ENFORCEMENT ACTIVITIES

COMPETITION TRIBUNAL WEIGHS IN ON FIRST MERGER CASE

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As reported in the September issue of the *Canadian Competition Policy Record*, the first merger application under the *Competition Act* came before the Competition Tribunal in an application by the Director involving the sale of Palm Dairies Limited.

The Director had initially applied for an interim junction pursuant to subsection 72(1) of the *Competition Act*. That application was scheduled to be heard by the Tribunal on October 20, 1986. However, at the commencement of the hearing, the Director withdrew the application for an interim junction and filed an application for a final order pursuant to section 64 of the *Competition Act*. At the same time, a motion was brought before the Tribunal for the issuance of a consent order which would have disposed of the section 64 application. The Tribunal adjourned the hearing on October 20 to allow the Tribunal to be properly constituted as a panel to hear the section 64 application and consent order as required by subsection 10(1) of the *Competition Tribunal Act*. The hearing on this matter then occurred on October 22, 1986. At the termination of the hearing on October 22, the Tribunal reserved and issued its reasons and order on October 28, 1986.

The Tribunal's written reasons stated as follows:

> The *Competition Act* is new; there is no jurisprudence to guide either the Director or the Tribunal. The order the Tribunal is asked to make raises a number of questions on which the Tribunal, because of the consent nature of the proceedings adopted by the Director and the respondents, has heard only one side. This puts the Tribunal in the very difficult position of being asked to "bless" a deal worked out by the Director and the respondents, which is acceptable to them, without having the benefit of all sides of the issue having been heard. While we recognize that the Director and the respondents have a knowledge of the particular circumstances of the case, to which the Tribunal is not privy, and that, in general, negotiated settlements may be preferable to those imposed by an adjudicative body, there is in this case a fundamental question on which the Tribunal considers it necessary to have argument. That fundamental issue is whether or not the Tribunal has jurisdiction at all in this case.

The jurisdictional question the Tribunal raised dealt with whether the merger had been substantially completed before the coming into force of the merger provisions of the new *Act*. If the merger had been substantially completed, then section 66 of the *Act* prohibits the Tribunal from making an order under section 64. The Tribunal's position was that the consent of all the parties to the exercise of jurisdiction by the Tribunal could not give the Tribunal jurisdiction if that jurisdiction did not otherwise exist.

The Tribunal in its October 28 reasons raised a second issue on which it felt it desirable to have argument. The second issue related to the appropriateness of certain provisions of the consent order sought. The Tribunal, while agreeing that the proposed order could be the subject of a Tribunal order, stated that: "Some of the terms and conditions that it is proposed to impose on the parties by way of a Tribunal order are of quite a vague nature." The Tribunal went on to state that it wished to hear argument with respect to the enforceability and effectiveness of the conditions asked to be imposed through the consent order.

Since the Director and the respondents had consented to the order and consequently there was no dispute between them, the Tribunal announced that it would appoint a counsel to act as *amicus curiae* for the purpose of presenting argument on the issues the Tribunal wished to have raised. Mr. Gordon Henderson, Q.C. was

subsequently appointed *amicus curiae* by the Tribunal for the purpose.

Further argument of the issues took place in Toronto on November 13, 1986. At that time Mr. Henderson argued both issues raised in the Tribunal's original reasons and order. The position taken by Mr. Henderson was that the new *Act* did apply to the transaction since, in his opinion, it was not substantially completed on June 19, 1986, when the *Act* was proclaimed in force. With respect to the appropriateness of the order, Mr. Henderson expressed a number of concerns and reservations.

The Tribunal issued its decision with respect to the application under section 64 on November 27, 1986.

In those reasons the Tribunal made no comment on the jurisdictional issue. Instead the decision dealt exclusively with the nature of the consent order sought. Principal features of the proposal order were to be that the co-ops proposing to buy Palm Dairies could be the owners of no more than 50 per cent of the shares of the dairy. Furthermore, the remaining 50 per cent of Palm would be controlled by a newly constituted Palm Management Group. Therefore, the basic structural features of the proposed order would have allowed the co-ops to own 50 per cent of Palm Dairies with the remaining 50 per cent being controlled by Palm Management Group. There were also provisions in the elaborate order, which ran to 23 pages, giving the Palm Management Group a casting vote in the event of a deadlock.

