading statement of fact were moved from the Criminal Code to the Combines Investigation Act in 1969. Remarking on the provisions at the time, the Director of Investigation and Research Mr. D.H.W. Henry, claimed:

> "It is a measure of the importance that Parliament and government have attached to the consequences of misleading advertising that these ... provisions have been inserted in the Combines Investigation Act ... These provisions relate to the consumer ... not only by protecting the consumer against fraud and deception but as well by improving the quality of information which is available to him in making his purchases."
> (Henry, 1969, p. 7)

These provisions are now found primarily in paragraphs (a) and (b) of section 52(1) of the Competition Act.

Provisions to deal with misleading or deceptive statements of fact had been in the Criminal Code in one form or another as far back as 1917 where they were originally directed against fraudulent land sales during the early real estate boom in Western Canada (see Cohen, 1971). Provincial authorities had made no use of the Criminal Code provision, however. The result of placing these new provisions in the federal legislation was a virtual explosion of prosecutions, from two in 1969/70 to 68 in 1974/75 to 125 in 1987/88 (see Table 3).

3.09 Need for Fundamental Reform

Despite these changes the government grew increasingly interested in reforming competition law. No doubt part of this interest may be explained by the increasing difficulties the government was facing in prosecuting cases. While recognizing the legislative purpose of the

policy on combines to be the protection of the public interest, the courts continually battled with the problem of deciding at what point horizontal agreements limited competition "unduly". In one of the early explicit judicial statements concerning the meaning of "undue" lessening, Cartwright J. in the case of Howard Smith Paper Mills Ltd. et al. v. R. stated:

> "... an agreement to prevent or lessen competition in commercial activities of the sort described in the section becomes criminal when the prevention or lessening agreed upon reaches the point at which the participants in the agreement become free to carry on those activities virtually unaffected by the influence of competition, which influence Parliament is taken to regard as an indispensable protection of the public interest."[20] (emphasis added)

In monopoly and merger cases, difficulties arose over the meaning of the criterion "to the detriment or against the interest of the public". Successful prosecution of a monopoly depended on a combination of great market control and public detriment. Gaining or holding a monopoly was not presumed to be against the public interest. Rather, a firm needed to be engaging in particularly restrictive behaviour designed to virtually eliminate all competitors before public detriment was deemed to occur (Stanbury, 1978a).

The difficulty found in interpreting public detriment was compounded in the case of mergers by the criminal nature of the legislation. In 1960, for example, the government lost two important merger cases: R. v. Canadian Breweries and R. v. British Columbia Sugar Refining Company and B.C. Sugar Refining Limited.[21] Neither was appealed. These cases aptly demonstrated the unsuitability of criminal law to merger review. The rules of evidence, burden of proof and implication of wrongdoing found in criminal provisions are inappropriate to evaluation of a merger's future impact on the competitive environment. This situation was further exacerbated by the requirement that not only must competition be lessened substantially but also that specific evidence of public detriment directly attributable to the merger be found (MacCrimmon and Stanbury, 1978).

To deal with these matters, among others, the newly-formed Economic Council of Canada was asked in 1966 to undertake a study of the Canadian marketplace and to make any relevant recommendations in respect of competition policy. In July of 1969 the Economic Council released its Interim Report on Competition Policy. Among the Council's recommendations was the adoption of a revised approach to competition policy, based on a mixture of criminal and civil law employing the single, clear objective of furthering the interest of Canadian consumers through an efficiently functioning economy. By focusing on the sole objective of improved economic efficiency, the Council believed competition legislation would be applied with greater consistency and effectiveness.[22]

Practices regarded by the Council as "rarely if ever productive of any substantial public benefit" were to be vigorously and publicly enforced within the sphere of criminal law. Thus, it was recommended that misleading advertising, resale price maintenance, and agreements between competitors to fix prices, allocate markets or prevent entry be illegal per se. It was further recommended that the existing criminal offences relating to monopoly and merger be replaced by civil law provisions to be adjudicated by an independent group of economic, legal and business experts to be known as the Competitive Practices Tribunal. Through the use of economic analysis, the Tribunal would determine whether mergers or other business practices operated in the public interest in the sense that they promoted economic efficiency, higher real incomes and consumer welfare.

Many of the Economic Council's proposals of 1969 were incorporated into Bill C-256 introduced to the House in June 1971.[23] While the Bill was aimed at achieving a number of objectives, efficiency enhancement was given priority. This was made clear not only by the preamble introducing the legislation but also through a series of speeches delivered by the Minister of Consumer and Corporate Affairs,[24] Mr. Ron Basford, shortly after introduction of the Bill (Gorecki and Stanbury, 1984). In a speech to the Canadian Chamber of Commerce, Mr. Basford stated:

> "The cornerstone of our policy, as the preamble clearly sets out, is that competition is the best means of attaining efficiency in the Canadian economy. It is our conviction - and this is carried through every part of the Act - that through the free interplay of market forces, our manpower, capital and natural resources will be directed into the most productive channels; that effective competition in our markets will provide a spur to greater productivity among Canadian industry; that the need to keep ahead of the competition will lead to progressive technological change and innovation; that Canadian industry will be in a better position to ensure and increase its ability to compete with foreign concerns in both domestic and international markets."
> (Basford, 1971, p. 5).

Business reaction to Bill C-256 was overwhelmingly adverse despite the government's efforts at consultation (see Stanbury, 1977a). The civil review procedures featured in the bill, particularly those pertaining to merger activity, were regarded as an excessive governmental interference in the workings of the marketplace. Canadian businessmen were of the long-standing view that optimal firm size in Canada needed to be so large relative to the small, domestic market that it necessitated very highly concentrated industries. In their view, restricting merger activity in the manner thought to be proposed by Bill C-256 would serve to only hinder the efficient operation of the economy.

3.10 Stage I Amendments

Given the intensity of business opposition, the government decided to proceed with competition policy reforms on an incremental basis. Thus, the Stage I Amendments, dealing with the least contentious proposed revisions to the Combines Investigation Act, were introduced in November 1973. Mr. Robert Bertrand was appointed Director of Investigation and Research in 1974 having the responsibility of getting the Stage I Amendments through the various Parliamentary Committees. The Stage I Amendments were enacted in 1975 after incorporating numerous House and Senate Committee revisions (see Stanbury, 1977a). The amendments came into effect in January 1976.[25]

The Stage I Amendments extended application of the Combines Investigation Act to services. New criminal offences of bid-rigging, the implementation of foreign directives giving effect to agreements contrary to the Act, double ticketing, pyramid and referral selling, bait and switch selling, and selling at higher than advertised prices were also enacted. Other criminal prohibitions against misleading advertising and price maintenance were strengthened. The meaning of the word "unduly" in the context of combines cases was clarified by eliminating any perceived necessity of proving that the combine's effect would be to virtually eliminate competition.

In addition, the amendments created a number of reviewable practices: refusal to deal; consignment selling; exclusive dealing; tied selling; and market restriction. The Restrictive Trade Practices Commission became the adjudicatory authority able to make remedial orders in reviewable practices cases it deemed appropriate. Private civil suits for recovery of single damages were also instituted. Finally, the Director was granted standing to make representations and to call evidence concerning the maintenance of competition before any federal regulatory board.

3.11 Stage II Amendments

Launching of the Stage II Amendments began with the appointment of an Advisory Committee. Lawrence A. Skeoch and Bruce C. McDonald headed the Committee. Their report, Dynamic Change and Accountability in a Canadian Market Economy, was released in May of 1976. The Skeoch-McDonald proposals called for competition policy legislation:

> "that will most effectively facilitate long run dynamic change within the Canadian economy, that will encourage the adoption of real-cost economies, and that will discourage restraints which result from mere market power rather than from superior economic performance."
> (Skeoch with McDonald, 1976, p. 202).

The report rejected extensive government intervention as a means of attaining these goals.[26]

The Skeoch-McDonald report did, however, affirm the need for an expert membership for the proposed National Markets Board which was to administer the civil law provisions relating to mergers and other fields requiring careful analysis of actual and potential economic effects. Nevertheless, Cabinet was to be empowered to set aside or change any order made by the National Markets Board. Important guidelines for identifying "dominant" firms and prohibiting their misuse of monopoly power were also outlined in the report. All structural tests, such as market share of firms, were to be abandoned save for the conditions of entry.

In March of 1977, Bill C-42, representing the first attempt to enact the Stage II Amendments to the Combines Investigation Act, was introduced in the House of Commons.[27] The Bill's preamble contained much of the language of the Skeoch-McDonald report, stressing that the objectives of Canadian competition policy should be the facilitation of the process of dynamic economic change.

Specific provisions of Bill C-42 recognized the need for civil law standards for reviewing mergers. An efficiency exception for mergers that would otherwise lessen competition substantially was also included. Differentiating this provision from previous draft provisions was the lack of a need to demonstrate efficiency gains would be passed down to consumers. The test of consumer benefit was also abandoned in the case of export and specialization agreements. In addition, export agreements would not be considered unlawful if their adverse effects on competition were "unintended" or "ancillary" to their primary objectives.

The capacity of the Director of Investigation and Research, to be renamed the Competition Policy Advocate, to intervene in regulatory hearings was broadened by the proposed Bill. Bill C-42 also required regulatory agencies to exercise their powers in a manner least restrictive of competition. Strict conditions for exemption of regulated conduct from competition legislation were spelled out.

