THE BCNI STUDY ON COMPETITION POLICY: A REVIEW

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Reforming Canadian competition policy has taken on a number of the characteristics of a Scandinavian saga. It has a long history; the process has now taken over 15 years - see Stanbury (1981a). It is studded with furious battles and loud cries of anguish followed by abrupt changes of direction. There has even been a minor victory for the advocates of reform in the form of the Stage I amendments (see Kaiser, 1979). The latest contribution to the saga is a report of the Task Force on Competition Policy of the Business Council on National Issues entitled A Consideration of Possible Amendments to the Combines Investigation Act published on August 10, 1981.[1] It is the product of almost 18 months work by the lobby group consisting of about 150 chief executives of Canadian businesses.[2]

The BCNI study consists of a 37 page essay (Sections 1 and 2) outlining the changes they propose together with the supporting arguments, to the extent any are made. Section 3, summarizes the suggested amendments in 9 pages while Section 4 offers an analysis of the effects of adopting them in 5 pages. The heart of the study, however, is the Appendix which is 177 pages long. It consists of a complete new Competition Act incorporating all of the new sections proposed by BCNI and what would remain of the existing Combines Investigation Act, together with a set of brief "explanatory notes".

The avowed purpose of the study is to "reduce the mistrust and cross-purposes between the federal government and the business community in a decade in which adequate economic performance will likely prove more difficult than at any time in the past forty years" (BCNI, 1981, p. 49). If the study's recommendations were fully implemented, BCNI's objective would be met because Canadian competition policy would be severely weakened. There would, however, be an amended statute of venerable age to which politicians could point in conducting their acts of symbolic reassurance when the public suffers bouts of anxiety or disquiet about the less attractive activities of business.

At a time when the only effective sections in the present Combines Investigation Act are those dealing with misleading advertising and deceptive practices, price maintenance/refusal to deal, and, perhaps, predatory pricing,[3] BCNI proposes to take a large step backward. (The conspiracy provisions, in spite of recent Supreme Court of Canada decisions retain somewhat more force than those concerning mergers, but that is not saying much.[4])

The study's recommendations can be grouped into three categories: those dealing with the powers of the Director and other procedural matters; the provisions of the substantive sections of the Act; and those concerning penalties and remedies.

Powers and Procedures

The bee in BCNI's bonnet is obviously the investigative powers of the Director: "The issue of the powers in the hands of the Director was, in many ways, considered to be at the heart of the acceptability of both the present law and of any proposed changes". The BCNI task force felt that "major emphasis" should be placed "on the Director's powers in arriving at recommendations" (BCNI, 1981, p.10).

BCNI's recommendations in respect of the powers of the Director and other procedural matters would:

- severely impair the formal investigatory powers of the Director[5] and also subject him to the political control of the Minister of Consumer and Corporate Affairs thereby destroying the independence obviously necessary to perform the tasks assigned to him;

- limit the role of the RTPC[6] to practices and transactions in interprovincial and international trade for "constitutional and practical considerations";

- abolish S.47, the provision for general inquiries by the Director, on the grounds that Parliament can establish such inquiries from time to time;

- provide for a full right of appeal on both facts and law to the Federal Court from decisions of the RTPC[7];

- provide for appeal to the Cabinet in addition to or as an alternative to appeal to the courts regarding orders of the RTPC in cases involving mergers, monopolization, and the enforcement of foreign laws or directives;

- remove the reverse onus in S.36(1)(b) regarding an adequate and proper test of the performance of a product and in S.36.1(1) concerning testimonials;

- broaden the due diligence defence in S.36 and S.36.1 regarding publication of a misleading advertisement

- require mens rea (wilfully) in a number of procedural offences;

- establish a six year "statute of limitations" on criminal offences.

- not require any advance notification procedure for mergers - except where the parties wished to avail themselves of the proposed binding preclearance procedures which may be overcome only if the parties have "wilfully failed to disclose to the Director material facts..." and unless a member of the RTPC so finds (BCNI, 1981, p.158);

These are just the procedural "reforms". What about the substantive ones?

