REFLECTIONS ON COMPETITION AND ANTITRUST LAWS: JOINT VENTURES AND THE CANADIAN AND AMERICAN MARKETS

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Generally speaking the Canada United-States full trade agreement was executed with a view to removing the many barriers to trade which exist between Canada and the United-States. There is a consensus in the business and legal community that the free trade agreement once fully implemented, will encourage more trade between the contries and increase the integration of the economy of Canada and the economy of the United-States in the coming years.

The business world has witnessed an increase in business related alliances designed to compete in increasingly competitive world markets. In this highly competitive context it has become more common place for businesses to combine efforts with a view to quickly and effectively enter new and rapidly changing markets.

There are of course, many ways in which companies may join strengths in order to compete, however, one of the more popular forms of such cooperation which has evolved is that of the joint venture.

The very nature of most joint ventures brings to light a central issue confronting competition policy. Depending on the arragement, such transactions may either handicap competition or promote economic efficiency and innovation. One of the problems, therefore, in analysing joint venture in the context of competition law, is the lack of a clear definition

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which may distinguish joint ventures from other types of corporate contractual agreements. There are a wide variety of joint ventures and no one definition will ever clearly encompass all of the potential agreements parties have to such a document.

For the puposes of competition law, however, it is not necessary to venture into every definition from a legal standpoint or otherwise of what a joint venture is. The elements of a joint venture which are of interest to the present discussion and which make them a distinct subject of concern under competition law, are the potential efficiency gains and anti-competitive risks created by such joint enterprises.

We shall see later on in this paper, that it is these two (2) characteristics which will attract the most scrutiny by enforcement agencies under the Canadian Competition Act and U.S. anti-trust laws.

On the one hand, it can generally be argued that the integration of certain operations by participating firms allows such firms to create additional productive capacity through the formation of a new producing organisation or perhaps the development of a new product or technology. This will often allow the creation of the joint venture to enter into a new market. When considered in such a light, a joint venture will be seen as a integration of operations which actually increase production. It will be in cases such as this, that the enforcement agencies in both the United-States and Canada will be likely to judge the effects on competition of such a joint venture in a more lenient manner.

On the other hand there is inherent in the joint venture arrangement a risk of anti-competitive effects on the market. One element of a joint venture which distinguishes it from other forms of contractual arrangements between firms, is that it creates a separate business entity from the parent corporations. There is in fact a unification of interests between the parents, which can have a distorting effect on the incentive of the parents to compete in the market in which the offspring of the joint venture is to operate.

It is in the context of the two (2) previously mentioned distinctions that we shall analyse the competitional law considerations which are to be apply to joint ventures, that is the potential for the new enterprise to increase productive capacity, increase new technology and to enter into new markets where the parents would not have entered had the offspring not been created, and the obvious anti-competitive risks caused by virtue of the joint venture arrangement.

We know that a joint venture differs from a merger since normally it involves the creation of separate, limited purpose company as opposed to an

amalgamation of two (2) previously existing firms. Many of the disavantages of mergers are avoided in the creation of a joint venture, given that joint ventures tend to protect the participants from opportunism and information in balance often inherent in merger agreements.

The importance of keeping anti-trust and competition principles in mind when entering into a joint venture agreement is as stated above, inherent in the anti-competitive effects of that the joint venture may create. As also mentioned above, the new entity may increase productive economic activity and foster competition where none previously existed. In may also allow the parents and the offspring of the joint venture to enter into new markets which neither or only one could have entered individually. And most importantly, the joint venture may result in an economy of scale and thereby allow the parties to produce a level of capacity of production which would have been impossible to maintain, had each participant to the joint venture attempted to perform the same fonction separately.

