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Legislative Comment

POLICY DEATH BY ADMINISTRATIVE RESTRICTION: THE HOUSE COMMITTEE'S REPORT ON BILL C-42, *THE COMPETITION ACT* OF 1977

By M. T. MACCRIMMON*
and
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A. INTRODUCTION

It is said that an entrant to the Queen's Plate designed by a Parliamentary Committee would be a two-humped camel. The House of Commons Standing Committee on Finance, Trade and Economic Affairs in its report on Bill C-42¹ (the proposed *Competition Act*²) has produced a set of enforcement procedures for Canadian competition policy less well-designed for that purpose than a camel for the Plate. The Committee, apparently in sympathy with the overwhelming representations of the business community, has chosen to all but destroy the potential value of Bill C-42, not by severely weakening the substantive sections dealing with mergers, monopoly, joint monopolization, price discrimination and class actions, but by recommending administrative procedures which will all but ensure that the enlarged civil provisions of the Act have little impact. The procedures are more complicated than the wilder versions of Rube Goldberg's marvelous machines. They will have the same effect — much motion, many inter-connections and no useful output.

The purpose of this paper is to describe and to analyze the impact of the Committee's recommendations in respect to the procedures by which the

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¹ *Proposals for Change*, Fourteenth Report of the Standing Committee on Finance, Trade and Economic Affairs Respecting Stage II Competition Policy (Ottawa: Supply and Services, 1977).

² Department of Consumer and Corporate Affairs, *Proposals for a New Competition Policy for Canada, Second Stage* (Ottawa: Supply and Services, 1977). A useful summary of Bill C-42 can be found in Martin J. Rochweg, *Proposed Stage II Amendments to Canadian Combines Legislation — Bill C-42* (1977), 15 Osgoode Hall L. J. 51.

Competition Act will be enforced. The proposed amendments to the substantive sections are, in our view, much less significant than those dealing with administration and enforcement.

B. BACKGROUND TO THE COMMITTEE'S REPORT³

The reform of Canadian competition policy has been over a decade in the making. In mid-1966 the federal government requested the Economic Council of Canada to prepare a report on "combines, mergers, monopolies and restraint of trade."⁴ Three years later the Council published its *Interim Report on Competition Policy*⁵ which proposed, among other things, that the exclusive reliance on the criminal law be sharply reduced and replaced by civil procedures. Two years later, the Minister of Consumer and Corporate Affairs, Ron Basford, introduced the ill-fated *Competition Act* of 1971.⁶ Fierce opposition from business resulted in the reforms being divided into two stages.⁷ Stage I was placed before Parliament in November 1973,⁸ and after substantial amendment reflecting business pressure, became effective in 1976.⁹ In the spring of 1975 the Department of Consumer and Corporate Affairs requested L. A. Skeoch of Queen's University to chair a committee to prepare a report with recommendations for the second stage. The Skeoch report was released on May 31, 1976.¹⁰ Nine months later, Anthony Abbott, the eighth Minister of Consumer and Corporate Affairs in

³ A more extensive discussion is found in W. T. Stanbury, *Business Interests and the Reform of Canadian Competition Policy, 1971-1975* (Toronto: Carswell/Methuen, 1977).

⁴ Economic Council of Canada, *Interim Report on Competition Policy* (Ottawa: Queen's Printer, 1969) at 1.

⁵ *Id.*

⁶ Bill C-256 (1971) *The Competition Act*, first reading June 29, 1971. See also *The Competition Act: Explanatory Notes* (Department of Consumer and Corporate Affairs, 1971) (mimeo).

⁷ Stanbury, *supra*, note 3 at 95-131.

⁸ Department of Consumer and Corporate Affairs, *Proposals for a New Competition Policy for Canada, First Stage* (Ottawa: Supply and Services, 1973).

⁹ *Combines Investigation Act*, R.S.C. 1970, c. C-23, amended by c. 10 (1st Supp.), c. 10 (2nd Supp.), 1974-75-76, c. 76. The amendments came into effect on January 1, 1976; however, the application of the Act to services became effective July 1, 1976.

¹⁰ L. A. Skeoch et al., *Dynamic Change and Accountability in a Canadian Market Economy* (Ottawa: Information Canada, 1976). This report is reviewed in W. T. Stanbury, *Dynamic Change and Accountability in a Canadian Market Economy: Summary and Critique* (1977), 15 Osgoode Hall L. J. 1. At the same time, the Department of Consumer and Corporate Affairs released a number of other studies prepared for the Stage II amendments: Neil J. Williams, "Damages Class Action Under the Combines Investigation Act" in *A Proposal for Class Actions Under Competition Policy Legislation* (Ottawa: Information Canada, 1976); (see also Neil J. Williams, *Consumer Class Actions in Canada — Some Proposals for Reform* (1975), 13 Osgoode Hall L.J. 1.) Jennifer Whybrow, "The Case for Class Actions in Canadian Competition Policy: An Economist's Viewpoint" in *A Proposal for Class Actions Under Competition Policy Legislation*, (Ottawa: Information Canada, 1976) at 196. M. J. Trebilcock, et al., *Proposed Policy Directions for the Reform of the Regulation of Unfair Trade Practices in Canada* (Ottawa: Information Canada, 1976); R. I. Cohen and J. S. Ziegel, *The Political and Constitutional Basis for a New Trade Practices Act* (Ottawa: Information Canada, 1976); C. D. Edwards, et al., *Studies of Foreign Competition Policy and Practice* (Ottawa: Information Canada, 1976).

