

## SUMMARY: INSTITUTIONAL DESIGN AND DECISION-MAKING PROCESSES IN CANADIAN COMPETITION POLICY

Edward M. Iacobucci and Michael J. Trebilcock

### i) An Overview of Canadian Competition Law and Institutions

While having a history dating to the first competition statute in 1889, Canadian competition policy was moribund for most of its first century. Very few cases were brought, and even fewer were successful. Its lack of vigour was largely attributable to the institutional framework. Fear of being found to have intruded on provincial jurisdiction over property and civil rights led the federal government to criminalize antitrust misconduct. Criminal treatment, and only criminal treatment, of not just conspiracy but also mergers and monopolies, contributed significantly to the ineffectiveness of the policy. Not only was the criminal burden of proof very difficult to surmount, but adjudication of criminal cases by inexperienced criminal courts was widely seen as a further obstacle to the development of sensible competition policy. Courts were extremely reluctant to penalize anticompetitive conduct.

In the late 1960s, the Economic Council of Canada recommended sweeping reform. In the face of considerable resistance from the Canadian business community, broad reform was not achieved until the passage of the Competition Act in 1986. This Act, which was amended significantly in 2009, remains the key statute in Canadian competition policy.

Under the Act, conduct may either be treated as a criminal or civil matter. Following the 2009 amendments, criminal offences are now restricted to hard core price-fixing and bid-rigging. These are *per se* criminal offences, unlike predecessor provisions that required a showing of an undue lessening of competition from a cartel. Fines and imprisonment are the potential consequences of such offences. There is, however, now a defence for price-fixing that is ancillary to a broader agreement where such price-fixing is “reasonably necessary” for the implementation of the principal agreement. Such broader agreements are reviewed as civil matters.

Other potentially anticompetitive practices are civilly reviewable under the Act. Refusals to deal that have an adverse effect on competition, resale price maintenance, exclusive dealing, tying, and exclusive territories (“market restrictions”) are all specifically enumerated civilly reviewable practices. The Act also contains abuse of dominance provisions that offer a non-exhaustive list of examples of potentially abusive practices by a dominant firm, and also invites orders with respect to analogous anticompetitive practices by a dominant firm. In general, the remedy for civilly reviewable practices is a cease and desist order, though administrative monetary penalties (“AMPs”) may be levied against a firm that has been found to have abused its dominant position.

Merger review in Canada is different from civilly practices generally in that mergers are generally evaluated prior to their taking place, though the Bureau may investigate any merger for up to a year after its consummation. Relief in the event of a finding of a merger that has lessened, or is likely to lessen, competition substantially is strictly injunctive in nature.

The institutional framework in Canada is as follows. The Competition Bureau, headed by the Competition Commissioner, may investigate criminal matters, but will hand over prosecution of any such case to the Department of Public Prosecutions. Such cases will be heard in ordinary courts, with all the due process rights associated with any other criminal matter.

With respect to civilly reviewable practices, the Competition Bureau will investigate, and may (and frequently does) negotiate settlements with the parties in question. It may, if it so chooses, enter into consent agreements with the parties that assume the force of a court order by their mere registration with the Competition Tribunal. The Tribunal comprises judges from the Federal Court Trial Division and lay members. Contested civil matters are heard before the Tribunal. While historically the Tribunal has tended to adopt procedures that resemble those in ordinary courts, in recent times there has been a commitment to expedite hearings. Very few competition matters are in practice contested before the Tribunal. For example, there have only been five contested mergers before the Tribunal since 1986, and only one since 2006.

Prosecution of criminal matters is exclusively the domain of the Department of Public Prosecutions, but there is a civil right of action in ordinary courts on these issues. Private parties may sue for (single) damages for breaches of the criminal provisions, which now focus only on price-fixing. Sole authority to challenge mergers or abuses of dominance before the Tribunal rests with the Competition Bureau. Thus, if the Bureau approves a merger, or concludes that an allegation of abuse is without merit, this is the final say on the matter. With respect to specifically enumerated practices like refusals to deal, RPM, etc., private parties may seek leave from the Tribunal to argue for a cease and desist order before it. A handful of private parties have sought leave, a smaller number have obtained it, and no private party has succeeded in persuading the Tribunal to order a remedy against a practice.

## ii) Assessing the Institutional Status Quo

In assessing the current institutional framework we interviewed several participants in Canadian competition policy circles, including all former Commissioners of Competition and the current Chair of the Competition Tribunal.

