CANADIAN COMPETITION LAW DEVELOPMENTS

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DIRECTOR APPLIES TO TRIBUNAL TO DISSOLVE AIRLINE RESERVATION SYSTEM MERGER

On March 3, 1988, the Director of Investigation and Research made an application to the Competition Tribunal for an Order under Section 64 of the *Competition Act* ordering Air Canada (AC) and Canadian Airlines International Limited (CAIL) to dissolve their limited partnership instituted to combine the operations of the Reservec and Pegasus Computer Reservations Systems into a single system known as Gemini.

Computer Reservations Systems (CRS) are an increasingly important element in the distribution and sale of airline passenger seats to travel agents and to the travelling public. The systems distribute information on schedules, fares, rules and seat availability to subscribers (usually travel agents) for the airlines which are hosted on or participate in the system. This information is distributed electronically through a Cathode Ray Terminal (CRT) which is sold or leased to the subscriber and is located on the subscriber's premises.

The Director's application states that prior to the merger Air Canada's Reservec distributed information to approximately 2,900 travel agencies on behalf of 50 airlines, railways and car rental agencies, 3,000 hotels and 16 tour wholesalers. The application indicates that Reservec was the dominant CRS in Canada, holding about 72% of the CRS market as measured by travel agent locations.

Pegasus was developed by Canadian Pacific Airlines prior to its 1987 merger with PWA. Pegasus entered the Canadian market in 1984, and according to the Director's application, "introduced some innovative features, providing competition for Reservec". The application claims that between 1984 and 1987 Pegasus established its system in approximately 720 travel agencies. Pegasus also provides CRS services to 60 airlines, 14 car rental agencies, 3,000 hotels and tour wholesalers. The application states that Pegasus is the second largest CRS in Canada, holding approximately 18% of the CRS market as measured by travel agent locations.

On June 1, 1987, AC and CAIL (the airline resulting from the CP/PWA merger) commenced steps to merge the Reservec and Pegasus systems through a limited partnership in which each of the parties received partnership units and other consideration reflecting the proportion of assets contributed to the partnership.

The application contends that there are no effective substitutes to a CRS and that prior to the merger there were three other competitors to Reservec and Pegasus, including Sabre, a subsidiary of AMR Corporation which also owns American Airlines. Sabre had entered the Canadian market in 1983 and, by June 1987, had approximately 10% of the market as measured by travel agent locations. The other two competitors noted are Apollo, a CRS operated by Covia Corporation which is owned by United Airlines, and Soda/System One, owned by Texas Air Corporation. The application claims that the latter two CRS's have "an extremely small presence in the market with a combined market of less than 1%." To establish the importance of CRS in the supply of airline tickets, the application notes that travel agencies are now the primary means for airlines to distribute their product to the travelling public. Approximately

70% of the tickets sold by Canadian airlines are sold through travel agents and approximately 90% of all Canadian travel agencies use CRS to make airline reservations and to print tickets. The other 30% of the tickets are sold by the airlines directly to the travelling public. In almost all cases the application claims the airlines use CRS to assist with sales.

Critical to the Director's theory of the case is the distinction between the CRS services available to a "hosted carrier," and the lesser grade of CRS services available to a "participating carrier." If a carrier is hosted, the CRS stores the carriers complete inventory information. In this case, the CRS provides the carrier with both an internal reservation and management system to manage its inventory and an external reservation system to distribute its product to travel agents and consumers. Air Canada and Canadian Airlines International are now hosted with the Gemini system.

If an airline is a participating carrier the CRS does not supply an internal reservation and management system but instead only lists the information on fares, schedules and seat availability which the participating carrier supplies. A participating carrier may choose not to supply all of its inventory so that certain classes of seats may not be displayed on the CRS in which the airline is participating.

The application alleges that being a hosted carrier provides that carrier with a significant competitive advantage over participating carriers because of the greater completeness, accuracy and timeliness of information on seat availability from the CRS with respect to hosted carriers.

The application goes on to state that, for practical purposes, an airline can store its entire inventory in only one place, "which means that it can participate in a number of CRS systems but can be hosted by only one." Many of the advantages of hosted carrier status can, however, be obtained by means of a direct access data link between the CRS and the database of the participating airline. The application notes that there are several CRS vendors in the United States, all of which have a direct access link with carriers who are hosted in another CRS:

> These links mean that these CRS vendors compete on the basis of what their systems can do and the price at which they do it rather than on the basis of exclusive control of airline inventory. In Canada, prior to October 31, 1987 there were no direct access links between the three largest CRS vendors in Canada namely Reservec, Pegasus and Sabre. On or about October 31, 1987 an electronic direct access link was established between Reservec and Pegasus, giving users of either Reservec or Pegasus last seat availability on Air Canada and Canadian Airlines International.

Last seat availability refers to the capacity of the CRS to call up for reservation seats held back by the airline from CRS booking of the airline and is regarded by travel agents as an important competitive feature.

The principal grounds presented by the Director in his application are:

1. Increased concentration:
   Gemini's post merger market share is calculated at 90% (of travel agent locations) vs. 10% for Sabre, and "has reduced the number of significant CRS competitors in Canada from three to two and in many non-urban areas has eliminated competition completely."
2. Increased barriers to entry:
   The application contends that the superior service delivered by Gemini for AC and CAIL and their affiliated and alligned carriers, coupled with the current dominant position of these two carriers in the Canadian market, provides Gemini and its owners with the ability to block or frustrate the entry of competing CRS by reducing the access of competing systems through timely and reliable information on the operations of AC and CAIL. The application also claims the possibility of new entry into the CRS by a non-airline vendor is remote because of the substantial software and hardware development costs and the fact that airline vendors enjoy significant economies of scope because they must have a reservation system in any event.
3. Lack of availability of substitutes:
   The application claims that other sources of information such as manual reference to the Official Airline Guide and the use of the

telephone to make airline reservations are too time consuming to interest, or to be a practical alternative for, the vast majority of travel agents.

4. Effective competition remaining and removal of a competitor:
   The application states that the merger will reduce the effectiveness of Sabre as a competitor because Sabre, in the absence of a direct access link with Air Canada, CAIL and Gemini, will not be able to provide its travel agent subscribers with the last seat availability and other enhancements on AC and CAIL flights available through Gemini. The application also alleges that Sabre could be quickly neutralized by AC and CAIL if they choose to exercise the market power they hold by reason of their dominant position in the airline market. For example, the application suggests that withdrawal of their participation in Sabre "would likely force Sabre to withdraw from the Canadian market because Sabre would then be providing a service without any booking fee revenues."
5. Impact on airline industry competition:
   The application also alleges that the merger will likely entrench the dominant position of AC and CAIL in the airline industry at the expense of Wardair and potential new entrants in both the jet carrier and turbo-prop markets in Canada, as well as U.S. and international carriers who compete in transport or international markets with AC and CAIL. In this regard, the application suggests that competing carriers which host or participate with Gemini "may be subject to bias and other disadvantages which could severely inhibit their ability to compete." The suggested disadvantages include denial of access to the CRS, inaccurate information loading, biased flight display ordering, and discriminatory booking fees. However, it should be noted that the application does not allege that any such practices have in fact taken place in Canada. They are essentially viewed in the application as being more likely were the merger to take place.

