CANADIAN COMPETITION RECORD

THE FIRST SECTION

COMPETITION TRIBUNAL UNFAIRLY CRITICIZED

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There is a widespread view that proceedings before the Competition Tribunal are overly cumbersome, inefficient and costly. In order to address these concerns, it has been suggested the Tribunal should be replaced by another model of dispute resolution; for example, one in which the Commissioner of Competition investigates and adjudicates all competition law disputes. Indeed, the *Competition Act* has recently been amended to permit this to be done (subject to certain limitations) with respect to a domestic service as defined in the *Canada Transportation Act*.

In my opinion, most of the criticism of the Tribunal is overly simplistic and overstated. Moreover, I am concerned that the Tribunal, in response to this criticism, will adopt strict time limits or other procedures which will restrict the ability of the parties, particularly Respondents, to make "full answer and defence" and to try cases properly. If this occurs, the process will unfairly compromise the rights of the parties and the requirement in subsection 9(2) of the *Competition Tribunal Act* that "all proceedings before the Tribunal shall be dealt with as informally and expeditiously as the circumstances and considerations of fairness permit" will be tilted in favour of expediency at the expense of fairness. In what follows, I offer a few comments on these issues.

The view that the Tribunal's proceedings have become too lengthy, too costly, and too litigious, and that "something must be done" has its origin in two or three early proceedings before the Tribunal. In *Palm Dairies*[1], the Tribunal rejected the proposed settlement whereas in *Imperial Oil*[2], after a lengthy hearing, the Tribunal imposed several conditions on its approval of the proposed Order. The Tribunal was widely criticized for its decisions in both of these cases on the basis that it ought not to interfere with settlements which necessarily involve a compromise on both sides. The critics appeared to give little weight to the fact that the Tribunal also has a mandate to protect the public interest in competition.

Thereafter, there have been several lengthy proceedings in both merger and other cases involving alleged vertical and other restraints on competition. This fuelled the criticism. What the critics failed to note however, is the fact that all of these cases were hotly contested. The Respondents did not accept the Commissioner's viewpoint and chose instead to litigate it. That is their right. On the other hand, there have been a number of consent proceedings which have been dealt with expeditiously as well as several contested cases that have not taken an inordinate amount of time. The recently completed *Canadian Waste Services Holdings Inc.*[3] case is one example.

In my view, much of the criticism is misplaced and fails to appreciate the realities of the cases that are brought before the Tribunal and the evolution of practice and procedure before the Tribunal. First, the

Commissioner has brought relatively few cases before the Tribunal, particularly in relation to the universe of potential applications. The vast majority of mergers and other claims that raise significant competition law issues are resolved before they reach the Tribunal. This suggests that the cases which are litigated raise substantive issues that should be resolved by the Tribunal. Moreover, these issues are often very complex and require careful consideration. For example, *Superior Propane*[4], which is one of the longest running proceedings before the Tribunal, raised significant antitrust issues relating to the interpretation of the efficiencies defence under section 96 of the Act. Second, the Competition Tribunal has become much more active in case managing its docket. This has been effective in reducing the length of time required to dispose of cases before the Tribunal. Furthermore, recent amendments to the Act as well as proposed rule changes will afford the Tribunal, as well as the parties, more opportunities to streamline the process.

It is beyond dispute that the Tribunal must provide a flexible, expeditious and timely forum for the review of contested mergers and reviewable practices consistent with considerations of fairness. On the one hand, the Respondents in proceedings before the Tribunal have pressing business interests at stake, with implications for a broad range of stakeholders including shareholders, employees and consumers. On the other hand, the *Competition Act* is concerned with protecting the public interest in competition. Where appropriate, the Tribunal must act quickly to protect the public interest. Of course, the Tribunal has to strike an appropriate balance. In some cases, the Tribunal will, of necessity, act quickly whereas, in other cases, more detailed consideration is required. In all of these cases, the Tribunal must exercise its discretion. The rules of practice and procedure should facilitate the exercise of this discretion, not place it in a straight jacket.

