CANADIAN COMPETITION LAW DEVELOPMENTS

SUPREME COURT OF CANADA RENDERS JUDGMENT IN IRVINE CASE

By: Lawson A.W. Hunter
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The Supreme Court of Canada, on the 26th of March, 1987, almost two and a half years after hearing an appeal from the Federal Court of Appeal, handed down a unanimous decision in an important case involving the conduct of inquiries under the *Combines Investigation Act.*

The facts of the case involve matters exclusively concerned with the *Combines Investigation Act* and not the amended *Competition Act.* However, since many of the provisions in issue were similar or the same as those in the present law, the judgment may well be important in interpreting the new investigatory provisions.

The case arose during the course of a section 17 hearing under the *Combines Investigation Act* in an inquiry dealing with the production, manufacture, purchase and sale of flat rolled steel and other types of structural steel products. During the course of that inquiry, the Director had sought and obtained, from a member of the Restrictive Trade Practices Commission, the authority to conduct examinations under section 17 of the *Combines Investigation Act.* That had resulted in the issuance of 29 subpoenas to witnesses involved with various companies. The cases involved decisions and rulings made by a hearing officer appointed by the Commission under section 17 of the *Act.*

In general terms, the issues involved the rights of witnesses or persons under investigation to be represented by counsel, the extent to which counsel for the witnesses or companies under investigation could participate in hearings and, finally, whether parties under investigation have the right to obtain the basis on which the Director initiates inquiries leading to oral examinations.

When the issues were raised first before the Trial Division of the Federal Court, Mr. Justice Collier had quashed a number of decisions of the Hearing Officer dealing with the rights of witnesses or counsel to be present during an entire examination and also granting counsel more extensive rights to examine all witnesses in the conduct of such examination. The Federal Court of Appeal set aside most of the orders of the Trial Division, upholding the Hearing Officer's decisions. At the Federal Court of Appeal, an additional issue was raised concerning access of parties under examination to the objective cause of the inquiry as set out in the Director's application to the Commission. The Court of Appeal dismissed that application as well.

All of the issues were heard before the Supreme Court of Canada.

Mr. Justice Estey, in writing for the Supreme Court of Canada, noted that although the Director

> must, for example, launch an inquiry when he receives a citizen's application under section 7 or a Ministerial direction under section 8(c)....Section 8 contains no rules or procedures for the guidance of the Director investigating those matters by statute assigned to him. The section does not set up any organization in the sense that the word inquiry is sometimes employed. Nor does it prescribe any process or procedure or rules for the guidance of the Director in making his inquiry.

Mr. Justice Estey then concluded an extensive review of the various investigatory and accusatory features of the *Combines Investigation Act* by stating:

> In all these functions the Director makes no decisions in the sense of a final determination of a right or an interest. He makes recommendations and allegations and forms opinions for consideration by others and sometimes only gathers facts and information for consideration by Ministers or by the Commission.

The Justice described the Restrictive Trade Practices Commission's role as largely in the second stage of an inquiry, consisting of the processing of information gleaned by the Director in the exercise of his investigations.

The Court then turned to consideration of the first question put to it. That question dealt with whether the Director has a duty to disclose the basis on which he initiated an inquiry to any person named in an order of examination. Since the statute was silent on the question of disclosure, Mr. Justice Estey found:

> In my view, the appellants are not entitled at this stage of the statutory investigatory process to an order quashing an inquiry by reason of the failure of the Director to disclose to those being examined under section 17 or are being investigated under sections 8 or 47 of the Director's reason for belief that one or more of the conditions in section 8(b) exist.

Having disposed of this issue, the Court turned to the more central issue of the rights of witnesses and persons under investigation to participate in examinations under section 17 of the *Act*. Mr Justice Estey stated the question as follows:

> This leads to more detailed and practical questions such as the rights of either persons or their counsel to be present throughout the inquiry and the rights of their counsel to cross examine witnesses and to call and examine other witnesses.

In analyzing this question, Mr. Justice Estey noted that the statutory provision was terse, saying only that certain persons have the right to be represented by counsel. Mr. Justice Estey then set out an extensive discussion of the administrative law principles relating to fairness and due process. After reviewing both United Kingdom and United States jurisprudence, he concluded:

> Neither jurisdiction appears to have produced a rule or gauge of easy application to determine when 'fairness' or 'due process' should apply to an administrative authority not subject (at least in the U.K. law) to the full force of the principles of natural justice, when acting in a purely administrative function. Each jurisdiction may bring an investigatory function within the fairness standard depending on the type and nature of the investigation, the nature of the right involved, the possible burden on the process and, most importantly, whether the particular investigation process exposes the person being investigated to prosecution, publication and serious adverse findings or other loss or damage.

Turning then to the interpretation to be given to the right to representation in the *Act*, Mr. Justice Estey stated:

> It follows from the above discussion that neither section 20(1) of the *Act* nor the doctrine of fairness provides the appellants with a right to cross examine witnesses at the inquiry. Fairness is a flexible concept and its content varies depending on the nature of the inquiry and the consequences for the individuals involved. The characteristics of the proceeding, the nature of the resulting report and its circulation to the public, and the penalties which will result when events succeeding the report are put in train will determine the extent of the right to counsel and, where counsel is authorized by statute without further directive, the role of such counsel. The investigating body must control its own procedure. When that body has determinative powers, different considerations enter the process. The case against the investigated must be made known to him. This is provided for in the *Act* in each of the progressive stages of the inquiry.

The judgment then addressed the submissions of the appellants that the investigation process in the *Combines Act* sets in train a result which would prejudicially affect their interests, either because a prosecution was launched or because information would be made public. The Court found that the provisions in the *Act* dealing with the next steps in investigations adequately protected the persons who might be subject to investigation, and that the Director's functions were purely investigatory in nature and preliminary to actions which could adversely affect any person. Mr. Justice Estey also relied on the requirements of section 27 of the *Act* that all inquiries be held in private. The Court, therefore, adopted the view that

examinations conducted under section 17 were preliminary as to their effects on persons under investigation.

