# CANADIAN COMPETITION LAW DEVELOPMENTS

## DIRECTOR NEGOTIATES CHANGES IN COFFEE SERVICE ACQUISITIONS

By: John Blakney
Fraser & Beatty, Ottawa

On August 18, 1987, the Bureau of Competition Policy announced that two acquisitions in the institutional coffee service business (the acquisition of the "Club" division of Nabisco by Nestlé Enterprises and the acquisition of Nabisco's "Melrose" and "Dickson's" operations by General Foods) would not be challenged.

Each former Nabisco division is engaged in the supply of coffee and related products to the food service sector, including restaurants, hotels, and other institutions. The operations of the Club division are primarily in Ontario while the Melrose service is located in Manitoba and Saskatchewan and the Dickson service operates in Alberta and British Columbia.

Initially Nestlé planned to acquire all three divisions combining them with its "Good Host" coffee service. The Bureau of Competition Policy, after examining this original proposal, informed the companies that the transactions would result in a substantial lessening of competition and would be the subject of an application to the Competition Tribunal.

The major factors in this decision were, according to the Bureau, the loss of a vigorous and effective competitor, the fact that effective competition would not remain after the merger, the substantial barriers to entry to significant new competitors, and the increases in concentration that would result particularly in the four Western provinces. The Bureau informed the parties that, although these were overall concerns with respect to the transaction, the most acute concern was with respect to the effect on competition in the four western provinces. As a result Nestlé proposed to acquire only Nabisco's Club operations and agreed to seek an alternative buyer for the Melrose and Dickson divisions.

As the result of the acquisition of the Melrose and Dickson divisions by General Foods, the Director concluded that, even though concentration in the Ontario market would increase, barriers to entry to the Ontario market were not as substantial as would have originally been the case and that it was likely that effective competition would remain.

However, the Bureau also indicated that it intends to monitor the food service coffee market in Ontario for a period of three years to determine the actual effects of the acquisition on that market.

With respect to the General Foods' western Canada acquisitions, the Director indicated that General Foods has a small share of coffee sales to the food service sector in each of these provinces and that the acquisitions will not significantly lessen competition in those markets.

It is worth noting that in this case the Director effectively defined the product market as the supply of coffee to a particular, albeit significant, class of consumers, namely users of commercial coffee services, and defined provinces to be the relevant geographic market.

## TWO LAY MEMBERS APPOINTED TO COMPETITION TRIBUNAL

On September 28, 1987 the federal government announced the appointment of two new lay members to the Competition Tribunal, Michael J. Trebilcock and Marie-Hélène Sarrazin.

Professor Trebilcock received his L.L.M. from the University of Adelaide, South Australia. After moving to Canada in 1969, he taught at McGill Law School, and University of Toronto Law School where he is currently Director of the Law and Economics Program. Professor Trebilcock is a well known expert on competition law and government regulation. He has written and collaborated on a variety of books, articles and academic reports, and has made significant contributions to the areas of the application of economics to contract, tort and product liability law, public policy analysis, the economic impact of government regulation, and the assessment of government economic adjustment programs. In the area of competition law, his most recent works are *The Common Law of Restraint of Trade: a Legal and Economic Analysis* (Carswell, Toronto, 1986) and *An Introduction to the Law and Economics of Canadian Competition Policy* (with Dunlop and McQueen) (Canada Law Book, 1987).

Marie-Hélène Sarrazin is an independent consultant with experience in corporate investments and finance, strategic development and planning, and portfolio management. After receiving her M.B.A. from l'École des Hautes Études Commerciales, Université de Montreal, Mme. Sarrazin joined the firm of Nesbitt Thomson Bongard Inc. and later joined the staff of the Caisse de dépôt et placement du Québec where she developed particular expertise in the energy, communications, transportation, food and high technology sectors. Mme. Sarrazin, who resides in Montreal, has been a member of the Board of Directors for several firms in Québec, has been active in the Montreal Chamber of Commerce, and is a lecturer in marketing and corporate finance at l'École des Hautes Études Commerciales.

## DIRECTOR ADDRESSES CANADIAN BAR ASSOCIATION

On August 21, the Director of Investigation and Research, Calvin Goldman, addressed the Corporate Counsel Section of the Canadian Bar Association on the impact of the *Competition Act* on corporate concentration.

Mr. Goldman's address reviewed the current approach of the Bureau of Competition Policy to public concerns over corporate concentration and provided a review of the Bureau's recent experience in merger cases.

By way of introduction, Mr. Goldman noted that the term "corporate concentration" is multi-dimensional and encompasses three distinct concepts:

(1) *aggregate or overall concentration* which measures the relative position of large firms in the economy as a whole or in broad sectors of the economy such as the manufacturing or financial services sector. This may include, although not necessarily, conglomerate firms which span two or more sectors.

(2) *industry or market concentration* which measures the relative position of large firms in specific markets such as meat packing or motor vehicles. This may be further refined to measure detailed product level concentration such as four-door passenger automobiles.

(3) *ownership concentration* which relates to the extent to which shares of a firm are widely-held and traded or closely-held by a few, wealthy, familiar corporate entities.

Mr. Goldman noted that, in some respects, these concepts are interrelated. High levels of aggregate or overall concentration in the Canadian economy may be the result of the presence of large firms in given markets and/or the conglomeration and common ownership control of different firms in different markets. A firm may be large not only in terms of absolute size in relation to the economy as a whole, but it may also account for a significant share of activity in specific markets. Thus, market concentration may underlie prevailing levels of aggregate concentration.

