

Canadian Competition Policy

ESSAYS IN LAW AND ECONOMICS

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Canadian Competition Policy: Essays in Law and Economics

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Preface

While the interaction of law and economics offers insights to a wide variety of subject areas, nowhere are the benefits of combining the analytical efforts of lawyers and economists more apparent than in the study of competition policy. Here, the legal rules are designed to promote competitive market structures and practices in order to ensure that the allocative advantages of the market are obtained. Therefore, competition legislation must be evaluated in terms of both the substantive content of the proposed rules and the likely efficacy of the rules as applied.

The essays in this book represent the combined perspectives of lawyers and economists on the development of Canadian competition policy with particular emphasis on the past decade. As editors, we have been fortunate to be able to persuade many of the leading commentators drawn from both academe and practice to present their diverse thoughts on the major issues of competition policy reform. Together the individual authors possess an extraordinarily rich experience of both involvement in and writing about competition policy in Canada.

This book was inspired by the publication of the *Dynamic Change Report* in 1976 and the subsequent introduction to Parliament in 1977 of the Stage II legislative proposals to reform Canadian competition policy. W. T. Stanbury and Gordon Kaiser initiated the organization of the National Conference on Competition Policy, held in Toronto in May 1977, which was designed as a forum for critical analysis of the Stage II proposals (*Bill C-42*). At that time, most of the essays in this book were presented in first draft form. Subsequently, and in light of the changes introduced in November 1977, in *Bill C-13*, the essays were revised and presented at the Competition Policy Workshop held at the University of Toronto during the spring of 1978. Finally, the essays went through an extensive review and editing process prior to inclusion in this volume.

At every stage in this endeavour we have received generous assistance from numerous institutions and individuals. The National Conference on Competition Policy was jointly sponsored by the Law and Economics Programme of the Faculty of Law, the Institute for Policy Analysis and the Faculty of Management Studies, all of the University of Toronto. The organizing committee was chaired by Michael Trebilcock and included Gordon Kaiser and ourselves. Martin Friedland, the Dean of the Faculty of Law, was consistently supportive of our efforts and assisted in making the Conference possible. Administrative support for the Conference was provided by the Executive Development Programme at the Faculty of Management Studies led by George Leonidas and Virginia

Leschuk. By acting as either commentators or chairmen at the Conference, Anthony Abbott, Max Clarkson, Ivan Feltham, Gordon Henderson, A. J. MacIntosh, Barbara Reeves, Edgar Sexton, Ralph Sultan and W. O. Twaits all contributed their knowledge and skills to the Conference.

The Competition Policy Workshop was organized by the Law and Economics Programme at the University of Toronto. Verna Percival, the secretary of the Programme, contributing time and effort beyond her normal duties, was responsible for the administration of the Workshop.

Senior officials of the federal Department of Consumer and Corporate Affairs including Sylvia Ostry, Robert Bertrand, Roy Davidson and Dennis DeMello provided valuable encouragement and support at all stages of our endeavours. In addition, the Department provided financial assistance which permitted us to proceed with both the Conference and the Workshop.

We are indebted to Shirley Hinterauer and Jim Michaud of Butterworths for their support and patience in this undertaking. We are also indebted to Francis Minter, Barbara Edelstone and James Douglas, all students at the Faculty of Law, who acted as research assistants from time to time on this project. Ann Wilson undertook the unenviable task of proofreading the entire manuscript and we thank her for it.

As editors, our major debt is of course to the authors who have contributed their essays. It has been both a pleasure and an honour for us to work with each of them.

Finally, we owe a special debt of thanks to Michael Trebilcock. From the outset, Michael, as Director of the Law and Economics Programme, has contributed his remarkable energy and imagination to ensure the success of this project. While his name appears nowhere else in this volume, his contribution, as always, went beyond all expectations.

May 1979

Editors' Introduction

Competition policy reform in Canada, like tax reform, has proven to be a long drawn out process, with the federal government's series of legislative proposals subject to a number of major revisions as a result of public evaluation and criticism. As the book goes to press, the reform of competition policy remains incomplete.

The process began in 1966 with the reference from the federal government to the Economic Council of Canada which resulted in the Council's *Interim Report on Competition Policy* in 1969. This was followed by the introduction of the first *Competition Act*, *Bill C-256*, in June 1971 which met very substantial criticism, primarily from the business community. This criticism led to the government's decision to proceed with competition policy reform in two stages with the more controversial reforms reserved for the second stage. The less controversial first stage involved a variety of proposals dealing with business practices, and extended the scope of competition policy to the entire service sector. These proposals were passed by Parliament in December 1975 and came into effect in 1976 as the Stage I amendments to the *Combines Investigation Act*.

