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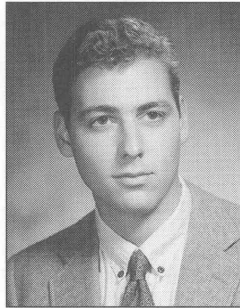
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THE IMPLICATIONS OF CANADIAN ANTITRUST ENFORCEMENT FOR U.S. BUSINESS IN CANADA

Peter Yoerg



Antitrust policy is an integral but underappreciated factor in the Canadian debate over free trade. Some Canadians have argued that big business has hurt innovation, investment, and thus Canada's standing in the world market. Other Canadians see most Canadian businesses as too small and vulnerable to destruction by foreign competition. The resolution of these issues will determine the degree of objectivity the Canadian government provides in regulating industry structure and upholding the very principle of the free market.

The voices of the debate on corporate concentration are filled with certainty, and sometimes virulence. Diane Francis, editor of Canada's *Financial Post*, lists her biggest enemies as welfare cheats, money launderers, socialists, and "the dragons of corporate concentration." (Posner, p. 126) From a more academic perspective, Professor Michael E. Porter of the Harvard Business School, in a report to Canada's Business Council on National Issues, cites "weak rivalry in the domestic market" as having seriously hindered Canada's international competitive success. (Porter, pp. 55-56)

On the other side of the issue, Rita Dionne-Marsolais of Quebec states that Canada must increase merger activity and cooperation among firms in order to secure its future prosperity. According to Dionne-Marsolais, "As competitors come from all over the world, our businesses need to work closer together, pool their resources to meet external markets, and form alliances to win against new and frequently little known, although powerful, competitors." (Dionne-Marsolais, p. 1)

While this political debate rages on, Canada's Bureau of Competition Policy asserts that its position on antitrust affairs is objective and based on sound theories of economics. However, the Competition Act of Canada and the guidelines established by the bureau for enforcement of the act open bureau policy to ideological biases that may unfairly impede U.S. business in Canada. Current bureau policy has largely avoided political contamination of policy. However, the articles in the North American Free Trade Agreement (hereafter referred to as NAFTA) governing antitrust coordination between Canada and the U.S. lack the power to

prevent questionable antitrust policy in the future and thus demand a critical look at the objectivity of Canada's Competition Act.

Modern Industrial Organization Theory: A Primer

An examination of antitrust enforcement is useless without at least a basic understanding of the theory that governs policy. There are certain predominant theories of industrial organization which frame policy debate in Canada. Most center around the Structure-Conduct-Performance model (hereafter referred to as the SCP model), which links the structure of an industry to the conduct and performance of its individual firms. The SCP model dictates that the level of competition in an industry will determine firm conduct and performance. However, a competing model — called the reverse-SCP model — contends that the performance of firms dictates the structure of the industry.

One might ask, why is there so much concern over finding a correct model of industrial organization? The answer is that the two models reach diametrically opposing conclusions about the proper degree of government intervention in the business practices of an industry. The SCP model concludes that a high level of competition prevents firms from gaining control over a market and using that control to charge unfair prices, to bully competitors out of the market, or to incur excessive costs and inefficiencies of production. Thus, the government has a duty to prevent a company or group of companies from cornering a market. Calvin S. Goldman, the former director of Canada's Bureau of Competition Policy, has best expressed the conclusions of SCP theory: "In short, when competition is protected, a propelling mechanism of the economy is protected." (Goldman, p. 124) On the other hand, the reverse-SCP model assumes a Darwinistic scheme, where companies earn their control over a market through superior efficiency. Government intervention in this process would result in an inefficient industry. (Perrakis, pp. 4-5)

The Application of Theory to the Canadian Model

The reverse-SCP model has intriguing

implications for the Canadian market. The predominance of large firms in Canada has been attributed to their superior efficiency; that is, it costs less for a certain product to be made in bulk by a few firms than to have many small firms making the same product. (Green, p. 104) Thus, the minimum efficient size (MES) of firms must be taken into account by policy makers. In addition, the assessment of MES in Canada must also consider the role of foreign competition. Many Canadian industries which prospered before the reduction in trade barriers have seen their markets conquered by larger and more efficient foreign companies. Foreign competition often heightens MES, as firms must restructure to remain competitive in the world market.

