

DIRECTION FOR REFORM

By Christopher Green\*

Editor's Note: The following is an excerpt from a larger paper by Dr. Green which has not yet been published. The larger paper provides an economic historic overview of Canadian competition policy and a thematic review of the jurisprudence.

---

If one could write an anticombiners law without worrying about the constitutional issue what should it look like? My preference is for a law which is brief and contains civil as well as criminal powers, both of which would be enforced before the courts. I emphasize brevity to indicate my hostility toward any form of competition policy "fine tuning". My preference for the use of courts rather than quasi-judicial tribunals springs from my fear that the latter may have a tendency to "fine tune", and in any event become rather bureaucratic institutions. Moreover, the courts are likely to retain much more respect, particularly from the individuals who must appear before them. At all costs the combines authorities must not become regulators. In my view, the enforcement of the "shared monopoly" provision contained in the aborted Second Stage Amendments inevitably would have thrust the proposed Competition Board into the role of a regulator of oligopolistic behaviour.

With respect to specific policies the following seem most sensible to me given the size and "structure" of Canadian markets.

1. Conspiracy: The most appropriate, although somewhat harsh, rule is a per se one along the lines followed in the U.S. There would no longer be a question of "undueness" or intent. One would hope, however, that the anti-combiners authorities would not chase after every "two-bit" price fixing conspiracy, but rather concentrate on major, long lasting (or likely to last long) agreements, whether tacit (conscious parallelism?) or explicit. Given that the small size of many tariff-protected Canadian markets creates conditions favorable to successful collusion, a tough pricing fixing law is necessary. This is true even if (a) many price fixing agreements are probably relatively harmless and (b) many agreements collapse quite quickly in the face of

---

\* Dr. Green is a professor of economics at McGill University. He is the author of Canadian Industrial Organization and Policy, McGraw-Hill Ryerson, 1980.

chiseling and threatened entry. A per se rule would end the jurisprudential confusion created by the current application of the conspiracy law, but would probably not materially change the number of important prosecutions. In "conscious parallelism" cases the courts should be willing to infer agreements or arrangements from abundant evidence of "plus" factors.

2. Monopoly: A structural (or dissolution) approach to monopoly is not appropriate to the Canadian scene where a small market and economies of scale may dictate a single dominant firm. Moreover, if entry barriers are low even a monopolist has limited discretionary economic power. As is traditional with monopoly law in other countries the focus in Canada should remain on monopolizing behaviour. The kind of behaviour at issue includes predatory tactics, restrictive practices, and price discrimination all aimed at gaining and/or retaining a monopoly position in the market of the dominant firm. An efficient monopolist is neither a public nuisance nor socially costly if its economic power is limited. If clearly predatory and restrictive tactics used by dominant firms are disallowed, little power remains except that which occurs as a result of natural (technological, product design, etc.) barriers to entry in conjunction with tariff walls. Thus Canada should make much more use of an old remedy contained in the combines legislation since 1897 - reduction of customs duties. Product-specific tariff reduction is an appropriate anticombines remedy whenever it is desirable to increase the number of actual or potential sellers able to serve the Canadian market. The product-specific tariff reduction remedy is quite separate from a revision of Canadian commercial policy in the form of general tariff reduction which, as I have already noted, might largely obviate the need for much Canadian anticombines policy.

3. Mergers: Most mergers are harmless, and some positively beneficial. Moreover, the prospect of a future merger accompanied by capital gains, is undoubtedly important to entrepreneurs considering whether to establish a business which requires hard work in order to build up its good will. Without the merger route as a convenient means of business firm death, many firms would never be established in the first place and the market place would be that much less competitive.

Thus a reform of Canada's merger law should not be viewed as a means of striking out at every major merger proposal reported in the business pages of Canadian journals. Rather, the anticombines authorities must be given a means of dealing with those (in my view, very few) mergers which clearly have the effect of removing substantial competition

and raising entry barriers.\* Even in those cases, if the respondent firm(s) were to show that the merger has important redeeming features in the form of increased economic efficiency (e.g. achievement of economies of scale, plant specialization, etc.) or ability to carry on socially desirable activities (R&D, market expansion) that would not be possible in the absence of the merger, the merger should be allowed. However, I would feel better if at the same time there were a tariff reduction or safeguard aimed at assuring that the public directly benefited from the redeeming features of the merger.

4. Price discrimination: Effectively Canada does not now have, and does not now need, a price discrimination law. Section 34a dealing with the power of large buyers to secure discounts from sellers has been rendered harmless by the phrase "like quantity and quality". No benefit, and much harm, could be created by amending the law to give it teeth (or fangs) along the lines of the U.S. Robinson-Patman Act. Section 34b deals with geographic price discrimination. As the Carnation (1969) case illustrates any cases likely to be brought under section 34b are also likely to involve behaviour better dealt with under the conspiracy law. Section 34c deals with predatory pricing. Despite the Crown's recent success in the Hoffman-LaRoche (1980) case, I think predatory pricing is better dealt with under the heading of monopoly law. So should any price discrimination which is so deeply exploitative as to warrant public intervention.

5. Resale Price Maintenance: Nothing needs to be changed in the r.p.m. law. Despite concern about the loss leader "loophole" little harm has been done to the effective enforcement of one of the few success stories in Canadian anticombiner enforcement.

6. Exclusive dealing; tying contracts: The current legislation (section 31.4) focuses on the use of these instruments by a major supplier. The emphasis is well placed. Restrictive practices are typically not harmful unless engaged in by firms with real economic power. What is crucial is that these practices, as well as mergers, be dealt with under civil, not criminal, law. On the face of it, tying contracts are more likely to be objectionable than are exclusive dealing contracts. However, the former

---

\* Although barriers to entry into retailing are not particularly high, I am nevertheless most concerned about reduced competition due to mergers at the retailing level. It is desirable to have several big and independent department store chain buyers exercising monopoly power who are in "tough" competition with each other as sellers.

may obviate vertical integration and thus reduce to some degree one of the incentives to merge. Where restrictive practices clearly foreclose markets then the law should be applied. However, the test of foreclosure should be a tough or rigorous test and not mainly a matter of rhetoric. In this respect, the RTPC decision in the Bombardier case seems eminently sensible - at least insofar as one can rely on newspaper accounts of the decision. Finally, the de facto per se rule on tying contracts in the U.S. goes quite a bit further than is necessary here.

### Conclusion

Canadian anticombiner policy is at something of a crossroads. Competition policy is needed more than ever - if for no other reason than as an alternative to the rising tide of direct regulation. However, the legislative wording and constitutional limitations rob Canadian competition policy of its economic content and social usefulness. Moreover, the increased tendency and willingness of the Supreme Court of Canada to enter the fray (3 major decisions in the last 4 years) has actually made life more difficult for anticombiner enforcement. Not only has Canada's merger law been rendered totally inoperative by the Supreme Court's K.C. Irving decision, but the unfortunate issue of intent (mens rea) has become a major stumbling block in conspiracy cases as a result of the Aetna & Sugar decisions. It will be a test of the degree of reason in Canadian public policy whether the necessary reforms to competition policy can be made without creating insurmountable political roadblocks. Simplicity, brevity, and latitude should be the hallmarks of reform. Complexity, lengthiness, over-specificity, and over-involvement, the hallmarks of the recent legislative reform packages, should be abjured.