Mr. Justice Estey made the following comment on the nature of investigations under the *Competition Act*:

> The area under investigation concerns trading crimes which by nature are difficult of investigation. Persons conspiring to profit improperly from trade combinations do not create much physical evidence and have every opportunity to disguise their conduct. The impact of the crime on the individuals affected is in each case very small in economic terms but in gross produces sizable criminal profit. Again this type of crime requires more than the usual combination of informants and complainants from the public at large. The demonstration of the crime generally requires the early and active investigative action by the state itself. An awareness of these concerns by the legislators is apparent when the investigative program established in the *Act* is read as a whole. The interpretation of the *Act* in its dying days and of the successor statute will perhaps attract different tests and standards not applicable in these proceedings when the issues then before the Courts will have arisen after the advent of the *Charter*.

The parties to the appeal had sought to have any Charter issues dealt with by the Supreme Court of Canada. That application was denied and, consequently, whether sections 7 and 8 of the *Charter* will have an impact on either the provisions of the *Combines Investigation Act* or the *Competition Act* must await another day.

The Court, in conclusion, found that persons being investigated are not entitled to be present throughout the whole of an examination, that counsel representing witnesses or parties under investigation may not examine or cross examine witnesses in an inquiry except that they may put questions to their clients for the purpose of clarifying and explaining evidence already given, and, finally, that neither the Commission nor the Director are required to disclose the "objective cause" of an inquiry when it is commenced.

In conclusion, the Supreme Court of Canada supported the government and the Director's position in all of the important matters raised by the case. The result is that the examination process under section 17 of the *Act* is allowed to continue largely as it has been conducted for many years. Although the new provisions of the *Competition Act* have made some changes, largely due to the abolition of the Restrictive Trade Practices Commission, the general framework for oral examinations of witnesses during inquiries remains intact. The new provision dealing with the right to be represented by a counsel are identical to those contained in the *Combines Investigation Act*. Therefore, it is likely that any challenge to the new provisions, apart from *Charter* implications, will be interpreted as the Supreme Court of Canada decided in the *Irvine* case.

PROHIBITION ORDERED IN MERGER CASE

By: Debra P. Steger
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In response to the second, and last, guilty plea in a case involving a criminal prosecution for merger under section 33 of the *Combines Investigation Act*, the Ontario Supreme Court issued a sweeping prohibition order against the accused and other related persons. Hamilton Funeral Homes Limited, Funeral Financial Services Limited and Arbor Capital Inc. were charged with having been involved in the formation of an illegal merger as a result of the acquisition by Hamilton Funeral Homes Limited in 1981 of five funeral homes in Hamilton, Ontario, from Canadian Funeral Management Inc. Other respondents named in the prohibition order were Wesley George Kee and Edward Wayne Powell, holders of a majority interest in Hamilton Funeral Homes Limited and Funeral Financial Services Limited. The shares of Hamilton Funeral Homes Limited were held in equal proportions by Messrs. Kee, Powell and Arbor Capital Resources Inc. Messrs. Kee and Powell also held between them a 90% interest in Funeral Financial Services Limited.

During the period from 1981 to 1985, Hamilton Funeral Homes Limited and Funeral Financial Services Limited owned and/or operated seven of the twelve funeral homes in Hamilton and seven of the ten funeral homes

located in lower Hamilton. In the Agreed Statement of Facts, the parties defined the market for funeral services in Hamilton as comprising two distinct geographic markets: upper Hamilton and lower Hamilton. This division was made on the basis of assertions that consumers generally rely on past service in selecting a funeral home and do not generally comparison shop for funeral services. Also, ethnic and religious affiliations play an important part in the selection of a funeral home. During the period of time covered by the indictment, the parties estimated that Hamilton Funeral Homes Limited and Funeral Financial Services Limited together controlled up to 60% of funeral services in lower Hamilton in 1982, up to 51.5% in 1983, up to 51% in 1984 and up to 52.5% in 1985. They also estimated that the two funeral services companies performed up to 70% of the Protestant funerals in lower Hamilton during that period.

The parties agreed that competition had been lessened in the sale and supply of funeral and related services in Hamilton to the detriment of the public based on the facts that prices had increased substantially in the Hamilton market and a competitor, namely Canadian Funeral Management Inc., had been eliminated. Prior to the acquisition, Canadian Funeral Management Inc.'s standard service charge had ranged between $945 and $985 per funeral. At the same time, Hamilton Funeral Homes Limited had a standard service charge of $500. Funeral Financial Services, prior to December 1981, had a standard service charge of $1,570 per funeral. By the end of 1985, the standard service charge for Hamilton Funeral Homes Limited had increased to $2,195 and Funeral Financial Services Limited's charge increased to approximately $2,200 per funeral. After the acquisition, Hamilton Funeral Homes Limited and Funeral Financial Services Limited, both owned and controlled by the same shareholders, had gained effective control over the market for funeral and related services in upper and lower Hamilton. As a result, they were able to increase their prices to the same comparative level thereby lessening competition by effectively reducing consumer choice.

The Court in this case issued an extraordinary order requiring dissolution of the merger and directed the individual shareholders to divest all of their shares and interest in the business of Hamilton Funeral Homes Limited within 30 days of the order. Hamilton Funeral Homes Limited was ordered further to carry on business independently of Funeral Financial Services Limited and the individual respondents. The Court also issued a standard section 30 order against Hamilton Funeral Homes Limited prohibiting that company from doing anything in continuation or repetition of the offence under section 33 of the *Combines Investigation Act.* It further prohibited all the respondents and their officers, directors, servants, agents and employees from purchasing or otherwise acquiring control over, or interest in, the whole or part of another funeral services business in the city of Hamilton whereby competition is or is likely to be prevented or lessened substantially within the meaning of section 64 of the *Competition Act.* If any of the respondents acquires in future another funeral service business in Hamilton likely to lessen competition substantially within the meaning of section 64, the Director would have the option of going to a court or to the Competition Tribunal for review.

Acting under section 31 of the *Competition Act*, the Court directed all of the respondents, in so far as they continue to engage in the sale or supply of funeral services in Hamilton, to report to the Director of Investigation and Research on any acquisition in Hamilton of an interest in a funeral home, or rights thereto under a lease, 30 days in advance of such acquisition. Ten days advance notice to the Director was also ordered for any proposed increase in the price of funeral services and related products in Hamilton where the increase would exceed an increase in the consumer price index. Section 31 of the *Competition Act,* which applies only with respect to criminal offences, provides that a court may require "the convicted person" to submit "such information with respect to the business of such person as the court deems advisable" for a period of three years after the date of the conviction.

