

## BILL C-91 - ITS PRINCIPAL PROVISIONS

### ADJUDICATION AND INVESTIGATIVE POWERS

#### ADJUDICATION

The Competition Tribunal Act, Part 1 of Bill C-91 introduced on December 17, 1985 creates what is hoped to be perceived as an independent specialized tribunal with jurisdiction to hear and determine all applications under Part VII of the proposed Competition Act and any matter related thereto.

The Tribunal has jurisdiction to hear all civil matters contained in the present Combines Investigation Act (with the exception of s 29 relating to patents and the civil damage action pursuant to s. 31.1), including those in Part IV. I of the Act such as exclusive dealing and consignment selling. In addition, the new civil matters created in Bill C-91, including mergers, abuse of dominant position, specialized agreements and systematic delivered pricing, are to be adjudicated by the Tribunal. The Tribunal is to replace the existing Restrictive Trade Practices Commission.

The Competition Tribunal will be composed of a combination of judges from the Federal Court Trial Division and lay persons. The Tribunal is not to consist of more than 4 judicial members nor more than 8 lay persons. Provision is made for the establishment of an Advisory Council to assist the Minister in the appointment of lay persons. The Advisory Council is to be composed of not more than 10 members who are knowledgeable in industry, commerce or public affairs.

The role of the Competition Tribunal is strictly adjudicative. It does not have power to supervise the Director's investigative powers, nor can it initiate investigation or provide research or policy advice to the Government. No panel shall be less than 3 members (containing both one judge and 1 lay person) nor greater than five. A judge must preside on each panel and the judicial members are solely responsible for determining questions of law. Questions of fact and mixed law and fact are to be determined by all members of the panel. An appeal from a decision of the Tribunal is to the Federal Court of Appeal.

All of the powers of a Superior Court of record are vested in the Tribunal, including those relating to the attendance of witnesses, oath giving, examination of witnesses, production and inspection of documents and the enforcement of its orders. Proceedings before the Tribunal are to be dealt with as informally and expeditiously as the circumstances and considerations of fairness permit. With the approval of the Governor in Council, the Tribunal may make general rules for regulating its practice, procedure and for carrying out its work and internal affairs.

Although the central registry of the Tribunal is located in the National Capital Region, the Tribunal is empowered to sit at such times and at such places throughout Canada as it considers necessary or desirable.

## INVESTIGATIVE POWERS

Bill C-91 creates a new code of investigative powers and reflects a legislative attempt to enable effective enforcement of competition laws while at the same time preserving the public's right to freedom from unreasonable search and seizure as enshrined in the Charter.

Only judges of the Superior, County or District Courts are authorized to supervise the exercise of investigative powers.

An order for oral examination, production or written return can only be made where the Court is satisfied by information on oath or affirmation that an inquiry is being made under s. 8 and that any person has or is likely to have information that is relevant to the inquiry. If so satisfied, the Court may order, inter alia, the production of any record. Apart from documentation generally associated with a "record", the definition includes photographs, film, microfilm, sound recording, videotape and machine readable records.

Where the order for production is made against a corporation, the Court can order production from its affiliates whether or not located in Canada, if it is satisfied on oath or affirmation that the affiliate has records relevant to the inquiry. Production will not be excused on the ground that the evidence may tend to incriminate the party producing but the evidence shall not be used or received against that party in any subsequent criminal proceedings other than for perjury.

Any person summoned to give evidence at an inquiry is permitted to be represented by counsel. The evidence is given before a "presiding officer" who must be a person who has been a barrister or advocate at the bar of a province for at least ten years.

The proposed amendments to the search and seizure powers incorporate the procedural safeguards set out in the Southam decision. The Director may apply before a judge ex parte for a warrant and such an order will be granted, only where the Court is satisfied by information on oath or affirmation that there are reasonable grounds to believe:

- a) that a person has contravened or failed to comply with an order made pursuant to sections 29, 29.1, 30 or Part VII;
- b) grounds exist for the making of an order under Part VII; or
- c) an offence under Part V or Part VI has been or is about to be committed;

**AND**

- d) there are reasonable grounds to believe that there is on any premises any record or thing that will afford evidence with respect to any of the circumstances outlined in sub-paragraphs a), b) or c) above.