The application therefore presents a number of important issues:

1. To what extent should concentration in one market in transport be utilized in assessing the impacts of a merger in the production of a complementary product (CRS), and conversely what weight should the Tribunal attach to the possible lessening of competition in air transport that may result from the CRS merger?
2. Is dissolution of the merger the only appropriate remedy? Can the possible anti-competitive impacts of the merger be sufficiently reduced if Air Canada's and CAIL's competitors are provided with direct access data links with those carriers' reservation systems as is done in the USA? To what extent is the viability of this option affected by the more concentrated nature of the Canadian air transport industry compared to the U.S. industry?
3. What weight, if any, should be given to any increased potential for the abuse of dominant position in the market of the merger or related markets in determining whether the merger substantially lessens competition?
4. Does the merger entail efficiency gains which are not likely to arise if the merger were dissolved and which, therefore, may exempt it from a remedial order notwithstanding that it may lessen competition?

J.F.B.

CANADA PACKERS ACQUITTED IN ALBERTA HOGS CASE

Canada Packers proved that persistence, let alone innocence, can triumph when they were acquitted by Mr. Justice Lomas of the Alberta Queen's Bench Division on January 15, 1988, of several charges of conspiring to share markets and fix prices under section 32 of the *Combines Investigation Act*.

The proceeding, which had originally been commenced against several meat packers in the province of Alberta, was reduced to Canada Packers alone when all of the other accused pleaded guilty during the course of the lengthy preliminary inquiry and trial. Canada Packers

chose to proceed to have the matter determined through a trial, which turned into one of the lengthiest in Alberta history.

There were five main corporate accused in the original charges: Canada Packers, Burns, Swifts, Gainers, and Intercontinental. It was alleged that they had, between January 1, 1965, and June 30, 1976, engaged in several conspiracies, namely:

- agreements to share available slaughter hogs marketed through the Alberta Pork Producers Marketing Board;
- an agreement to fix the price or price ranges at which hogs would be purchased through the Board;
- and an agreement to fix the selling price of high volume pork products in the distributive market.

Mr. Justice Lomas' lengthy judgment deals primarily with the issue of whether the evidence introduced by the Crown established beyond a reasonable doubt that an agreement existed between the alleged co-conspirators. With respect to all counts, he came to the conclusion that the Crown had not proved, beyond a reasonable doubt, the existence of an agreement as contemplated in section 32 of the *Combines Investigation Act*. Although the indictment included five charges, one charge was dropped at the conclusion of the evidentiary stage of the proceeding, with the Crown's consent. One charge was an overall charge encompassing the three specific alleged agreements set out above.

The court reviewed in some detail the evidence introduced with respect to each count. The evidence principally consisted of the testimony of officials of the various indicted companies as well as officials of the Board itself. The interesting aspect of the judgment is the manner in which Mr. Justice Lomas appeared to consider the meaning of the word "agreement" in section 32.

In citing testimony of various officers of the accused corporations, he, in a number of places, recites their belief that they did not have a "firm agreement" but merely "an understanding." He also refers to statements by certain officials that their discussions had led only to a "perceived agreement or an assumed agreement." He also recites testimony of an official who stated that there may have been a "consensus" among the parties but there were no "formal" agreements between them.

Mr. Justice Lomas concluded in considering whether there was an agreement to fix the price or range of prices to be paid for hogs, as follows:

> Considering all of the evidence I have a reasonable doubt whether Canada Packers agreed with the other packers, or any of them, as to the prices or price ranges at or within which slaughter hogs were to be purchased through the Board. Certainly the evidence fails to prove that there was an exchange of promises capable of being enforced if lawful, or even intended to be enforceable, concerning such prices or price ranges.

In Mr. Justice Lomas' consideration of whether there was an agreement to fix the selling price of high volume pork products, he stated:

> The law requires an exchange of promises between parties which, if legal, would be enforceable. It further requires an intention by the party charged to abide by those promises. Certainly the evidence of many of the witnesses was that they did not intend to abide by the understanding, or consensus, or whatever they called it and they did not expect the other parties to abide by it either. They referred to perceived agreements or understandings being constantly broken, which clearly indicates a lack of intent to be bound by any agreement.

Based on these conclusions, the court found the accused innocent of all counts. The interesting legal question the judgment raises is whether an "agreement" within the meaning of the law contemplates something which is tantamount to a legally enforceable contract. Certainly it would be hard to find support for such a proposition in previous jurisprudence under the *Act*, although the Supreme Court of Canada judgment in the *Atlantic Sugar* case certainly alludes to such a possibility. If the law under section 32 of the *Act* requires an agreement which would be enforceable if legal, the result would be a drastic reduction in the scope of agreements or arrangements subject to prosecution under the *Act*.

Another interesting feature of the case is that the evidence disclosed a degree of knowledge and communication, if not "understandings," between the parties that was long standing and consistent in scope and frequency. If such behaviour does not give rise to an agreement

within the meaning of the *Act*, because there is evidence that the parties did not abide by the "understandings" arrived at, then it throws into question whether the section is truly a conspiracy section at all since the offence of conspiracy is in the agreement and not in the execution of the agreement.

The case also demonstrates, once again, the Crown's great difficulty in proving the basic element of agreement in conspiracy cases. The federal government has successfully prosecuted only one conspiracy case through trial since 1976. In most instances where the Crown has lost, they have failed because they did not prove the fundamental element of an agreement or arrangement. The *Alberta Hogs* case proves once more, at great expense to both the Crown and the accused corporations, the difficulty that the Crown has with this fundamental section of Canada's competition laws.

Although the case turned fundamentally on the question of whether an agreement existed, there were other issues raised in the trial which are dealt with in Mr. Justice Lomas' decision. One of these issues concerns when an agreement, if it had existed, would have produced an undue lessening of competition. In this regard the court relied primarily on the expert testimonies of various witnesses introduced by the defence and the Crown. Justice Lomas concluded that the Crown had not proven beyond a reasonable doubt that any agreement would have prevented or lessened competition unduly.

Mr. Justice Lomas also dealt with the proposition of defence counsel that the degree of regulation of the industry was such that the law should be not applied to an industry such as the hog processors. There had been various references to the oppressive behaviour of the Board itself. However, Mr. Justice Lomas stated:

> I can appreciate how frustration with the Board's practices could induce the packers to exchange information, but it is too great a step from the mere exchange of information to justifying an apparently conclusive agreement.

He therefore refused to accept defence counsel's submissions that either their client's activities were not subject to the *Act* or were justified because of the oppressive behaviour of the Board which represented the interests of hog producers.

The judgment brings to a close one of the lengthiest proceedings in Canadian competition law history. The Crown has appealed.

L.A.W.H.

AGREEMENT REACHED IN TRAILMOBILE ACQUISITION OF FRUEHAUF

On January 18, 1988, the Director of Investigation and Research, Cal Goldman, announced that, as a result of undertakings given by the Trailmobile Group of Companies Ltd. to sell its highway trailer van business, there would be no challenge to Trailmobile's acquisition of Fruehauf Canada Inc. Fruehauf and Trailmobile are respectively the largest and second largest manufacturers of highway trailers in Canada. Fruehauf's assets include highway trailer manufacturing facilities in Mississauga and Ingersol, Ontario, and branch offices located throughout Canada.