This case is unique because it involves the provision of a local service in a market where

consumer choice was considerably restricted because of features unique to the type of service and the dominance of the two major firms, both owned by the same individuals. Although the merger upon which the charge was based in this case was between the accused, Hamilton Funeral Homes Limited, and the acquiree, Canadian Funeral Management Inc., the corporate veil of the accused company was pierced and its shareholders' involvement in other funeral services businesses in Hamilton was examined for the purposes of determining whether competition had been lessened to the detriment of the public. Competition, it was agreed, was lessened because the two major funeral services companies in Hamilton, both owned and controlled by the same individual shareholders, controlled over 50% of the market, had increased prices substantially to the extent that there no longer was any effective price competition and, by means of the acquisition, had eliminated a vigorous competitor. The case is also noteworthy because of the willingness of the Court to use the full arsenal of remedies available to it including dissolution, divestiture, prohibition against future acquisitions contrary to the new merger provisions, and reporting obligations.

OTTAWA HOTELS: ACCUSED FINED

By: John Blakney
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On March 13, 1987, Mr. Justice A.H. Hollingsworth sentenced Four Seasons Hotels, Delta Hotels, and Plaza Hotels, after the accused had entered guilty pleas to charges of conspiracy and bid-rigging under subsections 32(1) and 32(2) of the former *Combines Investigation Act.*

The three remaining accused (York-Hannover Hotels, operator of the Skyline Hotel, Holiday Inn, and CN Hotels, operator of the Chateau Laurier) subsequently pleaded guilty on April 22, 1987, and were sentenced on April 27th, by Mr. Justice McKeown.

In both instances, the court accepted the submissions of counsel for the Crown and the defence that a conviction be registered on the conspiracy count but be stayed with respect to the bid-rigging count. Both counts arose from an agreement not to compete in the supply of hotel rooms and related services to federal, provincial and territorial government employees.

In January of each year the federal government publishes a Hotel Directory listing hotels, motels, and other accommodation where public servants may stay while travelling on official business at rates which have been established by agreement with the hotel industry. This is accomplished through a tendering process known as the Government of Canada Agreed Maximum Hotel Rate program. Each September the Department of Supply and Services (DSS) sends a request for proposal to interested participants for rates to be charged to public servants for the following year. DSS, after receiving the proposals, recommends a maximum rate for each region to Treasury Board. After this maximum is approved, the Directory is published. It has two parts "White Pages" listing establishments whose rates are equal or less than the maximum rate, and "Green Pages" where the rate exceeds the maximum. Public servants must provide a justification for staying in Green Pages hotels.

In January 1985 the government's new 1985 Directory adopted $57.00 as the maximum White Pages rate for Ottawa. In October 1984 the accused met and agreed to submit a price of $62.00 per single room per night for 1985 except that the Chateau Laurier and Four Seasons could increase their rates to $70.00 and $98.00 for the balance of 1984 after the first four months. They did not disclose this agreement to DSS.

No evidence was submitted that anything other than this price was charged by the accused to government employees during the first four months of 1985. In total the six accused controlled 2700 of the 6700 hotel rooms in the National Capital Region.

In considering sentence for the first three hotels, Mr. Justice Hollingsworth referred to *R. v. McNamara* 56 C.C.C. (2d) 516 which involved a conspiracy among dredging

operators to defraud government agencies. He agreed with the Ontario Court of Appeal in that case that such business conspiracies should be regarded as "a shocking state of affairs" and that general deterrence should be the paramount factor to which effect must be given in the imposition of sentences in such a case. In *McNamara*, the Court of Appeal, at page 519, stated emphatically that:

> It is vital to the interest of the business community as well as the interest of society, that the leaders of the business community should act honestly in their dealings with public bodies.

Mr. Justice Hollingsworth noted that the Ontario Court of Appeal in *McNamara* cited the following matters as relevant to sentencing:

1. The size of the convicted companies.
2. Their share of the market.
3. Their position or influence in the conspiracy and the initiative in promoting the agreement.
4. Length of time as a member of the conspiracy.
5. The penalties levied in previous cases.
6. The large amounts of money involved and corresponding benefits anticipated by the (convicted companies).
7. The premeditation and deliberation involved in the commission of the offences.
8. The fact that the victims defrauded.

Mr. Justice Hollingsworth also referred to *R. v. Canadian General Electric et al* (1977) O.R. (2d) 360, (H.C.) (35 C.P.R. (2d) 210, at 212) in which the three accused were convicted under section 32 of the former *Combines Investigation Act*. In that case the trial judge, in his Reasons for Sentence, stated that of importance was the protection of the public interest in free competition and that relevant sentencing factors were: the size and scale of operation of the defendants; their share of the market; the length of time the total conspiracy was active; the geographic area involved in the consumption of the product; previous convictions, if any; penalties levied in other cases; and any mitigating circumstances.

Counsel for the Attorney-General made the following arguments with respect to these factors:

1. the Government of Canada was deprived of the benefits of competition for hotel accommodation in downtown Ottawa/Hull during 1985;

2. taxpayers were deprived of funds which would not have been paid out but for the agreement;

3. the accused controlled 25 to 35 percent of government hotel revenues in the market; and

4. as mitigating factors: the geographic market was relatively narrow for a *Combines Act* case and the accused had pleaded guilty and had indicated they would cooperate with the Attorney-General with respect to the case against the other accused.

Counsel for the Attorney-General, and counsel for the accused concurred that each accused should be fined $60,000 and be subject to a Prohibition Order. Mr. Justice Hollingsworth so fined the three accused and adopted the Prohibition Order to which counsel had previously agreed.

This decision is particularly significant for the weight attached by the Court in mitigation of sentence to the willingness of the accused to cooperate with the Crown in its case against the remaining accused hotel companies.

In passing sentence on the remaining accused Mr. Justice McKeown also followed the sentencing principles laid down in the *Canadian General Electric* and the *McNamara* cases. The Court noted that, while the remaining accused had not offered their cooperation to the Crown, other factors were relevant in mitigation of sentence. Counsel for CN Hotels had offered to plead guilty and provide cooperation to the Crown in return for a similar sentence to the first three accused the day after their plea was reported in the newspapers. York-Hannover waived the requirement of evidence at a preliminary hearing and Holiday Inn admitted there was an agreement at the preliminary hearing but had argued that there was no undue lessening of competition because of the agreement.

Mr. Justice McKeown concluded CN Hotels made an additional $80,000 in revenue as a result of the agreement but made no finding on the benefits of the agreement for the other accused. The Court concluded that general deterrence was the most important factor and fined each of the final accused $80,000 and adopted a Prohibition Order proposed by Counsel with slight modifications.