In my view, the advocates of reform of the Tribunal have placed an undue emphasis on expediency. We should be wary of reforms that limit the discretion of the Tribunal because it may have unintended consequences. For example, if the Tribunal limits its discretion by adopting rules that must be observed in all cases, there is a risk that Respondents will be disadvantaged. Indeed, it is ironic that many of the advocates of reforms that favour expediency at the expense of fairness appear to believe that this is in the public interest, as well as the interests of the business community. These are the very interests that will complain the loudest if they are not entitled to make "full answer and defence" in contested cases.

As noted, the Tribunal has made considerable strides in managing and controlling large cases. In particular, the Tribunal has been making increased use of the pre-hearing conference as a forum for case management and scheduling (sections 21, 22). Under Bill C-23, the Tribunal will soon be vested with additional powers to expedite certain proceedings. For instance, in cases where the application raises no genuine issue, the Tribunal will have the power to grant summary judgment (subsection 9(4)). To weed out frivolous motions and to discipline strategic delay, the Tribunal will soon be vested with the power to award costs (section 8.1).

There is still room for progress on this front, particularly with respect to the implementation of pro-active case management. The Tribunal could learn from the experience of the Commercial List in Toronto, where the judges of the Ontario Superior Court of Justice have instituted an accessible and flexible system for resolving urgent motions and applications in complex commercial matters and bankruptcies. The Tribunal already possesses the core tools to implement such a system under the current rules (sections 21, 22), but the Tribunal needs to wield these rules more effectively to deal with the exigencies of particular cases.

The Tribunal must also provide for a fair judicial inquiry, governed by law and due process, which operates as a "check" on the extraordinary powers of the Commissioner. The Commissioner has a sweeping array of investigative and prosecutorial powers. The Commissioner can compel the production of documents and sworn information (section 11), execute warrants and search premises (section 15), and under the amendments of Bill C-23, the Commissioner will soon be vested with broad powers to obtain *ex parte* interim relief from the Tribunal (section 103.3). Furthermore, the Tribunal has held that, in some circumstances, the information that the Commissioner obtains during his investigation is privileged and protected from disclosure. By contrast, Respondents often have limited means to obtain similar information prior to trial. Accordingly, it is important to remember that the Tribunal must have the discretion to ensure that justice is not only done but seen to be done.

From my perspective, the real unfinished work of procedural reform lies in the domain of accountability. To any objective observer, after Bill C-23, the Act tilts heavily in favour of the Commissioner. For a statute ostensibly devoted to "competition", the Commissioner enjoys a monopoly on certain important powers. I offer two particular examples:

The Commissioner's unilateral power to initiate references. Under Bill C-23, the Commissioner and a Respondent may, by agreement, refer a question of law, mixed law and fact, jurisdiction or procedure to the Tribunal for an advance determination (subsection 124.2(1)). In the absence of such an agreement, the Commissioner has the unilateral power to refer a question of law, jurisdiction or procedure to the Tribunal (subsection 124.2(2)). But, by deliberate omission, a private litigant does not enjoy any corresponding right[5]. In my view, this omission is both unfair and unwise. A private litigant's right to test and challenge the Commissioner's interpretation of the law before an impartial body is an important check on his prosecutorial power. Moreover, in a number of cases, the right to seek an advance resolution of an important point of law or jurisdiction will substantially shorten the time and cost of proceedings[6]. The only possible countervailing concern relates to the possible use of strategic motions. This concern can be readily alleviated by providing for costs in such circumstances (as currently drafted, the cost provision of Bill C-23 does not apply to references) (section 8.1).

The Commissioner's powers to obtain interim relief. Under the new bill, the Commissioner will be vested with a broad power to obtain *ex parte* interim relief in respect of reviewable practices (other than mergers) on the basis of harm or injury to specific competitors. There has been much debate about the necessity for such a dramatic power (particularly with respect to the absence of notice), and I do not intend to rehash this debate. We can all agree, however, that the Commissioner's power is exceptional, and it requires effective judicial review. Unfortunately, under the current bill, a Respondent's ability to challenge such an order is exceedingly restricted. The Respondent must initiate a separate application to challenge the order, and the Respondent appears to bear a "reverse onus" of disproving the pre-conditions of the order (subsection 103.3(7)). In its recent decision under section 104.1, the Tribunal has further suggested it will defer to the Commissioner's interpretation of the Act in interim proceedings (for instance, in the *Air Canada* case, Simpson J. declined to second-guess the Commissioner's view that the "matching" of fares could constitute an anti-competitive act)[7]. To frustrate matters even further, the Respondent has no right of appeal from the Tribunal's review of the order (subsection 103.3(10)).

