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UNNATURAL INJUSTICE

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Unnatural injustice

by Robert L. Dean

Not all the parties have emerged to live happily ever after a recent trade practices drama played out in the Federal Court. The case put the spotlight on the inadequacy of machinery in s. 50 cases and the author had a front row seat.

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One might be forgiven for sympathising with clients who adopt a cynical attitude to the law given the incredible saga of the recent battle between Australian Paper Manufacturers (A.P.M.), the Trade Practices Commission (T.P.C.) and Smorgon's Consolidated Industries (Smorgons). The drama, played on the Federal Court stage for eight months before an assortment of judicial audiences, employed a large cast, including many star performers, which cost the client promoters an estimated $2 million.

This extravaganza appears until now to have been treated well by the critics — that is to say, it has been completely ignored. Given the complexity and unpredictability of the plot, the multitude of issues, the number of unusual stratagems (not to mention a claim of bias), and the finale for which cast, promoters and maybe even some of the learned and discerning audience appeared unprepared, it is reasonable to assume that the deafening silence among commentators can be put down more to a "leave well alone" attitude than to disinterest. Similarly, it has been the danger of adding the role of critic to that of actor, together with a realisation that objective analysis requires a cooling off period that has dissuaded the writer from commentating until now.

Well, why the florid prose?

The seriousness of the problem can be best explained by looking at the first scene, and then the last.

First scene

Smorgons initiates a takeover bid for one of A.P.M.'s major customers which, if successful, would result in a vertical merger. A.P.M. retaliates with a defensive move to protect its existing market by itself making a takeover bid for that customer.

Smorgons, A.P.M.'s competitor both in the market place and for the takeover, but more importantly the T.P.C. also, take proceedings alleging that such an acquisition by A.P.M. will result in A.P.M. becoming a monopoly, or alternatively will strengthen an alleged existing monopolistic position. A.P.M. denies the allegations.

Last scene

After eight months of hair-raising and extremely costly litigation, A.P.M., barring appeal to the High Court, effectively loses its right to fight that particular fight. The result of the fight is effectively determined without A.P.M. ever having had the opportunity to set its foot in the ring. Far from a technical knockout, the matter of A.P.M. becoming or not becoming a monopoly has not been brought to issue. A.P.M. officials say "Well, we can't complain about not getting a fair hearing because we didn't get a hearing at all".

One can't even classify this as a case of guilty until proved innocent, because at least that sad state of affairs pre-supposes a trial.

Yet the loss of the basic right to be heard, not to mention the potential loss of many millions of dollars (the matter was finally settled), was a direct consequence of the allegation by the T.P.C.

How did it happen?

There is neither the room nor the inclination to relate a blow by blow description of eight months of litigation, nor is it necessary to do so in order to isolate the cause of this unfortunate outcome. The problem arises from a combination of three factors:

1. The inadequacy of the *Trade Practices Act* in the environment of a takeover battle.
2. The difficulty, heightened by the inherent lack of flexibility in the judicial system, for courts, as distinct from non-judicial tribunals, to resolve urgent questions of commercial fairness.
3. That, owing to a lack of legislative direction, the T.P.C. is disadvantaged by a schizophrenic duality, wherein it must vacillate between the role of regulator or ordinary litigant.

In order to explore the problem let us carry further the analogy between this legal saga and a one-act play. Let us consider in order the characters, the introduction and the development of the plot based on a simplified resumé of that saga.

The characters

In a flash of originality the characters of the play have been named Coy A, Coy B, Coy C and the Regulatory Body (RB).

Introduction

At the opening of scene one, A has 25 percent of market X, B has 70 percent of market X, and both A and B are manufacturers selling to market Y. C has 30 percent of market Y and buys 90 percent of its raw materials from B.

Development

A decides to take over C, and B, seeing its market drastically reduced by such a move, retaliates by itself seeking to take over C. C is, for the moment, happy to see A and B fight it out.