Where the competition act wishes to curb the activities of businesses entering into arrangements such as joint ventures, is where the joint venture reduces even potential competition and creates barriers to the entry of a given market. You must keep in mind that one or both of the parent companies to a joint venture may have entered the field occupied of the offspring of the venture, had the venture itself not even been formed. It is obvious that the parents to the joint venture would become less willing and less able to act as usual harms lenght competitiors in spheres of activity which are not related to that of the offspring. In other words, the closer a company is tight in with another company due to a joint venture has executed with the said company, the less it would be willing in other areas of market participation to compete with that company. They have, in a sense become friends. We may say that the competition act does not wish to find in the market place to many oversized friends controlling significant blocs of the Canadian economy.

Furthermore, the parent companies may restrain the potential of the offspring company to compete in the market in order to protect the existing markets of the parent companies or their customers.

Another problem which may be caused by a joint venture, would be the effective that it has on a third party firm which is not involved in the joint venture and which wishes to enter the market in which the offspring of the joint venture will be competing. This may be impossible for this third party firm to actually due if the joint ventures strength is over bearing in the market or where the offspring of the joint venture is restricted from dealing with third party company by the parents to the joint venture.

More obvious anti-competitive effect of a joint venture as where the parties have entered into the venture expressly with a view to fixing prices or dividing geographic markets.

As we shall see in both U.S. and Canadian competition legislation there is expressed the desire to efficiently determine for the purposes of establishing whether a contractual arrangement between two (2) firms as unacceptable anti-competitive effects, at what point the benefits of increased efficiency, growth of productive capacity, and entry into new markets which may be brought about by a joint venture amongst separate corporate parents are outweighed by the anti-competitive effects of same.

AN OVERVIEW OF CANADA'S COMPETITION ACT

Prior to the 1986 Canadian Competition Law consisted of primarily criminal law. The combines investigation act had been Canada basic anti-trust statut since the beginning of the century. The Act was entirely criminal law until 1976, when certain civil remedy provisions were added to the Act. The new competition Act of 1986 continued towards civil proceedings by establishing recourses with respect to mergers, monopolies (abusive dominant position), specialisation agreements and delivered pricing.

The new legislation, therefore, consisted of a dramatic change in Canada's competition Laws. Numerous criminal and civil features where added to the legislation of relevants to the present paper, we would like to site the following changes:

1.The establishing of a new civil procedure to deal with mergers that restrict competition;

2.Establishment of new Tribunal called the Competition Tribunal to deal with mergers and monopolies;

3.Establishment of a new procedure by which the Competition Tribunal concertified and exempts specialisation agreements, amends procedures relating to investigations by the Director of investigation and research;

The criminal provision of the new legislation of most relevance to the present essay, is that which concerns agreements to limit competition unduly. As to provisions with respect to civil proceedings those which are most relevance to the present essay, concern the abuse of a dominant position or anti-competitive practises in mergers which substantially less in competition.

AGREEMENTS TO RESTRICT COMPETITION

As noted above, the two (2) sections of the Act which are more relevant to the present paper are those concerning agreements to restrict competition which we shall discuss here and those concerning mergers.

The prohibition against conspiracies, agreements and arrangements that less in competition unduly has been carried over from the old combines investigation Act and it is one of the oldest prohibitions of Canadian Competition Law. The offence is still criminal in nature.

The conspiracy section of the Competition Act, at section 45 thereof states that anyone who combines, agrees or arranges with another person to lessen, restrain or injure competition induly is guilty of an offence and may be sue on that basis for actual damages suffered by anyother person or persons.

A joint venture may be subject to this section in the event that it has the effect of restraining competition.

Fines under this section raise from $1,000,000.00 to $10,000,000.00. Furthermore, the convinctions may be obtained by the Crown on the basis of circumstancial evidence. It is not necessary for the Crown to prove that the accused intended to lessen competition unduly, it is only necessary that Crown proves that an accused intended t2o enter into the agreement, and that the agreement, if carried into effect would lessen competition unduly. Section 45 further sets out three (3) defences available to the accused in proceedings taken under section 45. Whether each defence is followed by an exception to the defence when the subject matter raised in the defence touches on one of the subject matters stated in the acception.