The international scope of the Canadian market also plays a role in preventing collusion among firms. Normally, a government whose policies are aimed at encouraging the existence of competitive markets should insist on a large number of firms in each industry, because the presence of only a few firms presents a greater opportunity for firms to collude over the prices of their goods. The presence of foreign competitors unlikely to honor such agreements should then result in a more lenient government policy towards domestic mergers. (Perrakis, p. 51)

Still, the presence of foreign competition in Canada is not great enough to guarantee a competitive marketplace. The degree of competitiveness is significantly higher in the U.S. than in Canada, even taking into account the influence of imports. Specifically, the United States sees 77 percent of its G.D.P. contributed by competitive industry, in contrast to Canada's 44 percent. The presence of provincial trade barriers (which diminish outside competition) has also led to market concentration, especially in the media and service industries (Perrakis, p. 49)

There is also an essential difference between the United States and Canada in regard to the politics of antitrust policy. Namely, a more "liberal" government in the United States¹ usually engages in stricter antitrust enforcement, due to its characteristic suspicion of "big

¹"Liberal" here does not refer to classical liberalism, but rather liberalism in the sense that the Democratic Party is more liberal than the Republican party.

business.” In contrast, the Liberal Party in Canada is less concerned with the size of companies, at least when those large companies provide a degree of protection from foreign domination of domestic markets. Thus, Canada’s current Liberal government is likely to push for more creative interpretations of exemptions to the Competition Act.

In addition, the assessment of a country’s ability to compete in a free-trade market can be highly political. One need look no further than the heated NAFTA debate in the United States. Protectionists believe that small domestic businesses are unlikely to survive, given the “advantages” of foreign competitors. However, some of the “advantages” a foreign firm enjoys may be temporary. For example, the exchange rate could strengthen the currency of the foreign firm’s country, thus making the foreign firm’s goods more expensive in Canada. Such technical economic considerations are often downplayed in assessing the impact of a free-trade market.

It is important to keep in mind the influence of the reverse-SCP model in Canada, in order to better understand the idiosyncracies of Canada’s competition law and the attitude of the government towards its enforcement.

An Overview of Bureau Enforcement

Canada’s antitrust enforcement is carried out primarily under the Competition Act of 1986. The Competition Act demands that factors other than simple market concentration should be taken into account in policing mergers. In addition to the usual concerns of consumer welfare and competitive opportunities, the Bureau of Competition Policy is directed to focus its policy towards the “efficiency and adaptability” of the Canadian economy, as well as towards the expansion of Canadian participation in world markets.

To insure objectivity, the bureau has strived to maintain its political independence, as well as to enforce antitrust policy on a purely national scale. (Goldman, p. 124) A national basis for enforcement has helped Canada avoid the potential havoc that inferior and outdated state antitrust laws could play on merger activity in the United States.

The institutional structure of enforcement

balances expertise with objectivity. Cases are tried before the Competition Tribunal, composed of four judges and up to eight non-judicial members. Before the passage of the Competition Act, only judges decided antitrust cases; prosecutors were bound by the strict criminal rules for evidence and guilt, as well as by economic illiteracy on the part of some judges. The tribunal allows for consideration of economic theories while retaining judges to insure due process. (Goldman, pp. 124-25)

Confusion is generated by the amalgam of criminal and civil penalties available under the Competition Act. First, no private party can sue over a company’s merger or joint venture. The government can use civil prosecution in fighting “abuse of dominance” — when a company uses its market power to manipulate prices and shut out competitors. However, price collusion *per se* is still a criminal offense, and so very strict rules of evidence must be used. This makes price collusion prosecution very difficult, since a formal agreement of collusion must be produced in order to prove the parties guilty. Vertical restraint (constricting competition among retailers of the product) and price discrimination (charging different prices for the same product) can be punished through either criminal or civil penalties.

