

**COMMENTS REGARDING THE SOCIAL AND POLITICAL  
BENEFITS OF A FREE MARKET ECONOMY AND CERTAIN  
PROPOSED CHANGES TO THE COMPETITION ACT (CANADA)**

Submitted by  
Paul Bigioni  
BIGIONI LLP

The Competition Act (the “Act”) obviously exists to encourage competition within markets in Canada. To suggest improvements to the Act, one must first consider why this objective is important. It is not sufficient to rest on general, unarticulated assumptions about why competition is good. We must know precisely what we are setting out to do with the Act before we can assess its effectiveness or suggest changes.

Competition is regarded as the hallmark of a free market system. Confusion arises, however, when we mistake laissez-faire - the mere absence of regulation - with a free market system. They are not one and the same thing. There is no evidence that laissez-faire economics encourage competition. To the contrary, the absence of a legal framework to govern economic affairs results in the reduction of competition as the few most successful producers in a given market overwhelm their competitors. Unregulated markets descend into oligopoly or outright monopoly. The US airline industry is perhaps the most obvious example of this. The deregulation of that industry was supposed to bring benefits to the air traveler. Instead it has resulted in predatory pricing and domination by the few largest airlines.<sup>1</sup>

To Adam Smith, the fate of the US airline industry would have been predictable. Smith scorned monopoly every bit as much as government interference. Smith dryly noted that *“people of the same trade seldom meet together, even for merriment and diversion, but the conversation ends in a conspiracy against the public, or in some contrivance to raise*

---

<sup>1</sup> Adams, Walter and Brock, James, “The Bigness Complex”, 2<sup>nd</sup> Edition, pp.212-221

*prices.*”<sup>2</sup> This makes perfect sense. What sane businessman actually enjoys competition? None, of course. Competition is imposed upon business for the express purpose of achieving certain socially beneficial results. It can be said that the whole point of antitrust law is to ensure that the businessman's private profit is not made at the public expense.

In the late 19<sup>th</sup> century, antitrust laws were passed, first in Canada and then in the U.S., to address the predatory practices of the great industrial trusts. Back then, it was widely recognized that the undue concentration of economic power was not merely an economic problem. It was understood as a social and political problem as well. In 1898, Ohio Senator John Sherman, a Republican, stated that

“if we will not endure a king as a political power, we should not endure a king over the production, transportation and sale of any of the necessities of life. If we would not submit to an emperor we should not submit to an autocrat of trade, with power to prevent competition and to fix the price of any commodity.”<sup>3</sup>

Forty years later, US Supreme Court Justice Louis Brandeis observed that size alone gives private businesses “*a social significance not attached ordinarily to smaller units of private enterprise.*” He went on to observe that

“through size, corporations, once merely an efficient tool employed by individuals in the conduct of private business, have become an institution - an institution which has brought such concentration of economic power that so-called private corporations are sometimes able to dominate the state...Businesses may become as harmful to the community by excessive size, as by monopoly or the commonly recognized restraints of trade.”<sup>4</sup>

More recently, Professor James Brock has contended that

---

<sup>2</sup> Smith, Adam, “The Wealth of Nations”, Book I, Ch.10

<sup>3</sup> Quoted in Thorelli, Hans, “The Federal Antitrust Policy: Organization of an American Tradition”, p.180

<sup>4</sup> *Liggett Co. v. Lee*, 288 U.S. 517 (1932)

“economic power, and the threat it poses, is inherently - and unavoidably - both political and economic in nature. Power does not dutifully confine itself to the “economic” realm, narrowly construed. It does not meekly submit to “the market” or passively obey the modern economist’s laws of geometry and calculus. It does not submissively play according to an unalterable set of rules for survival and success. Instead, it reaches out to dictate the rules of the economic game - or to dispense with them all together - by capturing the state and perverting it to its own (antisocial) ends. It does so in a variety of ways: pleading for government protection from foreign competition; seeking privilege, preferment, and promotion at the hands of government and at society's expense; demanding government bailouts as a way of avoiding the consequences of self-inflicted injury and delinquent economic performance.”<sup>5</sup>

With these submissions, I hope to reacquaint policymakers with the broader social objectives which originally invigorated antitrust law. I will demonstrate that Canada's Competition Act, by expressly disavowing these broader objectives, renders itself incapable of providing to Canadians the benefits which we expect of a free market system.

