Preface / Avant-propos

THE *COMPETITION ACT* OF 1986: A LAND OF HOPE AND PROMISE

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Competition policy in Canada has a long history, most of it uneventful. Legal historians will hasten to point out that our first competition statute, *An Act for the Prevention and Suppression of Combinations Formed in Restraint of Trade*,[2] was enacted one year before its American peer, the *Sherman Antitrust Act*.[3] However, the passage of the early Canadian law was not exactly a watershed moment in Canadian legal and economic thought. Like the *Sherman Act*, it was seen with considerable skepticism (indeed, it was referred to as "a political sham" by Michael Bliss in 1973[4]) and the first successful prosecution did not take place until twelve years after it was passed, and would not have been possible if not for amendments in 1900.[5] The 1889 *Act* was also very much a work in progress: merger and monopolization were not introduced until 1910, pricing practices until 1935, misleading advertising until 1960, and (what are now known as) civilly reviewable matters until 1976.[6]

The Economic Council of Canada's *Interim Report on Competition Policy*, released in July of 1969,[7] marked the turning point that would drag Canadian businesses (in many cases, kicking and screaming) into the modern *Competition Act*. Unlike the *Combines Investigation Act*, which employed criminal provisions for merger control and prescribed *per se* illegality for high market share, the Council's report advocated a mixture of criminal and civil provisions, with a singular focus on "furthering the interest of Canadian consumers through an efficiently functioning economy."[8] The Council's recommendations generated considerable controversy. After Bill C-256 was introduced in 1971 including many of the Council's proposed reforms, the Financial Post noted that "[n]ot since the early days of the great tax debate has a single government proposal aroused the ire of the business community to the extent that the *Competition Act* has."[9] Businesses criticized the reforms as too consumer-oriented, having no concern for the survival of domestic industry. Businesses were also opposed to the perceived substitution of government-appointed "experts" for the judgment of the marketplace.[10]

In 1987, I wrote an article in this journal's predecessor contrasting two alternative approaches to merger control.[11] The first, which was in fact adopted, was

a merger review process based on an independent law enforcement review of acquisitions which, in turn, was based on justiciable factors. The other alternative was a "DIRA approach" – a *Domestic Investment Review Act* modeled after the old *Foreign Investment Review Act.* I found that the former approach, premised on clear justiciable standards, was preferable to the latter, in which the final decision to allow or disallow a merger would rest with a politician who could take into account anything he or she liked when making decisions. The justiciable issues approach, I concluded, offered greater certainty to businesses and presented less scope for abuse. But, since 1986, has the justiciable issues approach borne fruit? Has it allayed the concerns of businesses about undue government oversight of business decisions?

Section 1.1 of the *Competition Act* sets out its key objectives: to promote competition in order to (*i*) promote the efficiency and adaptability of the Canadian economy; (*ii*) expand opportunities for Canadian participation in world markets while at the same time recognizing the role of foreign competition in Canada; (*iii*) ensure that small and medium-sized enterprises have an equitable opportunity to participate in the Canadian economy; and (*iv*) provide consumers with competitive prices and product choices. Other parts of the Act (for example, the current sections 93 regarding mergers and 45 regarding cartels) set out the specific justiciable standards applied in assessing each section, to be read in light of the overall objectives enumerated in section 1.1. In 1987, Professor Dunlop et al. acknowledged that "[a]chieving all of these objectives simultaneously is, of course, a tall order – indeed, several of the objectives are inherently contradictory."[12] A key task for the competition bar was to harmonize these sometimes disparate objectives and to establish a consistent and predictable framework for the enforcement of the Act. In hindsight, the objectives clause has probably caused more harm than good, at least in furthering the development of clear standards.

In assessing the justiciability of the Act, one key advantage is its doctrinal approach. The Act effectively maps industrial organization economics onto legislation. This doctrinal approach necessarily implies limits to the law's application, and has helped to provide predictability and certainty to a statute that has received little judicial interpretation. The doctrinal approach to competition policy has also allowed the Act to play nicely with its international counterparts. In 1986, the only countries with serious antitrust regimes were the U.S., Germany and the EU, althought the EU had no merger review in 1986. Canada, Australia and the U.K. lagged behind, and much of Europe had no competition regime at all. Since then, over 140 countries have adopted merger control and competition laws. The large and international nature of many

modern businesses and mergers emphasizes the importance of competition statutes which allow for cooperation and uniformity with the statutes of other countries. In this international environment, the Act has had little difficulty working alongside other national competition regimes. Indeed, since the formation of the International Competition Network in October, 2001, two of its Steering Group's Chairs have been Canadians. Our statute, and our approach to competition policy in general, fit with the international approach.

Although economic literacy has continued to be a key feature underpinning the justiciable issues in the Act, individual provisions have changed and been re-imagined as the economic understanding of antitrust has evolved. For example, price discrimination and predatory pricing were once criminal offences in the Act, but have now effectively been removed entirely. The "efficiency defence" for mergers, found in section 96 of the Act, was intensely scrutinized in the decisions of the Competition Tribunal and the Federal Court of Appeal during the *Superior Propane* saga, and was ultimately interpreted in a way that was inconsistent with the predictions of most lawyers and academics.