The bureau has almost ignored vertical mergers,² except in regulated industries, where profit-shielding to circumvent rate regulation can be a problem. Conglomerate mergers³ do not concern policy officials, because the bureau feels this type of merger is undertaken most often by a firm trying to spread its risks over a diversity of markets, rather than trying to corner a specific market.

The bureau’s interpretations of the Competition Act have led to a liberalization of policy in recent years. For example, in determining whether it should block a company’s proposed merger, the bureau considers that company’s ability to handle foreign competition not only in Canada but abroad. The bureau has

²An example of a vertical merger would be the takeover of a raw material supply company by a manufacturer who purchases his materials from that company.

³A conglomerate merger is one between two companies whose product markets are totally different; thus, the merger could not concentrate market power in a specific industry.

also taken a lenient approach to takeovers involving a failing firm. Further, one of the justifications the bureau has made for its lenient policies has been the lowering of tariffs. With lower tariffs, the bureau has argued, outside firms face less of a barrier to entering a market.

The most consistent allowance for mergers, however, has been an efficiency exemption. As shown above, the Competition Act specifically allows for the "efficiency and adaptability" of Canada's economy to be taken into account when approval of a merger is pending before the bureau. Under Director George Addy, the bureau has allowed MES considerations to compensate for competitive losses if the merging companies can demonstrate cost efficiency as a reason for merging. Similarly, specialization agreements are allowed, in which firms may agree to stop producing the same product simultaneously if there are lower costs associated with one-firm production of the item.

A central fault in the efficiency exemption is the relative inaccuracy of efficiency predictions. After all, it is the company which produces the figures of projected cost savings. More questionable is the predictability of export gains available through a merger. Interest and exchange rate projections can be distorted by merging companies eager to avoid government intervention.

While efficiency exemptions prove vulnerable under uncertain international trade conditions, the bureau's aversion to formal litigation has acted to accommodate the dynamism of international trade. Litigation usually involves the choosing of one extreme, merger or no merger, as ex-Director Goldman points out, instead of an economically superior alternative, such as allowing a more limited merger. For example, the bureau most often intervenes in mergers through advance rulings, extensive advisory work, or a three-year monitoring process of a completed merger. In addition to the disadvantages of litigation detailed above, sensitive business issues would have to be divulged in an open court — a threat which could prevent many beneficial mergers. (Goldman, p. 127)

Since 1986, the bureau has restructured, rather than simply prohibited, two mergers to comply with competition policy. The first was a

partial acquisition of the InterBake Food Division of Weston Foods by Nabisco Brands Ltd. The second acquisition was by Nestle Enterprises Ltd., which purchased certain coffee assets of Nabisco Brands Ltd. In both instances, the permitted merger was less extensive than that planned by the companies involved, but limited mergers were negotiated to the satisfaction of all parties. (Weston, p. 917)

The Competition Act: Potential Dangers for Small Firms

In its efforts to incorporate flexibility into antitrust law, Canada has left open the potential for abuse of the law. Much interpretive power of the Competition Act lies in one government bureau, the Bureau of Competition Policy, rather than in the courts. This Canadian aversion to litigation does have its advantages, such as those detailed above. However, private citizens have their hands tied because the opportunities to sue privately against anticompetitive acts are so limited. (Goldman, p. 127)

Investment Canada

Investment Canada is an institution independent of the Bureau of Competition Policy, with its own merger-blocking powers. Its role in protecting Canadian business must also be considered as a potential danger to U.S. firms. This organization is chiefly responsible for controlling the degree of foreign ownership in Canada. While it has intervened less frequently in recent years, it still has the power to block mergers, even in contradiction with bureau policy. Thus, political bias in antitrust policy can still be readily effected by Investment Canada, despite the balance and objectivity achievable through the Competition Tribunal. (Goldman, p. 125)