CANADA SAFEWAY/WOODWARDS: MERGER AGREEMENT WITH BUREAU OF COMPETITION POLICY

On May 20, 1987, the Director of Investigation and Research, Calvin S. Goldman, announced that an agreement had been reached which would allow Canada Safeway to acquire the food floors of Woodwards Stores Limited, without an application for review being made under Section 64 of the *Competition Act* by the Director to the Competition Tribunal with respect to the transaction.

Canada Safeway's proposal to acquire Woodwards' food retailing operations was first announced in December, 1986. It was proposed that Canada Safeway would acquire 23 stores in 17 cities in Alberta, and British Columbia, together with inventory, for approximately $55 million.

After an examination of the transaction, the Director advised the parties that he intended to apply to the Competition Tribunal for a remedial order under the merger provisions of the *Competition Act*. Subsequent negotiations with representatives of Canada Safeway resulted in the following undertakings, on the basis of which the Director agreed not to make an application to the Tribunal at this time:

1. Within 24 months after the closing date of the acquisition, Canada Safeway will divest its interest in 12 Safeway stores (5 in Edmonton, 3 in Vancouver, one in each of Lethbridge, Port Alberni, Penticton and Red Deer).
2. Canada Safeway will, at the Director's request, for a period of three years, provide certain information to the Director to enable him to monitor the impact of the acquisition on competition in the following municipalities: In the province of Alberta, Calgary, Edmonton, Red Deer and Lethbridge; and in the province of British Columbia, Richmond, Matsqui/Clearbrook, Penticton, Vancouver, and Port Alberni.
3. The stores to be sold will be listed with a business broker or real estate agent for sale as retail food outlets.
4. The stores will be maintained and operated as ongoing businesses by Canada Safeway Limited until their divestiture.
5. For stores that have not been divested within the time periods, Canada Safeway will, if requested by the Director, consent to an order as agreed by the Competition Tribunal requiring divestiture within a further 6 months.
6. Canada Safeway has the right to request the Director to waive or amend any of the undertakings if the circumstances warrant.

Canada Safeway also has provided the following representations to the Director:

1. Canada Safeway will run the Woodwards' stores independently of the rest of Safeway's retail food operations.
2. The acquired stores will continue to operate under the Woodwards' trade name.
3. Traditional Woodwards' services such as credit card use, home delivery and small packaging will be maintained and enhanced.

The Director's Press Release provides some indication of the rationale behind the Director's decision to accept Canada Safeway's undertakings and representations. It notes that:

- The divestiture of 12 commercially viable sites by Safeway in the more acute areas of

concern should give food chains or independent food retailers a chance to either enter or expand in these markets.

- The divestitures should mitigate the increase in market share Safeway will likely realize in these markets as a result of the acquisition.
- The agreement preserves the choice and full range of services enjoyed by Woodwards' customers prior to the proposed merger.
- As well, although not of direct concern under the law, the solution arrived at has the additional benefit of preserving several thousand jobs in Western Canada that may have been in question had the proposal not been allowed to proceed.

FREIGHT FORWARDER INQUIRY COMMENCED

A formal inquiry has been commenced by the Director under section 32 of the *Competition Act* concerning the following commercial pool car operators: Clarke Transport Canada Inc., Consolidated Fastfrate Transport Inc., Cottrell Transport Inc., SSF Distribution Inc., and TNT Canada Inc. doing business as TNT Railfast, TransWestern Express Ltd. and Westway Forwarding Limited. On May 1, 1987, representatives of the Director executed warrants to enter and search the premises of the parties in southern Ontario pursuant to section 13 of the *Competition Act.*

Commercial pool car operators provide transportation services to shippers who use railway companies for line haul transportation. They pick-up less-than-carload (LCL) shipments from various shippers and consolidate them into carload (CL) shipments. They also provide pick-up and delivery service by truck. By virtue of the Canadian railways' General Freight Classification filed with and approved by the Canadian Transport Commission, the railways are prohibited from consolidating LCL shipments into CL shipments.

The information provided by the Director to obtain the warrants indicates that the Director had received information that the commercial pool operators named have had an agreement not to undercut each others' rates from Toronto to Western Canada. The information alleges that the parties have met on a regular basis to discuss their rates and to exchange information on special rates for particular customers, and that they have mutually agreed not to undercut these special rates. The information also claims that competing rate quotes by the parties have been slightly higher than the rates being charged by other pool car operators serving the customer at the time.

COURT CONSIDERS DISCLOSURE OF SEARCH INFORMATION IN FREIGHT FORWARDERS CASE

By: Lawson A.W. Hunter
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Mr. Justice Rosenberg of the Supreme Court of Ontario, in written reasons released on June 12, 1987, refused to allow certain applicant companies, the subject of an investigation under the *Competition Act*, the right to see the information on which a search warrant was issued until the search had been completed.

The case arose following Mr. Justice Rosenberg's grant of a warrant to enter and search premises on May 1, 1987. The warrant was issued pursuant to the provisions of subsection 13(1) of the *Competition Act.* The warrant, as delivered to each person being searched, specified the premises to be searched, the offence with respect to which the warrant was issued and the persons alleged to have committed the offence. The warrant alleges that certain named commercial pool car operators between January 1, 1976, and the present, unlawfully conspired and agreed to unduly lessen competition in the provision of rail freight forwarding services from Toronto, Ontario to Thunder Bay, Ontario; Winnipeg, Manitoba; Regina and Saskatoon, Saskatchewan; Calgary, Lethbridge, and Edmonton, Alberta; and Kamloops, Kelowna, Prince George, Vancouver and Victoria, British Columbia.

The warrant set out the records that could be seized, which included all records of meetings or other communications between the parties alleged to have committed the offence with respect to their pricing policies, as well as records relating to the minutes of the Canadian Pool Car Operators Association or other freight forwarder associations.

Certain of the parties named in the warrants brought an application before the Court seeking:

> the information on oath to show that there were reasonable grounds to believe that an offence had been or is about to be committed and that there were reasonable grounds to believe that there was on any premises any record or other thing that will afford evidence with respect to the circumstances.

In other words, the applicants sought the informants' sworn statement on which Mr. Justice Rosenberg had initially issued the warrant.

In considering the application, Mr. Justice Rosenberg stated that the decision turned on the balance between the applicants' interest in disclosure at the earliest possible moment in order to determine whether an attack on the warrant was appropriate as opposed to the public's interest that the investigation of alleged crimes not be jeopardized.