A particular interest to the present discussion is the defence with respect to ccoperation and research in development, since oftern joint venture are set up specifically for that purpose. If such an agreement relates only to cooperation and research in development and its not likely to lessen competition unduly in respect of prices, quantity or quality of production, markets or customers or chanels or methods of distribution or as likely to restrict any person from entering into or expending business in a trade industry or profession, then the defence will be upheld, it is of the utmost importance to analyse the acceptions to the defence with respect to cooperation and research in development which are found at sub-section 4 of paragraph 45 of the Act.

We shall see that the test applied by the Act in the case of mergers and abusive dominant position is that of "substantial lessen of competition",

whereas under the criminal section presently being discussed, the old test of "unduly limiting competition" has been maintained.

Finally, it is important to set out that the director is broad from taking an application under the merger provisions which we shall be studying in the next section, against the person agains whom proceedings have been commenced under section 45 that is the criminal provision with respect to agreements to restrict competition.

JOINT VENTURES AS MERGERS

It is by far the provisions of the competition Act with respect to mergers which are of the most relevant to a discussion of the anti-competitive effects of joint ventures. The broad definition of the term merger in the relevant provisions of the Act fully encompasses the features inherent in joint venture contractual arrangements. As we shall see later, this is also the case in the United-States. In fact, a joint venture involving companies with significant operations in both Canada and the United-States can potentially involve all of the competition and anti-trust law implications applicable to murders in both contries.

Under the Act, the term merger is defined as:

> "The acquisition or establishment, direct or indirect, by one or more persons, whether by purchase or lease of shares or assets, by amalgamation or by combination or otherwise, of control over or significant interest in the whole or a part of a business of a competitor, supplier, customer or other person."

This very general definition is curbed only by vary limited exception for certain joint ventures described at section 95 of the Competition Act.

Once a joint venture is defined as constituting a merger for the purposes of the Act, several of the most important provisions of the Law will receive application. Both those concerning substantive questions and does with respect to procedural aspects of the Act.

SUBSTANTIVE ELEMENTS OF MERGER PROVISIONS

Once the Canadian authorities are notified of a merger or when a proposed merger otherwise comes to their attention, a review of the transaction is carried out with a view to establishing whether the merger or proposed merger prevents or lessens, or is likely to prevent or lessen competition substantially in the market (section 92 of the Act).

The competition laws of Canada and the United-States were drafted in order to protect markets which may be defined as the United-States or Canada, or even smaller original markets within each country, the whole for the benefit of consumers in the relevent jurisdictions.

The authority for such review in Canada is the Bureau of Competition Policy.

It is establishing whether a merger should be block, once it has been decided that it prevents or lessens or is likely to prevent or lessen competition substantially that we now return in more detail to the discussion commenced in an introductory way in are priliminary remarks.

Since under the Canadian Act a merger, although judged to be likely to lesen competition substantially, may not be block if it is determine that efficiency gains will result from the merger that are likely to be greater than and will offset the effects of lessen of competition, and that efficiency gains will not likely be achieved if the merger is block, furthermore the Act specifically foresees that the tribunal is not entitled to find that a merger or proposed merger prevents or lessens, or is likely to prevent or lessen competition substantially solely based on evidence of concentration or market share.

It is evident that this latter consideration along with efficiency gains defence shall constitute the major argument of joint ventures against whom a recourse under the merger section of the Act is directed by the competition authorities.

In deciding whether a particular merger or, of course, joint venture offends the relevant provisions of the Act, the tribunal may consider inter alia the following factors:

1.the extent to which foreign products or foreign competitors provide or likely to provide effective competition;

2.whether the business or a part of business of a party to the merge or porposed merger has failed or is likely to fail;

3.the extent to which acceptable substitute for products applied by the parties to the merger are available or are likely to be available;

4.any barriers to entry in the market, including tariffs and none tariff barriers, inter-provisional barriers to trade and regular in control of a entry;

Other considerations are foreseen in the Act the most in globing being the sub-section which allows the tribunal to quote anyother factor that it is relevant to competition in the market that is or would be effected by the merger or proposed merger.