The achievements of Stage I were substantial. Specifically, the amendments introduced the first civil provisions (in the form of a number of "reviewable business practices" and the right of private parties to bring damage actions); enhanced the jurisdiction of the Restrictive Trade Practices Commission; increased the maximum penalties for most offences; strengthened both the misleading advertising and resale price maintenance provisions; enlarged the number of deceptive practices offences; and eliminated the interpretation of "unduly" in the conspiracy section as requiring the accused to have a virtual monopoly of the market in question. With the Stage I amendments, the main body of competition policy dealing with agreements between competitors and with a variety of anti-competitive practices is now extended to all sectors of the economy except those regulated or exempt by statute. With the important exceptions of price discrimination, monopolization, and joint monopolization, the reforms of the law focussing on firm *behaviour* or *conduct* may now be viewed as complete.

The Stage II reforms deal primarily with those aspects of the law which focus in whole or in part on the *structure* of markets. Structural issues dealt with include mergers, monopolies, joint monopolization, specialization and export agreements, and the relationship of competition policy to regulation. Although price discrimination (and the new civil provision for price differentiation) is normally viewed as a conduct issue, it too has important structural implications.

The first set of Stage II proposals (*Bill C-42* in March 1977) came under substantial attack and were replaced by a modified set of proposals in the form of *Bill C-13* in November 1977. These proposals were in part derived from the report titled *Dynamic Change and Accountability in a Canadian Market Economy* which was commissioned by the federal government and released in 1976 in preparation for the Stage II legislation.

Since the introduction of *Bill C-13* in November 1977, the government has failed to move forward to get parliamentary approval for its proposals. Faced with a wave of large mergers and attempted mergers in 1978 and early 1979 plus continued concern with the country's economic performance, Warren Allmand, the Minister of Consumer and Corporate Affairs, announced on February 27, 1979 that a third version of Stage II would be introduced shortly. While the Minister challenged the opposition to pass the legislation quickly before Parliament dissolved, a federal general election was called on March 26, 1979 before the legislation was even introduced.

The continuing delays in passing the Stage II proposals has led to increasing skepticism about and even ridicule by the nation's press of the government's intentions and will. The story of Stage II has been described as "a national joke ... a saga of delay and procrastination" (*Financial Times of Canada*, January, 1979). In the same vein, columnist Geoffrey Stevens provided a convenient summary of many Canadian views on the process of reform saying: "The present Combines Investigation Act is a joke. The government has been searching for a way to preserve competition in the marketplace without offending businessmen whose interests are not necessarily served at all by open competition. It's an impossible search" (*Globe and Mail*, March 6, 1979).

The failure to enact an adequate new law dealing with structural issues means that Canadian markets remain vulnerable to anti-competitive mergers and otherwise adverse structural developments. The impotence of present Canadian policy in dealing with structural developments stands in stark contrast to the situation in the United States where such developments must undergo rigorous antitrust scrutiny. In addition, the increasingly common demands for widespread regulatory reform leading to greater reliance on market forces intensifies the urgency of policies which will ensure the efficacy of the market.

It is often argued that conditions in Canadian markets, albeit largely self-imposed by government commercial and regulatory policies, necessitate a different antitrust posture than conditions in countries with larger markets. While correct, this view would argue for significant differences in the laws dealing with structural issues, not for a law with no structural impact at all. As the essays in this volume indicate, in most respects the proposed Stage II legislation has made adequate allowance for these peculiarities of Canadian markets and for the important differences between the Canadian and U.S. legal and political systems. While numerous improvements to the law are suggested by the authors, as well as numerous reservations expressed, on balance the Stage II proposals

get a sufficiently favourable review to indicate that they form a sound basis for the much needed structural reforms.

As the organization of this volume demonstrates, this set of essays represents a joint effort by lawyers and economists to review the major aspects of the *Bill C-13* version of the Stage II proposals. The book is divided into seven parts dealing with the development of Canadian competition policy; adjudication and enforcement, mergers and monopolization, regulated industries, price discrimination, specialization and export agreements, and corporate concentration. In addition, there is a comprehensive bibliography of Canadian competition law.

Upon rereading these essays, we come away with the view that the proposed competition policy reforms are desirable on economic grounds and, with some modification, feasible from an administrative and legal standpoint. At the same time, we recognize that the interests which perceive themselves to be threatened by these reforms remain and that their vigorous opposition over the past decade to the reforms is unlikely to abate. They will only be overcome by the development of a more thorough understanding of the widespread potential benefits of the reforms and a consequential increase in public and political support for them. We hope that this volume will help contribute to that understanding.

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