ENFORCEMENT ACTIVITIES

DIRECTOR MAKES APPLICATION IN FIRST MERGER MATTER UNDER NEW COMPETITION ACT

The *Canadian Competition Policy Record* has learned from the Registrar of the Competition Tribunal that the Director of Investigation and Research made an application on September 3, 1986, seeking an interim order under subsection 72(1) of the Act to prevent certain parties, for a period of 21 days, from closing a transaction whereby a numbered Alberta company was to acquire all the shares of Palm Dairies Limited.

The respondents named in the application were Palm Dairies Limited, 340280 Alberta Limited, the acquiring party, Fraser Valley Milk Producers Cooperative Association, Northern Alberta Diary Pool Limited, Central Alberta Dairy Pool, Dairy Producers Cooperative Limited, and Union Enterprises Ltd.

Union Enterprises Ltd., which had acquired Palm Dairies through its acquisition of the Burns companies a few years ago, is the selling party. The numbered Alberta company had been created by the various cooperatives named in the application as the vehicle for purchasing the shares of Palm Dairies.

The notice of application indicated that the application would be made before the Competition Tribunal on Tuesday, September 9, 1986. The *Canadian Competition Policy Record* has learned that no such application or hearing took place on that date, the matter being adjourned until October 20th. It is understood that discussions are continuing between the Director's office and the respondents at this time.

The documents that the *Canadian Competition Policy Record* obtained from the Tribunal indicate that a central issue in the case is whether the acquisition of Palm Dairies had been "substantially completed" prior to June 19, 1986.

Section 66 of the *Competition Act* states that:

> The Tribunal shall not make an order under section 64 in respect of:
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> a) a merger substantially completed before the coming into force of this section.

The merger provisions of the Act were proclaimed in force on June 19, 1986.

The factum prepared by the Director's counsel, Sandra Simpson, recites the history of the proposed sale of Palm's shares. It notes that the respondent cooperatives had made and entered into an unconditional offer to pay $66 million for Palm Dairies on June 17, 1986. On that date a deposit cheque in the amount of $1 million, which had been previously deposited by the cooperatives, was cashed by the vendor. In addition, an Agreement of Purchase and Sale was signed on June 17, 1986.

The Director's factum goes on to discuss the various aspects related to the Agreement of Purchase and Sale and the

closing. In particular, it discusses the warranty provisions, the conditionality of the closing, the undertakings made by the vendor, the financing arrangements, the form of the transaction, the preparations for closing, and the events to occur subsequent to closing.

The Director's position, as stated in the factum, is:

> Given its plain meaning, substantial completion of a merger should, in normal circumstances, involve a closing with acts of acquisition or completion whereby share certificates are exchanged for the purchase price. If those events have taken place, and if outstanding or post closing matters are merely minor and routine, the merger will be substantially complete. Only once post closing matters have been dealt with, will the merger be complete.

After reciting the various matters which had not occurred by June 19, 1986, the factum goes on to state that:

> On June 19, no steps had been taken to implement the merger and neither party was even remotely ready for a closing. The essential acts necessary to give effect to the merger were, by agreement, not to occur until July 9, 1986. In these circumstances if one gives an ordinary or plain meaning to the phrase substantially completed, the merger was not substantially completed on June 19, 1986 when the *Competition Act* came into force.

The issue of the meaning of substantial completion is obviously a transitional one with respect to the substantive merger provisions of the *Act*. However, it should be noted that the same words appear in the prenotification section of the *Act*. In that section transactions are exempt from prenotification if the transaction is pursuant to an agreement entered into before the prenotification sections come into force but substantially completed within one year after they come into force. That provision is contained in subsection 85(c) of the *Act*. The Director's argument relied on the different wording in the two sections in concluding that the Agreement of Purchase and Sale, as it existed on June 17, was not sufficient to meet the test of substantial completion in the merger section.

Competitive Impact of the Proposed Acquisition

Accompanying the Director's application for interim relief from the Competition Tribunal was an affidavit of a David Wolinsky, an officer in the Bureau of Competition Policy. The Wolinsky affidavit, in addition to setting out the historical facts relating to the acquisition, also discusses the effect of the acquisition on competition.

