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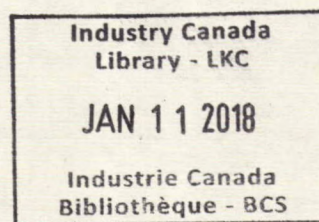
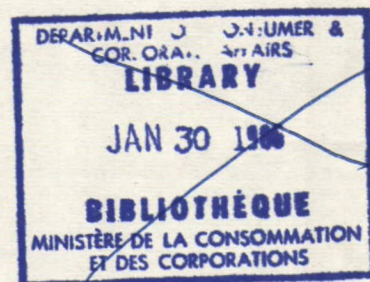
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REFORM OF COMPETITION POLICY

IN CANADA:

A CONSULTATION PAPER

MARCH 1985



(disponible en français)

Canada

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REFORM OF COMPETITION POLICY

ADJUDICATION

Introduction

1. The issue of which forum is best suited to adjudicate non-criminal competition cases has been the subject of much debate throughout the history of the amendment process.

2. The Economic Council of Canada's 1969 Interim Report on Competition Policy stated that any shift of competition policy legislation out of the criminal law should be accompanied by the formation of a specialized tribunal. Their rationale was based, in part, on a perceived difficulty which courts might have in exercising judgments based on complex economic arguments and analyses. There was also a stated preference for the flexibility and informality which a tribunal could offer, in contrast with the "strong sense of crime and punishment" of a court setting. The amendments which were passed in 1975 implemented this proposal by identifying certain reviewable trade practices which were subject to the adjudication and remedial orders of the Restrictive Trade Practices Commission.

3. In their 1976 Report on the next phase of the amendments to the Combines Investigation Act, Lawrence A. Skeoch and Bruce C. McDonald re-iterated the need for a specialized adjudicator in combines cases. They also stressed the need to dissociate the specialized adjudicator from departmental policing and policy making functions, so as to ensure impartiality. This latter view has also been expressed by the Supreme Court of Canada in Southam.

4. There is general agreement that competition policy issues involving mergers, monopolies and other related matters should not be dealt with by criminal sanctions, but should be governed instead through the process of civil law. There is less agreement on which adjudicative model would be most suitable for these cases. Past efforts have, at different times, shown a preference for both a specialized economic tribunal and the courts.

Economic Tribunal

5. The use of a specialized economic tribunal has generally been favoured by consumer groups, academics, and the small business community. This model is considered to provide the greatest potential for expertise in economics and business, and to allow more scope for response by the decision-maker to social and economic change. Those who oppose the use of a tribunal are concerned that there would

be less uniform application of the law, engendering uncertainty within the business community. In addition, rights of appeal under the tribunal model would be more restricted than in the ordinary courts, because to allow full right of appeal from the tribunal would lengthen what may already be a too lengthy legal process.

Courts

6. The alternative approach of using the courts has been supported by certain segments of the business community. A factor often cited in support of court adjudication is that courts produce consistent results with clear and full rights of appeal. However, critics of this model question the ability of the courts to exercise the expertise needed for dealing with complex economic arguments. On the other hand, it has been suggested that greater potential exists for the development of this expertise in the courts if such cases were referred to one court - for example, the Federal Court of Canada. In addition, the use of a single court allows for more uniform application of the law in this complex area.

Enforceability

7. The choice for an adjudicator will also have an impact on the enforceability of the criteria sought to be applied. It has been suggested that competition law cannot realistically define many undesirable market situations, except in terms of their economic effect. Such general statutory language allows for flexibility in responding appropriately to market conduct on a case-by-case basis. However, it is sometimes argued that courts are more suited to the objective application of a fixed set of rules, rather than the making of subjective assessments based on general rules set down in broad terms. In a combines context, this means, for example, that the conceptually complex standard for an efficiency defense may not lend itself to clearly defined rules. Such matters may be better dealt with if left to the more sophisticated economic judgment of the adjudicator, who will subjectively assess the evidence to determine whether or not the prohibited effect has occurred.

8. For competition law to be effective, many of its provisions must be phrased in general terms. In choosing the most appropriate adjudicator for such cases, it will be necessary to determine which type (i.e. court or economic tribunal) is most suited to the sophisticated economic judgments required. The ability to choose adjudicators who have, or can develop, the necessary expertise, is also an important consideration.