EXCEPTION FOR JOINT VENTURES

JOINT VENTURES EXEMPTION UNDER THE ACT

In principal joint ventures may be considered mergers under the competition Act, given the fact that they may foreclosed potential competition. However, section 95 of the Act creates an exception for joint ventures which may be described as being very limited in scope.

The exception in question is limited to unincorporated combinations for a specific project or program of research in development that only if all five (5) conditions set out at section 95 are respected.

It would appear from a literal reading of the said section that it could only be made to apply with respect to very extraordinary and unique projets or programs of research in development not otherwise attainable without the cooperation of one or more large size firms. In generally speaking the Act, therefore, gives the tribunal discretion to exempt the joint venture notwithstanding the fact that it would subtantially lessen competition.

Before going on to the question of pre-merger notification under the Act, we wish to remind the reader not to confuse the exceptions discussed under the present section with those which would be discussed under the pre-notification section of this paper. Joint ventures which may exempt from the pre-notification requirements to be discussed next, may still be subject to the provisions of the Act which concern the regulation of mergers.

UNITED-STATES LAW AND PRACTICE ON TRANSNATIONAL JOINT VENTURES

The major principle guiding U.S. anti-trust policy may be said to be similar to that of Canada's trade policy in that U.S. Law prohibits a merger if the effect may be subtantially to lessen competition or to tend to create a monopoly. As in Canada, it may be said that the U.S. anti-trust Law applies to joint ventures, as it is foreseen specifically at section 7 of the Clayton Act, the

legality of joint ventures in anti-trust legislation in the United-States involves essentially the same consideration as mergers. The United-States law and practice on the question of joint ventures in the context of anti-trust regulation was reviewed in detail in the United-States decision of the United-States -vs- Pen Oil and Chemical Company to which we will refer in more detail later on on this paper.

The United-States Law foresees pre-merger notification to be based on the nature of the merger on a case by case basis and may be said to encompass joint ventures. It has been noted that the detailed required in U.S. filings, for pre-notification, are considerably more extensive than in Canadian filings.

The Authority in the United-States for questions of anti-trust policy are the Federal trade Commission and the anti-trust division of the Department of Justice. We shall not go into the details of the jurisdiction of each department in this paper.

We noted earlier that the competition Act specifically declares that the decision as to whether a merger or proposed merger prevents or lessens or is likely to prevent or lessen competition substantially may not be based solely on data relating to market shares or concentration ratios. This is not necessary the case in the United-States law in practice where strong derived from the anti-competitive effects of mergers in industries where they exists high concentration ratios, and under circumstances where a merger would caused significant increases in those ratios.

The joint ventures we are discussing here in the context of the United-States law in practice are those which have a competitive effect on U.S. foreign or interstate commerce, if a venture effects only the commerce of foreign country the conduct is not within the subject matter of the U.S. anti-trust laws. In effect, U.S. anti-trust law apply when a venture has a substantial and foreseeable effect on commerce inside the United-States or on U.S. exports or imports.

In the United-States anti-trust authorities must, as is the case in Canada, dogged and balance the possible competitive effects of joint ventures, whether they be pro-competitive effects or anti-competitive effects.

As in Canada, U.S. authorities must tackle the policy problem of determining at what point the benefits of increase efficiency, growth of productive capacity, in entering to new markets brought about by cooperative ventures amongst separate corporate parents or out way by the anti-competitive effects of joint action.

In reason reason, the U.S. Courts and the anti-trust enforces have developed a force step in analysis of joint venture. 1988 anti-trust enforcement guide lines for international operations stated that the department would be judging the likely competitive effects of joint ventures under a rule of reason, due to the fact that joint ventures typically achieve integrative efficiencies.

The first question in a force step analysis of a joint venture is whether the joint venture would likely have anti-competitive effect in the market or markets in which the joint venture proposed to operate.