The Commissioner's extensive interim powers may also have the unintended consequence of undermining other parts of the new bill. For instance, under Bill C-23, a private litigant is now permitted to seek leave from the Tribunal to initiate an application with respect to certain vertical restraints (section 103.1). This provision was intended, in part, to open up proceedings before the Tribunal, particularly in instances where the Commissioner has decided not to act. Query whether this provision will become an effective and meaningful avenue of relief in view of the Commissioner's superior access to interim relief. Under the amended statute, the Commissioner may seek *ex parte* interim relief under the low thresholds of section 103.3, but a private litigant is limited to seeking interim relief in accordance with the usual judicial principles of irreparable harm under subsection 104(1). As a consequence, many private litigants may prefer to focus their efforts on lobbying the Commissioner to initiate a case before the Tribunal (so as to vicariously enjoy his powers of interim relief), rather than prosecuting their own applications under section 103.1. In short, the Commissioner's disproportionate interim powers may actually frustrate the utilization of the private right of action under Bill C-23.

As a result of Bill C-23 and the forthcoming rule amendments sponsored by the Tribunal, the Tribunal will be better equipped to deal with the complex merger and reviewable practice cases which come before it. The next phase of reform, however, needs to focus more on improving the accountability of the Commissioner. While there are a number of "checks" already in place, the inclusion of a parallel right on behalf of litigants to seek a preliminary determination of a question of law would help level the playing field, and it would also serve as an expeditious means of resolving certain cases at the preliminary stage.

In summary, criticism of the Competition Tribunal is largely misplaced. The problem lies elsewhere. If you accept the notion that the office of the Commissioner of Competition should be principally concerned with investigating and, where appropriate, prosecuting competition law cases and the Tribunal or the courts should be principally concerned with adjudicating those cases that are brought before them, you cannot fail to have noticed that most of the cases are decided in the office of the Commissioner of Competition and relatively few are dealt with before the Competition Tribunal. Is this system open and accountable? Is it in the public interest? In my opinion, we would be better served if the critics of the Tribunal paid more attention to these questions and the public policy considerations that are inherent in them.

Notes

[1] *Canada (Director of Investigation and Research)* v. *Palm Dairies Ltd.* (1986), 12 C.P.R. (3d) 540; 12 C.P.R. (3d) 425 (Can. Comp. Trib.).

[2] *Canada (Director of Investigation and Research)* v. *Imperial Oil Ltd.*, [1990] C.C.T.D. No. 1.

[3] *Canada (Commissioner of Competition)* v. *Canadian Waste Services Holdings Inc.*, [2001] C.C.T.P. No. 32.

[4] *Canada (Commissioner of Competition)* v. *Superior Propane Inc.*, [2000] C.C.T.P. No. 15, rev'd (2001) 199 D.L.R. (4th) 130 (F.C.A.), lv. dismissed [2001] S.C.C.A. No. 257.

[5] As they might be entitled to under the normal *Rules of Civil Procedure* for declaratory relief. See *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, R. 14.05. The development of this type of procedure in normal litigation has been widely praised for assisting commercial disputes. *Veneziano di Armamento e. Novigazione* v. *Northumberland Shipbuilding Co. Ltd.* (1919), 121 L.T. 628 at 635 per Lord Atkin. "This form of action is, I think, one of the most valuable contributions that the courts have made to the commercial life of this country."

[6] Again, the right to have a determination of a point of law in civil litigation in order to shorten the litigation is well-accepted: *Rules of Civil Procedure*, R. 21; *Girsberger* v. *Kresz* (2000), 47 O.R. (3d) 145 (C.A.) (limitation period issue determined first).

[7] *Air Canada* v. *Canada (Commissioner of Competition)*, [2000] C.C.T.D. No. 24 at para. 53.