The second important principle ennunciated in the proposed consent order was that the business of Palm Dairies would be run at all times independently from and in competition to the business of the co-ops. The order would have required that all decisions of the board of directors of Palm, or the holding company created to own it, be made only with reference to the best interests of Palm "as a viable competitive enterprise and specifically without reference to the interests of the co-ops as competitors of Palm."

The Tribunal noted that the consent order substantially revised the original Agreement of Purchase and Sale entered into by the co-ops with the vendor on June 17, 1986. They concluded, however, since the Director continued to challenge even the revised agreement, that he is "only satisfied with the operational and shareholding restrictions contained in the new agreement if they are imposed by Tribunal order." In fact, the Director's counsel had so indicated in the course of argument before the Tribunal. The Tribunal then stated:

> Under the *Act* the Director has wide discretion to determine what acquisitions or mergers should be challenged. He has authority under section 74 to approve acquisitions and mergers without involvement of the Tribunal. But once the Director has invoked the adjudicative powers of the Tribunal, the Tribunal has a duty to determine the nature of the anti-competitive conduct and to fashion an order which in its judgment serves the purposes of the *Act*. Or, at the very least when the Tribunal is asked to issue a consent order it is incumbent on it to satisfy itself that that order will be effective to accomplish, with due regard to the circumstances of the case, the objectives of the *Act*.

The Tribunal's decision then cited section 1.1 of the *Act* which contains the *Act's* purposes and objectives and went on to comment:

> The purpose of the consent order is to maintain Palm Dairies as an independent entity in the market place. A key question is the extent to which the order sought meets this test. It is incumbent on the Tribunal to satisfy itself that the order sought meets a critical threshhold of effectiveness, namely that of eliminating the likely prevention or lessening substantially of competition that gave rise to the application for the order. Palm currently is an independent competitive entity. If the effect of the consent order is to place this status in jeopardy, there is a danger that this threshhold will not be met.

The Tribunal then reviewed the extensive nature of the proposed order and concluded that the complexities of the order arose because of the "fragile" situation created by the 50-50 ownership split sought to be created. The Tribunal then concluded:

> What is sought with respect to many of the terms in the order is essentially relief in the nature of a perpetual mandatory injunction. The terms proposed would direct on a perpetual basis the way in which the internal management of Palm Dairies would operate. ... It is not immediately obvious that these are appropriate subject matters, in any event, for a perpetual mandatory injunction. One also has to ask

> whether a statute that is meant to result in an improvement in market forces should be used to create long-term enforcement of an elaborate arrangement when more obvious and straightforward remedies are available.

With respect to the nature of orders which may be made by the Tribunal under the new legislation, the Director had argued that the Tribunal should be less demanding in regard to precision, effectiveness and enforceability than a court would be. In support of his argument, counsel for the Director had apparently argued that since the *Act* contains vague terms such as "substantial lessening of competition" therefore, imprecision in Tribunal orders should not be seen as inappropriate. The Director's counsel also argued that since the respondents had consented to the order, it would not "lie in their mouths" to challenge the order as vague at some later date. Finally, the Director's counsel argued that in order to accomplish the purposes of the *Competition Act,* it is essential that the Tribunal willingly issue consent orders negotiated by the Director and private party respondents.

The Tribunal, in its reasons dismissed both of the first two arguments advanced by the Director's counsel.

The Tribunal then considered the third argument raised by the Director dealing with the appropriateness of the Tribunal sanctioning consent orders negotiated between the Director and private parties. In considering this issue, the Tribunal's decision comments on United States precedents as well as the previous history of courts granting prohibition orders pursuant to section 30 of the *Combines Investigation Act.* In concluding its comments on the previous prohibition orders granted under the *Act,* the Tribunal stated that although the orders were often on consent and were long and detailed:

> there are no clauses in them that impose perpetual mandatory injunctions on the parties with the vagueness and precision which exists in some clauses of the order now sought from the Tribunal. Nor is there anything which imposes a mandatory injunction on parties to enter into a purchase and sale agreement or to make corporate management decisions by reference to vague directions respecting competitive behaviour. Indeed, those judgments contain prohibitory orders only.

