A LOOK BACK AT THE RECORD

By The Retiring Editor

This final issue of the Record under the retiring management provides an opportunity to thumb through the preceding 24 issues in order to bring together some of the underlying trends which were reflected by the various competition-related events of the past six years.

The Supreme Court of Canada's reversal of the conspiracy convictions in Regina v Atlantic Sugar Refineries et al. in July, 1980 substantially reduced the effectiveness that had remained in section 32 of the Act after the Court upheld the acquittal in Aetna Insurance Co. and Others v. The Queen some three years earlier. The acquittal of Thomson Newspapers Ltd. and Southam on sonspiracy counts by the Supreme Court of Ontario in December, 1983 was a further reminder of the difficulties of obtaining convictions under s. 32 of the Act. The case involved a series of apparently coordinated newspaper closures in Montreal, Ottawa and Winnipeg and ownership consolidations in Vancouver and elsewhere.

Two other decisions had the effect of narrowing the scope of the Act in other respects. On August 9, 1982 in The Attorney General of Canada v. The Law Society of British Columbia, the Supreme Court of Canada decided that the Act does not apply to the Law Society, its governing body or its members in restricting price advertising or in disciplining its members who challenge such restrictions. In reaching this decision the Court held that, where a provincial legislature has jurisdiction to regulate a particular matter, it is also within the jurisdiction of the legislature to decide on the form of regulation, whether strict governmental supervision or self-regulation. On December 15, 1983, in R. v. Eldorado Nuclear Ltd. et al., the Supreme Court of Canada upheld the immunity of Crown-owned uranium firms from prosecution under the Act for alleged participation in a cartel.

The proclamation of the Charter of Rights and Freedoms on April 15, 1982 created investigatory difficulties. On September 17, 1984 the Supreme Court of Canada decided in Lawson A.W. Hunter et al. and Southam Inc. that the search and seizure provisions in s. 10 of the Act are inconsistent with s. 8 of the Charter and therefore of no force and effect. The power to call for papers under s. 17 of the Act is also in question (Between Thomson Newspapers Limited et al., Applicants, and Director of Investigation and Research et al., Respondents, Supreme Court of Ontario, March 13, 1986).

The Director has been able to use s.443 of the Criminal Code for searches and seizures in criminal investigations, but the admission of evidence obtained earlier under s. 10 has been the subject of frequent challenges.

The record of court decisions over the past six years is, nevertheless, by no means entirely negative from the viewpoint of enforcement. Moreover, many of the damaging decisions noted above will be remedied now that the competition reform bill has been enacted. The conspiracy provisions will have

been rehabilitated; some life has been breathed into the merger and monopoly provisions; the investigatory procedures have been brought into harmony with the Charter; and Crown corporations engaged in commercial activities have been brought under the Act.

The judgment of Mr. Justice Dickson (as he then was) of the Supreme Court of Canada in Attorney General of Canada v. Canadian National Transportation Limited et. al. (1983) 2 S.C.R. 206 served to reinforce the view that the reviewable practices in Part IV.1 of the Act were intra vires under the general federal power over trade and commerce. In that case, the majority found that the Attorney General of Canada was empowered to conduct criminal proceedings under s. 32(1)(c) of the Act in Alberta by virtue of the federal power over criminal law. Dickson, J., while concurring in the results of the decision, held that the Attorney General of Canada cannot conduct criminal proceedings in respect of a federal statute whose constitutional validity depends solely on the criminal law power but that s. 32(1)(c) could be supported under the trade and commerce power as well as under the criminal law head. Justices Beetz and Lamer, also concurring in the results of the decision, expressed "substantial agreement" with Mr. Justice Dickson and based their decision on a finding that s. 32(1)(c) had been validly enacted under the federal trade and commerce power. In reaching his decision, Mr. Justice Dickson set out five indicia for the valid exercise of the trade and commerce power. While stating that the list was not exhaustive and that the presence or absence of any or all of them was not necessarily decisive, he stated that "the presence of such factors does at least make it far more probable that what is being addressed in a federal enactment is genuinely a national economic concern and not just a collection of local ones".

