

CANADIAN COMPETITION RECORD

THE FIRST SECTION**REFLECTIONS ON SEVEN YEARS AS COMMISSIONER OF COMPETITION**

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There are few positions in Canada which offer one the ability to make a real impact on every Canadian's life. The Commissioner of Competition is one and I am pleased at how the Competition Bureau and competition policy and enforcement evolved over my seven year tenure. The Bureau now enjoys a national and international profile earned through our efforts and the strict adherence to five operating principles: fairness, predictability, transparency, confidentiality and timeliness.

Any successes the Bureau enjoyed are the result of concentrated efforts on many fronts. I propose to highlight the ones which, in retrospect, I consider most significant.

Policy Statements and Enforcement Guidelines

Providing clear policy statements on significant aspects of the administration and enforcement of the *Competition Act* has been critical to the Bureau's principles of transparency and predictability. The *Information Bulletin on Corporate Compliance Programs*, issued in June 1997, provides a clear explanation of the characteristics the Bureau considers necessary for an effective program designed to achieve compliance with the law for corporate activities in the market place.

The publication of the *Conformity Continuum Information Bulletin* outlined a new approach to the administration of the Act and has been copied by many other jurisdictions who recognize the effectiveness of balancing traditional law enforcement with education.

I felt very strongly that in order to live up to the principles of transparency and predictability it was critical for practitioners to know how the Bureau interprets the Act. Consequently, a series of guidelines was issued including: the *Merger Guidelines as Applied to a Bank Merger*, *Guidelines on the Abuse of Dominance Provisions*, the *Enforcement Guidelines on Abuse of Dominance in the Airline Industry*, and the *Bulletin on the Abuse of Dominance Provisions (Sections 78 and 79 of the Competition Act) as Applied to the Canadian Grocery Sector*.

Communications

While every industry and every political party pays generic tribute to competition and its salutary effect for economic growth, there are far more concentrated and powerful forces for protection and regulation. It is

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therefore extremely important for the Commissioner of Competition to ensure that the message of the benefits of competition is clearly and widely spread, that a coalition of support is marshalled on specific issues and that the Bureau's position is both legally and economically correct, as well as politically unassailable. Early involvement in policy issues is crucial, but will not occur unless the Bureau is recognized as having a role to play. Consequently, a strong and consistent involvement in communications is vital. We tried and I believe succeeded in changing the emphasis and the culture of the Bureau. As a result of the creation of our Communications Branch, in 2001, we increased the Bureau's public profile, emphasized stakeholder relations, and became a significant player in policy and legislative development in many areas e.g. transportation, communications, trade and agriculture marketing to name a few.

Mergers

In the area of mergers, we brought greater discipline to the review process through the introduction of service standards and the establishment of the Merger Review Unit to act as a clearing house as well as deal with non-complex cases. Another major shift was greater use of the consent order process to resolve cases. International cooperation became standard at the Bureau as Canada took advantage of globalization. For many cases in North America, the affected markets' or industry sectors' economic activity does not respect the borders. The best example is *Lafarge/Blue Circle*, where over \$2 billion of divestitures were ordered and the identical requirements were imposed by courts on both sides of the border. We also tried, in appropriate cases, to single out issues and take them to the Tribunal on a focussed basis. This was done in the *Canadian Waste* case and in the *United Grain Growers* case. Rather than having lengthy proceedings, this approach isolated the issue in dispute and allowed agreement on everything else.

It is obvious that we never shied away from taking on mergers when we concluded that they were anti-competitive. We tried either to re-structure them or, when this was not feasible, just told the parties outright that the Bureau would oppose the transaction. Of course, the best example of this is *PetroCan/Ultramar* which, in light of our opposition, did not go forward.

Mergers, of course, was also one of the areas where we had a considerable setback. Not only did we lose the contested *Superior Propane* case, resulting in a monopoly for that product in many markets, but as a result of the litigation the important issue of efficiencies is now hopelessly muddled and will have to be clarified by legislation. If I have one regret, it is that I left before this important issue could be resolved.

