REPORT OF THE TASK FORCE ON

THE NEW COMPETITION LEGISLATION

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EXECUTIVE SUMMARY

This report is a guide for Investment Canada officials to use in their discussions with CCA regarding our interface with CCA for cases which will fall under the pre-notification provision of the Competition Act and those involving significant competition issues.

The statements of purpose of the Investment Canada Act and the new Competition Act appear to be quite compatible and there are no inherent and apparent conflicts between the two statements.

There would be some ten to fifteen cases per year which may require "effective coordination" between CCA and INV to ensure optimum service to our clients, the investors.

Highlights of the New Competition Legislation

- The new Competition legislation consists of two Acts: The Competition Act replaces the old Combines Investigation Act, and a new Act, the Competition Tribunal Act establishes a quasi judicial Tribunal to hear and determine all applications made by the Director of Research and Investigation, CCA, in respect of conspiracies, trade practices and mergers affecting competition.

- Notice must be given to CCA by the parties to any merger or takeover involving two companies with combined assets or sales in Canada of more than $400 million, provided the company being acquired has in Canada assets or sales of more than $35 million.

- After Notice is filed with CCA, the parties to a proposed transaction would have to wait generally for 7 or 21 days and in some cases for a longer period of time before they can complete the transaction.

- The Director of Investigation and Research, CCA, can have a merger reviewed by the new Competition Tribunal within 3 years of the transaction, unless the Director has issued a ruling in advance that he will not do so.

- The Competition Tribunal, composed of Governor in Council appointees and judges, will also review applications from CCA concerning restrictive trade practices, which were handled by criminal proceedings under the previous Combines Investigation Act. The Tribunal's decisions are appealable, with leave, to the Federal Court of Appeal.

- Banks and crown corporations are now included under the Competition Act.

- Maximum fine for monopolistic practices increased to $10 million from $1 million.

- New prohibition on predatory pricing practices - such as loss leaders - if done "for the purpose of disciplining or eliminating a competitor."

- Rules against price fixing are tightened.

Issues and Recommendations

- Discussion with CCA should be started as early as possible so that we can better understand CCA's philosophy and thinking on the interpretation and implementation of the Competition Act in order to provide our input into the regulations and procedures which are now being developed by CCA. The primary purpose of our input would be related to the procedures and regulations which would impact on the administration of the Investment Canada Act. We need to ensure that Canada's new investment policy is factored into CCA's regulations and procedures; that concerns about competition in the marketplace are balanced against the need for Canada to be perceived as offering a favourable environment for doing business; and that conflicting decisions by the two government organizations will be avoided.

- It appears that the administrative burden on the investor for providing information under the two Acts cannot be reduced significantly because the information requirements under the two Acts are different. However, this matter could be explored further with CCA.

- We have assumed that in most cases CCA would render its decisions within the seven or twenty-one days time periods mentioned in the Competition Act. This expeditious administration by CCA would permit INV Minister to decide within 45 days. If delays occur regarding clearance from CCA, more "fallback" options for Investment Canada are discussed.

- In case of transactions which are notifiable under the Competition Act, the Review Officer should facilitate the notification process.

- For the transactions which are not notifiable under the Competition Act, generally speaking, we should be able to resolve any significant competition issues through discussions amongst CCA, Investment Canada and the investor. If necessary, the investor could develop plans or undertakings which would alleviate CCA's concerns.

- For transactions notifiable to the Director, both direct and indirect, investors would have to provide the required information to CCA before a transaction can be completed. Investment Canada has a similar requirement for direct transactions only. Therefore, it would be in the investors' interest to provide the complete information to Investment Canada and CCA as quickly as possible.

- For any transactions for which a not-to-proceed order has been issued by the Competition Tribunal, it would be wise to delay the decision under the Investment Canada Act for as long as the interim order will be in force.

- In order to provide guidelines to the investors, consideration should be given to CCA and Investment Canada Ministers/Deputy Ministers signing a Memorandum of Understanding (MOU) to deal with cases which require effective coordination between INV and CCA.

  In addition to stating general principles, such an MOU could include procedures, time frames, administrative details, and guidelines which could be published for investors' and their advisors' guidance.

INTRODUCTION

BILL C-91, an Act to establish the Competition Tribunal and to amend the Combines Investigation Act and other Acts in consequence thereof, as passed by the House of Commons on June 5, 1986 impacts on the administration of the Investment Canada Act (ICA). The Bill, with the exception of the provisions relating to the prenotification of mergers, came into force on June 19, 1986. This report examines the areas of the new competition legislation (The Competition Act and the Competition Tribunal Act) that are of potential consequence for the Investment Canada Act and provides recommendations with respect to procedures for the administration of the ICA to minimize potential conflicts with the administration of the competition legislation and to minimize the administrative burden on investors subject to both acts.

The recommendations were formulated keeping in mind Investment Canada's mandate to encourage investment and that Canada must compete in the international market to attract foreign investments; to be successful, Canada must be seen as a country offering a favourable business and legislative environment.

OVERVIEW OF THE NEW COMPETITION LEGISLATION

The new Competition legislation consists of two Acts: The Competition Act replaces the old Combines Investigation Act, and a new Act, the Competition Tribunal Act establishes a quasi judicial Tribunal to hear and determine all applications made by the Director of Research and Investigation, CCA, in respect of conspiracies, trade practices and mergers affecting competition.

THE COMPETITION TRIBUNAL ACT

The members of Tribunal shall be appointed by the Governor in Council and consist of:

- not more than four members, to be appointed on the recommendation of the Minister of Justice, from among the judges of the Federal Court - Trial Division; and

- not more than eight other lay members (e.g. from business, legal, consumer, labour sectors), to be appointed on the recommendation of the Minister of CCA.

All proceedings before the Tribunal shall be dealt with as informally and expeditiously as the circumstances and considerations of fairness permit.

The Tribunal is a court of review and its decisions, interim or final are appealable as if these are judgments of Federal Court - Trial Division.