ten years, presented Bill C-42, the Stage II amendments to the *Combines Investigation Act*, to the House of Commons. Shortly thereafter, the bill was withdrawn from the Order Paper and referred to the Standing Committee on Finance, Trade and Economic Affairs chaired by Norman Cafik. The Committee held hearings during June 1977, and received briefs and heard testimony from thirty-eight groups or individuals. Another 109 briefs were received by the Committee.¹¹ In comparison, for the Stage I amendments, the Committee heard testimony from only sixteen organizations and received briefs from another eighty-two.¹²

Few briefs supported Bill C-42.¹³ One reporter summarized the situation as follows: "The business community has presented a well-co-ordinated and solid front, through lobbying and briefs, on the issue of competition policy."¹⁴ After endorsing the virtues of a competition policy, the typical brief from individual firms and trade organizations often proposed the elimination of key sections or a severe reduction of their effectiveness. Senior civil servants of the Bureau of Competition Policy, present throughout the hearings,¹⁵ explained the policy and sought to correct many of the errors, misperceptions and overstatements contained in a good number of the briefs.¹⁶ In the end, as indicated in its report of August 5, 1977, the Committee evidently found some of the arguments of business, particularly with respect to administration of the expanded civil provisions, persuasive. At the same time, it appears that the Committee was less influenced by business representations concerning the substantive sections dealing with mergers, monopoly, joint monopolization,¹⁷ price differentiation, interlocking directorates, specialization

¹¹ Our analysis of the 147 briefs (38 of which were accompanied by testimony before the Committee) indicates the following distribution by source: individual business firms (43), trade organizations (38), farm organizations (12), marketing boards (22), academics (8), provincial governments or their departments (6), individuals (8), lawyers/Canadian Bar Association (5), consumer organizations (2), union/Canadian Labour Congress (2) and other (1). The briefs from farm organizations, marketing boards and provincial governments were almost exclusively devoted to objections to s. 4.5, 4.6 and 27.1 of Bill C-42. These sections deal with regulated conduct, the conditions for the exemption of federal and provincial marketing boards, and the power of the Advocate to intervene in federal regulatory proceedings. If these briefs were removed, business briefs accounted for 81 of the 107 remaining. With the exception of the Canadian Bar Association's brief, the other four from lawyers should be classified as "business briefs."

¹² Stanbury, *supra*, note 3 at 153.

¹³ Of those who wrote briefs and appeared before the Committee, strong support came from the Consumers' Association of Canada, Professors Reschenthaler and Stanbury, and the National Automotive Trades Association. Qualified support came from the Canadian Federation of Independent Business.

¹⁴ Hugh Nangle, "Competition bill worries enforcers," *Ottawa Citizen*, August 15, 1977, at 23.

¹⁵ The Committee officially invited the civil servants to be present throughout the hearings. This was not done during Stage I hearings although the officials accompanied the Minister when he testified and testified when questions were referred to them.

¹⁶ See *Minutes of Proceedings and Evidence of the Standing Committee on Finance, Trade and Economic Affairs* (Ottawa: Queen's Printer, June 2, 7-9, 14-16, 21-23, 27-30, 1977).

¹⁷ The one reviewable matter most strongly criticized by business was s. 31.73, joint monopolization. The Committee's two recommendations would make only a modest change in the section (*Proposals, supra*, note 1 at 64).

agreements, and class actions.¹⁸ Perhaps the Committee adopted this strategy because changes in the substantive sections would be more noticeable, while those dealing with administration and enforcement would be less obvious — except to the combines cognoscenti in business and academia. The result is that the Committee's ninety-four recommendations can be trumpeted as both retaining the key civil and criminal offence sections essentially as drafted in Bill C-42 and as offering "improvements" in their administration and enforcement.

In a story published one day after the report was released, the *Toronto Star* quoted Norman Cafik, Chairman of the Committee, as saying that its recommendations "substantially change the thrust" of the bill and as such will ensure its speedy passage in Parliament.¹⁹ One day *before* it was released, he is quoted as saying "the main thrust of the legislation will not be altered. We are determined to come up with a meaningful and effective competition policy."²⁰ The restrictions on enforcement of the civil provisions, however, will effectively nullify the words of the statute as they relate to the civil reviewable matters.²¹ Shortly after the report was released, one reporter noted:

Consumer and corporate affairs officials believe such changes would essentially undermine the thrust of the legislation and emasculate the role of the competition policy advocate.²²

If the Committee's recommendations with respect to the enforcement of civil provisions are adopted, Canada will have strong statutory language and little or no public civil jurisprudence.

C. ENFORCEMENT: BILL C-42

The potential impact of the Committee's recommendations can be seen by comparing Figures 1 and 2. Figure 1 describes the administration and enforcement procedures for the civil provisions (Part IV.1) of Bill C-42. Figure 2 embodies the procedures recommended by the House Committee.

