CANADA

Proposals For Change

Fourteenth Report of the Standing Committee on Finance, Trade and Economic Affairs Respecting Stage II Competition Policy

Norman Cafik, M.P.
Chairman

August 5th, 1977
Second Session
Thirtieth Parliament

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Standing Committee on
Finance, Trade and
Economic Affairs, 1976/77.
Fourteenth report to
the House of Commons
respecting the subject-
matter of Bill C-42.

THE STANDING COMMITTEE ON FINANCE, TRADE AND ECONOMIC AFFAIRS

FOURTEENTH REPORT TO THE HOUSE OF COMMONS

Respecting

The Subject-Matter of Bill C-42, an Act to amend the Combines Investigation Act and to amend the Bank Act and other Acts in relation thereto or in consequence thereof.

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ACKNOWLEDGEMENTS

The Committee extends its appreciation to those who appeared before it during hearings in the month of June for their valuable contribution to its deliberations on the subject matter of Bill C-42.

The Committee expresses its gratitude to all those who took the time and effort to prepare written submissions. Those submissions have greatly contributed to the Committee's awareness of the concerns of the public in respect to the proposals in Bill C-42.

Particular recognition is extended to the Legal Counsel to the Committee, Mr. D. S. Affleck, for his untiring efforts on behalf of the Committee both during the public hearings and in the preparation of the final Report of the Committee. Without such assistance, the Committee would have found it virtually impossible to have performed its task in the short time frame available.

The Committee also pays tribute to the excellent research assistance provided by the Library of Parliament, Research Branch, through the efforts of Mr. Frank Klassen who assisted the Committee as an economic adviser.

The participation of senior officials of the Department of Consumer and Corporate Affairs, notably the Director of Investigation and Research under the Combines Investigation Act, Mr. Robert J. Bertrand, and Mr. Roy Davidson and Mr. Dennis de Melto, contributed to the Committee's deliberations in the course of public hearings.

Sincere appreciation is also extended to the Clerk of the Committee, Miss Santosh Sirpaul, and to the many members of the Committees Branch and other House of Commons' staff for their valuable assistance.

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CHAPTER I

COMMITTEE PROCEDURES

1. On March 25, 1977, the House of Commons referred the subject-matter of Bill C-42 to its Standing Committee on Finance, Trade and Economic Affairs. The specific Order of Reference referred to the Committee was as follows:

> "That the subject-matter of Bill C-42, An Act to amend the Combines Investigation Act and to amend the Bank Act and other Acts in relation thereto or in consequence thereof, be referred to the Standing Committee on Finance, Trade and Economic Affairs."

2. On March 14, 1977, the Honourable Anthony C. Abbott, the Minister of Consumer and Corporate Affairs placed Bill C-42 on the Order Paper of the House of Commons. This Bill received first reading on March 16, 1977.

3. The Chairman of the Standing Committee on Finance, Trade and Economic Affairs and members of the Committee then had informal discussions to consider ways and means by which Bill C-42 could be studied. As a result of these discussions, members of the Committee agreed that it would be more productive if the Bill could be withdrawn from the Order Paper and the subject-matter thereof referred to the Committee. The Chairman agreed to approach the Minister to determine the feasibility of such a procedure.

4. The Committee's primary concern was twofold: first, that insufficient time would be available to the Committee and to the House of Commons itself to give full and complete consideration

to the Bill prior to the House rising for the summer and, secondly, Committee members felt that in view of the significant impact of Stage II of Competition Policy on the community at large it would be advisable for the Committee to be in the position of being able to make recommendations as to the content of that Policy at the earliest possible date.

5. As a consequence of these considerations and discussions with the Minister of Consumer and Corporate Affairs and the Government House Leader, agreement was reached whereby Bill C-42 would be withdrawn from the Order Paper and the subject-matter of that Bill referred to the Standing Committee.

6. The Committee wishes to acknowledge the assistance given to it by the Minister and the Government House Leader in following the course of action that it recommended thus providing an opportunity to the Committee to hopefully have significant advance input prior to any new bill being brought forward.

7. On April 1, 1977, the Finance Committee issued a Press Release indicating the procedures to be followed and the time frame established for consideration of the subject-matter of Bill C-42. This Press Release provided that the month of June would be set aside by the Committee for public hearings on the subject-matter. It further established that the deadline for the submission of briefs was to be May 20, 1977, and reserved to the Committee the right to select those witnesses which would appear before it.

8. On April 12, 1977, display advertisements were placed in all national newspapers inviting interested parties to submit briefs in respect to the subject-matter of Bill C-42.

9. In response to the Press Release and the advertisements placed, the Committee received one hundred and ninety-one letters and telegrams indicating an intention to submit briefs or appear before the Committee. One hundred and forty-six briefs were eventually received and distributed to all members of the Committee in both official languages. During the month of June, the Committee held twenty-six meetings and heard representations from thirty-two organizations, six individuals and a Provincial Government.

10. In addition, the Committee heard testimony from the Honourable Anthony C. Abbott, Minister of Consumer and Corporate Affairs and Departmental officials in respect to the subject-matter of Bill C-42.

11. Furthermore, the Committee held eight in camera meetings to consider its draft report to the House.

12. As indicated by the number of briefs, letters and telegrams received by the Committee, public interest in the subject-matter of Bill C-42 was substantial. That interest ranged from the expression of general philosophy to detailed analysis of the likely effects of Bill C-42 on particular sectors of the economy.

13. In order to make its review process more meaningful, the Committee adopted the following procedures:

(i) The Committee retained legal counsel to assist it in its deliberations and secured additional assistance by way of research through the Research Branch of the Library of Parliament.

(ii) The Committee conducted in camera briefing sessions with officials of the Department of Consumer and Corporate Affairs in order to obtain a better appreciation of the intent of the subject-matter of the Bill. These meetings were held during the month of May preceding public hearings.

(iii) Committee Counsel, D.S. Affleck, conducted further in camera briefings with members of the Committee in order that Committee members would be made aware of the concerns and the impact of the Bill as viewed by Counsel. This provided the Committee with an opportunity to have in depth exposure to the Bill and its possible implications prior to the commencement of public hearings.

(iv) The Committee decided that it was in its own interest to permit questioning of witnesses by its Legal Counsel to clarify, if necessary, the nature and likely effects of the representations being made.

(v) In addition, the Committee decided to adopt the procedure of inviting officials from the Department of Consumer and Corporate Affairs to appear along with outside witnesses so that the Committee would have the opportunity of exploring, in depth, the views of witnesses and Departmental officials simultaneously.

(vi) The Committee decided that in order to maximize the number of witnesses that could be afforded the opportunity of appearing before it within the limited time frame it would, in certain instances, hear more than one witness concurrently. This procedure permitted contrasting views to be

highlighted and allowed the Committee to determine whether the views being expressed were confined to only one organization or individual or were more universally held.

(vii) The Committee adopted a procedure whereby all briefs were analysed by the Research Branch of the Library of Parliament and that analysis, highlighting points of concern, was distributed to all members of the Committee to ensure that each point made in the briefs received was drawn to the attention of Committee members.

14. From time to time concern was expressed by both Committee members and witnesses respecting the delay in the distribution of briefs to Committee members. It is important to recognize that consistent with Government policy and the *Official Languages Act* all official communications on behalf of Parliament or its Committees must be made in both official languages. As a result of this fact coupled with the large volume of briefs received and the short time frame in which the Committee was working, such delays were, under the circumstances, inevitable.

15. The Committee deplores the delays involved as a result of translation difficulties and expresses the hope that improvements will be made in translation facilities so as to minimize the difficulties that were experienced in this regard by the Committee. Nonetheless, we wish to assure all those who made representations as witnesses or through their briefs that their views were in fact given consideration within the time frame available.

16. Thus, notwithstanding the fact that briefs and submissions only became available to Committee members commencing in late May, 1977 and that all twenty-six public meetings of the Committee took place during the month of June, the Committee feels that the adoption of the procedures outlined has enabled it to carefully assess the subject-matter before it. In this regard, the Committee considers its principal task as one of examining the subject-matter of Bill C-42 in light of the representations presented to it, and more particularly, the adequacy and acceptability of the provisions of that Bill in view of its expressed objectives.

17. The Committee in considering the form in which its Report would be presented has decided to organize its comments and recommendations on the basis of the substantial

areas of concern expressed respecting the Bill. In light of the fact that Bill C-42 is a proposal to amend the *Combines Investigation Act* and change its name to the "*Competition Act*", the Committee has opted to refer throughout our Report to the "*Competition Act*" and to the section numbers which would exist in that Act if Bill C-42 were to be enacted.

Recommendation 1

That in order to provide for a greater degree of public and Parliamentary contribution to proposed legislation, the Government more widely use, inter alia, the procedure of subject matter references to committees.

Recommendation 2

That in order to minimize the delay in the distribution of briefs from the public to committee members, changes be made in the translation services available to committees so that translation work will be expedited.

Recommendation 3

That in order to facilitate a more meaningful examination of public policy, committees be more routinely provided with sufficient expert and research staff to facilitate Committees and their members in their studies.

CHAPTER II

BALANCING THE SCALE

18. The large and diverse body of representations made in respect to the Competition Act clearly illustrate the dilemma faced by our Committee in attempting to come forward with a balanced view respecting competition policy.

19. Representations made to the Committee could be generally categorized as stemming from the business community, both large and small, consumer-interest groups and regulated sectors of the economy.

20. Quite obviously, the thrust of the representations made to the Committee varied considerably. Large corporations viewed the proposed legislation as imposing considerable uncertainties in an already uncertain market place; small business interests viewed the legislation as a welcome step to further protect them against the abuse of power by those larger than themselves; consumer-interest groups generally approved of the legislation and viewed it as a step forward for consumer rights, albeit not as large a step as they might wish. Finally, regulated sectors viewed the proposed legislation as but a duplication of existing regulating authority which, in their view, already adequately protects the public interest.

21. Against this background of divergent views and interests, the Committee must of necessity address itself to the concerns expressed by all groups and to weigh these concerns against a larger background of broad public interest. In attempting to achieve a balance, it is important to realize that the

fundamental purpose of economic policy is to benefit the public at large.

22. Inevitably, the Committee's recommendations, regardless of how far-reaching or incisive, will fail to meet all the specific concerns that have been expressed by these various groups. To have come forward with a report that would meet all objections of one group would deny the concerns, in many instances, of others. It is in this context that the Committee seeks to have all sectors of the market place view the contents of this Report.

23. Concern has been expressed by some Committee members and others that Stage II of Canadian Competition Policy does not, in fact, constitute an overall industrial strategy for Canada. The Committee is of the view that competition policy cannot be nor is it designed to be for such a global purpose. However, the Committee believes that it is essential for competition policy to be designed in such a manner as to ensure that it will not now or in the future become an impediment to the achievement of a global industrial strategy necessary to facilitate Canadian economic development in the years ahead.

24. The *Competition Act* has been accurately described as a general law of general application and as such does not generally speaking address itself to market place specifics but rather is an attempt to establish wide bounds within which the dynamic market forces may operate. The law is framed to do this both through its criminal law and reviewable practice provisions. The Committee welcomes this dual approach. However, the Committee recognizes that the interface between the criminal and civil side may require some adjustment and clarification.

25. The Committee is of the view that competition law cannot, in the conventional sense, be a set of rigid laws by which men can be guided in their every step. It is rather a general statement of commonly held principles and economic philosophy which only takes form as courts or governmental agencies apply its generalities to the facts of individual situations. This is not to say, however, that competition law should be devoid of the degree of certainty that permits of widespread understanding and voluntary compliance. In view of this observation, it is not unexpected that proposals to modify competition law will evoke valid criticisms from those who must operate in a complex economic society with multiple objectives.

26. The Committee is charged with the responsibility of giving careful and serious consideration to all representations made by the public. In addition, the Committee must take into account the historical development of competition policy in Canada bearing in mind the various changes in policy positions that have been brought forward over the past number of years.

27. Prior to the introduction of the *Competition Act*, the Government appointed an independent committee to enquire into the subject areas to be dealt with by this Act. That committee produced what is commonly known as the "Skeoch-McDonald Report" on March 31, 1976. Quite evidently this Committee must consider the views and recommendations contained within that Report in its deliberations.

28. The new *Competition Act* must, therefore, be viewed in the context of public representation, previous policy positions, studies and the proposals of the "Skeoch-McDonald Report". To do so inevitably leads us even further into a maze of divergent interests and value judgments which do not readily lend themselves to easy or simple resolution.

CHAPTER III

THE SKEOCH-MCDONALD REPORT

29. In the Spring of 1975, the then Minister of Consumer and Corporate Affairs, the Honourable André Ouellet, sought out a group of individuals from the private sector to prepare an independent report making recommendations for consideration by the Department in the drafting of Stage II of the competition policy. Following a year's consideration of the subject, this independent committee submitted its report entitled "Dynamic Change and Accountability in a Canadian Market Economy". This report has been commonly referred to as the "Skeoch-McDonald Report".

30. Copies of this Report were distributed to all Committee members because of its underlying and fundamental relationship to the *Competition Act*. In addition, many who made representations to the Committee directly referred to the contents of the "Skeoch-McDonald Report" and often pointed out the differences in approach taken in that Report to the approach that they believed was being taken in the Act. In this respect a statement was issued by Dr. L. A. Skeoch commenting on the fundamental differences in approach between the Report and the proposed legislation.

31. The Committee does not feel it necessary to recount the policy positions adopted in the "Skeoch-McDonald Report" in light of the fact that that Report has been public for some time and the central figures in our market economy are quite familiar with the proposals contained therein.

32. However, we feel that as a prerequisite to our specific proposals it is important for us to address ourselves primarily to the areas where divergent approaches may have been adopted.

33. Dr. Skeoch comments after close analysis that "neither in form nor in animating spirit do many sections of the bill derive from the report". The central thrust of Skeoch-McDonald is to provide a mechanism to critically examine market activity in order to promote adaptability and flexibility. Specifically, the strategic elements proposed for the promotion of dynamic change in a mixed economy were said to be threefold:

> "(1) the prohibition of artificial restraints, that is, restraints not based on superior economic performance;
>
> (2) the assumption by government of much of the heavy cost of economic change rather than encouraging resistance to change by protectionist devices; and
>
> (3) if necessary, the alteration of the environmental circumstances by upgrading incentives and strengthening pressures for adjustment so that questions of innovation, economies of scale, specialization of firms, rate of economic growth, and the like, could be largely left to dynamic, marketlike arrangements."

34. The thrust of this approach is a reliance upon the market forces to achieve the public interest while avoiding as much as possible direct control over the economy. Any movement toward fine-tuning the economy would be interpreted as an excessive intrusion into the market place. In addition, implicit in the "Skeoch-McDonald Report" is the belief that bureaucrats in isolation are not likely to be better judges of what is good for the market than the market itself.

35. Dr. Skeoch suggests that there are three specific areas of conflict between the "Skeoch-McDonald Report" and the *Competition Act* proposals: firstly, with respect to exempt sectors of the economy, particularly, marketing boards and labour unions; secondly, the pricing provisions of the *Competition Act*; and thirdly, there is in the Act an excessive attempt to fine-tune the economy.

36. The Committee will attempt to deal with these latter points specifically but before doing so it would like to state its basic and general agreement with the concept that a dynamic market economy must indeed be capable of adaptation to changing circumstances both domestically and abroad and be

allowed the flexibility necessary to achieve superior economic performance.

37. In respect to marketing boards and labour unions and their exemptions under the proposed Act, it is important to point out that no blanket exemption exists in the proposed law. Insofar as treatment of marketing boards is concerned, the Committee is of the view that the proposed legislation largely parallels the three conditions for exemption suggested on page 152 of the "Skeoch-McDonald Report". The Committee's consideration of representations from agricultural and horticultural marketing boards has resulted in recommendations to clarify these exemptions which, it is felt, still retain the central thrust of the provisions proposed in the "Skeoch-McDonald Report".

38. Insofar as labour union activity is concerned the "Skeoch-McDonald Report" itself suggests that the present provision of the existing *Combines Investigation Act* respecting such activity does not exempt labour from the Act except where combinations or activities of workmen or employees are "for their own reasonable protection". The Report points out that the limits of this provision have not been adjudicated by the courts and, therefore, a body of jurisprudence as to its application is not available for either our guidance or that of the public.

39. The second area of conflict relates to what is termed "perverse and retrograded sanctions" relating to price differentiation and the "loss leader" defence against resale price maintenance. It is suggested that such provisions amount to "bureaucratic monopolization". The Committee must indicate initially that the loss-leader defence against resale price maintenance is not part of the proposed revisions of the *Competition Act*. The Committee, therefore, has not directly addressed itself to this question. In respect to price differentiation, the Committee is impressed with the arguments put forward in the "Skeoch-McDonald Report" in respect to this question.

40. There is no doubt that price differentiation is an appealing concept on the surface particularly in terms of protecting the small business community. However, the Committee recognizes the concerns expressed in the "Skeoch-McDonald Report" respecting encouragement of vertical integration and tendencies toward price rigidities but has reservations as to the suggestion that these concerns can be removed by the use of the concept of "reasonably anticipated long run average costs".

41. The third area of conflict relates to the question of fine-tuning, particularly in relationship to the monopoly and merger provisions, and the suspicion that such an approach results from a "direct-control" bias on the part of the drafters of the legislation.