The Tribunal has jurisdiction to hear and determine all applications made under Part VII of the Competition Act and any related matters. Any person affected by its proceedings can make representations to the Tribunal.

THE COMPETITION ACT

The new Act is:

> "An act to provide for the general regulation of trade and commerce in respect of conspiracies, trade practices and mergers affecting competition."

It replaces the Combines Investigation Act which was:

> "An Act to provide for the investigation of combines, monopolies, trusts and mergers."

The purpose of the new Competition 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."

The Competition Act consists of nine parts which are outlined in Appendix II. For our purposes, Parts VII and VIII are more relevant and are summarized below.

MATTERS REVIEWABLE BY TRIBUNAL

Part VII deals with Matters Reviewable by Tribunal. These include 1) Restrictive Trade Practices, such as Refusal to Deal, Consignment Selling, Exclusive Dealing, Tied Selling and Market Restriction, Abuse of Dominant Position and Delivered Pricing, 2) Foreign Judgments and Laws, 3) Specialization Agreements and 4) Mergers.

Of particular relevance to Investment Canada are sections 63-79, which deal with mergers. These sections set out the procedures and rules for an application by the Director to the Tribunal for an order dealing with a completed or proposed merger which prevents or lessens or is likely to prevent or lessen competition substantially.

These sections apply to applications to the Tribunal either following a prenotification under Part VIII or where no prenotification was required but the Director has sufficient grounds to believe that a merger or proposed merger will substantially prevent competition.

"Merger" is defined in s. 63 as "the acquisition or establishment, direct or indirect, by one or more persons, whether by purchase or lease of shares or assets, by amalgamation or by combination or otherwise, of control over or significant interest in the whole or a part of a business of a competitor".

Where the Director makes an application to the Tribunal, the Tribunal determines whether the merger prevents or lessens competitions, having regard to the various factors outlined in s. 65. If the Tribunal decides that competition would be adversely affected by a proposed merger, it can make an order preventing the merger from proceeding (s. 64(1)(f)). If the merger has already been completed, it can order the persons involved to dissolve the merger or to dispose of any assets or shares that it designates.

There are various exceptions listed in the Act which can prevent the Tribunal from issuing an order under s.64. These include a) mergers substantially completed before the coming into force of this Act, b) amalgamations under s. 255 of the Bank Act or acquisitions under s. 273 of the Bank Act, c) joint ventures formed to undertake specific projects or programs of research and development, d) transactions where the gain in efficiency outweighs the lessening of the competition.

In addition, no application can be made to the Tribunal more than three years after the merger has been substantially completed or where proceedings have been commenced under s. 32 of the Act dealing with offences in relation to Competition Act or under s. 51 dealing with abuse of dominant position.

Where the Director wishes to prevent a proposed merger from proceeding before he has submitted an application to the Tribunal to review it under s. 64, he may apply for an interim order under s. 72. Such an order, if issued, would have effect for a maximum of ten days, if issued on ex parte application or a maximum of twenty one days, in any other case. After an interim order, the Director is required as expeditiously as possible to bring his application before the Tribunal under section 64; at the same time he may apply for a further interim order under s. 76, which would be in effect for such period of time as the Tribunal considers necessary.

S. 74 provides that the Director, if he is satisfied by a party to a transaction that he would not have sufficient grounds on which to apply to the Tribunal under s. 64, may, upon request, issue a certificate that he is so satisfied. If such a certificate is issued and the transaction is substantially completed within one year thereafter, the Director is precluded from applying to the Tribunal under s. 64 in respect of the transaction on the basis of substantially the same information.

NOTIFIABLE TRANSACTIONS

Basic Threshold

Part VIII of the new Competition Act deals with Notifiable Transactions. Section 81(1) establishes the basic overriding threshold for all transactions. It provides that Part VIII will not apply unless all the parties to the transaction and their affiliates have combined assets in Canada exceeding $400 million or gross revenues from sales in, from, or into Canada exceeding $400 million. "Assets" is not defined in the statute but will likely be referred to in the Regulations which are not yet available. Presumably, assets will include any tangible or intangible property, as is the case under the Investment Canada Act.

Other Thresholds

In addition to the general threshold, other thresholds are provided for in section 82, according to the type of transaction being proposed. There are four types of transactions described in this section, 1) an acquisition of assets; 2) an acquisition of voting shares; 3) amalgamation; 4) combination.

Acquisition of Assets

S. 82(2) deals with an acquisition of assets in Canada of an operating business. "Operating business" is defined in section 80 as "a business undertaking in Canada to which employees employed in connection with the undertaking ordinarily report for work". It should be noted that this would include a business which is actively being carried on by a receiver or a trustee in bankruptcy. The transaction will be notifiable (assuming the basic threshold is met) if either the assets being acquired or the gross revenue generated from those assets exceed $35 million. The method of valuation of the assets or gross revenues will be prescribed by regulation.

Acquisition of Voting Shares

S. 82(3) refers to an acquisition of voting shares of a corporation that carries on an operating business. "Voting share" is defined in s. 80 as "any share that carries voting rights under all circumstances or by reason of an event that has occurred and is continuing". In order to be notifiable, such an acquisition must, in addition to the basic threshold, satisfy two other thresholds. First, the assets owned by the corporation whose shares are acquired or the gross revenues generated from those assets, must exceed $35 million. Secondly, the party acquiring the voting shares must in the case of a public company, own at least 20% of the voting shares after the transaction or, if it already owned 20% or more before the acquisition, the result of the transaction will bring it to at least 50%. In the case of a privately held company, these figures become 35% and 50%.

Amalgamations

S. 82(4) refers to amalgamations between two or more corporations where at least one is carrying on an operating business. The notification provisions will apply where the basic $400 million threshold is met and the value of the assets in Canada that are to be owned by the continuing or surviving corporation or the gross revenues from sales generated by those assets, exceed $70 million. Amalgamation is not defined in the Act, however, it generally refers to the procedure in Canada where two or more corporations unite to create a new continuing corporation, which takes the place of the precedessor corporations. This procedure is outlined in the Canada Business Corporations Act, for federal companies, and in the various provincial corporations acts, for provincial companies.