Substantive Provisions

The BCNI study recommends that:

- S.38(1)(b) and S.38(6), refusal to deal, be repealed as they are included in the present civil provision S.31.2;[8]

- provision be made for specialization agreements;

- mergers subject to the Foreign Investment Review Act be exempted from review before the RTPC - they would be reviewed by the Cabinet in the context of the FIRA process;

- horizontal and vertical mergers involving Canadian-owned firms be subject to an order by the RTPC where "there is not or is not likely to be substantial competition remaining in the market or markets in which the parties to the merger were engaged or were likely to engage in business and as a consequence of which competition has been lessened or is likely to be lessened substantially". Such mergers shall not be prohibited, however, if "there is a reasonable probability that the merger will bring about substantial gains in efficiency", or there is a "reasonable probability that the merger will be, of significant benefit to Canada". (BCNI, 1981, pp. 152,154)

- the present criminal prohibition of monopoly be replaced by a civil law provision in which a monopoly is defined as a firm (or a firm and its affiliates) that "completely or substantially controls a class of business in a market ... and has or have the power to choose the rate of profits or share of the market to be enjoyed by the person or persons possessing the power, largely undeterred by any existing ability of rivals to compete away those profits or share of market by offering more favourable terms to

customers".[9] Before the RTPC can make an order, however, the monopolist must have "wilfully engaged in anticompetitive behaviour that is intended to operate and operates, in a substantial manner, to the detriment or against the Canadian public interest" (BCNI, 1981, p.160).

The merger, monopoly and specialization agreement provisions will be discussed below.

Penalties and Remedies

BCNI has addressed Canada's competition policy on all fronts. Consider the following recommendations concerning penalties and remedies:

- the term of the Prohibition Orders is to be limited to five years;
- the provision for remedial orders (i.e., other than simple injunctive relief) is to be eliminated and the RTPC is not to be given the power to dissolve a merger or monopoly;[10]
- the present section (S.31.1) providing for a civil cause of action is to be repealed "for constitutional considerations";[11]
- affiliated enterprises are to be considered as one with respect to fines under S.32.[12]

Conspicuous Omissions

BCNI has contributed to the continued inadequacy of Canadian competition policy by "letting sleeping dogs lie", i.e., by failing to recommend changes in the legislation that are badly needed in light of recent judicial interpretations. The most obvious example is the conspiracy section, S.32. The big business lobby proposes no change in this section presumably content with the new, adverse interpretations of the Supreme Court of Canada in Aetna Insurance and Atlantic Sugar.[13] Furthermore, BCNI specifically refrains from recommending:

- new provisions to deal with conglomerate mergers[14]which are to be left up to Parliament to be dealt with on a case-by-case basis, in line with the recommendations of the Royal Commission on Corporate Concentration (1978, p.133);
- any change in the Act concerning regulated industries;[15]
- any change in the Act concerning restraints of trade associated with intellectual or industrial property rights;[16]
- any change in S.34 relating to price discrimination (or predatory pricing);
- any civil provision to deal with "conscious parallelism plus" as was proposed, for example, by the Royal Commission on Corporate Concentration (1978 pp. 96-97);
- any provision for class or substitute actions;[17]
- any provision to deal with joint monopolization as proposed in Bills C-42 and C-13 and, included in the Minister's latest "Proposals...".[18]

Overall Approach

BCNI's study of competition policy is proudly atheoretical.[19] It also offers no recognizable empirical evidence in support of its conclusions. For example, we are told that "positions of economic power have been relentlessly eroded" by market forces (p. 49) and that "Canadian corporations do not loom as large as effective economic powers within Canada ... as they once did" (p.50). (see Table 1 below) We are told also, after less than two pages of analysis devoid of reference to any specific merger, that "competition factors have, on the whole, been a minor element in the present wave of mergers and

takeovers. The factors at work are overwhelmingly investment and business considerations". (p.29). Furthermore, if mistakes are being made and competition is reduced "the market will correct the situation faster and more effectively than bureaucratic intervention" (p.30). These statements may or may not be true, but the normal conventions of serious public discourse usually require that some attempt be made at substantiation.

