

ADJUDICATION UNDER THE COMBINES INVESTIGATION ACT - SOME CONSIDERATIONS

By John Rook*

Introduction

Bill C-29, which was introduced in the last Parliament on April 2, 1984, has renewed the debate on whether or not the Courts or an Administrative Tribunal such as the Restrictive Trade Practices Commission is the appropriate forum to adjudicate competition law issues. This debate has been at the forefront of any discussion concerning proposals to amend the Combines Investigation Act in the last several years.

There are numerous advocates on both sides of the debate. However, Bill C-29 departs from earlier proposals to amend the Combines Investigation Act by selecting the Courts as the principal forum for adjudicating civil competition law issues. This decision has been criticized by some commentators who suggest the not so invisible hand of the business community is at play influencing policy makers to prefer the Courts as the price of its support for Bill C-29. There is no doubt that the business community and its professional advisors played a role in making representations on this question. This is to be expected. However, the consultation process that preceded the introduction of Bill C-29 was not restricted to the business community and involved numerous interest groups including economists and lawyers. The decision to prefer the Courts probably reflects a balancing of competing considerations including the advantages and disadvantages of the respective forums as much as it reflects the input of any particular interest group.

The decision to prefer the Courts has also been criticized because it is claimed that the Courts have, in the past been unsympathetic, to put it mildly, to the economic issues at play by rejecting the expert opinion evidence which is often tendered in major prosecutions under the Combines Investigation Act. Thus, it is claimed that the Courts have neither the inclination nor the expertise to decide competition law issues. There is some validity in this criticism although it is less valid today than formerly. However, this criticism largely ignores the reality that the Combined Investigation Act is a criminal law statute. This has had a significant impact on the conduct of antitrust liti-

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gation in Canada; has restricted the degree of freedom the Courts have had to interpret the legislation; and has forced the Courts to downplay the broader economic and public policy considerations which are often involved in particular cases. Critics forget that there is a stigma attached to a conviction and the fine or term of imprisonment that accompanies it. In a criminal case, the Courts have the responsibility of determining guilt or innocence and this limits the scope for creative lawmaking.

These restrictions will largely disappear with the proposal to "decriminalize" mergers and monopolies (abuse of dominance). This should result in a more thorough analysis of the economic issues by the Courts.

There is no doubt that the debate on the appropriate forum will continue. This is partly because there are no "right" or "wrong" answers. On the contrary, there are at least two alternatives both of which have advantages and disadvantages. Accordingly, as indicated above, the decision to prefer the Courts, as opposed to an administrative tribunal, is the result of a balancing of the advantages and disadvantages of each alternative. The discussion which follows attempts to set out some of the relevant considerations.

Selecting the Proper Forum

The selection of the proper forum is really the third of three interlocking questions which must be addressed in attempting to design an optimal competition law. First, once the policy objectives have been established, policy makers must decide on the standards or tests to be included in the legislation to achieve their policy objectives. Should the standards be fairly broad, such as FIRA's "significant benefit to Canada" or should they be more specific? Second, there must be some assessment of the evidence, analyses and judgement which will be required to apply the legislative standards. Third, some decision must be made on the forum which will adjudicate particular questions.

Parenthetically, in selecting the appropriate forum, policy-makers must also bear in mind that the structure of the decision making body and its powers should permit decisions to be made in a timely manner in a forum with sufficient procedural protection to ensure fairness. Furthermore, as stated in the Skeoch-McDonald Report of 1976 the trier of fact must meet "the need for consistently perceptive decisions". In addition, as stated in that report, the success of Competition Policy "depends critically upon the existence of a decision making authority capable of dealing perceptively and impartially on a case by case basis with a complex question of facts and remedy that will frequently require analysis and prescription".

Bill C-29 addresses the three questions referred to above. First, the Bill adopts quite specific, substantive statutory standards. For example, the abuse of dominance provision, refers to a substantial or complete control of a class or species of business, a practice of anti-competitive acts and an effect of preventing or lessening competition. Second, it is obvious that several of the

provisions of Bill C-29 will require litigants to engage experts in various fields to undertake studies and give expert evidence with respect to the issues in any particular case. As a corollary the evidence led will place a heavy burden on the trier of fact. Third, the Bill prefers the Courts, as opposed to an administrative tribunal, to adjudicate these questions (excluding specialization agreements). It would appear that the policy-makers selected the Courts, because in their opinion, the Courts would be better able, on balance, to adjudicate on the legislative standards contained in the Bill. What then is the basis for this decision?

There is little doubt that the selection of the Courts reflects a growing consensus in the business community and the general public in favour of the Courts. This represents a change from the initial response to the discussion paper, which was released by the Department of Consumer and Corporate Affairs in April 1981, which indicated a roughly 50-50 split between the Courts and an administrative tribunal. There are probably several reasons for this change. However, one of the principal reasons appears to be the perception that the courts are better able to balance the public policy objective of maintaining competition in a mixed public-private enterprise economy with the rights of groups and individuals to be free of unwarranted intrusion by government into their affairs. This is particularly important when it is recognized that Bill C-29 substantially increases the potential for the Director of Investigation and Research to challenge mergers and anti-competitive practices. The prenotification and interim injunction provisions in the proposed merger section are but two examples.

This concern about the increased role of government is often reflected in the statement that the Courts are more "independent" than an administrative tribunal. This may be entirely subjective and reflect nothing more than individual preference, particularly among lawyers. Nonetheless, there appears to be a sense that the Courts are likely to be more effective in striking a balance between competition policy objectives and private rights. Historically, the Courts have been especially vigilant in affording some measure of protection to individuals and groups against the state. This role will take on increased significance if Bill C-29 is passed, with or without amendment, in the new Parliament.