If so satisfied, the Court may issue a warrant authorizing the Director to enter the premises and search for the record and copy or seize the record or thing for examination.

The warrant must identify the matter in respect of which it is issued, the premises to be searched and the record or other thing to be searched for. The warrant can be executed anywhere in Canada.

The Director is empowered to enter premises, search and seize without a warrant if the conditions in sub-paragraphs a), b), c) or d) above exist but by reason of exigent circumstances it would not be practical to obtain the warrant. One of those circumstances would be where delay in obtaining the warrant would result in the loss or destruction of evidence.

A person authorized to search premises for a record may use or cause to be used any computer system on the premises to search any data contained in or available to the computer system and may reproduce the record in the form of a print out or other intelligible output. The order may specify the individuals who are to operate the computer system and the Court can fix the times during which the seizure is to be conducted.

Any record or other thing that is seized is to be brought before the judge who issued the warrant, or a judge of the same Court, or, if no warrant was issued, before a judge of a Superior or County Court or of the Federal Court as soon as practicable. If the Court is satisfied that the record or other thing is required for an inquiry, the Court may authorize the Director to retain it.

Any record produced or seized and authorized for retention is to be returned to the party from whom it was produced or taken no later than 60 days after the taking unless there is consent to hold it beyond that time, a Court order is granted or proceedings are instituted in which the record is required.

A person ordered to produce a record may claim that a solicitor-client privilege exists in respect thereof. If such a claim is made, the person shall place the record in a package sealed and identified and place it in possession of the registrar or officer of the Superior or County Court in the province in which the document was found, or of the Federal Court.

Where a person is about to examine, copy or seize any record pursuant to the Act, or is in the course of so doing, and a person appearing to be in authority claims a solicitor-client privilege in respect thereof, the first mentioned person shall cease the examination or seizure and place the record, copies and any notes taken in respect thereof in a package, sealed and identified and thereafter deposit the package with the registrar or officer described above. A judge of a Superior or County Court or Federal Court sitting in camera may decide the question of solicitor-client privilege on application by the Director or the owner of the record.

No person who is about to examine, copy or seize a record shall do so without affording a reasonable opportunity for a claim of solicitor-client privilege to be made.

All information and evidence obtained pursuant to the administration or enforcement of the Act is to remain confidential unless it has already been made public.

## MERGERS AND PRE-NOTIFICATION

### MERGERS

Under the present Combines Investigation Act (the "CIA") parties who participate in the formation of a merger could be guilty of a criminal offence and subject to fines and imprisonment. A "merger" is defined in the CIA as the acquisition of control over the business of any person whereby competition is likely to be lessened to the detriment or against the interest of the public, whether consumers, producers or others. Because the CIA provides that formation of a merger is a criminal offence, the offence must be proved "beyond a reasonable doubt". This standard of proof has been too high for merger prosecutions to be successful and has deterred the Crown from prosecuting other mergers. There is also no formal mechanism in the CIA for pre-clearance of mergers.

The proposed Competition Act (the "Act") proposes to make all mergers subject to possible review by the Competition Tribunal (the "Tribunal"). Participation in the formation of a merger will no longer be a criminal act. Only mergers of a certain size (see below) must be specifically pre-notified to the Director appointed under the Act. Merger is defined in the Act as the acquisition of control over a significant interest in the whole or any part of a business of a competitor, supplier, customer or any other person. The director, and only he, can apply to the Tribunal for a hearing to determine whether the merger or proposed merger prevents or lessens or is likely to prevent or lessen competition substantially. The test appears to be whether existing (and not future) competition will be lessened substantially. In making such determination, the Tribunal has a wide discretion to consider the factors it considers appropriate. Some factors which are specifically set out in the Act are:

- (a) the extent to which there is effective foreign competition;
- (b) whether one of the businesses to form part of the merger has failed or is likely to fail;
- (c) the extent to which there are acceptable substitutes for the products of the merged businesses;
- (d) governmental barriers to entry into a market, including tariffs and regulating controls; and
- (e) the extent to which effective competition remains in the market affected by the merger.

The Tribunal must not come to the conclusion that competition is substantially lessened solely on the basis of evidence of concentration or market share.