In addition to being pontifical and replete with unsubstantiated statements, the BCNI study reminds readers that BCNI, instead of being the voice of reason and light, might have chosen another alternative and one "which may yet be thrust upon the business community". This would be to "take a more assertive position based on seeking to educate the public[20] well beyond their present state of understanding as to how competitive forces work in today's world economy and impact on their well being" (BCNI, 1981, p.49).

It is probably not too much to decode this euphemism as "we will scare the public by yelling loudly that unless our position on competition policy is adopted, tens or even hundreds of thousands will be unemployed". Given the difficulty the federal government has had in generating public support for its competition policy reforms, this threat will have its greatest effect on politicians. In the past, both government and opposition members have been acutely sensitive to the threat of the loss of even a small number of jobs.

BCNI continues and explains how it will apply its "more assertive" stance:

> This approach would require two things: a major effort to duplicate in Canada the research and communication efforts which have already had a significant impact in the United States; and a very principled, tough position on any proposal whenever and wherever made which breaches the principles of the new anti-trust thinking in the United States.[21] (BCNI, 1981, p.49)

The idea that BCNI might sponsor some serious research is to be welcomed. As for U.S. antitrust thinking one could only wish BCNI might be persuaded to adopt some of the old, and still current, U.S. ideas such as making price-fixing and market sharing agreements (cartel agreements in general) illegal per se.[22]

The BCNI study contains a number of misleading or inaccurate statements of some significance. Consider the following examples:

(i) In the context of their proposals to strip the Director of his independance and curtail his investigatory powers,BCNI states, "... the Antitrust Division of the [U.S.] Department of Justice has always proceeded with a much more sensitive view of the basic rights than has been customary in the case of the Director in Canada". (BCNI, 1981, p.10) The fact is that both the Director and the Antitrust Division exercise considerable discretion in the investigation of restraints of trade. Each operates within its own distinctive legal and institutional framework.[23] Each framework reflects philosophical differences concerning individual rights. The procedures and powers of the U.S. Antitrust Division, while different from those applied in Canada, are highly effective. BCNI has not proposed that they be transplanted here. For example, no reference is made to the strengthening of the Antitrust Division's investigatory powers in the Hart-Scott-Rodino Antitrust Improvements Act of 1976. Possible antitrust violations can now be investigated through the use of civil investigative demands without convening a grand jury or filing a court complaint. These provisions give the Antitrust Division a rough parity with the powers already possessed by the Federal Trade Commission (see CCH, 1976, pp. 7-22 and Marcus, 1980). The BCNI study also fails to point out that the Antitrust Division has complete discretion to enforce Sections 1 and 2 of the Sherman Act of 1890 on either a civil or a criminal law basis. The choice need not be made until after the investigation has been completed. There is no clear separation of the two as BCNI (1981, pp.11-12) proposes. It is also noteworthy that the European Economic Community's competition authorities, whose procedures are largely civil, conduct searches of premises in a manner quite similar to that of the Director in Canada.

Furthermore, while BCNI proposes to delete private single damage actions under S.31.1 (pp.21-22), the Antitrust Improvements Act introduced a parens patriae treble damage action provision for state attorneys-general to enforce the antitrust laws (see CCH, 1976, pp. 37-49). Finally, while arguing that there should be no pre-notification requirement for even the largest mergers BCNI ignores the U.S. requirements also amended by the Antitrust Improvement Act of 1976 (see CCH, 1976, pp. 23-36).[24]

(ii) "... in the United States, there is no legislation which now prohibits conglomerate-type mergers or subjects them to review..." (BCNI, 1981, p.27). True, conglomerate mergers are not prohibited per se. They have been, however, subject to successful attack under S.7 of the Clayton Act as ample, F.T.C. v. Consolidated Foods (1965) 380 U.S. 592; Allis-Chalmers v. White Consolidated (1969) 414 F. 2d 506 (cert. denied); U.S. v. Ingersoll Rand (1963) 320 F. 2d 509; U.S. v. General Dynamics (1966) 258 F. Supp. 36, to name a few such cases. See also the discussions in Blake (1973), Marcus (1980, pp. 363-378), Shenefield (1978b), and Stanbury (1978).