Those indicia have been cited in subsequent cases. On March 6, 1984, in BBM Bureau of Measurement v. Director of Investigation and Research, Mr. Justice Urie of the Federal Court of Appeal relied extensively on Mr. Justice Dickson's judgment in a unanimous judgment holding that s. 31.4 relating to exclusive dealing, tied selling and market restriction was intra vires under the trade and commerce power. In another unanimous judgment on November 21, 1985 relating to an action between Rocois Construction Ic. v. Quebec Ready Mix et al., Mr. Justice MacGuigan of the Federal Court of Appeal cited extensively from Mr. Justice Dickson's judgment in finding s. 31.1 providing for private actions to be within the federal trade and commerce power.

The conviction in Hoffman-LaRoche (upheld by the Ontario Court of Appeal on October 6, 1981, 125 D.L.R. (3d)607) and the acquittal in Consumers Glass by the Supreme Court of Ontario on June 17, 1981, 124 D.L.R.(3d) 274, were the first two decisions under s. 34(1)(c) relating to predatory pricing (see James P. Cairns, "Predatory Pricing: Notes on Hoffman-Laroche", 9 Canadian Business Law Journal 242 (1984); and "Economics In Court; The Consumers Glass Case", C.B.L.J., 212 (1986).

The enactment of the bid-rigging prohibition in s. 32.2 in 1976 has proven its worth, particularly in view of the reduced effectiveness of the general conspiracy section. Some problems have, however, been encountered with the

definition of bids, and it remains to be seen whether they can be resolved satisfactorily by the courts (see Canadian Competition Policy Record, March, 1985 for a description of the Coastal Glass decision by the Supreme Court of British Columbia on December 19, 1984).

Trends in enforcement activity have, of course, reflected the jurisprudential difficulties as well as the 1976 amendments. Criminal prosecutions have been largely concerned with misleading advertising and deceptive marketing practices, price maintenance and bid-rigging; there has been very little enforcement with respect to monopolies, mergers or conspiracies. For example, proceedings concluded during the calendar year ended March 31, 1985 consisted of 190 cases relating to misleading advertising and deceptive marketing, 17 related to price maintenance, one to conspiracy (a guilty plea), one to bid-rigging, one to predatory pricing and one to impeding an inquiry.

Enforcement activity respecting the reviewable practices in part IV.1 of the Act has been surprisingly infrequent. In the entire period since its enactment in 1976, the Director has made only six applications to the Commission under Part IV.1. Four of those have been withdrawn following settlements, with the result that the Commission has only had an opportunity of issuing two decisions other than of a procedural kind (Bombardier and BBM Bureau of Measurement). Those statistics do understate the impact of Part IV.1. For example, the application concerning motion picture distribution was withdrawn only after a settlement which has had a very significant pro-competitive effect. Moreover, the statistics do not reflect the deterrent effect of Part IV.1 or the cases which were withdrawn at the investigatory stage following modification of the practices at issue.

The fewness of applications is nonetheless surprising, particularly in view of the competence which the Commission displayed in its treatment of the two completed cases, and one can only speculate on the reasons. The reviewable practices as drafted present the Director with some difficult probative hurdles, and it may not be easy to identify cases which are likely to meet all the standards. It may also be that a fear of constitutional challenges in the early years made the Director extra careful in his selection of cases. The outstanding success of the Bureau in attacking misleading advertising and deceptive marketing practices could also point to another cause. The Bureau's expertise was founded upon enforcement of criminal prohibitions, and it may have been more attuned to the extension of its work into the enforcement of criminal marketing prohibitions than into the civil reviewable practices. On the other hand, as is noted below, the Director's function of intervening before regulatory commissions has been carried out very effectively. One explanation of the difference could be that a Branch was established within the Bureau for the specific purpose of dealing with regulatory matters, and there is another that deals only with advertising and marketing practices.

A prominent feature of the Bureau's work in recent years has been its extensive use of s. 27.1 of the Act under which the Director may make

representations before federal regulatory boards and commissions in respect of the maintenance of competition. Nearly every issue of the Record has reported on one or more such representations, some of which have been made to provincial bodies with their consent. The submissions have been of a high standard, sometimes including studies and presentations by expert witnesses and often reflecting substantial research projects by the Bureau. Many of the submissions have been in support of deregulation including subjects such as telecommunications, transport, financial services and agricultural supply management boards. Other matters addressed have ranged from particular international trade restrictions to intellectual property laws and ocean shipping conferences. There is no doubt that this work has had a substantial and positive effect on a variety of government policies. The Royal Commission on the Economic Union and Development Prospects for Canada (MacDonald Commission) noted it with approval and recommended that it be further intensified.