Expanded access to private enforcement of competition legislation was also provided by Bill C-42. Class actions were to be made available to those whose individual damages were so small as to preclude individual redress through the courts. Substitute actions were also called for by the Bill.[28] Under particular safeguards the Competition Policy Advocate could initiate court proceedings on behalf of a claimant group deemed too small to warrant the cost of administering the relief sought in a class action.

Bill C-42 was referred to the House of Commons Standing Committee on Finance, Trade and Economic Affairs chaired by Mr. Norman Cafik. Following the Cafik Committee's recommendations, the government announced that the Bill would be appropriately revised and resubmitted to Parliament. Business opposition to the proposals was strongly felt at the Committee level. In their final report the Cafik Committee stated that while they favoured "a good healthy competition policy", they proposed that "adequate safeguards must be built into the system to ensure that it does not get out of control due to well-intentioned but excessively enthusiastic enforcement". Unfortunately, the proposed safeguards would have seriously restricted the effectiveness of the new legislation (MacCrimmon and Stanbury, 1977).

Bill C-42 did not, however, move beyond Second Reading. Rather, it was replaced by Bill C-13 which was given First Reading in November 1977. Bill C-13 eliminated many of the features business had found objectionable.[29] Nevertheless, it died on the Order Paper in 1978, partly due to business opposition (Stanbury, 1988).

A further attempt at instituting the Stage II Amendments was made in May 1981 when the Minister of Consumer and Corporate Affairs, Mr. André Ouellet, released a discussion paper in the form of a set of proposals to amend the Combines Investigation Act. New civil provisions relating to mergers, monopolization, abuse of intellectual property, import and export restrictions were proposed. Adjudication of these provisions was to remain with the courts. Amendments to the conspiracy section would create certain per se criminal offences and establish a structural

(market share) standard for other types of agreements in restraint of trade. Other criminal offences proposed included the prohibition of Canadian firms exceeding a domestic market share threshold from participating in international cartels and a prohibition of refusal to supply by reason of a delivered pricing scheme. Specialization agreements, once approved by the RTPC, were to be exempt from the conspiracy provisions. It was also proposed that responsibility for competition policy in banking be transferred to the Combines Investigation Act (Canada, 1981).

The proposals did not result in a new bill, in part because of the government's concern about a hostile reaction from the business community at a time when it had other major economic policies to deal with.[30] Mr. Lawson A.W. Hunter replaced Mr. Bertrand as Director of Investigation and Research shortly thereafter.

3.12 Bill C-91, 1985: Success At Last

Recognizing the indisputable role business interests had played in developing competition legislation within Canada, the government increased consultation with business groups following the demise of the Minister's 1981 proposals. These discussions culminated in the introduction of Bill C-29 in the House in 1984.[31] As proposed in previous Bills, Bill C-29 would have reassigned many matters from the realm of criminal law to that of non-criminal or civil law. Reviewable matters would, however, be adjudicated by the courts rather than a special tribunal. The Bill was not enacted before the general election of 1984.

The Progressive Conservative government elected in September 1984 continued the consultative process with business, expressing its commitment to competition legislation reform with the introduction of Bill C-91 in 1985.[32] While very similar to Bill C-29, the new bill restored the proposal for a special tribunal to deal with non-criminal competition policy matters. In June 1986, Bill C-91 was passed into law, creating the Competition

Tribunal and amending the Combines Investigation Act which was renamed the Competition Act. Mr. Calvin S. Goldman was made Director of Investigation and Research shortly thereafter.

4.0 COMPETITION POLICY IN CANADA TODAY

Competition policy in Canada today encompasses four functions: (i) the administration and enforcement of the criminal and non-criminal provisions of the Competition Act; (ii) the conduct of interventions before federal and provincial regulatory bodies in respect of competition; (iii) the provision of input to the design and implementation of government policies that affect the competitive market system; and (iv) representation of Canada's interests in international antitrust forums.

The Competition Act represents the principal piece of framework legislation which seeks to maintain and strengthen the role of competitive market forces in Canada, thereby encouraging maximum efficiency in the use of Canada's economic resources.[33] Note that by focusing on achievement of economic efficiency, the Act continues the legislative tradition of not viewing large firm size as necessarily adverse to competition. Increases in size may be needed to effectively meet domestic and/or foreign competition. Like its predecessors, the primary concern of the Act is the potential abuse of a firm's market position. To this end, the legislation seeks to establish clear and equitable standards -- which are also effective and enforceable -- by which Canadian businesses are to conduct their activities.

The provisions for interventions by the Director of Investigation and Research before regulatory boards provide an excellent example of the Act's general applicability. While criminal jurisprudence has indicated that business activities which are effectively regulated pursuant to federal or provincial legislation may be provided with a "regulated conduct defence", there remain opportunities for adopting competition principles in the design and implementation of various regulations.

The Director was first granted right of intervention before federal regulatory bodies in 1976 as part of the Stage I Amendments to the Combines Investigation Act. Since that time the Director has appeared before numerous federal and provincial boards in an effort to advance competition as an alternative policy to regulation (see Table 2). Some of the boards and tribunals before which the Director has advanced competitive strategies include the Canadian Transport Commission (now the National Transportation Agency), the Canadian Radio-Television and Telecommunications Commission, the National Energy Board, the Canadian Import Tribunal (now the Canadian International Trade Tribunal), the Newfoundland and Labrador Board of Commissioners of Public Utilities, the Ontario Energy Board, the Saskatchewan Public Utilities Review Commission, and various federal and provincial agencies concerned with the marketing of agricultural products.

The provision of advice to senior levels of government and participation with various federal and provincial departments and agencies in the design of government policies affecting the competitive market system is another important aspect of the Bureau of Competition Policy's work. Some of the areas in which the Bureau has played a role in policy formulation include: (i) input to the bilateral free trade negotiating team regarding contingency trade remedies and aspects of intellectual property rights; (ii) regulatory reform of federal and provincial legislation governing financial markets; (iii) development of the National Transportation Act, Shipping Conference Exemption Act and Motor Vehicle Transport Act, which have substantially deregulated the transportation sector; (iv) development of recent legislative initiatives respecting patents and copyrights; (v) deregulation of natural gas and other energy markets; and (vi) active participation in telecommunications reform.

Finally, the administration of competition policy involves the representation of Canada's interests in international antitrust fora. In this function, the Director is involved in the work of the OECD Committee on Competition Law and Policy and the UNCTAD Intergovernmental

Group of Experts on Restrictive Business Practices as well as the various working parties of these organizations.

In particular, Canada has had long-standing contact with the United States in respect of competition policy. Formal contact regarding notification and consultative procedures is presently governed by the 1984 Canada/U.S. Memorandum of Understanding on Antitrust Matters. This arrangement dates back to the 1959 Bilateral Understanding announced by Canadian Minister of Justice Fulton and U.S. Attorney General Rogers. The agreement was subsequently renewed and expanded in 1969 and 1977. Through this agreement, Canada and the United States have effectively reduced the scope and intensity of potential conflicts arising from the independent application of their respective antitrust laws. Informal contact between the two countries has furthered the good working relationship the Bureau shares with both the Federal Trade Commission and the Antitrust Division of the U.S. Department of Justice.

4.1 Competition Act of 1986: An Overview

The primary focus of competition policy in Canada does, however, remain in the administration and enforcement of the Competition Act. The Competition Act and the Competition Tribunal Act came into force on June 19, 1986 resulting in a marked change from the previous legislation. Responding to the Economic Council's recommendations of two decades previous, the Act combines criminal and non-criminal law provisions. (Recall that the first non-criminal law provisions were enacted in 1976 - see Figure 1.)

Criminal offences under the Act include conspiracy, discriminatory and predatory pricing, misleading or deceptive marketing practices and price maintenance. These are, of course, matters resolved in criminal courts of competent jurisdiction. Strict rules of evidence apply and cases must be proven beyond a reasonable doubt. Reviewable matters include abuse of dominant position, mergers, and the practices of refusal to deal, consignment selling, market restriction, exclusive dealing, tied selling and the application of foreign laws and judgments to Canadian

companies (see Figure 2). These matters are adjudicated by the Competition Tribunal under administrative law standards.

4.2 Investigation: The Role of the Director

The Director of Investigation and Research remains the official responsible for ensuring that the Act is enforced in a fair, effective and timely manner.[34] In this respect, enforcement of the Act can take the form of investigation of violations of the Act with a view to prosecution and imposition of criminal penalties. In other instances the goals of maintaining and encouraging competition may be pursued with greater effectiveness and certainty, and with less time and expense, through an approach which stresses the promotion of continuing voluntary compliance with the Act and relies on a broad range of responses to non-compliant behaviour. It is noteworthy that such an approach was originally advocated, albeit in a somewhat different form, as early as 1910 when MacKenzie King introduced the first Combines Investigation Act to the House of Commons (see King, 1911, 1912).

Today's compliance-oriented approach is characterized by four principal components: a program of communication and education; facilitating compliance through advisory opinions, information contacts and advance ruling certificates; monitoring compliance with the Act; and responding to possible violations of the Act and reviewable matters through a variety of instruments (Canada, 1989).

Company officials, lawyers and others are invited to request an advisory opinion on whether the implementation of a proposed business plan or practice would give the Director grounds to initiate an inquiry under the Act. Those who seek an advisory opinion are not bound by the advice provided and similarly, the Director is not bound by the opinion given. Advisory opinions are given in relation to a specific set of facts. Should the details of the proposed plan differ when implemented from the plan presented to the Director, or should conditions change in a way that would alter the impact of the proposed plan on the market, the matter could be subject to further examination.