The most important case considered by the Court was the Supreme Court of Canada decision in *Attorney General of Nova Scotia et al v. MacIntyre* (1982), 65 C.C.C. (2d) 129.

Mr. Justice Dickson, as he then was, in holding that the public could have access to the information on which a warrant was issued stated as follows:

> Undoubtedly every court has a supervisory and protecting power over its own record. Access can be denied when the ends of justice would be subverted by disclosure or the judicial documents might be used for an improper purpose. The presumption, however, is in favour of public access and the burden of contrary proof lies upon the person who would deny the exercise of the right.

Dickson J. went on to state:

> ...the force of the 'administration of justice' argument abates once the warrant has been executed, ie., after entry and search.

The applicants argued that since the Director's officers were on the premises and searching, they could ensure there would be no destruction of evidence. The applicants argued that execution of the warrant means once it has been delivered to the applicants and the search commenced. The Director argued that a warrant was not executed until the search had been totally completed.

On considering the two interests involved in the case, Mr. Justice Rosenberg concluded as follows:

> I am of the opinion that the words used by Justice Dickson when he stated that the argument abates once the warrant has been executed, ie., after entry and search, means after the search has been completed. However, even if this interpretation is correct, it is not a complete answer to the problem. In appropriate cases, if there is no danger to the investigation, immediate disclosure should be ordered. On the other hand, it should not be ordered until the search is completed if such an order would jeopardize the investigation.
>
> I have reviewed the material and have come to the conclusion that in this case where a large number of corporations are involved, where the chief executive officers and the board may not know the details of the operations of individual personnel, where the information upon which I granted the application for the warrant contains details of specific names and specific times, places, meetings, etc., that the disclosure before the search is completed could jeopardize the investigation.

Mr. Justice Rosenberg therefore dismissed the application. He noted, further, that a recent Ontario Court of Appeal decision arising from the search of Hoffman/LaRoche Limited had concluded that there is no appeal from the decision of a Superior Court judge issuing a warrant under section 13 of the *Competition Act* to the appropriate Court of Appeal. He concluded that this removed some of the urgency alleged by the applicants and consequently would reinforce the decision he had taken that the material should not be disclosed until the search had been completed.

MERGER APPLICATION: QUEBEC MEAT RENDERING INDUSTRY

By: John Blakney
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On June 18, 1987, the Director of Investigation and Research applied to the Competition Tribunal under the merger provisions of the *Competition Act* for an order ordering the dissolution of two recent mergers in the Québec meat rendering industry.

The mergers affected by the application are the acquisition of Lomex Inc. by Alex Couture Inc. and the acquisition of the Paul and Eddy Inc. and Fondoir Laurentide Inc. by Sanimal Industries Inc.

Meat rendering firms acquire rendering material (waste and left-over material from animal slaughtering) and process this material into finished products such as meat meal, bone meal, blood meal and tallow.

The Director's application states that prior to January 26, 1987, four rendering companies were operated in Québec by the following companies:

- Alex Couture Inc. (40% market share)
- Lomex Inc. (40% market share)
- Les Moulins Maple Leaf Ltee. under the name of Laurenco (10% market share)
- Paul and Eddy Inc. and Fondoir Laurentide Inc., jointly (10% market share).

On January 26, 1987, by a series of transactions, Alex Couture, a subsidiary of Sanimal Industries Inc., acquired all the shares in Lomex Inc.; and Sanimal Inc. directly acquired a majority of the shares in Paul and Eddy Inc. and Fondoir Laurentide Inc.

The application concludes that as a result of these transactions, Sanimal Industries Inc. controls 90% of the market for collecting rendering material in Québec with the remaining 10% being controlled by Les Moulins Maple Leaf under the name of Laurenco.

The application alleges that the two mergers in question are contrary to section 64 of the *Competition Act* for the following reasons:

- There is no competition, and there is unlikely to be any competition, from outside Québec for the collection and processing of rendering material in the province, primarily owing to legislative requirements, the nature of the product, transportation costs, and long-run contracts between major suppliers and rendering companies.
- It is unlikely that a competitor from outside Québec would come to Québec for rendering material because there is no rendering company close enough to be competitive once transportation costs are added.
- Lomex Inc., Paul and Eddy Inc. and Fondoir Laurentide Inc. are not failing businesses.
- There is no acceptable substitute for the collection of rendering material.
- Access to the Québec rendering industry is restricted by a number of economic factors including transportation costs and the perishable nature of rendering material which limit transportation to relatively short distances, surplus capacity in Québec, the existence of economies of scale that make it necessary to enter this industry at a high production level, and provincial agricultural product regulations.
- Effective competition in the Québec market has been weak since the mergers. Laurenco serves only a small portion of the market because its operations are mainly concentrated in the Montréal area and lacks the capacity to handle all kinds of rendering.
- The mergers in question have eliminated vigorous and effective competitors. In this regard, the application notes that Lomex had engaged previously in price wars with Alex Couture Inc., that suppliers of rendering

products now have no viable alternative purchaser of their products, and that Lomex, Paul and Eddy and Fondoir Laurentide had, prior to the merger, generally paid higher prices than those paid by Alex Couture.

- After agreement in principle for the mergers was reached on September 8th, 1986, Alex Couture Inc. informed its suppliers that prices paid for rendering products would be reduced and, in some cases, suppliers would have to pay for the collection service.

This case represents the first occasion on which the Director has applied to the Competition Tribunal for a dissolution of a merger. The application raises a number of issues with respect to the new merger law including:

- the importance of transportation costs and government regulation in defining the relevant market and the impact of a merger on competition in the market;
- the relative weighing of market share and qualitative factors concerning whether competition has been substantially lessened by a merger; and
- the measurement of excess industry capacity, and the relevance of excess capacity, in accessing the likelihood of new competitive entry into an industry.

CONSTITUTIONAL VALIDITY OF *COMPETITION TRIBUNAL ACT* AND *COMPETITION ACT* CHALLENGED

By: Lawson A.W. Hunter,
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The *Canadian Competition Policy Record* has learned that the respondents in the merger application filed by the Director in the meat rendering case (reported above), on July 3, 1987, initiated an action in Québec Superior Court seeking broad-ranging declarations that the *Competition Tribunal Act* and the *Competition Act* are *ultra vires* the Parliament of Canada or contrary to the *Charter of Rights and Freedoms*. They also sought a stay of all proceedings arising from the Director's application to the Competition Tribunal.

