The Competition Act and Its Application to the Service Sector

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The federal government is now seeking the views of Canadians on the Competition Act. These views will enable the government to reintroduce an amended bill into parliament in early 1972 for possible passage into law in late 1972.

Although discontent with present Combines policy has been expressed by businessmen and consumers across Canada an important impetus for reform originated in B.C. Books by U.B.C. professors Moore and Rosenbluth emphasized the shortcomings of the present Combines policy and offered alternatives.[1] The background studies done in connection with the B.C. (Morrow Report) and Alberta gasoline industries were instrumental in the movement to revise the laws on trade practices.

The Competition Act is meant to amend the Bank Act, as well as replace the Combines Investigation Act. In the words of the government it "does not represent a major departure from established Canadian competition policy,"[2] "embodies many of the basic suggestions of the Economic Council's Interim Report,"[3] and has as its objective "to promote competition . . . promote honest and fair dealing . . . enhancing efficiency in the production and distribution of goods and services and transmitting the benefits of efficiency to the public . . . "[4]

The Combines Investigation Act has been criticized often and severely for its exclusive reliance on criminal law. This reliance on criminal law limited the type of investigation and prosecution that could be successful. Inevitably attention was focussed on proving that certain types of con-

[1] Moore M., *How Much Price Competition?* (McGill-Queen's University Press, Montreal, 1970). Rosenbluth and Thorburn, *Canadian Anti-Combines Administration 1952-1960*, University of Toronto Press, 1963.

[2] Explanatory Notes to accompany the Competition Act. (see footnote 4) hereafter footnoted as Explanatory Notes.

[3] Explanatory Notes p. 3. Report referred to is *Interim Report on Competition Policy*, Economic Council of Canada, July 1969.

[4] The House of Commons of Canada, Bill C-256, first reading June 29, 1971 hereafter referred to and footnoted as the Competition Act.

duct, usually price collusion had occurred, and levying fines. Attention was seldom given to the economic conditions that facilitated collusion.

The Competition Act follows the recommendation of the Economic Council's Interim Report by dividing trade practices into two categories. There are some practices whose implications invariably are anti-competive. These practices have been ruled illegal *per se* (i.e. regardless of circumstances) and remain under criminal law. Other practices whose implications are more uncertain may be considered before a tribunal under civil law.

First, to consider the *per se* offenses. These offenses were illegal under the Combines Act only if they lessened competition *unduly;* under the Competition Act they are illegal, period. Collusive agreements such as price fixing and bid rigging or colluding to rig market territory, quality or industry output of course are included. Misuse of monopoly power, misleading advertising, resale price maintenance, and such selling techniques as pyramid selling, referral selling and unfair contests will also be illegal *per se*. Although collusive agreements and resale price maintenance are "illegal *per se*" the Act permits exceptions (e.g. rationalization of industry).

Second, we consider trade practices whose implications on competition or efficiency are more uncertain. Such practices may be considered and restrained by a proposed Competitive Practices Tribunal. This Tribunal may be composed of seven individuals with expertise in economics, law, business or politics. The Tribunal's jurisdiction is under civil law. It will be a quasi-judicial body bound by the principles of administrative law. Thus the procedural rules are well defined and appeal on procedure is available through the courts. Guidelines are offered to encourage decisions consistent with economic efficiency, but sufficient flexibility remains to benefit from the members' judgment and expertise. The Tribunal will hear cases involving mergers, specialization agreements, export agreements,[5] price discrimination, promotion allowances, exclusive dealing, tying arrangements and refusal to deal.

Besides this distinction between types of market practices the Competition Act provides amendments to the Bank Act, and, unlike the Combines Act, extends coverage to the service sector. We now direct our attention to this aspect of the Act, its justification, ruling and expected results.

At present Canada is one of the few industrial countries that does not

[5] For example, the Tribunal may permit exporters to collude to charge higher prices on their export sales as long as there are no undesirable repercussions back on Canadian consumers. This provision could increase the income of exporters thus it is of particular relevance to B.C.

include services in anti-trust policy to some meaningful extent.[6] Service industries account for about 58% of Canada's economic activity (Gross Domestic Product). Included in this sector are such industries as storage, retail trade, wholesale trade, insurance, hotels, restaurants, transportation, communication, utilities, financial institutions, and business and personal services. At present the Combines Act generally covers the first six mentioned industries; the next three are, for the most part, publicly regulated. Thus the Competition Act is most relevant to the financial sector and the business and personal service industries. Accordingly, this is where our attention will be focussed.

