# CANADIAN COMPETITION LAW DEVELOPMENTS

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## BID RIGGING CHARGES PRODUCE LARGEST FINE

Companies involved in bid rigging investigations in the business forms industry have pleaded guilty to charges under s.32.2 of the *Competition Act*. The inquiry centered on the activities of R.L. Crain Inc. and Moore Corporation Limited in Nova Scotia, and, in Saskatchewan, these same two companies, along with Paragon Business Forms (Western) Limited which amalgamated with Southam Printing Limited and Lawson Business Forms (Manitoba) Limited. The charges in both instances related to alleged bid rigging activities involving sales to the governments of Nova Scotia and Saskatchewan. In the Saskatchewan case an additional charge against Lawson Business Forms (Manitoba) Limited related to the resale price maintenance provisions of the *Competition Act* contained in s.38.

In the Nova Scotia case the charges related to tenders submitted to the Nova Scotia Government Purchasing Agency between December 21, 1979, and December 31, 1982. During that period, according to the statement of facts submitted by the Attorney General of Canada, there were 416 separate tender calls involving a total value of approximately $718,000.

In the Saskatchewan case, the purchasers were the Saskatchewan Government Purchasing Agency and Saskatchewan Government Insurance. The statement of facts introduced by the Attorney General of Canada in the Saskatchewan case stated that the two purchasing agencies had issued calls for tenders on 273 different occasions during the period of the charges, and that the estimated total value of the business subject to these tender calls was approximately $433,000.

The price maintenance charge against Lawson Business Forms resulted from the efforts of representatives of that company to secure the participation in the arrangement of a competitor in the Saskatchewan market; namely, Mercury Printers Limited. In meetings with the Mercury representatives, Lawson Business Forms offered Mercury a certain amount of business if they would agree to the bid rigging arrangements already being used by the other participants in the market. The Nova Scotia charges related to an arrangement between the two companies either not to bid, or to bid at a sufficiently high level, to ensure that re-order business did not shift from one firm to the other.

The statement of facts introduced by the Attorney General in Saskatchewan indicates that the arrangement in Saskatchewan was designed to ensure that each of the participants for government business would continue to receive re-order business from the government. In other words, the participants operated so as to ensure they each maintained their market share of the government business. Because of the number of participants in the scheme, they also had to agree on the benchmark prices that should be offered for government business, basing this price on a discount off the Crain price book. In instances where one of the four accused was the previous supplier of the forms being re-ordered, the other parties agreed that they would bid above the benchmark price.

Apparently, as the scheme was operated, it became difficult to implement and a more direct form of communication between each of the parties was necessary on each bid, to ensure that the re-order business remained in the hands of the previous supplier.

In the Saskatchewan case, the fine imposed by the court, on agreement between the Crown

and the accused, was $1.6 million. This amounted to $400,000 for each accused. In the Lawson Business Forms instance, $40,000 of its fine related to the price maintenance charge. This level of fine is the largest ever imposed in total and individually under a conspiracy provision of Canada's competition laws. In one previous conspiracy case, a fine of $400,000 against one accused was imposed. But the $400,000 fine imposed in this case under s.32.2, the bid rigging section, is by far the largest ever imposed under that section. The level of the fines is also exemplary in that the total imposed by the court is almost four times the total amount of commerce affected by the legal activities. In the Nova Scotia case the fines imposed on the two accused were $200,000 each. It is not clear why the amounts of fines in Saskatchewan were double those in Nova Scotia when the amount of commerce involved was almost twice as much in Nova Scotia as in Saskatchewan. Perhaps it reflected the degree of deliberateness and agreement necessary in the Saskatchewan case because of the larger number of participants.

The statement of facts in both the Saskatchewan and the Nova Scotia cases reveal a high level of personal involvement by employees of the accused companies. However, in neither case were individuals charged. It has become commonplace in United States bid rigging cases brought by the government, not only to charge individuals but also to impose jail terms.