Expertise

9. In giving consideration to the question of expertise, those who favour the courts have suggested that expertise could be developed through the assignment of superior court judges to competition cases. This is also the thrust of arguments in favour of using the Federal Court of Canada. Another alternative would be to assign the responsibility of adjudicating economic legislation to a special court or a division of an existing court created for the purpose; however, it is doubtful that such a court would have a sufficient caseload to justify its existence.

10. If a specialized economic tribunal is chosen, there would be greater flexibility for the appointment of qualified experts. These people could be drawn from a broad range of experience, including business and the professions. They might also be appointed, on an ad hoc basis, to hear only cases within their area of specialty. A more permanent panel appointed for a period of years is also a possibility. In either case, some have suggested that appointing a Judge as Chairman would ensure greater certainty and procedural fairness in the decision-making process. What is needed is a mechanism for assuring that only highly qualified experts are appointed to this tribunal. A carefully selected tribunal made up of highly qualified experts would improve the confidence of parties appearing before it, both in the tribunal itself and the law which it would seek to apply.

Governor-in-Council override

11. A final issue on the question of who should adjudicate relates to whether there is a need for a Governor-in-Council override in certain cases. There may be situations in which it is not consistent with the economic policy of the government to permit or refuse to permit a particular transaction or course of conduct, notwithstanding the decision of an adjudicator. Such a mechanism exists, for example, in the case of the C.T.C. and the C.R.T.C. The use of a Governor-in-Council override in these cases makes it easier for the government to harmonize its economic policy with the broader public interest - for instance, for international or regional objectives. This form of input would not be available if the courts were to adjudicate competition cases.

Other considerations

12. Any decision with respect to the proper forum for adjudication of competition cases must also have regard to the present legislative context. Currently the Restrictive Trade Practices Commission (R.T.P.C.) has jurisdiction to issue remedial orders with respect to restrictive trade practices under Part IV.1 of the Act. The R.T.P.C. also authorizes the exercise of investigatory powers, and conducts s. 47 research inquiries into the state of competition in a market or industry. Previous proposals altered the responsibilities of the Restrictive Trade Practices Commission by transferring Part IV.1 matters to the courts, while creating new duties for the Commission with respect to specialization agreements. However, they did not deal with the conflict which exists in the presence of dual functions for the R.T.P.C. Since Southam, it has become clear that this conflict must be removed. In that decision, the Supreme Court of Canada concluded that "the administrative nature of the Commission's investigatory duties ... ill accords with the neutrality and detachment necessary" for it to act in a judicial capacity when authorizing a search and seizure.

13. If a decision is made to refer mergers, monopolies, and existing Part IV.1 matters to the civil courts for adjudication, it will become necessary to consider the advisability of retaining the Restrictive Trade Practices Commission for residual matters. As previously mentioned, past proposals retained the R.T.P.C. for adjudication of specialization agreements, the conduct of research inquiries, and the authorization of the exercise of investigatory powers. The investigatory powers have been discussed in another section of this paper. In regard to research inquiries, it has been suggested that these matters (such as the recent petroleum inquiry) could be dealt with under the Inquiries Act, at the direction of the Minister. The remaining matter to be dealt with would be specialization agreements.

14. In considering whether specialization agreements are more suited for adjudication by a specialized economic tribunal than by the courts, proponents of the former suggest that such trade related issues are too sophisticated and complex to be dealt with by the courts. On the other hand, opponents point out that, for a process which amounts to an exemption from criminal law, a tribunal cannot provide the degree of certainty and uniformity required to ensure fairness.

Summary

15. In summary, the choice of adjudicator is more than a procedural question, it is important to the effective enforcement of competition policy in Canada. The ultimate choice should provide the best possible combination of impartiality, expertise, flexibility, and procedural fairness.

INVESTIGATORY POWERS

Introduction

16. Inquiries under the Combines Investigation Act frequently involve the weighing of a firm's behavior against the economic effects that could result. Because of the complexity of this analysis, it is common for combines inquiries to involve a large number of documents spanning a long period of time. This process is complicated further when proof of intent is required, or the criminal burden of proof, beyond a reasonable doubt, must be met. Enforcement of legislation involving these critical factors requires unique investigatory powers.