The Director has indicated that the objective of the undertakings obtained from Trailmobile is to ensure that Trailmobile van business "continues as a national competitive enterprise in the market" and that the undertakings "will allow new entry, or expansion by an existing producer, and preserve the choice and range of products available to customers."

Finally, the Director has noted that by allowing the acquisition to proceed in this format, it is anticipated that Fruehauf Canada Inc. will be able to compete effectively in a free trade environment.

Trailmobile's published undertakings are as follows:

Sale of Van Business

1. Trailmobile has undertaken to divest its entire van business through a public bidding process which will include the following:
   - Trailmobile name, trade mark and good will;
   - all the assets and property comprising its highway trailer van operations, (excluding the Brantford, Ontario plant);
   - all inventories of trailer van raw materials, work in progress and finished goods;
   - all orders related to van sales;
   - all tooling for trailer van production;
   - a national distribution network;
   - all designs used in the manufacture of Trailmobile vans.
2. While the van tooling is being relocated, Trailmobile will ensure that the purchaser has the opportunity for continued supply of vans for a reasonable period of time.
3. Trailmobile will offer to assist the purchaser in relocating the van business.

Separate Operation of Van Businesses

- Pending the sale of the Trailmobile van business to a third party, Trailmobile has undertaken to hold separate and apart the respective trailer van operations of Trailmobile and Fruehauf and to ensure these operations continue to compete with each other. Trailmobile also has undertaken to ensure that there will not be any communication or sharing of information between the Trailmobile and Fruehauf organizations or their employees with respect to van operations.
- The Vice-President of Finance of Trailmobile and its General Manager of Data Processing will transfer immediately to Fruehauf .
- The current President of Trailmobile will remain and will be responsible for ensuring that vigorous competition remains between Trailmobile and Fruehauf with respect to the van business.

J.F.B.

DECISION ANNOUNCED ON INTERBAKE ACQUISITION

On February 1, 1988, the Director of Investigation and Research announced that he would not challenge at this time the proposed acquisition of certain assets of the InterBake foods division of Weston Foods Limited by Nabisco Brands Limited, nor would he challenge the related sale of the remaining assets of InterBake to Aliments Culinar Inc.

Nabisco had initially proposed in June, 1987, to acquire all of the assets of InterBake. After an examination of the merger the Director concluded that the transaction would result in a substantial lessening of competition in both the cookie and cracker markets in Canada. After being informed of the Director's intention to apply to the Competition Tribunal for remedial order, InterBake proposed to sell Nabisco only those brands which accounted for the majority of its export sales together with the lease of the Longueuil production facility used to manufacture these particular products. Under this proposal Nabisco would also obtain the right to use these trade marks for domestic sales within Canada. Nabisco undertook to seek an alternative buyer for the remainder of the assets and subsequently obtained an acceptable offer for them from Culinar, a company based in Montreal, Québec.

The Director has indicated that the restructured transaction:

> ...will help preserve competition in the Canadian market, allow Nabisco to obtain efficiencies in relation to the export of products which will be of benefit to Canada generally, and enable this industry to compete more effectively in the future.

The underlying concern to the Bureau of Competition Policy arising from the original transaction was the removal of InterBake as an effective and vigorous competitor in the Canadian market in light of its recent record of developing new and innovative products particularly in the snack cracker segment. The Bureau of Competition Policy also concluded that it was doubtful that effective competition would remain if the acquisition proceeded as originally planned and that significant entry into the biscuit market

or into any of its constituent segments was unlikely to be either easy or rapid.

The export oriented assets to be sold to Nabisco under the restructured transaction are principally the Red Oval Farms trade marks under which Stoned Wheat Thins are marketed, and the Sum of Each trade marks, as well as the lease of the Longueuil production facility used to manufacture these particular items.

The Bureau's analysis took into account that the sale of the non-export assets to Culinar provided Culinar with an immediate national presence through the acquisition of InterBake's direct store delivery system from coast to coast, a base of established national brands, and the opportunity for increased participation in the snack cracker segment of the market, which Culinar had indicated it intended to seriously pursue.

The Bureau also considered Nabisco's projections of efficiency increases that it expected to flow from the acquisition of the export oriented assets. Nabisco had stated to the Bureau it anticipated a substantial ongoing increase in the level of exports to the United States of the cracker products acquired from InterBake through the association of these brands with the Nabisco organization in the U.S., Nabisco also stated that the acquisition will allow it to realize efficiencies in the production, sale, marketing and distribution of these particular products in Canada.

This arrangement is significant in that not only did the Bureau take into account the proposed reduction in the business to be acquired through this merger in eventually deciding not to challenge the merger but also the effect of the sale of the balance of InterBake's business to Culinar.

J.F.B.

PROHIBITION ORDERS ISSUED AGAINST COUNTY LAW SOCIETIES

On January 11, 1988, Mr. Justice Frank Callahan of the Ontario Supreme Court issued prohibition orders against the Kent County Law Association and the Waterloo Law Association and the individual members of their respective executives for the years 1984 to 1987 with respect to their fee-setting activities.

In addition to prohibiting the commission of the section 32 offence and doing or continuing any act or thing constituting or directed towards the commission of the section 32 offence, the court issued a number of detailed and wide ranging prohibitions.

Specifically the court prohibited the respondents from:

- fixing, establishing, enforcing, administering, or directing the fees at which they supplied legal services, whether through the use of fee schedules, suggested or otherwise; and
- taking any measure to cause or attempt to cause any person to adhere to the fees so fixed, etc.

Further, the respondents have been prohibited for a period of 10 years from:

- promulgating any schedule of fees for legal services whether suggested or otherwise;
- forming or maintaining any committee in respect of legal fees, whether in whole or in part; and
- communicating to one another by any method the legal fees that members have charged, are charging, or plan to charge clients, save only for those communications appropriate to the day-to-day cooperation of a law practice, unless such activities have been approved by the Director of Investigation and Research.

The respondents have been directed for a period of 5 years to:

- provide to the Director notices and agendas for all general and special membership meetings at which the subject of legal fees will be raised and to permit a representative of the Director to attend such meetings;
- provide annually a sworn declaration to the Director by the members of the executive of the association stating that the subject of legal fees has not been raised at any general or special membership meeting or at any other meeting of the association except as notified to the Director; and
- provide to the Director on his request a sworn declaration as to the fees that members of

each association have charged clients for specified legal services.

The respondents are also required to publish the order in a local newspaper within 30 days of its issuance and to provide to members of the association a copy of the order and a written statement that it is the association's policy to require compliance with the *Competition Act* and with the order and that non-compliance with the order may constitute an offence.

In support of the agreed to prohibition order counsel for the Crown and the respondents filed with the court an agreed to statement of respondents' admissions.

Both sets of respondents acknowledged that the county law associations had responded to members undercutting of their suggested fee schedules by developing measures with which the schedules could be effectively enforced. Both associations had mailed, with a revised fee schedule, an acknowledgement form for the signature of the member stating that the member had received, reviewed and agreed with the fee schedule.