In respect of the charges Mr. Calvin Goldman, the Director under the *Competition Act*, stated that:

> The competitive bidding process is intended to provide taxpayers and customers with the best value for their money. The integrity of the bidding systems must be preserved and I believe that the results of this case contribute greatly to that end.

It will be interesting to see whether, in future cases, the government will seek to name individuals as well as follow the U.S. precedent of seeking jail sentences.

In both cases the courts imposed prohibition orders against the continuation of the offences. The orders prevent the convicted companies from using any watermarks or other identification features on their forms "for the purpose of facilitating or carrying out any agreement, arrangement or understanding" between or among themselves. However, another provision of the order states that the order not be construed "so as to limit the supplier's name or other identification from appearing on any business form supplied by it." It is not clear how these two clauses can coexist.

The prohibition orders also contain very strict prohibitions against communication between the companies in a number of areas such as prices charged, or proposed to be charged, to any person in Canada, discount structures, reports on business obtained, capacity and cost of production of business forms, and any other terms and conditions of sales.

These prohibitions, as well as the basic prohibition against agreeing with competitors, apply not only to sales in Nova Scotia and Saskatchewan, but also to sales to any person in Canada.

In addition, the prohibition orders contain what are now becoming common features of prohibition orders under the *Competition Act*; namely, provisions relating to education and monitoring of the activities of the convicted parties to ensure compliance. The education and monitoring provisions also pertain to all the business form commerce of the convicted parties in Canada, and not just in the affected provinces.

The Saskatchewan court order contains two additional features not included in the Nova Scotia order. First, it contains a prohibition against all of the convicted parties, not just the Lawson Business Forms company, from doing an act or thing directed towards the commission of an offence under s.38 of the *Competition Act*. The Saskatchewan order also requires the companies to publish an account of the prohibition order in the *Globe and Mail* "Report on Business" and two trade journals, the *Canadian Printer and Publisher* and *Modern Purchasing*. It is believed that this is the first instance that convicted parties have been required to publicize their conviction.

Ian Nielson-Jones, Director of the Services Branch in the Bureau of Competition Policy, stated:

> It is clear that these two cases constitute a quantum leap in the penalties courts are willing to impose for bid rigging offences. The Bureau has been stating for some time that bid rigging is

a high priority matter in its enforcement strategy. These cases should demonstrate the seriousness of the government's concern that the competitive tender process not be undermined.

The number of bid rigging cases in Canada, as a percentage of overall government enforcement, is far below that in the United States where bid rigging cases account for more than 80 percent of all charges brought by the government.

It will be interesting to see whether the affected government agencies seek to obtain damages as a result of the convictions of the companies of this case. It is possible, as well, that other purchasers of business forms will review bidding patterns for their past purchases to see whether they may also have been subjected to the activities and behaviour outlined in the statement of facts introduced by the Crown in these two cases.

As a final comment, it should be noted that the charge against Lawson Mardon under the price maintenance provision deals with horizontal price behaviour as opposed to vertical price behaviour. Ordinarily, s.38 is only used to charge individuals who are attempting to influence prices at another level of trade or distribution. Clearly, in this case, the efforts were directed at horizontal competitors. The theory of the case presumably is that the activity fell within the language of the statute since it constituted an attempt, through the promise of business, to encourage a competitor to raise prices, or at least not reduce them.

Although the section has been used in at least one previous case where the accused party pleaded guilty and where the facts disclosed a horizontal effect, the potential for the government using s.38 aggressively in horizontal cases should be monitored closely. There are two reasons why a widespread use of the section in this fashion would be important to business. First, if the section were used to deal with normal price fixing agreements between competitors, it would drastically strengthen the general conspiracy law since s.38 contains no undue effect on the competition test as does the more usual horizontal price fixing section of the *Act*. If s.38 can be used by the Crown to convict accused where they merely attempt to convince a competitor at their own level of trade to engage in a particular course of conduct, then it drastically strengthens the Canadian law and makes it far more vigorous than American antitrust law. It may be recalled that the U.S. antitrust authorities attempted to convict American Airlines for "attempting" to get their competitor to cease price discounting. The U.S. courts threw out that theory of the law.