Criminal Matters

In the area of criminal matters, the Bureau expended a great deal of effort on inquiries dealing with criminal cartel enforcement, especially in the areas of vitamins, food additives and construction materials. During my tenure, the Bureau obtained the largest fines in Canadian history and even had executives convicted and sentenced to community service or to jail. The Bureau developed an unprecedented partnership with U.S. and EU authorities, which our partners hold up as models for other countries to emulate. The success of the new immunity program, which parallels the model of the United States, is demonstrated by the fact that the Bureau

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has more applicants than its current resources allow it to handle. By regionalizing the criminal branch, the Bureau is now also better placed to prosecute local cartels and bid-rigging activities.

Civil Matters

On the civil side, the Bureau made a conscious effort to resolve more cases through the Competition Tribunal on a consent or, if necessary, contested basis. There was criticism that the Bureau often pre-empted the Tribunal, by making decisions behind closed doors with little or no transparency. I disagree; as part of its effort to be transparent, the Bureau brought as many responsible cases to the Tribunal as possible during my tenure. Examples include the airline litigation and the *BMG* case, which clarified the application of section 75. However, consistent with the *Conformity Continuum*, sensible solutions were worked out without going through the Tribunal in cases such as *Monsanto*, *ICBC*, and *Enbridge*.

Fair Business Practices

During my tenure, this Branch was consolidated to deal with the whole area of consumer information and administration of the four Acts for which the Bureau is responsible. The Bureau concentrated on fighting deceptive and fraudulent telemarketing, pursuing cases dealing with misleading representations under the new civil provisions to establish the effectiveness of dealing with such issues on the civil track. Fraudulent telemarketing unfortunately became a growth industry. Notwithstanding several productive partnerships with domestic and foreign law enforcement agencies, insufficient resources are devoted to this issue all over the world. Another Bureau innovation was the entry into productive partnerships with the private sector; for instance, the Bureau endorsed voluntary codes of conduct dealing with pet food labelling, scanning at checkouts and diamonds in order to encourage compliance with the law.

Operations

During the last seven years, the Bureau also completely overhauled its informatics infrastructure, ensuring that the latest technological and communications advances were readily available to its officers and staff, its budgeting process, and its internal accountability structure. Our computer search capabilities are the envy of our counterparts around the world. This allowed us to regionalize our work with the result that criminal and unfair business practices are now being pursued in all regions. The Bureau also implemented revised rules for conflict of interest and staffing and promotion. Lastly, every single office of the Bureau across the country was physically renovated and modernized. While these changes were largely invisible to the stakeholders of the Bureau, collectively they have made a tremendous difference to the people working in the Bureau, leading to better working conditions and even greater devotion to our work. This of course is reflected through greater efficiency and productivity.

Legislative Amendments

Two major packages of amendments, which complement and improve the *Competition Act* in a number of key areas, became law: Bill C-20 passed in 1999 and Bill C-23 passed in 2002. There are now specific criminal

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sanctions dealing with previously unaddressed areas: deceptive telemarketing and deceptive mail notices. These provisions give the Bureau tools to effectively combat particularly egregious behaviour that has become something of a scourge on Canada's reputation. In addition, amendments passed in Bill C-23 allow for private actions before the Competition Tribunal under sections 75 and 77 of the Act.

These amendments also provided stronger investigative powers for the Bureau. The provisions of the *Criminal Code* dealing with the interception of private communications (wire tapping) are now available for certain offences under the *Competition Act*, particularly deceptive telemarketing, bid-rigging and conspiracy offences in relation to prices, quantity or quality of production, markets or customers, or channels or methods of distribution. Offences under the Act are now covered under the provisions of the *Criminal Code* dealing with the proceeds of crime.