Mr. Goldman observed that, in his view, aggregate concentration levels in Canada tend to be somewhat higher than those prevailing in other western industrialized countries and that these levels have been increasing over the past decade. Industry or market concentration in Canada also tends to be high, but the trend in recent years has remained comparatively more stable. With both aggregate and market concentration, large firm size is a result of internal growth and corporate takeover activity. But the pace of takeover activity has increased in recent years and has contributed to the increasing trend in aggregate concentration. Ownership concentration in Canada also tends to be high relative to the United States. While the majority of major U.S. corporations listed on the New York Stock Exchange tend to be widely-held, the same is not true of the Toronto Stock Exchange.

Three areas of concern over corporate concentration were reviewed by Mr. Goldman. The first relates to whether or not high levels of aggregate concentration represent accumulation of economic, social and political power which can result in undue corporate influence on government decision-making. Assessing the validity of these concerns, in Mr. Goldman's view, falls outside the mandate of the *Competition Act*.

The second area of concern relates to the extent to which aggregate concentration results in concentration and dominance in individual markets giving rise to anti-competitive practices and adverse economic effects. Here the issues are twofold:

(i) those that arise from high levels of market concentration increasing the potential for use and abuse of market power such as predatory pricing, and

(ii) those that arise from conglomeration and may facilitate practices such as tied selling.

The last area of concern relates to ownership concentration. The issues that are generally discussed in this area relate to corporate governance, information disclosure and minority shareholder rights. Although these issues may conceivably raise some broader competition policy questions, they generally fall, Mr. Goldman noted, within the mandate of other statutes such as the *Canada Business Corporations Act* and provincial securities legislation.

Mr. Goldman went on to review the provisions of the *Competition Act* most relevant to the concern that concentration may lead to market dominance and anti-competitive practices: abuse of dominant position, mergers, specialization agreements and reviewable non-price vertical restraints (tied selling, exclusive dealing, and market restriction).

Mr. Goldman's address also presented the first comprehensive review of the Bureau's experience with the new merger provisions. As Mr. Goldman explained, "it is here that we have seen the major impact of the legislation on corporate concentration in particular markets."

According to the Merger Register maintained by the Bureau, there were 948 mergers and acquisitions in Canada during the calendar year 1986. Since the passage of the *Competition Act* there have been 833 mergers and acquisitions.

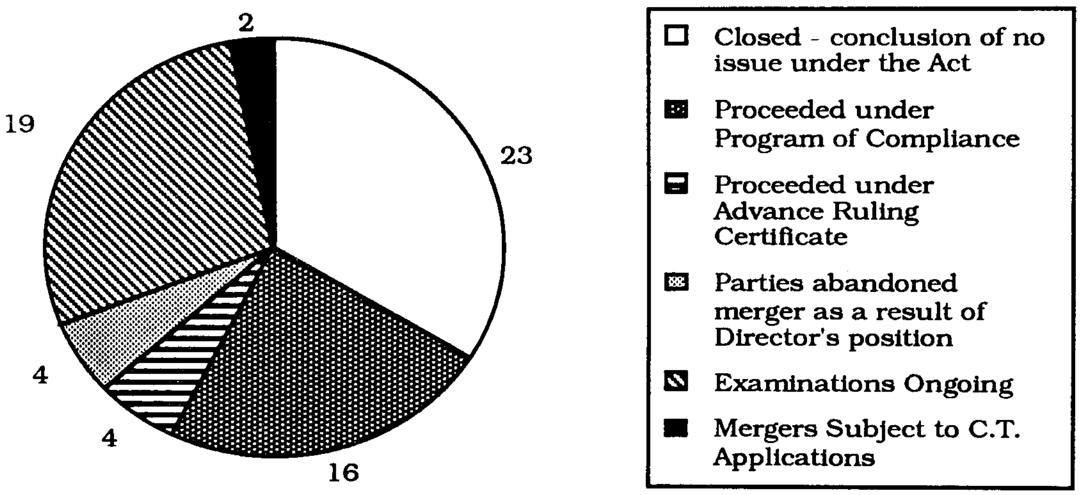
The vast majority of these mergers have had either a beneficial or neutral impact on the economy. However, a small proportion of these mergers, Mr. Goldman suggested, may have an adverse effect on competition and future economic performance. In this context, the Bureau has examined, mostly in a summary fashion, over 400 mergers since last June, many of which are connected with applications under the *Investment Canada Act*. Of these, 67 mergers raised issues which required more extensive examination by the Bureau. These examinations under the *Act* have either been completed or are currently ongoing. The following is a breakdown of the status of these cases:

<u>Statistics - June 19, 1986, to July 17, 1987</u>

| | |
|---|---|
| Mergers examined in a significant fashion - matters under *Competition Act* have been examined or are still ongoing | 67 |
| Closed - conclusion of no issue under the *Act* | 23 |
| Proceeded under Program of Compliance | 16 |

| | |
|---|---|
| Proceeded under Advance Ruling Certificate | 4 |
| Parties abandoned merger as a result of Director's position | 4 |
| Examination ongoing | 19 |
| Applications to Tribunal | 2 |

**Merger Register:**




Mr. Goldman emphasized that it should be apparent that the Bureau is exploring all available avenues to resolve merger cases and that the consultation and negotiation approach adopted by the Bureau is a cost-effective manner of resolving merger issues under the new *Act* where this is feasible. He then went on to describe some salient features of the Bureau's experience with the new merger provisions and discuss specific aspects of selected cases.