¹⁸ If adopted, the Committee's recommendations will make it more difficult for consumers (or a group of businesses) to launch a class action (*Proposals, supra*, note 1 at 86-88). However, substitute actions conducted by the Advocate, which were strongly criticized by business, remain with the proviso that they should proceed only where the damages awarded may reasonably be expected to become available to some or all members of the class. (*Proposals, supra*, note 1 at 90).

¹⁹ Stephen Handelman, "Competition bill needs softening committee says," *Toronto Star*, August 6, 1977, at A3.

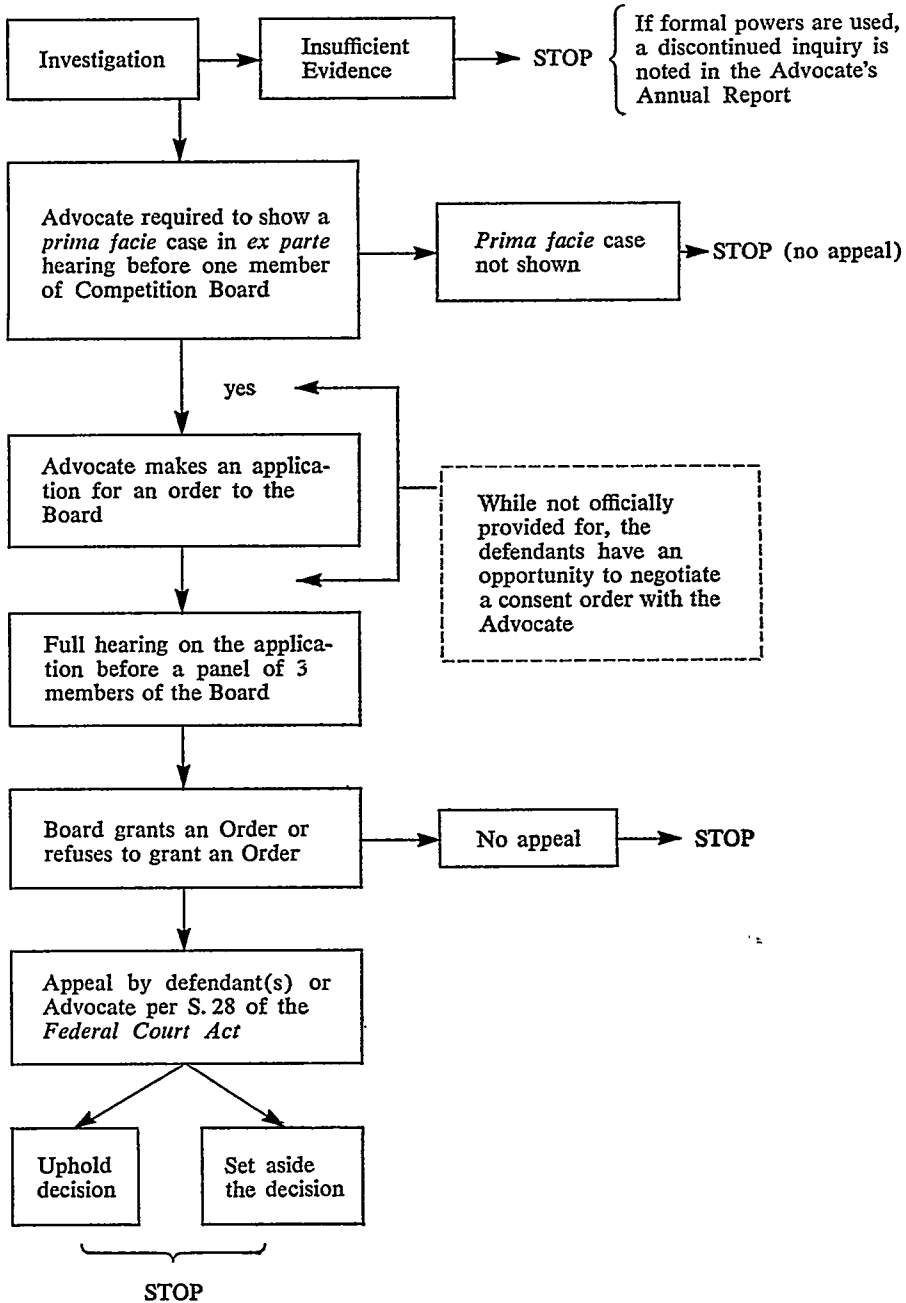
²⁰ "Business Groups Call for Changes," *Toronto Star*, August 4, 1977, at B7.

²¹ The Stage I legislation defined the following as civil reviewable matters: refusal to supply, consignment selling, exclusive dealing, market restriction, tied selling, foreign judgments and foreign laws and directives. Bill C-42 added the following: mergers, monopoly (also a criminal offence), joint monopolization, interlocking directorates, abuse of intellectual property rights, restrictions on imports or exports, and price differentiation. To this list, the House Committee recommends that price discrimination, currently s. 34(1)(a) of the *Combines Investigation Act*, R.S.C. 1970, c. C-23 amended by c. 10 (1st Supp.), c. 10 (2nd Supp.), 1974-75-76, c. 76, be made a reviewable matter under Part IV.1 of the Act. At present, price discrimination is a criminal offence.

²² Nangle, *supra*, note 14 at 23.