The Kent County Law Association's acknowledgement required the solicitor to undertake to charge fees only in accordance with the schedule. The Kent County Law Association also adopted a by-law which included, as grounds for unprofessional conduct, failure to sign the agreement form within a specified period of time and failure to follow and apply any fee schedule of the association. The directors of the Kent County Law Association were empowered, in the case of a finding of unprofessional conduct, to impose any sanction upon a member of the association as the directors may see fit including imposition of a fine, suspension of the member's privileges in the association or termination of a member's membership in the association.

The executive of the Waterloo Law Association, at a meeting held subsequent to the mailing of the new fee schedule and the acknowledgement form, suggested to members of the association that non-adherence to the fee schedule by any member would be regarded as being in breach of accepted ethical and professional standards, that such person not be given cooperation in the normal course of residential real estate transactions and was a person who may be boycotted by the legal community in Waterloo as a person trading upon the benefits of an enhanced volume of business at lower fees than charged by colleagues.

Approximately 95% of all lawyers in Waterloo who practice real estate voted in favour of the real estate fee schedule, and approximately 80% of the membership of the Kent County Law Association signed and returned to the executive the undertaking to adhere to that association's fee schedule.

The admissions of the Waterloo Association go on to state that the association undertook to monitor the fees being charged by individual members for the provision of real estate services to ensure that they were in accordance with the fee schedules in effect and that a committee of the executive of the association would contact any member not adhering to the accepted fee levels to determine why the fee schedule was not being adhered to and urge the member to adhere to it.

In the case of the Kent County Law Association it was admitted that, notwithstanding the removal of the enforcement mechanisms for the fee schedule following advice from the Bureau of Competition Policy, a significant number of members in the association continued to charge for residential real estate services only in accordance with the fee levels contained in the fee schedules and that the executive of the association took no effective steps to avoid such uniform conduct.

Both respondents admitted that their respective conduct constituted or was directed towards an agreement reached between the association, the executive, and a large majority of its members to restrain competition in the price provision of residential real estate legal services. The respondents also admitted that, because of the evident uniformity in fees, there had been a lessening or prevention of price competition between or among lawyers in each area in the provision of residential real estate legal services and that the respondents' conduct was undertaken with the intent of securing such a result.

Following the issuance of the prohibition orders, the Director of Investigation and Research, Cal Goldman, emphasized that the Bureau of Competition Policy would not be

limiting its section 32 enforcement activities to associations of lawyers which do not have express statutory authority to set fees as did the respondents. The Director also emphasized that, while these prohibition orders are binding only on the 2 county law associations, it may not be as easy in subsequent cases to proceed by the consent/prohibition order route.

J.F.B.

FREIGHT FORWARDERS CASE SUSTAINED ON APPEAL

The Ontario Court of Appeal in a judgment released January 22, 1988, upheld the decision of Mr. Justice O'Leary (reported in the December issue of the *CCPR*) dismissing an application by certain parties to an inquiry under the *Competition Act* to have notice of a retention hearing following searches under section 15 of the *Competition Act*.

The case involved two issues. First, the Director did not seek to retain the originals of any documents seized but had returned all of the originals and had proposed to retain copies of the documents pursuant to section 16(3) of the *Act*. The question was whether, in such circumstances, a retention hearing was necessary under section 15, and if so, whether the parties subject to the searches were entitled to notice.

The court held:

> We do not accept the proposition that "record" includes the photocopies made by the Director. "Record" as defined in s.2(1) and as used in s.15 can only relate to material seized from the appellants whether or not those materials are copies or originals. Obviously the Director does not seize the copies which he himself makes. If any further support is needed for this proposition it is to be found in s.16(3) which makes a clear distinction between records and the copies made by the Director.
>
> Since in these proceedings the Director does not seek to retain any of the seized records there is no need for an order pursuant to s.15(3) and as a result the appeal must fail on this issue alone.
>
> The question of the entitlement of the appellants to notice and a hearing in a proceeding pursuant to s.15(3) becomes moot and need not be decided on this appeal. This is a question which we expressly leave open.

The court thereupon dismissed the application. This judgment is of particular significance as to the manner in which the Director will proceed in future searches under the *Competition Act*. The judgment sustains the Director's practice of not seeking to retain originals of documents, but to quickly copy them so that the originals can be returned to the party from whom they were seized prior to the Director making a report to a court pursuant to subsection 15(1) of the *Act*. That section requires the Director or his representative to "as soon as practicable" take the record or make a report to the court. As long as the Director can make copies prior to making the necessary report, there will be no necessity to seek further authority from the court to retain originals.

An interesting question which does not appear to have been dealt with by the court is the meaning of the words "as soon as practicable." If those words are given a narrow meaning, in many instances it may not be possible for the Director to make copies prior to the expiration of the time permitted by the legislation. However, if its meaning is to allow the Director sufficient time to make copies, then there will seldom be a circumstance in which a retention hearing will be necessary under the legislation, except in circumstances where, for some reason, the Director requires the original of the document or, presumably, a situation where the seized matter is not capable of being copied, eg. a fur coat.

The appellants have sought leave to appeal to the Supreme Court of Canada.

L.A.W.H.

1987 COMPETITION LAW SEMINAR

On December 15, 1987, McCarthy & McCarthy, in conjunction with the Law & Economics Program of the Faculty of Law of the University of Toronto, hosted a seminar which

concentrated upon the approach the Bureau of Competition Policy has taken towards mergers since the *Combines Investigation Act* was substantially amended in 1986 and re-named the *Competition Act*. Approximately 75 people attended the seminar, including practitioners, academics, members of the Bureau and members of the newly formed Competition Tribunal.

Calvin Goldman, the Director of Investigation and Research, spoke at length about the Bureau's current approach regarding mergers. He paid special attention to the fact that the Bureau has adopted a "broad compliance oriented approach" to the enforcement of the merger provisions of the *Act*, which, following the 1986 amendments, are civil rather than criminal in nature. Goldman indicated that the Bureau's "open door" approach, which involves extensive consultation between members of the Bureau and the business community regarding proposed mergers, has been very successful. He stated that one of the principal benefits of this approach to enforcement has been the almost complete avoidance of contested litigation regarding mergers since the 1986 amendments. Goldman indicated that, in his view, it is in the best interests of all concerned to attempt, to the extent possible, to co-operate with the Bureau so as to resolve concerns of the Bureau regarding proposed mergers prior to proceedings being commenced before the Tribunal pursuant to Part VII of the *Act*.

Goldman indicated that although he has the capacity pursuant to s.74 of the *Act* to issue Advance Ruling certificates regarding proposed transactions, such certificates will be issued only in extraordinary circumstances. The effect of an Advance Ruling certificate is set out in s.75 of the *Act*. Pursuant to that section, where the Director issues a certificate under s.74, he:

> ...shall not, if the transaction to which the certificate relates is substantially completed within one year after the certificate is issued, apply to the Tribunal under section 64 in respect of the transaction solely on the basis of information that is the same or substantially the same as the information on the basis of which the certificate was issued.

Goldman stated that Advance Ruling certificates would be issued only where a proposed transaction raises no competition law concerns whatsoever. The Director will refuse to issue certificates in circumstances where the transaction in question raises no immediate competition law concerns as long as there is a possibility that changing market conditions could give rise to such concerns in the future. Goldman indicated that he has taken this position in an effort to "safeguard the public interest," because of the preclusive effects which flow from the issuance of certificates under the *Act*.