If the Tribunal determines that the merger has lessened competition substantially, it may order the parties in the case of a completed merger, to

- (a) dissolve the merger;
- (b) dispose of such parts of the merged business as the Tribunal directs;

and in the case of a proposed merger

- (c) not to proceed with the whole or any part of the merger; and
- (d) prohibiting actions of the parties after the merger, to ensure that the merger does not lessen competition substantially.

The Tribunal shall not make an order if it finds that the efficiencies created by the merger more than offset the effects of the lessening of competition. In addition, there is a specific exemption in the Act for unincorporated joint ventures formed for a specific project which ends when the project is completed, provided certain other tests are met. No application can be made to the Tribunal more than 3 years after a merger has been completed. The Tribunal may make interim orders to halt mergers upon the application of the Director, even if the Director has not made a formal application to have the merger reviewed. The Act also provides that the Director may issue binding advance rulings with respect to proposed mergers but does not specify any time limits in which such rulings must be given.

#### PRE-NOTIFICATION

Although all mergers are potentially subject to review by the Tribunal, only certain acquisitions, amalgamations or combinations are subject to pre-notification to the Director under the Act. There are two tests which must be met before the pre-notification provisions of the Act apply.

##### (a) Size Test

There is no requirement to pre-notify in respect of a proposed transaction unless the parties to the transaction, including their affiliates

- (i) have assets in Canada that exceed \$500 million in aggregate value; or
- (ii) had gross revenues from sales in, from or into Canada that exceed \$500 million in aggregate value.

The particulars of how to calculate such values will be prescribed by regulations to the Act. It should be noted that the test is tied into assets and sales in Canada. If the size test is not met, the parties will be completely outside the pre-notification provisions.

(b) Transaction Test

Even if the size test is met, the pre-notification provisions do not apply unless the assets to be acquired or the gross revenues generated from such assets exceed \$35 million. The calculation of this value is also to be prescribed by regulation.

This transaction test is further qualified in the case of share purchases. Pre-notification will only be required for share purchase transactions which exceed the \$35 million test if

- (i) in the case of a public company the acquiror, including its affiliates would acquire more than 20% of the voting shares, or if the acquiror already owned 20% or more of the voting shares prior to the acquisition if the acquiror would acquire more than 50% of the voting shares; and
- (ii) in the case of a private company, if the acquiror, including its affiliates, would acquire more than 35%, or if the acquiror already owned 35% or more of the voting shares prior to the acquisition, if the acquiror would acquire more than 50% of the voting shares.

If the size test is met, pre-notification will also be required in the case of amalgamations where the assets of the amalgamating parties in Canada or their sales in or from Canada are in excess of \$70 million. In the case of combinations, the \$35 million test applied.

There are a number of exemptions to the pre-notification requirements including transactions involving affiliates only, the acquisition of shares by underwriters in an underwriting and acquisitions resulting from foreclosures. Joint Ventures as described above are also exempt from the pre-notification provisions.

The parties to a transaction which is subject to the pre-notification provisions of the Act must supply the Director with certain information. The parties can elect to supply information on a short form basis, in which case the transaction cannot be completed for a minimum period of 7 days after the Director receives such information. The Director may, within such 7 day period require that information on a long form basis be supplied, in which event the transaction cannot be completed until 21 days after the Director receives such information. In either case, before the transaction is completed, the Director

must; within the 7 day or 21 day period, advise the parties that he does not intend to apply to the Tribunal for an order relating to the transaction. In the event of a stock exchange bid where information has been supplied on the long form basis, the Director must respond within 10 trading days or such longer period not exceeding 21 days as may be allowed by the rules of the stock exchange before the shares must be taken up, after he receives the information.

The merger and pre-notification provisions of the Act are in addition to any provisions of the Investment Canada Act or other regulatory statutes that may apply to the transaction.

## RESTRICTIVE TRADE PRACTICES

### ABUSE OF DOMINANT POSITION

It is proposed to replace the present criminal offence of monopoly with a civil "abuse of dominant position" provision. The government's rationale for this decriminalization includes the perceived lack of criminality in monopolistic conduct, the vagueness of the existing provision, the inappropriateness of normal criminal sanctions in monopoly situations and the ineffectiveness of the present monopoly section.