On the facts of the case, the Crown argued that the behaviour was an attempt, by promise, to affect prices. The interesting question is whether the government would bring a case under s.38 for an attempt to agree. The words of s.38 are: "by agreement, threat, promise or any like means, attempt to influence" the price.

Can the Crown base a charge on the notion that an attempt to obtain an agreement is all that is required under the words of the statute? It is arguable that the proper construction of the section is that the "attempt" referred to in the statute is directed at the upward or downward change in the price and not the means by which the attempt is made. However, if the means employed to affect price is, for example, a promise of future business or to stop discounting, then arguably no mutuality or consent by the party receiving the promise is necessary. In reality, it may be extremely difficult to separate a "promise" from negotiations aimed at an agreement. In any event, the use of s.38 in horizontal situations is largely unprecedented. It would be helpful for compliance purposes if the Director makes known his enforcement intentions with respect to horizontal situations which could arise under s.38.

*L.A.W.H.*

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## COMPUTER RESERVATION SYSTEM MERGER CASE - UPDATE

The Director's application to the Competition Tribunal to dissolve the merger of the Air Canada and Canadian Airlines International (CAIL) Computer Reservation Systems (CRS), Reservec and Pegasus respectively, which established a new CRS, (Gemini) in 1987 was reviewed in the March 1988 *CCPR*.

This article reviews:

(a) Air Canada's and CAIL's responses;
(b) the Director's reply; and
(c) the Tribunal's prehearing conference.

## Air Canada and CAIL Responses

The written responses of Air Canada and CAIL follow similar lines and dispute the Director's application in the following principal areas:

- market definition;
- efficiency gains and competitiveness in the CRS business; and
- impact on competition in the air transport business.

With respect to **market definition** the respondents contend that in certain respects the appropriate market for CRS and airline services should include the domestic, transborder, and international markets and that in this market Gemini remains a minor player relative to Sabre, the dominant CRS in North America, and the principal remaining CRS competitor in Canada. The respondents also contend that measurement of market share according to travel agencies served (as was done in the Director's application) is not appropriate and leads to an overstatement of Gemini's share. Booked flight segments is proposed as the appropriate proxy for CRS revenues.

Several **efficiency** related arguments are presented:

(a) The merger results in cost savings of $15 million a year flowing from economies of scale (reduced facilities and operational duplication).

(b) The world market can sustain only a few CRS firms due to the requirement for large scale technology and the inherent cost advantages of airline-sponsored CRS. A minimum efficient firm size or "critical mass" for the North American and Canadian markets is at least that of Gemini, if not larger, and only CRS's sponsored by major airlines are likely to survive over the long term. Air Canada and CAIL, therefore, contend that the merger increases the competitiveness of Gemini against rivals such as Sabre which have already reached an efficient size and can enter the Canadian market on an incremental cost basis. The respondents further submit that the Canadian market can support only one indigenous CRS. Dissolution of the merger would therefore result in two inefficient Canadian CRS suppliers.

(c) Pegasus was a non-starter. It could not achieve an efficient scale on its own and, due to poor product design and Reservec's prior established position in the Canadian market, Pegasus could capture only low volume non-urban travel agencies.

(d) The economies of scale realized from the merger will allow the Canadian CRS system to invest in new technology and to provide high quality CRS to smaller Canadian centres.

(e) Air Canada's and CAIL's desire to increase market share against North American rivals will keep Gemini CRS booking fees low for travel agents.

With respect to the **impact on competition in the airline business** the respondents state:

(a) The merger increases the ability of Air Canada and CAIL to negotiate improved reciprocal access to other North American CRS's thus enhancing their overall access to the North American and international market.