Concern about Investment Canada should not excite angst for U.S. business, though. Investment Canada's role is to block foreign business efforts in Canada that the bureau feels would result in excessive foreign concentration in a market. The political climate in Canada has recently shifted away from unreasonable concerns about foreign domination. Thus, the far more important problem for U.S. business trying to enter the Canadian market is the effort

of private firms, through price fixing or other anticompetitive schemes, to keep U.S. products out of the Canadian market. (Goldman, p. 126)

“Adaptability” and “Minimum Efficient Size”: A Pandora’s Box of Ambiguity

The Bureau of Competition Policy claims to supersede the largely political concerns of Investment Canada with sound economic theory. However, the selective identification of factors which would qualify as efficiency exemptions under the Competition Act demonstrates a political bias, albeit a slight one, in the bureau’s enforcement of antitrust policy. For example, an increase in the trade deficit⁴ would technically lead to an “efficiency” in the economy (with lower prices resulting from increased competition), as well as an increase in consumer power (as choice of products and competition among products for market share increases). Both macroeconomic and consumer power gains are mentioned explicitly in the Competition Act as proper exemptions to antitrust action. However, it is doubtful that the “efficiency gains” of an increasing U.S. share in the Canadian market would be taken into consideration if such a gain was accomplished by a U.S. company’s acquisition of a Canadian firm. Such a consideration would not be politically wise. It is therefore unlikely that this acquisition would avoid bureau action on the basis of such an efficiency.

There may also be too much reliance on MES (minimum efficient size of a firm) considerations in the bureau’s determination of acceptable size in Canadian businesses. The bureau’s almost automatic acceptance of the takeovers of failing firms has an implicit MES justification — namely, that the merger of the failing firm with another would create combined, and thus more efficient, production. Takeovers involving a failing firm are rarely challenged, even though an upstart or smaller firm might have taken over the demand in a more efficient manner, had not the failing firm been saved by bureau action. Perhaps a more proper name for MES is MIS —

minimum inefficient size. MIS would be the size the firm must maintain or build to in order to keep itself alive, rather than to be efficient. The company may have to become bigger in order to maintain market power and control prices, if its costs are too high (due to inefficiency) to meet a free-market price. The bureau’s directives and recent rulings show a definite tendency to encourage survival more than efficiency in Canadian businesses.

One aim of the Competition Act, according to the letter of the act, is to increase the “efficiency and adaptability of the Canadian economy.” The inclusion of the term “adaptability” opens up a Pandora’s box of questionable long-term exemptions from antitrust action. Granted, the term “adaptability” might also embrace an enhanced policy of enforcement, if the bureau thought that the Canadian economy would best adapt to the world market through the downsizing of firms to spur efficiency, innovation, and the development of niche markets.⁵ However, in Canada this version of “adaptability” has a negative connotation. Specifically, the Mulroney government argued that free trade with the United States was a necessary vehicle for Canadian business to adapt to a world economy. However, Canada saw the deconcentration of its market result in little innovation or development of niche markets for Canadian goods and services.

It is perhaps unlikely that the positive effects of free trade could ever outweigh the adaptive problems faced by a country’s market in the short run. Canada’s desire for quick positive results was due to a concern for political and not economic realities. With a Liberal government now in power in Canada, the “adaptability” criterion is more likely to be used to concede an anticompetitive environment. For example, the bureau could allow a merger which increases market share of two merging businesses to an anticompetitive level, if those businesses could convince the bureau that the merger in question would allow them to “adapt” to foreign advances on their market which would otherwise cause them to downsize or fail.

In the opinion of this author, neither MES

⁴A trade deficit increase would be effected through the successful integration of U.S. products in Canadian markets.

⁵This concept may look familiar to United States citizens witnessing such actions by giants like IBM.

nor "adaptability" considerations have been abused to the extent pictured above. However, the possibility of such abuse represents a potential problem in the Competition Act. Both MES and adaptability are valuable criteria in ascertaining the economic effects of a merger or pricing policy. However, their use is most effective and fair when limited and specific.