Figure 1

Administration and Enforcement Procedures per Bill C-42, March 1977
(Civil Provisions, Part IV.1 of the Proposed Competition Act)



Under section 31.91 of Bill C-42, following his investigation of a reviewable matter, the Competition Policy Advocate²³ must establish a *prima facie* case in an *ex parte* hearing before a member of the Competition Board. Should he fail to do so, he can go no further, the Board member's ruling is not subject to appeal. If he establishes a *prima facie* case, the Advocate makes an application for an order to the Competition Board and a full-scale adversarial hearing is held on the application. The Board operates like a court (in fact, it is a court of record), but it is an expert, civil tribunal not bound by any legal or technical rules of evidence²⁴ although subject to the rules of natural justice. The Board may grant or refuse to grant the order applied for by the Advocate. An order of the Board is not subject to appeal, *except* under section 28 of the *Federal Court Act*.²⁵ The importance of this limited right of appeal is that the Court of Appeal cannot substitute its judgment and/or remedy for that of the expert, civil tribunal. The Skeoch committee argued and we would agree that it would "risk defeating the entire purpose of the specialized Board to permit the courts to substitute their views as to proper judgments concerning facts, market definition or the design of the remedy."²⁶

D. ENFORCEMENT: THE COMMITTEE'S RECOMMENDATIONS

As illustrated by Figure 2, the Advocate, before he can start to bring a civil case before the Board, must obtain the written permission of the Minister of Consumer and Corporate Affairs for the first three years the Act is in place. This recommendation is intended to guard against the excessive powers of the Competition Policy Advocate.²⁷

The Committee argues that:

. . . adequate safeguards must be built into the system to ensure that it does not get out of control due to well intentioned but excessively enthusiastic enforcement.²⁸

At the same time, the Committee correctly pointed out:

It appears that what are perceived [by business] as expanded powers of the Com-

²³ The Advocate is the new name for the current Director of Investigation and Research, *Combines Investigation Act*.

²⁴ See s. 31.8 of Bill C-42.

²⁵ *Federal Court Act*, R.S.C. 1970, c. 10 (2nd Supp.) 28.(1) "Notwithstanding section 18 or the provisions of any other Act, the Court of Appeal has jurisdiction to hear and determine an application to review and set aside a decision or order, other than a decision or order of an administrative nature not required by law to be made on a judicial or quasi-judicial basis, made by or in the course of proceedings before a federal board, commission or other tribunal, upon the ground that the board, commission or tribunal (a) failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction; (b) erred in law in making its decision or order, whether or not the error appears on the face of the record; or (c) based its decision or order on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it."

²⁶ Skeoch et al., *supra*, note 10 at 310.

²⁷ *Proposals*, *supra*, note 1 at 17.

²⁸ *Id.* at 21.

petition Policy Advocate really amount to no more than either a codification of existing, informal practice or a modernization of already extant provisions.²⁹

Despite this acknowledgement, the Committee imposed the requirement of Ministerial permission even though such permission is not now, and has never been required.³⁰ At present, in criminal cases, the Director of Investigation and Research conducts his investigation and, if on the basis of the evidence before him, he has reason to believe an offence has been committed, he prepares a "Summary of Evidence." This document and relevant files are turned over to the Department of Justice with the recommendation for prosecution. The Department of Justice may seek an opinion from outside counsel, but it makes the final decision as to prosecution.³¹ In the case of civil reviewable matters, which have only been in the Act since January 1, 1976 and which have not been used to date, the Director submits to the Restrictive Trade Practices Commission (RTPC) an application for a remedial or prohibition order. The application must contain "a list of the pages of transcript of oral evidence in an inquiry under the Act, if any, and any other documents, suitably described, upon which the [Director] relies."³² Upon request, the defendant has the right to a copy of these documents and pages of transcript. The RTPC holds a full-scale adversarial hearing and either grants or refuses to grant the order requested.

In essence, the Committee has placed another obstacle before the chief enforcement officer of competition policy. One problem with the enforcement of the current statute may be a reluctance to test its limits, and the Committee's recommendations are likely to aggravate this problem. Between 1889 and 1974/75, the Crown won 82% of the completed combines cases. It won the same percentage of the 447 misleading advertising cases completed between 1971/72 and 1975/76.³³ Stronger evidence that enforcement has *not* been "excessively enthusiastic" is provided by the fact that in the last decade, in an increasing percentage of cases won by the Crown, the accused has pleaded guilty or failed to contest an application for a prohibition order

²⁹ *Id.* at 38.

³⁰ During the drafting of Bill C-42 there was a debate within the Cabinet and between the Departments of Justice and Consumer and Corporate Affairs over whether the Advocate would be required to obtain the Minister's permission to proceed with both civil and criminal cases.

³¹ Gorecki and Stanbury note that the slowness with which the Department of Justice acts in many cases constitutes a "filter" on effective enforcement. See P. K. Gorecki and W. T. Stanbury, *Canada's Combines Investigation Act: The Record of Public Law Enforcement* (paper presented at the National Conference on Competition Policy, University of Toronto, Toronto, May 12, 13, 1977) (mimeo) at 14.