Information contacts may be initiated when the Director is of the opinion that a person may be unaware of a particular provision of the Competition Act or of its application. Persons contacted are under no obligation to justify their conduct or to discuss the matter with the Director. Following an information contact the Director may decide to continue the examination, monitor the conduct in question over a reasonable period of time or close the file.

In the case of mergers, parties to a proposed transaction may wish to seek some assurance from the Director that the proposed merger will not raise competition concerns. Under section 102 of the Act, the Director may issue an Advance Ruling Certificate when satisfied by the parties to a proposed transaction that sufficient grounds on which to apply to the Competition Tribunal for a remedial order do not exist. Issuance of an Advance Ruling Certificate precludes the Director from challenging the merger if it is substantially completed within one year of issuance of the certificate and if there is no substantial change in the information on which the certificate is issued (see Table 5).

Despite efforts to increase compliance with the Act on a voluntary basis, instances of non-compliance do arise. For this reason, Bureau staff monitor conduct in the marketplace in an effort to keep the Director informed of possible violations of the Act. The principal information sources relied upon for monitoring purposes include: complaints received from business persons, consumers, government departments and others; material submitted pursuant to undertakings or to orders of the Competition Tribunal or the courts; material submitted pursuant to the notifiable transactions provisions of the Act; and general industry contacts, news reports and trade journals.

Matters which the Director pursues normally begin with a preliminary examination to determine whether a question under any of the provisions of the Act is raised. If the Director believes, on reasonable grounds, that an offence under Part VI or VII of the Act has been or is about to be committed, or that grounds exist for the Tribunal to make an order relating to a reviewable matter under Part VIII of the

Act, or that a person has contravened or failed to comply with an order made under the Act, the Director is obliged to commence an inquiry into all such matters considered necessary to determine the facts. The Director is also obliged to commence an inquiry at the direction of the Minister of Consumer and Corporate Affairs or when six Canadian residents make an application in accordance with section 9 of the Act.

Once an inquiry has commenced, the Director can apply for authorization from a court to search for and seize records, to conduct oral examinations and to exercise the other investigative powers provided by the Act. Note that the Competition Act substantially revised the investigatory powers available to the Director as a result of the 1984 decision of the Supreme Court of Canada in the Southam case.[35] In that decision the Supreme Court declared the former search powers to be unconstitutional under the Charter of Rights and Freedoms. The new search powers incorporate the standards set out by the Supreme Court in the Southam case, being designed to ensure a high degree of neutrality and impartiality in the adjudication of the merits of an application.

Search warrants may be obtained for both criminal and non-criminal matters and may be executed anywhere in Canada, but only after authorization by a judge of a superior or county court or of the Federal Court of Canada. Likewise, authorization for oral examinations and productions of documents must be obtained from a judge of a superior or county court or of the Federal Court of Canada.

The Competition Act also sets out new provisions dealing with the search of computer systems. The Director's representative is permitted by the Act to use any computer system on the premises described in the warrant to gain access to data stored at a location on or off the search premises, such as a service bureau or the head office of a corporation. The person who is in control of the premises has a duty, upon presentation of the warrant, to permit the search officer to use the computer system during execution of the warrant.

The Director may discontinue an inquiry at any stage if further investigation is not thought to be justified. In such an event, the Director is required to submit a written report to the Minister. If the inquiry was commenced as a result of a six-resident application, the Director must inform the applicants of the decision and the grounds for the discontinuance. The Director may be instructed to make further inquiry at the direction of the Minister.

As cited earlier, a number of instruments to resolve cases are available to the Director, including investigative visits, undertakings, orders on consent and contested proceedings. Investigative visits refer to contact the Director or an appointed designate may make with a party alleged to be involved in anticompetitive conduct in order to obtain further information. If the information obtained persuades the Director that further investigation is not justified, the inquiry will be discontinued. Alternatively, the Director may decide that further inquiry is not warranted after an investigative visit because of voluntary corrective action taken by the party.

In other circumstances, the Director may accept written undertakings which eliminate the need to make an application to the Competition Tribunal or refer a matter to the Attorney-General. Undertakings are not new. They have been accepted by Directors since the 1960s, being encompassed in the framework of the enforcement discretion given to the Director by various statutory provisions. Undertakings are designed to remedy or overcome the effects of an anticompetitive course of action. For example, a company might undertake to refrain from certain behaviour or to engage in certain activities which resolve the Director's concerns under the Act. In the case of a merger, the parties under inquiry might undertake to restructure the merger by disposing of certain assets or shares within a certain period of time (see Table 5).

4.3 Adjudication: The Courts and the Competition Tribunal

At any stage of an inquiry relating to the criminal law provisions of the Act, the Director may refer a matter to

the Attorney-General of Canada for consideration as to whether an offence has been or is about to be committed and for such action as the Attorney-General may wish to take. The Director will normally include a recommendation regarding the action the Attorney-General should take when a matter is referred. In this respect the Director may recommend proceeding under subsection 34(2) in pursuit of a prohibition order on consent. When the Court issues an order under this provision, the parties need not plead guilty nor do they stand convicted. No fine or other sentence is imposed. In circumstances where the Director believes it is appropriate to seek a conviction and fine, in addition to a prohibition order, the Director may recommend proceeding under subsection 34(1) of the Act. Orders of the court under these two subsections may be issued with or without the consent of the parties. Whatever recommendation the Director makes, the Attorney-General retains complete discretion as to the action taken. Ultimately, it is for the court to decide whether a proposed order should be imposed in the circumstances of a particular case.

In the case of reviewable matters, the Director may apply to the Competition Tribunal for resolution either on a consent or contested basis. Under section 105 of the Act, the Tribunal may make an order, without hearing the evidence usual in a contested application, in any matter where the Director and the respondents have reached agreement. The issuance of a consent order is ultimately at the discretion of the Competition Tribunal. Applications by the Director in contested proceedings for the Tribunal's issuance of an order are generally pursued in those cases where alternative case resolution instruments do not provide an appropriate remedy to the Director's competition concerns.

In establishing the Competition Tribunal, Parliament sought to combine the important element of judicial process with expertise in the fields of business and economics. To this end, the Tribunal consists of up to four judges of the Federal Court of Canada - Trial Division, and up to eight lay specialists. Appointments are for terms of up to seven years, and both judicial and lay members are eligible for re-appointment for further terms.

Applications to the Competition Tribunal are heard by panels of three to five members, with at least one judicial member and one lay member per panel. The presiding member on any panel is always a judicial member. Some functions have been assigned exclusively to the judicial members of the Tribunal. For instance, questions of law are to be determined by judicial members only. It is within the Tribunal's discretion to grant standing to third parties who may wish to participate in any proceeding before the Tribunal if those parties can demonstrate that they are affected by the matter which is before the Tribunal. Provincial Attorneys-General may intervene as a right in certain proceedings.

The Tribunal is a court of record and possesses the same powers as are vested in superior courts with respect to procedure and the enforcement of its orders. Decisions or orders of the Tribunal, whether final, interlocutory or interim in nature, can be appealed to the Federal Court of Appeal as if they were judgments of the Trial Division of the Federal Court. However, an appeal on a question of fact lies only with leave of the Federal Court of Appeal. There is no appeal to or override given to Cabinet.

4.4 Reviewable Matters

(1) Mergers

The new reviewable provisions relating to mergers represent one of the most important changes enacted in 1986.[36] As discussed earlier, previous merger provisions were under criminal law. Criminal law does not, however, readily facilitate the use of economic analysis, a failing recognized in the case of merger review by the Economic Council in 1969. In addition, criminal law procedural requirements and the strict burden of proof made the previous legislation difficult to enforce.

The Competition Act applies to all mergers in Canada, no matter what their size or the nationality of the acquirer.[37] In the case of asset acquisitions, parties to a proposed merger are obliged to comply with the mandatory

pre-notification requirements when they exceed two thresholds (see Wetston, 1989). First, the parties, together with their affiliates, must have total assets, or total annual revenues from sales in, from, or into Canada, of over $400 million. The second threshold relates to the size of the proposed transaction itself; $35 million in sales or assets. In the case of a corporate amalgamation, notification is required where the value of the assets in Canada or the annual gross revenue from sales in or from Canada of the continuing corporation exceeds $70 million.

For share acquisitions notification is required for a proposed acquisition of "voting shares" of a corporation, where the corporation has assets in Canada, or gross annual revenues from sales in or from Canada, that exceed $35 million and where, as a result of the acquisition, the acquirer will have a greater than twenty percent voting interest in a public company or a greater than thirty-five percent voting interest in a private company.

Upon notification, parties complete either a short or a long information filing. The parties are then required to wait either seven or twenty-one days, depending on the information filing made, before completing the transaction. If the acquisition is to be carried out through the facilities of a Canadian stock exchange, the waiting period is ten trading days. During this time the Director conducts an examination of the competitive implications of the transaction. By providing a period of time to carry out a meaningful preliminary examination of large transactions the notification provisions help avoid the problems associated with the ex poste restoration of firms and competition to their premerger state. Should the parties attempt to proceed with closing a transaction the Director believes is likely to be anticompetitive, the Director may initiate proceedings to ask the Tribunal to enjoin the proposed merger.

In the case of foreign acquisitions, Investment Canada continues to review direct and indirect acquisitions by non-Canadians to ensure that they are likely to be of net benefit to Canada. The assessment of the competition factor, which is only one of a number of factors examined by

Investment Canada, is done by the Bureau. However, Investment Canada is not bound to accept or to reject a proposed acquisition because of the Director's view. Similarly, the Director is not bound by an Investment Canada decision. The Competition Act applies even if a foreign acquisition of a Canadian business has been approved by Investment Canada.

