BILL C-911

WHAT ARE THE COSTS OF CLOSURE?

By

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There is much to welcome in Bill C-91 (The Competition Act) and prospects for closing out a decade and a half of often abortive and acrimonious debates over reform of Canadian Competition Policy appear reasonably bright.

The attractive features of the Bill can be shortly noted: the transfer to civil review by a specialized tribunal of abuse of dominant position and mergers (with pre-notification requirements over certain size thresholds) - both monopolies and mergers have until now been dealt with by the courts under criminal prohibitions; clarification of the elements of the conspiracy offence rendered confused and difficult to prove by recent court decisions; and the subjection of banks and Crown corporations to many of the provisions of Canadian competition law.

This comment will not attempt to set out the provisions of Bill C-91 in detail or to celebrate its strengths, but rather to focus on some selected features of the bill which are puzzling or a source of concern.

(1) The Objectives of the Bill

Section 19 of the Bill provides: "The purpose of this Act is to maintain and encourage competition in Canada in order to promote the efficiency and adaptability of the Canadian economy, in order to expand opportunities for Canadian participation in world markets while at the same time recognizing the role of foreign competition in Canada, in order to ensure that small and medium-sized enterprises have an equitable opportunity to participate in the Canadian economy and in order to provide consumers with competitive prices and product choices".

This may be a harmless statutory placebo intended to reassure all relevant political constituencies of the good intentions of the Bill -big business is assured that size and concentration is not bad if this is required to meet international competition; small business is assured that market behaviour (of large businesses?) will be appropriately disciplined by the legislation to ensure small firms of an "equitable" share of economic activity; and consumers are assured that neither the preservation of bigness or concentration will be allowed to curtail excessively product choices nor that the preservation of market power on the part of big business or inefficiencies on the part of small business will be allowed to put upward pressure on consumer prices.

Achieving all of these objectives simultaneously is, of course, a tall order - indeed several of the objectives are inherently contradictory. Thus, if either the courts or the new Competition Tribunal attempt to take this statement of objectives seriously in approaching the interpretation of particular substantive provisions of the legislation, they are likely to find little for their comfort or enlightenment.

Moreover, the statement of objectives expressly acknowledges, as do a number of other provisions in the Bill dealing with mergers, export agreements and specialization agreements, the close interdependence between domestic competition policy and external trade policy. The Bill generally recognizes that international competition is, or may be, a substantial disciplining force on domestic suppliers. While this premise is entirely accurate and sensible, it presupposes that Canada is entering an era of increased trade liberalization where foreign imports will increasingly discipline our domestic producers, and competition in export markets will increasingly discipline our export-oriented industries. Whether in fact we are about to enter such an era, despite the expousal by the present federal government of the goal of trade liberalization with the U.S., remains at this point quite conjectural. If instead, world trading regimes degenerate into new levels of domestic protectionism (a not remote scenario), a major premise of the Bill will be rendered fallacious. This is not to criticize the Bill on that account, but rather to underscore the hazards of sequential but highly interdependent policy-making.

(2) The New Competition Tribunal

While the increased reliance on civil review by an expert tribunal of competition policy issues follows a trend observable in most jurisdictions in the industralized Western nations[1], there are several features of the structure and jurisdiction of the new Competition Tribunal that provide grounds for disquiet. The case for wider use of an expert tribunal rather than all-purpose courts, rests, obviously enough, on perceived gains from institutional specialization (analogous to the gains from specialization in private sector organization recognized by economists ever since Adam Smith's famous pin factory example).

Given this rationale, it is not then so clear why either the chairman of the Tribunal at large or the chairmen of panels in particular cases should be all-purpose judges recruited from the Federal Court Trial Division, or why only judicial members of the Tribunal may determine matters of law, or how easy it will be to segregate such issues from mixed issues of law and fact that may be decided by all members of the Tribunal. For example, the question of whether a practise under s. 51 (abuse of dominant position) has "lessened competition substantially" may be viewed as a legal question pertaining to the meaning of this phrase, or a matter properly of economic theory (e.g. the economic implications of price discrimination) - a matter of law, fact, or something else? - or a question purely of fact calling for collective determination. Appeals from the Tariff Board in customs valuation disputes illustrate the elusiveness of these distinctions.[2] These difficulties of characterization seem likely to provide fertile grounds for appeal, for which a right is provided to the Federal Court of Appeal on issues of law or mixed law and fact (and thence to the Supreme Court of

Canada). Once again, all-purpose courts are likely to be the final arbiters of the meaning and application of the legislation (as opposed merely to issues of vires and due process). In most major disputed cases, appeals can be anticipated, so that the premise that specialized tribunals are likely to have a comparative advantage over courts in an area of complex economic policy such as competition policy seems ultimately to have been accorded very limited weight. If the government succumbs to current pressures from some quarters also to allow appeals from the Tribunal to the federal cabinet in merger cases, we will have invented the most unholy institutional brew imaginable, with all-purpose judges, economists, businessmen and other "experts", and politicians all engaged in a juridical imbroglio, the central perspective of which will quickly become lost to view.