³² The role of the RTPC following the 1975 amendments is described in J. J. Quinlan, *The Restrictive Trade Practices Commission: Its Functions and Duties* (speech before the Section of Antitrust Law of the American Bar Association, Montreal, August 12, 1975) (mimeo); R. S. MacLellan, "The New Quasi-Judicial Powers of the Restrictive Trade Practices Commission Contained in the Proposed Amendments to the Combines Investigation Act, Bill C-2" in Claude Masse, (ed.), *Rapport De La Conférence Canadienne Sur Le Droit et al Consommation* (Montreal: Université de Montreal, 1976) at 243; G. E. Kaiser, *The New Competition Law: Stage One* (1976), 1 C.B.L.J. 147.

³³ Quinlan, *id.*, at 5-9.

under section 30(2). Gorecki and Stanbury³⁴ indicated that between 1889 and 1947 the defendants contested 90% of all combines cases brought by the Crown. Between 1948 and 1964/65 this dropped to 52%. In the last decade (1965/66–1974/75) the defendants only contested the charges in 35% of the increasing number of cases brought by the Crown.³⁵

Table 1³⁶

Combines and Misleading Advertising Cases in Canada, 1889–1976/77

Period	Combines Cases		Misleading Advertising Cases	
	Total	Average No. per year	Total	Average No. per year
1889–1910	8	0.4	} not applicable	
1911–1921	0	—		
1922–1948	16	0.6		
1949–1955	12	1.7		
1956–1960	17	3.4		
1960/61–1964/65	18	3.6	15	3.0
1965/66–1969/70	25	5.0	75	15.0
1970/71–1974/75	48	9.6	483	96.6
1975/76–1976/77	29	14.5	225	112.5

The basis for the Committee's concern about "well intentioned but excessively enthusiastic enforcement" may lie in the significant increase in combines and misleading advertising prosecutions since World War II. This is documented in Table 1. Prior to 1949, the Crown did not bring a single case in forty-three of the sixty years during which this country had an anti-combines statute. From the mid-1950's to the mid-1960's the number of prosecutions averaged less than four per year. In the past two years the Crown laid charges in twenty-nine cases. Despite the increase in the number of prosecutions, there has never been one substantiated complaint of unjustified prosecution. Where is the demonstrated need to protect business from overly zealous enforcement?

With respect to its series of recommendations designed to deal with "well intentioned but excessively enthusiastic enforcement," the Committee noted that it was drawing upon its own ideas rather than those in the briefs

³⁴ *Id.* at 7-9 and Table 8.

³⁵ There is an alternative explanation. In view of the low fines imposed in all but a very few cases, defendants may prefer to plead guilty, pay the small fine and avoid the large legal costs of an expensive, contested case. See W. T. Stanbury, *Penalties and Remedies Under the Combines Investigation Act, 1889-1976* (1976), 14 Osgoode Hall L. J. 571.

³⁶ *Supra*, note 31. From 1889 to 1960 the cases are dated by the calendar year of the trial court's decision; from 1960/61 to 1976/77 cases are dated by the year beginning April 1 in which charges are laid.

and testimony it received. It said, “. . . the Committee's response may to some take a surprising turn in that no specific recommendation was made along the lines of the new approach that the Committee has adopted.”³⁷

The Committee recommends that Ministerial approval to launch a civil reviewable matter be required for only the first three years. Presumably, by that time the Advocate will be sufficiently politically sensitive that more overt control will be unnecessary. The recommended procedure invites big business and their legal counsel to put pressure on the Minister to accommodate their interests. The problem is compounded by the secrecy of the Minister's decisions. The Committee does *not* recommend that the Minister be required to give reasons for refusing the Advocate permission to proceed. Since most investigations are conducted in secret (unless the firm(s) make a public statement), the public will never know when the Minister has refused the Advocate permission to proceed. How is the public's interest in an effective competition policy to be protected from the Minister's interest in “getting along” with business?

Before he can proceed to the *ex parte* hearing before a member of the Board under section 31.91, the Advocate must “serve upon each person against whom [he] is seeking an order or recommendation from the Board a copy of the application and all supporting documentation to be used on the *ex parte* application.”³⁸ This is a partial substitute for a full examination for discovery. The Skeoch report pointed out that “[i]n matters as complex as are involved in this field, pre-hearing definition of the issues, and organization and exchange of evidence, can be fundamental requirements of efficient and fair hearings.”³⁹ Presumably the Board will make provision for oral examinations for discovery by the defendant.

Recommendation 34 of the Committee increases the burden of proof required of the Advocate at the *ex parte* hearing. Referring to section 31.91, Norman Cafik, Chairman of the Committee, said, “We've amended that, I think significantly, with one word. [The Advocate has] got to make a strong *prima facie* case before the board.”⁴⁰ Unfortunately, the Committee does *not* explain what is meant by a “strong” *prima facie* case, but is content with saying “a strengthening of this onus could well enforce the objectives of the section” (section 31.91).⁴¹ What is a “strong” *prima facie* case? Although the Committee complained along with many of the business briefs that the new terminology embodied in Bill C-42 increases uncertainty for those subject to it, it has compounded the uncertainty by creating a new term of its own.

In introducing its recommendations on enforcement, the Committee couched them in terms of the need to “maximize the possibility of achiev-

³⁷ *Proposals, supra*, note 1 at 21.