Economic theory leads to the conclusion that increased price competition will likely lead to a more efficient allocation of resources between industries, more efficient operation of firms, more equitable distribution of income, and more rapid economic growth. There is no fundamental distinction between the characteristics of goods-producing industries and service-producing industries that alters these implications. Indeed the Economic Council concluded, "There is enough evidence pointing to the existence in the service sector of anti-competitive practices detrimental to the public interest to lead to the conclusion that the continued exemption of parts of this (the service) sector from competition policy cannot be justified."[7]

There are in fact several reasons and some evidence why it is even more important for competition policy to cover services than goods. A consumer often cannot accurately examine or test a service before purchase as he might a commodity. A dissatisfied consumer usually cannot return a service for a refund, or resell it, as he might goods. Many service industries such as doctors, banks, laundries and barbers are local industries, quite immune from national, or international competition. Since resale is difficult and different consumers place a different value on the same service, price discrimination is possible. Thus laws forbidding collusion, false advertising, and price discrimination may be even more relevant to the service sector than the manufacturing sector.

In his book *How Much Price Competition* Professor Moore stresses that the lack of price competition can lead to economic waste in the form of excess capacity.[8] The service industries, namely gasoline service stations,

[6] Ireland is the only other O.E.C.D. country which generally exempts services. See Explanatory Notes, 22.

[7] *Interim Report on Competition Policy*, Economic Council of Canada, 147.

[8] Moore, M., *How Much Price Competition* 1970, 97.

banking, real estate, and life insurance, are identified as examples of where this occurs.

Since the Competition Act will likely affect the finance sector and the professions more than other service industries, we will attempt to establish the relative importance of these sectors to the B.C. economy.

Table I permits us to examine the relative importance and rates of growth of these sectors in B.C. over the past decade.

TABLE I

RELATIVE IMPORTANCE OF FINANCE AND PROFESSIONAL SECTORS IN THE B.C. ECONOMY

Percentages in this table are: $\frac{\textit{Taxable Income this sector}}{\textit{Total Taxable Income of B.C.}}$

	(1) *1961*	*(2)* *1965*	*(3)* *1968*
Finance	3.1%	2.3%	2.3%
Professions	3.2	2.6	3.1

SOURCES:

1961 data: *Taxation Statistics 1963*, Department of National Revenue.

1965 data on Finance: *Corporation Taxation Statistics 1965*, D.B.S.: *Professions Taxation Statistics 1967*, Department of National Revenue.

1968 data on Finance: *Corporation Taxation Statistics 1968*, D.B.S.

1968 data on Professions: *Taxation Statistics 1970*, Department of National Revenue.

From Table I we conclude that in terms of taxable income each sector is of roughly equal importance, accounting for about 3% of B.C.'s total taxable income. Note, however, that the income of the finance sector grew less rapidly than total income whereas the income of the professional sector grew at about the same rate.

It is pertinent to mention at this point that in 1968 the finance sector accounted for 2.7% of Canada's taxable income, the professions 2.8%. Thus finance is relatively less important in B.C. than in Canada overall (2.3%<2.7%) while the professions are relatively more important (3.1%>2.8%).

In Table II we examine the relative importance of the various industries within the finance sector. The data refers to Canada overall since comparable information is not available on a provincial basis. We note

deposit accepting institutions and credit agencies are the largest industries in the finance sector but their relative importance has been decreasing. Security dealers, investment companies and the insurance, real estate industries grew about 1½ times as rapidly as the finance sector overall. In fact the taxable income of each of these industries more than doubled over the seven-year period 1961-1968.

TABLE II

RELATIVE IMPORTANCE OF THE VARIOUS FINANCE INDUSTRIES
(CANADA)

Percentages in this table are: $\frac{\textit{Taxable Income this Industry}^1}{\textit{Taxable Income Total Finance Sector}}$

	(1) 1961	(2) 1965	(3) 1968
Deposit Accepting Institutions	54.0%	47.8%	41.9%
Credit Agencies	17.9	14.0	13.7
Security Dealers	3.1	4.9	4.5
Investment Companies	12.2	18.5	20.8
Insurance, Real Estate and other Agencies	12.8	14.8	19.1
Total Finance Sector	100.0	100.0	100.0

[1]Net taxable income minus losses.

SOURCES:
1961 data: *Taxation Statistics 1963* Dept. of Nat'l. Rev. p. 116.
1965 data: *Corporation Tax Statistics 1965* D.B.S. p. 23.
1968 data: *Corporation Tax Statistics 1968* D.B.S. p. 25.

Table III leads us to the conclusion that medical doctors and surgeons are by far the most important profession in terms of income, and their share of total professional income is increasing. The relative shares of dentists and accountants, the third and fourth most important professions, have been falling.

We conclude that even though the finance and professional sectors combined account for only about 6% of the B.C.'s income, certain industries within this group particularly investment companies, insurance, real estate, and medical doctors are growing much more rapidly than the B.C. overall economy.

TABLE III

RELATIVE IMPORTANCE OF THE VARIOUS PROFESSIONS (B.C.)