One last comment on the function of the Tribunal: the power of the present Restrictive Trade Practices Tribunal to conduct research inquiries (like the petroleum and Bell-Northern inquiries) has been removed from the new Tribunal. This is hard to fathom. While it may well be appropriate (and constitutionally ordained) that the Tribunal should not be issuing search warrants and the like in matters which may later come before it for adjudication, it is not clear why these due process objections should extend to research inquiries. This has been an important function of the R.T.P.C. in the past, and has been an equally important function of the British Monopolies Commission. The option of setting up ad hoc commissions of inquiry under the Inquiries Act is likely to be more difficult to invoke politically and, by diffusing the inquiry function, is not conducive to the evolution of a central cadre of expertise in competition policy matters.

(3) Contradictions

The Bill adopts contradictory policy stances on three important issues that arise in different substantive contexts:

First, in an appalling concession to the business community, the bill abandons any attempt to render bare cartels (price-fixing or market-division agreements) per se illegal under the general conspiracy provisions. This has been the law under the U.S. Sherman Act since the turn of the century. Most U.S. analysts of U.S. anti-trust policy, from conservatives[3] to interventionists, are agreed that it has been its major accomplishment and has generated enormous benefits for consumers both in cartels disbanded and incipient cartels discouraged. Yet, despite this capitulation in Bill C-91, other provisions in the bill subject banks to a rule of per se illegality in entering into agreements to fix interest rates on deposits or loans. This major discrepancy of approach is unfathomable.

Second, the general conspiracy provisions have been amended so as to indicate that only proof of intent to enter into a prescribed agreement is necessary, not intent to thereby lessen competition unduly. However, in the abuse of dominant position provisions, the Crown must prove that a dominant firm or firms engaged in certain practices with the object of lessening

competition. Why intent to lessen competition is relevant in one context and not the other is unclear. Surely all that is relevant is the impact of a practice on consumer welfare, if carried into effect or sustained. If we can abolish intent in the criminal conspiracy provisions, a fortiori it should have no role to play in the civilly reviewable case of abuse of dominant position and renders the already daunting task of the Crown under the remaining requirements of the provisions pertaining thereto unnecessarily forbidding.

Third, the efficiency defence included in the abuse of dominant position and merger provisions is framed in different terms. In the former case, the Tribunal may not make an order if a substantial lessening of competition is the result of superior competitive performance (s. 51(4)), while in the latter case the Tribunal may not make an order if the efficiency gains are greater than and will offset the effects of any lessening of competition (s. 68(1)). In the first case, no balancing of offsetting efficiency effects is required while in the second case it is. Given that in the case of mergers, the Tribunal, under s. 65(1)(e), is already required to consider "the extent to which effective competition remains or would remain in a market" after the merger, it is not clear why reductions in competition should be further weighed in the balancing process contemplated by s. 68(1). This balancing test involves weighing imponderables and introduces an unnecessary degree of uncertainty into the adjudicative process. Moreover, because the merger and abuse of dominant position provisions address essentially the same economic concerns - the accumulation or exercise of excessive market power, the review criteria should be as closely aligned as possible.

(4) Unfinished Business

Bill C-91 does not address a number of issues that are very unsatisfactorily resolved under the existing legislation:

(a) Price Discrimination and Predatory Pricing

These are presently criminal offences under s.34 of the Combines Investigation Act. Most economists are sceptical that price discrimination reduces consumer welfare. Most convictions under the U.S. Robinson-Pateman Act seem principally to have had the effect of protecting small businesses which cannot command the same terms in the market place as larger, more efficient businesses. Similarly, prosecutions for predatory pricing seem often to have been directed to vigorous forms of price competition[4], which the losers from naturally resent, even though consumers are better off. It might well have been adviseable to remove both forms of pricing behaviour from the realm of per se illegality and simply added them to the list of practices that the Tribunal may review under s.51, when considering alleged cases of abuse of dominant position. This would, in effect, subject them only to rule of reason review, and would explicitly link them to abuse of market power, the existence of which is a pre-condition to use of these pricing strategies for anti-consumer purposes. However, this is a context where small business interests perceive competition policy legislation as a charter of protectionism,

and keeping this political constituency on board, under the guise of protecting "equitable" economic opportunities, is an unfortunate price that seems to have been paid to ensure that the reform process goes forward.