42. The Committee is sympathetic to the concern expressed by Dr. Skeoch in this regard and is hopeful that the various recommendations made in our Report, in consort, would mitigate against this possibility.

43. In conclusion, the Committee acknowledges the substantial research and work contained in the "Skeoch-McDonald Report". It is a valuable document with which the Committee members largely agree. The Committee wishes to express its appreciation for having had the benefit of this Report in advance of its consideration of Stage II, Competition Policy.

CHAPTER IV

UNDERLYING CONCERNS

44. Prior to dealing with specific subject areas, the Committee wishes to express a number of central concerns that have arisen as a result of its deliberations concerning the Act.

45. Competition law should be a clear expression of public policy respecting the operations of the market place to ensure that it functions within broad parameters and in a manner which is both free and fair so as to assure the broad public interest.

Legal Certainty

46. All law should be as clear and as certain as possible so that those who are affected by it will be capable of voluntary compliance with its thrust. The present proposals with respect to the *Competition Act* have evoked considerable concern in the community at large respecting the degree of uncertainty that would exist in its application. The Committee recognizes that in such a broad general law, moving in a large part from criminal provisions to reviewable practices, that some uncertainty must inevitably exist otherwise the flexibility that is required to retain a free and open market place may be lost. Nonetheless, we feel it imperative to reduce this uncertainty to the maximum possible extent and in cases where this objective cannot be achieved to provide procedures for advance rulings, interpretative rulings and appeal provisions.

The Need to Encourage Voluntary Compliance

47. Although it is recognized that the Director of Investigation and Research under the *Combines Investigation Act* can negotiate consent orders on an informal basis, the Committee believes that positive steps need to be taken to encourage voluntary compliance with the provisions of the new proposed *Competition Act*.

48. The Committee is convinced that the public at large are generally well disposed to a good healthy competition policy in Canada and are largely prepared to adhere to sensible and reasonable provisions to achieve that objective. Consequently, the Committee considers that it would be worthwhile to institute a more formal procedure in the present proposals to maximize the possibility of achieving such voluntary compliance.

49. The Committee is alarmed at the general attitude prevailing in the business community respecting the application of competition policy in Canada. Generally speaking, large numbers of the business community view the role of the Department of Consumer and Corporate Affairs as being more negative than positive. The perceived adversary role of the Department and the spirit of confrontation is, in the view of the Committee, counter-productive.

50. The Committee does not make a value judgment as to the merits of this prevalent attitude but rather draws to the attention of the House the perception of the business community. The Committee considers that it would be more productive if a spirit of mutual co-operation were to exist thereby enabling the public interest to be better served.

51. The Committee believes that wherever possible competition policy should be more preventative and less punitive.

Departmental Over-Reach

52. Historically, the Department of Consumer and Corporate Affairs, in an attempt to enforce competition policy, has had in its view some rather negative results from the courts. Quite evidently, when it has taken cases before the courts it has been convinced that the public interest would be best served by convictions. In light of the fact that up until 1976 competition law was exclusively criminal in nature, the Department fell victim to the wording of the statute law and its judicial interpretation. As a

result, the Department felt prohibited from achieving its central public objective.

53. In light of these experiences and faced with the drafting of new competition law, it is perhaps understandable if Departmental officials wished to arm themselves with a statute more likely to provide a broader and more positive basis for enforcement.

54. The Committee notes this background and the numerous representations to the effect that the Department is now attempting to swing the pendulum to the opposite extreme, where the law would perhaps provide excessive powers to the Competition Policy Advocate and even the Board itself. Taking into account these two factors and balancing these concerns against the provisions of the proposed *Competition Act*, the Committee believes that it is important that provisions be provided to guard against any such tendency. The Committee's attempt to do so is found primarily in the areas relating to voluntary compliance procedures, interpretative rulings and appeal procedures which are dealt with in Chapters V and IX.

Expeditious Application

55. The Committee feels that it is important that any new body of competition law be framed in such a manner as to minimize the interminable delays that have inevitably taken place under such law both in Canada and the United States. Therefore, fundamental to our approach to the *Competition Act* is a desire to provide mechanisms by which such delays will be minimized, so as to achieve a fair, equitable and more expeditious application of competition law in Canada.

Regulated Conduct

56. Regulated conduct in Canada has grown considerably in recent years under the auspices of municipal, provincial and federal authorities. The Committee expresses an underlying concern that in some instances such conduct, insulated from competitive market forces, may be unwarranted. The Committee underscores its view that in certain central and essential areas such as public utilities, agricultural marketing boards, transportation, communications and so on that such regulated conduct may be required in the public interest.

57. It would be the hope of the Committee that insulation from the free forces of the market should only take place where

there is a clear and demonstrable public purpose to be served, and only then if adequate safeguards are put in place to ensure that the public interest is adequately and fully taken into account by appointed bodies responsible for the supervision of those they regulate.

Business Environment

58. In light of the feeling of some that big business is all bad and small business is all good, the Committee wishes to emphasize its fundamental belief that the best way to judge the public contribution of businesses, of all sizes, is primarily on the basis of efficiency and responsible market behaviour. Size per se is neither a virtue nor a vice.

59. Concern has been expressed as to the implications of competition policy particularly as it relates to the fostering and maintenance of the small business community which has contributed so substantially to the economic development of Canada. The Committee believes that appropriate measures to assist small business in a meaningful and effective way do not lie primarily in competition policy. Evidently, such matters should be taken into account in the bringing forward of competition law but the Committee largely shares the view expressed in the "Skeoch-McDonald Report" that broader and more universal strategies are required outside of the *Competition Act* in order to stimulate business opportunities in this and, indeed, all sectors of the economy.

60. The Committee is of the view that a broad industrial strategy is an urgent need to assist in economic development. Aside from specific policy changes or programs in this direction, it is also essential that a healthy and certain environment be created for the achievement of real growth.

International Competition

61. Competition policy must take into account not only the domestic economic scene but also economic activity on the international level. For Canada to retain a healthy and viable economy, it is essential that competition policy take cognizance of international competition. This inevitably implies some provisions to accommodate the need for industrial rationalization so that Canadian firms will be allowed to rationalize, develop and expand to become internationally competitive.

Efficient Allocation of Resources

62. In the preamble to the *Competition Act* it is stated that one of the purposes of that Act is to achieve a more efficient allocation of resources. The Committee agrees that this ought to be an objective of any rational economic proposal. The Committee also notes that the dual principles inherent in the Act, namely, efficiency and competition, would seem to reign supreme.

63. The Committee, without having studied the matter exhaustively, is of the view that these two principles may not always provide for an optimum allocation of resources. The whole question of how best to organize an economy so that it remains dynamic and free while at the same time minimizing what so often is described as wanton waste of natural resources, is difficult and complex. The problems, for example, of planned obsolescence and the change in products for the sake of change only give rise to the belief that a thorough study needs to be undertaken in these respects to balance the short term interest against the long term consequences.

64. Efficiency and competition are good objectives. However, they cannot ensure a continuing and unending spiral of economic advancement.

Tuning the Economy

65. A great deal has been said respecting the purported attempt by the *Competition Act* to fine-tune the economy. Fine-tuning, in that sense, carries with it the implication that legislators and bureaucrats are seeking to delve into and intervene in the day-to-day workings of the market place. The Committee believes that a general law of general application should resist this temptation unless there is clear and demonstrable justification for such intervention. The operations of the market place are not easily understood but undoubtedly are both powerful and sensitive. Any attempt to become too directly involved in the decision making of a dynamic market should be resisted.

CHAPTER V

NEW APPROACH

66. The method by which competition policy will be applied and the regime under which it will operate is of particular significance in light of the fact that the policy itself is framed in general terms. Therefore, the ability of the community to rely specifically and solely on the words of the Act is less likely than in most other types of legislation.

67. Although the Committee has attempted in its recommendations to provide a greater degree of certainty in the law itself, it must be recognized that if flexibility is to be maintained in the economy, a flexible approach must be taken by the law itself.

68. Therefore, the role of the Competition Policy Advocate, the operation and the function of the Competition Board and the powers inherent in both, are of central and crucial concern. In addition, adequate safeguards must be built into the system to ensure that it does not get out of control due to well intentioned but excessively enthusiastic enforcement.

69. A broad range of varying recommendations have been made to the Committee in this regard. In an attempt to deal with these central questions the Committee's response may to some take a surprising turn in that no specific recommendation was made along the lines of the new approach that the Committee has adopted. Nonetheless, we feel confident that the central concerns inherent in the majority of recommendations have been dealt with and are embodied in our proposals.

70. In an attempt to retain flexibility in a dynamic economy, to put in place mechanisms that permit voluntary compliance, to move toward a greater certainty under the law and, at the same time, to provide appeal mechanisms against undue intervention in the market place, the Committee makes the specific comments and recommendations that follow.

Interpretative Rulings

71. In keeping with our belief that competition law and those charged with its implementation should endeavour to provide explicit and intelligible guidance to all segments of the market, as to what are considered unacceptable methods of competition and deceptive practices that would undermine the economic system, it is proposed that the Competition Board be empowered to issue "interpretative rulings" in regard to any section of the *Competition Act* pursuant to which the Board can make an order or recommendation. Such rulings would be promulgated in three different ways: by the Competition Board on its own initiative; at the written request of the Minister of Consumer and Corporate Affairs; or, at the written request of any other person. The content of all written requests would be confidential.

72. Prior to the actual issuance of any ruling, however, the Competition Board would be required to make a preliminary draft of the intended ruling public and receive written representations thereon from all concerned parties for a period of ninety days before formulating and publishing the final version of the ruling. Once published in its final form, the ruling would be legally binding on the Board until such time as the Board might consider it necessary to rescind or revise it. While the Committee would expect this to rarely happen, it believes that in the event of rescission or revision any person who has relied on the former ruling should be given such reasonable time as is necessary to comply with the changed situation.

73. While it is not the intention of the Committee that the Competition Board be compelled to issue a ruling in response to every request received or that the Board be placed in the position of having to issue rulings on specific matters, the full facts in respect to which might not be available to it, it is the Committee's expectation that with the passage of time the Board will develop a body of interpretative rulings which will

permit both certainty and compliance outside the menace of the legal process.

Recommendation 4

That the *Competition Act* be amended to provide that on its own volition, upon the written request of the Minister of Consumer and Corporate Affairs or the written request of any other person the Competition Board may issue interpretative rulings in respect to any matter concerning which the Board could make an order or recommendation under the Act.

Recommendation 5

That the *Competition Act* provide that both the name of the person submitting a request for the issuance of an interpretative ruling and the content of that request be held in confidence and not be disclosed to anyone by the Competition Board.

Recommendation 6

That the *Competition Act* further provide that the Competition Board, prior to issuing an interpretative ruling, must make public a draft of such ruling and provide all persons with ninety days within which to make representations thereon and that following receipt of such representations the Board may issue the final version of the ruling and cause same to be published in the Canada Gazette.

Recommendation 7

That the *Competition Act* also provide that if the Competition Board considers it necessary to rescind or revise any interpretative ruling it will follow the same procedure as required for the issuance of a new ruling in bringing about such rescission or revision.

Recommendation 8

That the *Competition Act* further provide that the Competition Board shall not make any order or recommendation against any person who has relied on the provisions of a rescinded or revised interpretative ruling until such person has had a reasonable period of time to comply

with any revised ruling or otherwise adjust his position or conduct.

Ministerial Approval

74. In further recognition of the fact that even with the Competition Board's ability to issue trade practice rules the optimum degree of guidance will not exist for some time after the *Competition Act* comes into force and in order to control the Act's application and guard against over aggressive enforcement, the Committee proposes that for the first three years no application could be brought by the Competition Policy Advocate under the reviewable provisions of the Act without the Competition Policy Advocate having obtained the prior, written consent of the Minister of Consumer and Corporate Affairs to any such application.

Recommendation 9

That the *Competition Act* provide that for a period of three years after its coming into force no application may be brought under Part IV.I of the Act by the Competition Policy Advocate unless the Minister of Consumer and Corporate Affairs has given his prior, written consent thereto.

Voluntary Compliance

75. The charter of competition law is simple enough; to remove the imperfections of the market by restoring competition and preventing deceptive practices. The fulfilment of such a charter should be a benefit to all consumers since competition would breed efficiency and lower prices while the lack of deceptive practices would allow an unimpeded search for the best value. However, far too often the confrontation approach to competition law erodes any possible consumer benefit and only serves to highlight the axioms: the bigger and more important the case, the longer the delay; and justice delayed is justice denied.

76. While the alternative to constant confrontation, voluntary compliance, has existed on an informal basis outside the provisions of Canadian competition law for some time, the Committee is of the opinion that it should be given the impartial statutory frame-work necessary to provide it with the recognition, stature and objective application that such a policy

deserves. To do so will, the Committee suggests, permit competition law in Canada to take a new direction by emphasizing guidance and voluntary procedures as much as it does legal action.

77. For these reasons, the Committee proposes that procedures be introduced into the *Competition Act* whereby any person against whom the Competition Policy Advocate applies for an order or recommendation from the Competition Board will have an opportunity to "negotiate" a consent order. Such order would, however, not issue until the Competition Policy Advocate had filed with the Board a statement showing the economic impact of the proposed consent order, the public had an opportunity to comment upon it, any person affected had had an opportunity to seek its disallowance and a member of the Competition Board had approved it. Failing approval of the proposed consent order, the Competition Policy Advocate's application would proceed in the manner envisaged by the Act.

78. The Competition Board under such circumstances would then be able to review all documentation and seek to achieve an order which the parties can accept without the necessity of proceeding through a full hearing.

79. While the procedures are outlined in more detail in the Recommendations that follow, the Committee is of the view that they have important merits: first, they do not require the creation of any new layer of administrative machinery; second, they permit voluntary compliance against the backdrop of interpretative rulings and Competition Board decisions thus mitigating against over-reach on either side; and thirdly, they allow the public to have a "check" on the whole process. While the time limits imposed may appear too short, the Committee views them as necessary to prevent the procedures being used to produce a "Rip Van Winkle effect".

Recommendation 10

That section 31.91 of the *Competition Act* be amended to provide that the Competition Policy Advocate shall, before bringing an *ex parte* application before a member of the Competition Board, serve upon each person against whom the Competition Policy Advocate is seeking an order or recommendation from the Board a copy of the application and all supporting documentation to be used on the *ex parte* application.

Recommendation 11

That the *Competition Act* further provide that if the Competition Policy Advocate proves a *prima facie* case pursuant to subsection 31.91(1) the person or persons who received a copy of the application shall be notified accordingly and given thirty days from the date of notification to conclude a proposed consent order with the Competition Policy Advocate or, alternatively, file with the Competition Board a written response to the application brought by the Competition Policy Advocate, including any alternate proposed order.

Recommendation 12

That the *Competition Act* also provide that, if no proposed consent order is negotiated, all materials utilized by the Competition Policy Advocate in support of the application under subsection 31.91(1) and any written response thereto be admissible in any subsequent proceedings before the Competition Board in relation to the same matter.

Recommendation 13

That the *Competition Act* further provide that if a proposed consent order is negotiated the same, together with a clear and concise description thereof and an "economic impact statement" setting forth a brief statement of the costs and benefits of the proposed order, both such latter documents to be prepared by the Competition Policy Advocate, be filed forthwith with the Competition Board and be available to the public.

Recommendation 14

That the *Competition Act* provide that within sixty days of the filing with the Competition Board of the proposed consent order, the description thereof and the "economic impact statement" that any person be able to file with the Board written comments with respect thereto and further that any person that would be substantially affected by the proposed order as a consumer, producer or otherwise be able to file a written "application for disallowance" setting forth the manner in which that person would be substantially affected and the costs and adverse effects

such proposed consent order would have on that person as a consumer, producer or otherwise.

Recommendation 15

That the *Competition Act* also provide that if, upon the expiry of sixty days following the filing of the proposed consent order, no written comments or "application for disallowance" has been filed, the proposed consent order becomes a final consent order.

Recommendation 16

That the *Competition Act* further provide that if, upon the expiry of sixty days following the filing of the proposed consent order, any written comments or "application for disallowance" have been filed with the Competition Board, the member of that Board who heard the application under subsection 31.91(1) be required to review all materials filed and give written reasons within thirty days for either approving the terms of the proposed order or disallowing it.

Recommendation 17

That the *Competition Act* further provide that if a proposed order is approved by a member of the Competition Board that it be made a final consent order whereas if it is disallowed the Competition Policy Advocate be required to immediately proceed with the matter before the Competition Board.

Recommendation 18

That the *Competition Act* further provide that in all cases where a proposed consent order is disallowed by a member of the Competition Board that all materials filed in respect to such proposed order be admissible in proceedings before the Board in relation to that same matter.

Recommendation 19

That the *Competition Act* further provide that in all cases where the Competition Policy Advocate and the person or persons who received a copy of the application made under section 31.91 have filed materials with the Competition Board but no proposed consent order has been negotiated or a proposed consent order has been disal-

lowed by a member of the Board, that the Competition Board shall review with the parties all documents filed with it and seek to obtain a resolution of all or some of the issues before it before proceeding to hear the application.

Rights of Appeal

80. Representations have been made that the appeal provisions under the present proposals are inadequate. Various approaches have been suggested in order to rectify this situation. Prior to dealing specifically with our proposal in this respect, we feel it important to outline the appeal provisions already existing in respect to any decisions taken by the Competition Board.