The second question would be whether the joint venture or any of its restrenght would likely have an anti-competitive effect in any other market or markets in which the joint venture members are actual or pretential competitors outside of the joint venture.

The third question would be whether any likely anti-competitive effects associated with any none price vertical restrenght oppose in connection with the joint venture may exist.

Evidently, a joint venture will not be challenged if under the first three stamps it is concluded that the joint venture will not likely to have any significant anti-competitive of effects. However, in the event that the three first steps reveal significant anti-competitive risks, then a four step is invoked with respect to a consideration of pro-competitive efficiencies that would be achieve by the joint venture or whether they would outway the risk of anti-competitive harm, this joins the Canadian exception for efficiency referred to in the previous section on mergers under Canadian competition law.

As under Canadian Law, the basic question in the United-States with respect to the competitive effects of the formation of a joint venture, is whether the venture partners are in or would enter the market in which the offspring will operate. This is especially important where the parents are actual or potential competitors in that market.

Typically, the question that would be asked under U.S. Law and which is surely similar to that as under Canadian Law is how significant this competition in that particular market diminished by the venture.

The factors are relevant to this type of analysis parallel to those sustained specifically in the Canadian competition Act and include the size of the partners, their market share, the contribution of each parent to the venture, and the likelyhood that in the absence of the venture, one or both parents would undertake a similar project either alone or with a smaller firm.

As mentioned earlier in this essay, the leading authority on the effect of joint ventures on competition consists of the Pen Oil Case, in which justice Clark listed no less than fifteen (15) separate factors which the trial Court should have taken into account in assessing whether section 7 of the Kleton Act had been violated by joint venture, while it is not necessary to exhaust or list all fifteen (15) factors listed by the Honourable Justice Clark in his decision suffice to say that the factors specifically stated in the Canadian Competition Act are more than covered by this list and in any case, the sub-section of the Canadian Act which states that any other factors that is relevant to competition in a market that is or would be effective by the merger or proposed merger is to be taken into consideration is effectively covered by the listing of the Honourable Justice Clark.

It is, however, part of United States anti-trust policy to recognize that many joint ventures face stiff competition from foreign firms and that they may be created for variety of good business reasons. Often times joint ventures are created to take advantage of complimentary skills or economy of skill in production marketing or research in development or to spread risk.

It is a common policy of Canada and the Unitied-States to assure future competitiveness to respect to markets concerning new tecnologies in areas such as superconductor activity, high definition television, robotics and computerized design in manufacturing. It is obvious that the policies of both countries in the anti-trust field will unlikely act to restrain the ability of Canadian and American firms from entering these markets even at the expense of a certain lessening of competition.

Finally, in a recent attempt block a joint venture between Westinghouse and Asea Brown Bovera the U.S. justice department allowed the parties to the joint venture under scrutiny to restructure same in a manner acceptable to the department.

ANNEXE "I"

CERTIFICAT DE DÉCISION PRÉALABLE

L'article 102 de la Loi sur la concurrence permet à des parties qui complètent une transaction, de demander au directeur l'émission d'un certificat de décision préalable. Les parties doivent convaincre le directeur qu'il n'aura pas de motifs suffisants pour faire une demande au tribunal en vertu de l'article 92 de la Loi. Cet article permet au tribunal de la concurrence d'émettre des ordonnances lorsqu'un fusionnement réalisé ou proposé empêche ou diminue sensiblement la concurrence ou aura vraisemblablement cet effet.

Cependant, l'émission d'un tel certificat n'empêche pas le directeur de pouvoir attaquer ultérieurement la transaction ainsi complétée puisque celui-ci conserve toujours la faculté d'attaquer toutes transactions dans un délai de trois (3) ans. La seule certitude que confère l'obtention d'un certificat de décision préalable est que le directeur ne pourra pas attaquer la transaction sur la base des renseignements qu'il aura obtenus pour émettre un tel certificat. Remarquons néanmoins que l'obtention d'un certificat permet aux parties, si elles remplissent les conditions prévues aux articles 108 et suivants sur la pré-notification, de ne pas se soumettre à celle-ci.