It states that the respondent cooperatives had told Mr. Wolinsky that they bid for Palm's shares to preclude the entry of a new competitor into the western dairy industry. In particular, the affidavit states that the respondent cooperatives told Mr. Wolinsky that they feared the entry of a new competitor from eastern Canada and also feared that a new competitor would shift Palm into the production of milk substitutes, which would be contrary to the interests of the cooperatives.

The Wolinsky affidavit also sets out market share information with respect to fluid milk. The affidavit indicates that in the fluid milk market, after the merger, the cooperatives and Palm would account for 95 per cent of the market in Saskatchewan, 80 per cent of the market in Alberta, and some confusion as to the market share in British Columbia. In one of the tables set out in the affidavit, it indicates that post acquisition the cooperatives would control just over 57 per cent of the British Columbia market. In another table it indicates that the British Columbia market share figure would be 61.8 per cent post acquisition. The affidavit then removes from the latter

British Columbia figure the sales of dairies which are vertically integrated with retail chains. On that basis, it indicates that post acquisition the cooperatives would control 77.8 per cent of the British Columbia market.

The Wolinsky affidavit also discloses that the Director initiated an inquiry under the *Act* subsequent to receiving two separate six resident applications pursuant to section 7 of the *Act*. It also discusses the conduct of the inquiry to the date of the affidavit and discloses that the Director has received numerous complaints from many sectors of the dairy purchasing and processing industry with respect to the acquisition.

The affidavit, which may be an indication of the manner in which the Director will proceed in merger cases in the future, discusses each of the factors set out in section 65 of the *Act*. Section 65 sets out a list of factors which the Tribunal may consider in determining whether a merger would lessen competition substantially.

The affidavit also discusses the question whether the acquisition would be difficult to reverse if it were allowed to proceed. This obviously was done in order to provide a factual base for the Director's application for an interim order under section 72. Under that section, an interim order can be issued only where the Tribunal finds that:

> The proposed merger is reasonably likely to prevent or lessen competition substantially and, in the opinion of the Tribunal, in the absence of an interim order a party to the proposed merger or any other person is likely to take an action that would substantially impair the ability of the Tribunal to remedy the effect of the proposed merger on competition under section 64 because that action would be difficult to reverse.

The Wolinsky affidavit concludes by stating that the Director needed 21 further days to accomplish the task of completing his review of the more than 10,000 documents obtained from the parties during the course of the inquiry; to prepare, if so advised, an application for a final order under section 64 of the *Act*; and to prepare, if so advised, an application for further injunctive relief pursuant to section 76 of the *Act*. Section 76 authorizes the Tribunal to make interim or interlocutory orders once an application for a final order under section 64 has been made.

The Palm Dairies matter is important since it is the first application brought before the Tribunal under the new *Competition Act*. It is noteworthy that the application was made with respect to a merger. However, one might also speculate whether, given the market shares involved, the merger provisions of the previous *Combines Investigation Act* could be successfully appplied as well.

$50,000 FINE OBTAINED IN PRICE DISCRIMINATION CASE

On June 2, 1986, Neptune Meters Limited pleaded guilty to violating paragraph 34 (1) (a) of the *Combines Investigation Act*. The facts of the case were that Spectrum, which had placed 43 orders with Neptune over the time period in issue, received a discount of only $21.52 on purchases of $54,483.40. In the same period, Howard Good, on 33 orders, received discounts worth $4,105.50 on a total volume of purchases of $32,223.18. The charge covered the period from April 1, 1979, to December 31, 1979.

District Court Judge S. Borins reviewed the mitigating factors going to sentence in the case, including the fact that Neptune had discontinued the practice as soon as it had been informed of its illegality, and that they had never been convicted of an offence under the

Combines Investigation Act previously. He also stated:

> It is general deterrence which, in my view, is the most significant principle of sentencing that applies. The penalty that should be extracted should be one sufficient to discourage others who may be contemplating discriminatory practices. The purposes of the legislation, as I understand it, is to require that all customers be treated in a similar manner. It is my view that more than a nominal penalty is required in this case because the Court cannot leave the impression that the penalty is merely a licence fee for engaging in illegal activity. Therefore, the fine must be a substantial one.