Canada also now has in place a legislative framework to allow the use of mutual legal assistance with other jurisdictions in civil matters. Mutual legal assistance on the criminal side has been most successful in establishing close cooperation with other jurisdictions, particularly the United States, while preserving the confidentiality of the evidence we obtain. When the necessary treaty arrangements are in place, use of the provisions will enable more effective cooperation in civil matters, such as abuse of dominance and merger investigations.

International Cooperation

Finally, in the area of international cooperation, Canada has played a leading role in the last seven years, both at the OECD and more recently in the establishment and leadership of the International Competition Network (ICN). We are a natural bridge between the U.S. and the EU, and given our bilingual bi-juridical nature we are also a natural bridge between developing and developed countries. Under Canada's leadership, the OECD's Working Party No. 3 on International Cooperation made considerable progress on the issues of International Cartel Enforcement and Merger Review. But the greatest success was in the area of global cooperation. Initially, I was sceptical about the idea of a global initiative on competition. However, I became convinced of the need for it as a result of the eloquent advocacy of my good friend, Jim Rill, former Deputy Attorney General Antitrust in the U.S. (who originated the idea) and in light of the limitations in both membership and methodology of operation of other fora. The Bureau and I thus became heavily implicated in the formation and operation of the ICN. The Bureau functions as a *de facto* secretariat for the ICN and I became the Chair of its Steering Group. The success of the ICN has been remarkable. In a mere two years, it has issued eight Guiding Principles and six Recommended Practices in the area of merger review. It also issued a guide on advocacy that has become the blueprint for success for competition agencies' efforts to encourage reliance on competitive markets around the world and has been translated into four languages. As I have mentioned many times before, the success of the ICN is due to its virtual nature, hands-on contributions by its members, the extremely close working relationship with non-government advisors and the absence of a stifling bureaucracy. The ICN has been called "today's pre-eminent instrument for international cooperation in the field of competition". A remarkable success given its short existence and I am proud of the Bureau's contribution to its success.

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Future Challenges

While I loved every minute of my seven years as Commissioner and feel much was accomplished, I am under no illusion that there are many challenges still remaining. The resource base has to be fixed: it is plainly wrong for the small Bureau budget to be part of the gigantic Industry Canada budget. This means the Bureau's needs are never considered in isolation and that the efficient and tightly run Bureau inevitably gets brushed with the profligate and undisciplined image (deserved or not) of the "landlord" department, Industry Canada.

There is also the whole issue of the need to amend the legislation to provide for significant deterrents for civil breaches. The current regime has virtually no deterrent for those who break the civil sections. Similarly, section 45 needs to be fixed. I have never understood the need for an economic test to excuse price fixing. We need to bring our cartel legislation into line with international norms. And speaking of international norms, our relationship with the U.S. is primordial in a world of integrated North American markets. It will need constant watching and nurturing so that the present excellent cooperation is not derailed by extraneous considerations such as the important fight against terrorism, or political fallout over the potential extraterritorial effects of private treble damages actions. There is also the need to find the right role for the Fair Business Branch. Clearly they need more powers and resources to fight the outright swindles that undermine the confidence in the market. But how many resources should the Bureau pour into this area? How far should it go down the road of becoming a pure law enforcement body? What areas should be left or delegated to agencies such as the police? These are issues that have no clear answers but need to be resolved.

Summary

In summary, I look back with great fondness to my years in the Bureau. I think we accomplished a lot, and yes, I use the we, because it was truly a collective effort that I was privileged to lead. There are lots of new challenges awaiting the Bureau, lots of tasks not yet accomplished. The Bureau is a very special place. The fascinating subjects it deals with, the scope of its powers, the unrelenting commitment to competition, the esprit de corps and the sense of family of its members make it the best place to work in Ottawa. It will always have a special place in my heart. As I said at my swearing in as a judge "you can take me out of the Bureau, but you can't take the Bureau out of me". I wish the Bureau well and am confident that under its new leadership it will succeed in the task ahead.