Mr. Goldman indicated that, in his view, the initial experience of the Bureau with the new merger provisions, albeit brief, is encouraging. In most of the cases that have given rise to extensive examination, the parties have come forward voluntarily, sometimes well in advance of the public announcement of the transaction:

> This is a practice we hope to foster and encourage and is complementary to the Bureau's open door and compliance approach toward implementation of the *Act* ...

The *Act* is certainly requiring members of the business community and their counsel to carefully examine the competition implications of a proposed merger. Some commentators have suggested recently that business people may be reluctant to proceed to the Tribunal, preferring instead to see if the Director's concerns can be alleviated through negotiation. This may in part be due to the uncertain result if the matter were referred to the Tribunal, and in part because the ensuing process may lead to discussion of commercially sensitive information. In addition, the delay in completion of the transaction may be a significant factor.

The provisions of the *Act* do not distinguish between different types of mergers: horizontal, vertical and conglomerate. Mr. Goldman noted that the Bureau has examined all three types of mergers, though the majority of the substantive cases reviewed would be generally considered as horizontal mergers. This is because the focal point of analysis under the *Act* is the determination of the impact of a merger (or any other practice) on competition in a relevant market. While all types of mergers may lessen competition, the prospects of this occurring are greater in a horizontal merger where, simultaneous with control over a larger market share, there is also a reduction in the number of firms in the market.

The combined market share of the firms contemplating a horizontal type of merger has ranged primarily between 33 percent and 100 percent. However, other factors such as the degree of import competition, barriers to entry and the market power of large buyers have also been integral to the Director's decision in many cases. Approximately half of the 67 merger-related matters that Bureau staff has reviewed have met the pre-notification thresholds contained in the *Act* which came into force on July 15, 1987.

Mr. Goldman went on to summarize the use made by business people of the *Act's* prospective efficiency gains defence:

> Such gains were given significant weight in the decision-making process in three different merger cases relating to the tobacco, forest products and confectionery industries. However, in each of these cases, while the efficiency gains were viewed to be of significance, there were also other pro-competitive factors such as actual or potential competition from imports or other firms which alleviated Bureau concerns regarding the lessening of competition arising from the merger.

Mr. Goldman noted that, in the four cases where the parties had abandoned completing a proposed merger, the new *Act* has had its intended deterrent effect. In each case, it was conveyed to the firms that the merger would, in the Director's view, result in substantial lessening of competition and that an application would be made by the Director to the Tribunal in order to remedy the situation:

> From what we can ascertain, the prospect of unsuccessful or uncertain, complex litigation, and not other reasons such as problems of obtaining necessary financing or failure to arrive at a specific transaction value, contributed to these mergers not being completed. In each of these cases, had the merger been consummated, the resulting market concentration would have been in excess of 60 percent, in some market segments close to 100 percent and, the number of firms in the market reduced from three to two or two to one. In other words, we were dealing with situations of already highly concentrated markets where this factor, coupled with others, suggested competition would be reduced substantially. The *Act* in these instances has certainly stemmed any tendency towards higher concentration levels in the relevant markets. It should not, however, be concluded that the Bureau's cut off position with respect to concentration or market share is 60 percent or close to that figure. As is well known among economists, there is no defined critical concentration level which can be equated with lack of competition. It differs on a case-by-case basis.

Mr. Goldman also indicated that he had received feedback from lawyers that the *Act* is discouraging corporate clients from pursuing mergers which are likely to raise significant competition issues under the new *Act:*

> In a number of instances I understand that legal counsel have advised against possible merger plans, having regard to the new legislation, and the plans have been abandoned even prior to consultations with my office. It appears the business community will now need to weigh more carefully in advance the prospective benefits and anti-competitive costs arising from a merger before proceeding with the transaction.
>
> It has therefore become apparent to us that under our merger review process, a decision or likely decision by the Director to challenge a proposed merger can, in many instances, cause the parties to re-think the proposed transaction, possibly attempt to re-structure it or ultimately decide to terminate the proposal. The full public hearing before the Competition Tribunal, in an adversarial context, together with the inherent time delay are not encouraging factors for entrepreneurs seeking to close a major business transaction. Thus, recognizing the significance of any decision by the Director to challenge a merger, I can assure you that we are proceeding with great care and prudence in our merger review process, particularly at these early stages. We have committed all available resources to this function and we are making extensive use of outside experts where necessary to ensure we are making properly informed decisions. At the same time, recognizing the significance of the issuance of a binding Advance Ruling Certificate by the Director when we are doing prospective merger analysis — that is, predicting the likely effects of a merger on a market — we have also approached this new function with great care. As the legislation provides a three-year limitation period to challenge a merger in whole or in part, we want to be faced with a clear prospect of the merger not lessening competition substantially in the relevant market in that period before such a Certificate would generally be issued. In cases where there is not sufficient certainty, the merger will usually proceed under a compliance or comfort letter, which does not have the same binding effect as an Advance Ruling Certificate.

Mr. Goldman concluded by re-affirming that, in his view, the *Competition Act* is having its intended deterrent effect and that he is confident that the *Competition Act* will, over time, help to alleviate concerns over corporate concentration in particular markets. He indicated that the *Act* can be applied to stem corporate merger activity that results in higher levels of market concentration and which may adversely affect competition while at the same time, not inhibit those transactions which are likely to generate significant efficiencies which may offset any resulting anti-competitive effects.