The *Canadian Competition Policy Record* understands that the declarations sought in the action before the Québec courts include declarations that the *Competition Tribunal Act* is *ultra vires* the federal Parliament, being in relation to intra-provincial matters; a declaration that the *Competition Act* is unconstitutional and *ultra vires* the Parliament of Canada; a declaration the Competition Tribunal as constituted is invalid and contrary to both the *Charter of Rights and Freedoms* as well as sections 96 and 101 of the *Constitution*; declarations that sections 63 to 79, ie., the merger sections of the *Competition Act*, are inoperative and unconstitutional, being contrary to sections 2(d), 6, 7, and 15 of the *Charter*; declarations that sections 63 to 79 of the *Competition Act* are null and void for vagueness; and a declaration that section 45 of the *Competition Act* is contrary to sections 7 and 11 of the *Charter of Rights and Freedoms*.

In addition, the applicants have moved for a stay of all proceedings arising from the Director's application under subsection 64(1) of the *Competition Act*. This motion is returnable on July 7, 1987.

The respondent to the applicant's motions is the Attorney-General of Canada, with the Competition Tribunal, the Director of Investigation and Research, the vendors, and the Attorney-General of Québec named as mise-en-cause.

These proceedings are obviously of the utmost importance to the continued application of federal competition legislation. In a practical sense, the motion to stay the proceedings may be the most significant. If the applicants are successful in obtaining a stay from a provincial court it may become extremely difficult for the Director to enforce any of the provisions of the new legislation until such time as the legal issues raised in the proceedings are ultimately resolved.

EX PARTE APPLICATION DENIED

Mr. Justice Denault of the Trial Division of the Federal Court denied an *ex parte* application by the Director of Investigation and Research to retain documents obtained under a section 13 search warrant in the case of *re Norvinca Inc.*

The *ex parte* application, made under section 15 of the *Competition Act*, sought the right for the Director to retain documents seized pursuant to search warrants issued by Mr. Justice Joyal on February 27, 1987. The question before the courts was whether such an application for retention should be made on an *ex parte* basis. The Director's counsel relied on the judgment of the Ontario Court of Appeal in the *Church of Scientology* and the Ontario High Court decision in *re Famous Players*. The Director's counsel argued that the same principles as applied under the *Criminal Code* should apply to the *Competition Act.*

Mr. Justice Denault did not agree. He stated:

> In my opinion, the principles underlying section 446 of the Criminal Code are not necessarily applicable to section 15 of this *Act*.

Regarding the interpretation of section 15 of the *Competition Act,* he stated that:

> It seems obvious to me that, in enacting this section, the legislator wanted to make sure, by another form of judicial control, that the Director should be authorized to retain the records of things seized only if the judge is satisfied that they are 'required for an inquiry or any proceeding under this *Act*'.
>
> That control does not provide for the presiding judge to review the previous order of his colleague, but to verify, before granting retention, the usefulness of the seized record. This is not a mere administrative act but a judicial one, and it should be exercised only in the presence of the person whose objects were seized or after a duly served notice of that application.

Whether provincial superior courts will follow this precedent remains to be seen.

FEDERAL COURT OF APPEAL UPHOLDS RTPC DECISION

The Federal Court of Appeal, in a unanimous decision made on March 23, 1987, upheld a decision of the Restrictive Trade Practices Commission allowing the Director of Investigation and Research to withdraw an application he had made to the Commission seeking an order against Broadcast News Limited.

The Court found that the rules of the procedure of the Commission were "clear and unequivocal" and allowed the Director to withdraw any application unilaterally at any time before the Commission had begun hearing the substantive matters.

The applicants had also made a submission that the withdrawal of the application and the Commission's orders were contrary to subsection 2(e) of the *Canadian Bill of Rights* and section 7 of the *Charter of Rights and Freedoms*. Those sections deal with the right to be heard. The Court found that the principle of *audi alteram partem* has never been considered to allow a right of reply to a party where the case has been discontinued.

Consequently, the application was dismissed.

STRAYER ON NEW COMPETITION TRIBUNAL

Mr. Justice Barry L. Strayer, a judicial member of the Competition Tribunal, addressed a conference on the new law in Toronto on March 31, 1987. In the course of his address he set out the structure and jurisdiction of the Tribunal and compared it to other hybrid tribunals such as the Restrictive Practices Court in the United Kingdom and the Market Court in Sweden. In commenting on the nature of the Tribunal, Mr. Justice Strayer stated:

> Several factors indicate that the new Competition Tribunal, notwithstanding its hybrid composition, is

to be seen as a court and thus as having an arm's length relationship with both the corporate and legal community as well as government.

He then noted that the jurisdiction of the Tribunal is strictly adjudicative. He further commented:

> Another indication that the Tribunal is to be viewed as a court, and not as an administrative body enunciating decisions on the basis of its own view of the public interest, can be gathered from the fact that the Tribunal is to render its decisions on the basis of highly specific tests and standards explicitly set out in the *Competition Act*. I think it is doubtful that judges would have been asked, or would have agreed, to serve on such a tribunal if it were otherwise.

Rules Discussed

Mr. Justice Strayer also discussed the rules of procedure for the Tribunal. Those rules have now been proclaimed in force as reported elsewhere in this issue of the *Record*. The rules have been designed, in Mr. Justice Strayer's words, to have a minimalist approach. This gives the Tribunal greater flexibility to adapt the rules to particular cases. It will also allow the Tribunal to exercise "hands-on management" of its process.

Mr. Justice Strayer also commented on the provisions allowing for intervention by interested parties. In his words:

> Parliament has provided any person may intervene, with leave of the Tribunal. We want to make that a meaningful right, and this implies that potential interveners will have to have means of knowing what business is before the Tribunal including, probably, the consideration of consent orders. At the same time we recognize the burden that an excess officious intervener can impose on the immediate parties to the proceedings and we will endeavour to balance these interests.

Mr. Justice Strayer's comments are interesting in that it is clear the Tribunal intends that its proceedings be highly judicial in nature. His comment with respect to interveners is also important since it would appear to indicate an intention to, perhaps more liberally than was expected, allow third parties the right to intervene in proceedings before the Tribunal.