Goldman also discussed the recent experience of the Bureau regarding the pre-merger notification process, as prescribed in Part VIII of the *Act*. He stated that many participants to proposed transactions have met with members of the Bureau substantially in advance of making pre-merger notification filings, in an effort to ensure that their filings are as responsive as is possible to the particular concerns which the Bureau may have regarding these transactions. Goldman emphasized the fact that the consultative approach which the Bureau has taken regarding the enforcement of the substantive merger provisions of the *Act* extends to the pre-merger notification process as well. Goldman also stated that the Bureau generally will <u>not</u> publicly announce a decision to challenge a merger before the Tribunal as long as fruitful discussions regarding the merger are ongoing between the participants and the Bureau. He made the point, however, that the Bureau will not pursue negotiations indefinitely, and will have no hesitations about proceeding before the Tribunal should the need arise.

As Goldman noted, the compliance oriented strategy of the Bureau regarding mergers has had the practical effect of avoiding litigation concerning proposed mergers. While this result is no doubt beneficial insofar as the parties to the transactions in question are concerned, it is somewhat difficult for those members of the legal and business community who have not participated in this process of consultation and negotiation to develop a sophisticated understanding of the approach which the Bureau has taken in this area. The complete absence of any jurisprudence or merger guidelines regarding the new merger provisions of the *Act* has also

exacerbated this problem. This concern was raised specifically by Bruce McDonald during his remarks regarding his experience with the Bureau's Merger Branch following the 1986 amendments to the *Act*.

Goldman stated that he recognized the compliance oriented posture of the Bureau had given rise to concerns among the members of the business community pertaining to the lack of available information as to the position taken by the Bureau in respect of specific mergers. Nevertheless, he stated that in his view the Bureau's capacity to make information available to the public regarding its activities in respect of particular mergers is severely constrained by virtue of the confidentiality provisions contained in s.27 of the *Act*. Goldman indicated that he is working closely with the Department of Justice to develop a position as to what information the Bureau is authorized to release to the public under the *Act*.

Goldman indicated that the Bureau has examined approximately 400 mergers since the *Act* was amended in June, 1986. Of that number, 133 have been examined "in a significant fashion." He stated that the Bureau concluded 56 of the 133 mergers examined in detail did not give rise to any competition law concerns. Twenty-three mergers were dealt with through the Bureau's program of compliance, and involved either restructuring of the proposed transactions so as to satisfy the Bureau's concerns or undertakings given to the Bureau by the participants. Twenty Advance Ruling Certificates have been issued, 5 mergers were abandoned by the parties, and 29 mergers were outstanding as of mid-December, 1987. The Director had commenced proceedings before the Tribunal in respect of only 2 of the 400 mergers which had been scrutinized by the Bureau as of the date of the seminar. Commenting upon the relatively insignificant number of mergers which have been challenged before the Tribunal, Goldman indicated that, in his view, this result is in line with what has transpired in other countries in recent years, including the United States and Germany. In those countries, the majority of merger cases are resolved either in the absence of litigation or before the courts on a consent basis. Most mergers which are challenged before completion, and which are not resolved on a consensual basis, simply collapse or are not pursued.

Howard Wetston, the Deputy Director of Investigation and Research, spoke briefly concerning the Bureau's experience regarding pre-merger notification. As of mid-December, 1987, the Bureau had received approximately 30 formal pre-merger notification filings. The number of such filings has considerably exceeded the Bureau's pre-1986 expectations as to the number of transactions which would involve pre-merger notification obligations. Wetston stated that parties to proposed transactions, in compiling their pre-merger notification filings, should concentrate upon their "theory" of the merger, and upon an economical analysis of the probable impact which the proposed merger will have upon competition.

Wetston, in discussing the particular problems which the Bureau has encountered in respect of pre-merger notification filings, stated that in the Bureau's experience, many parties have attempted to define the product and geographic markets which will be affected by proposed transactions too broadly. A great deal of time must be spent, as a result, between the parties to proposed mergers and the Bureau in arriving at appropriate market definitions. This definition process can pose significant problems in circumstances where the transaction in question involves severe time constraints or pressures.

Wetston also stated that frequently there are significant inconsistencies between the internal documents prepared by the parties to a proposed transaction and submitted with the pre-merger filings, and those documents which are generated by the lawyers for those parties. These inconsistencies typically raise concerns at the Bureau regarding the proposed transaction.

Once pre-merger notification filings have been received by the Bureau, the Bureau ordinarily will attempt to verify the information contained in the filings by consulting with members of the industry involved, and by interviewing customers and possibly suppliers of the participants to the proposed transaction. Wetston stated that the Bureau is sensitive to the

fact that competitors who are asked to comment upon proposed transactions often have "hidden agendas" in providing their views to the Bureau as to the potential effects which the proposed transaction may have upon competition.

Wetston stated that although a number of parties have attempted to invoke the "efficiency gains" argument which is provided for in s.68 of the *Act* (namely, that the proposed merger is likely to bring about gains in efficiency which will offset the lessening of competition likely to result from the proposed merger), there has been no case in which the Bureau has been satisfied such arguments have efficacy. He stated the "efficiencies" relied upon by parties to proposed transactions have invariably been pecuniary in nature, rather than real. Wetston stated that arguments pertaining to efficiencies which may result from proposed transactions should be supported by statistical and economic analysis based upon the particular industry in question, rather than hypothetical facts or situations.

Shyam Khemani, a Senior Policy Advisor of the Merger Branch of the Bureau, distributed a relatively detailed "preliminary analysis" of 15 horizontal mergers which have been examined by the Bureau in a significant fashion. A copy of this analysis is set out at the end of this article.

If nothing else, Khemani's analysis indicates that the Bureau has "significantly examined" mergers where the combined market share of the participants to the proposed transactions was as little as 30%.

Abe Krash of the Arnold & Porter firm in Washington, D.C., spoke about recent trends in United States merger law and practice, and discussed, at some length, the recent F.T.C. challenges regarding the proposed merger of Coca Cola Company and Philip Morris (which owns Seven-Up Co.), and the proposed merger of Pepsi Co., Inc. and Dr. Pepper Company. The market shares of the participants to these mergers, at the time of the F.T.C. challenge, was as follows:

Company	Per Centage Share of the Market
Coca Cola Company	37.4
Pepsi Co., Inc.	28.9
Philip Morris	5.7
Dr. Pepper Company	4.6

Krash indicated that the F.T.C. was successful in its bid to block both mergers, notwithstanding the fact that the market shares of the acquirees were as little as 4.6% and in any event did not exceed 6%. Krash stated that in the United States the F.T.C. generally will challenge any merger between a "leading firm", or a company having a market share in excess of 35%, and any other company. This is so especially in highly concentrated industries. Krash stated that in making a decision as to which mergers will be challenged the F.T.C. and Department of Justice generally consider the potential impact of the proposed merger upon the market power of the acquiror. This consideration will typically involve an analysis of the proposed merger on the ability of the merged entity to sustain prices either above or below the "competitive price."

Krash commented as well upon the recent American experience under the *Hart-Scott-Rodino Antitrust Improvements Act of 1976*. He stated that in 1986, 2,400 transactions involved pre-merger notification filings. Of that number, only 82 were investigated by the F.T.C. and involved "second requests" for information. Only 13 of the 2,400 transactions were eventually challenged by the F.T.C.