81. Under section 28 of the Federal Court Act, the Federal Court of Appeal has the power to review and set aside decisions made by the Board where the Board has failed to observe the principle of natural justice, acted beyond or refused to exercise its jurisdiction, has erred in law in making its decision or order or has based its decision on an erroneous finding of fact made in a perverse or capricious manner without regard to the submissions before it.

82. In addition, the Trial Division of the Federal Court has jurisdiction under section 18 of the *Federal Court Act* to issue all the prerogative writs other than *habeas corpus*, and to grant injunctions and declaratory relief in respect to any matter where a decision or order has not yet been made by the Board.

83. It is the Committee's view that a further and absolute right of appeal to the Federal Court of Appeal should exist in respect to orders of the Competition Board that would effect a divestiture or dissolution of a business or the cancellation of certain intellectual property rights. In order, however, to avoid negating the rationale behind the creation of the Competition Board the Federal Court of Appeal would not, under the Committee's proposal, be permitted to substitute its decision for that of the Board but simply be permitted to direct the matter back to the Board for further determination. The Recommendations and details of the Committee's proposal in this regard are set out in Chapter IX—"Competition Board".

CHAPTER VI

COLLECTIVE BARGAINING ACTIVITIES

Principal Representations

84. Subsection 4(1)(c) of the *Competition Act* would exempt "contracts, agreements or arrangements between or among two or more employers in a trade, industry or profession" from all the provisions of the Act provided that such contracts, agreements or arrangements related to collective bargaining with employees or workmen and did not involve a "selective" boycott as described in subsection 4(2). This exemption was said to be too restrictive; first, because it would not permit inter-industry agreements of the type contemplated by the Act, and secondly, because it would not permit a "selective" boycott by employers. Both such rights, it was stated, are now enjoyed by organized labour for purposes of collective bargaining and would be preserved in the *Competition Act*.

85. General representations were made to the effect that organized labour activities should not be exempt from the provisions of the *Competition Act*. The premise for this argument rested on the belief that organized labour's activities were as prone to anti-competitive behaviour as activities in any other sector of the economy.

Comments and Recommendations

86. It is to be noted that subsection 4(1)(a) does not fully exempt labour from the purview of the Act. The exemption is only available when the activities of labour are for the "reasonable protection" of workmen or employees in their capacity as

such. It is noted, however, that the exact limitations of labour's exemption have yet to be defined by the courts. Nevertheless, the Committee does not believe that employers should be enabled to enter into arrangements that could result in a type of "selective" boycott during periods of labour strife and even beyond. To do so might well place labour and those not party to such arrangements in an inequitable and undesirable position.

87. In light of the representations made respecting the need to support in competition law a mechanism whereby combinations of employers would be allowed to negotiate with labour, the Committee believes that employers ought to be placed in a parallel and perhaps countervailing position under the provisions of section 4.

Recommendation 20

That subsection 4(1)(c) be amended so that it is applicable to contracts, agreements or arrangements pertaining to collective bargaining entered into by employers in different trades, industries or professions.

Recommendation 21

That the limitations found in subsection 4(2) relating to "selective" boycotts be retained.

CHAPTER VII

REGULATED CONDUCT

Principal Representations

88. A substantial number of submissions and briefs to the Committee expressed concern as to the effects of sections 4.5 and 4.6.

89. Many felt very strongly that section 4.5, in its present form, would lead to such uncertainty that certain "public agencies" to which it referred would be subject either to a series of court proceedings to clarify its application or would be reluctant to carry out their normal functions until this section was clarified. This at a time when, as the Committee was advised, many such public agencies were subject to considerable effective supervision. On the other hand, it was generally recognized that there was a need for a provision in the Act that would clearly specify the interface between "regulated conduct" and competition law for the benefit of both the regulator and the regulatees.

90. In addition, a number of groups initially indicated that they wanted full exemption from all aspects of the *Competition Act*. However, under examination before the Committee, we think it is fair to say that this original position was adjusted to the point that those who made such representations would be satisfied with an exemption for those sections already covered in section 4.5 extended to include section 38.1, which relates to "systematic delivered pricing".

91. The Committee's attention was further drawn to situations where provincial regulatory bodies exercised delegated

powers in relation to agricultural products over interprovincial and export trade. Again, the Committee was advised that there were ample provisions in Federal legislation for the extensive supervision and control of such powers although there was some question as to whether such provisions were, in fact, being actively exercised.

92. Further in respect to section 4.5 very considerable concern was expressed in relationship to subsection 4.5(2)(c) where it was felt that such a basket clause would, in fact, make it difficult, if not impossible, to qualify for the exemption otherwise available in the earlier paragraphs of subsection 4.5(2)(c).

93. Submissions were also received by the Committee to the effect that section 4.5 was deficient in that it would not encompass agreements between members of the air transport industry. In particular, it was stated that it would fail to exempt agreements relating to rates and fares entered into in accordance with bilateral international agreements negotiated between the Government of Canada and other countries since such agreements were not regulated by a "public agency" as contemplated by the section.

94. While the Committee's attention was drawn to Bill C-33, *An Act to amend the National Transportation Act and the Department of Transport Act*, which proposes a provision (section 3.3) which would permit the exemption of such agreements from the application of section 32 of the *Competition Act*, that provision was said to be too narrow and complex to achieve any meaningful result. Further, concern was expressed that Bill C-33, which received first reading on January 27, 1977, might not be enacted in advance of or coincidental with the *Competition Act*.

95. Concern was also expressed in relationship to section 27.1. Those representing marketing boards were particularly concerned that this expanded provision would allow the Competition Policy Advocate to intervene in respect to, and interfere with, the day to day activities of marketing boards.

96. Section 4.6 was regarded by some as an unnecessary intrusion into the operation of regulatory agencies particularly in light of the provisions of section 27.1. Indeed, it was stated that the requirements of section 4.6 would extend far beyond the activities of regulatory bodies established by Federal legislation. Others, however, felt that section 4.6 would serve to restrict the loss of competitive benefits resulting from regulation and to

demonstrate that regulation was not necessarily inimical to competition.

Comments and Recommendations

97. While conduct that takes place under the umbrella of the regulatory agency is generally insulated from the full forces of competition, the evidence before the Committee clearly indicates that the intent of section 4.5 is to exempt such conduct provided that it is being responsibly reviewed by an impartial body. The Committee supports this objective and concludes, from the submissions and briefs presented, that in the majority of circumstances such impartial review procedures are in place and functioning. In those cases where there is no impartial review of the activities of a "public agency" that is composed of representatives of the persons it is regulating, the Committee considers that a competition law of general application should not treat such activities differently than if they were undertaken by any other form of private business organization.

98. The Committee notes that section 33 of the *Farm Products Marketing Agencies Act* is also being amended by the *Competition Act* to facilitate its continued application under the new proposals. Section 33 of the *Farm Products Marketing Agencies Act* would provide a *Competition Act* exemption for any contract, agreement or other arrangement between an agency established under the *Farm Products Marketing Agencies Act* and any person or persons engaged in the production or marketing of a "regulated product" where that agency has authority to enter into such an arrangement. The full impact of the *Competition Act* on agencies under the *Farm Products Marketing Agencies Act* can thus only be viewed in light of section 33 of that Act.

99. The following Recommendations are therefore made in order to clarify the application of section 4.5 in a manner consistent with the express intent of that section.

Recommendation 22

That section 4.5 be revised to clearly indicate that all conduct in respect of the marketing of any agricultural or horticultural product would be subject to the exemption therein so long as such conduct was, in fact, attentively supervised or controlled by a government appointed "public agency".

Recommendation 23

That section 4.5 be further revised to clearly indicate that all conduct, other than in respect of the marketing of agricultural or horticultural products, be subject to the exemption provided in the section so long as such conduct is required or authorized by a government appointed "public agency" that is clearly entitled to control such conduct and is, in fact, attentively doing so.

Recommendation 24

That subsection 4.5(1) be amended to include reference to section 38.1 (systematic delivered pricing).

100. The effect of these three Recommendations would, in the Committee's view, clarify the application of section 4.5 while at the same time assuring that regulatory conduct would be exempt insofar as it was subject to impartial and considered control. As a result, the necessity for the retention of subsection 4.5(2)(c) would be questionable.

Recommendation 25

That subsection 4.5(2)(c) be deleted from the Act.

101. Except in the narrow area of agreements as to rates and fares made pursuant to bilateral arrangements entered into by the Government of Canada, the Committee does not consider that the air transport industry has presented any persuasive evidence as to why it should be exempted in respect of all agreements or arrangements affecting air transportation. Such a broad exemption would only serve to insulate the industry from the competitive system without even imposing upon it the need to justify the benefits, if any, of such a unique position.

102. If agreements between members of the air transport industry which would affect related industries and the air traveller are to be exempt from competition law, such an exemption should, in the Committee's view, only arise in the circumstances contemplated by section 4.5; that is, when the agreements are required or authorized by an appointed "public agency" that is clearly entitled to control the implementation of such an agreement and is doing so.

Recommendation 26

That section 3.3 of Bill C-33, *An Act to amend the National Transportation Act and the Department of Transport*

***Act*, be transferred, in its present form, to the *Competition Act*.**

103. Subsection 4.6(1) simply mandates regulatory agencies exercising federal powers in respect of prices, fees or rates, conditions of entry, mergers or output to achieve their objectives in the manner least restrictive of competition when there are alternate choices available. This is but an affirmation of the fact that regulation and competition can and should co-exist where possible.

104. The ability of the Competition Policy Advocate alone to appeal a decision or order of a regulatory agency that is exercising federal powers as provided in subsection 4.6(2) is only available if the Competition Policy Advocate has intervened under section 27.1 in the proceedings leading to such decision or order. If in the circumstances described in subsection 4.6(1), competition and regulation can co-exist effectively, and if representations are made to that effect, it would appear to follow that some procedure should be available to assure that regulatory agencies are alert to and explore the benefits of competition.

Recommendation 27

That subsection 4.6(2) be clarified by providing that the Competition Policy Advocate must appeal any decision or order arising out of proceedings concerning which he has intervened pursuant to section 27.1 within 10 days of the time that decision or order was first communicated to him.

105. In respect to the concerns expressed relating to section 27.1 the Committee notes that section 27.1 is an extension of an existing provision in the *Combines Investigation Act*. However, it remains unclear as to when the Competition Policy Advocate can intervene in any matter before a federal board, commission or other agency. In order to clarify this matter and to obviate the concern expressed by many that such powers could be abused in that the Advocate may be empowered to intervene in the day to day activities of the board, the Committee finds it advisable to recommend that the section be clarified.

Recommendation 28

That section 27.1 of the *Competition Act* be amended to provide that the Competition Policy Advocate may only

intervene in any matter before a federal board, commission or other agency when such board, commission or other agency is, in fact, conducting proceedings in respect to any matter before it.

CHAPTER VIII

COMPETITION POLICY ADVOCATE

Principal Representations

106. Certain briefs and submissions to the Committee urged the restriction of the powers of the Competition Policy Advocate, the name of the officer in charge of carrying out the public enforcement of competition law, or, alternatively, the modification of the Act so as to make that officer more accountable. In addition, there were specific representations relating to the following:

(i) The provisions regarding solicitor-client privilege found in section 10.1.

(ii) The provisions of section 10.2 relating to the Competition Policy Advocate's access to computer data.

(iii) The rights of parties to copy and obtain the prompt return of materials taken by the Competition Policy Advocate or his representative.

(iv) The relationship of the Competition Policy Advocate to the Competition Board.

(v) The adequacy of the provisions of subsection 27(3) relating to the confidentiality of evidence or information obtained by the Competition Policy Advocate under the Act.

Comments and Recommendations

107. By extending the scope of competition law, the Act naturally expands the duties of the Competition Policy Advocate. It does not necessarily follow, however, that the investigative

powers involved in such public enforcement must be expanded proportionately or at all. It appears that what are perceived as expanded powers of the Competition Policy Advocate really amount to no more than either a codification of existing, informal practice or a modernization of already extant provisions.

108. Nevertheless, the Committee is of the view that the provision regarding solicitor-client privilege, section 10.1, should be clarified. When solicitor-client privilege is claimed with respect to an item, the section, as it presently stands, would appear to provide the Competition Policy Advocate or his representative with the option of submitting the item to a court for adjudication as to that claim or disregarding the claim entirely.

109. The Committee realizes that the section was drafted in order to permit the resolution of claims of privilege without the necessity of a court hearing and if the procedure were made obligatory it might well make it impossible to resolve such a claim without a court hearing. However, the Committee considers that the inconvenience and expense of such a result, in the few circumstances where it might arise, is more than offset by the certainty that would be achieved by making the procedures of the section mandatory. Further, the Committee can see no reason why there should not be a clear right of appeal available to both the Competition Policy Advocate and the party concerned from a decision made pursuant to subsection 10.1(2).

Recommendation 29

That there be a right of appeal for both the Competition Policy Advocate and the party concerned from any order respecting the question of privilege made pursuant to subsection 10.1(2).

Recommendation 30

That subsection 10.1(1) be amended by replacing the word "may" with the word "shall".

110. Section 10.2 recognizes the fact that much business data previously maintained in various forms is now stored in computers and gives the Competition Policy Advocate access to such data during the course of an inquiry. In this respect, the section simply modernizes the long-standing provisions that permitted the examination of books, papers, records or other documents for purposes of an inquiry. The Committee is, however, concerned that a person who provides or is required to

provide a print-out or other copy of computer data not have to bear any financial burden in order to comply with the requirements of the section.

Recommendation 31

That section 10.2 be amended so as to require the Competition Policy Advocate to reimburse all reasonable expenses incurred by any person in providing a print-out or other copy of computer data.

111. Subsection 18(1) provides for either the return of books, papers, records or other documents obtained by the Competition Policy Advocate or copies thereof within sixty days after they come into his possession. Subsection 18(2) provides for the return of "things" within sixty days after their coming into his possession unless, in the opinion of the Competition Policy Advocate, they are required for the purposes of a criminal prosecution or a Competition Board proceeding commenced before the expiry of that time period. If, however, the Competition Policy Advocate is of the opinion that the "things" may be required for a prosecution or proceeding that has not been commenced within the sixty day period, he may return the "things" with a direction that they be retained unaltered for a stated period of time and returned to the Competition Policy Advocate if he so requests within that stated period.

112. It appears to the Committee that there may well be circumstances, particularly pertaining to "things", where the sixty day period or the requirement that there be no alteration of the "thing" could cause serious problems for the party concerned. If, for example, the "thing" was a computer tape relating to a business's accounts receivable, would that business be placed in the position of being unable to utilize such tape, first, for a period of sixty days and then, possibly, for a further indeterminate period? The Committee is of the view that in circumstances such as described there should be a clear provision in the Act which would prohibit the Competition Policy Advocate from retaining possession of either documents or "things" essential to the business activities of the person concerned without either providing that person with a copy of such document or "thing" or making other mutually satisfactory arrangements in respect thereto. Further, in the event of a dispute as to the impossibility or impracticability of making

copies or other arrangements, the Act provide that the person concerned be able to apply to the courts for the return of the item or items at issue and for permission to utilize such item or items on terms which would clearly preserve the Competition Policy Advocate's right to examine such items and introduce them in evidence in any subsequent proceedings.

Recommendation 32

That a provision be added to the Act prohibiting the Competition Policy Advocate from retaining possession of any book, paper, record, document or "thing", essential to the business activities of the owner of or any person from whom such item was obtained, without providing that person with a copy of such item or making other mutually satisfactory arrangements in respect thereto.

Recommendation 33

That a further provision be added to the Act whereby in the event of any dispute as to what is "essential" to the operation of a person's business, the impossibility or impracticability of making copies or other arrangements, the courts, upon an application by the owner of or any person from whom any book, paper, record, document or "thing" was obtained, can order the return of such item and permit the utilization thereof on such terms as will preserve both the Competition Policy Advocate's right to continued examination of such item and his ability to introduce it in evidence in the same state as it was found in any subsequent proceedings under the Act.

113. Concerns were expressed with regard to section 31.91 which requires the Competition Policy Advocate to bring an *ex parte* application before a single member of the Competition Board and to satisfy such member that a *prima facie* case exists for the making of an order or recommendation prior to the Competition Policy Advocate commencing a proceeding before the Board itself under any of sections 31.2 to 31.77. One of the concerns was that the section might serve to establish a relationship between those in charge of the public enforcement of the Act and those in charge of its adjudication.

114. The Committee notes that by deleting this section and other similar provisions, for example subsections 9(2), 10(3),

12(1), 17(1), 17(7) and 17(8), the Act would provide few checks on the exercise of powers by the Competition Policy Advocate. Further, the Committee would not expect that, in practice, the section would lead to any unhealthy relationship but, to the contrary, would serve to arrest proceedings founded upon questionable bases. In this regard, the Committee notes that the onus on the Competition Policy Advocate under subsection 31.91(1) is to satisfy a member of the Competition Board "that a *prima facie* case exists". The Committee considers that a strengthening of this onus could well enforce the objectives of the section.

115. It was also proposed that if section 31.91 was to remain in the Act the application to the single member of the Competition Board should not be *ex parte* but on notice to the party or parties concerned so that the proceeding would be more akin to a preliminary inquiry in the criminal law sense. It is the Committee's view that such a proposal would only serve to prolong proceedings under Part IV.I of the Act while at the same time detracting from the emphasis on civil as opposed to criminal enforcement of the Act.