Most interviewees agreed that the current bifurcated Bureau-Tribunal structure has not worked well. The Competition Tribunal, at least in contested cases, has often engaged in highly protracted, adversarial proceedings. While it has improved of late, the consensus is that timeliness of disposition is still a major concern with Tribunal proceedings. Perhaps relatedly, most interviewees were highly skeptical that the Tribunal has been able to bring substantial expertise to bear on its deliberations, noting the mixed to weak quality of most lay member appointments, as well as the lack of specialized expertise on the part of most judicial members.

Interviewees noted that there is a feedback effect from the lack of expertise: the very light caseload of the Tribunal since its creation has inhibited the development of a specialized body of expertise, which in turn has inhibited hearings before the Tribunal. Most interviewees were skeptical that the case load is likely to increase in the future. In the case of mergers, which are typically extremely time sensitive, it is difficult to conceive of many contested merger cases ever coming before the Tribunal, but rather are likely to be resolved in the Commissioner's office.

In light of these perceived shortcomings, different reforms were suggested by the interviewees. For many interviewees, the Competition Tribunal, at least in anything resembling its present form, is "unsalvageable." Interviewees taking this view tended, by substantial consensus, to favour reconstituting the Competition Bureau as a Commission with a body of three to five commissioners, including a Chair of the Commission, recognizing that as a practical matter most competition policy decisions will be made in the Bureau in settlement discussions with the parties and that these decisions should not be dependent entirely on the views and mindset of a single Commissioner. There were different views on the authority that would be vested

in this Commission. Many believed that the Commission should not have responsibility for both investigating and adjudicating because of a concern about bias, or perceived bias, from such dual roles. Others were less concerned about such matters, citing the Ontario Securities Commission and the Federal Trade Commission as examples. The primary perceived strength of overlapping adjudication and investigation is the increased expertise that the commissioners, as both adjudicators and investigators, would develop. The alternative is that the commissioners would only investigate, and engage in settlement discussions with parties, but would not ultimately adjudicate. Rather, any matter in dispute would be referred either to a reconstituted Tribunal or possibly the Federal Court.

Assignment of adjudicative responsibility is clearly an important and contentious issue. One option is to abolish the Competition Tribunal and simply replace it with the Federal Court Trial Division, where a single judge, perhaps drawn from a sub-set of Federal Trial Court judges that are prepared to commit to developing expertise in competition matters, would perform the adjudicative functions presently performed by the Competition Tribunal, subject to further appeals to the Federal Court of Appeal (as at present, in the case of decisions of the Competition Tribunal). However, other interviewees were of the view that Federal Trial Court judges would, in many cases, lack even the expertise of members of the Competition Tribunal, and that this option would exacerbate the concerns over lack of expertise in external adjudicative bodies. Moreover, this option would not address timeliness issues if proceedings before the Federal Court were to involve *de novo* hearing of the evidence. Another concern about vesting authority in the Federal Court was that it would be difficult for that body to accommodate competition policy-specific procedures within an otherwise general adjudicative framework.

In order to address the timeliness question before the Federal Court, one suggestion would be that the Commission would develop an evidentiary record and appeals to the Federal Court Trial Division would be limited to matters of law or mixed law and fact, with the possibility of remand to the Commission in the event of factual or evidentiary inadequacies in its record. These concerns in turn raise questions as to how a multi-member Commission would develop an evidentiary record which could be reviewable on appeal. One possibility is to contemplate a highly inquisitorial process before the Commission in contested cases. For example, the investigative staff of the Commission and the private parties involved could submit competitive impact assessments to the Commission, along with supporting written expert opinions, perhaps subject to written interrogatories by parties adverse in interest, with a highly truncated oral hearing before the Commission, followed by a written reasoned decision. If the Commission's decision-making processes, at least in contested cases, were structured in this fashion, a yet further option would be to provide for appeals not to the Federal Court Trial Division but to the Federal Court of Appeal, although this option again would raise questions of relevant expertise in members of the Federal Court of Appeals in competition matters.

With respect to the institutional performance of the Bureau itself, three considerations pertaining to institutional performance arose repeatedly: independence, accountability, and expertise, with some mention being made of a fourth factor, timeliness of decision-making.