The seminar was well attended, and provided a useful forum for discussion between senior members of the Bureau and people who work extensively in the competition law area.

K.E.T.

System Record Number	Acquirer Mkt Share (<)	Acquiree Mkt Share (>)	Rank in Market Acquirer	Rank in Market Acquiree	Transaction Value	Product Type	Market Size	Market Growth	Imports	Failing Firm	Entry Conditions	Other Firms (<)	Remaining Mkt Share (<)	Acquiree Vigorous	Other Factor	Regu-lation	Effi-ciencies	Decision of the Director of Investigation and Research
1	80.0	20.0	1	2	70.0	C/I	R	S	NS	F	D	3	40	T		S	F	Negative, Trans-action Abandoned
2	30.0	30.0	2	3	600.0	I	M/I	G/C	NS	F	M	4	50	?/F	T		T	Monitor
3	20.0	20.0	2	3	50.0	C	N	D	NS	F	M	5	70	F			F	No Issue
4	60.0	20.0	1	3	40.0	I	R/L	S	NS	F?	E?	2	40	T?			?	Negative, Trans-action Abandoned
5	40.0	40.0	2	1	0.0	I	N/I	C	NS	T	M	2	30	F	T	S	?	Monitor
6	10.0	20.0	3	2	200.0	C/I	N	S	NS	F	E	5	70	?	T		F	Compliance/ No Issue
7	20.0	30.0	1	2	20.0	I	N	S/D	NS	T	D	3	40	F	T		F	Compliance/ Monitoring
8	50.0	20.0	1	2	60.0	S	L	S	NS	F	D	4	40	T		S	F	Undertakings
9	25.0	15.0	2	4	150.0	C	M	D	NS	T	D	3	70	F			T	Compliance/ Monitor
10	10.0	40.0	4	2	350.0	S	R/N	G	NS	F	M	2	60	F	T	S	F	Compliance/ Monitor
11	10.0	55.0	4	1	70.0	I	R/L	S	NS	F	M	4	40	T			F	Compliance/ No Issue
12	30.0	40.0	2	1	150.0	I	R/L	S	NS	F	M	5	40	T	T		F	Compliance/ Monitoring
13	23.0	15.0	1	2	52.0	C	N	S	NS	F	M	2	60	T			T	Compliance/ Monitoring
14	70.0	30.0	1	2	30.0	I	N	S	NS	F	M	O	O	?	T		T	Negative/Trans-Act'n Abandoned
15	20.0	70.0	2	1	10.0	I	M/I	S	NS	T	E	4	20	T	T	S	T	Compliance/ No Issue

Codes:

Product Type:
- C - Consumer
- I - Intermediate
- S - Service

Market Size:
- N - National
- I - International
- R - Regional
- L - Local

Market Growth:
- G - Growth
- D - Declining
- S - Stable
- C - Cyclical

Entry Conditions:
- D - Difficult
- M - Moderate
- E - Easy

Other Column:
- S - Significant
- NS - Not significant
- T - True (yes)
- F - False (no)
- ? - Uncertain/Questionable

REGULATED CONDUCT DEFENCE APPLIED TO PRIVATE *COMPETITION ACT* ACTIONS

In reasons issued on January 8, 1988, Madame Justice Barbara Reed of the Federal Court Trial Division struck out, on the basis of the common law regulated conduct defence, a statement of claim made by a number of British Columbia milk producers which was founded on the right of private action established by section 31.1 of the *Competition Act*.

The plaintiffs had claimed damages and an injunction against the British Columbia Milk Board, the Canadian Dairy Commission, the Fraser Valley Milk Producers Cooperative and a number of individuals involved in the allocation of milk quota within the province of British Columbia.

Section 31.1 provides that any person who has suffered loss or damage as a result of, *inter alia*, conduct that is contrary to the criminal prohibitions of the *Competition Act* (in this instance, the section 32 prohibition against agreements to restrict competition unduly) may, in any court of competent jurisdiction, sue for and recover from the person who engaged in the unlawful conduct an amount equal to loss or damage proved to have been suffered.

The motion to strike the statement of claim was jointly brought by the Milk Board, the Milk Producers Cooperative Association, and the Canadian Diary Commission.

The Milk Board is established pursuant to the British Columbia *Milk Industry Act* and is authorized by that *Act* to make orders in relation to the production and marketing of milk for fluid consumption including:

- fixing the minimum producer price for fluid milk;
- apportioning the quantity of milk that may be produced and marketed by milk producers;
- determining the eligibility of producers from fluid milk quota; and
- prohibiting a person from engaging in the production or marketing of any class or grade of milk unless that person is a holder of a milk marketing quota.

The Milk Board, in addition to its intraprovincial regulatory powers under the B.C. *Milk Industry Act*, has been delegated regulatory authority with respect to international and interprovincial trade in B.C. produced milk pursuant to the federal *Agricultural Products Marketing Act*.

The Canadian Dairy Commission, pursuant to the *Canadian Dairy Commission Act*, operates a system for payment of federal subsidies with respect to industrial milk, purchases milk produced in excess of designated quotas for the purpose of disposing of such milk on the export market, and imposes levies on producers with respect to such over-production. Interprovincial quotas are established pursuant to a federal provincial agreement known as the National Milk Marketing Plan into which the Canadian Dairy Commission has considerable input. Provincial quota is then distributed in turn among the dairy farmers of the province by provincial boards, the Milk Board in B.C.'s case.

The Fraser Valley Milk Producers Cooperative has obtained approximately 3/4 of the milk quota of the province of British Columbia.

The plaintiffs had entered into milk production in British Columbia during the period 1982-83 during which B.C. had opted out of the National Milk Marketing Plan. After British Columbia rejoined the plan in 1984, the Milk Board refused to grant milk quota to parties including the plaintiffs who had entered the market during the 1982-83 period and also enjoined the plaintiffs from marketing their own milk.

The plaintiffs asserted that the operations of the Canadian Milk Supply Management Committee which administers the National Milk Marketing Plan amounted to an unlawful agreement pursuant to section 32 of the *Competition Act* and that this committee exercises the effective decision making power, subject to the agreement of the Milk Board, over how much the total national production will be allocated to British Columbia under the national plan.

The Fraser Valley Cooperative has been joined in the action on the basis that it exercised the effective decision making power of the Milk Board with respect to the establishment and

allocation of quotas in as much as it supplies members to the Market Share Advisory Committee of the Milk Board and holds the bulk of B.C. milk quota. It was alleged that only fluid milk producers are allowed to sit on the Market Share Advisory Committee, but not industrial milk producers or consumers.

Finally, the plaintiffs alleged that the various defendants designed and implemented this quota allocation scheme to eliminate all competition in the dairy industry and to enhance and fix prices for the benefit of the existing quota holders.

Before considering the application of section 31.1 to the alleged facts, the court reviewed other recent litigation arising from quota management by the Milk Board. In *Milk Board v. Clearview Dairy Farm Inc.* (1986) 69 B.C.L.R. 220(B.C.S.C.), affirmed (1987), 12 B.C.L.R. (2nd) 116 (BCCA), the British Columbia Court of Appeal rejected claims that the Milk Board's regulatory actions infringed the rights of industrial producers and cheese manufacturers under the *Charter of Rights and Freedoms* to the right of association, the right to work, the right to life, liberty and security of the person, and the right not to be discriminated against and to be accorded equal application of the law.