Recommendation 34

That section 31.91 be retained in the Act but that the onus under subsection 31.91(1) be strengthened by providing that there must be a "strong" *prima facie* case demonstrated before the Competition Policy Advocate can proceed before the Competition Board.

116. Subsection 27(3), providing for the maintenance of confidentiality with respect to evidence or information obtained by the Competition Policy Advocate under the Act, was also the subject of concern. That concern related not to the thrust but to the language used in the subsection and, in particular, to the fact that the subsection provided that evidence or information obtained could not be disclosed "except for the purposes of this Act". There was some question as to whether this language would permit the Competition Policy Advocate to disclose, for example, such evidence or information to a private party who had commenced a civil action under the Act. It is the Committee's view that the wording of the subsection can and should be clarified in this respect.

Recommendation 35

That subsection 27(3) be amended to make it clear that no evidence, information, document or thing obtained pursuant to the Act can be disclosed by the Competition Policy Advocate except for the purpose of exercising his powers and performing his duties under the Act.

CHAPTER IX

COMPETITION BOARD

Principal Representations

117. While many representations to the Committee approved of the partial shift from criminal enforcement of competition law to a process of civil review by the proposed Competition Board, there was considerable concern expressed with respect to the limited right of appeal from decisions of that Board and the qualifications of its members. The Committee's attention was also drawn, first, to the fact that there was no provision requiring publication of the proposed rules of the Board and hence no formal opportunity afforded to interested persons to make representations with respect thereto and, second, that the Board was not required to give reasons with respect to each of its decisions.

118. In addition, underlying concerns were expressed respecting the perceived significant and absolute power given to the Competition Board over economic activities in the market place. Basic concerns were also expressed respecting the potential conflict between Competition Board and Cabinet decisions under the *Foreign Investment Review Act*.

119. There were also concerns respecting the broad, open guidelines under which the Board would operate and the fact that in respect to its decisions there is no provision for the government to take into account other broad policy objectives through a Cabinet override.

Comments and Recommendations

120. It is clear from the nature of the functions proposed for the Competition Board that its members must bring to their task practical knowledge or training in the fields of business, law, economics or public affairs. From the hearings held by the Committee, it is apparent that this is recognized by the Minister of Consumer and Corporate Affairs and his officials. Any attempt to particularize the qualifications of potential appointees to the Board would necessarily introduce rigidity which could result in the disqualification of able persons.

Recommendation 36

That, in view of the foregoing comments, the *Competition Act* be amended to provide that persons appointed as members of the *Competition Board* have practical knowledge and training in such fields as commerce (including business and labour), finance, law, economics or public affairs.

121. Certain provisions of the Act would permit the Competition Board to order a divestiture or a dissolution of a business or the cancellation of certain intellectual property rights where it found that the purpose of a particular provision could not be achieved in any other manner. The Committee considers that in such circumstances the person against whom such an order is made should have an absolute right to a full appeal to the Federal Court of Appeal.

122. In order, however, to recognize the position of the Board with its unique expertise, the Committee is of the view that the Court of Appeal should not be permitted to substitute its decision for that of the Board and hence, if the appeal is allowed, should only be permitted to direct the matter back to the Board for further consideration and determination, either generally or in respect of a specified matter. In so doing, the Court should advise the Board of its reasons and give it such directions as the Court considers appropriate to the reconsideration.

Recommendation 37

That in the case of an order by the Competition Board

(i) directing the dissolution of a merger or the disposal of assets pursuant to section 31.71;

(ii) directing the dissolution of a "monopoly", a reduction in the degree of monopoly or the divestiture of part of a business or any of the assets thereof pursuant to section 31.72;

(iii) directing the dissolution of a "monopoly", a reduction in the degree of monopoly or the divestiture of part of a business or any of the assets thereof pursuant to section 31.73; or

(iv) directing the granting of patent, trade mark, copyright or industrial design licence or the revocation of a patent or expungement of a trade mark, copyright or industrial design pursuant to section 31.74

the person against whom such an order is made have an absolute right of appeal on questions of both fact and law to the Federal Court of Appeal. If the Federal Court of Appeal allows such appeal, it should not be permitted to substitute its decision for that of the Board but should only be permitted to direct the matter back to the Competition Board for further consideration and determination, either generally or in respect of a specified matter. In so directing the matter back, the Court of Appeal should be required to advise the Competition Board of its reasons and to give it such directions as are considered appropriate to the reconsideration.

123. As already indicated in Chapter V, this right of appeal would be in addition to the rights of appeal found in Sections 18 and 28 of the *Federal Court Act*.

124. The Committee was not advised of any reasons why proposed rules of the Competition Board could not be published in advance and an opportunity thus afforded to those interested to make representations in regard thereto. The Committee would view such a procedure as being consistent with that required of or adopted by many judicial and quasi-judicial bodies and, indeed, in keeping with the provisions of subsection 39.22(2) respecting the publication of regulations relating to practice and procedure in class and substitute actions.

Recommendation 38

That the Act be amended to provide that any rule proposed by the Competition Board pursuant to section 16.3

be published in the Canada Gazette and a reasonable opportunity afforded to interested persons to make representations with respect thereto.

125. With respect to decisions of the Board, the Committee notes that subsection 31.8(1.3) only requires that reasons for such decisions be given when they are requested by a party to a proceeding. The Committee considers that it would be appropriate, if for no other reason than to foster an understanding of the statute, to require that all the Board's decisions be supported by written reasons.

Recommendation 39

That subsection 31.8(1.3) be amended so as to require the Competition Board to give written reasons for each of its decisions.

126. In respect to the general concerns expressed relating to Cabinet overrides, conflicts with the *Foreign Investment Review Act*, excessive powers of the Board and broad general guidelines, the Committee has attempted to deal with these general questions throughout the report but, more particularly, in Chapters V and XII.

CHAPTER X

SPECIAL REMEDIES AND PROCEDURES

Principal Representations

127. Representations were made to the Committee regarding the Competition Board's powers to issue interim injunctions pursuant to section 29 of the Act. Concern was expressed that powers to grant interim injunctions and particularly *ex parte* interim injunctions should not lie in the hands of a body that might not have the legal experience of a court. On the other hand, of course, it might well be desirable in certain circumstances to prevent the continuance of conduct that appears offensive and that has or is expected to seriously injure the economic position of another. It was also stated that there should be provision for an appeal from an order of the Board granting an interim injunction.

128. The Committee's attention was also drawn to subsection 20(1) of the Act which provides that a person whose conduct is being inquired into will not be entitled to be present during the taking of evidence before a hearing officer unless it is his evidence that is being taken and then only during the actual time it is being taken.

129. The Committee was also referred to subsection 30(2) which would permit a court, on consent of the Attorney General and a person accused of an offence under Part V of the Act, to dismiss the prosecution and make a prohibition order under subsection 30(1). Concern was expressed, however, that the effect of this provision might well be rendered inoperative due to

the fact that subsection 30(5) expressly provides that there can be no appeal from an order made in such circumstances.

Comments and Recommendations

130. The Committee considers that the Competition Board, like the courts, should be able to act to prevent serious injury from occurring. No case would, however, appear to have been made as to the necessity for the Board to have *ex parte* injunctive powers or for modifying the tests or principles applied by the courts in granting interim injunctions. With respect to the question of appeals from orders of the Board in respect to interim injunctions, it is the Committee's view that the provisions of section 28 of the *Federal Court Act* provide sufficient scope for review in this regard.

Recommendation 40

That subsection 29(3) empowering the Competition Board to grant *ex parte* interim injunctions be deleted from the Act with necessary consequential changes to subsections 29(2) and (5).

Recommendation 41

That the bases upon which the Competition Board and the courts are permitted to grant interim injunctions as set out in subsections 29(1) and 29.1(1) be amended to reflect the principles followed by the Federal Court of Canada in granting such injunctions which are referred to in subsection 30(8).

Recommendation 42

That the Act also be amended to provide that any written comment by a person whose conduct is the subject of an enquiry be made part of any documentation or information relating thereto that is transmitted to the Governor-in-Council under Section 28 or supplied to the government of any other country pursuant to Section 47.1.

131. The Committee is concerned with the fact that under subsection 20(1) a person whose conduct is being inquired into will not have an opportunity to be present when oral evidence is given by others in respect to the matters involved in that inquiry. While the Committee understands that there is concern that witnesses are inhibited by the presence of the person against

whom they may find themselves giving evidence, this concern must, in the Committee's view, be balanced against the fact that oral evidence given before a hearing officer could serve as the basis: for a proceeding before the Competition Board or the courts; for the removal or reduction of custom duties under section 28; and that it could also be utilized in another inquiry pursuant to subsection 47(2) or could be provided to another government or agency in accordance with an international agreement made under the provisions of section 47.1.

132. Under the circumstances, it is the Committee's view that when oral evidence is given in the course of an inquiry under the Act each person whose conduct is being inquired into should be afforded an opportunity to comment on the subject matter of the inquiry before any further action or proceedings are taken in respect to that inquiry.

Recommendation 43

That the Act be amended to provide that when oral evidence is given during an inquiry the person or persons whose conduct is the subject of that inquiry be provided by the Competition Policy Advocate with a brief statement of the matters to which that inquiry relates and be afforded an opportunity to comment thereon in writing prior to any further action or proceedings being taken under the Act in respect to the subject matter of that inquiry.

133. The Committee fully supports the objective of subsection 30(2) but is satisfied that this objective would be better served if a right of appeal was granted to the accused person and the Attorney General in respect to any order made thereunder.

Recommendation 44

That subsection 30(4), which denies any right of appeal from an order made under subsection 30(2), be deleted from the Act.

CHAPTER XI

AGREEMENTS RESTRICTING IMPORTS OR EXPORTS

Principal Representations

134. Submissions were received by the Committee to the effect that this provision would interfere with normal marketing arrangements between "affiliated" corporations.

Comments and Recommendations

135. The provisions of the section would only come into play should there be agreements or arrangements to restrict imports or exports that also were designed to protect the price levels within or outside Canada of the product concerned. Thus, in the Committee's view, section 31.61 should not interfere with normal marketing arrangements between affiliates provided such agreements are not in the nature of mini-cartels.

136. In examining the language of section 31.61, the Committee noted that its provisions would only apply in the case of agreements or arrangements by "corporations". In view of the other provisions relating to conduct reviewable by the Competititon Board, the Committee considers it would be desirable to have section 31.61 apply to "persons", including natural persons, associations, partnerships and others. Further, the Committee would suggest consideration be given to the re-drafting of subsection 31.61(2) to provide that no order will be made against any corporation that does not account for twenty-five per cent or more of the production or supply "in a Canadian market".

Recommendation 45

That section 31.61 be amended so as to apply to "persons".

Recommendation 46

That subsection 31.61(2) be amended by deleting the words "in Canada" and substituting therefor the words "in a Canadian market".

CHAPTER XII

MERGERS

Principal Representations

137. Many submissions to the Committee approved of the fact that under the *Competition Act* the subject of mergers would be reviewable by the Competition Board and would no longer be characterized as a criminal offence. Nonetheless, concern was expressed as to:

(i) the definition of "merger" in subsection 31.71(1);

(ii) the position of joint ventures under the section;

(iii) the twenty per cent threshold test for horizontal mergers;

(iv) the list of factors which the Competition Board was directed to consider by subsection 31.71(4);

(v) the "substantial gains in efficiency" test in subsection 31.71(5);

(vi) the Competition Board's inability to consider any determination made under the *Foreign Investment Review Act* and, as a result, to be in the possible position of making an order dissolving a merger notwithstanding that it had been allowed under the *Foreign Investment Review Act*;

(vii) the lack of any procedure whereby proposed mergers could be considered in advance and a determination obtained as to whether they would be considered reviewable if consummated; and

(viii) the lack of any limitation period beyond which a merger would not be reviewable.

Comments and Recommendations

138. While the definition of "merger" in subsection 31.71(1) is similar to that found in the *Combines Investigation Act*, the use of the words "establishment" and "or otherwise" have broadened the scope of the definition considerably. There is no doubt, however, that the definition must be of sufficient compass to permit consideration of situations which, no matter by what name they may be called, connote the union or combining of two businesses. Thus, certain types of joint ventures should not be considered beyond possible review simply because of the use of the phrase "joint venture". On the other hand, it is clear that not all joint ventures should be reviewable. The question then is one of eliminating unnecessary uncertainty without sacrificing the flexibility required to allow skilled judgments to be made.

Recommendation 47

That the definition of "merger" in subsection 31.71(1) be amended so as to limit its potential scope to situations where there is some type of union or combination of two businesses. It is suggested that this might be achieved by replacing the words "or otherwise" with the words " or other similar manner".

Recommendation 48

That the position of joint ventures under the Act be specifically addressed either in section 31.71 or elsewhere in the Act so as to clarify the application of section 31.71 and other relevant provisions thereto.

139. Subsection 31.71(2) provides that a "merger" that "lessens or is likely to lessen, substantially, actual or potential competition" is reviewable if it is a horizontal merger and the parties thereto, together with their affiliates, will have more than twenty per cent of any market once the merger is completed. It is recognized by the Committee that the twenty per cent criterion is nothing but a rough basis for separating out the "significant merger" from the insignificant one. As has been pointed out frequently in the representations made to the Committee, a concentration percentage is but one indicator, and perhaps a minor one, of a market situation. It is felt that the Competition Board will also view it as such. Nevertheless, it does provide a type of *per se* guidance that can be relied upon.

140. In assessing the list of factors set forth in subsection 31.71(4), it is to be noted that the Competition Board has the discretion to determine which of those factors it considers relevant in any particular fact situation and, in addition, has the discretion to determine the weight to be assigned to the factors it does consider relevant. It must also be noted that a consideration of those factors is only relevant to the Board's finding of whether or not the merger "lessens or is likely to lessen, substantially actual or potential competition" and is not necessarily determinative of whether the Board will make an order. The list is exhaustive and in that respect provides certainty but at the same time each of the items is not so narrow in scope as to preclude development in appropriate situations. Nevertheless, the Committee notes that the list of factors does not include any reference to the transmission of benefits to society that might be achieved by a merger.

Recommendation 49

That the list of factors set forth in subsection 31.71(4) be expanded to include a new factor giving the Board discretion to take into account the nature, extent and timing of the transmission of the benefits of any efficiency gains to society.

141. Subsection 31.71(5) directs the Competition Board to permit a merger when it is "satisfied" by the parties to the merger or proposed merger that "there is a high probability that it will bring about substantial gains in efficiency . . . that are not reasonably attainable" otherwise. The Committee considers this a rigorous, all-embracing test that tends to run counter to the expressed need for flexibility as evidenced by the shift from criminal control to civil review.

Recommendation 50

That subsection 31.71(5) be amended so as to permit the Board to allow a merger on the basis of a less onerous test than that presently proposed when the parties adduce evidence that it will bring about substantial gains in efficiency. In this regard and for purposes of symmetry, consideration should be given to replacing the words "where it is satisfied by the parties" with the words "where, after hearing the parties, it finds that".

142. Much concern was expressed in many of the representations made to the Committee in respect to subsections 31.71(10) and (11) which, in essence, provide that an "investment" under the *Foreign Investment Review Act* can be reviewed before the Competition Board and no determination in respect thereof pursuant to the *Foreign Investment Review Act* is binding upon the Board. Some perceived such provisions as but another substantial barrier to business investment while others reasoned that the provisions simply confirmed the vastness of the Board's potential powers.

143. While it was made clear to the Committee by officials of the Department of Consumer and Corporate Affairs, that it was expected that consideration of any relevant "investment" would proceed simultaneously under both the *Foreign Investment Review Act* and the *Competition Act*, the Committee can detect no substantive reason why the *Competition Act* cannot be structured so as to assure that a situation that is to be reviewed by the Competition Board will not, at the same time, be susceptible to recommendation under the *Foreign Investment Review Act*.

Recommendation 51

That subsections 31.71(10) and (11) be revised so as to provide that an "investment" under the *Foreign Investment Review Act* which is also a "merger" for purposes of the *Competition Act* shall not be recommended to the Governor in Council:

(a) unless notice of such investment has been given to the Competition Policy Advocate and he has failed to indicate within forty-five days after receipt of such notice that he has brought or that he shall, within ninety days after receipt of such notice, bring proceedings in respect to such investment pursuant to section 31.71 of the *Competition Act*; or

(b) if proceedings are brought under section 31.71, such proceedings are final and there is no order outstanding under subsection 31.71(3).

144. The issue of pre-merger notification and clearance raises questions of considerable complexity, for example:

(i) Should pre-notification be a requirement or should it be optional?

(ii) Should pre-notification be only applicable to mergers of a certain size and, if so, what size?

(iii) If there is advance notification, should a binding ruling be required within a certain period of time or otherwise the proposed merger be deemed non-reviewable? If so, what is an appropriate waiting period and what information concerning the merger is to be required? Should the reviewing authority have the right to request and obtain additional information?

145. If, however, the provisions of section 31.71 are designed, at least in part, to halt monopolies and restraints of trade in their incipiency and before they can successfully achieve a substantial lessening of actual or potential competition, the Committee would be concerned that the provisions of the Act would not permit a realistic opportunity to do so. Experience in other jurisdictions and, in particular, the United States, indicates that once consummation occurs, it is often too late to obtain meaningful relief even if the merger is ultimately found to be anti-competitive. The damage to the market place can consequently never be repaired. For this reason, the addition of a pre-merger notification provision to the Act would contribute to effective and realistic implementation of the Act.