En outre, bien que cette obligation de pré-notification constitue un nouvel interventionnisme étatique dans les milieux commerciaux, on peut néanmoins conclure qu'une telle intervention est sans doute préférable à des procédures dirigées contre une fusion déjà réalisée.

ANNEXE "II"

L'OBLIGATION DE PRÉ-NOTIFICATION

AU CANADA

1) INTRODUCTION

L'obligation de pré-notification est sans doute l'une des dispositions majeures des amendements apportés à Loi sur la concurrence en 1986. Elle constitue une importante forme de contrôle potentiel de l'économie au Canada. Cette obligation nous a été inspirée par la législation américaine et plus particulièrement par les dispositions Hart-Scott-Rodino introduites dans la Loi anti-trust en 1976 aux États-Unis.

Avant d'étudier plus en détails cette obligation, quelques remarques préliminaires s'imposent. Tout d'abord, la pré-notification en matière de fusion n'est obligatoire que si cette dernière a une certaine importance quant à sa valeur, comme nous le verrons un peu plus loin. Ceci est vrai parce qu'il est plus probable qu'une fusion de taille entraîne une réduction de concurrence plus importante et aussi parce qu'il est plus difficile de défaire, après coup, une fusion importante.
Le Parlement a donc jugé nécessaire d'introduire aux articles 108 à 124 de la Loi sur la concurrence une obligation, pour les parties qui participent à une fusion importante, de préaviser le directeur avant d'effectuer leur transaction.

Ensuite, et bien que l'obligation de pré-notification soit liée à l'importance d'une transaction, elle n'a en elle-même rien à voir avec la question de réduction de la concurrence. En effet, l'obligation de pré-notification est totalement indépendante de l'existence ou non d'une réduction de concurrence. A titre d'exemple, si deux (2) parties à une fusion ne remplissent pas les critères édictés par la Loi sur la concurrence les obligeant à pré-notifier, cette absence de pré-notification n'empêche pas la réduction de la concurrence.

Enfin, nous n'envisagerons ici que les dispositions les plus pertinentes concernant la pré-notification. En effet, il ne nous semble pas nécessaire de présenter les dispositions de la loi qui énoncent le contenu du préavis que les parties doivent faire parvenir au directeur des enquêtes et des recherches (articles 114 et suivants).

2) OBLIGATION DE PRÉ-NOTIFICATION

Quand l'obligation de pré-notifier existe-t-elle? La pré-notification est imposée à l'égard des transactions qui peuvent ou non constituer une fusion au sens de l'article 91 de la Loi sur la concurrence. Mais en pratique, nous nous trouverons généralement face à des transactions qui seront en fait des fusions. De toute façon, il ne peut y avoir obligation de préaviser que s'il y a acquisition d'une entreprise en exploitation, c'est-à-dire d'une entreprise active où des employés sont affectés à son exploitation.

Comme nous l'avons déjà mentionné plus haut, l'obligation de pré-notification n'est applicable qu'aux transactions qui sont importantes du point de vue de leurs valeurs. Ce sont les articles 109 et 110 de la Loi sur la concurrence qui définissent quel type de transactions est visé. Ces articles définissent deux (2) conditions préalables et cumulatives qui devront être réalisées pour qu'il y ait obligation de pré-notifier.

La première de ces conditions concerne les parties en cause. Les parties à la fusion projetée, incluant leurs compagnies affiliées le cas échéant, doivent, ensemble, avoir des actifs ou des revenus annuels au Canada de plus de $400,000,000.00.