17. The present Combines Investigation Act provides the Director of Investigation and Research with the power to inquire into possible violations of the Act through a number of means. These include the powers to search premises and seize documents (s. 10), to require written returns of information (s. 9) and affidavit evidence (s. 12), and to subpoena witnesses for the purpose of giving oral testimony or the production of documents (s. 17).

18. These investigatory powers have a long history. In 1910, the Combines Investigation Act was passed into law by Parliament for the express purpose of establishing a specialized agency to enforce the law on competition. There was a recognition on the part of Parliament that the fulfillment of this mandate required broad investigatory powers. However, it has now become necessary to open up these provisions and make a fresh statement of the government's commitment to this principle in light of recent developments.

Decriminalization

19. The need for re-examination of the investigatory powers is evident in light of the recent trend, both in the Act and in past proposals, towards the decriminalization of certain types of conduct which may be anti-competitive. Traditionally, search and seizure has been associated with the enforcement of criminal law. As more of our competition law is made non-criminal, it becomes necessary to determine the most effective means of enforcing the substantive provisions of the Act, and whether or not search powers should be retained for non-criminal matters.

20. The use of search and seizure powers should be avoided where means less intrusive of individual rights and freedoms are equally effective. Of course, at the early stages of an investigation into a Combines matter, it may be difficult to determine whether the resulting proceeding will be civil or criminal in nature. In addition, where civil reviewable matters require proof of factors such as intent, it may be necessary to provide for complete investigative powers in order to ensure effective enforcement. An alternative solution, sometimes discussed, is the narrowing of extraordinary powers in civil matters, together with the lowering of thresholds to be proven and the elimination of any requirement to prove intent in such provisions.

Constitutional Challenge

21. The enactment of the Charter of Rights and Freedoms has generated several challenges to the constitutionality of the investigatory powers. In Southam, the Supreme Court of Canada held that the search power under Section 10 of the Act was of no force and effect since it infringed the Charter's protection against unreasonable search and seizure. The power to subpoena witnesses under Section 17 has also been subjected to scrutiny (N.H.L. and Business Forms). These developments, and the growing litigation in the area, dictate the urgent need to introduce effective powers which are in conformity with the Charter.

22. The decision by the Supreme Court of Canada in the Southam case defined a standard of procedural safeguards to be followed for the valid prior authorization of a search. The Court found that, as a minimum, there must be (i) established on oath, (ii) reasonable and probable grounds to believe, (iii) that an offence has been committed, and, (iv) that there is evidence to be found at the place of the search. They also held that the person authorizing the search must be impartial and capable of acting judicially but need not necessarily be a judge.

Impartiality

23. In the Southam case, the Supreme Court decided that the investigatory functions of the Restrictive Trade Practices Commission (R.T.P.C.), such as the power to gather evidence through hearings and to direct further investigation, impaired its ability to act as an impartial adjudicator. Since the power to authorize a search and seizure is a judicial function, the dual roles of the R.T.P.C. did not accord with the neutrality and detachment necessary to balance the interests involved. Therefore, it becomes necessary to ensure that the Director's application for search authorization is dealt with by an impartial adjudicator. As such, a Justice of the Peace or a Judge would likely be the most effective overseers of the investigatory powers.

24. A redesigned economic tribunal provides administrative convenience but runs the risk of falling short of the Supreme Court's requirements for "neutrality and detachment" if its functions require it to be both "investigator and judge with respect to breaches of the Act". A Justice of the Peace provides quick service on reasonably short notice in many centres of the country, but issues of their independence and ability to act judicially have sometimes been raised. Finally, a Superior Court Judge might lend a higher degree of scrutiny and independence to these matters, but may be unavailable on short notice in cases where swift action is deemed necessary. With regard to the latter two choices, it has been suggested that the territorial limits imposed upon these adjudicators could result in discrepancies of treatment and that, in the interests of uniformity, recourse to a Federal Court Judge should be possible. Alternatives and options, in a broader context, are discussed further in the section entitled "Adjudication".