146. Considered from the point of view of the parties to a potential merger, some type of pre-notification and clearance procedure might well advance the legitimate interests of the business community in planning and in certainty while at the same time minimizing the costs associated with post-merger proceedings.

Recommendation 52

That consideration be given to including in the *Competition Act* procedures that would allow for the advance clearance of mergers. As indicated previously, the Committee is of the view that such procedures would provide:

(i) for compulsory pre-notification of very large mergers involving the acquisition of a corporation with total assets or annual sales of $500,000 or more by a corporation having total assets or annual sales of $9 million or more; and

(ii) for the issuance, at the discretion of the Competition Policy Advocate, within 30 days of receipt of the pre-notification, or such other period as many be agreed upon by the parties and the Competition Policy Advocate, of a binding certificate of compliance.

147. Such procedures must be considered in light of the Committee's other recommendations. Even then these procedures may appear too rudimentary but it is the Committee's view that any other system would require the creation of a rather detailed legislative frame-work which we do not consider warranted at this time. The Committee realizes, of course, that in some measure our approach would simply codify the present compliance program operated by the Bureau of Competition Policy and would depend for its success on the abilities of those in the Bureau who administer that program. Such codification may, it is suggested, assist in developing that program into a more meaningful alternative to judicial or quasi-judicial proceedings.

148. The Committee considers that parties to a merger should not be subject to having the merger reviewed following the lapse of a reasonable period of time after the fact of the merger has either come to the attention of the Competition Policy Advocate or become widely known.

Recommendation 53

That a new subsection be included in section 31.71 providing that no application may be brought under the section after the earlier of a period expiring six months after the fact of the merger has come to the attention of the Competition Policy Advocate or after that fact has been published in a newspaper or periodical of general circulation.

CHAPTER XIII

MONOPOLY

Principal Representations

149. Again, while a number of submissions received by the Committee commended the intent and thrust of section 31.72, concern was expressed as to:

(i) the need for section 31.72 when the criminal offence of monopoly was to be retained in the Act or, alternatively;

(ii) the necessity of retaining the criminal section in light of section 31.72;

(iii) that portion of the section which would permit the Competition Board to find a monopoly where one or more persons accounted for less than fifty per cent of a business; and

(iv) the uncertainty engendered by the use of the words "restraining economic activity in a manner otherwise than as described" which are found in subsection 31.72(2)(a)(v).

Comments and Recommendations

150. In considering whether both a reviewable provision and a criminal provision with respect to "monopoly" can or should exist in the same statute at the same time, it is necessary to determine whether the two provisions can be distinguished. In this regard, the Committee notes that section 31.72 would only provide for review of monopoly situations where certain specified types of exclusionary behaviour occurred or was likely to occur whereas the criminal provision, section 33, is confined

solely to situations where a "monopoly" causes or is likely to cause detriment to the public.

151. While the distinction is clear, is it necessary to retain both? Viewing the schema of the Act as a whole, the Committee can find no compelling reason why only one should exist. Indeed, it would be unacceptable in many cases to characterize a monopoly situation as criminal when no element of actual detriment need have resulted. However, when public detriment sufficient to satisfy the criminal onus does exist, it should be subject to the sanction of the state and the victim should be in a position to recover the economic loss suffered as a result.

Recommendation 54

That both sections 31.72 and 33 of the Act be retained.

152. With regard to subsection 31.72(5) which permits the Competition Board to find a monopoly where one or more persons account for less than fifty per cent of a business, the information presented to the Committee clearly indicates that monopoly power is not necessarily a corollary of bigness. It would be unrealistic to strike a figure below which it could be said there would be no monopoly problems but above which it could be accurately presumed there were such problems. The figure of fifty per cent is therefore arbitrary. However, it should be viewed in the context of attempting to provide guidance and clarity.

Recommendation 55

That no amendment be made to subsection 31.72(5).

153. The words "restraining economic activity in a manner otherwise than as described" in subsection 31.72(2)(a)(v) have evoked some considerable concern. Such concern is aptly summarized in the words of the eminent American jurist, Mr. Justice Brandeis, as found in the case of *Northern Pacific Railway Co.* v. *United States* (1958), 356 U.S. at page 4, "Every agreement concerning trade, every regulation of trade, restrains. To bind, to restrain is of their very essence". While the words of subsection 31.72(2)(a)(v) were said to be governed by the legal maxim of *eiusdem generis* and hence in keeping with the desire to particularize the circumstances under which the Competition Board could find that monopoly power was being exercised, the Committee is concerned with whether, in fact, such an interpretation will result.

Recommendation 56

That subsection 31.72(2)(a)(v) be amended to clearly indicate that it relates only to activity of the same type as described in the preceding four paragraphs numbered (i) to (iv) inclusive.

154. In Chapter XII, the Committee commented on the use of the word "satisfied" in those circumstances where the Competition Board is directed to not make an order. So that the Act may have symmetry, the Committee considers the same treatment should be applied to subsection 31.72(4).

Recommendation 57

That subsection 31.72(4) be amended in accordance with the Committee's Recommendation in respect to subsection 31.71(5).

CHAPTER XIV

JOINT MONOPOLIZATION

Principal Representations

155. The dichotomy in the submissions to the Committee with respect to section 31.73 was clearly defined; some welcomed the provision while a substantial number recommended its deletion. The former felt the section would assist in correcting certain business inequities and the latter argued that it would ensnare almost any firm regardless of that firm's conduct.

Comments and Recommendations

156. Those that expressed concern with this section generally did so on the basis that any parallel conduct could be reviewable, whereas, parallel conduct could be consistent with a highly competitive market structure as well as an oligopolistic market structure. The Committee notes, however, that it is not parallel conduct *per se* that is subject to review but only parallel conduct that restrains economic activity in the manner described in subsection 31.73(1).

157. In the Committee's view much of the real concern with the section actually stems from the language used in paragraphs (a) to (f) of subsection 31.71(1). If that concern was to be alleviated, the Committee would consider it logical that the restrictive behaviour of an oligopolist should be subject to a similar type of review as that of a monopolist. Indeed, such an approach would appear particularly apt in respect of an enactment directed to the fostering of a market economy that is both dynamic and efficient regardless of its structure.

Recommendation 58

That subsection 31.73(2)(f) be amended to clearly indicate that it relates only to activity of the same type as described in the preceding paragraphs (a) to (d) inclusive.

158. In Chapter XII, the Committee commented on the use of the word "satisfied" in those circumstances where the Competition Board is directed to not make an order. In order that the Act have symmetry, the Committee considers the same treatment should be applied to subsection 31.71(5).

Recommendation 59

That subsection 31.73(5) be amended in accordance with the Committee's Recommendation in respect to subsection 31.71(5).

CHAPTER XV

INTELLECTUAL PROPERTY

Principal Representations

159. Representations to the Committee indicated that each of the items of industrial property referred to in this section was governed by a specific Act of Parliament and hence any restrictions on the exercise of the rights granted by those Acts should be contained therein and not in the *Competition Act*. Furthermore, the Committee's attention was drawn to the fact that in at least certain circumstances industrial property rights arise through the operation of the common law and not exclusively from statute.

160. Particular concern was expressed with respect to the provisions of subsection 31.74(1)(c) whereby the Competition Board would, upon finding that a person was utilizing his industrial property rights in a manner not authorized by the specific Act relating thereto and so as to adversely affect competition, be empowered to direct the granting of a licence of the property right concerned. In the case of trade marks, it was seriously questioned whether compulsory licensing would be in accord with legal theory upon which the nature of a trade mark is based. Furthermore, since the primary function of a trade mark is to enable consumers to choose between competing products, the trade mark fosters competition and promotes the public interest. It is therefore agreed that compulsory licensing of a trade mark would not serve the public interest.

Comments and Recommendations

161. While there is no doubt that those Acts of Parliament pertaining to industrial property rights should express the public policy with respect to those rights, including the limitation of the rights established by such enactments, this does not, in the Committee's view, derogate from the principle that a general law as to competition should treat those rights in a manner consistent with the treatment accorded other commercial assets.

Recommendation 60

That the provision in the *Competition Act* permitting the review of industrial property rights under circumstances which create exclusionary or anti-competitive effects be retained.

162. In view of the representations received and the Committee's own consideration of the section, there is a substantial degree of concern with respect to whether the section, as presently proposed, will serve to achieve its objectives in an efficient and reasonable manner. In particular, the Committee questions whether the section should permit the compulsory licensing of trade marks when it appears that there are considerable doubts as to the public benefits of doing so.

Recommendation 61

That section 31.74 be redrafted so as to provide that:

(i) no application could be brought: unless an industrial property right was being exercised in a manner that was not clearly permitted by another provision of the *Competition Act*; or unless an industrial property right was being exercised in a manner not authorized by the enactment conferring or authorizing the right or by the common law, if any, pertaining to such right;

(ii) no order be made in respect to an industrial property right by the Competition Board unless the exercise of such right is or is likely to lessen competition substantially; and

(iii) no order be made by the Competition Board expunging the registration of a trade mark or requiring the compulsory licencing of a trade mark or having either of those effects.

CHAPTER XVI

INTERLOCKING MANAGEMENT

Principal Representations

163. Representations received with respect to this section suggested that since there was no empirical evidence as to abuses of interlocking relationships and since there was a shortage of senior managerial talent in Canada the provision was unwarranted.

Comments and Recommendations

164. The Committee notes that section 31.75 would only permit the Competition Board to review a situation where a director or officer of one corporation is a director or officer of another corporation and as a result a substantial lessening of competition had or was likely to occur. As it is presently, most businessmen would be reluctant to serve two competing corporations as they would foresee substantial conflict of interest problems. Consequently, the Committee cannot foresee the section having any adverse impact on situations involving competing corporations.

165. In the case of non-horizontal interlocks, it would appear that to be consistent with the principles of the Act, situations that were found to substantially lessen competition should be subject to review. If, as it has been stated, there is an absence of evidence that interlocks have harmed competition in Canada then most non-horizontal interlocks would not be in jeopardy.

166. The Committee must conclude, therefore, that the section would only have application in those rare circumstances where competition was substantially impaired and its main effect would be one of deterrence.

Recommendation 62

That section 31.75 be retained in its present form.

CHAPTER XVII

SPECIALIZATION AGREEMENTS

Principal Representations

167. A substantial number of representations to the Committee from the private sector expressed concern with section 31.76. Most of the concern centered upon two points; first, the permitted period for specialization agreements was said to be too short to encourage effective rationalization within industries and, second, by restricting specialization to "articles", as that word is defined in subsection 31.76(1), the section would exclude the possibility of specialization agreements for new products, services, and non-production matters including research, marketing and development. Further, concern was also expressed as to the fact that the section would not permit specialization on a geographic basis.

168. On the other hand, there were representations to the Committee that expressed the concern that consumers might not be fully protected from the industrial concentration that specialization agreements could create, nor, would all the economic benefits flowing from large scale production be passed on to consumers unless there were sufficient reductions in tariffs to maintain competitive pressures and such tariff reductions were maintained even after the specialization agreements came to an end.

Comments and Recommendations

169. The Committee believes that the time limits proposed in this section are not unreasonable. Agreements may be grant-

ed a life of up to five years, or ten years if there are a series of tariff reductions and any period of less than five years may be extended up to the limit of five years upon application to the Board giving valid reasons for the extension. Since most specialization agreements will arise in the manufacturing sector and since the capital cost allowance on the vast majority of capital equipment employed within this sector is at a rate of twenty per cent or more, a five year limit on specialization agreements should not present a significant impediment to rationalization and re-tooling of production lines. Nevertheless, the Committee is concerned with the lack of clarity in the section respecting the date upon which specialization agreements are considered to come into effect.

Recommendation 63

That the time period for which a specialization agreement is permitted not commence until one party to the agreement has discontinued commercial production of an article which is referred to in that specialization agreement.

Recommendation 64

That in all other respects the time limits contained in the section be retained.

170. With regard to extending the application of specialization agreements to new products, non-production matters and services, the Committee has heard no substantial arguments supporting such an extension. Clearly, the purpose of these agreements is to rationalize existing industries where market forces dictate the restructuring but the industrial structure is such that firms will not change their production processes unless assurances are given that their competitors will do likewise. Thus, there is no need to include new products whose production patterns will be governed by prevailing market forces.

171. Secondly, there appears to be no reason to include services as most service industries are already characterized by vigorous competition and are again susceptible to prevailing market forces. Because of the labour intensive nature of most services, it is doubtful if there are many cost efficiencies to be gained through concentration.

172. Thirdly, although there may be economic efficiencies to be gained through joint non-production matters it would be

difficult as in the case of services, to determine and apply appropriate tariff reductions against industries employing such practices in order to ensure that the economic gains may be passed on to consumers. Also, such joint non-production matters may have undesirable anti-competitive effects within an industry.

173. Finally, with regard to specialization on a geographic basis within Canada, the Committee finds nothing in the section that will prohibit this if it is acceptable to the Board. There is no doubt, however, that the Board will be reluctant to permit such geographic agreements unless the article under consideration is freely traded between provinces and the transportation costs for the article are not high in relation to its value. If regional agreements were to be permitted on any other basis, the consumers of the product in the area concerned would be exposed to potential, adverse price movements resulting from decreased competition. As there are no tariffs within Canada, the Competition Board would have no means available to protect the purchasers.

Recommendation 65

That specialization agreements not be extended beyond the scope of the definition of "article" as presently found in the section.

Recommendation 66

That subsection 31.76(8) be extended to provide that the register of specialization agreements maintained by the Competition Board also contain a description of the type and magnitude of tariff reductions and any other condition relating to the agreements that have been allowed by the Board.

Recommendation 67

That section 4.4 be amended to accord with the foregoing Recommendations.

CHAPTER XVIII

PRICE DIFFERENTIATION

Principal Representations

174. A number of submissions to the Committee questioned the need for this section and suggested that it could well lead to price rigidities and hence have a dampening effect on competition. On the other hand, there were also submissions, mostly on behalf of consumers and smaller businessmen, that commended the section as providing an opportunity to restrict inequitable discounts given large purchasers to the prejudice of the smaller purchaser and in many cases the consumer.

175. More particular comments concerning this section related to the costs that might be incurred in complying with its provisions; to the fact that it should also be applicable to buyers who force discrimination on suppliers; and to the difficulties that would be encountered in justifying differing prices to competing customers. There were also a number of representations to the effect that any provision on price differentiation should be contained in that portion of the Act dealing with criminal offences where the provision on price discrimination (section 34) is found.

Comments and Recommendations

176. The Committee considers the onus that rests on the Competition Policy Advocate under subsection 31.77(1) is a substantial one. As a result, there should not be any tendency on the part of suppliers to narrow justifiable price spreads to ensure compliance. Further, the Committee believes that the section

would tend to assist suppliers resist the efforts of major customers to force them into unjustifiable price differentiation.

177. The Committee does not regard the "reasonable assessment" test in subsection 31.77(2) as burdensome. If a supplier is presently charging differing prices for different quantities, it could reasonably be expected that those prices are based on criteria that relate to his assessment of his business operations. It would not, therefore, appear onerous to require the differing prices to reflect the supplier's "reasonable assessment" of his costs, actual or anticipated. Further, it is to be noted that the supplier's assessment may be based on both the costs of supplying and the costs related to delivery terms and conditions.

178. In considering the representations with respect to section 31.77 together with those pertaining to subsection 34(1)(a), the Committee has concluded that both provisions, in fact, deal with price discrimination. Subsection 34(1)(a) relates to price discrimination where the same quantity is sold or offered for sale whereas section 31.77 deals with price discrimination that arises in situations where different quantities are supplied to competing customers at prices which bear no relationship to the supplier's costs. Having arrived at this conclusion, the Committee finds it difficult in principle to justify terming one practice criminal and the other reviewable. Indeed, the Committee considers that there may be some relationship between the almost complete lack of jurisprudence pertaining to subsection 34(1)(a) and the fact that section 31.77 has been proposed as a reviewable, not a criminal, provision.

Recommendation 68

That subsection 34(1)(a) and associated provisions be removed from Part V of the Act relating to criminal offences and be made part of Section 31.77. (As the Committee makes a Recommendation with respect to the language of subsection 34(1)(a) in Chapter XX of this Report, the reference to subsection 34(1)(a) is to be read in accordance with that Recommendation).

Recommendation 69

That subsection 31.77(2) be amended by deleting the words "is satisfied by that supplier" and replacing those words with "after hearing the supplier, finds".

Recommendation 70

That paragraph (a) of subsection 31.77(1) be amended by adding the words "at the time the article is supplied" thereto so as to achieve symmetry with the language of subsection 34(1)(a).

CHAPTER XIX

COMPETITION BOARD PROCEDURES

Principal Representations

179. Representations to the Committee concerning section 31.78 related to two specific matters: one, that persons other than the party or parties to be directly affected by a hearing should not be given standing before the Board as this could cause serious problems when confidential information was presented to the Board; and two, that those who might have a substantial matter to raise with respect to an application before the Board should not be precluded from doing so by reason of the fact that they would not be directly and "substantially affected" by any such order.

180. Concern was expressed in certain representations to the Committee that subsection 31.8(1.1) should be amended to provide that legal rules of evidence would apply to all matters before the Board.