(iii) "It is inconceivable that a judicial body have independent investigation powers in any area, let alone in an area which may overlap its judicial function" (BCNI, 1981, p.20). Presumably the members of the BCNI task force have never heard of the U.S. Federal Trade Commission established in 1914 which combines investigation, prosecution, adjudication and research all in one administrative agency.[25] The fact that they disapprove of combining such functions is another matter and their position on this is worthy of support.

(iv) "The Courts [in the Canadian Breweries case] in effect held that enough competition remained to keep the beer market competitive" (BCNI, 1981, p. 24). This is an incomplete and self-serving reading of the ratio of the judgement as the following passage at the end of Mr. Justice McRuer's judgment demonstrates:

> I now come back to apply the language of Mr. Justice Cartwright in the Howard Smith case to the facts of this case, and ask myself the question: Has it been proved beyond a reasonable doubt that the merger has conferred on the accused the power to carry on its activities without competition, or substantially without competition? I think the irresistible answer is "No".
>
> I ask myself this further question: Has it been proved beyond a reasonable doubt that the merger has conferred on the accused the power to control the market so that the Provincial authority in the exercise of its duty in fixing prices cannot protect the public interest?[26] To this question I think the irresistible answer is "No.". (1960) 126 C.C.C. 133 at p.168)

In other words the accused had not obtained the power to carry on their business virtually without competition and they were not in a position to subvert the provincial regulatory authorities, who it was said, set the price of beer.[27]

(v) "The facts are that enough competition remained to strip away from Canadian Breweries during the years following the merger some two-thirds of its merger-achieved market share." (BCNI, 1981, p.24) The statement is misleading for what it omits. First, it has taken well over twenty years for the "inexorable forces of the market" to work their will. the present value of a benefit of $1 delayed two decades, discounted at even 10%, is only a few cents. Second, while Canadian Breweries was acquitted, the fact of prosecution put the company on notice that further acquisitions would almost certainly push the firm over the line of legality. We should remember that E.P. Taylor created Canadian Breweries as a vehicle to obtain control of major brewing markets by means of acquisition and merger. Between 1930 and 1953, in Ontario alone, Canadian Breweries acquired 22 breweries and its market share increased from 11.2% in 1931 to 60.9% in 1958. When Canadian Breweries could not buy market share, its true competitive strength was revealed. Its market share eroded --but it took a long time for this to occur.

(vi) "... at the end of a full economic cycle, it is also doubtful if the total concentration of corporate wealth in the Canadian economy will have materially increased" (BCNI, 1981, p.30). We are given no idea of what BCNI believe constitutes "a full economic cycle" (e.g., do they think in terms of 50 to 70 year Kondratieff cycles?) or what is meant by "materially increased". But it would have been useful for them to point out the increase in aggregate concentration since the mid-1960s. See Table 1. And these figures do not include the results of the large number of large mergers in 1979-81. Even so, Khemani (1981, p.8) reports that between 1975 and 1978 when merger activity was lower than between 1979 and mid-1981, the 25 largest non-financial enterprises increased their assets by 26 per cent per year by acquisitions.

Furthermore, the aggregate level of concentration in Canada is substantially higher than in the U.S., i.e., Canada's top 100 non-financial enterprises had 48.6% of all corporate assets while the top 100 in the U.S. had 30.6% in 1975 (Francis, 1981, p. 56).

Mergers, Monopoly and Specialization Agreements

It should be apparent, except to the most naive, that the proposed monopoly provision is weaker than the present S.33 and S.2 (definition). It would appear that even Eddy Match could not be caught although a civil standard of proof would apply. Part of the Skeoch-McDonald approach has been grafted on to the existing provision. Not only must a firm completely or substantially control its market (which might be met by showing a high market share), but also the Crown must meet Skeoch's functional test of "dominant position". The benefit of the civil law standard of proof was negated by the insertion of the words "wilfully", "intended" and "in a substantial manner". Futhermore, the definition of a monopoly was changed from the present S.2 to exclude the case of a shared monopoly among unaffiliated firms. See, for example, the Large Lamps judgment in 1976.[28]