Other considerations

25. The subpoena powers under the Act are an important part of the investigatory powers. They complement the search power by permitting the taking of evidence which is not attainable on a search. In addition, they permit the production of routine business records in cases where searches would be otherwise necessary. Restructuring of the search power will require concomitant changes to these other powers, so that a cohesive package can be designed to ensure effective enforcement of all aspects of our competition laws. This will involve, for example, the

choice of an adjudicator and the enunciation of a standard for the issuance of subpoenas. It will also be necessary to determine an acceptable standard for supervision of the hearing process, in which oral testimony is given prior to the institution of formal proceedings against any individual or corporation. This includes such things as: type of hearing officer, procedures for enforcing non-compliance with subpoenas, and rights of appeal.

Summary

26. In recreating the investigatory powers it will be necessary to determine the most appropriate means of balancing the need for a full inquiry in competition cases with the need for ensuring that individual rights are protected during an investigation. The choice of adjudicator for the task of supervising the exercise of search powers must also be carefully considered in light of the Charter as well as enforcement considerations; it is no longer acceptable to have a single tribunal performing both investigative and adjudicative functions. Finally, it will be necessary to design adjudicative standards for the power to subpoena oral testimony and documentary evidence.

MERGERS

Introduction

27. Section 33 of the Combines Investigation Act creates a criminal offence for mergers defined by section 2 to mean the acquisition by one or more persons of any control over the business of another, whereby competition is likely to be lessened to the detriment of the public.

28. The present merger law is generally considered to be largely ineffective. There has never been a conviction in a contested merger case in its 75 year history. Indeed, because criminal law in this context is so difficult to apply, the Crown has brought before the courts only eight cases involving a charge of illegal merger over the past seven decades. This situation may have arisen from the fact that the criminal law is not well adapted to the examination of future economic effects. Obviously, the requirement of proof beyond a reasonable doubt is formidable in such situations. Also, this provision allows for punishment of business behaviour that is not normally thought of as criminal.

29. The previous proposals had been considered to be a significant improvement over the present law. However, some issues still have to be considered in order to attain the best merger law for Canada. The major issues are however, the choice of the adjudicator, the lessening of competition test, the efficiency defense and the status of joint ventures. The first issue is dealt with elsewhere in this paper under the heading Adjudication.

International Competition

30. A high percentage of Canadian Gross National Product is dependent upon the competitiveness of Canadian industry on the world markets. We have witnessed in recent years a considerable heightening of competition in foreign markets where there has been a traditional Canadian export presence. Moreover, many Canadian markets have seen greater penetration by foreign producers. This increases the pressure on Canadian industry to become more efficient and innovative. There may be a need for some industries to become more concentrated in order to achieve the minimum efficient size of plant or other efficiencies necessary to compete in world markets. It is important that the law be effective in dealing with mergers which are clearly not in the public interest but it should be flexible enough that it does not impede truly efficient reallocations of productive resources.

31. The previous proposals for mergers took account of foreign competition by including in the list of factors to be considered, the availability of substitutes from abroad. It may be preferable for the law to more explicitly take account of international competitiveness. This may be particularly relevant when the merger in question would enhance the ability of Canadian industry to compete abroad or when the possibility for foreign competitors to compete in the domestic market is limited or restricted.

"Lessening of competition" test

32. Under the existing merger provision, it is required that the lessening of competition be to the detriment or against the interest of the public. The courts have placed considerable emphasis upon a simple structural test which seemed to require proof that a virtual monopoly

was created by a merger (Canadian Breweries and B.C. Sugar cases). In addition, since the Irving Newspaper case it has been clear that even if a virtual monopoly was established, it cannot be presumed that detriment to the public automatically follows.

33. The previous proposals used a "significant" lessening of competition test for mergers to be subject to an order. A significant lessening was further defined as requiring a major and not insubstantial effect on competition. This was to accommodate the concern that a significant lessening of competition might be interpreted to mean any effect that was not insignificant. It has been pointed out that the test was inconsistent with other tests used elsewhere in the law, particularly in the abuse of dominant position section, where the test was "substantial lessening of competition".

34. Some have proposed a double test before an order could be issued. The suggestion was a test that would include a lessening of competition requirement, as well as a requirement that there be no substantial competition remaining. The concern with this test is that it would effectively leave the law in its present state where a virtual elimination of competition is required.