The Tribunal went on to note that non-compliance with an order of the Tribunal could lead to contempt proceedings or criminal prosecutions pursuant to section 46.1 of the *Act.* The Tribunal then stated that:

> a consent order (or indeed any order) which the Tribunal is asked to issue should be expressed in terms sufficiently clear to permit a person governed thereby to know with tolerable certainty the extent to which conduct engaged in is either lawful or unlawful.

In conclusion the Tribunal stated:

> By way of summary, then, the Tribunal is asked to issue a consent order which was developed through a process of negotiation between the Director and the respondents. That order will establish a highly detailed, complex and, in parts, vaguely defined arrangement between the respondents. It would require perpetual monitoring by the Director and, probably, frequent reassessment by the Tribunal. There is no evidence before the Tribunal that this complex arrangement, as opposed to a more simple, straightforward remedy such as allowing another (completely independent) purchaser to acquire Palm Dairies, is necessary to meet the objectives of the *Act.* Also, there is reason to doubt the effectiveness of the arrangement which it is sought to impose and consequently issuing the order could possibly lead to a substantial reduction in competition. Although the terms of the order are designed to maintain Palm as a separate competitive force in the market there is considerable doubt that they would over the long term have that result.

The Tribunal therefore denied the request for the issuance of the consent order.

The decision also raises issues with respect to interventions by third parties in proceedings before the Tribunal. The Tribunal set out certain rules of a *pro tem* nature which it will use until such time as its general rules of procedure have been adopted. Basically, the Tribunal's position is that proposed intervenors must state with some specificity the nature of their interest necessary to justify standing and also provide other parties to the proceedings an opportunity to respond to their application.

At time of writing the saga of the first merger case under the *Competition Act* continues to unfold. It is not publicly known what position the vendors and proposed purchasers of Palm Dairies will take. It is known that the Director has appealed the Tribunal's order. However, the

appeal may have been filed as a conservatory precaution only.

What is clear is that the Tribunal has exercised its jurisdiction and authority in an aggressive and independent fashion in the first case brought before it. They have implicitly provided an indication of the manner and seriousness with which they will view competition issues. They have also provided some guidance as to the nature of orders, whether on consent or otherwise, they believe it appropriate for the Tribunal to issue.

The fact that the Tribunal would not issue an order arrived at after extensive and protracted negotiations between the Director and the private parties involved undoubtedly may cause concern that the process of merger review created by the *Act* will not work in a timely and efficient manner. However, it must be recognized that this case had unique circumstances relating to its transitional features, and that it will obviously take some time in order to obtain more specific guidance from the Tribunal as to the manner in which it will administer the law. In that regard, it can be argued that the Tribunal's decision is helpful for the guidance that it already has provided.

MISLEADING ADVERTISING CASE RAISES IMPORTANT CHARTER ISSUES

On November 3, 1986 His Honour Judge. A.C. Whealy issued reasons for judgment dealing with important legal questions raised on a motion by the Independent Order of Foresters. The IOF had been charged with certain misleading advertising practices under subsection 36(1) of the *Competition Act.*

Statutory Defence

The first point raised by the IOF dealt with the constitutional validity of subsection 36(1) of the *Competition Act* as well as the section of the *Act* creating a statutory defence to the commission of the offence, namely, section 37.3.

Section 37.3 of the *Act,* which was enacted in 1976, provides a statutory defence to the commission of an offence under section 36 if the accused establishes that:

(a) the act or ommission giving rise to the offence with which the person is charged was an error;

(b) the accused took reasonable precautions and exercised due diligence to prevent the error;

(c) the accused or any other person took reasonable measures to bring the error to the attention of the class of persons likely to have been reached by the representation; and

(d) the steps taken to bring the error to the attention of the persons reached were taken forthwith after the representation was published.