A number of factors have combined in the past decade or so to diminish rather than enhance the importance attributed by many experts to the contribution that competition laws can make to a nation's productive efficiency and international competitiveness. The period between the 1969 Interim Report on Competition Policy by the Economic Council of Canada and the 1985 report of the MacDonald Commission was one of many changes in North American industrial structure, in economic and legal analysis and in the general climate of intellectual outlook.

One positive change has been a substantial reduction in trade barriers and a significant rise in import competition as well as of exports. As one result, the average level of industry-by-industry concentration in Canada has been declining when imports are taken into account. (R.S. Khemani, The Extent And Evolution Of Competition In The Canadian Economy, Background Studies for the MacDonald Commission, Vo. (2), 1985). On the other hand, it remains much higher than in most other developed market economy countries, and overall concentration in terms of the share of total assets controlled by a few wealthy persons or groups has been increasing. The latter phenomenon has been a source of increasing public concern as the debates in the House of Commons on the competition law reform bill showed. The fact is, however, that remedies, to the extent that they exist and are required, appear to lie beyond the traditional sphere of competition laws.

The ongoing process of deregulation has contributed to the competitiveness of the Canadian economy. Significant progress in that regard was achieved in telecommunications, transportation and financial services, but the reverse has been the case in the agricultural sector (see Khemani, Supra.).

A negative trend in the Canadian economic environment, as noted with serious concern by the MacDonald Commission, has been the increasing intervention by the federal and provincial governments in private enterprise investment and production decisions through an array of subsidies and tax concessions. As Richard Bird and Christopher Green (Government Intervention In The Canadian Economy, Institute For Policy Analysis, Toronto, 1985), have

concluded the problem is not so much the amounts of money that are involved, which are very large, but that much of it is misdirected and negative in ultimate effect. Canadians now carry a huge tax burden to finance a bewildering array of tax exemptions, subsidies, grants, loans and loan guarantees (see also Economic Growth: Services and Subsidies To Business, a Study Team Report to the Task Force on Program Review, Ottawa, 1986). In response to the apparent inability of governments to direct their industrial policies at general rather than particular interests, there has been increasing hostility to government intervention in general including intervention through stronger competition laws (see, for example, the output of the Fraser Institute).

A major negative development for antitrust enforcement in North America has been a substantial loss of academic support. The Reagan administration's policy of limiting enforcement almost entirely to horizontal conspiracies is not drastically out of line with prevailing academic views. There was a time when the recent endorsement by the Antitrust Division of General Electric's proposed acquisition of RCA, the largest non-oil merger in history, would have raised academic hackles. Yet, in the American Economic Review Papers And Proceedings of the December, 1985 Meetings, Oliver E. Williamson accords unqualified approval to the administration's Merger Guidelines. There is also plenty of academic support for the current U.S. policy of not enforcing the antitrust laws as they apply to vertical restraints (see, for example, the paper by G. Frank Mathewson and R.A. Winter in New Developments In The Analysis Of Market Structure, edited by Jospeh E. Stiglitz and G. Frank Mathewson, the MIT Press, Cambridge, Mass., 1986).

Joe Bain's structure-conduct-performance paradigm no longer reigns as it did in the 1960's (Industrial Organization, New York, 1959), Economists are now at best agnostic about the belief that high concentration with barriers to entry carries with it a high probability of anti-competitive conduct and thence to poor performance as measured by excess profits. Even where high concentration and high profits can be shown to be correlated statistically, the causual connections are questioned. In the 1970's, economists at Chicago advanced an alternative explanation of the relationships along the lines that, where high profits of large firms in concentrated industries existed, they reflected rents earned by superior efficiency derived from such factors as superior management or expenditures on research and development. Also, more emphasis is now placed upon efficiences associated with very large scale than was previously the case (see, e.g., J. Baldwin and P. Gorecki, The Determinants of Small Plant Market Share In Canadian Manufacturing Industries In The 1970's, Review of Econmics And Statistics, Vol. 67, No. 1, 1985).

Baumol, Panzar and Willig (Contestable Markets And The Theory of Industrial Organization, New York, 1982) have recently advanced an alternative to the older views of market behaviour which are based upon perfect competition. Their theory provides intellectual support for the proposition that there may be important circumstances under which even a market with only one firm may behave competitively.