Under the Canada-U.S. Free Trade Agreement, the direct acquisition threshold for Investment Canada review of American acquisitions will be raised and the indirect acquisition threshold gradually phased out. Note, however, that the Free Trade Agreement does not alter in any way the applicability of the merger provisions to acquisitions involving domestic or foreign firms. Business firms will continue to face the Competition Act tests that currently apply in Canada.

The amended Act also gives the Director, rather than the Inspector General of Banks, responsibility for investigating bank mergers. Nevertheless, the Minister of Finance may exempt a bank merger from the Competition Act on the basis of financial policy considerations.

Under the Competition Act mergers are assessed to determine whether they will likely prevent or lessen competition substantially. In making this assessment, the legislation expressly denies a finding of substantial lessening or prevention of competition solely on the basis of evidence of market share or concentration. This provision highlights the fact that merger review is more than a mechanistic process. Both qualitative and quantitative aspects of competition will be taken into account in order to avoid an overly structuralist approach to the law. Competition is a dynamic process, and merely adding up market share in some circumstances may tell little about the effect of a merger on competition.

In addressing whether a merger prevents or lessens competition substantially, or is likely to do so, the Bureau may evaluate any factor relevant to competition in a market. Seven factors are expressly referred to in the statute: the extent of effective foreign competition;

whether a party to the merger is likely to fail; the extent to which acceptable substitutes are available; the presence of any barriers to entry; the extent to which effective competition remains; whether the merger results in the removal of a vigorous and effective competitor; and the nature and extent of change and innovation in the relevant market. This is a non-exhaustive list, and not all factors need necessarily be considered in all cases.

The new merger law also provides for an efficiency exception. Under this provision the Tribunal shall not prohibit a merger which lessens or prevents competition substantially if it finds that the merger has brought about or is likely to bring about gains in efficiency that will be greater than, and will offset, the effects of any prevention or lessening of competition resulting from the merger, and that such efficiency gains would not likely be attained if an order were made. Additional consideration will be given to those gains in efficiency which give rise to a greater real value of exports or increased import substitution.

(2) Abuse of Dominant Position

While large firm size is not in and of itself cause for concern under the Competition Act, the Act does provide for remedies when dominant firms engage in anticompetitive conduct. Several elements must be proven in such cases.[38] First, "one or more persons" must substantially or completely control a class or species of business in Canada or any area thereof. Second, the dominant firm must engage in a practice of anticompetitive acts. A non-exhaustive list of acts is provided in the legislation to illustrate the type of conduct which may be considered by the Tribunal to be anticompetitive. These include activity such as the squeezing of profit margins by vertically integrated customers, and the pre-emption of scarce facilities or resources required by a competitor for the operation of a business. Note that such activity must have an anticompetitive object or purpose. Finally, the practice of anticompetitive acts must have or be likely to have the effect of preventing or lessening competition substantially in a market.

In determining whether the practice of anticompetitive acts lessens competition substantially, the Tribunal is directed to consider whether the practice is a result of superior competitive performance. This provision recognizes that consumers benefit when product innovation or improved distribution systems result in a firm out-distancing of its rivals in the marketplace. If competitors fall from the market because a dominant competitor is more efficient than its rivals or more effective in meeting consumer needs, the lessening of competition does not result from an abuse of market power, but rather it is a natural consequence of the competitive process. Inclusion of this provision then ensures that efficiency and innovation are among the factors considered by the Tribunal in its assessment of the trade practices of the dominant firm or firms.

The discretion available to the Tribunal in respect of abuse of dominance is restricted to remedies sufficient to overcome the effects of the anticompetitive practices and restore competition in the marketplace, thereby ensuring minimal interference in the marketplace. In many cases, the Tribunal may choose simply to prohibit continuation of the practices in respect of which the Director has brought an action. However, if this is considered to be insufficient, an alternative provision empowers the Tribunal to make an order requiring partial divestiture or any other remedial measure necessary to restore competition in the market.

On June 1, 1989 the Director filed the first application to the Tribunal under the abuse of dominance provisions. The application filed seeks an order in relation to acts of the NutraSweet Company that the Director alleges are having the effect of lessening competition substantially in the Canadian aspartame market. The application is on the public record before the Competition Tribunal.

(3) Specialization Agreements

The specialization agreement provisions of the Competition Act allow firms to reorganize production in order to achieve efficiency gains made possible from longer production runs. Specialization agreements are defined by

the Act as arrangements where each party agrees to discontinue producing an article or service on the condition that the other party agrees to discontinue producing an article or service. Parties may apply, on notice to the Director, to the Tribunal for an order to register the agreement. Registration provides an exemption from the conspiracy and exclusive dealing sections of the Act.

The Tribunal will register a specialization agreement only if the parties have demonstrated that the agreement is likely to bring about gains in efficiency that will be greater than, and will offset, the effects of any prevention or lessening of competition. Like the efficiency exception in the merger law, it must also be shown that the gains in efficiency would not likely be achieved by other means, such as the unilateral specialization of product lines by the firms.

Where the Tribunal is satisfied that the agreement will produce efficiency gains that offset the lessening of competition but that there will be no substantial competition remaining in the market if the agreement is registered, orders of the Tribunal may be made conditional upon achievement of other matters such as a wider licensing of patents, a reduction in tariffs, a removal of import quotas or a partial divestiture of assets. The Tribunal can set out in its order the period of time that the order of registration will be in force. The Director may make an application to the Tribunal to remove the registration if the conditions underlying registration change.

(4) <u>Refusal to Supply</u>

Refusal to supply cases require the Director to establish the following four criteria before the Competition Tribunal when applying for remedial orders:

(i) a person is substantially affected in his/her business or is precluded from carrying on business due to his/her inability to obtain adequate supplies of a product anywhere in a market on usual trade terms;

(ii) the person is unable to obtain adequate supplies of the product because of insufficient competition among suppliers of the product in the market;

(iii) the person is willing and able to meet the usual trade terms; and

(iv) the product is in ample supply.

Where these criteria are met, the Tribunal may order the respondent supplier(s) to accept the party as a customer on the usual trade terms within a specified period of time. A statutory exception arises where, in the case of an article, customs duties are removed, reduced or remitted within a specified period, having the effect of placing the person on an equal footing with other persons who are able to obtain adequate supplies of the article in Canada. In the latter circumstances, the basis of the complaint is considered to have been removed.

An important distinction arises in the case of franchise systems. In these cases an article is not considered as a separate product solely on the basis that it is differentiated from other articles in its class by a trade mark, proprietary name or the like. In order to be treated as a separate product, an article differentiated in this way must occupy such a dominant position in the market as to substantially affect the ability of a person to carry on business in that class of articles unless he/she has access to the article so differentiated.

The first application to the Competition Tribunal specifically under provisions of the Competition Act dealing with refusal to supply was brought against Chrysler Canada Ltd. on December 15, 1988. The application filed asks the Tribunal to order Chrysler Canada to supply Chrysler automotive parts for export purposes to a dealer in Montreal.

(5) Consignment Selling

The Competition Act provides that the Tribunal may make an order respecting the practice of consignment selling where it finds that the practice has been introduced for the

purpose of controlling the price at which a dealer supplies the product, or discriminates between consignees and other dealers. The key issue under this provision is whether a person has an anticompetitive purpose or sound business reason for engaging in consignment selling.

(6) Exclusive Dealing, Tied Selling and Market Restriction

The Competition Act also covers the practices of exclusive dealing, tied selling and market restriction. The Act defines exclusive dealing in two ways. In the first case, a supplier requires a buyer to primarily purchase from that supplier or their nominee(s). In the second case, a supplier induces a buyer to deal only in their, or their nominees' products by offering to supply the products to buyers on more favourable terms or conditions (see Takach, 1983).

The practice of tied selling may also take several forms.[39] First, it may involve a requirement by a supplier that the buyer acquire a second product from a supplier or their nominee, as a condition of being granted supply of a first and usually highly desirable product. A second form of tied selling involves the requirement that a customer refrain from using or distributing, in conjunction with the tying product, another product not manufactured by or designated by the supplier or their nominee. The final form of tied selling is to offer the tying product on more favourable terms or conditions if the buyer agrees to either of the first two forms of tied selling.

In order to be the subject of a remedial order by the Competition Tribunal, the practices of exclusive dealing and tied selling must be shown to be engaged in by a major supplier or to be widespread in a market. In addition, the practice must be shown to be likely to impede entry or expansion of a firm or a product into the market, or have any other exclusionary effect in the market with the result that competition is or is likely to be lessened substantially.

Market restriction is defined by the legislation as any practice whereby a supplier of a product, as a condition of

supplying a customer, requires the customer to sell or supply the product only in a defined geographic market, or exacts a penalty of any kind if the customer breaches such a condition. As in the case of exclusive dealing and tied selling, market restriction must be shown to meet specific statutory criteria before it will be the subject of an order by the Tribunal. In particular, the Director must establish that, because the practice is engaged in by a major supplier of a product or is widespread in a market, the market restriction is likely to substantially lessen competition in relation to the product.

Orders issued by the Tribunal in exclusive dealing, tied selling and market restriction cases will normally require the cessation of the practice by all suppliers against whom they are directed. In the case of exclusive dealing and tied selling, the Tribunal may include in such orders any other requirement that, in its opinion, is necessary to overcome the effects of the practice or to restore or stimulate competition in the market. In regard to market restriction, the Tribunal may include any other requirement that, in its opinion, is necessary to restore or stimulate competition in relation to the product.