Combinations

S. 82(5) refers to combinations of two or more persons to carry on business otherwise than through a corporation where one or more of the persons propose to contribute assets to the combination that will form all or part of an operating business. "Person" is defined in s. 80 and includes individuals, corporations, trustees, etc. Combinations will be subject to the notification procedure where the value of the assets in Canada that are the subject matter of the combination or the gross revenues from sales generated from those assets, exceeds $35 million. "Combination" itself is not defined in the Act but would appear to include general and limited partnerships and joint ventures. Certain joint venture combinations are exempt from the notification requirements if they meet the conditions of s. 84. This would generally exempt a joint ventures that does not result in the change in control of any party and which is created for a certain specified project, after which time it is to be terminated.

Exemptions

S. 83 provides for exemptions with respect to the following acquisitions of voting shares or assets:

- acquisitions of real property or goods where the acquiror would not be acquiring the assets of a business or the operating segment of a business.

- acquisition of voting shares for underwriting purposes.

- acquisition resulting from a gift, intestate succession or testamentary disposition. Except for the reference to gift, this is indentical to the exemption contained in the Investment Canada Act.

- acquisitions of security in debtor-creditor relationships. It is similar to but broader than the exemption contained in the Investment Canada Act.

- acquisition of resource properties within the meaning of the Income Tax Act, or the acquisition of voting shares of a corporation with the right to develop resource properties, if the acquiror has an obligation to incur expenses to carry out exploration or development activities with respect to the property.

S. 85 provides for certain general exemptions (irrespective of the type of transaction):

(a) where the parties are affiliates of each other;

(b) if the Director has issued a certificate under s. 74 ruling in advance that he would not have sufficient grounds to apply to the Tribunal;

(c) for transactions entered into before s. 85 comes into force but completed within one year after it comes into force, and

(d) for any other classes of transactions that may be prescribed by regulation.

Notice and Information

Sections 86 - 91 refer to Notice and Information. S. 86 provides that where a notifiable transaction is proposed, the persons proposing the transaction shall notify the Director and supply him with information in accordance with section 92. Section 92 gives the person proposing the transaction an option. He may supply either the information set out in section 93 or in section 94. The information required by both sections is extensive, but s. 94 requires more detailed financial and statistical data, product descriptions and information regarding the share holdings of each party. (The information required under Sections 93 and 94 are outlined in some detail in Appendix III).

The Competition Act does not indicate the circumstances in which parties to a proposed transaction should prenotify with s. 93 or s. 94 information. Possibly the regulations or other guidelines issued by CCA

would provide some guidance to investors in this regard. However, it appears that where the parties believe that there are no competition implications, they will likely pre-notify with s. 93 information. The Director can, within 7 days of receipt of s. 93 information, require them to provide s. 94 information as well. Where the parties believe that there are competition implications, they will likely pre-notify with s. 94 information to avoid extra 7-day delay.

Although the information required under s.93 of the Competition Act is substantial, and more so in the case of s.94, it can be argued that, because the transaction involved is large, most of the required information would already have been prepared by the parties concerned.

Section 87 provides that if a notice has been filed under s. 86 for an acquisition of shares exceeding one of the percentage limits set out in s. 82(3), then if the investor's percentage drops below that limit and then returns above the limit within 3 years, he will not have to file another notice.

Section 88 provides that if any of the information required under S. 86 is not known or reasonably obtainable, or cannot be obtained without breaching confidentiality, the person filing may instead of supplying that information, inform the Director under oath or affirmation of the matters in respect of which information has not been supplied and why it has not been obtained. The same rule applies to information which could not reasonably be considered to be relevant to an assessment by the Director, however, in this case the Director may within 7 days advise the person that he requires the information. Section 89 provides that a director of a corporation need not supply information that he is aware of solely by virtue of his position as a director of an affiliate, unless the affiliate either wholly owns, or is wholly-owned by the corporation.

The information supplied to the Director, whether it be the information specified in s. 93 or s. 94, must be certified by an oath or affirmation in accordance with s. 90.

S. 91 provides that where a notice is filed for a proposed transaction and the transaction is not completed within one year, a new notice will be required if the transaction is still pending.

Restriction on Proceeding with Transaction

S. 95 provides that if a person files in accordance with s. 93 he may not proceed with the transaction until 7 days have expired provided that the Director has not within these 7 days, required him to file under s. 94.
When the person has chosen or is required to file under s. 94, he may proceed with the transaction after 21 days have elapsed. However, if the proposed transaction is an acquisition of voting shares to be effected through a stock exchange in Canada, the transaction may not proceed for 10 trading days or such longer period not exceeding 21 days as may be allowed by the rules of the stock exchange before shares must be picked up.

It should be noted that while s. 95 provides that a transaction may proceed after the time limits set out therein, the Director may apply to the Tribunal under s. 72 for an interim order to be issued to prevent the transaction from proceeding. This order, which can be applied for only before the Director makes an application to the Tribunal to review a merger under s. 64, and is limited to a duration of 21 days, or in the case of an exparte application, 10 days.

If the Director subsequently applies to the Tribunal under s. 64, he may then apply for a further interim order under s. 76 of the Act. This order is effective for such period of time as the Tribunal considers necessary and sufficient to meet the circumstances of the case.

CASES WITH POTENTIAL COMPETITION ACT CONSEQUENCES

Exhibit 1 lists the cases which have been/are being reviewed under Investment Canada legislation and which would be subject to pre-notification provisions of the Competition Act. Of these 17 cases (which cover a 15 month period), 10 involve mergers/acquisitions of relatively unrelated businesses and are rather unlikely to cause any concerns to CCA.

All the larger transactions reviewable under the ICA, would be covered by the pre-notification provisions of the Competition Act. There will remain a small number of cases that are not covered by the pre-notification provisions but may cause concern to CCA.