TABLE 1

Percentage of Assets and of Manufacturing Shipments Accounted for by the Largest 25, 50 and 100 Non-Financial Enterprises in Canada, 1965, 1973, 1978

	1965*	1973**	1978
largest			
25 assets	23.8%	25.2%	31.1%
mfg. shipments	24.5%	27.1%	29.2%
50 assets	30.6%	32.4%	38.0%
mfg. shipments	33.3%	37.0%	38.7%
100 assets	38.6%	40.1%	48.6%
mfg. shipments	43.9%	48.2%	50.4%

* 1968 for mfg. shipments
** 1974 for mfg. shipments

Source: Khemani (1981, p.3)

The merger provisions proposed for domestically-owned firms involve a two-part test

(i) there is not likely to be "substantial competition remaining" in the market and as a consequence,

(ii) competition has been "lessened substantially".

What is to be done if the RTPC finds that competition has been lessened substantially, but that there is substantial competition remaining in the market?

These requirements, however, may not be the operative ones in that if there is a reasonable probability that the merger will bring about "substantial gains in efficiency" or the merger will be of "significant benefit to Canada" it shall not be prohibited. The crucial words are "significant benefit to Canada". This is the test provided in the Foreign Investment Review Act. While that Act provides a list of factors to be taken into account by the Cabinet in arriving at its decision, the RTPC is not given any such guidance in the BCNI proposal. Therefore, it appears that mergers involving foreign-owned companies may well be treated differently than those involving Canadian-owned firms. In procedural terms, the FIRA process has been criticized by Schultz et al. (1980) as "the worst of all possible systems: political control without meaningful effect and decision- making without answerability".

Provision for specialization agreements has been made somewhat along the lines proposed in Bill C-13. There are, however, several crucial differences: (a) there is no time limit whereas Bill C-13 proposed it be five years; (b) articles not currently in production may be included whereas in Bill C-13 only articles currently in production were included; (c) a specialization agreement can include distribution and R & D whereas these were not included in Bill C-13; and (d) where, as a result of a specialization agreement, "there is not likely to be substantial competition remaining in the market or markets..." the RTPC may either reject the agreement or allow it subject to certain changes in tariffs or trade barriers. Under Bill C-13 the test was eliminating or virtually eliminating competition. Adoption of what BCNI proposes will provide for long term, protected cartel agreements.[29]

Good News?

So far, I have been somewhat critical of the BCNI study. Does it contain any "good news"? Very little I am afraid, but several points should be noted:

(i) BCNI plumps for the use of an expert, administrative tribunal, rather than the courts, to adjudicate the civil law provisions. They do so entirely without discussion of the issue. The truth is apparently self-evident! This is surprising in light of briefs submitted by large firms and trade associations in respect to Bills C-42 and C-13 in 1977.[30] The tribunal approach was, however, strongly endorsed in the Skeoch-McDonald report in 1976. The tribunal is acceptable now probably because BCNI has surrounded it with other provisions which will ensure that its effects can be carefully limited by (i) the full right of appeal to the courts; (ii) appeal to the Cabinet as an alternative or in addition to the courts; (iii) limiting the RTPC's power to issuing simple cease and desist orders to be in effect not more than five years (positive remedial orders including dissolution or divestiture in merger or monopoly cases will not be available to the RTPC).

(ii) There are a number of minor, but useful, blessings proposed:

- provisions is to be made for consent orders, however, these are not to be admissable in any subsequent proceedings as evidence of any conduct or activity of, or the contravention of the Act by anyone subject to the order (p.130);

- the RTPC is required to give written reasons for its decisions as was proposed in Bill C-13.

"Fear and Loathing"

The BCNI study has about it more than a whiff of "fear and loathing" (to use Hunter Thompson's apt phrase) for the actions of the previous activist Director of Investigation and Research, Robert Bertrand. In the name of protecting civil liberties, constitutionality and the "avoidance of mischief" (a term never defined), the BCNI study proposed not merely to "clip the wings" of the Director, it proposes to remove them.