35. In the Canadian economy, a test based on a flexible, case by case approach would allow for a careful balancing of the economic losses and gains from mergers and minimize the possibility of wrong decisions. Such a criterion could be a requirement that competition must be lessened substantially before an order could be issued. The adoption of such a test would address concerns that have been raised with respect to the test included in the previous proposals.

36. Accordingly, it is necessary to determine the most appropriate competition test that would prevent mergers having adverse economic consequences yet that would exempt those that do not have considerable impact on competition.

Efficiency Defense

37. Any new merger law needs to reflect the uniqueness of the Canadian economy, an economy that is relatively small and open. In Canada, firms may have to grow bigger with resulting higher concentration in order for Canada to be

internationally competitive. An optimal merger law for Canada would be one which weighs the advantages of economic efficiency against the disadvantages of the lessening of competition, all in the international trading context.

38. The previous proposals contained an efficiency gateway allowing mergers which gave rise to large efficiency gains, even if they lessened competition. Although the need for such a provision in a Canadian merger law is widely recognized, precise wording has been difficult to draft.

39. Some have suggested an absolute dispensation if there are any efficiencies resulting from the merger, even if there was a significant lessening of competition. Such a defense would simplify, to some extent, the provision, while possibly reducing investigation and litigation costs. However, such a measure would undermine the effectiveness of the Act because it could allow mergers which are, on balance, bad for the economy as a whole.

40. On the other hand, others would require proof that efficiency gains would be passed on to consumers. Although such a requirement might contribute to a desirable distribution of those gains, an extensive monitoring and regulatory system would be needed to enforce it.

41. There have also been general comments suggesting that the economic language of an efficiency defense is inappropriate for determination by a court. It is argued that the subtleties of the defense could be better dealt with by a tribunal or should be simplified to less technical language.

42. Efficiency is a very important factor that has to be considered in a Canadian merger law. The main issue is to determine the most appropriate wording for an efficiency defense so as to ensure the greatest clarity and effectiveness in the law.

Joint Ventures

43. Joint ventures are covered by the current definition of merger. This type of business organization is often required in order to share risks or to undertake large capital projects. Joint ventures are particularly common in the oil and gas and natural resources sectors of the economy.

44. Under the previous proposals, joint ventures were exempted from the prenotification provisions but were still subject to the other sections of the Act, including the merger provisions, if they lessened competition significantly. Many argued that joint ventures should be exempted from the substantive merger provisions because most joint ventures do not significantly lessen competition and are beneficial to the economy. However, the discussion only focussed on the status of those joint ventures that clearly did not lessen competition. If they did not lessen competition, of course, they were not prohibited in any event. Moreover, it would not seem desirable to exempt those joint ventures that do lessen competition. It should be noted that the efficiency defense would also be available to the few joint ventures which would have considerable adverse effects on competition.

45. Because it is almost impossible to effectively distinguish joint ventures from harmful mergers, an effective but limited exemption based only on the forms of transactions would not be feasible. If an exemption for joint ventures were specified in the legislation, firms could, in some circumstances, arrange their mergers in such a way as to come within the joint venture exemption. It should be the substance of the effects of the transaction on competition that is important, and not its form.

46. Therefore, the issue is to arrive at a treatment of joint ventures under the substantive merger provisions which would offer certainty and, at the same time, ensure that the law does not allow joint ventures that have considerable adverse effects on competition and are not beneficial for the economy as a whole.

PRENOTIFICATION

Introduction

47. The present Combines Act does not have a prenotification provision for proposed mergers although such provisions already exist in the United States, United Kingdom, Germany and Australia. A prior prenotification provision is essential for an effective analysis of the largest, most complex mergers likely to have substantial effects on competition. A prenotification provision should also reduce the costs associated with post-merger proceedings.

48. The prenotification provisions which were part of the previous proposals raised a number of concerns, particularly with respect to their complexity and the extent of the information requirements.

Complexity

49. The previous proposals included an elaborate prenotification provision, in part to ensure certainty for the business economy. However, many found it to be overly complex and convoluted. Some groups found the ordering of the sections confusing. In particular, it was suggested to move the minimum size threshold of 500 million dollars to the beginning of the provision. Also, some elements were thought to be unnecessary, such as the definition of "operating business".