None of the theories, old or new, has been firmly established empirically as providing the best explanation of what happens in the real world. Whatever the future may hold, it is unlikely to be merely a rehabilitation of the relatively simple structure-conduct-performance paradigm; too much has now been learned about the determinants of market structure and the motivational forces present in large organizations to permit such a return. There are, however, some persistent beliefs outside the field of economics which could well be reasserted more strongly if the pendulum of opinion swings back from its present conservative phase. There is, for example, Lord Acton's dictum that power corrupts and absolute power corrupts absolutely. Something like that view helped to shape the work of the fathers of American independence and later to bring the antitrust laws into being.

As noted above, the application of the U.S. antitrust laws to vertical restraints has been under attack, particularly to the extent that per se prohibitions apply as in the case of resale price maintenance. There is now a tendency to analyse RPM on a case by case basis in somewhat the same way as vertical integration as distinct from horizontal integration (see R.D. Anderson and S.D. Khosla, Recent Developments in the Competition Policy Treatment of Resale Price Maintenance, Canadian Competition Policy Record, December, 1985).

A study for the Macdonald Commission by F. Mathewson and R. Winter (Competition Policy And The Nature of Vertical Exchange, Background Studies, Vol. 7, forthcoming) has brought these questions to the fore as they apply to the prohibition of price maintenance in Canada. While their work in that field had already been published in leading economic journals, their study for the Commission deals specifically with the situation in Canada. Funding for the study was received from the Business Council on National Issues, the Department of Consumer and Corporate Affairs, and the MacDonald Commission. The final report of the Commission cites a contention in the study that there are circumstances in which resale price maintenance could provide significant economic benefits, and the Commission recommends a review of the resale price maintenance provision in the Act.

The authors deal primarily with the case of RPM imposed by a single producer. The producer's motives are higher profits through greater volume by attracting more retailers and providing retailers with an incentive to offer more services along with the sale of his product. The services include point-of-sale information, post-sale servicing, more generally the enhancement of the image of his product, or special services of which an example cited is refrigeration. The author's general conclusion is that efficiency is increased whenever RPM is imposed on the initiative of the producer for any of the foregoing reasons. The authors consider RPM to be inefficient when it supports a producer cartel or protects a cartel of established retailers against entry by more efficient (discount) retailers. Their recommendation is that RPM should be legal in the absence of "conclusive evidence" of the presence of one or other of those two latter situations.

The authors do not dispute the historical emergence of RPM as a means used by retailer cartels to delay the entry of discount stores, but they argue that "this is less relevant today when discount stores are a well-established institution in most consumer markets". The fact of the matter is that discount stores proliferated in Canada as a direct result of the 1951 ban on RPM, and there is little doubt that most of them would disappear if the authors' recommendation were to be implemented.

Moreover, the kinds of RPM to which the authors would have us return would usually turn out to be in circumstances somewhere between their cartel models and their model of the individual producer dependent upon retailers to project his product's image. The producer would typically be in a highly concentrated industry, selling a nationally advertised brand name product and anxious to have his product kept on the shelves of retailers, whether pharmacists, grocers or large department stores. There would be conscious parallelism among the few producers and strong pressures from the retailers or associations of retailers. The economic analysis of such cases would have much in common with the analysis of cartel situations.

The authors have performed a service in carrying forward the analysis of why it may be in the interest of the producer as well as of retailers to have RPM. However, in stressing the incentive that RPM gives retailers to offer more services to consumers, they neglect the obvious opportunity it gives the producer to maintain or increase his wholesale price. Taking the example of Lee jeans that the authors cite with approval, , the wholesale price was $6.00, the resale maintained price was $10.95, and they were being sold by discounters for as little as $6.99. Surely Lee's ultimate motivation in acting against the discounters was, not only to sell more, but also to protect or increase the wholesale price which department stores and other "quality" outlets would be willing to pay. It would be difficult to convince consumers that their welfare would be increased by enacting a law which would require all consumers to pay $10.95 rather than as little as $6.99 for a pair of Lee jeans.

Moreover, prior to 1951 RPM was widely practiced in respect of products - such as tooth paste - for which the authors' services argument is less than convincing. Producers of products in connection with which the services factor is important and where "free riding" could be of concern have more effective means than RPM to protect their images. They can and often do prescribe reasonable standards for their retailers and they are under no legal obligation to sell to those not meeting their standards.

Looking ahead, it is clear that much is still unsettled in the field of competition policy, and deficiencies in the Canadian legislation will continue to surface as they have in the past. It is to be hoped that, as those deficiencies become evident, corrective action will not take the inordinate time that has elapsed since the need for something like Bill C-91 became evident.