If he (or she?) should make even threatening noises, the BCNI lobby of CEOs has provided for the Minister to yank on the Director's chain. Given the easy accessibility that senior businessmen and top trade association executives have to ministers in general, we can be sure that the line of political accountability will run from the Director to the Minister to big business when it decides to flex its muscle. What Professor MacCrimmon and I said before about the Cabinet appeal provision in Bill C-13 is appropriate here:

> Sadly, what many businessmen mean by accountability in this context is direct accountability by the Minister, and the government establishment generally, to their specific interests. It is expected that the general electorate should wait until the next election to hold its representatives accountable, but business interests should be able to take the government to task immediately after an important decision has been rendered. Accountability of the type incorporated in Bill C-13, i.e., S.31.91, will mean accountability to business, not to the public generally. It may well open the door to the crassest form of political pressure (and economic pressure through the threat of withholding campaign contributions) and the most opportunistic form of decision making by the Cabinet. (MacCrimmon and Stanbury, 1978, p.103).

Conclusion

The BCNI study should be viewed in the same light as Jonathan Swift's "A Modest Proposal" would have been seen by the Irish in the 18th Century. It must be a grotesque satire on a process that has gone on far too long and keeps in place a weak policy that fails to protect adequately the economic interests of the general population. It is most unfortunate that as prestigous a group as BCNI should labour so long, and no doubt at considerable (tax-deductible) expense, to produce a document so hostile to genuine competition policy reform.[31] The many thoughtful and reasonable business leaders in Canada, upon a close reading of the BCNI study, may find it too extreme for their taste. It is probably too much to ask that they publicly repudiate it. They could, however, consign it to the file of good ideas that didn't pan out.

Adam Smith, the patron saint of those truly interested in competition, recognized the "mean rapacity" and "monopolizing spirits" of merchants and manufacturers who wish to restrict competition for their own benefit. Smith warned legislators that "the proposal of any new law or regulation of commerce which comes from this order, ought always to be listened to with great precaution, and ought never to be adopted till after having been long and carefully examined, not only with the most scrupulous, but with the most suspicious attention." Parliament should accept Adam Smith's wise advice.

NOTES

1. The study is dated April 1981 and the Preface states it was completed prior to the Minister of Consumer and Corporate Affairs (1981) began to circulate his "Proposals for Amending the Combines Investigation Act" late in April. It is regrettable that the study did not incorporate a postscript on the Minister's 21 page paper. Published analyses of the Proposals can be found in Lecraw (1981) and Stanbury and Reschenthaler (1981).

2. BCNI is modelled on the Business Roundtable in the United States. Its origins are described by its first president, William D. Archbold (1977). On BCNI as a lobby group see Anderson (1977). The organizations's previous effort on Parliamentary reform was quite well received. See BCNI (1979), which was based on d'Aquino et al. (1979). Some idea of BCNI's previous views on corporate concentration can be found in Archbold (1979).

3. The unenforceability of the merger provisions was confirmed by the K.C. Irving case in 1976, (1977) 32 C.C.C. (2d) 1, see, for example, Reschenthaler and Stanbury (1977), Roberts (1977) and Cairns (1981b). With the exception of the Eddy Match case, (1954) 109 C.C.C. 1, the monopolization provisions have had little effect - see Stanbury (1978b)

and Rosenbluth (1979). It is only with the Hoffman-LaRoche case (1980) 28 O.R. (2d) 164 - see Gorecki (forthcoming) and perhaps with R. v. Consumers' Glass (unreported judgment, judgment, Supreme Court of Ontario, June 17, 1981, Bureau of Competition Policy mimeo #365.1) that the predatory pricing provisions have shown some life. The ineffectiveness of the price discrimination provisions are described in Dunlop (1979) and Nozick (1976).

4. The conspiracy provisions, formerly a bulwark against a wide variety of horizontal agreements, have been severely weakened by the Supreme Court of Canada's decisions in Aetna Insurance (1977) 34 C.C.C. (2d) 157, and in Atlantic Sugar (1980) 16 C.R. (3d) 128. See the discussion in McFetridge & Wong (1981), Reschenthaler and Stanbury (1981) and Cairns (1981a).