In considering the scope and application of the above provisions, it is important to note the several exceptions outlined by the Act. The Tribunal shall not make an order where it believes exclusive dealing or market restriction is or will be engaged in only for a reasonable period of time to facilitate entry of a new supplier or a new product into a market. Tied selling that is attributable to a technological relationship between or among products is also allowable. Finally, tied selling that is engaged in by a person in the business of lending money and is reasonably necessary for the purpose of better securing loans made by lenders will not be challenged.

(7) Delivered Pricing

The Competition Tribunal may prohibit a supplier from refusing to permit a customer or potential customer to buy and take delivery of an article at any locality at which the supplier makes a practice of making delivery to any other of

their customers on the same trade terms that would be available to the denied customer if their place of business were in that locality. In general, the provision is directed at a supplier's practice of dividing the market into geographic zones and selling their goods on a delivered price basis.

Several conditions must be met before the Tribunal may make an order prohibiting suppliers from engaging in delivered pricing. First, the respondent must be a "major supplier" in a market, or delivered pricing must be "widespread" in the market, and the customer in question must be denied an advantage that would otherwise be available to him/her in the market. Second, the prohibition applies only to articles, not to services. Third, the supplier must make a "practice" of refusing to deviate from their delivered pricing policy and must also make a practice of offering delivery at the place the customer or would-be customer seeks to take delivery. Fourth, the customer or potential customer must be prepared to take delivery on the same trade terms as others.

Two exceptions or defences are provided by the Act. First, the Tribunal shall not make an order where it finds that the supplier could not accommodate any additional customers at a locality without making significant capital investment at that locality. Second, no order is to be made in respect to refusing delivery of an article that the customer sells in association with a trade mark that the supplier owns where the Tribunal finds that the practice is necessary to maintain a standard of quality in respect of the article.

4.5 Criminal Offences

The criminal offences found in Part VI of the Competition Act include conspiracy, bid-rigging, agreements among banks, price maintenance, price discrimination, predatory pricing, misleading advertising and deceptive marketing practices. For the most part, these provisions are relatively unchanged from those that existed under the Combines Investigation Act.

(1) Conspiracy

The prohibition of horizontal agreements to fix prices, allocate markets and restrict the entry of competitors has been the core of Canadian competition policy since 1889.[40] Cartel-like agreements unilaterally redistribute income from buyers to sellers and hence they contradict the basic tenets of the market system. Such agreements also relax the pressure for firms to be efficient, further raising prices by allowing firms to operate without minimizing their costs.

The basic conspiracy provision functioned with reasonable effectiveness until the mid-1970s, at which time the Supreme Court of Canada judgments in the Aetna Insurance and Atlantic Sugar cases gave rise to considerable uncertainty over the meaning of "unduly" preventing or lessening competition, and hence resulted in reduced effectiveness.[41] To deal with the problems associated with these cases, among other matters, the conspiracy section was amended in 1986. A subsection was inserted providing that the court may infer the existence of a conspiracy "from all the surrounding circumstances, with or without evidence of communication between or among the alleged parties...". In addition, the Act was amended to make it clear that the Crown need only prove the accused intended to and did enter into a conspiracy, but not that the parties intended that the conspiracy have the effect of lessening competition unduly. The exception to the export agreement defence was also altered to provide that where such agreements result in a reduction or limitation in the real value of exports, rather than volume, they are not exempt from the conspiracy provisions. Finally, the 1986 amendments raised the maximum fine and imprisonment relating to conspiracy convictions to $10 million and 5 years respectively.

In a recent conspiracy case under the Competition Act, the Federal Court of Canada issued an Order of Prohibition on December 20, 1988, thereby ending a number of conspiracy and price-fixing inquiries into the Canadian real estate industry. The Director's investigation began in 1986 after receiving complaints from customers and industry members alleging impediments to competition existed with respect to commissions, services or practices of nine real estate

boards in five provinces. During the course of the Director's inquiries, the Canadian Real Estate Association voluntarily approached the Director seeking to resolve the matter without going through the lengthy and costly process of contested prosecutions. Following extensive discussions, all parties agreed to the prohibition order resolution, which in turn was transmitted by the Director to the Attorney-General who, after reviewing it, decided to make the application to the Federal Court.

(2) Bid-rigging

The criminal offence of bid-rigging first came into effect in 1976. It is presently governed by section 47 of the Competition Act. Bid-rigging is defined as an agreement or arrangement between parties to either refrain from submitting a bid in response to a call for tenders or to submit a bid which has been arranged between the parties before the time of bid submission, and where the agreement is unknown to the party requesting tenders. Unlike the general conspiracy provisions, bid-rigging is a per se offence. There is no need to show that the restraint on competition is likely to be undue. Furthermore, the degree of market control exercised by the participants to the bid-rigging agreement is irrelevant.[42]

Record fines were recently imposed by the Saskatchewan Court of Queen's Bench and the Supreme Court of Nova Scotia against several business forms companies for bid-rigging on provincial government tenders.[43] Comprehensive orders of prohibition were also imposed. The seriousness with which the courts regard the anticompetitive impact of bid-rigging is reflected in the large fines.

(3) Agreements Among Banks

Agreements among banks have been brought under the scrutiny of the Director of Investigation and Research by the Competition Act. Six types of agreements among banks are made illegal per se: agreements concerning interest rates on deposits or loans, service charges, the amount or kinds of loans, and the kinds of services to be provided to a customer. Several exceptions are also specified, and

include agreements concerning deposits or loans payable outside Canada, underwriting agreements, and those approved by the Minister of Finance "for the purposes of financial policy". Given the small size of the Inspector General's staff and the Inspector's focus on other regulatory responsibilities, this change should strengthen the application of competition policy to banks.

(4) Price Maintenance

The Competition Act provides that no person who is engaged in the business of making or selling a product shall, directly or indirectly:

> "by agreement, threat, promise or any like means, attempt to influence upward, or to discourage the reduction of, the price at which any other person engaged in a business in Canada supplies or offers to supply or advertises a product within Canada."

In order to establish an offence under this provision, the Crown does not need to prove that a supplier actually succeeded in influencing upward or discouraging the reduction of another party's prices. A mere attempt to influence prices in this way has been established as a per se offence.[44] The jurisprudence confirms that acquiescence by the person whom the accused has attempted to influence is not necessary to support a conviction.

Producers or suppliers who make suggestions regarding the resale prices of their products must, in order to avoid liability under the price maintenance provisions, also make clear to the party to whom the suggestion is offered that they are under no obligation to accept the suggested price. In the absence of proof to this effect, the making of suggestions respecting resale prices is deemed to be proof of an attempt to influence the person in accordance with the suggestion offered. Advertisements published by a supplier of a product, other than a retailer, that mention a resale price for the product, must make clear that the product may be sold at a lower price. Unless this is done, the publication of such an advertisement is deemed to constitute an attempt to influence upward the selling price of any person into whose hands the product comes for resale.

Regarding the issue of mens rea, it has been held in several cases that it is not necessary for the Crown to prove that an accused person intended their actions to have the effect of maintaining higher-than-competitive price levels. Rather, it is sufficient to support a conviction if the Crown shows that the accused knowingly carried out the acts which constituted the offence.

Several exceptions to the price maintenance provisions are provided in the case of product distribution systems. The Act does not apply to situations solely involving affiliated companies or directors, agents, officers or employees of the same company, partnership or sole proprietorship; or companies, partnerships or sole proprietorships that are affiliated. In addition, the Act does not apply in situations where the person attempting to influence the conduct of another person and that other person are principal and agent.

The Act makes it a separate offence to refuse to supply on the basis of price discounting. Like the price maintenance provisions, the refusal to supply offence is also directed at controlling possible attempts by dealers to initiate refusals by their suppliers to supply to competing, lower priced distributors. Several defences are provided to a person charged with refusal to supply where the defendant believes that the party that has been refused supply has made a practice of: (i) using the supplied product as a loss-leader; (ii) using the product for the purpose of attracting customers to their store rather than selling for profit; (iii) engaging in misleading advertising in respect of such products; or (iv) failing to provide the level of service that might reasonably be expected by purchasers of the product. It should be noted, however, that these exceptions do not apply to the basic offence of price maintenance, nor do they apply to the offence of inducement to engage in refusal to supply.

(5) Price Discrimination

The extent to which a supplier may discriminate among purchasers of a product on the basis of price is also covered by the Competition Act (see Nozick, 1976). Price

discrimination focuses on the relationship between the price charged to the customer and the prices available to competitors of the customer. The injury to be prevented is injury to these competitors rather than to the general process of competition. Hence, the Act proscribes situations where suppliers charge different prices to competitors who purchase like volumes.

The Restrictive Trade Practices Commission defined competing purchasers as sellers "seeking to serve the same customers." Firms may compete although they are located at different points in the distribution process if they sell to the same customers. Thus a supplier to a wholesaler and a retailer will not be permitted to grant the wholesaler a discount if the wholesaler and retailer serve the same customers. Geographical location of the purchasers is also relevant. Purchasers are competitors when the area they serve overlaps. Proximity is not necessary. Note, however, that the Act requires that the supplier know that purchasers are competitors. The legislation also requires that there be a "practice" of price discrimination. "Practice" implies more than one instance, or even two or three instances, of price discrimination.

The only price differentials then permitted between competitive purchasers are differentials based on volume discounts. Thus, year end discounts are permitted provided that the supplier grants the same discounts to all who purchased the same amount in the same period. Discounts may not be based on performance such as an increase in purchases over the previous year's purchases. Although the Act does not explicitly require suppliers to make volume discounts known to all purchasers, the Director advises businesses that it would be good practice to inform all customers of the discounts which are available.