50. The value of reorganizing the whole provision is obvious. However, certain complexity will be necessary to provide for all possible circumstances and thereby minimizing government discretion. As is often the case in competition policy matters, the law must find a proper balance between certainty and complexity.

Information Requirements

51. In the previous proposals, two types of notification were set out: a short 7-day notice requiring a minimal information filing and a longer, 21-day notice requiring more complete information. Some expressed the view that the latter information requirements were too extensive and time-consuming and that there should be an extremely short initial notice to weed out obvious "no issue" proposals. On the other hand, the waiting periods were considerably shorter than those proposed in the Investment Canada legislation or those contained in foreign merger laws.

52. One must recognize that the length of the waiting periods are related to the sufficiency of the information provided to assess the impact of the merger on competition. In fact, the waiting periods previously proposed would not have provided sufficient time for the gathering of information from other sources. An extremely short initial notice period might reduce the burden of paperwork for parties in obvious "no issue" proposals. However, it may have to be balanced by longer waiting periods with complete information for those proposals that would not so obviously raise no competition issue.

53. It has also been suggested that detailed information requirements should be specified in regulations. While making the prenotification sections less confusing, such a measure also has the advantage of offering more flexibility for adaptation as practice and experience with the law is developed.

Summary

54. Accordingly, issues that must be addressed are:

- (i) what is the appropriate form and extent of the information requirements that would provide sufficient information for an effective assessment within a reasonable delay;
- (ii) it is advisable to place detailed information requirements in regulations.

MONOPOLY (ABUSE OF DOMINANT POSITION)

Introduction

55. Under the present law it is a criminal offence to operate a monopoly to the detriment of the public. Since the provision was first enacted, there has been only one successful conviction following a trial. Moreover, due to the criminal burden of proof, the provision does not lend itself to an appraisal of the economic complexities associated with monopolistic behavior. The relative flexibility of civil law is more effective in dealing with, and correcting, abusive conduct which may be engaged in by dominant firms. Certain sectors of the economy including the small business community and consumers, are strongly in favour of making the section a civil matter with improved legal standards.

56. The small size of the Canadian market and the overall importance of trade to our economy requires that firms in some industries become quite large, relative to the domestic market, in order to remain internationally competitive. A realistic and effective law must take into account the extent of foreign competition faced by Canadian business at both the domestic and international levels. Therefore, it is considered inappropriate to prohibit dominance per se; rather what is contemplated is a provision dealing with the anti-competitive effects of any abusive, anti-competitive conduct carried out by dominant firms. In past proposals, the court could issue an order if a dominant firm or firms were engaging in a practice of anti-competitive acts which prevented or lessened competition substantially in a market.

Anti-Competitive Acts

57. To provide guidance to the business community, past proposals have included an illustrative list of anti-competitive acts. While the list was favored in the small business community, other interests have argued that there should be no list or that the list of anti-competitive acts should be exhaustive. Those who favor a non-exhaustive list are concerned that the courts may dismiss evidence of anti-competitive conduct which is not incorporated in the legislation, even though that would not be intended by the legislation.

Efficiency Defense

58. There is strong support for an efficiency defense when reduced competition in a market dominated by one or more firms results from superior economic efficiency and not anti-competitive practices. The primary concern with an efficiency defense is that it could become a gateway for anti-competitive practices since, in certain circumstances, it may be difficult to determine whether reduced competition stems from superior economic efficiency or anti-competitive conduct. Moreover, critics have argued that it is difficult to measure superior economic efficiency. This is of concern to some because it could result in lengthy proceedings and create uncertainty in the law.