In total, there may be some ten to fifteen cases per year which may require effective coordination between CCA and INV to ensure optimum service to our clients, the investors.

EXHIBIT 1

LARGE ACQUISITIONS REVIEWED BY INVESTMENT CANADA LIKELY REQUIRING NOTIFICATION UNDER THE COMPETITION ACT

	INVESTOR	CANADIAN BUSINESS
1.	Alexander/Alexander	Reed Stenhouse
2.	Rio Algom Ltd.	Potash Co.
3.	BF Goodrich Con.	Diamond Shamrock
4.	Mobil Corp.	Cdn. Superior Oil
5.	Ultramar Can. Inc.	Gulf Can. Ltd.
6.	R.J. Reynolds Inc.	Nabisco Brands Ltd.
7.	Philip Morris Co.	General Foods Inc.
8.	Allied Signal Inc.	Allied Can. Inc.
9.	British Telecom	Mitel Corp.
10.	General Electric	RCA Inc.
11.	BCI Holdings Corp.	Beatrice Foods
12.	Allied Lyons	Hiram-Walker
13.	Coca-Cola	Canada Dry
14.	Uniroyal Tire(US)	Uniroyal Tire (Can)
15.	Deere & Co.	Versatile Corp.
16.	Boeing Co.	de Havilland
17.	148605 Can. Inc. (Burroughs)	Sperry

OPTIONS

As far as possible, both Investment Canada and CCA need to have efficient procedures for expeditious administration of our Acts so that the Government does not cause any undue delays in approving foreign investment in Canada.

For the transactions which are not notifiable under the Competition Act, generally speaking, we should be able to resolve any significant competition issues through discussions amongst CCA, Investment Canada and the investor. If necessary, the investor could develop plans or undertakings which would alieviate CCA's concerns.

For transactions notifiable to the Director, both direct and indirect, investors would have to provide the required information to CCA before a transaction can be completed. Investment Canada has a similar requirement for direct transactions only. Therefore, it would be in the investors' interest to provide the complete information to Investment Canada and CCA as quickly as possible.

Once the Notice is filed with CCA, generally speaking, the parties involved would need to wait for 7 or 21 days, and in some cases for a longer period of time. If the proposed transaction involves serious competition issues and a review by the Tribunal is required, it would take longer. As long as applications to CCA and Investment Canada are submitted around the same time, it should be possible for the Investment Canada Minister to render a decision within 45 days or within 75 days.

However, if there are delays (caused by CCA's administrative procedures, by investor's slowness in providing the required information to CCA, or because the Tribunal has issued a not-to-proceed injunction) well beyond the seven or twenty-one day periods envisaged under the Competition Act, some "fallback" options, based on the following premises, need to be considered by Investment Canada:

1. Remove the competition factor from ICA to make it independent of the new competition legislation.

2. Un-coordinated administration by the two departments, INV and CCA;

3. Coordinated administration of the two Acts:

(a) Delay the decision under Investment Canada Act (which requires consideration of six factors including competition) until the competition issue has been resolved by CCA;

(b) CCA and INV working together to provide expeditious administration of the two statutes and to provide effective service to our clients, the investors.

OPTION 1. Remove Competition factor from s.20 of the Investment Canada Act.

PRO
- Puts the competition issue solely under the jurisdiction of the Competition Act, which is the proper statute dealing with the issue.
- With respect to the Competition law, Canadian and non-Canadian investors will be in the same position.

CON
- Requires amendment to ICA.
- Removes an important factor in determining net benefit to Canada under ICA.
- Other factors under s.20 of ICA may become the subject of other statutes; removing the competition factor would establish a precedent and may lead to dilution of s.20 thereby reducing the effectiveness of the review process.
- Does not eliminate the risk of rendering conflicting decisions under the two Acts.

DISCUSSION

Removal of the competition factor from Section 20 of the Investment Canada Act would put the Canadian and non-Canadian investors on an equal footing as far as the Competition Act is concerned. Under this option, the Government's requirements for a decision under the Investment Canada Act would be fulfilled and it would be up to the investor to fully comply with all of the laws of Canada including the Competition Act. Under ICA, the effect of the transaction on competition would not be examined at all, and the decisions under the two Acts would clearly become independent and unrelated. However, competition is an important aspect and should be retained as a factor in determining net benefit to Canada. Removing the competition factor from the ICA will not prevent the rendering of conflicting decisions by the parts of the Canadian government. This option, therefore, is not to be retained.

OPTION 2. Render a decision under the Investment Canada Act and advise the investor (where CCA indicates serious concern) that the decision does not preclude the possibility that the transaction may be reviewed under the Competition Act.

PRO

- Minister can render prompt decision under ICA without necessity of extending the statutory period.
- Puts the non-Canadian investor in the same position as a Canadian investor with respect to the effects of the Competition Act.
- Avoids the appearance that the administration of the ICA is overly dependent on other departments.

CON

- Conflicting decisions may be rendered under the two Acts.
- Removes time pressure on CCA to render a speedy decision and could lead to further delays for investor.

DISCUSSION

The premise here is that the Canadian government takes the responsibility of making itself open to criticism because of the possibility of rendering conflicting decisions under the two Acts. It would assume this responsibility based on the rationale that the Competition Act would generally be applicable to large investors who have access to competent legal advice. It can be argued that these investors fully understand that the Investment Canada Act and the Competition Act are independent of each other. All businesses after obtaining approval under ICA have to abide by all the prevailing federal, provincial and municipal laws; the competition law would be just another one of these laws. Many transactions which are approved under ICA require licensing or approval under other Acts such as the Canadian Transportation Act.

OPTION 3(a). When necessary (i.e. in cases where CCA expresses serious concern), delay decision under the Investment Canada Act with Investor's agreement (s. 22 (1)), until a decision under the Competition Act is made.

PRO

- Avoids/minimizes conflicting decisions under the two acts.
- Aims to give one complete response to investor's proposal.
- Would influence CCA to proceed expeditiously.