La seconde condition, quant à elle, est relative directement à la transaction. Celle-ci doit viser des actifs ou des actions valant au moins $35,000,000.00. Dans le cas d'acquisition d'actions avec droit de vote, il faudra que les actifs ou les ventes annuelles de l'entreprise acquise ou de l'entreprise contrôlée par l'entreprise acquise dépassent au Canada $35,000,000.00. De plus, il faudra, comme résultat de la transaction, que la partie acquérante ait plus de vingt pourcent (20%) des actions avec droit de vote s'il s'agit d'une

compagnie publique, ou de plus de trente-cinq pourcent (35%) s'il s'agit d'une compagnie privée. Dans le cas d'une amalgamation, ce chiffre de $35,000,000.00 est porté à $70,000,000.00.

Ajoutons enfin que même si les parties à une transaction remplissent les conditions énumérées ci-dessus, la Loi sur la concurrence prévoit, aux articles 111, 112 et 113, des exceptions à la pré-notification dont les principales sont les transactions impliquant exclusivement des parties qui sont toutes affiliées entre elles; les transactions à l'égard desquelles le directeur a remis un certificat de décision préalable tel que prévu à l'article 102 de la Loi (voir Annexe "I"); enfin les entreprises à risque partagé ou (joint venture) et ce, sous certaines conditions.

Signalons dès à présent, mais sans rentrer dans les détails, qu'une fois que les parties auront rempli les documents aux fins de préaviser le directeur, celui-ci devra répondre dans un certain délai quant à savoir si la transaction envisagée réduira ou non sensiblement la concurrence (voir "INFRA").

On peut, à première vue, considérer que la valeur des montants prévus par la Loi est assez élevée. Il n'est cependant pas rare que des entreprises canadiennes atteignent ces seuils. En outre, bien que cette obligation de pré-notification constitue un nouvel interventionnisme étatique dans les milieux commerciaux, on peut néanmoins conclure qu'une telle intervention est sans doute préférable à des procédures dirigées contre une fusion déjà réalisée.

3) DÉLAI INHÉRENT À LA PROCÉDURE DE PRÉ-NOTIFICATION

Lorsque nous nous trouvons dans le cadre d'une pré-notification, les parties doivent fournir un certain nombre d'informations relatives à la transaction proposée. La Loi, aux articles 121 et 122, permet aux parties de produire deux (2) types de renseignements, soit ceux de l'article 121 ou ceux de l'article 122. C'est en fonction du choix entre ces deux (2) catégories de procédures qu'il faut se placer pour calculer les délais de réponse de la part du directeur.

Il nous faut distinguer trois (3) calculs de délai de réponse possibles.

Premièrement, lorsque les parties ont choisi de fournir les renseignements sous l'article 121, le directeur aura alors un délai de sept (7) jours depuis le jour de la réception des renseignements pour aviser les parties qu'il n'envisagera pas, pour le moment, de demander au tribunal l'émission d'une ordonnace prévue à l'article 92 de la Loi. Cependant le directeur aura la possibilité durant ce même délai d'exiger les renseignements qui sont prévus à l'article 122.

Deuxièmement, si les personnes impliquées dans une transaction fournissent les renseignements prévus à l'article 122 et ce, qu'elles le fassent volontairement ou sur demande, le directeur se verra l'obligation de répondre, dans un délai de 21 jours, sur la possibilité d'une éventuelle demande au tribunal de la concurrence pour que ce dernier émette une ordonnace en vertu de l'article 92 de la Loi sur la concurrence.

Troisièmement, lorsque nous avons à faire face à une transaction proposée concernant une acquisition d'actions comportant droit de vote, et relativement à laquelle les renseignements fournis sont ceux prévus à l'article 122, il est nécessaire qu'il se soit écoulé au moins un délai de 10 jours d'activité de bourse ou un délai plus long, mais sans que celui-ci ne dépasse 21 jours et ce, par rapport à ce qui est prévu par les règlements de la bourse qui régit. Ici encore le délai s'impute à partir de la date de réception des renseignements par le directeur qui conserve toujours la possibilité de donner un avis avant l'expiration de ce délai.