(6) Predatory Pricing

Two types of predatory pricing are defined within the Competition Act. The first may be described as "geographic predatory pricing" (see Kaiser and Nielson-Jones, 1986). Sellers are prohibited from engaging in a policy of selling products or services in one region in Canada at a price

lower than in another region with the intent or effect of lessening competition substantially or of eliminating a competitor.[45] While this provision asks whether customers are paying the same price in different regions, it is directed at preventing anticompetitive effects to rivals of the seller.

The second type of predatory pricing offence is committed when a business engages in a policy of selling products at "unreasonably low" prices having the effect or intended effect of substantially lessening competition. In assessing the reasonableness of a price, the Courts have instructed consideration of all direct production costs as well as any potential future savings or benefits. Sellers' beliefs over reasonableness of price are not regarded as relevant. Finally, predatory pricing becomes an offence only when the supplier engages in a "policy" of such pricing behaviour.

(7) Misleading Advertising and Deceptive Marketing Practices

Within the overall framework of competition policy, the marketing practices provisions play a key role in ensuring that the market mechanism operates effectively and that consumers are protected from deceptive practices.[46] Along with the obvious need to protect consumers from direct exploitation by semi-fraudulent types of representations, misrepresentations may also cause injury to honest competitors by distorting the functioning of the market. As noted earlier, the impetus toward effective misleading advertising laws in 1960 was due to pressure from business, not consumers. With the passage of broader provisions at later dates the consumer protection aspect of the legislation was clearly recognized. Since their introduction in the 1960s the provisions relating to misleading advertising have been vigorously enforced by the Bureau, absorbing a considerable portion of the Bureau's resources.[47]

Section 52(1)(a) of the Competition Act generally prohibits representations conveyed "by any means whatever"

which are false or misleading in a material respect. In particular, section 52(1) prohibits unsubstantiated claims, misleading warranties and guarantees, and misleading price representation. Untrue and misleading tests and testimonials are prohibited under section 53. A statutory defence to charges laid under sections 52 and 53 of the Act is provided when the defendant establishes that he/she committed an honest error, exercised due diligence and reasonable precautions, and took prompt corrective action upon discovery of the error.

The Competition Act also prohibits "bait and switch selling", defined as situations where a person advertises the product at a bargain price and at the same time does not supply the product in reasonable quantities. Reasonable quantities will depend on the nature of the market in which the party carries on business, the nature and size of the business carried on by the advertiser, and the nature of the advertisement. If an advertiser clearly indicates the number or approximate number of items for sale, an offence will not have been committed. Furthermore, a person will not be deemed to have committed an offence where it can be established that he/she took reasonable steps to obtain a reasonable quantity of the advertised product but was unable to do so due to unanticipated events beyond their control; or that he/she had reasonable quantities but demand surpassed their reasonable expectations; or that he/she offered "rain checks" and fulfilled that undertaking.

Under the Act, the person conducting a promotional contest must ensure that there is no undue delay in distributing prizes and that selection is made by random choice or by skill in any area to which prizes have been allocated. There are also requirements for disclosure of the number and approximate value of prizes and of any fact within the advertiser's knowledge that would materially affect the chances of winning. It should be noted, however, that this section does not refer to advertisements or representations. It does not require that all such information must be disclosed in each and every advertisement. It is only necessary to ensure that at some time before purchase or before entering the contest, the

consumer is made aware in an adequate and fair manner of all these relevant facts.

Other misleading advertising and deceptive marketing practices provisions relate to double ticketing and sales above advertised price. Pyramid and referral selling schemes are also violations under the Act, except where licensed or otherwise permitted by a province. Again, there are exclusions and limitations applicable to these provisions, as well as various defences.

5.0 CONCLUSION

As indicated by its extensive history, Canadian competition policy has come a long way from its rather modest beginnings a century ago. Over time the legislation has expanded with development of the Canadian economy. Yet, at its core, it continues to aim at removing unreasonable or undue restraints on competition in the belief that free and open competition will protect the interests of consumers and business alike and ensure that resources are allocated efficiently. Although the recent reform process has been a long and arduous one, the result is undoubtedly a more effective statute. With the Competition Act of 1986 in place, Canadians are better able to pursue future efficiencies while still protecting the competitive state and health of the domestic economy.

FIGURE 1

ORIGINS OF THE SUBSTANTIVE PROVISIONS IN CANADIAN COMPETITION LEGISLATION

(A) Criminal Offences

. Conspiracy (horizontal combinations)[1]	1889
. Agreements among banks[2]	1986
. Bid-rigging	1976
. Mergers (horizontal or vertical)[3]	1910-1986
. Monopoly (and monopolization)[3,4]	1935-1986
. Predatory pricing	1935
. Price discrimination	1935
. Resale price maintenance and refusal to supply	1951
. Discriminatory advertising or promotion allowances	1960
. Misleading price advertising[5]	1960
. Misleading advertising re: deceptive or misleading statements of fact or of guarantees/warrantees	1969
. Misleading tests or testimonials	1976
. Marketing practices	1976
. Refusals to supply	
. Pyramid selling	
. Referral selling	
. "Bait and switch" selling	
. Multiple ticketing	
. Disclosure in promotional contests	
. Sales above advertised prices	

Notes

1. The original conspiracy section had no force until "unlawfully" was removed in 1900. Conspiracies relating to professional sports and foreign directives to Canadian firms to enter a conspiracy were made illegal in 1976.

2. Transferred from s. 309 of the Bank Act.

3. With the Competition Act of 1986 these offences were replaced by non-criminal reviewable merger and abuse of dominant position provisions.

4. While the word monopoly was in the definition of a combine in the Combines Investigation Acts of 1910 and 1923, it was not defined until 1935 (see Stanbury, 1978a).

5. There were forerunners of this provision in the Criminal Code.

1976 = January 1, 1976
1986 = June 19, 1986

FIGURE 1 cont'd

(B) Reviewable Matters

. Refusal to supply (domestic supplier)	1976
. Refusal to supply (foreign supplier)	1976
. Consignment selling	1976
. Exclusive dealing	1976
. Tied sales	1976
. Geographic market restrictions	1976
. Foreign judgments	1976
. Foreign laws and directives	1976
. Abuse of dominant position (replaced monopoly)	1986
. Delivered pricing	1986
. Specialization agreements	1986
. Mergers (replaced criminal law provisions)	1986

Notes

1976 = January 1, 1976
1986 = June 19, 1986

FIGURE 2

STRUCTURE OF THE SUBSTANTIVE PROVISIONS OF THE COMPETITION ACT, 1986*

I. CRIMINAL OFFENCES

(1) Distribution Offences

(a) Price discrimination, s. 50(1)(a)
(b) Discriminatory advertising or promotion allowances, s. 51
(c) Predatory pricing, s. 50(1)(b),(c)
(d) Price maintenance, s. 61(1)(a)
(e) Refusal to supply, s. 61(1)(b)
(f) Pyramid selling, s. 55
(g) Referral selling, s. 56

(2) Misleading Sales Promotion Offences

(a) False or misleading representation in a material respect, s. 52(1)(a)
(b) Representation not based on a proper test, s. 52(1)(b)
(c) Misleading warrantees or guarantees, s. 52(1)(c)
(d) Misleading price advertising, s. 52(1)(d)
(e) Misleading tests or testimonials, s. 53
(f) Bait and switch advertising, s. 57(2)
(g) Sale above advertised price, s. 58
(h) Promotional contest requirements, s. 59
(i) Multiple ticketing, s. 54

(3) Agreements to Restrict Competition

(a) Conspiracies to fix prices, limit output, fix the price of inputs, etc. that lessen competition unduly, s. 45(1)
(b) Foreign directives to Canadian firms to enter into a conspiracy to lessen competition, s. 46
(c) Bid-rigging, s. 47
(d) Conspiracies relating to professional sport, s. 48
(e) Agreements or arrangements among banks, s. 49

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* See Competition Act, R.S.C. 1985, c. C-34, as amended R.S.C. 1985, c. 27 (1st Supp.), ss. 187, 189; R.S.C. 1985, c. 19 (2nd Supp.); R.S.C. 1985, c. 34 (3rd Supp.), s. 8; S.C. 1988, c. 2, s. 16; S.C. 1988, c. 15, s. 16.

FIGURE 2 cont'd

II. CIVIL PROCEEDINGS

(1) Reviewable Matters

(a) Refusal to supply (domestic supplier), s. 75
(b) Refusal to supply (foreign supplier), s. 84
(c) Consignment selling, s. 76
(d) Exclusive dealing, s. 77(1) and (2)
(e) Geographic market restrictions, s. 77(1) and (3)
(f) Tied selling, s. 77(1) and (2)
(g) Foreign judgments, s. 82
(h) Foreign laws or directives, s. 83
(i) Abuse of dominant position, s. 78-79
(j) Delivered pricing, s. 80-81
(k) Specialization agreements, s. 85-90
(l) Mergers, s. 91-103 (Pre-merger notification requirements are in s. 108-123)

(2) Regulatory Intervention

The Director under s. 125 may make representations and call evidence before federal regulatory tribunals "in respect of competition" and the factors that the tribunal is entitled to take into consideration in making its decisions. Under s. 126 the Director, at the request of any provincial board, commission or other tribunal, or on his/her own initiative with the consent of the board, may make representations and call evidence as in s. 125.