³⁸ *Id.* at 25. For convenience we use the term defendant(s) to denote the person(s) against whom the Advocate is seeking an order.

³⁹ Skeoch et al., *supra*, note 10 at 304.

⁴⁰ Radio Station CJOH, “Committee Recommends Complete Overhaul of Competition Bill,” *Newsline*, 6:00 p.m. August 5, 1977.

⁴¹ *Proposals, supra*, note 1 at 41.

ing . . . voluntary compliance” and in terms of minimizing “interminable delays” so as to achieve “expeditious application of competition law in Canada.”⁴² In particular, it wanted to reduce “constant confrontation” and provide an “impartial statutory frame-work” for voluntary compliance.⁴³

Recommendations 11 and 19 formally introduce bargaining into the enforcement procedures. If the Advocate establishes a “strong” *prima facie* case under section 31.91, Recommendation 11 provides that the defendants will have thirty days in which to attempt to negotiate a consent order with the Advocate. If a consent order cannot be negotiated⁴⁴ with the Advocate, Recommendation 19 provides “that the Competition Board shall review with the parties all documents filed with it and seek to obtain a resolution of all or some of the issues before it before proceeding to hear the application.”⁴⁵ What was to be a highly qualified, impartial civil tribunal is now to act as a *mediator* between the Advocate and those against whom he is seeking an order. If its mediation efforts fail, the Board may later be required to revert to its *judicial* role and conduct a full-scale adversarial hearing on the matter.

The institutionalization of “enforcement by bargaining,” as proposed by the Committee, particularly in respect to the dual role of the Competition Board as both mediator and adjudicator, is most undesirable. The Skeoch report emphasized that, “[e]very reasonable step should be taken to ensure both the fact and the appearance of an independent and impartial adjudicator.”⁴⁶ The whole thrust of the Skeoch report, of Bill C-42, and of many of the business briefs submitted to the Committee, was to ensure the competence and impartiality of the Board. It appears that the members of the Board who, under Recommendation 19, “seek to obtain a resolution of all or some of the issues before it. . . .”⁴⁷ (i.e. act as mediators), sit as adjudicators in the full-scale hearing on the Advocate’s application for an order. This conflict of roles is inconsistent with the widely-shared perception of the Board’s role as an adjudicatory body. It is also inconsistent with independent and impartial adjudication.

Perhaps in recognition of their dual roles, the Committee has changed its view on the qualifications of the members of the Board. Throughout the hearings, the Committee members emphasized the high calibre of persons to be appointed, i.e. they were to be distinguished in their field, impartial and knowledgeable in law, economics, business or public affairs. In Recommendation 36, the Committee has emphasized the need for “practical knowledge and training” in these fields.⁴⁸

⁴² *Id.* at 16-17.

⁴³ *Id.* at 24.

⁴⁴ The wording of R 11 is at best obscure — does a defendant who is unsuccessful in his attempt to negotiate have the right to file reasons with the Board? The wording is in the alternative: The defendant has 30 days “to conclude a proposed consent order with the Competition Policy Advocate or, alternatively, file with the Competition Board a written response” (*Proposals, supra*, note 1 at 26.)

⁴⁵ *Proposals, supra*, note 1 at 28.

⁴⁶ Skeoch et al., *supra*, note 10 at 289.

⁴⁷ *Proposals, supra*, note 1 at 28.

⁴⁸ *Id.* at 44.

Recommendation 13 provides that should a consent order be negotiated between the Advocate and the defendant(s), the Advocate must file a copy of the proposed order, a short description of it and an "economic impact statement" setting forth a brief statement of the costs and benefits of the proposed order . . ." with the Board.⁴⁹ This idea was not suggested by any one of the first 100 or so briefs submitted which the authors examined. In practical terms, particularly in view of the time constraint, such a benefit-cost analysis is at best speculative. At the worst, it may be totally misleading. This recommendation is merely fashionable jargon devoid of practicality and substance.

Recommendation 14 provides that within sixty days any person can file with the Board written comments on the order and any person ("consumer, producer or otherwise") substantially affected by the proposed order can file an "application for disallowance."⁵⁰ These provisions would appear to have been borrowed from the U.S. Department of Justice treatment of consent decrees.⁵¹ If an application for disallowance or any written comments have been filed with the Board, Recommendation 16 provides that all of the documents are then reviewed by the member of the Board who heard the application at the *ex parte* hearing. This member may or may not approve the proposed order and must give written reasons for his decision. While this must be done within sixty days of the filing of the proposed consent order, it adds one more step to the procedure and one more barrier which must be overcome before the Advocate can obtain a full hearing before a three member panel of the Board. What is more, it creates a situation where a *single* member of the Board, by approving a proposed consent order, has the power to set policy for the entire Board. Since such remedial or prohibition orders are the sole public remedy available under the civil procedures (Part IV.1 of the Act), it is not desirable that this power should reside in a single member.