À la lecture de cet article, nous pouvons dire qu'il serait souhaitable, lorsque des parties à une transaction doivent fournir des renseignements sur celle-ci dans le cadre de la procédure de pré-notification, de le faire directement sous l'article 122. En effet, le délai de sept (7) jours prévu à l'article 121 de la Loi entraînera sans aucun doute l'exigence, de la part du directeur, d'obtenir les renseignements prévus à l'article 122. L'exercice de cette faculté par le directeur entraînera donc la prolongation des délais de sept (7) jours initialement escomptés par les parties mais sans doute, seront supérieurs à celui de 21 jours prévu à l'article 123 de la Loi puisqu'il n'est indiqué nulle part que le délai qui aurait été écoulé en fonction de la présentation des renseignements sur l'article 121, s'imputerait automatiquement du délai de 21 jours prévu lorsque les renseignements sont donnés sous l'article 122.

ANNEXE "III"

APPLICABILITÉ DE LA LOI SUR LA CONCURRENCE AUX COMPAGNIES DE LA COURONNE ET AUX INDUSTRIES RÉGLEMENTÉES

La Loi sur la concurrence s'applique à toutes les personnes et entreprises qui la violent et ce, dans tous les secteurs de l'activité canadienne. C'est une loi de nature économique, c'est-à-dire qu'elle s'applique aussi bien aux produits et qu'aux services (voir la loi à l'article 2 sous produits et services).

Il est prévu dans les Lois d'interprétation, l'article 16(f) de la Loi fédérale et l'article 45(p) de la Loi provinciale que les corporations de la Couronne bénéficient d'une exemption générale à l'application de la loi lorsqu'elles agissent pour celle-ci sauf si la loi le prévoit autrement. Or, l'article 2.1 de la

Loi sur la concurrence prévoit expressément l'applicabilité de la Loi aux corporations de la Couronne à l'égard des activités commerciales qu'elles exercent en concurrence réelle ou potentielle avec d'autres personnes. Soulignons que l'existence de cet article n'enlève pas l'immunité à la Couronne en tant que telle, par exemple lorsqu'une activité contraire à la Loi sur la concurrence émane directement d'une autorité gouvernementale, provinciale ou fédérale.

Qu'en est-il des industries réglementées? Une industrie est considérée comme réglementée lorsque, par exemple, l'état fixe les prix (bière en Ontario ou lait au Québec) ou bien, lorsque l'état fixe des normes sur la publicité (industrie du tabac) ou bien encore des normes concernant l'hygiène publique, etc.... Dans son souci de protéger le consommateur, l'état peut prendre des mesures directement en contradiction avec la libre concurrence, par exemple, la fixation des prix. Les questions qui se posent dès lors sont de savoir si: premièrement lorsque l'on pose un geste contraire à la Loi sur la concurrence mais autorisé par un règlement, ce geste viole-t-il la Loi sur la concurrence? Deuxièment lorsqu'une activité est réglementée partiellement, cette réglementation entraîne-t-elle la non-applicabilité de la Loi sur la concurrence à toutes les autres activités de cette même industrie?

Pour répondre à la première question, soulignons que la Cour suprême dans l'affaire In Re: Farm Product Marketing Act (1957) R.C.S. 198, a considéré qu'une activité autorisée par une loi valide ne pouvait être contraire à la Loi sur la concurrence, ces deux (2) Lois étant adoptées dans l'intérêt public.

La réponse à la deuxième question a été précisée tout d'abord dans l'affaire R. -vs- Canadian Breweries Ltd. (1976) QR. 601, où la Cour a conclu que ce qui était exempté était seulement ce qui était autorisé par une loi valide.

En conclusion sur ce sujet, nous pouvons dire que l'exemption pour les industries réglementées n'est qu'une défense à portée limitée, que cette exemption n'est applicable que lorsque le règlement a été autorisé par une Loi provinciale ou fédérale valide, et qu'il a effectivement réglementation, c'est-à-dire exercice du règlement. Enfin, cette défense ne s'applique pas aux activités non réglementées, parce que c'est une défense relative à des conduites et non à l'industrie en général.