(3) Private Damage Actions

Private parties under s. 36 may bring suit for damages as a result of (i) conduct that is contrary to the criminal provisions of the Act, or (ii) the failure of a person to comply with an order of the Competition Tribunal (i.e., dealing with a civil reviewable matter) or a court under the Act.

FIGURE 3

KEY PARTICIPANTS AND THEIR ROLES IN CANADIAN COMPETITION POLICY, 1986*

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o DIRECTOR OF INVESTIGATION AND RESEARCH

- Responsible for administration and enforcement of the Competition Act
- Has a number of formal investigatory powers:
  - testimony under oath (s. 11)
  - required production of records (s. 11)
  - written returns of information under oath (s. 11)
  - search and seizure of records (s. 15)
  - required production of computer records (s. 16)
- Conducts inquiries in response to
  - a six-citizen application; or
  - his/her own "reason to believe" an offence has been committed or he/she has grounds for an order in respect to a reviewable matter; or
  - the direction of the Minister of Consumer and Corporate Affairs.
- Required to inform those subject to an inquiry of the progress of the inquiry if requested in writing.
- Prepares a statement of evidence for submission to the Attorney-General of Canada in criminal cases (s. 23). Note that the decision to prosecute is the Attorney General's.
- Discontinues any inquiry where he/she is of the opinion that the matter "does not justify further inquiry" (s. 22); must indicate to the Minister in writing the reason for discontinuance. The Minister may instruct the Director to make further inquiry.
- In cases dealing with reviewable matters, the Director (or his/her appointed counsel) may bring an application for an order directly to the Competition Tribunal.
- May appear before federal and provincial regulatory tribunals to make representations and call evidence in respect to competition.
- Prepares an annual report that is submitted to the Minister and is later tabled in Parliament.

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* See Competition Act, R.S.C. 1985, c. C-34, as amended R.S.C. 1985, c. 27 (1st Supp.), ss. 187, 189; R.S.C. 1985, c. 19 (2nd Supp.); R.S.C. 1985, c. 34 (3rd Supp.), s. 8; S.C. 1988, c. 2, s. 16; S.C. 1988, c. 15, s. 16.

FIGURE 3 cont'd

- **COMPETITION TRIBUNAL***
  - Responsible for the adjudication of all reviewable matters (s. 8).
  - Composed of both Federal Court judges and lay persons, and is chaired by a Federal Court judge
  - (s. 3-4).Works in panels of three to five members including at least one judicial and one lay member. The panels must be chaired by a judicial member (s. 10).
  - Court of record, but proceedings are to be as informal and expeditious as the circumstances and considerations of fairness permit (s. 9).
  - Questions of law are decided by judicial members only; questions of fact or mixed fact and law are decided by all members (s. 12).
  - Appeal lies to the Federal Court of Appeal; appeal on a question of fact may be made only with leave of the Federal Court of Appeal (s. 13).

- **ATTORNEY GENERAL**
  - Makes the decision whether to prosecute criminal cases referred to him/her by the Director of Investigation and Research (s. 23).
  - Makes the decision on appeals in criminal cases.
  - Appoints counsel in criminal cases and when requested to do so by the Director in non-criminal cases.
  - May appoint counsel to assist the Director in conducting an inquiry (s. 21).

- **COURTS**
  - Adjudicate all criminal cases brought by the Attorney General and supported by the statement of evidence prepared by the Director.
  - Decide on the Director's applications requesting an order requiring testimony of witnesses under oath before a presiding officer, production of records, written returns under oath, search of premises, or production of a computer record (s. 11, 16).
  - Decide on appeals in criminal cases.

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* See Competition Tribunal Act, R.S.C. 1985, c. 19 (2nd Supp.), as amended S.C. 1988, c. 2, s. 17.

FIGURE 3 cont'd

- **MINISTER OF CONSUMER AND CORPORATE AFFAIRS**
  - May require the Director of Investigation and Research to conduct an inquiry (s. 10).
  - Receive the written report of the Director discontinuing an inquiry; may require the Director to make a further inquiry.
  - Must table the Director's annual report in Parliament within 15 days of receipt (s. 127).
- **GOVERNOR IN COUNCIL**
  - May make regulations regulating the practice and procedure in respect of applications, proceedings and orders under s. 11 to 19 (s. 24).
  - May make such regulations, not inconsistent with the Act, as are necessary for carrying out the Act and its efficient administration (s. 128).
- **ATTORNEY GENERAL OF A PROVINCE**
  - May intervene in merger cases, and in applications for a specialization agreement (s. 88, 101).
- **CITIZENS**
  - May make informal complaints to the Director regarding matters under the Act (most of the Director's inquiries begin with a complaint letter).
  - May make a formal six-citizen application for an inquiry that requires the Director to begin an inquiry (s. 9).
  - With the leave of the Tribunal, any person may make representations in any proceeding before the Tribunal in respect of any matter that affects them.

TABLE 1

RESOURCES AND EXPENDITURES OF THE OFFICE OF THE DIRECTOR OF INVESTIGATION AND RESEARCH

Period, fiscal year ending March 31	Average Yearly Staff	Average Yearly Expenditures ($'000)
1926-1930	n.a.	54
1931-1935	n.a.	43
1936-1940	8	30
1941-1945	8	39
1946-1950	23	115
1951-1955	37	270
1956-1960	45	372
1961-1965	55	491
1966-1970	82	1,030
1971-1975	156	2,758
1976-1980	202	6,448*
1981-1985	245	11,259
1986-1988	256	15,284

* Data unavailable for 1977-78

n.a. = data not available.

Sources: Annual Reports of the Department of Consumer and Corporate Affairs, Annual Reports of the Director of Investigation and Research and data provided by the Bureau of Competition Policy. See also Ball (1934) and Rosenbluth and Thorburn (1963) for annual data from 1923 to 1960.

TABLE 2

SELECTED ACTIVITIES OF THE BUREAU OF COMPETITION POLICY
(EXCLUDING MISLEADING ADVERTISING AND DECEPTIVE MARKETING PRACTICES PROVISIONS)

	Number of files opened[1]	Applications for inquiries under section 7	Inquiries in progress at end of year	Matters referred to the Attorney General of Canada	Matters referred where the Attorney General decides no further action warranted	Prosecutions or other proceedings commenced	Applications to the Competition Tribunal[2]	Interventions before regulatory bodies
1965-66	117	2	47	2	0	3	—	—
1966-67	117	0	54	2	0	7	—	—
1967-68	97	0	59	2	0	5	—	—
1968-69	107	1	57	4	0	3	—	—
1969-70	141	1	76	12	0	7	—	—
1970-71	255	2	83	9	0	8	—	—
1971-72	271	5	86	16	1	6	—	—
1972-73	188	2	76	9	5	14	—	—
1973-74	165	6	77	14	7	8	—	—
1974-75	84	5	81	11	2	7	—	—
1975-76	158	4	71	18	2	12	—	—
1976-77	143	7	73	26	4	16	20	4
1977-78	173	5	76	23	6	24	1	5
1978-79	205	7	73	14	6	11	1	2
1979-80	262	7	78	24	3	21	2	4
1980-81	238	8	69	21	5	6	0	4
1981-82	199	9	69	33	6	24	0	15
1982-83	218	8	71	24	5	21	1	11
1983-84	223	2	58	20	6	16	0	23
1984-85	269	2	54	27	4	17	0	23
1985-86	237	8	58	21	11	19	1	22
1986-87	237	13	78	9	4	14	1	18
1987-88	328	9	84	15	3	9	2	16

Notes: 1. Beginning in 1974-75 substantive complaints only, later changing in 1982-83 to those files which required two or more days of review.
2. Prior to 1986-87 this figure indicates applications to the Restrictive Trade Practices Commission.

Sources: Annual Reports of the Director of Investigation and Research, Combines Investigation Act, and data provided by the Bureau of Competition Policy.

TABLE 3

OPERATIONS UNDER THE MISLEADING ADVERTISING AND DECEPTIVE MARKETING PRACTICES PROVISIONS

	Number of files opened	Applications for inquiries under section 7	Number of complete examinations	Matters referred to the Attorney General of Canada	Matters referred where the Attorney General decides no further action warranted	Proceedings commenced during year	Completed cases: convictions
1968-69	33	n.a.	n.a.	n.a.	n.a.	15	13
1969-70	412	n.a.	n.a.	n.a.	n.a.	29	27
1970-71	2,520	n.a.	n.a.	n.a.	n.a.	56	43
1971-72	2,872	1	753	105	12	88	61
1972-73	3,470	9	649	84	5	82	68
1973-74	4,387	8	911	123	10	83	70
1974-75	5,068	12	1,047	126	12	107	87
1975-76	6,203	1	1,373	120	12	88	72
1976-77	7,850	4	1,895	117	14	120	87
1977-78	8,078	3	2,113	141	n.a.	119	89
1978-79	8,091	0	2,135	174	11	147	119
1979-80	9,431	0	2,234	129	12	132	100
1980-81	8,373	0	2,147	167	2	134	103
1981-82	8,557	0	2,319	142	13	122	95
1982-83	9,875	1	2,336	199	6	169	121
1983-84	10,091	0	2,068	181	13	163	138
1984-85	9,816	1	2,145	136	10	148	137
1985-86	9,809	0	2,151	175	19	158	109
1986-87	11,514	0	2,188	151	10	149	111
1987-88	12,374	1	2,187	113	0	125	84

n.a. = data not available

Sources: Annual Reports of Director of Investigation and Research, Combines Investigation Act, various years; Proposals for a New Competition Policy for Canada, First Stage (Ottawa: Information Canada, 1973), pp. IC-34C; and data provided by the Bureau of Competition Policy.