5. For example, the Director must determine in advance if he is conducting his investigation under a criminal or a civil provision. Searches for documents cannot be used in civil matters. The use of any formal power (search, return of information, affidavit) must be preceeded by a court order. In obtaining the court's authorization, the Director must provide reasons in writing which spell out in some detail the nature of his inquiry. For example, the "nature and scope of the Director's inquiry" must be specified "with sufficient particularity to enable the intended recipient to determine the materiality of the documentation to be copied or taken away". (BCNI, 1981, p.74).

   Furthermore, at all times, the Director is to be subject to the direction of the Minister of Consumer and Corporate Affairs, who, presumably can abort any investigation at anytime for any reason at all. This may not be as attractive to the Minister as it first sounds. Presumably he would have to answer in the House of Commons for such decisions and would be subject to the pressure of his colleagues on specific cases.

6. The Restrictive Trade Practices Commission is to adjudicate all the civil matters in the Act. To the "reviewable matters" introduced effective January 1, 1976 (refusal to deal, consignment selling, tied selling, exclusive dealing, market restriction, foreign judgments, and foreign laws and directives), BCNI proposes to add mergers, monopolies and specialization agreements.

7. This goes well beyond the recommendation of Skeoch-McDonald (1976, pp. 309-313) which proposed an appeal on questions of law or natural justice to the Federal Court under S.28 of the Federal Court Act. In addition, Skeoch-McDonald (1976, pp. 314-315) proposed the Cabinet be given the power to vary or rescind any order of the administrative tribunal within 60 days on the basis of "over-riding concerns of public policy", BCNI (1981, p.102), however, recommends that the court of appeal be able to vacate an order but not be able to vary an order of the RTPC. They would refer it back to the RTPC for them to excercise their judgment in light of the appeal court's ruling.

8. This change would severely weaken S.38, the price maintenance section, since refusal to deal is the most common means by which a supplier enforces or tries to enforce price maintenance on retailers. The test for refusal to supply in S.31.2 is much more difficult to meet, i.e., the retailer must be "substantially affected in his business or [be] precluded from carrying on busines due to his inability to obtain adequate supplies of a product in a market on usual trade terms...". Perhaps one reason BCNI is seeking to severely weaken S.38 is the rising number of prosecutions under this section and the increase in the average fine per case as the following data illustrates:

Period	Section 38 No. of Convictions* (cases)	Average Fine Per Case
1950-1959	3	$ 502
1960-1969	11	1,550
1970-1974	11	4,750
1975-1979	29	17,362

* excludes six cases involving only Prohibition Orders
Source: Stanbury (1981b)

In one 1979 case, Levi-Strauss (Bureau of Competition Policy, mimeo #307-1), the total fine was $150,000 on eight counts.

9. This definition follows Skeoch-McDonald (1976, p. 156).

10. Presently, under S.30(1) of the Combines Investigation Act, following a criminal conviction for monopoly or merger, a court may "direct the person convicted or any other person to do such acts or things as may be necessary to dissolve the merger or monopoly in such manner as the court directs".

11. Surely the verdict on the constitutionality of this section should be left to the courts. With its repeal, the only penalty that can be invoked is a modest fine (see Stanbury, 1976). In civil cases, the government is to be limited to simple injunctive orders not exceeding five years. In the U.S. private treble damage actions account for over 95% of all antitrust cases and the recoveries reduce the profitability (and incentives) of possible antitrust violations. For example, in the famous Electrical Equipment conspiracy in the U.S. in the early 1960s, the fines were under $2 million while the successful treble damage claims totalled about $350 million. Unfortunately, it has been estimated that the companies involved received over $800 million in extra revenues from the conspiracy. In any event, BCNI seeks to eliminate private enforcement of the Combines Investigation Act as well as make public enforcement very much more difficult.

12. This idea may stem from the Dredging case brought under the Criminal Code in which Chief Justice Parker of the Ontario Supreme Court fined Richelieu Dredging Corporation, a wholly-owned subsidiary of J.P. Porter Company Limited, $500,000. The parent company was fined $1 million (June 11, 1979).