(b) CAIL benefits from obtaining some of the "halo effect" Reservec formerly provided exclusively to Air Canada.

On the related issue of the merger facilitating future abuse of dominant position in both CRS and air travel, the respondents have argued that:

(a) Reservec used to have 100% of the Canadian market but no anti-competitive conduct was detected by a federal Task Force, unlike the findings of the 1984 Civil Aeronautics Board with respect to the airline display practices of some U.S. systems.

(b) Both Air Canada and CAIL are formally committed in writing to the Minister of Transport to fair access to Canadian CRS's.

(c) Gemini is operated autonomously from the airlines.

(d) The Director can make an abuse of dominance application at any time when the facts support it.

The Director's application considered at some length Gemini's provision of Last Seat Availability (LSA) only to Air Canada and CAIL and argued that this practice would lessen competition among Canadian airlines by creating an incentive to agents relying on Air Canada's and CAIL's service exclusively. The respondents, however, contend that LSA has been overrated as an impediment to fair competition since travel agents can obtain the

last seats directly from the airline in any event. They also contend that LSA provides an important commercial advantage in competing for travel agency clients with the "functionally superior" U.S. based Sabre system.

### Director's Reply

The Director's reply presents the following principal arguments:

(i) **Market Definition**: Canada is the appropriate geographic market. CRS operations are geared to the principal business incentives of their airline parents. U.S. CRS's, therefore, lack the same incentives as Gemini to provide service in Canada since their airlines cannot serve the entire Canadian market.

(ii) **Critical Mass/Economies of Scale:** The respondents have presented no empirical evidence on the minimum efficient size for a CRS firm and no evidence that the Canadian market could support only one indigenous firm. Reservec was profitable before the merger with 2,900 travel agency subscribers.

(iii) **Pegasus as a Failing Firm:** Pegasus should be expected to lose money in its start-up years but by the time of the merger Pegasus had achieved 72% of the 1,000 travel agency subscribers originally forecast as required for break-even.

(iv) **Remaining Effective Competition:** Sabre's competitiveness in the Canadian market is entirely dependent on Gemini not exercising its market power by refusing to provide direct access to airlines competing with Air Canada and CAIL.

(v) **Abuse of Dominance:** Political assurances of fairness are insufficient protection to competitors. Wardair and other domestic competitors have no domestic CRS alternative as the result of the merger. Gemini has a near monopoly position in some local CRS markets.

### Prehearing Conference/Intervention Applications

The Tribunal's Prehearing Conference was held on June 8, 1988. In addition to hearing parties' claims for confidentiality and/or privilege, and motions for oral examination for discovery, the conference also heard argument respecting the applications of the Consumers' Association of Canada (CAC), American Airlines (owner of Sabre), and Wardair, for leave to intervene. In addition to standing to make representations as is provided to interveners under the Tribunal's rules, CAC's application also requests standing to cross-examine on certain issues and proposes that the Association have an opportunity to conduct examination for discovery. Both the American Airlines and Wardair applications request intervener standing as provided in the Tribunal's rules but without any specific terms or conditions being imposed.

The Tribunal's decision on the intervention application has been reserved pending submission of written legal arguments from the applicants and written replies from the parties. A decision on these applications is expected in July.

The hearing of the merits of the Director's application is expected to commence in November, 1988.

*J.F.B.*

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## CDC LIFE'S BID PROMPTS APPLICATION TO COMPETITION TRIBUNAL

The Director of Investigation and Research has made the first application to the Competition Tribunal with respect to an alleged failure to comply with the prenotification provisions of the *Competition Act*. The case arose out of the bid by Institut Mérieux S.A. to acquire additional shares of CDC Life Sciences Inc. as a result of which Mérieux would own more than 20 percent of the voting shares of CDC Life. CDC Life is a publicly traded company.