The Act's economic literacy and its focus on justiciable issues have made it a durable framework for consumers and business. However, a paucity of judicial interpretation and the ample discretion granted to the Commissioner have also led to a wanting of transparency. In my 1987 paper, I advocated the establishment of quantitative guideposts to ensure certainty for businesses and consistent application of justiciable standards. However, the incentives created by the Act were such that not many litigated cases were anticipated. As a result, many of the signposts have come in the form of guidelines issued by the Competition Bureau. This type of guidance is beneficial because it helps to fill in the gaps left by a lack of Tribunal decisions and because it is easily updated as economic thinking evolves. But, it is also non-binding, meaning that it cannot provide definitive, reliable guidance to businesses. Indeed, throughout the course of the *Superior Propane* case in the early 1990s, the Commissioner advocated an approach to the efficiency defence which was inconsistent with the guidance offered in the then-current version of the Bureau's *Merger Enforcement Guidelines*. Such guidelines are, therefore, only imperfect substitutes for true statutory interpretation by the Tribunal or by the Federal Courts.

Also concerning is the fact that the Act gives significant discretion to the Commissioner of Competition to prosecute or negotiate settlements as he or she pleases. This discretion has led to variations in enforcement among different Commissioners. For example, the immediate past Commissioner, Sheridan Scott, initiated relatively few challenges and was sometimes viewed as academic and policy-oriented. By contrast, the current Commissioner, Melanie

Aitken, has been much more aggressive. In many ways, the Bureau has also failed to be transparent about the reasons for the exercise of its discretion. When the Bureau opts not to prosecute a particular practice or merger, often it usually does not provide any information to the public. When it does publish statements or so-called "technical backgrounders," these documents are brief and non-substantive. This lack of transparency is amplified by the practice of settling merger challenges with consent agreements, which are not evaluated by the Tribunal because of legislative amendments removing this oversight.

The Bureau's reluctance to be transparent about its decision-making process may owe to its interpretation of the confidentiality provisions of the Act or to its fear that businesses will hold its present decisions against it in the future. However, given the importance of transparency and given the fact that few competition investigations ever reach the Tribunal or the courts, the Commissioner should be encouraged to be more transparent in the exercise of his or her significant discretion.

Another key feature of the institutional design of the *Competition Act* was the creation of the quasi-judicial Competition Tribunal to adjudicate disputes between the Commissioner and businesses. This is a key plank of the justiciable factors approach described above: in order for the enforcement of the Act to be predictable and reliable, it must be premised on the decisions of an independent, economically-literate body and not of politicians (as was the case with the *Foreign Investment Review Act*). However, the Tribunal has heard too few cases to be a truly relevant authority. In the previous volume of this journal, Professors Edward Iacobucci and Michael Trebilcock remarked that the Tribunal has, "for all practical purposes, ceased to provide an external check on the Bureau's decision-making."[13] They found that businesses, especially in the case of mergers, effectively require the approval of the Bureau because they cannot credibly threaten to litigate cases before the Tribunal. This predisposition against the use of the Tribunal, when combined with the Bureau's own failure to be sufficiently transparent in its operation, presents significant risks for the justiciability of the standards set out in the Act. Future reforms should aim to entrench the important role of the Tribunal in ensuring that the application of the Act is consistent and principled.

Without a doubt, the *Competition Act* marked a significant development in Canadian competition policy, and the past 25 years have been characterized by many more positive developments. The Act's economic literacy and its adoption of justiciable standards are in stark contrast to the *Foreign Investment Review Act* and the modern-day *Investment Canada Act*, which suffer from less predictability and a greater scope for political pandering and abuse. Going

forward, there is likely to be an intense focus on harmonization and international cooperation, and Canada's approach to competition policy will make it an invaluable asset in the development and evolution of the international approach to antitrust.

ENDNOTES

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[2] S.C., 1889, 52 Vic., c. 41.

[3] Ch. 647, 26 Stat. 209, 15 U.S.C. §§ 1 – 7.

[4] Michael Bliss, "Another Anti-Trust Tradition: Canadian Anti-Combines Policy, 1889-1910", XLVII(2) *Business History Review* 177 at 182 (1973).

[5] Carman D. Baggaley, "Tariffs, Combines and Politics: The Beginning of Canadian Competition Policy, 1888-1900", in *Historical Perspectives on Canadian Competition Policy*, R.S. Kemani and W.T. Stanbury eds. (Halifax: IRPP, 1991) [Perspectives] at 1.

[6] Paul K. Gorecki and W.T. Stanbury, *The Objectives of Canadian Competition Policy 1888-1983* (Montreal: IRPP, 1984) at 7.

[7] Bruce C. McDonald, "Canadian Competition Policy: Interim Report of the Economic Council of Canada," 15 *Antitrust Bulletin* 521 (1970).

[8] Ian D. Clark, "Legislative Reform and the Policy Process: The Case for the Competition Act," in Kemani and Stanbury, *Perspectives* at 228.

[9] From id. at 229.

[10] For example, see Steven Globerman, "The Merger Provisions of Bill C-91: An Evaluation," in Reaction: *The New Combines Investigation Act* (Vancouver: Fraser Institute, 1986) at 103.

[11] Lawson A.W. Hunter, "The New Competition Act – Merger Provisions – Certainty or a Random Walk," 8(4) *Can. Comp. Pol.* Record 1 (1987).

[12] Bruce Dunlop et al., *Canadian Competition Policy: A Legal and Economic Analysis* (Toronto: Canada Law Book, 1987) at 287.

[13] Edward Iacobucci and Michael Trebilcock, "Critical Reflections on the Institutional Design of Canadian Competition Policy," 24 *Can. Comp. L. R.* 39 at 46.