*Editor's Note: Four weeks later, on September 19, in an address forming part of the 1987 Meredith Lectures at McGill University, Mr. Goldman provided the following data on the Bureau's merger activities updated to September 11, 1987:*

- *82 mergers subject to extensive review*
- *30 of these mergers cleared as having no competition issue*
- *20 mergers dealt with under the Program of Compliance*
- *5 given Advance Ruling Certificates (2 further Certificates were issued between September 11 and September 19)*
- *5 mergers abandoned*
- *2 mergers subject to Competition Tribunal applications*
- *21 ongoing merger examinations*

*To September 11, Bureau had received 8 formal pre-notifications. The pre-notification provisions became effective on July 15, 1987.*

## EXAMINATION PROVISION OF *COMBINES ACT* WITHSTANDS *CHARTER* SCRUTINY

By: Lawson A.W. Hunter
Fraser & Beatty, Ottawa

Associate Chief Justice Jerome of the Trial Division of the Federal Court, in a decision released August 10th, 1987. refused to grant a declaration that section 17 of the *Combines Investigation Act* was inconsistent with section 7 of the *Charter of Rights and Freedoms*. The application for the declaration had been brought by Stelco Inc. in the course of an inquiry being conducted under paragraph 34(1)(a) of the *Combines Investigation Act*. The inquiry had reached the stage where an order had been issued pursuant to section 17 to obtain the oral testimony of certain witnesses. Stelco raised two points in its argument: first, that the provisions of the *Act* amounted to an infringement of the applicant's right against self incrimination and, second, that the procedures set out in the legislation fall short of the *Charter* guarantees with respect to fundamental justice.

In presenting their argument, Stelco first advanced the position that a member of the Restrictive Trade Practices Commission was not an impartial arbitrator, relying on the Supreme Court of Canada decision in *Hunter v. Southam*. The argument advanced was that the same reasoning as used in the *Southam* case should apply to the Commissioner's power to compel testimony under section 17 of the *Act*. Associate Chief Justice Jerome did not agree. He stated:

> The power to order an examination under oath is an essential and integral part of the Commission's investigatory duties. Without that power, no proper investigation could take place. In the passage quoted above, Dickson, J. specifically recognizes the "administrative nature of the Commission's investigatory duties". There is no reason to find that one of the component functions of those duties - the ordering of examinations - is anything other than an administrative act. It certainly cannot be said that the considerations which Dickson, J. indicates are appropriate to the performance of the Commission's duties vitiate the capacity of a member to fairly carry out the power given by s.17.

The question of the right to counsel was also advanced. The same issues had been raised in a case decided earlier in 1987 by the Supreme Court of Canada, namely, *Irvine et al v. The Restrictive Trade Practices Commission et al* (March 26, 1987, unreported). That decision, which involved facts prior to the enactment of the *Charter*, had not determined whether section 17 could withstand *Charter* scrutiny. Associate Chief Justice Jerome found that it could. He found that the reasoning in the *Irvine* case had direct application in the present case. He stated:

> The determination that the proceedings here determine no rights, impose no liabilities, are conducted in private and at most lead to a statement of evidence to the Commission, puts the s. 7 issue to rest. Fundamental justice does not require the right to counsel appropriate to a judicial proceeding.

The final issue raised dealt with the right to be protected against self incrimination. Associate Chief Justice Jerome dismissed the application. He found that:

> The privilege against self-incrimination, as it exists in Canada, does not permit these witnesses to refuse to answer questions during the course of an investigative hearing. It clearly cannot provide them the right to refuse to attend. They are fully protected against the subsequent use of any incriminating answers by the *Canada Evidence Act* and s. 20(2) of the *Combines Investigation Act*, as well as s. 13 of the *Charter*. When coupled with the right to counsel, these protections are more than adequate in the factual circumstances of this case.

In coming to this conclusion he followed the reasoning of Mr. Justice Holland in *Thompson Newspaper Limited v. Director of Investigation and Research* reported in the December 1986 issue of the *Canadian Competition Policy Record.*

In conclusion Associate Chief Justice Jerome found that the orders made pursuant to sections 17(1) of the *Combines Investigation Act* were not inconsistent with the principles of fundamental justice and did not offend section 7 of the *Charter*. He therefore dismissed the application. Stelco is seeking leave to appeal to the Supreme Court of Canada.

## COMPETITION TRIBUNAL PROCEEDINGS IN MEAT RENDERING MERGER STAYED BY QUÉBEC COURT OF APPEAL:

### A Case Comment

By: Sandra J. Simpson
Fraser & Beatty, Toronto
On Secondment to the Federal Department of Justice,
Bureau of Competition Policy

The *Canadian Competition Policy Record* reported in June that the applicants in the constitutional challenge to the *Competition Act* and *Competition Tribunal Act*, had moved in Québec Superior Court to stay proceedings in the Director's application to the Competition Tribunal.

Their motion was successful and a stay was imposed by Mr. Justice Jean Moissan on August 6, 1987. However, the Director was granted leave to appeal and the appeal was heard by the Québec Court of Appeal on September 9 and 10, 1987. On September 15th, the appeal was dismissed and, as a result the Director's case before the Tribunal is stayed until November 16, 1987. At that time the stay will be reconsidered by the Judge hearing the main constitutional argument that the merger provisions of the *Competition Act* are *ultra vires* with respect to intra-provincial mergers.

In reaching its decision, the Court of Appeal applied the reasoning of the Supreme Court of Canada in *Attorney General of Manitoba* v. *Metropolitan Stores (MTS) Ltd. et al* (unreported, released March 5, 1987) and held that:

(1) serious matters were in issue

(2) there would be irreparable harm in forcing the applicants to participate in proceedings before the Competition Tribunal when they disputed its composition and the constitutionality of the *Competition Act*

(3) the balance of convenience favoured the stay as the parties had undertaken not to implement the merger

(4) the undertaking preserved the *status quo* and protected the public interest.