GOLDMAN ELABORATES HIS VIEWS ON COMPLIANCE

Calvin Goldman, the Director of Investigation and Research, in an address in Toronto on March 31, 1987, set out, in some detail, the initiatives in the compliance area he proposes to undertake as Director. He said the Bureau is in the process of taking administrative action on three fronts. The first will be an enhanced communication program whereby bulletins will be distributed setting out the Bureau's views on the application and interpretation of the *Competition Act*. The second area will be a greater emphasis on the program of compliance. The third area Mr. Goldman addressed will be the greater use of information visits and negotiated settlements.

It has been evident that Mr. Goldman wishes to rely on negotiated settlements in resolving enforcement problems under the *Act*, particularly in the merger area. However, extending the use of information visits beyond the non-misleading advertising areas of the *Act* would appear to reflect a significant change in policy. In discussing this aspect of his program, Mr. Goldman stated:

> In relatively minor matters at the complaint stage, an investigator may simply contact the company involved, explain the applicable law, and how it applies in the circumstances. The Bureau has successfully used this approach in the past in resolving some misleading advertising and deceptive marketing matters.

Mr. Goldman, in his address, also discussed recent merger experience the Bureau has had. He stated that the Bureau has looked in depth at 30 mergers up to the end of March, and that most of them had been resolved in favour of the merging parties. He indicated that one situation had resulted in the abandonment of the merger by the

proposing parties. The only contested case was the *Palm Dairies* case. Since Mr. Goldman's address, the Canada Safeway acquisition of Woodwards' has been resolved (as reported elsewhere in this issue of the *Record*) and the Director has filed another application with the Tribunal in the Québec meat rendering case.

ROSEMAN MADE A PERMANENT MEMBER

The Governor in Council has appointed Dr. Frank Roseman for a seven-year term as a lay member of the Competition Tribunal. Dr. Roseman had been previously appointed on a temporary basis as a lay member of the Tribunal. He had previously served two terms as a member of the Restrictive Trade Practices Commission. To date, the government has not appointed any other lay members to the newly constituted Tribunal.

PRE-NOTIFICATION RULES PROCLAIMED

The *Canadian Competition Policy Record* has learned that the government intends to proclaim Part VIII of the *Competition Act*, which contains the merger pre-notification rules, on July 15, 1987. At the time Part VIII is proclaimed, the draft regulations previously published in the *Canada Gazette* will also be proclaimed.

The *Canadian Competition Policy Record* has also learned that the Minister of Consumer and Corporate Affairs, Mr. Harvie Andre, on July 8, 1987, will issue a press release anouncing the proclamation of the sections. At that time, the Director of Investigation and Research will make available a kit of information containing a guide to the pre-notification sections. The guide will set out the meaning of certain terms in Part VIII as well as provide forms for applications under the pre-notification sections.

COMPETITION ISSUES IN TRANSPORTATION INDUSTRIES - POST REGULATORY REFORM: TWO BUREAU PERSPECTIVES

By: John Blakney
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Two recent presentations by officials of the Bureau of Competition Policy have sought to clarify the application of the *Competition Act* to the transportation industry once Bills C-18 and C-19, the comprehensive transportation regulatory reform legislation, are in place.

In an address to Transportation Law Seminars in Toronto and Montreal on May 1 and 4, 1987, Howard Wetston, Deputy Director of Investigation and Research, after an examination of the main elements of C-18 and C-19 and of the *Competition Act,* observed that, as regulatory control is removed, there will be significantly increased scope for the application of the *Competition Act,* where appropriate, in respect of conduct which would previously have fallen under the umbrella of the regulated conduct defence.

As the proposed reforms in the air mode would effectively eliminate entry and rate regulation, Mr. Wetston concluded that the provisions of the *Competition Act* would apply fully to this mode at least in southern Canada as that is defined in the legislation. For the same reason, extra-provincial trucking would be fully subject to the *Act* once the transition period to full entry deregulation in the legislation had been passed.

On the other hand, the rail mode would remain subject to considerably more regulation than air or extra-provincial trucking. The removal of section 279 of the *Railway Act* which permits railways to collectively establish rates, Mr. Wetston noted, would make these carriers subject to the *Competition Act* provisions with respect to anti-competitive agreements such as price-fixing. Permitting confidential contracts as proposed should facilitate aggressive intra-rail competition for shipper contracts. This may

create an opportunity for price discrimination and predatory pricing. However, Mr. Wetston noted that since the legislation would retain regulatory measures to avoid non-compensatory rates, the predatory pricing provisions of the *Competition Act* will not likely apply in the rail mode.

The legislation contains a number of provisions aimed at increasing intra-rail competition by providing alternatives to captive rail shippers through the expansion of existing interswitching rights and the introduction of competitive line rates. As a result, Mr. Wetston observed that the role of the *Competition Act* vis à vis these aspects of intra-rail competition would, in all likelihood, be limited to interventions before the National Transportation Agency in the event hearings are held on these matters.

Mr. Wetston then went on to consider carrier/shipper agreements, and in particular shipper buying groups, in relation to the *Competition Act*. Since carriers will no longer be able to establish rates collectively under the regulatory reform legislation, shippers will be able to negotiate independent competitive rates. However, Mr. Wetston noted that, by removing rate transparency and the rigid nature of transportation rates, additional competitive pressure will be placed not only on carriers but on shippers as well:

> In a regulated transportation environment shippers are readily aware of the rates and service levels that other shippers are able to obtain. Incentives to negotiate advantageous agreements are minimized since all rates and corresponding service levels are generally available to all shippers. However, as a result of the proposed reforms, the cost of transportation becomes an area in which one shipper may obtain a significant advantage over a competitor through the negotiation of a more favourable rate. This environment encourages shippers to become more innovative in arranging their shipping requirements so as to be in a position to obtain the best possible transportation rate available. Improving dock facilities to speed up loading and unloading of rail cars, consolidating shipments or perhaps joining a buying group are but a few examples of shipper innovativeness. The end result will be a more efficient responsive transportation system which should allow shippers to extend their geographic market domestically and internationally.

Mr. Wetston then examined competition issues which may arise with respect to transportation service buying groups. First, he noted that, although the price discrimination provisions of the *Competition Act* applied only to "articles" as defined in the *Act*, that definition includes "tickets or like evidence of a right to transportation" and that, in the Bureau's view, this definition is broad enough to cover transportation services.

Section 34(1)(a) of the *Competition Act* prohibits a supplier from granting a rebate, discount, allowance or concession to a purchaser of articles from him/her which is not, at the time of the sale, available to other purchasers who are competitors of the first purchaser and are buying articles of like quantity and quality.