The constitutional argument raised by counsel for the IOF was that since the courts have clearly established the misleading advertising offence created by subsection 36(1) of the *Competition Act* as a strict liability offence, that the effect of the statutory defence created by section 37.3 is to create an absolute liability offence. They argued that an absolute liability offence would be contrary to the rights guaranteed by section 7 of the *Charter of Rights and Freedoms.*

The IOF argued that an absolute liability offence was created since, in order to avail itself of the statutory defence created by section 37.3, it was necessary for the accused to admit the fact of a false or misleading representation. If an accused wishes to argue that a representation was not false or misleading, then its only defence is to put the Crown to the test of proving beyond a reasonable doubt the falsity of the representation involved. However, if the accused is unsuccessful in that the Crown is able to prove the misrepresentation, then the accused at that point cannot rely on the defence created in section 37.3. It was argued that the effect of this was to create the offence as an absolute liability offence.

The Crown argued that the accused clearly had two options in defending a charge under section 36 of the *Act*. It could either defend on the merits as to the falsity of the representation or it could concede the *actus reus* and establish the elements required under section 37.3.

Judge Whealy found that the Supreme Court of Canada had decided in *Reference re Section 94(2) of the Motor Vehicle Act,* 23 C.C.C. (3d) 289 at p.311 that even the creation of absolute liability offences is not *per se* contrary to section 7 of the *Charter*. His Honour argued that, consequently, strict liability offences, such as misleading advertising, being less intrusive than absolute liability offences, would not automatically offend the provisions of the *Charter*.

He stated:

> I am satified that Parliament does not lack the constitutional jurisdiction to create the offence in the words that it has and to restrict the statutory defence in the way that it has.

Regulated Industry Doctrine

A second issue raised in the IOF case dealt with the so called regulated conduct defence. The IOF is incorporated under the *Canada and British Insurance Companies Act* and holds a license under the Provincial Insurance Acts in Ontario and Alberta. The IOF argued that, consequently, its activities in dealing with insurance matters were regulated and closely supervised by appointed public officials. They, therefore, argued, based on the line of regulated conduct cases leading to the *Jabour* decision of the Supreme Court of Canada in 1982, that the IOF could not be prosecuted or convicted under the *Combines Investigation Act* because the behaviour was subject to provincial supervision.

In denying the IOF application to stay the prosecution, Judge Whealy stated:

> In my view, the particular questions cited by the defendant in support of his position, when read in context, were not intended to be judicial pronouncement stating that provincially regulated industries are shielded from the possibility of prosecution under the *Combines Investigation Act*, but rather are statements emphasizing that once a prosecution has been put forward and the defendant company or industry has shown itself to be a regulated industry, then it ought to be shielded from conviction under the *Combines Act* because the provincial regulations authorize it to do things which would otherwise be illegal under the federal statute. In each case the particular activities or allegations must be measured against the provincial regulations to see if, in fact, the provincial regulatory agency has addressed that kind of behaviour which is the subject of the prosecution.

In concluding this issue, Judge Whealy indicated that the defendants were at liberty, at trial, to raise the regulated conduct issue anew to show that they were indeed regulated on the facts of the case and able to invoke the defence.

Evidentiary Presumptions Created In Section 45

The third issue raised in the IOF was the constitutionality of section 45 of the *Competition Act*. That section creates certain evidentiary presumptions in favour of the Crown in proceedings under the *Act*. It was challenged by the IOF as being contrary to subsection 11(d) of the *Charter of Rights and Freedoms* which guarantees the innocence of an accused until proven guilty.

Subsection 45(2) of the *Act* contains three subsections employing slightly different wording. Paragraphs 45(2)(a) and (b) state that the acts of agents or documents written or received by agents shall "*prima facie*" be deemed to have been done or written or received with the authority of a participant. Subsection 45(1) defines who a participant is for the purposes of the section. Paragraph 45(2)(c) states that documents of agents or participants, in certain circumstances, will be admissible and are "*prima facie* proof" of their contents.