The elements necessary to constitute "an abuse of dominant position" are: (1) that one or more persons substantially or completely control, either in Canada as a whole or in any part thereof, a certain class of business, (2) that such person or persons engage in a practice of anti-competitive acts with the object of lessening competition and (3) that such practice actually prevents or lessens or is likely to prevent or lessen competition substantially in a market. The currently required element of "public detriment" will be dropped.

A relatively high degree of market share will likely be required to constitute control. The section could, however, apply to "shared monopoly" or "joint dominance" situations.

"Anti-competitive acts" are broadly defined to include a number of acts such as using fighting brands, pre-empting scarce resources or facilities, buying up products to prevent the erosion of price levels and adopting product specifications incompatible with products produced by any other person. These practices will have to have the object of eliminating competition or preventing entry into a market. The definition of such acts is non-exclusive and it will be open for the Tribunal to expand the instances of prohibited conduct.

To be prohibited, the practice of anti-competitive acts must have or be likely to have the effect of preventing or lessening competition substantially in a market. The adverb "substantially" is used elsewhere, both in the present Act and in the proposed section on mergers, but there is no clear precedent to assist in the determination of its meaning. While the use of "substantially" would seem to require a relatively high level of impairment of competition, the use of the adverb "sensiblement" in the French version might invite the Tribunal to apply a relatively lower threshold test.

The Tribunal may either make an order prohibiting the impugned conduct or, where such order is unlikely to restore competition, make an order directing the taking of certain action, including the divestiture of assets or shares. A defence is available where the prevention or lessening of competition is the result of superior competitive performance.

## OTHER CHANGES

### CONSPIRACY

Two subsections would be added to the conspiracy provision in order to remedy the enforcement difficulties following the Supreme Court of Canada decisions in Aetna Insurance and Atlantic Sugar. One will make it clear that the existence of an agreement may be proven from circumstantial evidence with or without direct evidence of communication among or between the parties. The other clarifies the issue of intent. It provides that it is necessary to prove that the parties intended to and did enter into a conspiracy. It would not, however, be necessary to prove that the parties intended the conspiracy to lessen competition unduly. The Crown would still be required to prove that the agreement, if carried into effect, would unduly lessen competition.

Fines would be increased from a maximum of \$1 million to \$5 millions.

### EXPORT AGREEMENTS

The exemption of export agreements from the conspiracy provision would be broadened. Subsection 32(5)(d), which disallows the export exemption if an agreement lessens competition unduly in relation to a product in the domestic market, would be repealed. There would also be a change in Subsection 32(5)(a), which now disallows an export exemption if it results in a reduction in the volume of exports from Canada. The word volume would be replaced by value.

### AGREEMENTS OR ARRANGEMENTS OF BANKS

The new provisions make agreements or arrangements among banks, including rates of interest on deposit and loans and service charges illegal per se. The provisions will make every director, officer or employee who knowingly makes such an agreement or arrangement guilty of an indictable offence and liable to a fine not exceeding \$5,000,000 or to imprisonment for a term not exceeding 5 years or both.

### DELIVERED PRICING

The provisions of the Bill create a new restrictive trade practice. Delivered Pricing is defined as a practice of refusing a customer or person seeking to become a customer delivery of an article at any location where the

supplier makes delivery of the same article to other customers on the same trade terms if his business were in the same locality. Such a practice is reviewable by the Tribunal who has the power to make an order prohibiting such practice. There are exceptions, including where the practice is carried out in association with a trade mark and is necessary to maintain a standard of quality in respect of the article or where the supplier could not accommodate more customers without significant capital investment.

#### SPECIALIZATION AGREEMENTS

This new provision is incorporated with the goal of enhancing economic efficiency and international competitiveness. The new provision will, to the extent such agreements are approved by and registered with the Tribunal, exempt them from the conspiracy and exclusive dealing provision of the Act. The Tribunal will have considerable discretion not only subjectively in determining economic benefit as against lessened competition but objectively in imposing conditions precedent and subsequent in conjunction with any approval.

#### CROWN CORPORATIONS

A section would be added to make the proposed Competition Act binding on federal and provincial Crown corporations, agents of Her Majesty, in respect of their commercial activities that are in competition with other firms.