The Director's application was made on April 28, 1988, in the midst of Mérieux's bid on the Montréal and Toronto Stock Exchanges to acquire the CDC Life shares. CDC Life was actively resisting the bid. CDC instituted procedures in other fora to resist Mérieux's bid. For example, proceedings had been commenced in the Ontario courts under the *Bank Act*, and proceedings were launched in the United States alleging competitive harm resulting from the bid. A joint hearing was also held before the Ontario and the Québec Securities Commissions with respect to the bid. A

negative decision by the Securities Commissions resulted in Mérieux dropping the bid, at least, temporarily. The principal feature of the bid which prompted the decision by the Ontario and Québec Commissions was the arrangement between Mérieux and the other principal shareholder of CDC Life, the Caisse de depôt, whereby the Caisse could put its approximately 20 percent holding in CDC Life to Mérieux in a year's time and receive a premium over the market of 15 percent.

Following the decision by the Ontario and Québec Commissions, Mérieux informed the Director that it was not intending to proceed with its offer, and consequently the Director's application to the Tribunal was withdrawn. Nevertheless, the pleadings in the case before the Tribunal are interesting in that they reveal the Director's view of the acquisition and how the *Competition Act* applies to such transactions.

The Director's application was brought under ss.72(1) of the *Competition Act* to obtain an interim order. The order sought was to restrain Mérieux from purchasing any of the shares until 21 days after Mérieux had notified the Director of the proposed acquisition and had supplied the necessary information under s.92 of the *Act*. In other words, the application merely sought to enjoin the purchaser until such time as the prenotification provisions of the *Act* had been complied with.

Although that was the only order sought by the Director, the material filed in support of his application clearly demonstrated that the Director believed there to be a significant competition question arising from the transaction, in addition to the failure to prenotify. The Director's application was supported by an affidavit from a senior officer of CDC Life which set out the competitive relationship between CDC Life and Mérieux. It also contained telexes and letters from officials and ministers of the Ontario government well as officials from the University of Toronto, all of whom expressed concern about the impact of the bid on competition, among other things.

Perhaps the most interesting feature of the application was the means by which the Director concluded that the thresholds in the prenotification provisions of the *Act* had been exceeded. One of the thresholds which must be exceeded in the legislation is that the combined assets or revenues of the parties to the transaction, and their affiliates, must be greater than $400 million in Canada. CDC Life, by itself, had assets slightly in excess of $260 million dollars in Canada. The acquiror, Institut Mérieux, did not have any substantive assets in Canada. However, it was an affiliate of another French company, Rhône-Poulenc S.A., which owned slightly more than 50 percent of the shares of Mérieux. The assets of Rhône in Canada, comprising the assets of its subsidiary, Rhône-Poulenc Pharma Inc., were slightly less than $30 million in Canada. Together, therefore, the assets of the acquiree and the controlling shareholder of the acquiror were less than $300 million in Canada. However, Rhône-Poulenc is "controlled" by the French state. The Director's application did not specify the manner in which Rhône was controlled by the French state.

The basis on which the Director alleged that the transaction exceeded the $400 million in assets in Canada was the inclusion, for the purpose of that threshold, of the assets in Canada of the Banque Nationale de Paris (Canada) and Crédit Lyonnais Canada, both of which are also controlled by the French state. The two French banks each had assets in Canada of more than $1 billion. The affidavit filed on behalf of the Director indicated that these assets should be included since Mérieux was affiliated with the two banks and all three were ultimately controlled by the French state.

In order for this theory to be sustained under the *Act*, it would be necessary to allege that the French state was a person within the meaning of the *Act* and could be a linkage for the purpose of determining affiliation. The affidavit filed on behalf of the Director did not define the "French state" and did not detail the manner in which the French government controlled the various government entities.

It is interesting to note that a similar theory could not be used to affiliate various Crown corporations in Canada since ss.80(2) of the *Competition Act* states that one corporation is not affiliated with another corporation "by reason only of the fact that both corporations are controlled by Her Majesty in right of Canada or a province."