Another danger of conditional antitrust enforcement concerns tariffs. The bureau often takes a lowering of tariffs into account in calculating the probability of collusion in a concentrated market. For example, a concentrated industry may not be the target of bureau action if a tariff on its market product has been recently reduced or eliminated. The thinking behind such a justification is that foreign competitors are less likely to collude with the current oligopoly. Such thinking ignores the logical consequence that the introduction of foreign competition would be a probable inducement for the oligopoly to collude in the interest of shutting out the foreign competitor(s). It would collude through typical abuses of market power such as predatory pricing or retail price maintenance.⁶

Canada also allows the participation in world markets to be considered. That is, a merger might be allowed in Canada if the businesses in question were projecting an expansion of Canadian participation into world markets, even if Canadian business' standing in the domestic market was not improved. (Goldman, p. 126) It is unclear whether the products enhancing Canada's hold on the world market must be made in Canada.

The problems inherent in Canada's amalgam of civil and criminal antitrust codes has already been discussed. However, the bureau's strategy to prosecute successfully under these codes has been less than successful. In order to avoid difficult criminal trials, the bureau often prosecutes price discrimination under the civil violation of "abuse of dominance." (Perrakis, p. 289) Unfortunately, the Competition Act does not define "abuse of dominance" in specific terms, leaving open the same dangers of ambi-

guity found in the exemption clauses in the merger section of the act.

The "Adaptability" Criterion and the Limited Tariff Model

One more example will demonstrate the potential danger of a long-term exemption to antitrust law in the name of "adaptability." Namely, the contrast between tariff barriers and private collusion will be established in order to highlight the faulty logic of allowing private collusion to advance the "adaptability" of an economy.

Tariff barriers function in a similar way to private collusion — they both keep out competition. That is, a group of Canadian businesses colluding to keep U.S. business out of its market is trying to accomplish the same thing as a government which erects a tariff barrier against foreign goods. A recent trend in economic thought is the acceptance of a limited tariff to allow a domestic firm time to prepare for foreign competition. An example in the United States would be the tariff the U.S. once placed on motorcycles of over 1000 cc displacement. This was done in order to allow Harley-Davidson (which only manufactured motorcycles over 1000 cc) a chance to make its plant sufficiently efficient and technologically advanced to compete successfully with foreign motorcycle manufacturers. This limited tariff is still largely regarded as a successful effort at adapting U.S. industry to foreign competition.

It is tempting to make a parallel between a government effort at limited tariff assignment and a private business effort of collusion to shut out foreign competition. Why can't the bureau selectively allow anticompetitive practices if the Canadian businesses in question simply want an opportunity to adapt to the foreign threat? After all, they just need a few years to invest their profits into capital improvements, instead of drastically reducing their profit margin trying to meet the competitors' prices.

Such logic is highly fallible. The bureau's permission to collude would grant market concentration to a number of firms, not just one (in the most common case of an oligopoly). Firms with a serious interest in capital investment could not be targeted in the manner that

⁶Predatory pricing occurs when a producer lowers his prices below cost in order to force his competitors to lower their prices also below cost, thus bankrupting the competitors. Retail price maintenance refers to the forced maintenance of a single price among retailers by the producer.

a limited tariff makes possible.

The effects of antitrust policy on economic health are controversial enough that the employment of antitrust policy outside of its traditional objectives really makes little sense. This knowledge has led U.S. antitrust authorities to avoid adopting Canadian-style antitrust policy. Unfortunately, false parallels such as that seen between the theories of conditional antitrust enforcement and limited tariffs may encourage a destructively passive enforcement of antitrust policy.