(b) Resale Price Maintenance

This is also currently a per se offense under s.38 of the Combines Investigation Act. Economic thinking on resale price maintenance has evolved rapidly over the last decade,[5] and apart from resale price maintenance designed to effectuate either a retailers' or a manufacturers' cartel, seems in most other cases consistent with consumer welfare. The cartel manifestations of R.P.M. could readily be dealt with under the general conspiracy provisions. Whether a case exists at all for proscribing individual (as opposed to collective) R.P.M. seems highly problematic. About half of the prosecutions in recent years under the Combined Investigation Act in respect of anti-competitive offences have involved R.P.M. Few of these cases have involved collective forms of R.P.M. Much of this enforcement effort seems misdirected. Despite the Macdonald Commission's recommendation that the legal position on R.P.M. be rethought[6], Bill C-91 is silent on the subject.

(c) Regulated Conduct

Bill C-91 abandons efforts made in its abortive predecessors to define the scope of the regulated conduct exemption. Missing from the Bill are provisions, found in predecessors, mandating federal regulatory bodies to adopt policies in furtherance of their regulatory objective that are least restrictive of competition. In the context of current efforts to achieve a measure of de-regulation in various regulated sectors and an enhanced role for competitive forces, this seems an unfortunate omission. In addition, the recent decision of the Supreme Court of Canada in Jabour v law Society of British Columbia[7] has driven a coach-and-four through the conspiracy provisions of the Act where the conduct of self-regulating trades or professions operating under the authority of provincial legislation is in question. A provision that an exemption applies only where the conduct in question is specifically mandated by legislation or regulations of the provincial legislative or government would have gone a long distance towards closing this yawning gap.

(d) The Implications of Bilateral Free Trade for Domestic Competition Policy

Some specific implications of bilateral free trade for provisions in Bill C-91 may shortly call for reconsideration of these provisions. For example, it seems inconceivable that the U.S., in free trade negotiations, will be prepared to tolerate the exemption of export cartels from the conspiracy provisions of the Act, at least where the

cartel is designed to extract supra-competitive returns from U.S. consumers. There may be similar reservations about the specialization agreement exemption from the cartel provisions. The fact that in both contexts the Bill deems it a positive factor that the real value (rather than the volume) of exports may be increased implies that reducing output and raising prices so as to increase revenues is legitimate despite the negative impact on foreign consumers and on Canadian suppliers of labour and other imports, the demand for which is reduced. There are obvious foreign and domestic concerns about such arrangements. In addition, present provisions on predatory pricing may need to be re-thought and harmonized with U.S. law if anti-dumping cases arise in bilateral trade are to be dealt with under anti-trust laws (as has been proposed), rather than under a separate legal regime. These and other issues requiring a significant degree of harmonization of U.S. and Canadian anti-trust laws in the context of a free trade agreement with the U.S. suggest that the book on competition policy reform in Canada may not yet be closed.

FOOTNOTES

(1) See Warren Grover, "The Competition Bill: The Courts on a Specialized Administrative Tribunal", in Prichard, Stanbury, and Wilson (eds.) Canadian Competition Policy (Toronto: Butterworths, 1979).

(2) See P. Slayton, J. Quinn, and J. Cassels, The Tariff Board (Law Reform Commission of Canada, 1981).

(3) See R. Posner Antitrust Law: An Economic Perspective (University of Chicago Press, 1976), p. 39; R. Bork, The Antitrust Paradox (N.Y.: Basic Books, 1978) p. 263.

(4) See D.G. McFetridge and S. Wong "Predatory Pricing in Canada", (1985) 63 Canadian B. Rev. 685.

(5) See F. Mathewson and R. Winter, Competition Policy and The Nature of Vertical Exchange, Research Study for the Royal Commission on the Economic Union and Development Prospects for Canada; R.D. Anderson and S.D. Khosla, September 1984 and December 1985, Canadian Competition Policy Record.

(6) Op cit, (Ottawa: Supply and Services Canada, 1985) p. 224.

(7) Jabour v Law Society of British Columbia (1982) 132 D.L.R. (3d) 1 (S.C.C.) and comment thereon by J.B. Dunlop, (1983-4) 8 Canadian Business Law 235.