There is also increasing disaffection with "regulation" of the economy and the role administrative tribunals play in that process. In some respects this reflects the public policy agenda in the United States which has now moved into Canada. Witness the reexamination of regulation in the airline industry, trucking and telecommunications to name three examples. This trend is likely to continue and may well accelerate.

Specialization

There is, of course, a case to be made for an administrative tribunal, in that, there is much more room for specialized expertise with such a tribunal than is likely to be found in the Courts. For example, the Restrictive

Trade Practices Commission could offer, through the appointment of qualified members, expertise in the areas of law, business, economics and public affairs. Furthermore, it is also possible to appoint part time or ad hoc members to offer expertise in particular industries. Accordingly, the varied backgrounds of the members of the Commission facilitate an understanding of the often complex issues at hand and are of assistance in assessing the likely impact on the economy. Moreover, a Commission is able to build up expertise, something which is much more difficult in the Courts.

A note of caution is nevertheless warranted regarding the expertise of a tribunal, particularly with respect to the appointment of the members of the tribunal. The Skeoch-McDonald Report cautioned as follows:

"It is almost trite that on specialized subjects good experts are better than courts, but bad experts can be much worse. We should stress that we place more faith in experience and informed common sense than in cloistered "expertise". The responsibilities we propose for the Board are formidable but we are confident that if the matter of appointments to the Board is treated as seriously by the government as are appointments to judicial office, we will have a Board capable of making perceptive and realistic decisions and making the statute work to the long-run benefit of the country. If, however, the government in making the appointments were to be influenced by any grounds other than personal qualifications for the job, the results could be considerably more damaging than leaving the law as it is."

There is clearly a strong argument in favour of a specialized tribunal. However, there is also an argument for the Courts. In the past, the Courts have demonstrated an ability to acquire expertise on many technical and complex subjects. There are numerous examples of complex commercial litigation, involving several disciplines such as engineering, architecture and accounting among others, where the Courts have demonstrated expertise in sorting through the facts to determine the issues. It is also likely that there will be an increased emphasis, in administering the Courts, on developing panels of judges who are interested in competition law issues and have the necessary background and expertise to adjudicate these issues.

It should also be noted that there is a great deal of mythology associated with the criticism of the role of the Courts. More recently, the decisions in Consumer Glass (1982) 33 O.R. (2d) 228 and Hoffman LaRoche (1980) 28 O.R. (2d) 164 (Trial) and (1982) 33 O.R. (2d) 694 (Appeal) illustrate an appreciation and understanding of complex economic analysis and argument. The issues which arose in those cases and the treatment of the sophisticated economic evidence which was called by both the prosecution and the defence demonstrates that the Courts are capable in this field.

Rules of Procedure

There is also no doubt that the rules of procedure play a role in selecting the appropriate forum. Flexible procedural and evidentiary rules are often the hallmarks of administrative tribunals. It is this flexibility which, it is said, enables a tribunal to deal with the exigencies of each case coming before it. It is also said that this flexibility is important because competition cases do not always lend themselves to the relatively more stringent rules of the courts. For example, while a court will exclude hearsay evidence, a tribunal may admit it and weigh it accordingly. Such a relaxation of rules would ensure that all available relevant evidence is placed before the trier of fact.

This flexibility necessarily carries with it an element of uncertainty. Persons appearing before tribunals have claimed that frequently they are not sure what to expect. The right to be present, to cross-examine witnesses, the type of evidence and whether or not to lead evidence are all important issues which may not necessarily be addressed until proceedings have commenced. Thus, it has been claimed that this uncertainty militates against presentation of the best possible defence.

On the other hand, the rules in the courts are well-settled and offer certainty to persons appearing before the court. Moreover, procedural and evidentiary court rules are the product of years of evolution and exist for good reason. For example, the rules relating to hearsay evidence are designed to avoid unfairness to the person against whom such evidence is tendered since that person cannot adequately test the accuracy of that evidence.

The appeal process in the courts is also well known and understood. The opposite is true of appeals from the decisions of administrative tribunals. Businessmen and lawyers alike are often baffled by the finer points of appeals from such bodies.

Non-Competition Policy Objectives

There are also policy objectives which may conflict with the maintenance of competition in the economy and this militates against the Courts as the proper forum to adjudicate competition law issues. For example, it has been suggested that competition law issues should not be dealt with in isolation from other public policy objectives such as the maintenance of full employment, economic growth and the impact of offshore competition on the Canadian economy. Further, it is suggested that were such objectives to be considered, then an administrative tribunal is preferable to the Courts in adjudicating such questions. Historically, the Courts and the Restrictive Trade Practices Commission have never played such a role and Bill C-29 does not confer such a role on the either body. However, if the legislation is amended to reflect additional public policy objectives, the argument in favour of an administrative tribunal, not to mention a Cabinet override, is immeasurably strengthened.

There are also policy objectives which militate in favour of the Courts. For example, it has been suggested that federal legislation such as the Combines Investigation Act does not reflect local or regional interests and that a federal administrative tribunal such as the Restrictive Trade Practices Commission cannot deal with such interests. Without commenting on the merit of this suggestion, if any, there is a perception that the Courts are more likely to be sensitive to local or regional interests. This may reflect nothing more than the fact that the administration of justice is largely a provincial responsibility and the courts are resident in the community and are therefore more accessible than a federal administrative tribunal.

Conclusion

The foregoing summarizes some of the considerations policy-makers take into account in balancing competing considerations in selecting the proper forum. There are probably other factors. Hopefully, this brief elucidation of some of the issues has shed some light on the difficulties policy-makers encounter in shaping amendments to the Combines Investigation Act, not only in the selection of the forum, but in other areas as well. If, in the result, the legislation is passed, it has at least one advantage over earlier proposals which are gathering dust on the shelves of the experts.