### **THE ECONOMIC IMPORTANCE OF COMPETITION LAW**

Genuinely competitive markets result in the broad distribution of diverse products at low prices. Competitive markets also result in innovation by producers seeking to increase sales and profit. Innovation (technological and otherwise) benefits consumers and society at large. Furthermore, competitive markets facilitate the free entry of new producers into the economy, resulting in further innovation and the increase of overall economic activity. The free entry of new producers into the economy is important for another reason. Without it, the scope of economic freedom of any Canadian citizen would be limited. The freedom of any Canadian to earn a living as he or she deems fit is threatened by the barriers to entry erected by the few dominant producers in an

---

<sup>5</sup> *Supra*, Note 1, pp.317-318

oligopolistic marketplace. Barriers to entry deter would-be producers precisely at the time when we want a vigorous economy that can compete on a global scale.

### **THE SOCIAL/POLITICAL IMPORTANCE OF COMPETITION LAW**

In monopolistic or oligopolistic conditions, dominant market players have market power. Market power is generally considered in a strict economic sense to mean the ability of a producer to maintain prices at levels which are higher than would be achievable in a competitive environment.<sup>6</sup> When a dominant producer wields market power, it can destroy its competition, thereby depriving society of the economic benefits accruing from a free market. Market power is, however, more than this. It is, after all, power. As such, it is often wielded for purposes which are not merely economic in nature. This fact, ignored nowadays, was widely recognized in an earlier time. U.S. President Franklin Delano Roosevelt once stated that

“the liberty of a democracy is not safe if the people tolerate the growth of private power to a point where it becomes stronger than the democratic state itself. That, in its essence, is fascism - ownership of a government by an individual, by a group, or by any other controlling private power”<sup>7</sup>.

The U.S. Department of Justice stated the problem more specifically. Thurman Arnold, head of the Antitrust Division of the Department of Justice, made the following observations:

“Germany, of course, has developed within 15 years from an industrial autocracy into a dictatorship. Most people are under the impression that the power of Hitler was the result of his demagogic blandishments and appeals to the mob... Actually, Hitler holds his power through the final and inevitable development of the uncontrolled tendency to combine in restraint of trade.”<sup>8</sup>

---

<sup>6</sup> Assaf, Dany and Facey, Brian, “Competition & Antitrust Law”, 3<sup>rd</sup> Edition, p.238

<sup>7</sup> “Recommendations Relative to the Strengthening and Enforcement of Antitrust Laws”, U.S. Senate Document 173, 75<sup>th</sup> Congress, 3<sup>rd</sup> Session

<sup>8</sup> from a speech to the Denver Bar Association, May 15, 1939

“Germany presents the logical end of the process of cartelization. From 1923 to 1935 cartelization grew in Germany until finally that nation was so organized that everyone had to belong either to a squad, a regiment or a brigade in order to survive. The names given to these squads, regiments or brigades were cartels, trade associations, unions and trusts. Such a distribution system could not adjust its prices. It needed a general with quasi-military authority who could order the workers to work and the mills to produce. Hitler named himself that general. Had it not been Hitler it would have been someone else.”<sup>9</sup>

The connection between anti-competitive activity and fascism is for the most part forgotten today. It must be relearned. Fascism in both Italy and Germany arose in the context of highly concentrated economies. In both of those countries, the bulk of all economic activity fell under the control of a handful of men. Market power expressed its political will in those nations by supporting the fascist movements. Germany and Italy represent the most extreme and dramatic examples of the social and political damage that monopolized economies can cause.

In Germany, the economy was organized into an intricate web of cartels and business associations. These associations exercised a very high degree of control over the businesses of their members. They frequently controlled pricing, supply and the licensing of patented technology. These associations were private, but were entirely legal. Neither Germany nor Italy had effective anti-trust laws, and the proliferation of business associations was generally encouraged by government. This was an era eerily like our own, insofar as economists and businessmen constantly clamoured for self-regulation in business. By the mid 1920's, however, self-regulation had become self-imposed regimentation. By means of monopoly and cartel, the businessmen had wrought for themselves a “command and control” economy which effectively replaced the free

---

<sup>9</sup> from a speech to the American Bar Association, July 10, 1939

market.<sup>10</sup> It cannot be said that business suffered under Nazi rule. In 1934, the Nazi government reorganized the existing network of private business associations in a manner which effectively gave them control over the German economy. The Communists were (literally) destroyed, strikes were outlawed and the “Leader Principle” was applied to all commercial enterprises, giving the business owner complete authority over his workers. Slave labour was supplied to many German businesses. The largest German businesses certainly felt compelled to cooperate with Hitler, but the rewards were enormous.<sup>11</sup> For example, Thyssen, Krupp, I.G. Farben (the producer of poison gas for the death camps) and Mercedes profited handsomely during the 1930’s. It is interesting to consider that all of the above-noted companies exist and thrive to this day (Bayer and BASF having been spun off from I.G. Farben after the war<sup>12</sup>).