Percentages in this table are: $\frac{\textit{Total Income this Profession}}{\textit{Total Income all Professions}}$

	(1) 1961	(2) 1965	(3) 1969
Accountants	11.0%	9.0%	8.0%
Medical Doctors & Surgeons	43.4	44.8	47.4
Dentists	13.9	12.7	11.2
Lawyers & Notaries	17.6	17.9	17.4
Engineers & Architects	3.6	5.5	3.6
Entertainers & Artists	2.0	2.8	2.2
Other Professions	8.5	7.3	10.2
Total Professions	100	100	100

SOURCES:

1961 data: *Taxation Statistics 1963* Dept. of Nat'l Rev. p. 89.
1965 data: *Taxation Statistics 1967* Dept. of Nat'l. Rev. p. 78.
1969 data: *Taxation Statistics 1971* Dept. of Nat'l Rev. p. 122.

For the most part the wording of the Competition Act reads "goods and services" where that of the Combines Act only reads "goods." However, we note the government's intentions. "The government recognizes that it is impossible to place all service industries under one category and apply to each the same rules and regulations. Services vary in kind and method of operation much too widely for that. For these reasons, and also to recognize appropriate provincial jurisdiction, the proposed Act exempts those activities of professions or trades that are regulated by provincial or municipal authority."[9] This loophole could account for a vast difference between the original publicized intent of the Act, and its actual application. Specifically the Act reads, "Nothing in this Act applies where the parties to the agreement . . . are authorized . . . by . . . the legislature of a province or by any regulation by law whether municipal or otherwise."[10] Thus the B.C. government can pass a law stating that a particular industry or profession is regulated by the province, a municipality or is self regulating; if so, that group is exempt from the Act.

[9] Explanatory Notes, 23.

[10] Competition Act, 97.

Currently collusion by banks on either their lending or borrowing rates of interest is now illegal under the Bank Act. The Competition Act proposes to amend the Bank Act to also make illegal collusion on "the amount of any charge for a service provided to a customer."[11] Penalties for infraction will be comparable to those under the Competition Act.

Probably the objective of the Act here is to prevent the recurrence of uniform service charges and their typical well-organized movements. Neither this objective nor a semblance of increased competition in the banking industry will follow as long as over 90% of the business is shared between only five banks of mutual dependence. Five decision makers, each familiar with the others' position do not have to agree explicitly to end up with identical policies.[12]

It is relevant to emphasize here that the structure of the Canadian banking industry which inevitably has given rise to the lack of competition is largely the result of explicit government policy. If the government was serious in its intentions to create competition in the banking industry, it would alter the Bank Act to reduce the initial capitalization required, shorten the time required to obtain a charter, and eliminate restrictions on foreign ownership. Until the government ceases to unnecessarily restrict enterprising businessmen who want to enter the banking industry and share the profits of existing banks, the public will not receive the benefits of competition in banking.

General insurance companies (this does not include life insurance) though generally covered by the Act will receive several exemptions. General insurance companies will be permitted to collude on the collection and dissemination of claims, statistics on losses and claims, and compilation of premium claims ratios. The Act specifically forbids these firms from colluding on common premiums or model contracts. At present the Canadian Underwriters Association fixes maximum commission rates for agents. This practice will be illegal under the new Act.

Investment dealers, also generally covered by the Act, will receive important exemptions when making primary issues. In this case the Act permits investment dealers to engage in any of the *per se* offenses and

[11] Competition Act, 104.

[12] Firms in highly concentrated industries can collude implicitly therefore not create any evidence for Combines investigations to introduce into court. This makes Combines policy ineffective in preventing non competitive prices in concentrated industries. Combines policy has focussed almost exclusively on proving certain types of conduct illegal through criminal law proceedings. Therefore it should not be surprising that this "cops and robbers" approach as Rosenbluth and Thorburn label it, has been ineffective. See Rosenbluth and Thorburn, *Canadian Anti-Combines Administration 1952-1960* (University of Toronto Press, Toronto, 1963).

resale price maintenance. In the wording of the government, "This is necessary to permit the continued use of syndicates to give broad distribution to securities and for orderly marketing during the initial selling phase."[13] But if an unduly restrictive agreement has been made regarding underwriting the Tribunal may prohibit the firm involved from entering into a similar agreement in the near future.

The present practice of fixing minimum stock exchange commissions on transactions of less than $500,000 appears, at first glance, to be jeopardized by the new Act. However, since stock exchanges are under provincial jurisdiction perhaps this practice will be condoned by the B.C. government, and therefore permitted to continue.

Real estate firms could be forced to alter their conduct by the Act. Often real estate boards set commissions that members charge for selling homes. Sometimes co-operation is merely requested, sometimes it is required or expulsion from the real estate board is threatened. This practice, or any collusion on standard commissions, will clearly be illegal. A multiple listing service will no longer be permitted to restrict access to listings nor to agree on uniform commissions. Whether a M.L.S. could survive under these restrictions seems uncertain.