Differences Between U.S. and Canadian Price Discrimination Law

In Canada, price discrimination⁷ is not considered an offense unless it has become a standard practice of the firm. The following goals can justify “occasional” price discrimination: gaining a new buyer, entering another market, or participating in a store’s promotional clearance or anniversary sale. In contrast, price discrimination in the United States is generally prohibited. (Goldman and Bodrug, p. 7)

Canada’s Director of Competition Policy does not have to prove intent on the part of the seller to lessen competition in order to gain a price discrimination conviction. Competitive injury (in this case, the use of price discrimination to harm or destroy competition) does not have to be proven, either; but the decision to prosecute a price discriminator will take into account the degree that such discrimination resulted in, or would result in, a lessening of competition. Also, in the United States, a sale to at least two buyers, reflecting the price discrimination, is needed. (Goldman and Bodrug, p. 10) In Canada, even if the higher-price purchaser refuses to pay, the law still considers this price discrimination. And buyers are not the only party who can sue or lodge a complaint with the Director; competitors of the seller or even customers of the buyers may also sue or complain. (Goldman and Bodrug, p. 10)

The Robinson-Patman Act, the major price discrimination law of the United States, does not allow sellers to charge different prices

⁷When a company charges different prices to consumers based on their ability to pay, price discrimination has occurred.

at different levels of the distribution chain according to the Supreme Court’s decision in *Texaco Inc. v. Hasbrouck*. (Goldman and Bodrug, p. 10) For example, a seller could not charge a wholesaler a different price than that it offered to a retailer. In Canada, such price differences are prohibited only when the wholesaler and retailer compete against each other. For example, a warehouse club which caters mostly to consumers would be considered a competitor with retailers.

A few additional examples will be used to delineate the differences in Canadian and U.S. antitrust law and to further demonstrate a significant incompatibility between the antitrust laws of both countries. In the United States, sellers are allowed to justify price differences if it costs the seller more to produce the good for one buyer than for another. In Canada, such an allowance is not permitted. However, a quantity discount is allowed, so any cost savings due to higher quantities can be passed on to the buyer. (Goldman and Bodrug, p. 11)

In regard to the “availability” of discounts, United States law requires that a price offer must be disclosed to all competing buyers. In Canada, on the other hand, a negotiated price, as detailed before, does not have to be disclosed, but rather only offered to all competing buyers. (Goldman and Bodrug, p. 11)

While the United States limits violations to those that occur within the U.S., Canadian law considers two sales anywhere in the world to competing buyers to fall within the jurisdiction of price discrimination law. Also, the permitted price difference that is caused by consumer preference of one brand name over another is smaller in the U.S. than in Canada.⁸ As was seen before, this difference in consumer preference can occur because of differences in trademarks or labelling. (Goldman and Bodrug, p. 12)

Finally, Canadian law does not hold a buyer liable just for knowingly accepting a discriminatory price, while under the Robinson-Patman Act in the U.S. the buyer would be liable. However, Canadian price discrimination

⁸Even though a consumer may not choose one brand name over another because of a quality difference between the two, the selection process is similar to making a decision between brands of differing quality. Thus the difference between the two brands is classified as a “quality” difference.

law is stricter in that it covers "articles," not only the "commodities" of Robinson-Patman. Articles can include both real property (commodities) as well as personal or intangible property (such as energy). (Goldman and Bodrug, p. 12)

Price Discrimination Law and Cross-Border Transactions

As has just been pointed out, the types of justifications for price discrimination are different in Canada and the United States; therefore, companies who wish to adopt a universal selling strategy in North America have to consider each country's laws. However, the limits of each country's jurisdiction restricts in some ways full compliance with both Canadian and United States law. For example, the jurisdiction of the Robinson-Patman Act is limited to sales within the United States. Selling at two different prices, one price to an American buyer and the other price to a Canadian buyer, would not be an offense under U.S. law. However, Canadian law would consider the previous scenario an offense. Still, the bureau has stated that its concern is the market within Canada, and therefore it is unlikely to prosecute the offense. Even so, this attitude may change as transborder markets develop into a more interdependent structure. (Goldman and Bodrug, p. 13)