Joint Dominance

59. In the Large Lamps case the court determined that more than one firm, where there is coordinated behaviour beyond purely parallel conduct, can substantially or completely control a market even when the firms are not affiliated. The question has been raised whether abuse of dominant position provisions should apply to joint dominance or only a single firm in the absence of an actual agreement. There are very few industries in the Canadian economy where only one firm dominates; however, many industries are highly concentrated and dominated by two or more firms. It has been argued that limiting the scope of the dominance provision to a single firm will weaken the law to such an extent that it will be ineffective. Others are concerned that it may be difficult to determine the degree of co-ordination among firms necessary to justify joint dominance with the result that purely consciously parallel behavior may be unfairly scrutinized. However, effectiveness of the provision could be maintained while limiting its application to a single firm. This could be

achieved by lowering the threshold of control to perhaps a major supplier situation or having effect when the practice is widespread in the market as envisaged in the exclusive dealing, tied selling and market restriction provisions of the present Act. Alternatively, joint dominance could be effective with a higher burden on the government.

60. A number of interests are concerned that dominant firms may be faced with proceedings under both the civil dominance provisions and the criminal conspiracy provisions if there is evidence of an agreement. This perceived problem in the previous proposals could be dealt with by a technical amendment prohibiting action under joint dominance or conspiracy where proceedings have been commenced under the other section of the Act in respect of the same facts.

Summary

Introduction

61. The issues to be addressed are:

- a) in what manner should a list of practices be incorporated in the legislation,
- b) how should an efficiency defense be structured, and
- c) to what extent should the dominance provision apply to more than one firm?

CONSPIRACY

62. The present conspiracy law makes it a criminal offence to conspire to unduly lessen competition. Two court decisions in the late 1970's (Aetna Insurance and Atlantic Sugar) have created considerable uncertainty with respect to the law on inferential agreements and intent.

Agreement

63. For many years the jurisprudence held that the existence of an agreement could be proven from circumstantial evidence. In conspiracy cases direct evidence is often not available. It has been argued that the majority decision of the Supreme Court of Canada in the Atlantic Sugar case confused the distinction which previously existed in the jurisprudence between illegal agreements which could be inferred from indirect evidence and consciously parallel behaviour. The latter is legal and

frequently exists in concentrated or oligopolistic markets, particularly when the product is homogeneous. Some concern has been expressed that this type of behaviour would be caught by an amendment to restate the law on this issue. In clarifying the law on inferential agreements there is no intention to prohibit consciously parallel behaviour. Opinion on this issue is generally in favour of amending the law by codifying, clearly, the distinction between conspiracy which may be inferred and consciously parallel behaviour.

Intent

64. The state of the law with respect to intent is similarly unclear. The essence of conspiracy is in the act of agreement. Criminal intention, or mens rea, must be present in the act of agreement for the courts to find that agreement has taken place. Until recently the requirement to prove mens rea in a conspiracy case was generally thought to be satisfied when the Crown established, beyond a reasonable doubt, that the parties intended to and did enter into an agreement the object of which was to lessen competition. This standard was established by a large body of jurisprudence over many years which considered that when parties to a conspiracy entered into such an agreement they intended the natural consequences of the agreement.

65. The judgments of the Supreme Court in Atlantic Sugar and Aetna Insurance are said to have confused this issue to the extent that they have been interpreted by some to require proof, not only that the parties intended to enter an agreement the object of which was to lessen competition, but also that they intended to prevent or lessen competition unduly. Such an interpretation, which has been referred to as "double-intent", would seriously weaken this most important provision by placing a burden of proof on the Crown which could only be satisfied in very exceptional cases. A proposal specifying the requirement of so-called "single-intent" has been suggested as one means of clarifying the law.

Competition Test

66. A matter frequently raised in relation to conspiracy law is the question of what competition test is appropriate. Unduly has been interpreted by the courts as requiring a very large effect on competition. This has generally been assessed on the basis of market share. Replacing "unduly" with a new standard risks the loss of certainty provided by the jurisprudence. Nevertheless, it may be appropriate to provide clearer guidance to the courts

on the kind or nature of effects upon competition which this provision is designed to prevent. A number of interested parties have argued that the present test of lessening "unduly" competition is inadequate to deal with certain kinds of agreements, such as market sharing and price fixing, which clearly have serious adverse economic consequences and seldom have redeeming social value. Some would suggest that the present test of "unduly" is too onerous for the Crown in relation to such agreements. This raises the question of whether the law needs to be strengthened by a clearly articulated statement of the harm to competition of such agreements. It may be desirable to apply a different standard to this type of activity or otherwise revise the law to deal more effectively with such agreements.