As points 3 and 4 disclose, the fact that the Director had obtained undertakings from the merging parties not to implement the merger beyond the changes made at closing, weighed heavily in the Court's decisions. It appears that the Court viewed the undertakings as an effective response to all public interest concerns. In so doing, the Court appeared not to accept that there are two issues of public interest and that the undertakings address only the first issue.

The public interest in cases of completed mergers requires an effective order by the

Competition Tribunal and the prospects for an effective order improve if:

1. Implementation of the merger is blocked by undertakings to the Director or by an interim order of the Tribunal so that, if divestiture is ultimately ordered, the order will be effective.

2. The order is made quickly so that competition in the industry is not suspended for an undue period. There is little point in preserving a distinct business entity for the purpose of a divestiture if it can never regain a competitive position in the market.

It is the <u>post merger</u> *status quo* which the undertakings preserve in this case. If the Director's figures are correct one management mind has directed 90% of the meat rendering collection business in Québec since January 16, 1987. The Court apparently did not consider whether the preservation of such a non-competitive *status quo* might be detrimental to the public interest in the early restoration of a competitive environment.

In the writer's view in circumstances where mergers have closed, where Tribunal proceedings are at the pleadings stage, and where the constitutional question has yet to be argued, one would have thought that the interest of the parties pursuing a constitutional challenge would be outweighed by the public interest in timely Tribunal proceedings.

## REAL ESTATE BROKERS INQUIRY

By: John Blakney
Fraser & Beatty, Ottawa

In March 1987, the Bureau of Competition Policy commenced a major inquiry into the commission setting and Multiple Listing Service (MLS) practices of residential real estate brokers and real estate boards in a number of regions.

Premises of a total of 25 real estate agencies and real estate boards in Vancouver, the Fraser Valley, Calgary, Regina, south-west Ontario, Hull, Montréal and Québec City have been searched.

The facts relied on to obtain the warrants to enter and search the premises in each market relate to alleged conduct specific to each market. However, the basis of the Bureau's inquiry, as disclosed by the information provided to the Federal Court to obtain the warrants, would appear to be that, in each market, real estate agents have actively pressured "discount brokers" to raise their commissions on residential real estate brokerage services and to refrain from advertising below-norm commissions, and, in some cases, that adherence to a standard resale commission would appear to have been made a condition of access to the MLS operated by the local real estate board.

The inquiries are being pursued under section 32 of the *Competition Act* which prohibits agreements to unduly restrict competition and, in some instances, section 38 which prohibits resale price maintenance.

A MLS listing is made pursuant to an existing agreement between the vendor and the broker whereby the real estate to be sold is listed only with that broker, but through the MLS, information relating to the real estate listing is provided to all other brokers with access to the MLS system. Other brokers are permitted to arrange a purchaser for that real estate and the total commission is split with the listing agent. Certain real estate boards, which are voluntary associations of local agents, the Bureau alleges, have restricted access to the MLS system to their members.

The Bureau would appear to view access to the MLS system to be necessary for a residential broker and that control over this access by the local Real Estate Board has, in certain instances, been made an effective means of coercing broker compliance with a standardized residential real estate commission structure.

In July, a number of the parties subject to the inquiry moved to cross-examine the Bureau officer which had provided the information to obtain the warrants. The parties also moved, after the hearing of this motion, to rescind the search orders.

In denying the motion for cross-examination, Mr. Justice Dubé Trial Division of the Federal Court held that there was no *prima facie* right to cross-examine at this preliminary stage of an inquiry:

> The application for approval of the search warrant is merely an investigative step and no substantial injustice is caused by denying the right to cross-examine. The application for approval is not determinative of any final right and no useful purpose would be served by extending the right to cross-examination at this early stage (*Re Corsini and the Queen* (1979) 49 C.C.C. (2d) 208 (OHCJ)). The respondents have not, as yet, specified on what grounds the informations are being challenged. There is no allegation that the informants have lied. Cross-examination at this early stage would be merely a fishing expedition.

The Court also referred to *McIntosh Paving Company Limited v. L.A.W. Hunter* (Supreme Court of Ontario, March 8, 1984) in which the court held that,

> before cross-examination should be permitted an allegation of deliberate falsehood or omission or reckless disregard for the truth with respect to essential material should be made and before a warrant should be set aside such allegation should be established.

## INDICTMENT IN WESTERN TRUCKING CASE QUASHED

By: Lawson A.W. Hunter
Fraser & Beatty, Ottawa

On June 8, 1987, Alberta Provincial Judge R.S. Dinkel quashed the indictment laid by the Crown in 1979 against twenty trucking corporations and eleven individuals. The prosecution, also known as the *Western Trucking* case, has been the subject of numerous judicial proceedings since the charges were laid. At least two proceedings have reached the Supreme Court of Canada. The charge alleges that the accused were engaged in an illegal conspiracy in Western Canada between December 1, 1960 and November 4, 1979 with respect to the movement of general merchandise weighing up to and including 10,000 pounds.

The motion to quash the indictment was made pursuant to section 529 of the *Criminal Code* and was based primarily on the grounds that the counts specified in the indictment did not contain sufficient detail of the circumstances or events to give the accused reasonable information with respect to the matter to be proved against them.

The Court considered whether the number of accused, the long period of time during which the offence was alleged to have occurred and the use of general phrases such as "articles", "trade and commerce", and "general merchandise" would provide grounds to nullify the indictment. In these three instances, the Judge found the form of the indictment was not objectionable.