In *Beldon Farms Ltd. et al v. Milk Board and Canadian Dairy Commission* (1987), 14 B.C.L.R. (2nd) 60 (B.C.S.C.), the Milk Board's and CDC's pricing system, were challenged unsuccessfully as not providing the plaintiffs with an opportunity to obtain a fair return on their labour.

In the instant case, after reviewing the leading cases on the regulating conduct offence (Reference Re: *Farm Products Marketing Act*, [1957] 1 S.C.R. 198, and *Attorney General of Canada et al v. Law Society of British Columbia et al*, [1982] 2 S.C.R. 307, the *Jabour* case), Madame Justice Barbara Reed concluded as follows.

1. Section 31.1 does not remove the plaintiffs from the operation of the established jurisprudence on the *Competition Act*. The plaintiff must prove the same elements as must be proved to establish an offence under section 32 in order to have a cause of action.
2. The regulated conduct defence does not apply only when a regulatory agency operates in the public interest in the view of the court. The courts have no mandate under the jurisprudence to determine whether or not a Board is acting within the public interest. Acting within the public interest is to be deemed from a regulatory body acting lawfully within its enabling statute. Whether or not such activities are in the public interest is a matter for the legislature to decide.
3. The inclusion of a new objects section in the *Competition Act* (section 1.1), and the fact that the *Competition Act* has been made to apply to Crown agencies acting in a commercial capacity separately or together do not have the effect of overriding the common law regulated conduct defence. The court noted that over the legislative history of the Phase II revisions to the *Combines Investigation Act* which resulted in the current *Competition Act* in 1986, there were in fact a number of attempts to codify the common law regulated conduct offence. The court also noted that far more specific language would be required than is present in the new objects section to permit the courts to infer that the regulated conduct defence has been overruled by implication. Finally the court noted that the application of the *Competition Act* to commercial activities of Crown agents was of no help to the plaintiff in the circumstances in as much as the activities complained of, the establishment and enforcement of producer quotas, were not commercial in nature and that the Milk Board was not, at least with respect to the activities complained of in the statement of claim, engaged in commercial activity.

The court also rejected the argument that the Canadian Dairy Commission should be subject to the *Competition Act* because Parliament had expressly exempted similar federal supply management bodies established under the *Farm Products Marketing Agencies Act* from the *Competition Act*, but had not done so for the Canadian Dairy Commission.

Madame Justice Reed did, however, emphasize that the regulated conduct offence did not amount to a blanket exemption for regulated industries from the application of the *Competition*

Act and that only specific activities required or lawfully authorized by statute may not form the basis of a prosecution under the *Competition Act*.

It is important to keep in mind that section 31.1 of the *Competition Act* does not provide a private remedy with respect to reviewable practices under the *Competition Act*, and therefore, the court's decision in this case may not be binding with respect to the interpretation of the availability of a regulated conduct defence with respect to practices which are reviewable, and are not criminal offences, under the

J.F.B.

CANADA PACKERS DENIED COSTS IN ALBERTA HOGS CASE

Following their acquittal by Mr. Justice Lomas in the Alberta Hogs case, reported above, Canada Packers moved to have the court award costs against the Crown in the proceedings. The matter was heard in chambers before Mr. Justice Lomas on January 28, 1988. Mr. Justice Lomas in dismissing the application stated:

> It is true that the trial was extremely lengthy and that the majority, defence counsel estimated 95 percent which may be fairly close, of the time was taken by the submission of Crown evidence in an endeavour to prove the allegations in the indictment.
>
> The Crown has an obligation to the court and to the accused to lay before the court all matters which are relevant to the proceedings or to the allegations on which the court may find the accused guilty or not guilty. I cannot fault the Crown in any way for the length of time that the trial consumed.
>
> As I have stated in my Judgment, there was considerable evidence adduced of conversations between employees of the five major packing companies and of meetings between those employees. In my opinion, there was certainly — in considering the evidence in retrospect — certainly sufficient evidence available to the court to permit the laying of the indictment.
>
> I have found the accused not guilty because I am not satisfied beyond a reasonable doubt that those conversations and meetings resulted in an agreement of the nature required to find the accused guilty of conspiracy under the *Combines Investigation Act*.
>
> Considering all of those factors, I cannot find that there has been an abuse or frivolity of the proceedings or misconduct or dishonesty on the part of the Crown, or that these proceedings were taken for any ulterior motive.

The court thereupon dismissed the application. This is probably the first time that an acquitted defendant has sought to have costs awarded against the Crown in a *Combines* prosecution.

L.A.W.H.

EPSON (CANADA) LIMITED FINED $200,000

In a judgment released December 11, 1987, District Court Judge D.G. Humphrey fined Epson (Canada) Limited $20,000 for each of ten charges laid under section 38(1)(a) of the *Combines Investigation Act*. Epson had pleaded guilty to all ten counts.

The record established that Epson, following receipt of legal advice, had entered into dealer agreements whereby the dealers agreed not to advertise certain Epson products for sale at prices lower than Epson's suggested retail price.

Mr. Justice Humphrey considered the company's arguments that it had relied on the legal advice obtained and that this should be a mitigating factor in sentencing. He did not pay much attention to this argument.

The court considered various principles of sentencing, and in particular referred to the words of the late Judge Honsburger in the *A & M Records* case. Mr. Justice Honsburger was quoted as saying "It is equally beyond doubt that an inducement to advertise at a higher price creates an inducement to sell at higher prices."

The court then stated:

> I also, from a dealer point of view, consider the "bully" factor. The company dominated the printer market and dealers clamored to be

> authorized to sell the company's product. To take advantage of that situation by bullying the dealers into agreeing not to engage in competitive advertising is obviously contrary to the public interest.

The court assessed the fine at $20,000 per count for a total of $200,000. This is one of the highest fines ever obtained under the resale price maintenance section of the *Act*, particularly in a situation where the facts indicated that the policy had been completely ineffective.

L.A.W.H.

MANITOBA COURT OF APPEAL REJECTS CHARTER ARGUMENT

The Manitoba Court of Appeal rejected an argument raised by CLP CanMarket Lifestyle Products Corporation related to the pyramid selling provisions of the *Combines Investigation Act*. In particular the application sought to rely on section 15 of the *Charter* with respect to equal protection under the law. The provision of the *Combines Investigation Act* in dispute was section 36.3(4) which states:

> This section does not apply in respect to a scheme of pyramid selling that is licensed or otherwise permitted by or pursuant to an Act of the legislature of a province.

The applicants argued that the consequence of this provision was that activities could be unlawful in Manitoba but lawful if carried out in, for example, British Columbia, Alberta or Saskatchewan.

The Court of Queen's Bench had dismissed the application and the matter had been appealed to the Manitoba Court of Appeals.

In coming to its conclusion the Court of Appeal relied on the significant Privy Council decision in *Attorney-General of Ontario et al. v. Canada Temperance Federation* et al. (1946) 2 D.L.R. 1. In that case Sir Montogue E. Smith held that:

> In statutes of this kind the legislation is general, and the provision for the special application of it to particular places does not alter its character.