CON

- Makes the administration of Investment Canada Act overly dependent on another department.
- Slows down the review process under the Investment Canada Act, violating the spirit of the Investment Canada Act which contemplates speedy review.
- Delay could continue for an uncertain period of time as there are no statutory time limits for decisions under the Competition Act; Investment Canada/government could be criticized by non-Canadian investors for undue delays.
- ICA (s.34) specifically provides that decision does not affect the administration of any other Act, hence there should be no need for delay.
- Time extension beyond 75 days under ICA is possible only with the agreement of the investor.

DISCUSSION

This option implies that, in order to avoid the possibility of conflicting decisions under the two Acts, Investment Canada would delay its decision until the competition issue is resolved. In order to avoid unlimited delay, Investment Canada could agree with the investor that a decision under ICA would be rendered within, say 135 days of the date of certification. In cases where the decision under ICA is rendered (either at investor's or Investment Canada's insistence) before the competition issue is resolved, the possibility of two conflicting decisions under the two acts will remain.

OPTION 3(b). Develop a Memorandum of Understanding (MOU) with CCA to cover two situations.

(a) When transactions fall under the pre-notification provisions of the Competition Act for which CCA does not have serious concerns, but requires additional information, we ask CCA to issue a s. 74 advance ruling therefore allowing Investment Canada to render its decision without running the risk of future conflicting decisions.

b) When transactions do not fall under the pre-notification provisions of the Competition Act for which CCA has expressed concerns; following agreements on plans/undertakings, CCA will again issue s. 74 advance ruling. The Investment Canada Minister can then render a decision without running the risk of future conflicting decisions. This situation may, however, require extension for decision under the ICA.

PRO

- When advance ruling is obtained, uncertainty for the investor and the possibility of conflicting decisions under the two acts would be eliminated.
- Would convey a helpful attitude and concern (on the part of Investment Canada) to the investor that Investment Canada is trying to remove any future potential difficulties for the investor.
- Leaves Investment Canada the option of delaying the decision with investor's agreement - the purpose of the delay would be to eliminate the uncertainty for the investor.

CON

- When investor asks for a ruling under s.74 of the Competition Act, CCA could ask for detailed information, thus creating additional paperwork burden for the investor.
- Investor may decide not to apply for advance ruling for reasons of its own.

DISCUSSION

For cases which require pre-notification, CCA, after obtaining sufficient information from the investor, may agree to issue an advance ruling under s.74 of the Competition Act. This advance ruling would remove the uncertainty for the investor, as well as for the INV Minister.

If CCA has serious concerns, and the Director has obtained a not-to-proceed order from the Tribunal, the Investment Canada Minister would delay his decision until the competition issue is resolved.

For cases where CCA expresses concerns, Investment Canada, CCA and the investor could work together to develop certain undertakings by the investor (to Investment Canada and/or CCA) to satisfy CCA's concerns.

RECOMMENDATIONS

- Discussion with CCA should be started as early as possible so that we can better understand CCA's philosophy and thinking on the interpretation and implementation of the Competition Act in order to provide our input into the regulations and procedures which are now being developed by CCA. The primary purpose of our input would be related to the procedures and regulations which would impact on the administration of the Investment Canada Act. We need to ensure that Canada's new investment policy is factored into CCA's regulations and procedures; that concerns about competition in the marketplace are balanced against the need for Canada to be perceived as offering a favourable environment for doing business; and that conflicting decisions by the two government organizations will be avoided.

- It appears that the administrative burden on the investor for providing information under the two Acts cannot be reduced significantly because the information requirements under the two Acts are different. However, this matter should be explored further with CCA.

- In case of transactions notifiable under the Competition Act, the Review Officer should facilitate the notification process.

- For the transactions which are not notifiable under the Competition Act, generally speaking, we should be able to resolve any significant competition issues through discussions amongst CCA, Investment Canada and the investor. If necessary, the investor could develop plans or undertakings which would alleviate CCA's concerns.

- For transactions notifiable to the Director, both direct and indirect, investors would have to provide the required information to CCA before a transaction can be completed. Investment Canada has a similar requirement for direct transactions only. Therefore, it would be in the investors' interest to provide the complete information to Investment Canada and CCA as quickly as possible. For any transactions for which a not-to-proceed order has been issued by the Competition Tribunal, it would be wise to delay the decision under the Investment Canada Act for as long as the interim order will be in force. In specific terms:

- Assuming that on a prenotifiable transaction under the Competition Act, the Director will decide within 7/21 days whether to make an application to the Tribunal, it is recommended that the Minister wait for such decision before making a decision under the IC Act.

- If the Director applies for an interim order under section 72 of the Competition Act, resulting in a further delay of up to 21 days, it is recommended that the Minister wait the expiry of the interim order before making a decision.

  It should be noted that the Minister would, in the above cases, be justified in delaying his decision under the IC Act (with the investor's consent) on the basis of s. 20(d) of the IC Act which provides that he takes the competition factor into account in determining net benefit. Where this factor would be crucial to his decision, he could not be criticized for extending the statutory time periods for his decision.

- In cases where the Director has made an application to the Tribunal under s.64 of the Competition Act, it is difficult to determine whether the Minister's decision under the IC Act should be further delayed. At this time, we have no indication of the length of time the Tribunal could take to dispose of a matter referred to it. Once the rules of practice, have been drafted, that would govern the proceedings before the Tribunal are available, we would be in a position to determine how long the process could take.

- The purposes of the Investment Canada and the Competition Acts are quite compatible and INV and CCA should be able to agree on a Memorandum of Understanding (MOU) which would be signed by the two Ministers/Deputy Ministers and published for the guidance of investors and their advisors. Such an MOU could include:

  - purpose of the two acts.

  - Government's stated policy of private sector being the engine of economic growth in Canada.

  - that Government wants to work effectively with the private sector and the Government departments would work together to provide effective service to its clients.