Since the provisions of the legislation do not

deal specifically with corporations controlled by foreign governments, the Director presumably was operating on the theory that a foreign government can serve as the person to link affiliated commercial enterprises. The question whether the French government could have relied on a sovereign immunity defence to exclude the application of Canadian legislation to its state-controlled corporations was not addressed in the Director's application. Neither was the question whether the commercial nature of the corporations would alter the argument of sovereign immunity under the Restrictive Sovereign Immunity legislation the Canadian government has enacted to deal with commercial activities of foreign states in Canada. *L.A.W.H.*

## UPDATE ON CONSTITUTIONAL CASES

The Supreme Court of Canada heard argument recently in two important cases concerning the constitutional validity of section 31.1 of the *Competition Act.* The cases of *General Motors of Canada Limited* v. *City National Leasing Limited* and *Québec Ready Mix Inc. et al.* v. *Rocois Construction Inc. et al.* were heard together as they dealt with essentially the same issues. The court has not, as yet, delivered its decisions in these cases.

In the *City National Leasing* case, the appellant, General Motors, argued that section 31.1 must be considered both as it stands alone and as part of a legislative scheme involving enforcement of the *Combines Investigation Act.* The thrust of the appellant's argument was that section 31.1 is simply a matter of property and civil rights and, therefore, strictly within the legislative jurisdiction of the provincial legislatures under subsection 92(13) of the *Constitution Act, 1867.* Section 31.1 is merely a private civil remedy for business injury, they argued, and is not legislation designed to regulate trade and commerce.

For it to qualify as part of a regulatory scheme under the federal trade and commerce power, the appellant argued, section 31.1 must involve the use of the government's executive and administrative machinery. However, section 31.1 is aimed solely at regulating the ethical conduct of business people and the private contracts they have entered into for the benefit of a single business competitor. The absence of any administrative control by government over the disposition of private complaints in private litigation prevents section 31.1 from being considered part of a national regulatory scheme. The appellant argued, furthermore, that the Director of Investigation and Research and the Attorney General of Canada can "easily and effectively" enforce the provisions of the *Combines Investigation Act* without section 31.1.

The appellant argued also that section 31.1 is not "necessarily incidental" to the regulatory scheme embodied in the *Combines Investigation Act.* It was suggested that the section is not necessary to prevent the essential legislative purpose of the *Act* from being defeated. Section 31.1 also cannot be supported by the federal government's criminal power. The *Act*, the appellant argued, is properly characterized under the criminal law power alone. The federal government could, if it wished, enact legislation providing compensation to victims under the *Act* if its sole objective was to ensure that particular businesses injured by violations of the *Act* received compensation. By disguising section 31.1 as an exercise of the federal trade and commerce power, the appellant argued, the federal government has made a colourable attempt to evade the legislative jurisdiction of the provinces in the property and civil rights area.

The respondent, City National Leasing, argued that section 31.1 is directed at the regulation of anticompetitive trade practices in general, and is *intra vires* Parliament under subsection 91(2) of the *Constitution Act, 1867.* The respondent also submitted that the *Combines Investigation Act* as a whole contains a regulatory scheme, the object of which is to promote and enforce competition throughout Canada, and that section 31.1 is an integral part of that scheme. In response to the appellant's main argument, the respondent argued that even if it is considered alone, section 31.1 is valid under subsection 91(2) as legislation directly related to "the general regulation of trade and commerce affecting the whole Dominion" under the second branch of the *Parsons* case. Section 31.1, it was argued, does not create a general action for damages, but is directed at the regulation

of anticompetitive trade practices through the means of a civil remedy. Furthermore, it is of paramount authority even if it incidentally infringes upon matters assigned to provincial legislatures.