TABLE 4

COMBINES CASES AND ACTIVITIES, 1889/90 TO 1988/89

Period, fiscal year ending March 31	Combines Prosecutions[1] Total	Con-spiracy[2]	Merger and/or Monopoly	RPM and Ref. to Sell	Other	Reports or Cases Sent to Attorney General but not Prosecuted	Discontinued Inquiries	Files Opened in Response to Complaints
1890-1910	10	10	0	—	0	n.a.	n.a.	n.a.
1911-1923	1	1	0	—	0	n.a.	n.a.	n.a.
1924-1940	13	10	1	—	2	17	n.a.	538
1941-1946	3	3	0	—	0	0	n.a.	66
1947-1955	9	6	1	2	0	9	25[3]	794[4]
1956-1960	18	13	2	1	2	6	30	456
1961-1965	19	8	0	10	1	10	77	816
1966-1970	25	16	1	7	1	5	82	579
1971-1975	45	18	4	15	8	19	95	963
1976-1980	72	19	2	47	4	19	74	941[5]
1981-1985	82	18	0	58	6	26	96	1,147
1986-1989	62	21	2[6]	38	3	19	71	1,152

n.a. = data not available

Notes:

1. Excludes all misleading advertising and deceptive practices cases and 3 patent cases started in 1945/46, 1967/68 and 1969/70. The first dealt with optical goods, the last two, Union Carbide's plastic extrusion and printing patents.

2. Dated by month in which the case was completed.

3. 1951-1955 only.

4. 1950/51 - 1954/55 only (542).

5. 1957-1982 figures cover "substantive complaints only, due to change in procedure in Records Office." This changes to files which required two or more days of review beginning in 1982-83.

6. See also Table 5 for merger statistics under the Competition Act.

Sources: Gorecki and Stanbury (1979a) and Annual Reports of the Director of Investigation and Research.

TABLE 5

MERGER STATISTICS

	1986-1987*	1987-1988	1988-1989
Examinations Ongoing at Beginning of Period:	-	14	25
EXAMINATIONS COMMENCED: (during period)	40	146	191
Commenced examination as result of prenotification:	0	65	92
COMPLETIONS:	26	133	182
Advisory Opinions:	8	21	20
With undertakings and monitoring:	0	3	4
- no undertakings:	5	7	10
With undertakings - no monitoring	0	1	0
No issue:	3	10	6
Advance Ruling Certificates:	3	26	59
With undertakings and monitoring:	1	0	0
With monitoring - no undertakings:	0	0	0
No issue:	2	26	59
Other Closed/Concl. Matters:	14	86	103
Concluded as posing no issue under the act:	12	84	101
Abandoned following BCP involvement:	2	2	2
APPLICATIONS TO TRIBUNAL:			
Filed or Notice filed:	1	2	2
Orders granted:	0	0	0
Orders refused:	1	0	0
Ongoing proceedings:	0	2	2
Transaction abandoned: (following application to Tribunal)	1	0	0
Tribunal matters concluded or withdrawn:	1	0	2
EXAMINATIONS ONGOING AT END OF PERIOD: (excludes matters currently before Tribunal)	14	25	34

* June 1, 1986 to March 31, 1987.

NOTES

1. Generally, see Ball (1934); Baggaley (1982); Bliss (1973), (1974); Canada (1888); Cohen (1938); Gorecki and Stanbury (1984), (1989), Gosse (1962); Magwood (1981); Reynolds (1946); Smandych (1983); Stanbury (1981a).

2. See Figure 1 for an overview of the origins of the substantive provisions in Canadian competition legislation.

3. Weidman v. Shragge (1912) 46 S.C.R. 1 at p. 28.

4. R. v. Alexander (1932) 57 C.C.C. 346 at pp. 360-361.

5. See the views of W.L. MacKenzie King as quoted in Skeoch (1966a) and King (1911), (1912).

6. See Brecher (1982); Canada (1978); Economic Council (1969); Rowley and Stanbury (1978); Skeoch (1972), (1979); Skeoch with McDonald (1976); Stanbury (1977a).

7. See Competition Act, R.S.C. 1985, c. C-34, as amended R.S.C. 1985, c. 27 (1st Supp.), ss. 187, 189; R.S.C. 1985, c. 19 (2nd Supp.); R.S.C. 1985, c. 34 (3rd Supp.), s. 8; S.C. 1988, c. 2, s. 16; S.C. 1988, c. 15, s. 16.

8. Generally, see Baggaley (1982); Bliss (1973); Canada (1888); King (1911), (1912); Weldon (1966).

9. Generally, see Baggaley (1982); Bliss (1973); Gorecki and Stanbury (1984), (1989); Gosse (1962); Smandych (1983).

10. R. v. Elliot (1905), 9 O.L.R. 648.

11. R. v. Elliot (1905), 9 O.L.R. 648 at p. 661-2.

12. See Traves (1974a), (1974b).

13. Reference re Board of Commerce Act, 1919 and Combines and Fair Prices Act, 1919, [1922] 1 A.C. 191.

14. See Table 1 for estimates of the resources available to the position.

15. See Ball (1934); Gorecki and Stanbury (1989); Stanbury (1981a).

16. Generally, see Anderson and Khosla (1985b); Dunlop et al. (1987); Hayden (1983); Kaiser (1982); Moore (1970); Nozick (1976).

17. Reference re Dominion Trade and Industry Commission Act, [1936] 3 D.L.R. 607.

18. Generally, see Anderson and Khosla (1985c); Dunlop et al. (1987); Kaiser (1982); Skeoch (1966b).

19. The administration and enforcement of the Combines Investigation Act between 1952 and 1960 is described and analyzed in Rosenbluth and Thorburn (1963).

20. See Howard Smith Paper Mills, Ltd. et al. v. R., [1957] 8 D.L.R. (2d) 449 at 473.

21. See R. v. Canadian Breweries, [1960] O.R. 601 and R. v. British Columbia Sugar Refining Company and B.C. Sugar Refining Limited (1960) 32 W.W.R. 557.

22. See Economic Council (1969); McDonald (1970).

23. See Canada (1971); Skeoch (1972); Stanbury (1977a).

24. The Office of the Director of Investigation and Research was moved to the newly formed Department of Consumer and Corporate Affairs in 1967.

25. Generally, see Canada (1973), (1976); Grange (1975); Kaiser (1979); McQueen (1976).

26. Generally, see Skeoch (1979); Stanbury (1977b).

27. Generally, see Canada (1977a), (1977b), (1977c); MacCrimmon and Stanbury (1977); Prichard (1979); Rochwerg (1977); Skeoch (1979); Stanbury (1977a), (1979), (1988); Stegemann (1977).

28. See Prichard (1979); Reid (1978); Whybrow (1976); Williams (1976).

29. Generally, see the papers in Rowley and Stanbury (1978); Stanbury (1978a), (1979).

30. See Block (1981); Lecraw (1981); Skeoch (1982); Stanbury (1988); Stanbury and Reschenthaler (1981). See also BCNI (1981) and Stanbury (1981b).

31. See Canada (1984a), (1984b); Stanbury (1984a), (1984b), (1984c), (1985).

32. Generally, see Canada (1985a), (1985b), (1985c); Maule and Ross (1988); Stanbury (1986), (1988).

33. See Figure 2 for an outline of the Act's substantive provisions.

34. See Figure 3 for an overview of the key participants and their roles in Canadian competition policy. See also Table 1 for an historical overview of the resources available to the Office of the Director of Investigation and Research in administering competition legislation in Canada.

35. See Goldman (1984); Kaiser and Nielsen-Jones (1986); Thomson (1985).

36. Generally, see Canada (1988a), (1988b); Crampton (1989); Goldman (1988c), (1989b); Wetston (1988).

37. See Table 5 for a summary of the Bureau's merger review activity.

38. Generally, see Anderson and Khosla (1987); McDonald (1987).

39. See Anderson and Khosla (1985a).

40. See Table 4 for a summary of the conspiracy case activity conducted over the last hundred years. See also Stanbury (1989) for a review of the cases in the period 1965/66 to 1987/88.

41. Generally, see Cairns (1981b); Green (1981); McFetridge and Wong (1981), (1982); Reschenthaler and Stanbury (1981a), (1981b); Webber (1982).

42. See Kaiser and Nielsen-Jones (1986).

43. On June 8, 1988 Moore Corporation Limited of Toronto and R.L. Crain Inc. of Ottawa were each fined $200,000 after pleading guilty to bid-rigging on tenders submitted to the Nova Scotia Government Purchasing Agency between December 21, 1979 and December 31, 1982. The following day, R.L. Crain Inc., Moore Corporation Limited and Southam Printing Limited of Toronto were each fined $400,000 after pleading guilty to bid-rigging on tenders for business forms submitted to Saskatchewan Government Insurance and the Saskatchewan Government Purchasing Agency during the years 1980 and 1981. Lawson Business Forms (Manitoba) Ltd. of Winnipeg was fined $360,000 after pleading guilty to the same offence.

44. See Anderson and Khosla (1985c).

45. Generally, see Anderson and Khosla (1985b); Dunlop et al. (1987); Hayden (1983); Kaiser (1982).

46. Generally, see Canada (1983); Cohen (1971); Esbin (1981); Orr (1975); Quinlan (1972); Thompson (1977). See also the Bureau of Competition Policy's quarterly Misleading Advertising Bulletin.

47. See Table 3 for a summary of the Bureau's activity in this area.

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