  - procedures, time frames, administrative details, guidelines to investors.

- In order to effectively represent investors' points of view, Investment Canada may want to negotiate a specific interchange of staff agreement with CCA. Such an interchange would contribute to a better understanding of both the processes, ensure effective liaison and interface between Investment Canada and the Competition Bureau regulatory functions and would expand career opportunities for staff.

CONCLUSION

This paper is based on our interpretation of the new Competition legislation and some reasonable assumptions about CCA's regulations and procedures. As discussions with CCA progress, appropriate changes would be necessary. It appears that there will be between 10 to 15 cases annually where competition would be a significant issue. If both Investment Canada and CCA can work together to arrive at a single decision by the Government of Canada, such a situation would be very desirable from the investors' point of view.

While the Investment Canada Act provides for statutory time limits, the Competition Act has a rather open-ended time period of three years within which the Director can refer a transaction to the Competition Tribunal. Even when the parties to a transaction are required to give pre-notification, the Director has up to 3 years to indicate whether or not the case will be referred to the Competition Tribunal. There is a provision under Section 74 whereby the parties to a transaction, whether or not it is subject to pre-notification, can request a ruling from the Director. The Director is required to deal with such a request "expeditiously", however, the Competition Act does not specify actual time frames within which a s.74 Ruling has to be provided.

Under the Investment Canada Act, the basic review period is 45 days and the government has available to it only one unilateral extension period of 30 days. Any further extension of time require the consent of the investor. In the event of a negative decision by the Minister, the investor is accorded a 30-day (or longer by mutual agreement) period to make further representations to the Minister.

Under the Competition Act, legally speaking, the Director has a time period of 3 years within which a transaction can be referred to the Tribunal. However, in practical terms, the applicable time frames would be much shorter; because it is very difficult to undo a merger/acquisition, the Director, when he has serious concerns, would have to take appropriate action before the merger is completed.

With CCA's 28 days plus time frame and INV's statutory time limit of 45 days (extendible to 75 days), it should be possible to work out appropriate procedures such that INV can continue to resolve most cases within 45 days. In cases, when the Director secures an interim order and/or the matter is referred to the Tribunal, the investor could be pursuaded to wait for the decision under the Investment Canada as well.

In case the regulations, CCA's administrative practices or other factors cause delays for decisions under ICA, we would have to choose from the "fallback" options.

APPENDIX I

Task Force on the new Competition Tribunal Act (CTA)

Purpose: To prepare for discussions with CCA on policies and procedures to manage the interface between the Investment Canada Act and the Competition Tribunal Act and the administration of the two Act.

Task:

a) To analyze the new CTA to identify the extent to which transactions subject to the review procedures of ICA may also be subject to the merger or prenotification provisions of the CTA.

b) To identify the procedures and statutory time limits set out in the CTA and to analyze how they fit with and the potential for conflict with the procedures and time limits prescribed in the ICA.

c) To assess the potential for conflict between decisions under the two Act.

d) To prepare recommendations with respect to procedures for the administration of the ICA to minimize potential conflicts with the administration of the CTA and to minimize the administrative burden on investors subject to both Acts.

Time Frame: A paper should be ready for consideration by Executive Committee on August 23.

APPENDIX II

OUTLINE OF COMPETITION TRIBUNAL ACT AND COMPETITION ACT

Competition Tribunal Act

- Establishes Competition Tribunal composed of not more than four judges and not more than eight other members chosen by Cabinet on recommendation of Minister
- Allows for establishment of advisory council of up to ten members to advise Minister with respect to appointments
- Tribunal has jurisdiction to hear applications under Part VII of Competition Act
- Proceedings before the Tribunal shall be dealt with as informally and expeditiously as circumstances and fairness permit
- Appeal from order of Tribunal can be made to Federal Court of Appeal

Competition Act

- Purpose of the Act 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, in order to ensure that small and medium-sized enterprises have equitable opportunity

Part I INVESTIGATION AND RESEARCH

- Cabinet can appoint Director of Investigation and Research
- Provides for inquiries by the Director into contraventions of the Act

Part III ADMINISTRATION

- Provides for the staffing necessary to administer the Competition Act

Part IV SPECIAL REMEDIES

- Orders to remove or reduce customs duties
- Powers of Federal Court where patents used to restrain trade
- Interim injunctions

Part V OFFENCES IN RELATION TO COMPETITION

- Conspiracy
- Foreign directives
- Bidrigging

. Conspiracy relating to professional spirit

. Agreements or arrangements of banks

. Illegal trade practices

. Misleading advertising

. Double ticketing

. Pyramid selling

. Referral selling

. Sale above advertised price

. Price maintenance, refusal to supply

Part VI OTHER OFFENCES

. Obstruction of inquiry under the Act

. Contravention of subsection 13(5) or 14(2)

. Failure to make return or supply information

. Destruction or alteration of records or things

. Procedures for enforcing penalties

. Evidence

. Jurisdiction of Federal Court

Part VII MATTERS REVIEWABLE BY TRIBUNAL

Restrictive Trade Practices

. Refusal to deal

. Consignment selling

. Exclusive Dealing, Tied Selling and Market Restriction

. Abuse of Dominant Position

. Delivered Pricing

. Foreign Judgements and Laws

. Foreign Supplies

. Specialization Agreements

Mergers

- Definition
- Application to Tribunal for order
- Factors to be considered regarding lessening of competition
- Exception for mergers substantially completed before section came into force
- Exception for joint ventures
- Exception where gains in efficiency
- 3 year limitation period
- Conditional orders directing dissolution of merger
- Interim order before s.64 application up to 21 days
- Advance ruling certificate as to whether Director would have grounds to apply to Tribunal
- General interim order