13. See the references in note 4 above. In fact, there is no discussion of S.32 in the text of the study.

14. The author has compiled a list of 40 mergers or takeovers between 1978 and July 1981 where the takeover price was in excess of $100 million. In 17 of these the value of the cash or stock exchanged exceeded $400 million. This is apparently no cause for alarm to the BCNI task force. A number of these large mergers were the conglomerate type. The problem, however, is that there exists no mechansim for assessing the desirability of mergers of any type or size since at least the K.C. Irving decision late in 1976.

15. The study was apparently completed before the Economic Council's (1981) study was published. They might have reviewed S.4.5 as proposed in Bill C-13. See the papers in Prichard, Stanbury & Wilson (1979, Part IV).

16. The discussion of regulated industries and intellectual and industrial property occupies less than a page of the study (BCNI, 1981, p.37).

17. See the discussion by Prichard (1979).

18. We are told that "the concept of joint monopoly, in the absence of a criminal conspiracy, was concluded to be both misleading and a contradiction in terms. It is without legislative precedent. And, in the Canadian setting, it would greatly increase the potential for government intervention and regulation and decrease reliance on market forces as the best way to bring about efficiencies and price competition" (BCNI, 1981, p.33) In one paragraph the central aspect of "the oligopoly problem" is dismissed. For a different view, see Shenefield (1978a), Minister of Consumer and Corporate Affairs (1981), and Stanbury and Reschenthaler (1977).

19. The study notes that "the approach taken was ... not theoretical" and that "previous approaches ... were too theoretical and all-embracing..." (BCNI, 1981, pp.5,1).

20. BCNI printed 5000 copies of its study.

21. While no references to any of the new thinking are given, they seem to have in mind some of the work of the "Chicago school", e.g., Demsetz, Posner, Weston, Brozen, Bork.

22. See the line of decisions beginning with Trans-Missouri Freight (1897) 166 U.S. 290 and continuing with; Trenton Potteries, (1927) 273 U.S. 392 and Socony-Vacuum Oil (1940) 310 U.S. 150.

23. The Director of Investigation and Research between 1960 and 1973, D.H.W. Henry (1963, p.10), noted that "in administering the Act the Director is compelled to put his mind to the question whether he has reason to believe an offence has been or is about to be committed. If he has such reason to believe, the Act requires him to commence an inquiry; if he does not have reason to believe he has no authority to intervene in the affairs of an industry".

24. The lengthy regulations have been subject to some well- merited criticism. See Latimer (1979).

25. Skeoch-McDonald (1976, p.289), also recommended that the adjudication function alone be the responsibility of the competition policy tribunal they proposed.

26. One page earlier in his judgment, McRuer, J. had expanded on this point.

> When a Provincial Legislature has conferred on a Commission or Board the power to regulate an industry and fix prices, and the power has been exercised, the Court must assume that the power is exercised in the public interest. In such cases, in order to succeed in a prosecution laid under the Combines Act with respect to the operation of a combine, I think it must be shown that the combine has operated, or is likely to operate, so as to hinder or prevent the Provincial body from effectively exercising the powers given to it to protect the public interest. If the evidence shows that by reason of a merger the accused is given a substantial monoply in the market, this onus, in my opinion, would be discharge. (1960) 126 C.C.C. 133 at p.167)

27. Jones (1967) shows that in practice, the breweries set the price and the Liquor Control Board of Ontario was generally a passive actor which usually ratified the prices proposed by the companies.

28. R. v. Canadian General Electric et al. (1976) 34 C.C.C. (2d) 489; 75 D.L.R. (3d) 664.

29. BCNI fails to appreciate the purpose of an exemption for specialization agreements. It is to permit manufacturers to get out of an existing situation characterized by long product lines and short, inefficient, production runs. It is to offer relief for past inefficiencies, not facilitate cartelization.

30. See the discussion in Macdonald & Rowley (1978).

31. The BCNI study contains no discussion of the goals or purposes competition policy should be designed to achieve. The authors say "the law was taken as it stood and examined from the twin standpoints of soundness in principle and importance in practice" (BCNI, 1981, p.6). Why should the law be taken as given? In any event, the study does not define and justify the principles by which the existing and proposed law were judged.

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