As the essential function of a buying group is to pool purchases to obtain a lower price, Mr. Wetston indicated that, to avoid competition concerns, the buying group should exhibit the characteristics of a separate purchaser. From the Bureau's perspective these are:

1. The group must be a distinct legal entity which purchases from suppliers;

2. It must acquire ownership of the articles and be responsible for payment (although taking delivery is not essential);

3. The group must resell the articles to its members in a distinct transaction; and

4. The group should not attempt to limit or qualify its legal responsibility to pay for its purchases.

Mr. Wetston concluded, however, that shipper buying groups generally will not raise serious concerns under section 34(1)(a).

Mr. Wetston also noted that the activities of a buying group could trigger the application of the section 32 prohibition against agreements (including agreements to purchase a product) which unduly lessen competition. However, the vast majority of buying group agreements, Mr. Wetston concluded, would not lessen

competition unduly since, in most circumstances, the group would not constitute a large percentage of the purchase side of a market. On the other hand, if a buying group were significantly large to affect the purchasing of a particular transport service in a particular geographic region, a competition issue might arise. Mr. Wetston observed in this regard:

> For example, an undue lessening of competition could result if the buying group were in a position to dictate rates and services offered to the group and to other buyers or if its market power were used to disadvantage competing buyers of the transportation service.
>
> Undueness can be quantitatively estimated by the market share controlled by the parties to an agreement. Defining the relevant market is a difficult problem. In the case of transport services, factors to be considered would include the availability of alternative services, whether specialized equipment is involved, the geographic extent of the market and, possibly, countervailing market power by the seller.

Mr. Wetston also noted that the collective purchase of transportation may provide a vehicle for an agreement on other competitive variables for shippers producing the same product:

> In pursuing buying group activities, shippers need to be careful that their collective activities do not extend beyond the original purposes and in some manner restrict competition among themselves.

In a March 5, 1987, submission to the House of Commons Standing Committee on Transport, Harry Chandler, Acting Director of the Bureau's Regulated Sector Branch, examined the application predatory pricing provisions of the *Competition Act* with respect to trucking services. The submission responded in part to concerns raised during Second Reading Debate on Bill C-19, the *Motor Vehicle Transport Act, 1986*, that the Canadian for-hire trucking industry was susceptible to predatory pricing by large U.S. trucking firms which, under the proposed legislation, would have freer access to Canadian markets and that the provisions of the *Competition Act* may not be effective in combatting such practices.

Competition law and the economics literature define predatory pricing as the practice of a firm selling products at prices below cost so as to eliminate or discipline competition or a competitor in the market, and, thereby, establish a position of market power which can be exploited by increasing prices above competitive levels. Mr. Chandler noted that, to have any chance of success in pursuing such a practice, a number of conditions must be met:

1. The predator must have access to relatively large financial resources in order to finance the below cost pricing;

2. There must exist entry barriers to the market which are substantial enough to prevent new entry for a long enough period to allow the predator to recoup the losses; and

3. There must be substantial fixed costs which will inhibit the victim from withdrawing from the market for the duration of the low prices. This usually implies a high ratio of fixed to variable costs.

Mr. Chandler then reviewed studies of the Canadian and U.S. industry experience initiated by the Bureau of Competition Policy in response to industry concerns over potential dominance of the Canadian for-hire trucking sector by large U.S. firms.

A study conducted by Professor Michel Boucher of the University of Québec (Ecole nationale d'administration publique) in 1985 focussed on the Québec market. Large U.S. carriers have been active in this province for a number of years (one since 1972). Approximately 60 shippers and carriers were interviewed including most of the major carriers. The major findings of the Boucher study were:

1. The major U.S. carriers (ie. Yellow, Roadway and Consolidated Freightways) operate in the Québec market as specialists in transborder long-haul (over 1000 miles) less than truckload (LTL) transportation of general freight.

2. Québec carriers are short-haul (500 miles and less) transport generalists, hauling both truckload (TL) and LTL to realize economies of joint production.

3. It is more efficient for large U.S. carriers to use regional Québec carriers as short-haul feeders rather than provide the service themselves.

4. A significant number of Québec carriers are active in the short-haul transborder market where they compete with other U.S. and Canadian carriers of similar size using the same production techniques.

5. The presence of large U.S. carriers in Québec has not been detrimental to Québec carriers, nor has there been evidence of dislocation of the Québec trucking industry.

The preliminary findings of a study by Professor Garland Chow of the University of British Columbia, into the Ontario - U.S. transborder market, Mr. Chandler noted, are very similar. These findings are:

1. Although large U.S. carriers dominate single line long-haul movement of LTL freight between Ontario and the U.S., 80 percent of the transborder market is short-haul (500 miles or less), an area in which Canadian carriers can effectively compete.

2. A number of Canadian carriers have expanded their transborder operations in the U.S. since deregulation in 1980.

3. Sixty percent of transborder freight is controlled by Canadian domiciled shippers or receivers.

4. The major U.S. carriers most feared by Canadian competitors are already well-established in the Canadian market.

5. Two U.S. carriers which expanded into the Canadian market did so by creating separate subsidiaries since their advantages in the LTL market were not transferable to the short-haul market.

6. A viable Canadian presence in the transborder market presently exists and will continue to exist after regulatory reform.

With respect to the U.S., Mr. Chandler noted that the General Accounting Office, in 1985, found "a substantial amount of discount pricing but no conclusive evidence relating to the existence of predatory pricing" and that there were no court cases involving allegations of predatory pricing in trucking despite the opportunity for private anti-trust actions. Concentration in the U.S. trucking industry was also found to be about the same as the U.S. manufacturing sector in general.

Mr. Chandler concluded that:

> ...for-hire trucking is not an industry which exhibits the characteristics conducive to predatory pricing. In particular, save for economies of density achieved by large carriers specializing in long-haul LTL services, the industry exhibits no economies of scale in the LTL sector. Statistics Canada data for 1983 shows that variable costs, especially fuel and labour, for all for-hire trucking, account for at a minimum, 65 percent of total costs. Capital equipment such as terminals, tractors and trailers can be easily leased and the major barrier to entry is regulatory control of licensing other than a fitness test.

This analysis should be influential in the consideration of complaints of below cost or predatory pricing by trucking firms by the Bureau of Competition Policy and would suggest that special circumstances need to be established for the Bureau to challenge the pricing practices of trucking firms.