Comments and Recommendations

181. With respect to the matter of confidentiality, the Committee is of the view that the Board has ample power both on the basis of the language of section 31.78, where an intervenor only has to be afforded a "reasonable opportunity" to be heard, and on the basis of subsections 27(2) and (4) to protect any party against disclosure of "sensitive" information.

182. The Committee concludes that there is merit in the suggestion that persons who may not be directly affected by any order of the Board and who have matters of substance to raise

in respect to a proceeding before the Board have an opportunity to do so. Nevertheless, there must be some procedure available whereby the Board and the parties can be assured that the proceeding will not be unnecessarily protracted or subject to a repetitive series of representations.

Recommendation 71

That section 31.78 be amended to permit the Competition Board to hear representations from persons that will not be directly and "substantially affected" by an order of the Board provided that such persons file with the Board a statement setting forth in reasonable detail a complete list of the matters upon which they wish to be heard at least thirty days prior to the commencement of the proceedings or by such later date as the Board may decide and provided the Board finds that the statement so filed demonstrates that the person seeking to be heard will be making representations on matters significant to the issues before the Board and which otherwise would not, in the Board's opinion, be raised in the same manner in the proceedings.

Recommendation 72

That as a consequential amendment, consideration be given to amending subsection 31.8(2) so that it is clear that the person against whom an order is sought is entitled to cross-examine any witnesses other than those called on his own behalf.

183. The Committee considers that it would be contrary to the civil review concept to formalize the proceedings of the Board. It is to be noted, however, that while the Board is not bound by the legal rules of evidence it is bound to conduct its proceedings so as to ensure fairness. Further, the Committee observes that a virtually identical provision appears in the present *Tax Review Board Act*, S.C. 1970-71-72, c. 11, s.9.

Recommendation 73

That subsection 31.8(1.1) be retained in its present form.

CHAPTER XX

CRIMINAL LAW PROVISIONS

(i) Export Agreements

Principal Representations

184. Certain questions where raised in the submissions to the Committee as to whether subsections 32(4),(5) and (5.1) would in fact encourage the formation of agreements relating to exports. It was suggested that if such agreements are to be encouraged the exemptions provided should be broadened.

185. The Committee's attention was also drawn to paragraphs (a) and (c) of subsection 32(4) and in particular to the fact that paragraph (a) purports to exempt conspiracies, combinations, agreements or arrangements that relate only to "the export of products from Canada" whereas paragraph (d) would provide an exemption only in respect of "any service not referred to in paragraph (b) or (c) (deposits and loans made outside Canada) that is performed outside Canada for a person outside Canada and that is to be paid for by a person outside Canada". Since the word "product" is defined in section 2 of the Act to include an article and a service, an apparent conflict appears to exist between paragraphs (a) and (d) of subsection 32(4).

Comments and Recommendations

186. The Committee is of the view that these subsections should be clarified and broadened so as to further encourage export agreements.

Recommendation 74

That paragraphs (a) and (c) of subsection 32(4) be clarified so that the exemption in respect of services can be readily ascertained.

Recommendation 75

That subsection 32(5.1) be extended to include reference to paragraphs (b) and (c) of subsection 32(5) while at the same time amending the phrase "in the domestic market" in paragraph (d) of subsection 32(5) and in subsection 32(5.1) to read "in a domestic market".

(ii) International Conspiracies

Principal Representations

187. Representations to the Committee expressed concern that Canadian participation in international underwriting agreements could be severely restricted by the provisions of this section with resulting detriment to the Canadian position in international capital markets. Concern was also expressed with regard to the fact that the section contained no test of undueness as found in section 32.

Comments and Recommendations

188. While the Committee is anxious to maintain the Act as one of general application, it is concerned with the effect that section 32.1 might have on certain international underwriting agreements. It would appear to the Committee that rather than amending this section, a reference to section 32.1 should be added to section 4.1. In this manner, only international underwriting agreements that bore a "reasonable relationship to the underwriting of a specific security" would not be subject to the sanctions of section 32.1.

Recommendation 76

That subsection 4.1(1) be amended by inserting therein reference to section 32.1.

189. In view of the uncertainty that has surrounded and continues to surround the meaning of "unduly" as found in section 32, the Committee considers that it would not be in keeping with the desire that the Act contain that degree of certainty that permits understanding and compliance to insert a

test of undueness in section 32.1. The Committee notes that there is, in subsection 32.1(4), a test that would provide a person with an absolute defence to a prosecution under the section in circumstances where that person could demonstrate to a court that he does not account for fifty per cent or more of the production or supply in Canada of the "product" concerned. In the Committee's view this test is to be preferred to that of "unduly".

Recommendation 77

That the phrase "satisfy the Court" in subsection 32.1(4) be deleted and replaced by the word "establish".

(iii) Foreign Directives

Principal Representations, Comments and Recommendations

190. It has been brought to the Committee's attention that this section may not provide an exemption for affiliated corporations. Such an exemption would appear to have been available under that part of the section that is repealed by the Competition Act by reason of the reference to "section 32" contained in subsection 32.1(1) of the repealed provision. In order that the application of section 32.11 be clear, it is the Committee's view that the exemption for affiliated corporations be retained.

Recommendation 78

That a new subsection be added to section 32.11 containing the same language as subsection 32(7).

(iv) Monopoly

191. The Committee's comments and recommendations with regard to the whole subject of monopoly are set forth in Chapter XIII entitled "Monopoly".

(v) Price Discrimination and Predatory Pricing

192. In view of the Committee's Recommendation that subsection 34(1)(a) and associated provisions be transferred from the criminal law provisions of the Act to those dealing with reviewable practices (see: Chapter XVIII) the Committee intends to confine its consideration of this section to an examination of

the language utilized by paragraphs (a), (b) and (c) of subsection 34(1).

Principal Representations

193. Concern was expressed over the use of the words "same ultimate customers" in paragraph (a) of subsection 34(1). It was stated that those words completely ignore the practice of providing discounts in return for "functional services". Further, there was concern expressed as to how the provisions in this paragraph would affect competing customers one of whom was a member of a buying group and the other was not.

194. In respect of paragraph (c) of subsection 34(1), representations were received urging the retention of the word "unreasonably" in preference to the word "abnormally". However, other representations commended this proposed change in language.

Comments and Recommendations

195. The Committee is concerned with the effects that the language of paragraph (a) of subsection 34(1) could have on the distribution of articles. On the one hand, the language should permit a pure wholesaler to obtain the same price concessions from a manufacturer on purchases of similar quantity as are available to a purchaser that is an integrated wholesaler-retailer thereby increasing price competition at the retail level. On the other hand, the Committee would be concerned lest certain manufacturers who are presently selling to both retailers (whether integrated or not) and wholesalers, might not be inclined to change their distribution practices and either sell solely to retailers or solely to wholesalers. Any such change in distribution methods could well serve to limit not foster price competition.

196. With respect to the extension of the language to buying groups, the Committee perceives certain problems that lie not with the principle of the extension but with the language used. It would seem to the Committee that that language would not only foster buying groups but also place a premium on being a member of such a group. For example, a purchaser who was not a member of a buying group could be placed at a competitive disadvantage vis-à-vis a competitor who was a member of such a group notwithstanding the fact that both purchased a similar quantity of product at the same point in time. The

member of the buying group would obtain a price advantage solely by reason of the fact that other members of that group purchased the same product. The Committee questions whether such a result is either equitable or in the interests of the economy as a whole.

Recommendation 79

That paragraph (a) of subsection 34(1) be amended so as to achieve its objectives in a manner which will be least disruptive of present distribution patterns and which will not create inequities between members of buying groups and non-group competitors.

197. In the Committee's view the replacement of the word "unreasonably" by the word "abnormally" in paragraph (c) of subsection 34(1) substitutes a subjective test with an objective one and hence is more in keeping with the search for clarity and certainty in the law. In the Committee's view the requirements of the paragraph, namely, that the "abnormally" low price must be part of a policy either designed to or having the effect or tendency of substantially lessening competition, should protect sales of products at abnormal prices when such prices are the result of bona fide business decisions that reflect only short term or cyclical factors.

Recommendation 80

That paragraph (b) and (c) of subsection 34(1) be retained in Part V of the Act without amendment.

(vi) Delivered Pricing

Principal Representations

198. While certain representations to the Committee suggested that section 38.1 should be transferred and placed with those matters reviewable by the Competition Board, others suggested that the section was not rigorous enough.

199. Concern was also expressed as to whether the section would cause undue hardship to suppliers with limited delivery facilities in particular localities.

200. There were also representations urging the addition of the words "like quantity and quality" to the provisions of subsection 38.1(1).

Comments and Recommendations

201. The Committee notes that the section does not prohibit delivered or base point pricing but simply provides a purchaser of articles with the opportunity to take delivery at a point other than where he may be located, in accordance with the same terms and conditions of sale and delivery prevailing at that point, if he considers it advantageous to do so. An offence only arises when a supplier refuses to allow a purchaser that option or refuses to deal with a potential customer because that customer insists on taking delivery at a particular location where the supplier is already making delivery of the article. Therefore it is apparent that the section will not require a supplier to establish any new delivery facilities but simply permit the use of existing facilities by other customers who consider it advantageous to do so.

202. With respect to the concept of "like quantity and quality", the Committee considers that this concept is embodied in the phrase "same terms and conditions of sale and delivery", as that phrase is found in subsection 38.1(1).

203. The Committee would observe, however, that section 38.1 does not distinguish between domestic and export markets. In view of the provisions of subsections 32(4), (5) and (5.1), the Committee considers that the section should be limited to situations only affecting Canadian customers.

204. In view of the intent of the section, the Committee can see no real merit in recommending that the section be transferred to the jurisdiction of the Competition Board. The section as it stands does not require any substantive analysis or consideration of economic factors and hence would seem inappropriate for the Board to deal with.

Recommendation 81

That subsection 38.1(1) be amended by adding the words "in Canada" after the word "customers" in the second and sixth lines of subsection 38.1(1).

Recommendation 82

That subsection 38.1(2) be amended by adding the words "in Canada" after the word "customer" in the first and second lines and after the word "customer" in the first and second lines and after the word "customers" in the last of that subsection.

CHAPTER XXI

CLASS ACTIONS

Principal Representations

205. While a substantial number of representations to the Committee supported the introduction of class action provisions into Canadian competition law, many were fearful that such actions would become unmanageable. Concern was also expressed as to the specific provisions governing costs. Some stated that those provisions were not even-handed and others sought assurance that they would not permit the abuses said to be rampant in respect to class action proceedings in the United States. Other more specific representations were addressed to whether the scope of traditional class action jurisprudence in Canada should be extended and whether the proposed notice provisions were reasonable.

Comments and Recommendations

206. In the Committee's view a class action is really a bringing together for a single determination the claims of a number of persons against the same party where such claims essentially raise an identical question. What then justifies the class action is the interest of all in having a common question determined in one proceeding against the defendant. To require a complete commonality amongst members of a class would not only negate the rationale of the modern class action proceeding but also place a premium in the hands of the wrongdoer who by varying the facts associated with his wrongdoing could avoid any appreciable exposure to such an action.

207. In considering the impact of a class action, it is important to assess the effect such an action would have on a defendant.

208. While private antitrust actions are brought in the United States for treble damages, the defendant is permitted to deduct any judgment or damage settlement for income tax purposes. The best information available to the Committee is that it is the view of Revenue Canada officials that such a deduction would not be available in Canada. Therefore as far as the Committee can determine, the American defendant and the Canadian defendant would be in virtually similar after-tax positions (assuming identical class actions) notwithstanding that the American defendant had been adjudged liable for three times the amount found against the Canadian defendant. Such a result would obviously impose a substantial element of deterrence on the businessman. If, however, the tax consequences of a class action judgment were such that the judgment was considered a deductible expense, the businessman might be tempted to risk such an action if all he would lose was his "illegal" profit.

209. The Committee is vitally interested in assuring, as far as may be possible, that class actions in Canada avoid some of the more negative aspects perceived in the American experience while at the same time allowing such actions to function as instruments of relief for a number of persons who, by reason of the small size of their claims, could not have sued by themselves. For this reason, the Committee has recommended amendments to section 39.12 which should provide further assurance against abuse.

Recommendation 83

That subsection 39.13(2) be amended by deleting the word "finds" and replacing it with the words "is satisfied".

Recommendation 84

That subsection 39.12(2) be further amended in paragraph (e) by inserting the word "substantially" before the word "superior".

210. In respect to costs, the Committee is of the view that the provisions of section 39.2 reflect a reasonable balance. However, it would be salutary if a defendant in a class action for damages was able to make a payment into court, especially in

the case of an action based on substantially the same facts as a prior conviction under the Act, and recover his solicitor and client costs thereafter should the class not be awarded judgment in excess of the payment into court. Furthermore, the Committee is concerned that contingency fees not become a feature of class actions whether or not they are permitted in provincial jurisdictions.

Recommendation 85

That section 39.2 be amended so as to provide that where a defendant has made a payment into court and the class is not subsequently awarded judgment in excess of such payment that the defendant recover his reasonable solicitor and client costs incurred after the date of payment into court and that such costs be deducted from the amount of the judgment awarded in priority to any other charge thereon.

Recommendation 86

That a provision be inserted in Part IV.I of the Act to provide that notwithstanding any other rule or regulation no arrangement as to any form of contingency fee is applicable to a class action commenced pursuant to the provisions of the *Competition Act* and that section 39.23 be amended accordingly.

211. The Committee further expresses concern at the negative option technique pertaining to the provisions as to notice to class members. It seems ironic when concern is expressed and indeed laws are passed to prohibit the sending of unsolicited credit cards, books and records that the same type of procedure is put forth in provisions dealing with class actions. While the Committee is cognizant of the problems and costs engendered by compulsory notification, it considers that some procedure can be devised whereby a class representative can demonstrate that there is some interest among members of the class in the action particularly if the reasonable costs incurred in doing so are treated in the same manner as "solicitor and client" costs under subsection 39.2(2).

Recommendation 87

That an amendment requiring the class representative to demonstrate, prior to obtaining an order to proceed under

section 39.12, that a representative cross-section of the class is interested in having the action proceed.

Recommendation 88

That an amendment be made to subsection 39.2(2) providing that the reasonable costs incurred by the member or members of the class that commenced the action in demonstrating that a representative cross-section of the class was interested in having the action proceed be treated in the same manner as solicitor and client costs under that subsection.

Recommendation 89

That further consideration be given as to whether the provisions of sections 45, 45.1, 45.2 and 45.3 should be applicable to class actions.

CHAPTER XXII

SUBSTITUTE ACTIONS

Principal Representations

212. Many representations to the Committee expressed concern that the substitute action should not be used as a means of deterrence by the state. These representations saw, in the substitute action, the distinct possibility of mixing private civil actions and public enforcement proceedings which would be unsound in principle. Furthermore, while an award of damages in a substitute action might be justified on the basis that the defendant had caused damage to others, such justification would not be applicable where the amount of damages was to be paid into the Consolidated Revenue Fund and never used to compensate those that had been injured.

Comments and Recommendations

213. The Committee notes that a substitute action can only arise if: first, there has been a violation of a criminal provision of the Act or an order made by the Competition Board; second, a class action has been commenced but has been refused certification by the court solely on the basis that the cost of administering it would not be warranted in view of the fact that there are not a "sufficient number of members of the class who are likely to have suffered a significant quantum of loss or damage" (subsection 39.12(3)(b)); and third, the substitute action is commenced within the time periods set forth in paragraphs (a) and (b) of subsection 39.14(2).

214. Since the economic burden of most violations of the criminal provisions of the Act and breaches of orders made by the Competition Board will be borne by the consumer, it would appear contrary to the most elementary conception of justice and public policy to require the consumer to bear such economic burden simply because the individual consumer's loss was not significant. To find otherwise would simply mean that if a violation of a criminal provision of the Act resulted in an overcharge of 50¢ on a relatively low-priced item, and 1 million such items were sold, the aggregate impact on consumers of some $500,-000.00 could not be recovered in any practical manner. The wrongdoer would thus be enabled to profit by his wrongdoing at the expense of the victim. No criminal prosecution would redress such wrong even if it lead to a substantial fine.

215. Pursuit of this logic results in the concern by the Committee that the proposed substitute action procedure would not serve to redress this situation. As a result, the Committee is of the opinion that while the concept of the substitute action is sound in principle the provisions of the Act do not serve to permit it to achieve the fundamental objective of redress.

216. One further observation should be made as to the matter of uncertainty which some have felt would arise should a substitute action be permitted; particularly as related to the matter of damages. To state this concern more succinctly is to answer it: "Who should bear the risk of the uncertainty? The wrongdoer, so found, or the consumer?"

Recommendation 90

That section 39.14 be amended to provide that, in addition to the criteria already stated therein, the Competition Policy Advocate not be enabled to commence a substitute action unless the court is satisfied, after hearing all parties, that should judgment be awarded to the Competition Policy Advocate on behalf of the class the court can implement procedures, by means of orders or the exercise of its other powers, directed to any or all of the parties to the action, whereby the amount of such judgment may reasonably be expected to become available to some or all of the members of the class.

Recommendation 91

That no further amendment be made to the provisions concerning substitute actions.

217. The Committee notes that if its Recommendations with respect to section 39.12 are adopted, particularly as to requiring some type of positive opting in by a number of class members, the concern that the Competition Policy Advocate could somehow use the substitute action as an alternative means of enforcing the Act would be blunted.