As indicated in Figure 2, the Board, before holding a hearing, enters the process following one of three occurrences:⁵² (1) if the defendant has filed a written response in the thirty day period after the Advocate has shown a "strong" *prima facie* case; (2) after the defendant has tried unsuccessfully to negotiate a consent order with the Advocate; or (3) after a proposed consent order has been disallowed by a member of the Board. It appears, although not clearly specified by the Committee, that if the Board negotiates a consent order it is not subject to the procedures set out by Recommendations 13 to 16. It is also unclear whether a "consent order" is an order within the meaning of section 31.1(1) of the present Act, which provides that a person who has suffered loss or damage as the result of "the failure of any person to comply with the order of the Board" may recover damages in a private

⁴⁹ *Id.* at 26.

⁵⁰ *Proposals, supra*, note 1 at 26. The purpose of the requirement that an application for disallowance can only be filed by a person substantially affected is not clear since a Board Member must review the proposed order if there are written comments by "any person" or if there is an application for disallowance.

⁵¹ Mark J. Green et al., *The Closed Enterprise System* (New York: Bantam Books, 1972) Chapter 6.

⁵² *Proposals, supra*, note 1 at 26-28.

action. If a consent order is not negotiated with the aid of the Board it is finally possible to hold a full-scale hearing before the Board.

The House Committee argues that the procedures outlined to this point "have important merits:

first, they do not require the creation of any new layer of administrative machinery; second, they permit voluntary compliance against the back drop of interpretative rulings⁵³ and Competition Board decisions thus mitigating against over-reach on either side; and thirdly, they allow the public to have a 'check' on the whole process.⁵⁴

The first and last claims are the most exaggerated. Anyone who, after looking closely at Figure 2 (what the Committee recommends) and comparing it with Figure 1 (what is proposed in Bill C-42) can say no new layer of administrative machinery has been added is confusing form with substance. More layers of procedure have been added than Salomé had veils! How does the public have much of a "check" on these procedures? The Committee does *not* indicate that if the Board negotiates a consent order under Recommendation 19, such an order will be subject to either written comments from the public and/or an "application for disallowance." If such a procedure were followed, there is the possibility of a single Board member overruling the Board members who assisted in the negotiations. In most cases, the activities of regulatory agencies are little publicized. How will those affected by a proposed order know of it so as to be in a position to challenge it? Who will pay for their intervention? Why should interventions be limited (apparently) to a written submission? With the exception of larger businesses directly affected by a proposed order, we doubt that broader consumer interests will

⁵³ In accord with the Committee's belief that competition policy and its enforcers "should endeavour to provide explicit and intelligible guidance . . . as to what are considered unacceptable methods of competition and deceptive practices . . .," it proposes that the Competition Board "be empowered to issue 'interpretative rulings' in regard to any section of the *Competition Act* pursuant to which the Board can make an order or recommendation." (*Proposals, supra*, note 1 at 22). Such rulings could be initiated by the Board, by the Minister of Consumer and Corporate Affairs and at the written request of any other person. Before an interpretative ruling is made final, the Board would publish a preliminary draft and for a period of 90 days it would receive written representations "from all concerned parties" and may change the ruling before it becomes final. Once published in final form the ruling "would be legally binding on the Board until such time as the Board might consider it necessary to rescind or revise it" (*Proposals, supra*, note 1 at 22). However, the Board would not be compelled to issue a ruling following every request, nor would it be required to rule on specific matters, "the full facts in respect to which might not be available to it" (*Proposals, supra*, note 1 at 22). The details are contained in Recommendations 4 through 8 in the Committee's report (*Proposals, supra*, note 1 at 23-24).

It is regrettable that the Committee did not heed the injunctions of the Skeoch report: "The specialized body we propose is a substitute for the regular courts and is not a regulatory agency in the American tradition of having legislative, adjudicative and executive functions rolled into one and the same body such as is the case for example with the Federal Trade Commission. Accordingly, we propose that the Board not have the power [to, *inter alia*] . . . engage in general rule making. . . ." (Skeoch et al., *supra*, note 10 at 299). We see little difference between interpretative rulings, divorced from the facts of specific cases, and the type of general rulemaking Skeoch has warned against.

⁵⁴ *Proposals, supra*, note 1 at 25.

be able to challenge undesirable orders. Such challenges are public goods in the technical sense, and without government financial support for consumer interventions they will be rare.⁵⁵ The public "check" on negotiated consent orders is only superficially attractive; it offers little to Canadians more concerned with inadequate rather than overly aggressive enforcement.

E. APPEAL PROCEDURES RECOMMENDED BY THE COMMITTEE

Following its hearing on the Advocate's application for a remedial or prohibition order, the Competition Board may or may not grant an order. If it refuses to do so, the Advocate may appeal, but only under section 28 of the *Federal Court Act* the provisions of which have been described above. If the Board grants an order, the defendant(s) may appeal, under section 28; alternatively under the Committee's Recommendation 37, they will have an absolute right of appeal on questions of both fact and law to the Federal Court of Appeal. This right follows any order requiring: (1) the dissolution of a merger or the disposition of assets under section 31.71; (2) the dissolution of a "monopoly" or a divestiture of assets under section 31.72 or section 31.73; or (3) the granting of a patent, trademark, copyright or industrial design licence or the expungement of a trademark, copyright or industrial design under section 31.74.⁵⁶ Such an appeal was not permitted under Bill C-42.