Judge Whealy stated that the use of the two different phrases by Parliament must exhibit an intention that their meanings are different. He stated:

> In my view, "*prima facie* proof" is a standard of proof at which the fact is proved sufficiently for conviction if the accused adduces nothing to contradict the fact,

> or to raise a reasonable doubt. It is also my view that "*prima facie* be deemed" is a lesser standard, and a conviction need not necessarily follow if the accused stands silent.
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> The documents which are the subject of the former state of proof may well be documents proving the *actus reus* or *mens rea* of the offence, and thus displace the presumption of innocence guarded by s.11(d) of the *Charter*.

Judge Whealy therefore found that paragraph 45(2)(c) of the *Combines Investigation Act* offended subsection 11(d) of the *Charter* and is of no force and effect. He added, however, that the section might be saved by s.1 of the Charter dealing with reasonable limits prescribed by law as are demonstrably justified in a free and domocratic society. The Judge did not rule on whether s.1 of the *Charter* would in fact save the provision. All three issues raised in this case have important practical consequences for the application of the misleading advertising and other provisions of the *Competition Act*.

WARRANT ISSUED UNDER NEW SEARCH PROVISIONS OF COMPETITION ACT

On October 28, 1986, Mr. Justice F.C. Muldoon of the Trial Division of the Federal Court of Canada issued reasons for the issuance of a search warrant requested by Robert Weist, an officer of the Director of Investigation and Research under the *Competition Act*. The *ex parte* applications for the warrants were made pursuant to subsection 13(1) of the *Competition Act*. By title of Mr. Justice Muldoon's reasons, it would appear that the warrants were sought to search the premises of Irving Equipment, a division of J.D. Irving, Ltd. The reasons indicate that applications were sought to obtain three warrants but do not specify whether the persons to be searched included Irving Equipment only, or whether other premises were also sought to be searched.

The warrants were sought with respect to an investigation into predatory pricing pursuant to paragraph 34(1)(c) of the *Competition Act*.

Justice Muldoon's reasons quote from the warrant as follows:

> ...being persons engaged in business, unlawfully did, between May 31, 1984 and the present, in the City of Saint John in the Province of New Brunswick, in the City of Dartmouth in the Province of Nova Scotia and elsewhere in the provinces of New Brunswick and Nova Scotia, engage in a policy of selling products, to wit: industrial cleaning services, at prices unreasonably low, having the effect or tendency of substantially lessening competition or eliminating a competitior, or being designed to have such effect, contrary to paragraph 34(1)(c) of the *Competition*

The reasons indicate that the applicant Director had sought to obtain warrants to search the respondent's premises from a Judge of the Court of Queen's Bench in New Brunswick. However, that Judge had declined to issue the warrant. The Director's counsel indicated to Mr. Justice Muldoon that the previous information sworn by the same informant had been more sparse and less informative than the information presented to the Federal Court Judge.

After reviewing the search provisions contained in section 13 of the *Competition Act*, and the information filed by the informant, Mr. Justice Muldoon found:

> This information is ample to demonstrate the informant's reasonable grounds to believe that the offence has been committed and that there are, on the stated premises, records or other things which will afford evidence with respect to the circumstances of the alleged offence. It must be emphasized that the said reasonable grounds provide only the threshhold to the matters in issue; they do not provide proof beyond a reasonable doubt unless they remain totally unanswered by the prospective accuseds. Nothing herein dilutes their right to be presumed innocent. The amplitude of the information furnishing, as it does, the reasonable grounds, satisfies the Court that it is lawful to issue the search warrant which the Director seeks.
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> The warrant is to be issued in duplicate, one signed original of which is to be furnished to a, or the, person who is in possession or control of the premises to be searched, and the other signed original is to be retained by or on behalf of the applicant to be returned to be filed in Court with the report and application to retain, if any, contemplated by section 15 of the *Act*. There shall be attached to both original warrants for each search copies of subsections 13(3), (4), (5) and (6) and 14(1), (2) and (6) of the *Competition Act*. Any number of photocopies of the warrant may be produced and furnished to searchers and persons in possession or in control of the premises, as need and public relations sensitivity require.