In Italy, nearly all industrial activity was owned or controlled by a few corporate giants, F.I.A.T. and the Ansaldo shipping concern being the chief examples. Land ownership in Italy was also highly concentrated and jealously guarded. Vast tracts of farmland were owned by a few *latifundisti*. The actual farming was carried out by a landless peasantry who were locked into a role essentially the same as that of the share cropper of the U.S. deep south. As in Germany, the few owners of the nation’s capital assets had immense influence over government. Mussolini, like Hitler, used socialist language to lure the people to fascism. Once in power, however, he outlawed strikes and sent his black-

---

<sup>10</sup> see generally, Brady, Robert, “Business as a System of Power” and “The Spirit and Structure of German Fascism”, Neumann, Franz, “Behemoth: The Structure and Practice of National Socialism, 1933-1944”, Seldes, George, “Facts and Fascism”

<sup>11</sup> *Ibid* and see also Bellon, Bernard, “Mercedes in Peace and in War: German Automobile Workers, 1903-1945”

<sup>12</sup> see Martin, James Stewart, “All Honourable Men”

shirted *squadristi* to forcibly evict squatters from the lands of the fascist government's wealthy patrons<sup>13</sup>.

The histories of Italy and Germany do not show that fascism was some kind of business movement, or even that it was fundamentally economic in nature. They do show that when a nation's productive capacity is controlled by a very small number of men, those men will use their market power to influence politics in their own self-interest. Fascism was, in significant part, the institutionalization of this tendency.

Some may protest that these concerns are irrelevant to Canada, as we already have a free market economy. In answer, I would say that if we take a hard, honest look at ourselves, we reach the inescapable conclusion that much of our economy is oligopolistic. Oil and gas, pharmaceuticals, steel, aluminum, tobacco, banking, food sales, alcohol, computers, newspapers, television and radio broadcasting, cellular and landline telephone service - these markets are oligopolistic. Can anyone seriously contend that these markets are not dominated by a few major stakeholders? Can anyone seriously expect all the benefits of a free market from any of these oligopolies? It is worthless to formulate policy on the assumption that we are dealing with a free market system. To paraphrase one economist, this would be mere fussing over the celestial mechanics of a nonexistent universe. We must address the system that we have, or else we shall fail.

While Canada is in no immediate danger of becoming a fascist dictatorship, the influence of undue market power is nonetheless damaging. If the trend continues and all our

---

<sup>13</sup> *Supra*, Note 10 and Seldes, George, "Sawdust Ceasar"

economic activity falls into the hands of fewer and fewer businesses, then the task of governing our economy will become impossible. One of the advantages of a true free-market system is that as numerous smaller competitors fail or succeed over time, unmanageable disruptions to the nation's economy do not result. When the market for some important resource or service is dominated by one or only a few huge firms, then the failure of any one such firm can have a palpable, negative influence on the nation's economic performance. It can cause disruption in such measure that government support or a bailout becomes a lesser evil than allowing the firm to fail in the ordinary course. This is the ultimate reward of market power: the socialization of a private firm's losses. When we arrive at this point, our society is receiving essentially none of the benefits promised by a free-market system. (It is remarkable to me that some business journalists speak favourably of national champions. A national champion in any market is, almost by definition, a firm which the state cannot afford to let fail. The advent of national champions signals nothing less than the death of a free-market economy. It is not by accident that national champions in industry earned the acclaim of Nazi economists.)

The lesson of Italy and Germany is that a concentrated, uncompetitive economy represents a potential political threat to any democratic system. Competition law can and must address this reality. It does so first by simply existing, but more is needed than merely to deter the most extreme anticompetitive behaviour. I suggest that Canada's *Competition Act* should be amended to explicitly recognize the social and political benefits which accrue from a truly competitive economy characterized by numerous, smaller producers. In its current form, the *Competition Act* directs itself to economic

objectives only. This must change. Set out below are a series of recommendations which would assist in bringing about this change.