The Judge then imposed a fine of $50,000, a figure that had been agreed to by defence and the Crown in advance as being in the proper range. A fine of this magnitude is the highest fine ever obtained in a single count price discrimination case in the history of the legislation. Recognizing the fact that the amount of commerce involved was relatively small, indeed, in the same order of magnitude as the fine itself, the fine may be regarded as being substantial.

SUNOCO FINED $200,000 FOR VIOLATION OF PRICE MAINTENANCE PROVISIONS

District Judge P. German, on August 18, 1986, imposed a $200,000 fine on Sunoco Inc. for violating the resale price maintenance provisions of the *Combines Investigation Act* This fine is the largest fine ever imposed by a court for a single count conviction under the resale price maintenance provisions. Sunoco has announced its intention to appeal the conviction and fine.

The conviction against Sunoco was entered on June 24, 1986, following the trial of the matter. Sunoco had been charged under both paragraph 38 (1) (a) and paragraph 38 (1) (b) of the *Combines Investigation Act.* Paragraph 38 (1) (a) makes it illegal for a supplier by agreement, threat, promise, or any like means, to attempt to influence upward or discourage the reduction of the price at which any other person supplies or offers to supply the product in Canada. Paragraph 38 (1) (b) makes it illegal for a supplier to refuse to supply a product because of the low pricing policy of the purchaser.

The charge was related solely to Sunoco's relationship with Phulel Singh and Sons Limited, a gasoline retailer in the Town of Markham in Metropolitian Toronto. Singh, a branded Sunoco dealer, was located in an area where its competition consisted of full service gas stations run by Petro Canada and Esso, as well as an unbranded station operated by Pioneer. The Pioneer station was a self serve station, unlike the Sunoco station operated by Singh.

The Court found that in October of 1984 Singh had entered into a contract with Sunoco whereby Singh agreed to buy all of its gas from Sunoco, and Sunoco agreed to supply gas to Singh. These documents also establish the price that Singh would pay as Sunoco's tank wagon price. Sunoco leased the property from Singh and agreed to pay certain rent on the land based on the number of gallons of gasoline sold by Singh. Although the dealer price was stipulated to be the tank wagon price, sales rarely took place at that price because the dealer was given price support based on the competition he faced.

The facts disclosed a dispute between Sunoco and Singh with respect to the price at which Sunoco would provide support. Sunoco took the position that it provided support only to allow Singh to match competition from branded stations, in this case Esso and Petro Canada.

Singh took the position that it was entitled by the agreement to match any of its competition, including Pioneer. In January of 1985, a dispute arose because Singh lowered its price to match a price Pioneer had instituted. The Pioneer price was below that being charged at the time by Esso and Petro Canada. There were discussions at that time between Sunoco officials and Singh resulting in the termination of the supply agreement between them. It was the basic agreement between Sunoco and Singh; the particular events that took place in January; and the ultimate termination of the agreement which led to the charges under the *Combines Investigation Act.*

Judge German did not find that the behaviour of the Sunoco representative in January was an attempt by Sunoco to influence upward Singh's price. There was contradictory evidence given by Singh and the Sunoco representative on these points, and the Court found the Sunoco evidence more credible.

The Court also did not find the termination of the contract between Sunoco and Singh to be a refusal to supply contrary to paragraph 38 (1) (b) of the Act. Judge German held:

> It was the position of the defence that far from refusing to supply gas to Singh, that Sunoco had continued to supply gas and that the T.V.A. was the pricing policy. While I accept the Crown's position that in some circumstances the refusal to sell at a price which allows the dealer to make a profit might amount to indirect refusal to supply, in this case I accept the defence's position that there was no restriction on the amount of gas which the Singh station could obtain.

The court thereupon acquitted the accused on the refusal to supply count.