The bureau's recent enforcement guidelines concerning sales to subsidiaries has a singular importance to U.S. firms. The firm and its subsidiary must work as a "single economic unit." Additionally, the firm must offer discounts to its subsidiary only in return for services rendered by that subsidiary. If these two conditions are not met, the U.S. company must sell goods to its subsidiary at the same price it sells to outside Canadian buyers. If, on the other hand, it sells the same good directly to buyers and also indirectly through a subsidiary, direct sales must include the same price concessions made by the subsidiary to buyers. (Goldman and Bodrug, pp. 13-14)

Antitrust Provisions of the North American Free Trade Agreement

The importance of NAFTA lies not only in

fostering free trade among Mexico, Canada, and the United States, but also in establishing the terms of trade that will determine the fairness and success of the treaty. While the news media has emphasized the environmental and labor side agreements to the treaty, provisions for antitrust cooperation have also been established in NAFTA. The strength or weakness of these provisions will play a pivotal role in determining U.S. influence over Canadian antitrust policy.

One of the five main objectives listed in the first chapter of NAFTA is the promotion of "conditions of fair competition" in North America. (Paul et al., p. 3) However, there are few concrete mechanisms of cooperation in antitrust affairs laid out in NAFTA, such as those found in the antitrust cooperation agreement signed in September of 1991 between the U.S. and the European Economic Community. The lack of formal mechanisms to coordinate antitrust policy is perhaps due to the low priority placed on competition issues by NAFTA negotiators. (Paul et al., p. 73)

NAFTA does set the stage for increased antitrust cooperation, however, through its establishment of a trilateral Working Group on Trade and Competition to make recommendations for action within five years. And the inclusion of a competition chapter in NAFTA sounds, according to Paul, "an important tone: antitrust concerns will play a major — and unappreciated — role in determining how successful NAFTA will be in achieving a seamless North American market." (Paul et al., p. 75)

Antitrust cooperation is detailed in NAFTA to include the exchange of information and mutual assistance between enforcement agencies, as well as the notification of antitrust action to each country's agency. However, the NAFTA dispute settlement provisions specifically exempt issues of competition policy or enforcement, so that no independent panel review or consultation with other governments is guaranteed. (Paul et al., p. 74)

Despite NAFTA's impotence in establishing uniform antitrust regulation, it does establish specific rules concerning state enterprises and monopolies. If, for example, a state enterprise has the power to grant licenses, approve transactions, or charge fees, then it must not do so in a way which discriminates in favor of

domestic companies. Additionally, a state enterprise must offer the same price for its goods or services to foreign and domestic buyers. (Paul et al., p. 74) Thus, American firms have a right to the same prices as Canadian firms in such areas as hydroelectric energy, and may challenge current price breaks offered to some Canadian firms in this area.

Government-declared monopolies must follow the same rules, but they face three additional restraints. First, the price and availability of the good or service must be "in accordance with commercial considerations." (Paul et al., p. 75) Second, price discrimination is illegal. Third, a monopoly cannot use its advantages to concentrate non-monopoly markets through price discrimination, cross-subsidization (using profits from its monopoly business to subsidize strategic predatory pricing), or any predatory conduct. In contrast to the enforcement guidelines for private industry, state enterprises and monopolies are not held exempt from the NAFTA dispute settlement provisions. (Paul et al., p. 75) Finally, NAFTA specifically excludes intellectual property rights (such as patents or copyrights) from the definition of

"monopoly," despite the similar market power derived from both monopolies and patents.

Conclusion

In conclusion, Canadian antitrust enforcement utilizes a combination of economic theory and specific political objectives in enforcing antitrust law. The main justifications for stifling competition are efficiency gains and international competitiveness. Due to the vague wording of Canada's Competition Act, the door is open for excessively liberal allowance of mergers in the name of "adaptability" and "efficiency" in an economy, even in the face of verbal promises by the bureau to crack down on big business. In fact, the misuse of the exemptions laid out in the Competition Act could result in a hindrance to Canada's adjustment to free trade. It is through conditional enforcement of antitrust policy that Canada remains more liberal than the United States in the field of antitrust. Finally, it is conditional enforcement that continues to pose a danger to U.S. business in Canada.

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