The *Canadian Competition Policy Record* believes this case to be the first instance of reasons being granted with respect to the issuance of search warrants under the new search powers contained in the *Competition Act*. It has not been customary in the past for Judges or Justices of the Peace to issue reasons for the granting of search warrants. The case may indicate that the practice of the Trial Division of the Federal Court, which is granted the authority under the new *Competition Act* to authorize the Director's use of investigatory powers, will be routinely to issue written reasons. The instructions issued by the Justice with respect to the execution of the warrant may also be an indication of the manner in which search warrants will be handled by the Federal Court.

ONTARIO COURT OF APPEAL UPHOLDS CONSTITUTIONAL VALIDITY OF COMBINES SUBPOENA POWER

The Ontario Court of Appeal, in a unanimous judgment released on October 23, 1986, upheld the constitutional validity of the provisions of the *Combines Investigations Act* with respect to the compelled production of documents pursuant to an order of the Restrictive Trade Practices Commission. Mr. Justice Grange, in writing the decision for the Court, noted that the new *Competition Act* has materially changed the provisions in issue in the case before the Court. He noted that "to some extent, therefore, the problems raised in this appeal are moot."

The case involved an investigation being conducted under the *Combines Investigation Act* into predatory pricing allegedly engaged in by Thomson Newspapers Limited. The dispute arose after the applicants, who were officers of Thomson Newspapers Limited, were summoned in 1985 to appear and give evidence and also to make production of certain financial documents relating to the cost of production of and revenues from the Corporation's publications.

This investigatory step had followed a search and seizure in 1983 by the Director of Investigation and Research in the same investigation where the seizure had been subsequently set aside by Mr. Justice Collier of the Federal Court on the basis that the search powers under the *Combines Investigation Act* were contrary to the *Charter*. The orders to appear and produce documents issued in 1985 were obtained pursuant to the provisions of section 17 of the *Combines Investigation Act*. Thomson Newspapers Limited challenged the validity of section 17 in light of the provisions of sections 7 and 8 of the *Charter of Rights and Freedoms*.

Section 7 of the *Charter* states:

> Everyone has a right to life, liberty and security of the person and the right not to be deprived thereof, except in accordance with the principles of fundamental justice.

Section 8 of the *Charter* states:

> Everyone has the right to be secure against unreasonable search or seizure.

At the trial of the application, Mr. Justice Holland dismissed the application with respect to section 7 of the *Charter* but found that certain provisions of section 17 of the *Combines Investigation Act* constituted an unlawful seizure and were in breach of section 8 of the *Charter*. (*Thomson Newspapers Limited et al. v. Director of Investigation and Research et al.* (1986), 25 C.C.C. (3d) 233).

The Director appealed the finding of Mr. Justice Holland under section 8 and Thomson Newspapers Limited appealed the decision under section 7.

Self Incrimination

The argument under section 7 of the *Charter* related to whether that section can be used to protect the witness from incriminating himself and raised as well the question of whether there is a protection against producing incriminating documents.

The Court of Appeal basically found itself in agreement with the decision of Mr. Justice Holland. The Court found:

> I am of the view that the only rights against self-incrimination now known to our law are those found in ss.11(c) and 13 of the *Charter*, namely: the right of a person charged with an offence not to be compelled to be a witness in those proceedings and the right of a witness not to have incriminating evidence given by him used against him in subsequent proceedings.
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> We in Canada have no modern tradition against a witness incriminating himself by his own testimony. At least since 1893 when the *Canada Evidence Act* was amended to include what is now s.5 our tradition has been that every witness must answer quesions legitimately put to him subject to the protections now found in s.13 of the *Charter* and subject to the protection against compelling an accused person to testify in proceedings directed against him (s.11(c) of the *Charter*.

With respect to the section 7 argument, the Ontario Court of Appeal decision is basically in conformity with the decision in *Haywood Securities Inc.* (1985), 24 D.L.R. (4th) 724 and *Transpacific Tours Ltd. et al.* (1985), 8 C.P.R. (3d) 325. The decision is contrary to the decision of the Saskatchewan Court of Queen's Bench in *R.L. Crain Inc. et al. v. Couture and Restrictive Trade Practices Commission et al.* (1983), 6 D.L.R. (4th) 478.