Judge German did convict Sunoco under paragraph 38 (1) (a) in relation to the basic supply agreement entered into between Sunoco and Singh in October of 1984. The Judge held:

> I am satisfied that the offence under paragraph 38 (1) (a) is committed if the manufacturer intends to enter into an agreement which attempts to influence upward or discourage downward pricing by the dealer. I am satisfied that this was the intention of Sunoco in the agreement reached with the Singhs in October of 1984. I am satisfied that the intention of the agreement in October, 1984 was that Singh would match his prices to Esso and Petro Canada and that he was not permitted to initiate downward pricing. The essence of the agreement was that Sunoco determined who the competition would be, not the retailer, and that he could match the competition but not initiate downward price changes.
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> I am satisfied that this is the conduct which the statute is designed to prohibit. The means by which Sunoco carried out the prohibited conduct was the temporary voluntary allowance. This was part of Sunoco's pricing policy, and, as stated by Mr. Martel, so long as the dealer competed with major stations, he would be given an allowance, but if he chose to compete with an independent then he is not entitled to an allowance. Clearly, this policy violates the statute because it indirectly discourages the dealer from reducing his price. In applying the policy to Mr. Singh, the agreement was even more in violation of the statute because it prohibited him from ever initiating a downward price.
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> Sunoco's position that their policy permitted competition by allowing the dealer to compete with this similar and like competition is not a defence, in my mind.

The Court therefore found Sunoco's temporary voluntary allowance program to be in and of itself a violation of section 38 of the *Competition Act.* In reading the decision of the Court, it appears that the judge would have convicted the accused even if the agreement had not contained the provision prohibiting Singh from initiating any downward price movement. Judge German appears to find that the attempt by Sunoco to determine the retailers with whom Singh could compete violated the statute because it indirectly discouraged downward price movement.

The decision may have far reaching implications in many industries, but particularly the retail gasoline business because of the wide-spread use of dealer price support systems not unlike that used by Sunoco.

B.C. COURT OF APPEAL UPHOLDS ACQUITTAL IN BID RIGGING CASE

The British Columbia Court of Appeal on May 15, 1986, refused an appeal by the Crown from the acquittal of three glass and glazing contractors who were alleged to have engaged in bid rigging contrary to section 32.2 of the Combines Investigation Act. The decision raises interesting issues with respect to the coverage of the bid rigging provisions of the Act, the only *per se* conspiratorial provision in the legislation. In particular, the case discusses the meaning of the words "bids" or "tenders" as used in the statute.

The appeal on two of the counts raised the issue whether the procedures used to obtain quotes, which were similar with respect to both counts, resulted in bid or tenders being submitted.

The facts were that building developers for the Lougheed Community Centre and the Chilliwack Intermediate Care Home placed ads in newspapers calling for bids from general contractors. Those advertisements made no mention of glass or glazing subcontractors. Once general contractors had picked up plans and tender applications from the Amalgamated Construction Association of British Columbia, subcontractors interested in the particular contact could obtain plans at the headquarters of the construction association and submit prices for their particular trade directly to the general contractor who had picked up a tender application. The general contractor submitting bids to the developer would use the quotes obtained from the subcontractors in submitting their sealed bids to the developer.

The charges for the two projects involved the submission of price quotations by the glass and glazing subcontractors to the general contractor. In the Lougheed Community Centre project, Bogardus, one of the accused, acquiesced in Central's request that it submit a cover bid to assist Coastal in obtaining the job. In return for this, Coastal was to purchase items from Bogardus and Central at inflated prices. As a result of this arrangement, Bogardus actually submitted a bid more than 50 percent higher than the bid he had originally proposed to submit. With respect to the Chilliwack Intermediate Care Home project, Coastal and Central engaged in discussions resulting in Coastal's submitting the lower price.

The trial judge, in acquitting the accused on these two counts, found that price quotations submitted in this manner did not constitute bids or tenders under paragraph 32.2 (1) (b) of the *Combines Investigation Act*. He held that only offers capable of becoming legally binding upon acceptance constituted bids or tenders. Since the price quotations submitted in the actual situations did not guarantee their acceptance, as the general contractor was not certain of obtaining the project at that point, the trial judge acquitted the accused.

Madam Justice McLachlin, writing for the Court of Appeal, also considered the meaning of the words "bid" and "tender." Although she found the words capable of being defined as the trial judge had defined them, she also thought it plain that the word "bid" was capable of a broader meaning. She then considered the words in the context of the statute.

The relevant section of the statute reads as follows:

> 32.2 (1) In this section, "bid rigging" means
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> (b) the submission, in response to a call or request for bids or tenders, of bids or tenders that are arrived at by agreement or arrangement between or among two or more bidders or tenderers, where the agreement or arrangement is not made known to the person calling for or requesting the bids or tenders at or before the time when any bid or tender is made by any person who is a party to the agreement or arrangement.