Many bar associations have established tariff schedules for those legal duties that do not involve a court appearance. However, since compliance is quite voluntary and enforcement is difficult the tariff schedule is quite effective. This being the case the Act will have little impact.

Medical doctors, the most important professional group as far as total income is concerned, and perhaps the profession enjoying the most monopoly power, will be little affected by the Act. In B.C. the fee schedule is agreed upon jointly between doctors and the provincial government. Presumably this will lead to the B.C. government granting doctors an exemption from the Act. One proposal which could bring the benefits of increased competition and efficiency in medical services to the public is to reduce the doctors' ability to control the supply of medical services available. For example we could make increased use of medical technicians not under the direct employment of a practising doctor.

The Competition Act states that, "No person shall conspire . . . to limit unduly the opportunities for any other person to participate as a player or competitor in professional or amateur sport . . . "[14] The intent of the Act is to "protect the rights of the individual in team sport as now organized

[13] Explanatory Notes, 128.

[14] Competition Act, 18.

in national and international leagues."[15] However impressive this intent may sound the result will likely be negligible. The Act adds the guideline that in regulating the "court shall have regard to whether the sport is organized on an international basis."[16] This seems to indicate that an exemption for the N.H.L. hockey teams and the Expo's baseball team would be seriously considered. It seems unlikely the hockey and baseball teams could compete in their international leagues without an exemption from the Act. If these exemptions are granted the C.F.L. football teams will surely argue that consistency demands that they also be exempt. Since most C.F.L. teams are barely viable financial operations at present, holding them to the intent of the Act could convince these marginal operators to shutdown. Since it is not likely government policy will affect professional sports so drastically the most plausible conclusion seems to be that the exemption clauses will be generously interpreted, leaving the result of the Act almost negligible; quite different from the intent.

Service trades such as barbers and taxi cab drivers often collude on rates. This would be illegal under the Act, but since these trades are often under provincial, local, or self-governing bodies the B.C. government will likely grant them an exemption.

The Act specifically exempts labour unions and fishermen from coverage. "Nothing in the Act applies in respect of persons who are authorized to engage in collective bargaining . . . or the activities of fishermen."[17] The explanation for this is that it "recognizes the particular situation of fishermen as independent individuals dependent on large fish processors for the disposal of their catch and accorded the rights to make collective agreements comparable with those made by trade unions."[18] By this reasoning it would seem consistent to permit small firms, (i.e. retailers or construction companies), to collude in their bargaining with large labour unions.

The inclusion of professionals while excluding trade unions seems to depend on a very fine distinction. The Act appears to indicate that it will be illegal to collude against the public at large but legal to collude against big or small business. For example it appears legal for a plumbers union to collude on a standard plumbers rate via collective bargaining with plumbing firms, but at the same time illegal for independent plumbers to collude on a standard rate charged the public for service calls. One could

[15] Explanatory Notes, 91.

[16] Competition Act, 19.

[17] Competition Act, 94.

[18] Explanatory Notes, 101.

argue about any dividing line chosen. But, if the Act is to apply to services without causing a drastic change in the structure of the union movement this distinction seems most logical.

As I review the proposed Competition Act I have several conclusions from the point of view of an economist interested in consumer welfare. The intent of the Act is commendable. In fact most of the provisions, as they stand, move towards this intent as much as can be expected given the legal setting of the Competition Act. The Department of Consumer and Corporate Affairs is not to be seriously faulted.

Nevertheless, three conclusions seem obvious. Firstly, because of exemptions already given, and those likely to follow the lobbying of the more organized and wealthier affected groups, the Act will be diluted. Secondly, attempts to increase competition and efficiency through restrictions on conduct are of negligible impact in a concentrated economy such as Canada's since oligopolists can collude implicitly and thereby avoid prosecution. Thirdly, one of the primary reasons we have the concentrated market structure which yields anticompetitive behaviour is due to explicit government policies. If the government really was serious about the objectives stated in the Act, specifically increased competition and efficiency, it would reduce tariffs and quotas, reduce the monopoly power of government-operated or regulated firms, and revise their regulatory process. It would encourage provincial governments to abandon such monopolistic and inefficient operations as agricultural marketing boards which restrict output and liquor control boards. These changes could confer some significant benefits to consumers at the expense of particular producer or labour groups who now can successfully persuade the government to protect them from competition.

These conclusions are quite applicable to the finance and professional sectors of the B.C. economy. Thus the end result of the Competition Act will be that where consumers now suffer from monopoly power, they will continue to suffer. This is particularly unfortunate since government is in a position to improve consumer welfare significantly.