The RB (understandably encouraged by A) wishes to institute proceedings to enjoin B because it alleges B will be in breach of s. 50 of the *Trade Practices Act* if it takes over C. B denies this allegation.

From the very start, the RB is in difficulties. If it succeeds in enjoining B at this critical stage, it effectively succeeds in preventing the takeover by B without ever having to prove its case — A would win. If it waits until after the battle and B wins, it may be too late to enforce a divestment. Further, a divestment might be unconstitutional and it cannot be sure that the divestiture won't be to Coy D, a close friend of B. In any event it would mean A would be shut out despite the RB's success, because although B was not entitled to take over C it would hardly be likely to divest to A.

The answer, which seems at the time to be the correct one, is to obtain undertakings from everybody, that is A, B and C, that there will be no dealings with any shares until after the litigation. This way, the RB doesn't have to risk the interlocutory injunction proceedings, B stays in the match, A gets a chance to bid without competition and C doesn't seem to mind.

The RB then sues B and C for an injunction; B to prevent the sale, and C to prevent any "aiding and abetting". A obtains leave to join in, and, not unnaturally, sits next to the RB at the bar table. The case begins to work its way towards a hearing.

Unfortunately, the seeds are now sown for a fiasco. C starts to become nervous. B, tainted by the RB's action which has already rubbed off on C because C is embroiled in the litigation, starts to look less attractive. Time ticks by. C starts to see its competitors raising the uncertainty of its future as a means of chipping away at its goodwill. B wants the litigation to come to a conclusion as quickly as possible. Someone is heard to mention a period of two years of litigation!

Consequently, B's bid becomes depreciated by the hour and C decides it wants out. But out means a possible aiding and abetting charge if it deals with B, so it decides to forgo any extra money B might

offer and says publicly that under no circumstances will it now or in the future deal with B. On those grounds, it asks again and again to be excused from its undertakings along with A. Needless to say, A is not exactly unhappy about such a proposal. But the court says "No, an undertaking is an undertaking". The tension mounts.

All of a sudden the RB, which has been having a rather nice time of it all sitting on the fence watching A, B and C fight over the undertakings, realises that everybody appears to be focussing attention on it. If the RB withdraws that would allow the undertakings to fall. The RB is in a very tempting position. In actual fact, it is in the very same position as it was at the beginning but now everything looks a little different. The parties are no longer quite so pleasant. If it withdraws, it will fix everything. A would acquire C which is what the T.P.C. wants insofar as it doesn't want B to acquire C; whereas if it continues it might lose against B. On the other hand, the damage to C is still potential rather than actual, and neither A nor B is going to lower its bid — in fact they have each increased their bid on the floor of the court by a rather novel use of affidavits. However, that hasn't stopped C's fears becoming more and more vocal. The RB looks around for some helpful advice but receives none.

So worried is C that it offers to pay the RB its costs if it withdraws. What could the T.P.C. do — after all, it's only human. It withdraws. A.P.M. tries to stop it withdrawing.

Other considerations then come into play. The next scene calls for a much enlarged set. Just as this scene is being created a courier enters and cries "Settlement!", and the curtain falls.

Those witnessing the spectacle rise to their feet in spontaneous applause. The actors have given a magnificent performance. However, some of the promoters seem to have a rather puzzled look on their faces, not to mention a fairly empty feeling which they all have in their hip pockets.

Back to reality

The problem can be simply stated. Cases take time — particularly s. 50 cases. To freeze a takeover contest may cause considerable loss. The answer is machinery to minimise the loss or a decision as to who should bear the loss. Of all the possible solutions, and there are many, the one that was reached in the A.P.M. case was the worst of all choices. Not only did it result potentially in maximum loss to a minimum of participants, but it also denied a citizen his day in court.

The denial of a chance to be heard outweighs tenfold the financial losses entailed in the case. Except insofar as the T.P.C. need not have included Fibre Containers, the target company, in the action (thereby heightening that company's anxiety), no criticism can be laid at the feet of any particular party. The fault lies, in this critic's view, fairly and squarely with the system. ■