Fines

67. The fines awarded by the Courts in conspiracy prosecutions have been insufficient to provide a true deterrent effect. Fines against firms found guilty of conspiracy have varied widely with the average being a small fraction of the allowable fine. It has been suggested that the present maximum fine of \$1 million should be raised to \$5 million in order to send a clear message to the Courts that Parliament considers combines conspiracies a serious crime and that the fines awarded should be consistent with the gravity of the offence.

Export Exemption

68. A large portion of our economy depends on exports. The present export exemption to the conspiracy provision consists of a defense where the agreement relates only to the export of products from Canada, but provides for exceptions to the defense where there has been a specified effect upon the domestic market. These exceptions have been criticized as making the defense in relation to exports too restrictive. Previous proposals have attempted to broaden the defense by allowing for a broader range of agreements. There is a need to balance the benefits of increased exports through export consortia and the need to provide adequate protection for the export activities of new entrants and existing domestic competition and thereby protection for consumers.

Summary

69. In dealing with the question of the application of the Act it will be necessary to consider carefully the following issues:

- 1) how should the ambiguity regarding inferential agreement be dealt with by an amendment;
- 2) should the proof of intent required under conspiracy law be clarified, and if so how;
- 3) Should the competition test of unduly lessening competition be amended or clarified;
- 4) How should the deterrent effect of fines under conspiracy law be increased;
- 5) How may the export exemption be broadened without opening a gateway for harmful effects on domestic competitors and competition?

BANKS

Introduction

70. At present, conspiracies and mergers among banks are subject to provisions in the Bank Act and not those of the Combines Investigation Act. While s. 309 of the Bank Act creates a per se criminal offense for certain kinds of agreements among banks, the conspiracy provision in the Combines Investigation Act prohibits only those agreements which lessen competition unduly.

71. The most recently proposed amendments to the Combines Investigation Act would have moved s. 309 of the Bank Act into the Combines Act virtually without change. Mergers would have become subject to the Act through repeal of the existing exemption in s. 255(5) of the Bank Act. This transfer of enforcement responsibility from the Inspector General of Banks to the Director of Investigation and Research was based on proposals contained in the 1976 White Paper on Banking.

Rationalization

72. The existing distribution of responsibility for the application of competition policy to banks has been criticized for its inefficiencies. There is also the additional problem that banks are treated separately and distinctly from other competing financial institutions, raising questions of the fairness of such an arrangement. This has become more apparent with the increasing competition between banks and other financial institutions. However, competition among different kinds of financial institutions raises questions of the optimal regulation of financial markets generally and involves broad policy considerations.

Summary

73. The issue to be addressed is whether it is appropriate to rationalize enforcement efforts by subjecting bank mergers to the merger provisions in the Combines Act and by providing for the transfer of provisions governing inter-bank agreements from the Bank Act to the Combines Act?

CROWN CORPORATIONS

74. Federal and provincial Crown corporations are engaged in a wide range of commercial endeavours and in many industries they occupy significant or even dominant positions. Also, in many cases they are engaged in competition with private sector firms. A ruling of the Supreme Court of Canada in the Eldorado case rendered Crown corporations, agents of Her Majesty, immune from the Combines Investigation Act when acting within their purposes. In the interest of fairness, all Crown corporations engaged in commercial activity should be subject to the same rules of conduct as private firms.

75. Previous proposals have dealt with this issue by providing that all Crown corporations, engaged in commercial activity in competition with others, would be subject to the Combines Investigation Act, except in relation to activities directly associated with their regulatory functions. This was criticized as not providing sufficient certainty whether or not a revised Act would apply to particular Crown corporations and in which situations.

76. An alternative approach suggested was to list Crown corporations which would be subject to the legislation. This approach, however, raises other problems. First, a list would have to be revised either legislatively or by Order-in-Council each time there was a change affecting the legal status of the listed Crown corporations. Second, many Crown corporations are engaged in commercial activities, as well as having non-commercial roles defined by legislation. The use of a list would necessitate either including in, or exempting from, the legislation all or parts of such corporations.

77. It will be necessary to determine whether the application of the Act to Crown corporations, agents of Her Majesty, should be made by their characteristic and function, or by a list.