The Judge also considered two other propositions. The first was whether the location of the alleged conspiracy, namely in the cities of Winnipeg, Edmonton, Calgary, Vancouver and elsewhere in Canada was too vague. He found that:

> The latter phrase is not of itself objectionable but taken together with the four named cities it casts

> a net which does not contain details of where and when but also does not allow the accused reasonable information with respect to the acts to be proven against them.

The Judge then considered the phrase that the defendants had conspired "with one or some of them and with persons unknown". He found that "the individuals accused are almost helpless to identify their alleged co-conspirators to which the indictment refers."

He therefore found that the indictment did not reasonably inform the accused of the charge. He found that the indictment did not sufficiently specify the events so as to allow the accused adequate opportunity to prepare their defences and present full answers.

Provincial Judge Dinkel concluded:

> The indictment does not contain details of the circumstances of the alleged offence so as to give the accused reasonable information with respect to the acts to be proved against them and to identify the transactions to which the count refers. Accordingly, the requirements of s. 510 of the *Criminal Code* have not been met.

The issues raised in this judgment are significant both with respect to the particular case involved as well as the government's general method of forming charges under the conspiracy section of the *Competition Act*. The form of the indictment used in the *Western Trucking* case is the usual form used by the Crown in similar cases. It contains phrases which have often been used in the past by the Crown in laying indictments under section 32 of the competition legislation. For this reason, it may be presumed that the Crown will vigorously fight to prevent this decision becoming a precedent to be used in subsequent cases.

The Crown has applied to the Alberta Court of Queen's Bench for a writ of *certiorari* to overturn the decision of the lower court. This application is scheduled to be heard in December.

---

## ONTARIO COURT OF APPEAL CLARIFIES SEARCH WARRANT PROCEDURES

The Ontario Court of Appeal, in reasons for judgment released on June 4, 1987, dealt with several important issues with respect to the operation of the search and seizure provisions of the new *Competition Act*.

The issues arose during an inquiry, under sections 34 and 38 of the *Competition Act*, into the activities of Hoffman-La Roche. In the course of the inquiry Mr. Justice McKeown of the Supreme Court of Ontario issued search warrants authorizing certain premises be searched. Hoffman-La Roche sought to appeal the issuance of the warrants by Mr. Justice McKeown to the Court of Appeal. The Director of Investigation and Research under the *Act* moved to quash the appeal on the basis that the Ontario Court of Appeal was without jurisdiction to entertain the appeal.

Both parties to the motion agreed that the determination of the issues depended, at least in part, on whether the inquiry was being conducted under federal legislation enacted pursuant to the criminal law power or some other head of federal jurisdiction.

Counsel for the Director submitted that if the legislation was in substance criminal legislation, then recourse must be had to the *Criminal Code* to determine any question of appeal. Since the *Criminal Code* provides no such right of appeal, the Director's counsel argued that none existed.

Counsel for Hoffman-La Roche argued that the legislation was not criminal law, but enacted pursuant to the federal trade and commerce power. He, therefore, argued it was necessary to rely on the provincial rules of civil procedure, in particular, the *Courts of Justice Act*, 1984. Pursuant to paragraph 17(1)(b) of that *Act*, an appeal lies to the Ontario Court of Appeal from a final order of a Judge of the High Court.

Apparently the Director initially took the position that the provisions of the *Competition Act* were supportable under both the criminal law power and the trade and commerce power. However, counsel for the Director later retreated and restricted the submission to the criminal law power alone. If this, in fact, was the position of the Director and the federal government, it may reflect an important retreat from positions previously taken by the federal Crown. In the *Western Trucking* case, argued at the Supreme Court of Canada, the federal Crown had argued that the criminal provisions of the *Combines Investigation Act*, as it then was, were supportable under the trade and commerce power. If the federal government chooses not to advance that argument in future cases involving the constitutionality of the *Act*, it may have restricted its latitude to legislate in areas of competition policy, presently covered by the criminal provisions. This is so since there is, presumably, much greater flexibility to use different remedial and regulatory powers if the subject matter of the legislation is trade and commerce.

Mr. Justice Finlayson, writing for the Court, extensively reviewed the various provisions of the *Competition Act*, including the recently enacted civil provisions with respect to mergers, the Competition Tribunal, etc. He also reviewed various decisions relating to the constitutionality of the criminal prohibitions contained in the legislation. He concluded:

> From all the above it appears that while the scope of the *Combines Investigation Act* has been broadened by the *Competition Act*, Part V of the *Competition Act* substantially reproduces Part V of the *Combines Investigation Act*, and it in turn was duplicated in part at least by sections of the *Criminal Code*. Parts of the present statute may require the assistance of the trade and commerce provision of the *Constitution Act*, 1867 for its constitutional justification, but Part V can be sustained exclusively by reference to s. 91(27). The fact that the statute in its entirety may require the support of both s. 91(2) and s. 91(27), in no way changes the character of the offences enumerated under Part V. They are criminal in nature and are an exercise of the criminal law power.

Mr. Justice Finlayson further stated:

> I conclude on the basis of the above that the alleged offences supporting the issuance of a search warrant against Hoffman-La Roche (ss. 34 and 38 in Part V) are criminal in nature and depend upon s. 91(27) of the *Constitution Act*, 1867 for their enactment. They cannot be supported solely by reference to the trade and commerce power (s. 91(2)), and the fact that other parts of the *Competition Act* may require such constitutional support is irrelevant to the issues before this Court. The real question is, having decided that ss. 34 and 38 of Part V of the *Competition Act* are criminal law enactments, where does it take us on the issue of the jurisdiction of this court to hear an appeal from McKeown J.

