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Canada: 20 years on

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Canada: 20 years on

How has the Competition Act turned out?

*by **George Addy** and **Mark Katz****

Last year marked the 20th anniversary of the Competition Act. The successful passage of the legislation followed many unsuccessful attempts to change the law and years of consultation and study on what direction Canada should take. The new law introduced several substantive and institutional reforms intended to give Canada a leading-edge market-oriented competition law founded on sound economic principles.

What was the vision in 1986?

■ **The legislation**. While maintaining several of the historical provisions, such as the criminal prohibition against conspiracies, the Act introduced new civil provisions to deal with merger review and abuse of dominance. Previously, mergers and monopolistic practices were governed by criminal prohibitions, which had proved to be singularly ineffective. The intent of the changes was to make the review of mergers and abuses of dominance in Canada more relevant by choosing a process with more economically-oriented market analysis and moving away from the punitive criminal law approach.

The focus of the new regime was on market efficiency rather than the welfare of any particular competitor, as exemplified by an explicit "efficiencies defence" that allowed for even anticompetitive mergers to proceed provided that the "efficiencies" they generated outweighed any anticompetitive effects. The enforcement philosophy underpinning the new Act reflected domestic market realities and took the view that price-fixing is bad, abuse of dominance may be bad, and mergers are rarely bad from a competition policy standpoint.

■ **Institutions.** Responsibility for enforcement of the Act was given to (what is now called) the Commissioner of Competition. The Commissioner, while appointed by Cabinet, was to exercise independent enforcement discretion by safeguarding the broad public interest in a competitive marketplace as well as acting as a strong and vocal advocate within government (both federal and provincial) and more generally for the benefits of competitive market forces.

The Department of Justice was to play principally two roles: first, lawyers with the DoJ would provide independent legal counsel to the Commissioner in non-criminal matters such as merger review and abuse of dominance cases. They would act as counsel to the Commissioner and his or her staff, providing advice internally as cases were developed, and as counsel representing the Commissioner in proceedings before the Competition Tribunal and appeal courts. Secondly, in criminal matters, the attorney general would take the lead in determining whether charges were appropriate and in prosecuting criminal cases before the courts.

A new specialised administrative body, the Competition Tribunal, was created to hear and adjudicate non-criminal proceedings under the Act. The Tribunal consisted of judges and lay experts, in order to combine legal, business and economic experience, and was intended to deal with cases informally and expeditiously. While the legislation contemplated the possibility of appeals from Competition Tribunal decisions, it was believed that appeals would be few and that the Federal Court of Appeal would show considerable deference to this new specialised tribunal.

■ **Enforcement.** The enforcement of the Act was meant to be open, transparent and in full view of the public. Enforcement accountability, either by overview of the Competition Tribunal or the courts, was core to the institutional design. Decision-making and case resolutions were also intended to be quick and decisive. In addition, the shift away from the punitive model to deal with mergers and abuse of dominance was a clear indication that enforcement action was to be surgical, targeting those few cases which might cross the line.

What actually happened?

■ **The legislation.** The Act has been amended on a serial basis since 1986. At a general level, the tendency of the amendments has been to lighten the Bureau's enforcement burden and to increase the potential for sanctions. For example, the Competition Tribunal was authorised to impose "administrative monetary penalties" (AMPs) – ie fines – in cases of misleading advertising. The quantum of these penalties has been significant and probably reflects the pendulum swinging back towards the pre-1986 punitive model. In a similar vein, the Bureau continues to study proposals to amend the Act's conspiracy provision to make it more prosecution friendly and to expand the tribunal's authority to issue AMPs.

While the "continuous improvement" approach to amending the legislation allows for an easier parliamentary process, it has meant that the Act is no longer treated as a legislative whole, where balance across the enforcement spectrum is maintained. The incremental approach to amending the legislation has also opened the door for those wishing to advance narrower stakeholder interests such as industry carve-outs and exemptions.

■ **Institutions**. The Competition Bureau has grown both in staff count and budget. This growth is in large measure a result of the assumption by the Competition Bureau of personnel and responsibilities previously under the Consumer Products branch of the now defunct Department of Consumer and Corporate Affairs. While this integration occurred in the early 1990s, the cultural tensions between those trained in the Competition Bureau, with its market protection approach, versus those transitioning from the Consumer Products Branch, with its consumer protection approach, have yet to be fully resolved.

The growth in Bureau numbers has been accompanied by the retirement of many of the Bureau's most senior officers, creating a resource gap for more junior officers and a management challenge to capture corporate knowledge. The experience gap has been aggravated by fewer court or Competition Tribunal

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cases and lower levels of traditional enforcement activities. Perhaps due to the attrition of experienced senior members of the Bureau, the role of the lawyers within the Department of Justice also has become blurred. Increasingly, DoJ lawyers are perceived to be acting more as senior investigative case officers than as providing counsel. While it is unclear whether this is somehow related to the increasingly adversarial nature of proceedings before the Competition Tribunal and the courts, the effect is probably not the most desirable outcome from a public policy perspective. Recent structural changes within the Department of Justice may help to clarify counsel's role.