CHAPTER XXIII

OTHER AREAS OF CONCERN

Recovery of Damages

218. The Committee notes that section 31.1 of the *Competition Act* permits any person who has "suffered loss or damage as a result of" conduct contrary to a criminal provision of that Act or the breach of an order of the Competition Board to, amongst other things, sue for and recover such loss or damage from the person who engaged in the conduct or failed to comply with the Board order. This section was introduced into Canadian competition law with the Stage I amendments that came into force in 1976. Part V.I of the *Competition Act* would extend the right granted by section 31.1 to classes of persons.

219. The object of section 31.1 is to provide a person with the ability to obtain compensation for the loss or damage he has suffered. The law recognizes that the elements of damage can be placed under two main heads; pecuniary and non-pecuniary loss. The former encompasses all financial and material loss incurred while the latter comprises all losses which do not represent an impingement upon a person's financial or material assets.

220. Pecuniary loss is itself susceptible to division into two heads; normal and consequential loss. The normal loss is that loss which every person in a like situation will suffer whereas the consequential loss is the loss which is special to the circumstances of the particular person.

221. To award damages so as to place a person, as far as money can do, in the position he would have been had there

been no conduct contrary to the *Competition Act* or no breach of an order of the Competition Board would, in the Committee's view, place too great a burden upon defendants. Some limits must be placed upon liability to prevent indemnity for losses that are improbable, remote and unpredictable. In this regard, it is suggested that section 31.91 limit recovery to losses of a kind which the defendant ought to have realized were not an unlikely result of his conduct.

Recommendation 92

That subsection 31.1(1) of the *Competition Act* be amended so as to provide that the only loss or damage that may be recovered is loss or damage which the person who engaged in conduct contrary to a criminal provision of the Act or who failed to comply with an order of the Competition Board ought to have realized was likely to result from such conduct or failure.

Constitutionality

222. A substantial number of representations to the Committee questioned the constitutional validity of the *Competition Act*. Many such representations urged the Committee to adopt the view that the Act should be subject to a constitutional reference before being promulgated.

223. The provisions of the *Competition Act* are extensive and largely interwoven. The factual situations that could arise under those provisions are virtually unlimited. To put a reference composed of general and hypothetical questions would place the Supreme Court of Canada in a position of having to decide constitutional issues without knowing the precise effects such decisions would likely to have. The precedents which flow from such "advisory opinions" have been characterized as "ghosts that slay".

224. On the other hand, to present a reference with a factual underpinning, with market data and other information necessary to permit the Court to consider the multi-facets of the Act and its effects would undoubtedly be equally unsatisfactory. Accordingly, it is the Committee's view, that a reference for determining whether the *Competition Act* is competent, in all its aspects, under the *British North America Act* is of doubtful utility. The courts should be left to rule on any constitutional

issues in actual cases of controversy between contending parties.

Duty of Federal Boards—Definition of "Merger"

225. While "merger" is specifically defined in section 31.71 as well as in section 4.3 (by reference to section 31.71), no definition of merger is contained in subsection 4.6(1)(c). To provide consistency and clarity the duty placed on federal boards, commissions or other agencies with respect to the regulation of mergers should make reference to the definition of "merger" as contained in section 31.71.

Recommendation 93

That subsection 4.6(1)(c) be amended so as to provide that reference be contained therein to the definition of "merger" as found in section 31.71.

Board Recommendations Respecting Duties and Customs

226. Concern has been expressed that the Competition Board has the power under various sections of the Act to recommend the reduction in duties of customs or other trade barriers. It is not clear that in making such recommendations the Board must take into account possible adverse effects on others in the same market or species of business.

Recommendation 94

That a new section be added to Part IV.1 of the Act to require the Competition Board to take into account any likely adverse effects that may arise in any market or species of business by reason of any recommendation that the Board is considering in respect of the reduction in duties of customs or other trade barriers.

CHAPTER XXIV

SUMMARY OF RECOMMENDATIONS

COMMITTEE PROCEDURES

Recommendation 1

That in order to provide for a greater degree of public and Parliamentary contribution to proposed legislation, the Government more widely use, inter alia the procedure of subject matter references to committees.

Recommendation 2

That in order to minimize the delay in the distribution of briefs from the public to committee members, changes be made in the translation services available to committees so that translation work will be expedited.

Recommendation 3

That in order to facilitate a more meaningful examination of public policy, committees be more routinely provided with sufficient expert and research staff to facilitate Committees and their members in their studies.

A NEW APPROACH

Recommendation 4

That the *Competition Act* be amended to provide that on its own volition, upon the written request of the Minister of Consumer and Corporate Affairs or the written request of any other person the Competition Board may issue interpretive rulings in respect to any matter concerning

which the Board could make an order or recommendation under the Act.

Recommendation 5

That the *Competition Act* provide that both the name of the person submitting a request for the issuance of an interpretive ruling and the content of that request be held in confidence and not be disclosed to anyone by the Competition Board.

Recommendation 6

That the *Competition Act* further provide that the Competition Board, prior to issuing an interpretive ruling, must make public a draft of such ruling and provide all persons with ninety days within which to make representations thereon and that following receipt of such representations the Board may issue the final version of the ruling and cause same to be published in the Canada Gazette.

Recommendation 7

That the *Competition Act* also provide that if the Competition Board considers it necessary to rescind or revise any interpretive ruling it will follow the same procedure as required for the issuance of a new ruling in bringing about such rescission or revision.

Recommendation 8

That the *Competition Act* further provide that the Competition Board shall not make any order or recommendation against any person who has relied on the provisions of a rescinded or revised interpretive ruling until such person has had a reasonable period of time to comply with any revised ruling or otherwise adjust his position or conduct.

Recommendation 9

That the *Competition Act* provide that for a period of three years after its coming into force no application may be brought under Part IV.I of the Act by the Competition Policy Advocate unless the Minister of Consumer and

Corporate Affairs has given his prior, written consent thereto.

Recommendation 10

That section 31.91 of the *Competition Act* be amended to provide that the Competition Policy Advocate shall, before bringing an *ex parte* application before a member of the Competition Board, serve upon each person against whom the Competition Policy Advocate is seeking an order or recommendation from the Board a copy of the application and all supporting documentation to be used on the *ex parte* application.

Recommendation 11

That the *Competition Act* further provide that if the Competition Policy Advocate proves a *prima facie* case pursuant to subsection 31.91(1) the person or persons who received a copy of the application shall be notified accordingly and given thirty days from the date of notification to conclude a proposed consent order with the Competition Policy Advocate or, alternatively, file with the Competition Board a written response to the application brought by the Competition Policy Advocate, including any alternate proposed order.

Recommendation 12

That the *Competition Act* also provide that, if no proposed consent order is negotiated, all materials utilized by the Competition Policy Advocate in support of the application under subsection 31.91(1) and any written response thereto be admissible in any subsequent proceedings before the Competition Board in relation to the same matter.

Recommendation 13

That the *Competition Act* further provide that if a proposed consent order is negotiated the same, together with a clear and concise description thereof and an "economic impact statement" setting forth a brief statement of the costs and benefits of the proposed order, both such latter documents to be prepared by the Competition Policy Advocate, be filed forthwith with the Competition Board and be available to the public.

Recommendation 14

That the *Competition Act* provide that within sixty days of the filing with the Competition Board of the proposed consent order, the description thereof and the "economic impact statement" that any person be able to file with the Board written comments with respect thereto and further that any person that would be substantially affected by the proposed order as a consumer, producer or otherwise be able to file a written "application for disallowance" setting forth the manner in which that person would be substantially affected and the costs and adverse effects such proposed consent order would have on that person as a consumer, producer or otherwise.

Recommendation 15

That the *Competition Act* also provide that if, upon the expiry of sixty days following the filing of the proposed consent order, no written comments or "application for disallowance" has been filed, the proposed consent order becomes a final consent order.

Recommendation 16

That the *Competition Act* further provide that if, upon the expiry of sixty days following the filing of the proposed consent order, any written comments or "application for disallowance" have been filed with the Competition Board, the member of that Board who heard the application under subsection 31.91(1) be required to review all materials filed and give written reasons within thirty days for either approving the terms of the proposed order or disallowing it.

Recommendation 17

That the *Competition Act* further provide that if a proposed order is approved by a member of the Competition Board that it be made a final consent order whereas if it is disallowed the Competition Policy Advocate be required to immediately proceed with the matter before the Competition Board.

Recommendation 18

That the *Competition Act* further provide that in all cases where a proposed consent order is disallowed by a

member of the Competition Board that all materials filed in respect to such proposed order be admissible in proceedings before the Board in relation to that same matter.

Recommendation 19

That the *Competition Act* further provide that in all cases where the Competition Policy Advocate and the person or persons who received a copy of the application made under section 31.91 have filed materials with the Competition Board but no proposed consent order has been negotiated or a proposed consent order has been disallowed by a member of the Board, that the Competition Board shall review with the parties all documents filed with it and seek to obtain a resolution of all or some of the issues before it before proceeding to hear the application.

COLLECTIVE BARGAINING ACTIVITIES

Recommendation 20

That subsection 4(1)(c) be amended so that it is applicable to contracts, agreements or arrangements pertaining to collective bargaining entered into by employers in different trades, industries or professions.

Recommendation 21

That the limitations found in subsection 4(2) relating to "selective" boycotts be retained.

REGULATED CONDUCT

Recommendation 22

That section 4.5 be revised to clearly indicate that all conduct in respect of the marketing of any agricultural or horticultural product would be subject to the exemption therein so long as such conduct was, in fact, attentively supervised or controlled by a government appointed "public agency".

Recommendation 23

That section 4.5 be further revised to clearly indicate that all conduct, other than in respect of the marketing of agricultural or horticultural products, be subject to the exemption provided in the section so long as such conduct is required or authorized by a government appointed

"public agency" that is clearly entitled to control such conduct and is, in fact, attentively doing so.

Recommendation 24

That subsection 4.5(1) be amended to include reference to section 38.1 (systematic delivered pricing).

Recommendation 25

That subsection 4.5(2)(c) be deleted from the Act.

Recommendation 26

That section 3.3 of Bill C-33, *An Act to amend the National Transportation Act and the Department of Transport Act*, be transferred, in its present form, to the *Competition Act*.

Recommendation 27

That subsection 4.6(2) be clarified by providing that the Competition Policy Advocate must appeal any decision or order arising out of proceedings concerning which he has intervened pursuant to section 27.1 within 10 days of the time that decision or order was first communicated to him.

Recommendation 28

That section 27.1 of the *Competition Act* be amended to provide that the Competition Policy Advocate may only intervene in any matter before a federal board, commission or other agency when such board, commission or other agency is, in fact, conducting proceedings in respect to any matter before it.

COMPETITION POLICY ADVOCATE

Recommendation 29

That there be a right of appeal for both the Competition Policy Advocate and the party concerned from any order respecting the question of privilege made pursuant to subsection 10.1(2).

Recommendation 30

That subsection 10.1(1) be amended by replacing the word "may" with the word "shall".

Recommendation 31

That section 10.2 be amended so as to require the Competition Policy Advocate to reimburse all reasonable expenses incurred by any person in providing a print-out or other copy of computer data.

Recommendation 32

That a provision be added to the Act prohibiting the Competition Policy Advocate from retaining possession of any book, paper, record, document or "thing", essential to the business activities of the owner of or any person from whom such item was obtained, without providing that person with a copy of such item or making other mutually satisfactory arrangements in respect thereto.

Recommendation 33

That a further provision be added to the Act whereby in the event of any dispute as to what is "essential" to the operation of a person's business, the impossibility or impracticability of making copies or other arrangements, the courts, upon an application by the owner of or any person from whom any book, paper, record, document or "thing" was obtained, can order the return of such item and permit the utilization thereof on such terms as will preserve both the Competition Policy Advocate's right to continued examination of such item and his ability to introduce it in evidence in the same state as it was found in any subsequent proceedings under the Act.

Recommendation 34

That section 31.91 be retained in the Act but that the onus under subsection 31.91(1) be strengthened by providing that there must be a "strong" *prima facie* case demonstrated before the Competition Policy Advocate can proceed before the Competition Board.

Recommendation 35

That subsection 27(3) be amended to make it clear that no evidence, information, document or thing obtained pursuant to the Act can be disclosed by the Competition

Policy Advocate except for the purpose of exercising his powers and performing his duties under the Act.

COMPETITION BOARD

Recommendation 36

That, in view of the foregoing comments, the *Competition Act* be amended to provide that persons appointed as members of the *Competition Board* have practical knowledge and training in such fields as commerce (including business and labour), finance, law, economics or public affairs.

Recommendation 37

That in the case of an order by the Competition Board

(i) directing the dissolution of a merger or the disposal of assets pursuant to section 31.71;

(ii) directing the dissolution of a "monopoly", a reduction in the degree of monopoly or the divestiture of part of a business or any of the assets thereof pursuant to section 31.72;

(iii) directing the dissolution of a "monopoly", a reduction in the degree of monopoly or the divestiture of part of a business or any of the assets thereof pursuant to section 31.73; or

(iv) directing the granting of patent, trade mark, copyright or industrial design licence or the revocation of a patent or expungement of a trade mark, copyright or industrial design pursuant to section 31.74

the person against whom such an order is made have an absolute right of appeal on questions of both fact and law to the Federal Court of Appeal. If the Federal Court of Appeal allows such appeal, it should not be permitted to substitute its decision for that of the Board but should only be permitted to direct the matter back to the Competition Board for further consideration and determination, either generally or in respect of a specified matter. In so directing the matter back, the Court of Appeal should be required to advise the Competition Board of its reasons and to give it such directions as are considered appropriate to the reconsideration.

Recommendation 38

That the Act be amended to provide that any rule proposed by the Competition Board pursuant to section 16.3 be published in the Canada Gazette and a reasonable opportunity afforded to interested persons to make representations with respect thereto.

Recommendation 39

That subsection 31.8(1.3) be amended so as to require the Competition Board to give written reasons for each of its decisions.

SPECIAL REMEDIES AND PROCEDURES

Recommendation 40

That subsection 29(3) empowering the Competition Board to grant *ex parte* interim injunctions be deleted from the Act with necessary consequential changes to subsections 29(2) and (5).

Recommendation 41

That the bases upon which the Competition Board and the courts are permitted to grant interim injunctions as set out in subsections 29(1) and 29.1(1) be amended to reflect the principles followed by the Federal Court of Canada in granting such injunctions which principles are referred to in subsection 30(8).

Recommendation 42

That the Act also be amended to provide that any written comment by a person whose conduct is the subject of an enquiry be made part of any documentation or information relating thereto that is transmitted to the Governor-in-Council under Section 28 or supplied to the government of any other country pursuant to Section 47.1.

Recommendation 43

That the Act be amended to provide that when oral evidence is given during an inquiry the person or persons whose conduct is the subject of that inquiry be provided by the Competition Policy Advocate with a brief statement of the matters to which that inquiry relates and be afforded an opportunity to comment thereon in writing prior to any further action or proceedings being taken

under the Act in respect to the subject matter of that inquiry.

Recommendation 44

That subsection 30(4), which denies any right of appeal from an order made under subsection 30(2), be deleted from the Act.

AGREEMENTS RESTRICTING IMPORTS OR EXPORTS

Recommendation 45

That section 31.61 be amended so as to apply to "persons".

Recommendation 46

That subsection 31.61(2) be amended by deleting the words "in Canada" and substituting therefor the words "in a Canadian market".

MERGERS

Recommendation 47

That the definition of "merger" in subsection 31.71(1) be amended so as to limit its potential scope to situations where there is some type of union or combination of two businesses. It is suggested that this might be achieved by replacing the words "or otherwise" with the words " or other similar manner".

Recommendation 48

That the position of joint ventures under the Act be specifically addressed either in section 31.71 or elsewhere in the Act so as to clarify the application of section 31.71 and other relevant provisions thereto.

Recommendation 49

That the list of factors set forth in subsection 31.71(4) be expanded to include a new factor giving the Board discretion to take into account the nature, extent and timing of the transmission of the benefits of any efficiency gains to society.

Recommendation 50

That subsection 31.71(5) be amended so as to permit the Board to allow a merger on the basis of a less onerous

test than that presently proposed when the parties adduce evidence that it will bring about substantial gains in efficiency. In this regard and for purposes of symmetry, consideration should be given to replacing the words "where it is satisfied by the parties" with the words "where, after hearing the parties, it finds that".

Recommendation 51

That subsections 31.71(10) and (11) be revised so as to provide that an "investment" under the *Foreign Investment Review Act* which is also a "merger" for purposes of the *Competition Act* shall not be recommended to the Governor in Council

> **(a) unless notice of such investment has been given to the Competition Policy Advocate and he has failed to indicate within forty-five days after receipt of such notice that he has brought or that he shall, within ninety days after receipt of such notice, bring proceedings in respect to such investment pursuant to section 31.71 of the *Competition Act*; or**
>
> **(b) if proceedings are brought under section 31.71, such proceedings are final and there is no order outstanding under subsection 31.71(3).**

Recommendation 52

That consideration be given to including in the *Competition Act* procedures that would allow for the advance clearance of mergers. As indicated previously, the Committee is of the view that such procedures would provide

> **(i) for compulsory pre-notification of very large mergers involving the acquisition of a corporation with total assets or annual sales of $500,000 or more by a corporation having total assets or annual sales of $9 million or more, and**
>
> **(ii) for the issuance, at the discretion of the Competition Policy Advocate, within 30 days of receipt of the pre-notification, or such other period as many be agreed upon by the parties and the Competition Policy Advocate, of a binding certificate of compliance.**

Recommendation 53

That a new subsection be included in section 31.71 providing that no application may be brought under the section after the earlier of a period expiring six months after the fact of the merger has come to the attention of the Competition Policy Advocate or after that fact has been published in a newspaper or periodical of general circulation.