Unreasonable Search Or Seizure

The Court then turned to what it characterized as the more difficult question of whether the subpoena powers set forth in section 17 of the *Combines Investigation Act* were contrary to section 8 of the *Charter*. The Court reviewed the history and purpose of combines legislation in Canada and found that "if broad powers of investigation were not available the inquiries so launched might well prove futile and the fulfilment of the economic policy contemplated might well prove unattainable."

After reviewing the *Charter* history of the search provisions in section 10 of the *Combines Investigation Act* the Court held that:

> Section 17 provides for neither an impartial arbiter nor a reasonable belief of an offence having been committed so if the order under s.17 is the equivalent of a search and seizure under s.10, it would be difficult to uphold it.

However the Court did not stop its inquiry there and found that the crucial question in a section 17 instance is not only whether the seizure was reasonable but also whether there was a seizure at all. In considering this issue, the Court was cognizant of the fact that the recipient of a notice under section 17 is given certain protections under subsection 3 of section 17. That section states that a person subject to an order of a member of the Commission cannot be penalized for failing to comply with it without there first being an application made to a judge on notice to the person in non-compliance. The Court also commented on the situation raised in *Director of Investigation and Research v. Restrictive Trade Practices Commission et al.* (1985), 4 C.P.R. (3d) 59 (F.C.A.) That was a case were a member of the Commission had amended an order issued under section 17 and the Director had challenged the amendment made by the Commission member. Mr. Justice Grange found that:

> The important thing, however, is that the Commissioner entertained an application to amend an order made under s.17 before there was any breach of it and the Court entertained an application to review that decision under s.28 of the *Federal Courts Act*.

Mr. Justice Grange then discussed the process which is followed under section 17. He stated:

> What happens under s.17 is that an order is issued. An order is of course to be obeyed and if it is obeyed then the consequence is much the same as a seizure under s.10. But if it is not obeyed no penalty can be imposed without the matter being considered by an impartial judicial arbiter. Moreover as appears from *Director of Investigation and Research v. Restrictive Trade Practices Commission et al., supra*, the order can be attacked on motion to review before it takes effect. The result of the order is really no different from that consequent upon the issuance of a subpoena *duces tecum* which can be issued in either civil or criminal proceedings without any requirement of assessing its reasonableness and the conflicting interests of the parties.

As a final conclusion with respect to what would constitute a seizure for the purpose of the *Charter*, the Ontario Court of Appeal found:

> It is sufficient to say that the s.8 prohibition does not encompass an order requiring the production of documents so long as the section authorizing the order (or the law apart from that section) gives the person required to produce a reasonable opportunity to dispute the order and prevent the surrender of the documents. That in my view is precisely the position under s.17.

The Court then considered the consequences of their being wrong in holding that section 17 was not a seizure and decided the issue whether such a seizure would be unreasonable under section 8 of the *Charter* in any event. The Court gave short shrift to this argument relying on the judgment on Mr. Justice Marceau in *Zeigler v. Hunter* [1984] 2 F.C. 608 where the Court found that the protection contained in subsection 17(3) was sufficient to make the process a reasonable one since it was tantamount to the issuance of a subpoena *duces tecum.*

The Court therefore found for the government on both the section 7 and section 8 *Charter* arguments. It is expected that Thomson Newspapers Limited will seek leave to appeal the decision to the Supreme Court of Canada.

The implications of this decision may be important for the new subpoena powers contained in the *Competition Act.* Those powers, which are contained in section 9 of the *Competition Act*, are modelled somewhat on the provisions of the *Combines Investigation Act.*

Unlike the former provisions, the new provisions require the powers to be exercised only with the prior approval of a judge of a Superior or County Court or of the Federal Court. There is a similar provision to that contained in subsection 17(3) of the *Combines Investigation Act* in that a person cannot be forced to comply with an order without first being given notice of an application to compel compliance. The new provisions also contained additional safegaurds in that there must be evidence presented to the judge issuing an order sufficient to satisfy him that there is, in fact, an inquiry underway, and that the person against whom production is sought has or is likely to have information that is relevant to the inquiry. This standard, however, is not as stringent as the standard required to obtain a search warrant under section 13 of the *Competition Act.*