Another public policy disappointment is that the Competition Tribunal has been much less active than originally anticipated. Over its 20 year history, the Competition Tribunal has heard very few contested cases. Even "consent order" proceedings have disappeared, following the enactment of amendments to the Act in 2002 that replaced the Tribunal's consent order process with a "consent agreement" process. Under this new regime, resolutions negotiated with the Commissioner are now filed with the Competition Tribunal without any adjudication by that body. As a result, the role of the Competition Tribunal, and indeed the public at large, in consent agreements is virtually non-existent. While convenient for the parties directly involved in a Bureau matter, there is some concern from a public policy perspective because consent agreements are now the Bureau's principal means of enforcement and there is virtually no room for interveners or the public at large to voice concerns over the merits of settlements once they are filed.

On the relatively rare occasions when the Tribunal has heard cases, its proceedings also have been more "judicial" than originally anticipated. In addition, there is a mixed perception within legal and academic circles of the efficiency of the Tribunal process. Some argue that cases take too long and cost too much to be adjudicated, while others argue that, given the stakes at issue, fairness should not be sacrificed on the altar of expediency. The Competition Tribunal itself is struggling to find the right balance, but it is a difficult task when so few contested cases are brought forward. There are very few opportunities for the Tribunal to test and adjust the balance of fairness and timeliness. This, in turn, undermines the perceived value of the Tribunal – a classic chicken-and-egg dilemma. Also, the lay members of the Tribunal have taken more of a back seat in cases as the process has become more judicialised.

■ **Enforcement**. While the number of contested proceedings is not great, contested enforcement has become much more aggressive and adversarial since 1986. Intransigence, if not outright hostility, is unfortunately on the rise. This may be, at least in part, a function of the Bureau's increasing focus on more consumer protection issues (for example, the Fair Trade Practices branch now consumes more than half of the legal resources consumed by the entire Bureau). The success and high visibility associated with attacks on fraudulent telemarketing may have come to colour the enforcement approach adopted in other areas of the legislation where a "crime" mindset is clearly inappropriate. For instance, mergers, which are rarely anticompetitive and were seen as an efficient means of allowing the Canadian economy to adapt to an increasingly globalised marketplace, are often effectively treated as reverse onus cases, with the burden resting on the parties to establish why they should not be challenged by the Competition Bureau. This runs counter to the initial design introduced in 1986.

Given the sparse Competition Tribunal jurisprudence, the interpretation of the law has been left largely to the Bureau's determination. The lack of case law, the Commissioner's enforcement discretion, and the costs and time associated with formally challenging the Bureau's approach, have created a vicious circle where parties would often rather cut their losses and give into the Bureau's demands, even though they disagree with the Bureau's interpretation, than endure lengthy and expensive proceedings in front of the tribunal or the courts. A collateral effect of this phenomenon is more of a black-and-white approach to enforcement of the legislation as opposed to an appreciation of just how much "grey" there is in the law.

Another notable trend over the last 20 years has been the growing and successful co-operation between the Bureau and its counterparts in other jurisdictions. This is especially true in the areas of cartel and merger enforcement. While there may also be some limited international substantive convergence of approach, relinquishing domestic legislative or enforcement authority is unlikely.

Looking to the future

Canadian competition law faces three challenges in particular.

First, the tension between showing that domestic enforcement "has teeth" and the need for increasing domestic concentration required to compete in global markets (such as in the forestry and mining sectors) will lead to increased political debate on how those tensions should be resolved.

Second, doubts about the relevance of competition legislation in certain areas are likely to be raised. For instance, after two decades of experience, a cost/benefit analysis of the Act's merger notification and review regime could well lead to questions about the "net benefit" to the economy of sustaining that regime. However, given the existence of such regimes elsewhere, the lack of political advantage in changing the status quo, and the revenues generated from filing fees, the likelihood of eliminating the Act's merger regime is slim. Even so, there will be questions about elements of the law and its enforcement.

Third, after 20 years, competition policy in Canada has lost its "new car smell". Different economic and social considerations are now seen to be of equal or even greater importance to Canada. This explains, for example, the recent legislative effort to subject mergers in the transportation sector to a concurrent "public interest" review. It is no longer necessarily accepted that competition principles ought to be the sole or even the pre-eminent standard upon which some mergers should be judged.

Closing thoughts

In reflecting on the 20 years since the Act was adopted, one can ask: Did it turn out as planned? No. Are there issues to be resolved? Yes. Does Canada have the institutional and legislative foundation in place to make the necessary improvements? Absolutely. And was it worth it? Without question. One would be hard pressed to find anybody in Canada who would dispute that the introduction of the Act represented a substantial improvement over its predecessors and launched Canadian competition law into a new era of relevance and importance.