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by *D. Martin Low Q.C.*

COMPETITION POLICY

If it ain't broke ...



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Members of Parliament, the Commissioner of Competition and a handful of legal and academic commentators is calling for the reform of Canada's cartel laws, the core of competition policy since 1889.

Under section 45 of the Competition Act, it is an offence to conspire with another person to prevent or lessen competition "unduly." With penalties of up to five years in prison and fines of up to \$10-million, the law has real teeth. The key to the crime, though, is that the conspiring competitors must have an "undue" (or significant) economic effect.

Some people dislike that test, calling it uncertain. Some say it discourages people from making legitimate agreements, others argue it's so difficult to prove that obvious and egregious price-fixers have gone free. Critics note that in the 1980s and early 1990s, the Competition Bureau lost most cases it prosecuted.

As a result, reformers call for Canada to adopt a U.S.-style law that would outlaw per se any price-fix or hard-core cartel behaviour, regardless of its economic significance. But it is hard to draft an offence that does not catch trivial or even pro-competitive agreements. For example, three small grocery stores in a big city share the cost of advertising a specific "weekend special." Surely, no one would want them prosecuted, but with a broadly defined offence it would be left to the prosecutor's discretion whether to prosecute. The result of such an approach would create just as much uncertainty, if not more, than today.

A second proposal to reduce uncertainty would authorize the bureau to "clear" or exempt specific strategic alliances, joint ventures and other arrangements among competitors. But with a new, open-ended offence, prosecutorial discretion, and the risk-adversity of most lawyers, virtually every co-operative arrangement will likely seek preclearance.

Are these changes really needed?

From 1995-2000, I was senior general counsel at the bureau and prosecuted almost all the international cartel cases in Canada. Price-fixing conspiracies in major cases like fax paper, lysine, citric acid, vitamins and other industries resulted in 29 prosecutions and guilty pleas with over \$135-million in cumulative fines on companies and individuals. The economic significance of such offences was not and is not an insuperable impediment to successful prosecution.

Those who advocate change ignore two significant shifts in the legal environment. First, the bureau's recently introduced Immunity Policy has had an enormous impact. Under it, cartel participants who co-operate with the bureau get immunity from prosecution. They provide firsthand testimony of price-fixing meetings and extremely valuable, otherwise unavailable, economic evidence. Second, in 1992 the Supreme Court provided some real guidance on the meaning of undueness. That level of understanding was not as clear in the 1980s, when the bureau lost so many cases. Its recent record is very good.

The case for reform turns on the issue of certainty in business dealings. I know no clients who have been deterred from legitimate business arrangements as a result of uncertainty in the law. No lawyers have shown a specific instance of such a chill. The bureau has never prosecuted a joint venture or strategic alliance as a cartel. But if there is real doubt, businesses can seek a binding advisory opinion from the bureau, which obviates the need for a preclearance procedure.

Rather than enhancing the business climate, the proposed changes are a recipe for years of uncertainty and litigation.

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