The Court concluded that unless there is an explicit statutory right of appeal contained in the *Competition Act* or the *Criminal Code*, no right of appeal would exist. There is no such right of appeal contained in any other piece of legislation.

The Court then turned to the question whether an appeal was possible under the provincial legislation. In particular the Court considered the question whether the issuance of a search warrant is a final order and appealable under paragraph 17(1)(b) of the *Ontario Courts of Justice Act, 1984*.

The Court found that the issuance of a search warrant has traditionally been characterized as an investigative tool when issued by a High Court Judge. The Court therefore found that it could be reviewed only to the extent permitted by expressed statutory authority. They also held:

> It certainly is not reviewable other than by statutory authority because the prerogative remedies have no application to a judge at that level. These remedies are used by the superior courts to supervise the proceedings in inferior courts.

The Court also found that Parliament must have deliberately intended to exclude an appeal from an order made at the investigatory stage of an inquiry as a matter of policy. That being the case, Mr. Justice Finlayson stated:

> The remedy of the person whose documents have been seized lies in the "complete code" of review in the *Competition Act* that I have set out in some detail above.

Hoffman-La Roche also sought to appeal the lower Court's refusal to allow a cross-examination of the informant on his affidavit. The Court of Appeal considered these arguments and finally rejected them.

> The *Competition Act* has its own safeguards built into it for the protection of the party that is the subject of the search and this Court should not encourage resort to other remedies. In the final analysis, the ultimate safeguard to a person being investigated is his trial once charges have been formulated. No court should speculate at this stage of the proceedings as to whether the issuance of a search warrant may become an abuse of process.

The Court therefore allowed the motion and quashed the appeal.

This decision is one of the most important judicial interpretations of the recently enacted search provisions of the *Competition Act*. It clearly restricts the right of review by a party subject to searches under the *Act*, but at the same time, places great importance on the review mechanisms created in the *Act* itself, particularly the role of Judges in supervising the use of investigative powers by the Director.

---

## COURT REFUSES TO ACCEPT COPIES OF SEIZED DOCUMENTS

On June 29th, 1987, Judge T. Taylor of the Saskatchewan Provincial Court refused to admit into evidence microfiche copies of documents seized under the provisions of the *Competition Act*. The question arose in *re Lawson Business Forms (Manitoba) Ltd. et al.* It arose in the course of the preliminary inquiry following charges being laid under sections 38 and 32.2 of the *Combines Investigation Act* against four companies and certain individuals engaged in the business of printed business forms. The named company defendants are R.L. Crain Inc., Lawson Business Forms, Paragon Business Forms (Western) Ltd. and Moore Corporation Limited.

The question concerned the manner in which the documents had been handled by the Director's office. The Crown presented evidence that one of the Director's officers had seized, examined and copied certain documents in the possession of the defendant Paragon. The seizures had taken place pursuant to section 10 of the *Combines Investigation Act* and a Mr. Friesen as well as four other employees of the Department had been acting as authorized representatives of the Director under that section.

The Crown attempted to introduce in evidence microfiche copies of the original documents seized, examined and copied by the investigators.

The question before the Court concerned the interpretation of section 11 of the *Act*. The section has never before been the subject of judicial interpretation. Section 11 authorizes records or documents obtained or received by the Director to be inspected by him or such other persons as he directs. A separate subsection of section 11 allows the Director to make copies of any materials that he receives. When introduced in evidence, the copies have the same force as the originals. Section 11, however, never refers to an authorized representative of the Director but speaks of the Director alone.

The Provincial Court Judge found that section 11 "gives authority only to the Director to have such copies made for the purpose of proceedings under this *Act*."

Judge Taylor further stated:

> Section 11 provides for the personal inspection by the Director of the documents seized, originals and/or copies, and his personal decision is required as to whether copies should be made for use in legal proceedings.

He also found that the Director had not delegated his authority to act under that section. Consequently the Judge found that he could not accept the tendered microfiche copies as exhibits in the case.

The Crown has not launched an appeal of the Decision pending the outcome of the preliminary inquiry.

## CEMENT INDUSTRY INQUIRY — SEARCH WARRANTS INVALIDATED

By: John Blakney
Fraser & Beatty, Ottawa

In a decision dated 24th of July 1987, the Superior Court of the Province of Québec quashed a number of search warrants issued for the premises of cement manufacturers in the Province on the grounds of abuse of process (*Canfarge Ltee. et al v. M.P. O'Farrell et al*, unreported). The facts of the case are as follows.

In June 1985, the Québec Court of Appeal quashed several search warrants issued by a Justice of the Peace in Hull which were to be executed on premises in Montréal. The Court of Appeal found that the Justice of the Peace had exceeded her territorial jurisdiction in issuing those warrants. Subsequently, the Attorney-General of Canada applied to the Supreme Court of Canada for leave to appeal the Québec Court of Appeal decision. At the same time, the Attorney-General applied for a second series of search warrants for the same premises based on the same grounds. These warrants were issued and executed.

The subject cement firms then applied to the Superior Court to have the second set of warrants quashed. The firms argued that the second set of warrants amounted to an abuse of process on the grounds that they were simultaneous with the first warrants and that the Crown had other intermediate means to ensure that the evidence which was originally seized by the first set of warrants would be conserved.