Mr. Justice O'Sullivan, writing for the Manitoba Court of Appeals applied this reasoning. He stated:

> What is sought to be prohibited is unregulated and unlicensed pyramid selling. Where a province has a regulatory scheme in effect, it cannot be said that the pyramid selling is unregulated or uncontrolled.

The court thereupon dismissed the application.

L.A.W.H.

DIR 86-87 ANNUAL REPORT PUBLISHED

The *Annual Report* of the Director of Investigation and Research for the year ending March 31, 1987, was tabled in the House of Commons during the first week of February by Consumer and Corporate Affairs Minister Harvie Andre.

This is the first *Annual Report* to be published following the proclamation of the *Competition Act* and the *Competition Tribunal Act*. Chapter 1 of the *Annual Report* which traditionally provides a layman's explanation of the prohibitions and reviewable practices of Canadian competition law now presents such a review for the 1986 revisions to the law.

Enforcement statistics for 86-87 presented in the *Annual Report*, indicate no marked departures during the year in terms of enforcement throughput (complaints received, inquiries in progress or concluded, prosecutions) with the exception of the number of inquiries referred to the Attorney General (which declined to 9 from an average of 23 over the previous four years). Interventions before federal regulatory bodies declined to eight after averaging 16 per year over the previous three year period. This decline reflects a reduction in major issues-oriented hearings on the part of the CRTC and the former CTC.

The *Annual Report* notes that, during the 86-87 year, fifty cases under the *Act* (excluding misleading advertising and deceptive marketing practices cases) were considered by the courts.

These consisted of 13 proceedings commenced during the year, and 37 proceedings before the courts from previous years. Eleven cases related to agreements in restraint of trade under section 32 of the *Act*; 5 related to bid rigging under section 32.2; 1 related to merger or monopoly under the previous section 33 of the *Combines Act*; 2 related to price discrimination under section 34; 2 related to promotional allowances under section 35; and 29 related to price maintenance or refusal to supply under section 38. The predominance of section 38 prosecutions is consistent with previous years' enforcement activities.

Twenty-two proceedings were concluded during the year, of which 16 resulted in conviction, and 6 resulted in the acquittal of the accused. Two of the concluded proceedings related to section 32; 2 related to section 32.2; 1 related to section 34; 1 related to section 35; 16 involved price maintenance under section 38.

Fines totalling over $683,000 were imposed during the year with respect to these offences.

During the year, 264 misleading advertising and deceptive marketing practices cases were considered by the courts. These consisted of 143 proceedings commenced during the year and 121 proceedings before the courts from previous years. There were 154 proceedings concluded during the year, 115 of which resulted in convictions and 39 in acquittals, charges withdrawn, and other completions of court proceedings which were not convictions. Fines totalling over $947,000 were imposed during the year.

The *Annual Report* also provides brief descriptions of the Director's involvement in 13 merger cases completed during the 1986-87 year. These descriptions add to the available base of public information on the approach being taken by the Bureau of Competition Policy to assessing the likely impact of a merger on competition and on whether a particular merger is likely to be challenged by the Director. A variety of factors have been cited in the *Annual Report* as supporting a decision not to challenge a merger including: countervailing market power held by large and sophisticated buyers in the relevant market, ability of buyers to switch to foreign suppliers, efficiency gains through industry rationalization and removal of excess capacity, ease of entry into the relevant geographical market by firms located outside that market, an absence of significant entry and exit barriers to the industry, and a low level of resulting market concentration in the affected industry.

The following passage from the *Annual Report* which summarizes the Bureau's merger experience to the end of March 1987 is consistent with various public statements which have been made by the Director of Investigation and Research on the new merger law:

> At this stage it is too early to generalize, but some salient features of the Director's experience with mergers may be noted. The provisions of the *Act* do not distinguish between different types of mergers, vis. horizontal, vertical and conglomerate. The Director has examined all three types of mergers although the majority of the substantive cases reviewed would be generally considered as horizontal mergers. The combined market share of the firms contemplating a merger has ranged primarily between 33% and 100%. In one case where the Director issued an Advanced Ruling certificate, the combined market share was as low as 12% (up to 36% in one submarket). Half of the forty merger related matters which the Director has reviewed to date would meet the size thresholds of the merger prenotification provisions contained in the *Act* had these provisions been in effect during the period under review. A final observation is that prospective efficiency gains arising from a particular merger have been raised by business persons in a number of cases but, except in a few cases, have not played a major role in the Director's decision.

The *Annual Report* also reviews a number of judicial decisions regarding the manner of exercise and the constitutionality of the Director's investigatory powers, *Charter* challenges to the making of direct indictments, and the statutory limitation on the common law due diligence defence relating to misleading advertising prosecutions.

In addition to an examination of enforcement activities and current developments in general, the 1987 *Annual Report*, as in the case of previous Annual Reports, provides a detailed description of the recent activities of the various branches of the Bureau of Competition Policy.

The *Report* also presents a discussion of the Bureau's contribution to the Canada-U.S. Free Trade Agreement. During the year, the Bureau assisted the Trade Negotiation Office in the analysis of Canadian and U.S. trade remedies and the development of a competition policy alternative to the application of such remedies in the context of a bilateral free trade area. The Bureau submitted that existing competition law provisions dealing with geographic price discrimination and predatory pricing provide a preferable alternative to existing antidumping laws for governing transborder pricing practices in the context of the free trade area. The Bureau argued that competition law standards are more rigorous than antidumping standards as they focus on the effects of a pricing practice on the process of competition rather than on injury to specific competitors.

The *Report* goes on to note that implementation of such a proposal would, however, require careful attention to the need and scope for greater compatibility of substantive and procedural elements of Canadian and U.S. antitrust laws. The question of jurisdiction, discovery rules, the scope of public and private enforcement and the enforcement of remedies are also important considerations that would need to be addressed to ensure effective application of price discrimination/predatory pricing provisions to transborder pricing practices.

Finally, the *Report* notes that the Bureau has been actively involved in interdepartmental deliberations to define Canada's position on a number of issues including trade-in-services, technology, investment and government procurement, and that the Bureau has participated in examining the impact of a free trade agreement on specific sectors of the economy namely the financial, communication and transportation sectors. These initiatives indicate that the involvement of the Bureau of Competition Policy in the development of federal economic policy continues to broaden and become more sophisticated.

J.F.B.

DIRECTOR OF INVESTIGATION AND RESEARCH RANK UPGRADED

The position of the Director of Investigation and Research under the *Competition Act* has recently been reclassified to the equivalent of a Deputy Minister-1 level position. This reclassification reflects the increased authority and responsibilities under the amended *Act*. With the reclassification, the Department of Consumer and Corporate Affairs has dropped the title Assistant Deputy Minister, Bureau of Competition Policy, since this would no longer properly reflect the rank of the position.

The Director will continue to have all of the responsibilities previously held by the incumbents of the job, including the policy responsibilities of advising the Department and the government on competition policy matters, and conducting interventions before regulatory Boards and Tribunals.

Although Mr. Goldman has dropped one of his titles, he has picked up another. In the list released by the federal government at the end of 1987, it was announced that Mr. Goldman had been made a federal Q.C.

L.A.W.H.