The respondent also argued that section 31.1 is part of a regulatory scheme, the purpose of which is to deter unfair competitive practices throughout Canada. The *Combines Investigation Act* sets out a "complex administrative machinery" and a "flexible repertoire of remedial responses to enforce the policies underlined in the *Act*." These remedies include criminal sanctions, civil suits, interim injunctions and orders of the Restrictive Trade Practices Commission (RTPC) prohibiting various anticompetitive practices. The respondent argued that section 31.1 is an intricate part of this regulatory scheme. It was pointed out that civil law suits are a well-established part of the regulation of anticompetitive practices in many other countries, including the United States, Australia, West Germany, Switzerland, Spain and France.

The respondent also argued that the *Act*, as a whole, is within a legislative competence of Parliament under subsections 91(2) and 91(27). The *Act* as a whole satisfies all of the indicia set out by Mr. Justice Dickson, as he then was, in the *Canadian National Transportation* case as a valid exercise of subsection 91(2). Furthermore, the respondent argued, there is a rational, functional connection between a civil remedy for anticompetitive trade practices and the rest of the *Act* which is directed at the regulation of anticompetitive practices in Canada.

In *Québec Ready Mix et al.* v. *Rocois Construction Inc. et al.*, the appellant, Québec Ready Mix, argued that paragraphs 31.1 (1)(a) and (3) are *ultra vires* the Parliament of Canada and are not authorized by subsections 91(2) or 91(27) of the *Constitution Act, 1867*. With respect to the criminal law power, the appellant argued that section 31.1 is a civil remedy of purely local character, and not legislation directed at the maintenance of order, public security or the suppression of criminal activity.

The appellant argued also that section 31.1 is not justifiable under the peace, order and good government power of Parliament. In this respect, section 31.1 does not qualify, they argued, because it is not intended as a response to an emergency situation, and it falls solely within categories of subjects assigned exclusively to the provincial legislatures under subsections 92(13) and 92(16).

Paragraph 31.1(1)(a) is also not justifiable under the federal trade and commerce power, suggested the appellant, because it is not necessarily incidental to an integrated scheme of regulation of the economy as a whole. Furthermore, paragraph 31.1(1)(a) is not a part of the administrative mechanism necessary for enforcement of the *Combines Investigation Act*. It stands alone from the other remedies in the *Act*. The appellant argued further that the civil remedy provided in paragraph 31.1(1)(a) is there exclusively for private parties, and neither the Director, the Department of Consumer and Corporate Affairs, the Attorney General of Canada nor the RTPC have the ability under section 31.1 to provide compensation to victims. The appellant concluded that paragraph 31.1(1)(a) is not absolutely necessary for the functioning of the enforcement provisions of the *Act*, is not justified under the criteria set out in the *Canadian National Transportation* case, and is not a valid exercise of the federal government's trade and commerce power.

In a lengthy submission on behalf of the respondent, the Attorney General of Canada submitted that federal regulation of competition is constitutionally valid as an exercise of Parliament's exclusive authority over the general regulation of trade and commerce, and that the validity of section 31.1 must be determined, not in isolation, but in the context of the *Act* as a whole. Section 31.1, the Attorney General argued, is an inextricable part of the regulatory scheme set out in the *Act* and as such is valid as an exercise of the federal trade and commerce power. The scheme of the *Combines Investigation Act* is grounded, in part, in Parliament's criminal law power, but its broad sweep rests also on the general trade and commerce power. The *Act* meets the indicia laid out by Dickson, J., as he then was, in the *Canadian National Transportation* case.

The Attorney General argued further that section 31.1 is an integral part of the regulatory scheme established by the *Act*. Canadian courts have consistently upheld Parliament's jurisdiction to provide civil remedies as part of legislation

which itself was valid under federal heads of power. Examples include *Multiple Access Ltd.* v. *McCutcheon et al.* Furthermore, section 31.1 is part of a larger scheme to regulate competition, having a rational, functional connection with that scheme. There is no constitutional reason why Parliament cannot create civil remedies to enforce federal legislation. Indeed, Part IV of the *Act* contains additional remedies enforceable by various authorities in a variety of forums.