MONOPOLY

Recommendation 54

That both sections 31.72 and 33 of the Act be retained.

Recommendation 55

That no amendment be made to subsection 31.72(5).

Recommendation 56

That subsection 31.72(2)(a)(v) be amended to clearly indicate that it relates only to activity of the same type as described in the preceding four paragraphs numbered (i) to (iv) inclusive.

Recommendation 57

That subsection 31.72(4) be amended in accordance with the Committee's Recommendation in respect to subsection 31.71(5).

JOINT MONOPOLIZATION

Recommendation 58

That subsection 31.73(2)(f) be amended to clearly indicate that it relates only to activity of the same type as described in the preceding paragraphs (a) to (d) inclusive.

Recommendation 59

That subsection 31.73(5) be amended in accordance with the Committee's Recommendation in respect to subsection 31.71(5).

INTELLECTUAL PROPERTY

Recommendation 60

That the provision in the *Competition Act* permitting the review of industrial property rights under circumstances

which create exclusionary or anti-competitive effects be retained.

Recommendation 61

That section 31.74 be redrafted so as to provide that:

(i) no application could be brought: unless an industrial property right was being exercised in a manner that was not clearly permitted by another provision of the *Competition Act*; or unless an industrial property right was being exercised in a manner not authorized by the enactment conferring or authorizing the right or by the common law, if any, pertaining to such right;

(ii) no order be made in respect to an industrial property right by the Competition Board unless the exercise of such right is or is likely to lessen competition substantially; and

(iii) no order be made by the Competition Board expunging the registration of a trade mark or requiring the compulsory licencing of a trade mark or having either of those effects.

INTERLOCKING MANAGEMENT

Recommendation 62

That section 31.75 be retained in its present form.

SPECIALIZATION AGREEMENTS

Recommendation 63

That the time period for which a specialization agreement is permitted not commence until one party to the agreement has discontinued commercial production of an article which is referred to in that specialization agreement.

Recommendation 64

That in all other respects the time limits contained in the section be retained.

Recommendation 65

That specialization agreements not be extended beyond the scope of the definition of "article" as presently found in the section.

Recommendation 66

That subsection 31.76(8) be extended to provide that the register of specialization agreements maintained by the Competition Board also contain a description of the type and magnitude of tariff reductions and any other condition relating to the agreements that have been allowed by the Board.

Recommendation 67

That section 4.4 be amended to accord with the foregoing Recommendations.

PRICE DIFFERENTIATION

Recommendation 68

That subsection 34(1)(a) and associated provisions be removed from Part V of the Act relating to criminal offences and be made part of Section 31.77. (As the Committee makes a Recommendation with respect to the language of subsection 34(1)(a) in Chapter XX of this Report, the reference to subsection 34(1)(a) is to be read in accordance with that Recommendation).

Recommendation 69

That subsection 31.77(2) be amended by deleting the words "is satisfied by that supplier" and replacing those words with "after hearing the supplier, finds".

Recommendation 70

That paragraph (a) of subsection 31.77(1) be amended by adding the words "at the time the article is supplied" thereto so as to achieve symmetry with the language of subsection 34(1)(a).

COMPETITION BOARD PROCEDURES

Recommendation 71

That section 31.78 be amended to permit the Competition Board to hear representations from persons that will not be directly and "substantially affected" by an order of the Board provided that such persons file with the Board a statement setting forth in reasonable detail a complete list of the matters upon which they wish to be heard at least thirty days prior to the commencement of the proceedings or by such later date as the Board may decide

and provided the Board finds that the statement so filed demonstrates that the person seeking to be heard will be making representations on matters significant to the issues before the Board and which otherwise would not, in the Board's opinion, be raised in the same manner in the proceedings.

Recommendation 72

That as a consequential amendment, consideration be given to amending subsection 31.8(2) so that it is clear that the person against whom an order is sought is entitled to cross-examine any witnesses other than those called on his own behalf.

Recommendation 73

That subsection 31.8(1.1) be retained in its present form.

CRIMINAL LAW PROVISIONS

Recommendation 74

That paragraphs (a) and (c) of subsection 32(4) be clarified so that the exemption in respect of services can be readily ascertained.

Recommendation 75

That subsection 32(5.1) be extended to include reference to paragraphs (b) and (c) of subsection 32(5) while at the same time amending the phrase "in the domestic market" in paragraph (d) of subsection 32(5) and in subsection 32(5.1) to read "in a domestic market".

Recommendation 76

That subsection 4.1(1) be amended by inserting therein reference to section 32.1.

Recommendation 77

That the phrase "satisfy the Court" in subsection 32.1(4) be deleted and replaced by the word "establish".

Recommendation 78

That a new subsection be added to section 32.11 containing the same language as subsection 32(7).

Recommendation 79

That paragraph (a) of subsection 34(1) be amended so as to achieve its objectives in a manner which will be least disruptive of present distribution patterns and which will not create inequities between members of buying groups and non-group competitors.

Recommendation 80

That paragraph (b) and (c) of subsection 34(1) be retained in Part V of the Act without amendment.

Recommendation 81

That subsection 38.1(1) be amended by adding the words "in Canada" after the word "customers" in the second and sixth lines of subsection 38.1(1).

Recommendation 82

That subsection 38.1(2) be amended by adding the words "in Canada" after the word "customer" in the first and second lines and after the word "customer" in the first and second lines and after the word "customers" in the last of that subsection.

CLASS ACTIONS

Recommendation 83

That subsection 39.13(2) be amended by deleting the word "finds" and replacing it with the words "is satisfied".

Recommendation 84

That subsection 39.12(2) be further amended in paragraph (e) by inserting the word "substantially" before the word "superior".

Recommendation 85

That section 39.2 be amended so as to provide that where a defendant has made a payment into court and the class is not subsequently awarded judgment in excess of such payment that the defendant recover his reasonable solicitor and client costs incurred after the date of payment into court and that such costs be deducted from the amount of the judgment awarded in priority to any other charge thereon.

Recommendation 86

That a provision be inserted in Part IV.I of the Act to provide that notwithstanding any other rule or regulation no arrangement as to any form of contingency fee is applicable to a class action commenced pursuant to the provisions of the *Competition Act* and that section 39.23 be amended accordingly.

Recommendation 87

That an amendment requiring the class representative to demonstrate, prior to obtaining an order to proceed under section 39.12, that a representative cross-section of the class is interested in having the action proceed.

Recommendation 88

That an amendment be made to subsection 39.2(2) providing that the reasonable costs incurred by the member or members of the class that commenced the action in demonstrating that a representative cross-section of the class was interested in having the action proceed be treated in the same manner as solicitor and client costs under that subsection.

Recommendation 89

That further consideration be given as to whether the provisions of sections 45, 45.1, 45.2 and 45.3 should be applicable to class actions.

SUBSTITUTE ACTIONS

Recommendation 90

That section 39.14 be amended to provide that, in addition to the criteria already stated therein, the Competition Policy Advocate not be enabled to commence a substitute action unless the court is satisfied, after hearing all parties, that should judgment be awarded to the Competition Policy Advocate on behalf of the class the court can implement procedures, by means of orders or the exercise of its other powers, directed to any or all of the parties to the action, whereby the amount of such judgment may reasonably be expected to become available to some or all of the members of the class.

Recommendation 91

That no further amendment be made to the provisions concerning substitute actions.

OTHER AREAS OF CONCERN

Recommendation 92

That subsection 31.1(1) of the *Competition Act* be amended so as to provide that the only loss or damage that may be recovered is loss or damage which the person who engaged in conduct contrary to a criminal provision of the Act or who failed to comply with an order of the Competition Board ought to have realized was likely to result from such conduct or failure.

Recommendation 93

That subsection 4.6(1)(c) be amended so as to provide that reference be contained therein to the definition of "merger" as found in section 31.71.

Recommendation 94

That a new section be added to Part IV.1 of the Act to require the Competition Board to take into account any likely adverse effects that may arise in any market or species of business by reason of any recommendation that the Board is considering in respect of the reduction in duties of customs or other trade barriers.

APPENDIX "A"

List of Witnesses who appeared before the Committee on the Subject-matter of Bill C-42

	Issue
ORGANIZATIONS	
Thursday, June 2, 1977	
From The Canadian Federation of Agriculture:	50
Mr. Charles G. Munro, President.	
Mr. David Kirk, Executive Secretary.	
Mr. François Lemieux.	
From The Canadian Manufacturers' Association:	50
Mr. T.B.O. McKeag, Q.C., Chairman, CMA Subcommittee on Competition Policy, General Counsel, Shell Canada Limited.	
Mr. G.C. Hughes, Director, Legislation, Taxation and Technical Group CMA.	
Mr. Frank Brady, Director and Vice-President, Dominion Textiles.	
Mr. R. M. Snelgrove, Q.C., Chairman, CMA Legislation Committee, Director Legal Affairs and Secretary, The Ford Motor Company of Canada Limited.	
From The Canadian Chamber of Commerce:	50
Mr. R. F. Booth, Chairman, Executive Council.	
Mr. Douglas H. MacAllan, Chairman, Corporate Affairs Committee.	
Tuesday, June 7, 1977	
From The Canadian Construction Association:	52

Issue

PROVINCIAL GOVERNMENT

Thursday, June 23, 1977

Ontario Ministry of Agriculture and Food: 65

The Honourable William C. Newman, Minister of Agriculture and Food, Province of Ontario.

Mr. John C. McMurchy, Solicitor, Legal Branch.

Mr. W.V. Doyle, Executive Director, Marketing Division.

APPENDIX "B"

List of Provincial Governments, Organizations and Individuals who submitted briefs but were not selected to appear on the Subject-matter of Bill C-42

—Ademco, Montreal, Quebec

—Air Transport Association of Canada, Ottawa, Ontario

—Alberta Egg and Fowl Marketing Board, Calgary, Alberta

—Alberta Wheat Pool, Calgary, Alberta

—Aluminum Company of Canada Ltd., Montreal, Quebec

—American Can of Canada Ltd., Rexdale, Ontario

—Archibald, D.F., Port Williams, N.S.

—Association of Canadian Advertisers Incorporated, Toronto, Ontario

—Association of Canadian Franchisors

—Association of Canadian Travel Agents, Ottawa, Ontario

—Barnett Lumber Industries, Vancouver, British Columbia

—Board (The) of Trade of Metropolitan Toronto, Toronto, Ontario

—B.P. Canada Limited, Montreal, Quebec

—British Columbia Federation of Agriculture, Victoria, British Columbia

—Calgary (The) Chamber of Commerce, Calgary, Alberta

—Canada Middle East Trade Council, Ottawa, Ontario

—Canada Packers Ltd., Toronto, Ontario

—Canadian Business Equipment Manufacturers Association Toronto, Ontario

—Canadian Chemical Producers' Association, Ottawa, Ontario

—Canadian Daily Newspaper Publishers Association, Toronto, Ontario

—Canadian Federation of Insurance Agents and Brokers Associations, Toronto, Ontario

—Canadian Institute of Plumbing and Heating, Montreal, Quebec

—Canadian Institute of Steel Construction, Willowdale, Ontario

—Canadian (The) Mutual Funds Association, Toronto, Ontario

—Canadian Pulp and Paper Association, Montreal, Quebec

—Canadian Tire Corporation, Limited, Toronto, Ontario

—Christian Farmers Federation of Western Canada, Edmonton, Alberta

—Christie Brown and Company Limited, Toronto, Ontario

—Clarke, S.G., Chairman, Department of Economics, University of Lethbridge, Lethbridge, Alberta

—Coca-Cola Limited, Toronto, Ontario

—Colgate-Palmolive Canada, Toronto, Ontario

—Comcheq Services Limited, Winnipeg, Manitoba

—Communist Party of Canada, Toronto, Ontario

—Construction Owners Association of Alberta, Edmonton, Alberta

—Continental (The) Group of Canada Limited, Toronto, Ontario

—Council of Forest Industries of British Columbia, Vancouver, British Columbia

—Council of Marketing Boards of British Columbia, Victoria, British Columbia

—Creditel of Canada Limited, Vancouver, British Columbia

—Dominion Foundries and Steel Limited, Hamilton, Ontario

—DuPont of Canada Limited, Montreal, Quebec

—Ferguson, Ralph, Alvinston, Ontario

—General Bakeries Limited, Don Mills, Ontario

—General Foods, Limited, Toronto, Ontario

—General Mills Canada Ltd., Toronto, Ontario

—General Motors of Canada Limited, Oshawa, Ontario

—Government of Saskatchewan, Regina, Saskatchewan

—Halton Egg Producers, Hornby, Ontario

—Hawkins, M.H.W., Professor, Department of Rural Economy, University of Alberta

—Howes, D. Terry, Toronto, Ontario

—Husky Oil Operations Ltd., Calgary, Alberta

—Imasco Limited, Montreal, Quebec

—Independent Contractors and Businessmen Association of British Columbia, Burnaby, British Columbia

—Institute of Canadian Advertising, Toronto, Ontario

—Investment (The) Funds Institute of Canada, Toronto, Ontario

—Kellogg Salada Canada Ltd., Rexdale, Ontario

—Kuhnle, A., Winnipeg, Manitoba

—Liff, Rebecca (Mrs.), Ottawa, Ontario

—Loyns, R.M.A., Professor of Agricultural Economics, University of Manitoba, Winnipeg, Manitoba

—MacLachlan, D.L., Professor of Economics, University of Calgary, Calgary, Alberta

—MacMillan Bloedel Limited, Vancouver, British Columbia

—Manitoba Egg Producers' Marketing Board, Winnipeg, Manitoba

—Manitoba Farm Bureau, Winnipeg, Manitoba

—Manitoba Pool Elevators, Winnipeg, Manitoba

—Maple Leaf Mills Limited, Toronto, Ontario

—Meat Packers Council of Canada, Islington, Ontario

—Ministry (The) of Agriculture for the Province of British Columbia, Victoria, British Columbia

—Mining (The) Association of Canada, Ottawa, Ontario

—Monsanto Canada Limited, Mississauga, Ontario

—Moore, A.M., Professor of Economics, University of British Columbia, Vancouver, British Columbia

—New Brunswick Department of Agriculture and Rural Development, Fredericton, New Brunswick

—New Brunswick Federation of Agriculture, Fredericton, New Brunswick

—Newfoundland (The) Egg Marketing Board, St. John's, Newfoundland

—Northern Telecom Limited, Montreal, Quebec

—Nova Scotia Chicken Marketing Board, and Nova Scotia Turkey Marketing Board, Port Williams, Nova Scotia

—Nova Scotia Egg Producers Association, Truro, Nova Scotia

—Nova Scotia Egg and Pullet Producers Marketing Board, Truro, Nova Scotia

—Ontario Apple Marketing Commission, Toronto, Ontario

—Ontario (The) Asparagus Growers' Marketing Board, St. Catharines, Ontario

—Ontario (The) Chicken Producers' Marketing Board, Burlington, Ontario

—Ontario (The) Egg Producers' Marketing Board, Willowdale, Ontario

—Ontario Fruit and Vegetable Growers' Association, Toronto, Ontario

—Ontario Soya-Bean Growers' Marketing Board, St. Catharines, Ontario

—Ontario Tender Fruit Growers' Marketing Board, St. Catharines, Ontario

—Osborne, John C., Q.C., Ottawa, Ontario

—Osler, Hoskin & Harcourt, Barristers and Solicitors, Toronto, Ontario

—Owner-Client (The) Council of Ontario, Oakville, Ontario

—Pacific Petroleum Ltd., Calgary, Alberta

—Periodical Press Association, Toronto, Ontario

—Province of Prince Edward Island, Charlottetown, P.E.I.

—Ralston Purina of Canada Ltd., Rexdale, Ontario

—Reliance Electric Limited, Ottawa, Ontario

—Rembrandt Home Owners' Association, Willowdale, Ontario

—Richmond Plywood Corporation Ltd., Richmond, British Columbia

—Rogers, T. Blythe, Vancouver, British Columbia

—Saskatchewan Chicken Marketing Board, Regina, Saskatchewan

—Saskatchewan Commercial Egg Producers Marketing Board, Regina, Saskatchewan

—Saskatchewan Federation of Agriculture, Regina, Saskatchewan

—Saskatchewan (The) Hog Marketing Commission, Saskatoon, Saskatchewan

—Saskatchewan Turkey Producers Marketing Board, Regina, Saskatchewan

—Skeoch, L.A. Dr., Glenburnie, Ontario

—Simon, L., Vancouver, British Columbia

—Sun Oil Company Limited, Toronto, Ontario

—Systems Dimensions Limited, Ottawa, Ontario

—Unifarm, Edmonton, Alberta

—*L'Union des producteurs agricoles*, Montreal, Quebec

—United Electrical, Radio and Machine Workers of America, Don Mills, Ontario

—William Neilson Co. Limited, Toronto, Ontario

—Wood Lynn Farms Limited, London, Ontario

—Wotherspoon, Stuart F.M., Q.C., Honeywell & Wotherspoon, Barristers & Solicitors, Ottawa, Ontario