In analyzing these words, Madam Justice McLachlin concentrated on the words "request for bids or tenders". The defence argued that there were no requests or call for tenders with respect to the projects since the subcontractors submitted their bids based solely on the knowledge that the general contractor had picked up plans for the particular project. The Crown argued that although no formal call for tenders was made by the general contractors, the industry practice was such that a submission of prices by a subtrade to a possible general contractor, as was the practice in the industry, constituted a request for bids or tenders by the general contractor.

Madam Justice McLachlin did not agree with the breadth of the Crown's submission. She stated:

> The section contemplates a 'person' who calls for requests (sic) bids or tenders which are then submitted in response to that call. This suggests a direct relationship, or nexus, between the person calling for the bids and tenders and the persons submitting the tenders. In the case at Bar, the price quotations in issue were submitted to the candidates for general contract, but they cannot be said to have been submitted in response to a call from those candidates. Those candidates for general contractor cannot be said to have called for bids or tenders. It cannot be said that any person who picks up the application to tender as general contractor has thereby requested bids or tenders from all subtrades involved in the work. In my view, such an interpretation unduly strains the section, On the facts in this case, the invitation, if any, to subtrades to tender, arose generally from the practice of the industry. There was no individual or 'person' who requested or called for those bids. It is essential to the working of the sections that there be such an identifiable person, since an element of the offence is that that person have no knowledge of the 'arrangement of agreement' between bidders or tenderers.

The issue that arose in count 3, involving the construction of Georgia Place in Vancouver, was different from that which arose in the other two counts under appeal. In the Georgia Pacific project, the owner acted as his own general contractor and did solicit bids directly from subtrades. Both Coastal and Bogardus were asked to submit bids. On the facts, Bogardus wished to obtain the job, but Coastal did not. But Coastal nevertheless wished to submit a bid to keep its name before the owner. Information passed between Coastal and Bogardus, but the trial judge found that Bogardus merely accommodated Coastal by providing it with sufficient information to submit a price, albeit, with the expectation that the price would be higher than the Bogardus tender. The trial judge found that Bogardus bid competitively, notwithstanding it had submitted certain information to Coastal. The Bogardus bid was successful. The trial judge found that the "accommodation" between the two subcontractors did not constitute an agreement or arrangement within the meaning of section 32.2.

The Crown, on appeal, argued that the trial judge erred as to the proper legal meaning of the words "agreement or arrangement." The defence argued that the trial judge, as a matter of fact, found there was no agreement or arrangement and that since the Crown has no right to appeal pure questions of fact, the appeal should be dismissed.

The Crown, in its argument, raised the portions of the trial judge's decision where he spoke of no harm being

inflicted on the owner as a result of the information exchanged between the subcontractors, and also that the price submitted by Bogardus was fair in all the circumstances. Madam Justice McLachlin found the question whether or not harm resulted irrelevant to the charge. She also found that if the trial judge meant that "mutuality" required more than agreeing or arranging, that too would be irrelevant to the charge. However, she found that in the context, the trial judge had found as a fact that an agreement or arrangement had not been proved beyond a reasonable doubt. Therefore, she held:

> It is not open to this Court to say that he erred in acquitting the defendants, notwithstanding the fact that he may have gone on to consider matters not germane to the issues before him.

She therefore dismissed the appeal on count 3. The Crown has not yet appealed the acquittals.

The decisions may have important consequences for the future enforcement of the bid rigging provisions of the Act. Particularly, the definition given by the Court of Appeal to the words "bids or tenders" may limit the application of the section to the construction business if the industry practice followed in British Columbia is similar in other parts of the country. An official of the Combines branch involved in the cases indicated that it is his understanding the practice is indeed similar elsewhere in Canada.

The impact of the acquittal on count 3 may be less significant since it clearly turned on the finding that there was no agreement or mutuality involved in the exchange of information. Nevertheless, the exchange of commercially sensitive information has been a matter usually frowned upon by Combines officials, and the case seems to authorize the exchange of such information if there is evidence that the purpose of the exchange was not to arrive at an agreement.