With respect to independence, interviewees were unanimously of the view that their decisions as Commissioners in particular cases had never been influenced by the Minister or his or her political staff, and indeed that no such efforts had been attempted. However, the majority of interviewees were of the view that the Bureau, which is currently constituted as a statutory agency within Industry Canada, would be better assured of institutional independence, in a systemic sense, if the head of the Bureau held the status of Deputy Head and the Bureau received

its own parliamentary budget allocation separate from Industry Canada. With respect to accountability, a number of interviewees expressed concern that the registration of consent agreements in merger cases with the Competition Tribunal, and automatic enforcement thereof as orders of the Tribunal without review, is undesirable in that little public scrutiny of the agreement is possible given the skeletal nature of the agreements. This is exacerbated by a perception that the Bureau provides no or inadequate technical backgrounders or competitive impact assessments by which the broader public can evaluate the appropriateness of such orders, or other settlement arrangements. With respect to expertise, many interviewees noted the lack of consistent input from senior experienced economists in the Bureau's activities (as with the Competition Tribunal), they also noted that the Canadian academy currently produces very few economists with the industrial organization and applied skill sets required in regulatory environments such as the Competition Bureau (but also in other areas of economic policy making, such as energy policy). With respect to timeliness of decision-making within the Bureau, some interviewees were critical of the protracted nature of Bureau decision-making in many cases, and argued for legislated deadlines, as opposed to merely internal service deadlines, in order to focus and discipline the Bureau's efforts.

### iii) Conclusions

In our view what emerges from this canvass is that the core institutional question confronting Canadian competition policy, particularly with respect to civil matters, is how best to structure the institutional relationship between investigation and adjudication.

Perceived shortcomings of the performance of the current institutional framework stem in large part from the existing structure. Some shortcomings are exogenous to institutional structure; for example, if relatively few industrial organization economists are being trained in Canada, this has nothing to do with the Bureau and the Tribunal. But others we believe relate intimately to the institutional set-up. For example, timeliness at the Tribunal may relate to the lack of expertise at the Tribunal, which in turn relates to the small caseload that it hears. Relatively inexperienced adjudicators on the Tribunal cannot develop such expertise on the job because of the rarity of cases, which in turn contributes to the rarity of cases. Timeliness at the Bureau may also depend ultimately on the challenges that parties face in considering litigation before the Tribunal. The Tribunal has, for all practical purposes, ceased to provide an external check on the Bureau's decision-making. Parties, especially in mergers, thus effectively require the Bureau's approval because they are not in a position to threaten credibly to take disagreements to the Tribunal. Moreover, third parties have limited rights to bring complaints before the Tribunal. This allows the Bureau considerable leverage both in conducting its inquiries and in reaching settlements with the parties. While there is no reason to suppose that officers at the Bureau would intentionally act unprofessionally, there is little discipline on their discretion, which may contribute to delay as risk-averse case officers probe every possible competition angle in a case. Accountability also relates obviously to the institutional framework. With public adjudication at the Tribunal occurring only rarely, the Bureau can enforce the law with relatively little public oversight. Settlement discussions behind closed doors are the norm and publicity the exception.

Given the connection between the central criticisms of current institutional performance and the current institutional structure, we believe that this structure deserves thorough review and reform. We are drawn to greater de jure integration of the adjudicative function within the

Competition Commission. We understand the concerns about bias that arise from such integration, but believe that the gains from increasing expertise, timeliness and accountability in the adjudication process justify the risk of bias. At present, adjudication, when it arises (which is very rarely), involves adjudicators for the most part without considerable expertise in the competition policy sphere. By bringing greater adjudicative responsibilities within the Commission, the decision-makers will be fully immersed in the field and the expertise, timeliness and accountability problems will be mitigated considerably. While there are interaction effects of a number of kinds, the core reason to integrate investigation and adjudication is that expert adjudicators are better able to provide timely decisions, which will increase formal adjudication, which will increase accountability.

There are four responses to concerns about bias, which clearly do not individually or collectively eliminate these concerns, but do diminish the role such concerns should play in shaping institutional reform. First, under the status quo, there is de facto integration of investigation and adjudication within the Bureau; de jure integration may not add significantly to bias concerns. Second, concerns about bias can be addressed within the reform. Reform could take advantage of the multi-person Commission, for example, by ensuring that Commissioners vested with decision-making authority in any given case are not involved in the investigation associated with that particular case. Third, it is essential in contemplating reform not to treat concerns about bias as a kind of trump card. In civil matters, the typical remedy is a cease-and-desist order. The mildness of the remedy, which could even be institutionalized by eliminating Administrative Monetary Penalties if the Commission adjudicates a matter, undermine concerns about bias. Moreover, while concerns about bias are relatively weak under the status quo, concerns about expertise, accountability and timeliness are widespread and strong. Allowing residual concerns about bias to exist within an institutional framework may well be appropriate in light of the potential gains to be had on these other dimensions. Fourth, we are open to persuasion that appeals should lie to the Federal Court of Appeal on matters of law, mixed law and fact, and fact (with leave) from Commission decisions (as is the case currently with decisions of the Tribunal), although this option comes at a cost – lack of timeliness and expertise in decision-making. The latter concern would be mitigated if the Federal Court of Appeal were to show more deference to decisions of an expert Commission than it has to decisions of the Tribunal.