## RECOMMENDATIONS

### 1. Amendment to section 1 of the *Competition Act*:

Existing section 1.1 of the *Competition Act* reads as follows:

1.1 The purpose of this Act is to maintain and encourage competition in Canada in order to promote the efficiency and adaptability of the Canadian economy, in order to expand opportunities for Canadian participation in world markets while at the same time recognizing the role of foreign competition in Canada, in order to ensure that small and medium-sized enterprises have an equitable opportunity to participate in the Canadian economy and in order to provide consumers with competitive prices and product choices.<sup>14</sup>

As a result of section 1.1, the Act is limited to strictly economic objectives. I suggest that section 1.1 be amended to make explicit reference to social and political purposes. This alone would enable the Commissioner and the Courts to enforce the Act's specific provisions for the purpose of stifling any political expression of market power. With such an amendment, the judicial treatment of conspiracy, merger review, monopolization and abuse of dominant position could, in appropriate cases, prevent market power from becoming political power.

I am of the view that such an amendment to the Act would have a tremendous social benefit. If we take seriously the fundamental democratic concept that each citizen is entitled to one vote, then we must resist by any means necessary anything which detracts from that. Political power ultimately rests, or should rest, with the individual citizen. To the extent that dominant business enterprises wield political power as a result of their

---

<sup>14</sup> R.S.C. 1985, c. C-34, as amended

market position, the individual voter is in some measure disenfranchised. I believe that Canadians feel this viscerally, even if they cannot precisely explain it. The individual knows that he or she has less political power than a large business corporation, yet a corporation is not entitled to vote. It is not supposed to have any political power. If section 1.1 is amended as described above, then the *Competition Act* would become a powerful tool for reinvigorating Canadian democracy. It would be an effective means of protecting the citizen's political authority and directing the energies of Canadian business enterprises toward innovation, production and trade.

**2. The restraint of cartel-like behaviour:**

The very fact that our economy is substantially oligopolistic indicates that in the broadest sense, the *Competition Act's* bar is set too low. While conspiracy itself may be prosecuted under section 45 of the Act, in oligopolistic conditions, socially and economically unacceptable results occur even in the absence of conspiracy. Innovation is stifled, prices are raised and barriers to entry into the marketplace are frequently erected without any criminal conduct. These are the structural characteristics of oligopoly. Competition law, if it is to deal with these problems effectively, must recognize these things as structural problems.

It is widely acknowledged that tacit collusion among the few dominant producers in a given market is a result of the rational behaviour of each producer. Each producer will carefully and constantly watch the others for price signals. If one firm unilaterally decides to reduce its prices, the others will follow suit or lose market share. Logic

dictates that each firm in an oligopoly must engage in “groupthink”. The success of any one firm is predicated upon the success of the group. Competition is subverted. If each producer behaves rationally, then the result which obtains is essentially the same as in a situation of an outright conspiracy to fix prices.

Furthermore, in an oligopoly, the dominant firms can erect barriers to entry into the market without engaging in any conspiracy. In the U.S. airline industry, for example, the major firms have effectively used their control over computerized reservation systems to reduce sales to smaller airlines. By negotiating exclusive use agreements for gates, terminals and concourses, the dominant airlines have created “monopoly hubs” which shut out smaller competitors.<sup>15</sup>

If Canada's *Competition Act* is to address the structural shortcomings of oligopoly, then it must do more than prosecute outright conspiracy. A more pronounced preference for a greater number of smaller firms in a given market must be adopted in the course of enforcing the Act. If tacit collusion yields the same results as conspiracy, and if tacit collusion is the norm in an oligopoly, then the Act should deter the creation and maintenance of oligopoly in any market.

### **3. Merger review:**

There is a general presumption that mergers result in productive and innovative efficiencies. As a result, the legal analysis of any proposed merger tends to be positively disposed toward the merger, and only to critically analyze it if there is evidence of

---

<sup>15</sup> *Supra*, Note 1, p.218

anticompetitive results which would outweigh the presumed efficiencies. I believe this general presumption to be false, and would argue that merger review should not be influenced by it. A given merger might result in operational efficiencies internal to the merging firms. In the context of oligopoly, however, there is no reason to imagine that society will benefit at all from such internal efficiencies. The merged firm will simply gain more market power and thus more power to further subvert competition.

The following examples demonstrate that large, oligopolistic business enterprises are inefficient in a variety of ways. (These examples are taken from “The Bigness Complex”, 2<sup>nd</sup> edition, by Walter Adams and James Brock.)

*Poor operating efficiency:*

The American automobile industry illustrates the reality that operating efficiency is deterred in an oligopoly. The “big three” represent perhaps the largest oligopoly on earth. This was especially true prior to the advent of foreign competition in North America. It was often assumed that the massive size of these firms enabled them to efficiently plan and coordinate their business activities. Unfortunately, the contrary was and is true.