Virtually every business brief supported an absolute right of appeal, particularly in cases where structural remedies were to be imposed. Many also supported a Cabinet power to override, whether in lieu of appeal to the courts or in addition to it. Fortunately, the Committee eschewed the override. It also wisely limited the ability of the appeal court, in the event it allows an appeal, "to direct the matter back to the Competition Board for further consideration and determination, either generally or in respect of a specified matter."⁵⁷ It is not entitled to substitute its decision for that of the Board. The Committee continued, "In so directing the matter back, the Court of Appeal should be required to advise the Competition Board of its reasons and to give it such directions as are considered appropriate to the reconsideration."⁵⁸ It should be noted that the Committee recommends a limited form of appeal. First, it can only be invoked where structural remedies are ordered. Second, the Court of Appeal cannot substitute its own judgment on the facts and in regard to the remedy. It can only return the case to the Board for reconsideration.

F. CONCLUSIONS

The administrative process recommended by the Committee could well result in "soft" remedies and insufficient protection for the public for a number of reasons:

⁵⁵ Stanbury, *supra*, note 3 at 30-32.

⁵⁶ *Proposals, supra*, note 1 at 44-45.

⁵⁷ *Id.* at 45.

⁵⁸ *Id.* at 45.

- (1) Politically sensitive cases may never be brought before the Board. If the Minister of Consumer and Corporate Affairs wishes to be tolerated by the corporate community, he will see that they do not get beyond the investigative stage.
- (2) The Advocate has a limited senior staff capable of negotiating effective consent orders within the time constraints the Committee recommends. Given the generally unsupportive climate in which Canadian competition policy operates, the result may be weak consent orders.
- (3) Under the Committee's recommendations, the Advocate is forced to negotiate. If the Advocate is reluctant, because of a lack of qualified senior personnel,⁵⁹ to engage in comprehensive negotiations in the stages preceding the full hearing before the Board, the Board may perceive the Advocate as failing to fulfill his responsibilities within the "less confrontation" approach proposed by the Committee. As a result, they may tend to see the business defendants in a more favourable light in deciding on the Advocate's application for an order.
- (4) Placing the Board in the dual role of mediator and adjudicator will increase the possibility of political influence, undermine the fairness of the hearing and defeat the objectives⁶⁰ of the Act. The Skeoch report concluded that the success of the legislation in achieving "reasonable decisions in specific situations" was critically dependent "upon the existence of a decision-making authority capable of dealing perceptively and *impartially* on a case-by-case basis with the complex questions of fact and remedy. . . ."⁶¹

The "bargaining/negotiating" approach of the House Committee reflects an unwarranted fear of the overt determination of the conflict between the private interests of business enterprise and the larger public interest. It is time we liberated ourselves from the ghost of Mackenzie King, who in speaking of the *Combines Investigation Act* of 1910, said, "I would like the House to understand that in introducing this legislation no attempt is being made to

⁵⁹ The Advocate may be required to use staff lawyers from the Department of Justice to handle his cases beyond the *ex parte* hearing.

⁶⁰ The preamble of the current *Combines Investigation Act* (*supra*, note 9) states that it is an "[a]ct to provide for the investigation of combines, monopolies, trusts and mergers." In contrast, the preamble to Bill C-42 provides *inter alia* that its purpose is to "provide for the general regulation of trade and commerce by promoting competition and the integrity of the market place. . . ." The national interest and the interest of individual Canadians will be promoted by "an economic environment that is conducive to the efficient allocation . . . of resources, stimulates innovation . . . , expands opportunities" in domestic and export markets, and "encourages the transmission of those benefits to society in an equitable manner." A requisite condition to achieving this purpose is the "creation and maintenance of a flexible, adaptable . . . Canadian economy that will facilitate the movement of . . . resources . . . , reduce or remove barriers to such mobility," and "protect freedom of economic opportunity . . . by discouraging unnecessary concentration and the predatory exercise of economic power. . . ." "[S]uch a market economy may only be ensured through the recognition and encouragement of the role of competition in the Canadian economy. . . ."

⁶¹ Skeoch et al., *supra*, note 10 at 279 (emphasis added).

legislate against combines, mergers and trusts as such. . . ."⁶² It is necessary (if not sufficient) to legislate against the untoward effects of combines, mergers, and joint monopoly power and to make the necessary hard decisions when the interests of firms conflict with those of consumers.

If both the public and the firms involved are to have confidence in the civil procedures embodied in the *Competition Act*, it is essential that the role of the Board be restricted to that of an impartial, expert adjudicatory body. In the case of very significant new legislation it is imperative that we obtain clearly-articulated interpretations of the statute rather than see public policy made implicitly, largely by bargaining.⁶³

Until a serious case, one with hard evidence of abuse of power, can be made for restricting the ability of the Advocate to bring civil cases before the Competition Board, the requirement of obtaining the permission of the Minister of Consumer and Corporate Affairs should not be enacted. It is an invitation to the worst form of political control of competition policy. It will be a policy conducted in secret, subject to the pressures of the firms under investigation, and not subject to the scrutiny of the general public.

⁶² *Canada: House of Commons Debates*, 1909-10 at 6803. Cited in L. A. Skeoch, (ed.), *Restrictive Trade Practices in Canada* (Toronto: McClelland and Stewart, 1966) at 23-24.

⁶³ See *supra*, note 53 for a discussion of the authority of the Board to issue interpretative rulings.