The Superior Court found in favour of the applicant cement companies. It followed the established case law which holds that simultaneous or concurrent search warrants are an abuse of process while successive warrants are not. Fontana on the *Law of Search and Seizure in Canada* states the principle as follows:

> Where a second search warrant is obtained, the original having been quashed, the courts have referred to it as being a successive warrant. But where the officer has succeeded in obtaining a second search warrant when the question of the validity of the first warrant has not yet been finally decided upon, the courts have referred to it as a simultaneous warrant.
>
> They (the courts) have nevertheless been emphatic in refusing to accept a simultaneous search warrant procedure, condemning it as an abuse of process.
>
> Successive search warrants, when the initial one has been finally quashed, are quite acceptable however.

The Superior Court held that because the Crown had elected to apply for leave to appeal from the original Court of Appeal decision quashing the first warrants, the question of the validity of the first warrants had not yet been finally decided. However, the Superior Court also concluded that the point of final determination concerning the first warrants arrived when the Supreme Court of Canada refused leave to appeal. The Québec Superior Court declined to let the second set of warrants stand even though the first set had been definitely quashed by the Supreme Court's refusal of leave because the second warrants were issued and executed prior to that date and also because the Crown's decision to seek two simultaneous routes to search and seize in this case had "uselessly and illegitimately multiplied the procedures." The Superior Court held that the Crown, by choosing two routes at once, had taken the risk of being unsuccessful at both.

The Québec Superior Court concluded that the second set of warrants could be quashed not only on the basis of the common law rule against simultaneous search warrants but also on the basis of sections 8 and 24 of the *Charter of Rights and Freedoms* which, respectively, provide a right against unreasonable search or seizure and a remedy against the infringement of guaranteed rights as a court of competent jurisdiction considers appropriate and just in the circumstances.

The Superior Court appears to have been strongly influenced by the measures presented by the applicant as alternative means of conserving the evidence seized under the first warrants short of obtaining a second set of warrants. These options included agreement between the Crown and the parties to conserve evidence, applying to the Court of Appeal for an order under the Court's discretion to conserve the evidence and, finally, making an application to the Supreme Court of Canada for a stay of execution of the order of the Court of Appeal directing return of the evidence.

Both series of search warrants in question in this proceeding were issued pursuant to section 443 of the *Criminal Code* in relation to inquiries under the predatory pricing provision of the former *Combines Investigation Act*. At the time, the *Criminal Code* search warrant procedures had been employed for criminal law investigations under the *Combines Act* after the search and seizure provisions of that *Act* had been declared inoperative.

Although the search and seizure provisions of the *Competition Act* do not rely on the *Criminal Code* and are an independent search authority, the approach of the Québec Superior Court may nevertheless be relevant to the conduct of inquiries under the *Competition Act*.

The Crown has filed a notice of motion for leave to appeal the decision of the Superior Court with the Québec Court of Appeal.

## ACQUITTAL OF AIR CANADA OVERTURNED BY DISTRICT COURT

By: Lawson A.W. Hunter
Fraser & Beatty, Ottawa

Mr. Justice Hawkins of the District Court of Ontario, on the 5th day of August, 1987, overturned an acquittal of Air Canada by the Provincial Court of three charges brought by the Crown pursuant to subsection 37(2) of the *Combines Investigation Act*.

That section of the *Act* reads as follows:

> No person shall advertise at a bargain price a product that he does not supply in reasonable quantities having regard to the nature of the market in which he carries on business, the nature and size of the business carried on by him and the nature of the advertisement.

The prosecution related to advertisements run by Air Canada in three Toronto newspapers in January, 1984. The advertisements related to charter flights Air Canada was offering to Fort Lauderdale and West Palm Beach in Florida on January 21st, 1984.

The evidence showed that on the last date for cancellation of the decision to place the ads, Air Canada had a limited number of seats available to sell and a somewhat higher number of seats if an oversell factor was included.

The evidence further showed that subsequent to the ads running, three individuals attempted to purchase seats at the advertised price. All three of them were informed that the flight was unavailable and were offered flights at a higher price. In discussing section 37 of the *Act*, Mr. Justice Hawkins stated:

> Section 37 of the *Combines Investigation Act* is designed to address the evil of "bait and switch" selling, the process by which a seller establishes contact with a potential customer through an advertisement offering something at a very attractive price. The seller then hopes to sell a higher priced article either by downgrading the bargain item and lauding the higher priced article

> (a perfectly legal exercise in salesmanship) or by being conveniently out of supply of the bargain item thus requiring the customer to either leave empty handed or buy a more expensive item. It is this latter process that is addressed by s.37.

The Court then considered the potential revenue gains by Air Canada in relation to the costs of the advertisements. The evidence showed that the combined cost of the advertisements was just over $20,000.00. The maximum possible revenue which could be obtained by selling the seats available could never exceed $20,000.00. The Court concluded that there were only two possible explanations for such behaviour; Air Canada was mismanaged, or there were other reasons for running the advertisements. Mr. Justice Hawkins stated:

> I am driven to the irresistible conclusion that the latter is the true explanation. The Court heard from three people who inquired about $169.00 seats. All three were refused and all three were offered seats at a higher price.

The Justice then turned to a consideration of the errors made by the Trial Judge in acquitting the accused. One such error the Court found in the Trial Judge's reasoning was his reliance on the warning contained in the ads that certain flights could be sold out. Mr. Justice Hawkins dismissed this as an improper consideration since, in his view, subsection 37(2) imposes a positive obligation not to advertise a product unless reasonable quantities are available. He stated that:

> Surely a disclaimer or warning that the product may be sold out appearing in the advertisement itself cannot excuse failure to provide reasonable quantities of the product!

He therefore found that the warning or disclaimer was, in relation to a section 37 prosecution, a red herring. He allowed the appeal, set the acquittals aside and convicted Air Canada.