Alfred Sloan, a chairman of GM, once stated that “sometimes I am almost forced to the conclusion that General Motors is so large and its inertia is so great that it is impossible for us to be leaders.” The divestiture of large parts-making operations and the creation of separate divisions such as GM's Saturn are nothing if not an admission that great size actually deters operating efficiency.

*Poor innovative efficiency:*

The American automobile industry also illustrates the fact that oligopoly and great market power do nothing to improve innovative efficiency. A high-ranking GM official once described the postwar era as a “*quarter-century of technical hibernation.*” Without competition, innovation simply does not happen. Business enterprises will not innovate just for fun. In 1971, economist Lawrence White observed that

“the major features of today's automobiles - the engines, automatic transmissions, power steering and power brakes - all are prewar innovations. These have been considerably improved and refined over the past 25 years, but still the industry has been uninterested in pursuing alternatives. The suspension, ignition, carburetion and exhaust systems are fundamentally the same. Only the pressure of federal legislation on air pollution has affected any changes in these last three systems.”

Foreign competition is the only real reason that this lack of innovation has been remedied at all since the above words were written.

*Poor social efficiency:*

The US automobile industry also provides an illustration of how oligopoly and market power can result in socially inefficient outcomes. In 1948, GM was convicted of criminal conspiracy to violate U.S. antitrust law in connection with its organization of a business enterprise called National City Lines<sup>16</sup>. GM operated National City Lines together with its co-conspirators Firestone and Chevron. National City Lines acquired and physically destroyed 46 mass transit systems in 45 American cities. These transit systems were then replaced with GM buses. The result was more gridlock, more pollution, less convenience for commuters and more profit for GM, Firestone and Chevron. This was, to say the least, a socially inefficient result of the tremendous market power of oligopolistic business.

---

<sup>16</sup> *U.S. v. National City Lines*, 334 U.S. 573 (1949)

If the *Competition Act* is amended to permit the consideration of social and political factors, then such factors should influence merger review specifically. A proposed merger should not be presumed to result in any efficiencies. A proposed merger should be considered not only economically but also in terms of whether or not it is socially detrimental.

Under Canada's Merger Enforcement Guidelines (“MEGs”), the first step in any merger review is to identify the relevant product and geographic market. If social and political considerations are to be taken into account, then it will be appropriate in some cases to look beyond any narrow definition of the relevant market. For example, Canada's telecom industry is now characterized by a few giant firms which seek to operate cable television, internet, cellular telephone and landline telephone businesses simultaneously. The social and political impact of such agglomeration cannot be seriously addressed in a merger review if the scope of the review is limited to just one of these business operations. This particular example is especially important, given the concerns expressed in a recent Senate Committee Report<sup>17</sup> regarding the homogenization of editorial content due to common ownership of multiple media outlets.

In the context of print media specifically, the degree of competition is measured in terms of advertisement sales. Smaller community-based newspapers with little national news or editorial content are accepted as competitors to major national newspapers. As a result, the analysis of whether or not anticompetitive behaviour exists or will result from

---

<sup>17</sup> Report of the Senate Standing Committee on Transport and Communications, June, 2006

a proposed merger is almost completely insensitive to the Senate Committee's concerns about the homogenization of editorial content. If instead competition between newspapers is measured with greater reference to circulation and the extent of diversity of editorial content, then the merger review process could address the important social and political concerns expressed by the Senate Committee.

**4. Lower market concentration thresholds:**

Part 4 of the MEGs sets out threshold levels of market concentration below which a proposed merger will generally not be challenged. These thresholds should be lowered so that more merger proposals come under scrutiny. This would more effectively deter further concentration of ownership and control within Canada's already oligopolistic markets. If undue market power and the stifling of competition and innovation are the structural realities of oligopoly, then the merger review process should be improved to reduce the extent of those structural realities.

**5. Post-merger review:**

Valuable insights into the alleged efficiencies of mergers can be obtained by means of post-merger review. Merger review frequently involves detailed evidence with regard to efficiencies which are anticipated to result from a proposed merger. Post-merger review should be employed to provide valuable data to policy makers about the extent to which these alleged efficiencies are realized in fact. (There exist some proposals for post-merger review procedures, but the particulars of these proposals are beyond the scope of this submission.)

## CONCLUSION

Recognition of the social and political benefits which result from a free-market system is not new to competition law. It has, unfortunately, been strangely forgotten with the passage of decades. Given the increasingly oligopolistic conditions of the Canadian economy, the time has come to direct the *Competition Act* not only to economic objectives, but to social and political ones as well.