Part VIII NOTIFIABLE TRANSACTIONS

- Definitions
- General limit relating to parties - $400 million assets in Canada or sales in Canada
- Acquisition of assets - $35 million or sales from assets greater than $35 million or sales from assets greater than $35 million
- Acquisition of shares where assets in Canada or sales in Canada are greater than $35 million
- Amalgamation - assets in Canada or sales in Canada of continuing corporation are greater than $70 million
- General exemption - affiliates, advance ruling certificate, transaction entered into before section came into force and completed within one year after it came into force
- Notice and Information
- Notice of Proposed Transaction
- Prior notice of acquisition of voting shares
- Where information cannot be supplied or is not relevant
- Information required - either s. 93 or s. 94
- Time within which transaction cannot proceed - 7 days, 21 days
- Provision for regulations

Part IX REPRESENTATIONS TO BOARDS, COMMISSIONS OR OTHER TRIBUNALS

. Federal boards, definition

. Provincial board, commission or other tribunal

. Annual Report

. Regulations to be made under this Part

APPENDIX III

INFORMATION REQUIREMENTS UNDER THE COMPETITION AND INVESTMENT CANADA ACTS

Information to be provided on Notices under the Competition Act is much more detailed and broader in scope than that required on applications for review under the ICA. However, it should be noted that CTA applies to all persons, Canadian or non-Canadian, while ICA applies only to non-Canaldians.

Information common to the two Acts

- Name
- Address
- Annual Reports/Financial Statements (3 years for applications reviewable under ICA)
  (1 year for Competition Act Notices)

Additional information for Investment Canada Act

- Copy of purchase and sale agareement or outline of principal terms and conditions
- Investor plans

Additional information for Competition Act

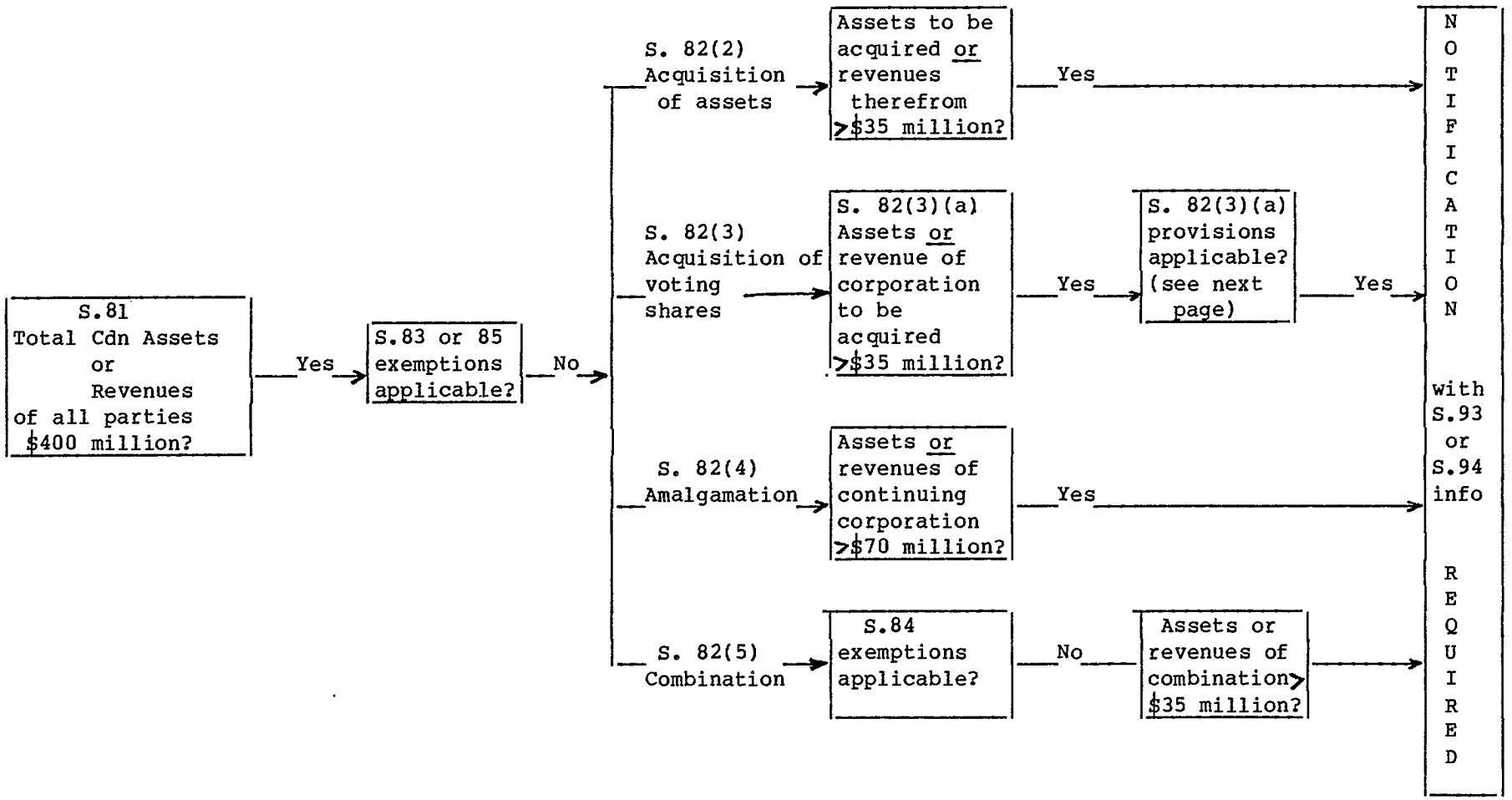
- Description of proposed transaction and business objectives
- Copies of legal documents or drafts
- Information on affiliates with significant assets or sales in Canada
  (Summary information, s.93 and detailed information, s.94)
- Names and business addresses of directors (s.94, also for affiliates)
- Summary descriptions of principal business
  (s.94 also requires financial statements for principal businesses of contracting parties and their affiliates for most recent fiscal year and subsequent interim periods)
- Any filing with stock exchanges, any information to shareholders during the last two years
- Proforma financial statement as if the proposed transaction has already occurred

Under s.94, the following additional information is needed:

- Principal categories of products sold and gross sales of each
- Principal categories of products purchased and expenditures for each
- Analysis prepared for board of directors
- Any filing with stock exchanges, any information to shareholders during the last two years

APPENDIX IV

TRANSACTIONS PRE-NOTIFIABLE UNDER THE COMPETITION ACT

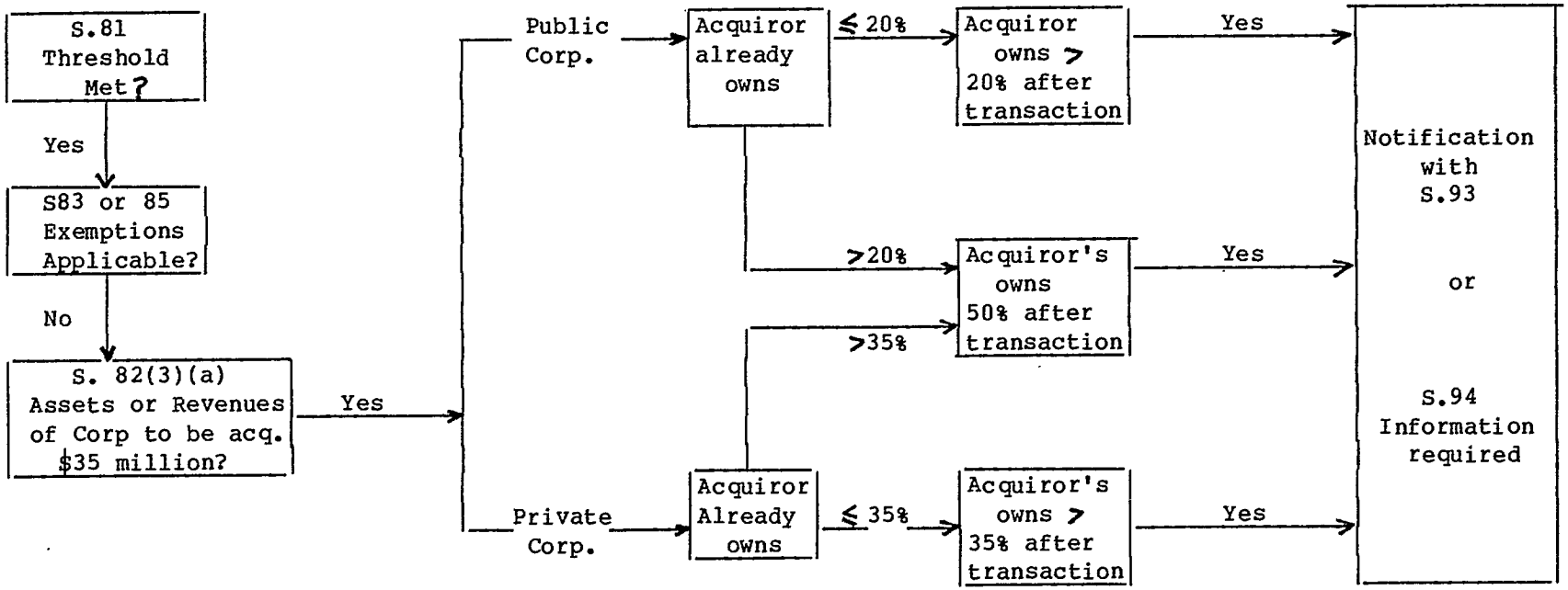


Note: If the indicated thresholds/criteria are not met, the transactions are not notifiable under the Competition Act.

APPENDIX V

ACQUISITION OF VOTING SHARES

TRANSACTIONS PRE-NOTIFIABLE UNDER THE COMPETITION ACT



Note: If the indicated thresholds/criteria are not met, the transactions are not notifiable under the Competition Act.

APPENDIX VI

Purpose Statements of the Competition Act and of Investment Canada Act

COMPETITION ACT

PURPOSE

1.1 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."

INVESTMENT CANADA ACT

PURPOSE

2. Recognizing that increased capital and technology would benefit Canada, the purpose of this Act is to encourage investment in Canada by Canadians and non-Canadians that contributes to economic growth and employment opportunities and to provide for the review of significant investments in Canada by non-Canadians in order to ensure such benefit to Canada.

APPENDIX VII

Factors to be Considered by the Competition Tribunal

Factors to be considered regarding prevention or lessening of competition

65. In determining, for the purpose of section 64, whether or not a merger or proposed merger prevents or lessens, or is likely to prevent or lessen, competition substantially, the Tribunal may have regard to the following factors:

(*a*) the extent to which foreign products or foreign competitors provide or are likely to provide effective competition to the businesses of the parties to the merger or proposed merger;

(*b*) whether the business, or a part of the business, of a party to the merger or proposed merger has failed or is likely to fail;

(*c*) the extent to which acceptable substitutes for products supplied by the parties to the merger or proposed merger are or are likely to be available;

(*d*) any barriers to entry into a market, including

(i) tariff and non-tariff barriers to international trade,

(ii) interprovincial barriers to trade, and

(iii) regulatory control over entry,

and any effect of the merger or proposed merger on such barriers;

(*e*) the extent to which effective competition remains or would remain in a market that is or would be affected by the merger or proposed merger;

(*f*) any likelihood that the merger or proposed merger will or would result in the removal of a vigorous and effective competitor;

(*g*) the nature and extent of change and innovation in a relevant market; and

(*h*) any other factor that is relevant to competition in a market that is or would be affected by the merger or proposed merger.

Exception where gains in efficiency

68. (1) The Tribunal shall not make an order under section 64 if it finds that the merger or proposed merger in respect of which the application is made 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 that will result or is likely to result from the merger or proposed merger and that the gains in efficiency would not likely be attained if the order were made.

Factors to be considered

(2) In considering whether a merger or proposed merger is likely to bring about gains in efficiency described in subsection (1), the Tribunal shall consider whether such gains will result in

(*a*) a significant increase in the real value of exports; or

(*b*) a significant substitution of domestic products for imported products.