The Attorney General also argued that section 31.1 does not create a general private action for damages, but is limited to violations of the provisions of Part V of the *Act* and to violations of orders issued by the RTPC. Therefore, the civil action for damages provided by section 31.1 is clearly as integral a part of the legislative scheme regulating competition throughout Canada as the criminal or administrative provisions of the *Act*. The Attorney General submitted, in conclusion, that section 31.1 is not an isolated provision with an entirely local flavour, but rather, is part of a national regulatory scheme and is applicable to a limited and specific range of anticompetitive conduct which has implications reaching beyond merely local concerns.

The respondent, Rocois Construction, also argued that section 31.1 is a necessarily incidental part of a regulatory scheme adopted by Parliament for the regulation of competition within the national economy. Furthermore, it has a rational and functional connection with the scheme of the *Combines Investigation Act*.

The decisions of the Supreme Court of Canada in these cases are eagerly awaited. This is the first time that the private civil action for damages in section 31.1 of the *Competition Act* will be considered by the Supreme Court. These cases are also significant because they represent the first time that the Supreme Court will have to address head on the extent of the federal government's economic regulatory power under subsection 91(2) of the *Constitution Act, 1867*. The decisions in these cases will have obvious precedential value for any future challenges to the federal government's free trade legislation.

*D.P.S.*

## NOVA ACQUISITION OF POLYSAR CLEARED BY DIRECTOR

On May 5, 1988, the Director of Investigation and Research, Calvin S. Goldman, announced that after considering the proposed acquisition by Nova Corporation of Alberta of a 25 percent interest in Polysar Energy & Chemical Corporation, he had decided not to apply to the Competition Tribunal, at that time, to prevent the acquisition. Since the time of Mr. Goldman's announcement, Nova and Polysar have reached an agreement whereby Nova will obtain a majority interest in Polysar.

From his press announcement, it is clear the Director has been conducting an inquiry into the acquisition. It is believed that this inquiry was commenced, at least in part, by the filing of the six-resident complaint on behalf of Dupont of Canada. Dupont has been publicly critical of the acquisition since it would create a monopoly in the production of ethylene in Canada. Mr. Goldman announced that his inquiry will be continuing, and he pointed out that the merger provisions of the *Competition Act* provide a three-year statutory limit for the Director to apply to the Competition Tribunal for an order.

While Nova and Polysar are major participants in the Canadian petrochemical industry, apparently their only common activity is in the production of ethylene. Ethylene is used as a feed stock for the manufacture of products such as polyethylene and polystyrene.

The Director stated that his present expectations about the competitive impact of the transaction were affected by a number of considerations. Among these was the fact that there are long-term contractual arrangements for the purchase of ethylene and the Director was of the view that the merger would not likely affect competition in this product for many years to come.

The Director's press release stated that other factors will be closely monitored, including:

> ...possible changes in Alberta Government policy regarding the development of the province's petrochemical industry, including the restrictions on shipments of ethylene from Alberta; changes in the economics of transporting ethylene on the Cochin Pipeline; the possibility for new entry or

the expansion of existing ethylene production facilities in Ontario or in Alberta; and the degree to which Nova exercises market power as the result of the acquisition with respect to its customers or competitors.

The Director also noted that the petrochemical derivative markets are "North American" in scope and very competitive. The Director, therefore, believes the implementation of the *Free Trade Agreement* between Canada and the United States should have a positive effect on competition and lessen the concern about the particular transaction under review. The Director stated that: "The impact of the *Free Trade Agreement* on this acquisition will also be monitored...."

The Director's decision is of precedential value in that it required an interpretation of "significant interest" in the definition of a merger contained in s.63 of the *Competition Act*. Section 63 defines a merger to mean the acquisition or establishment of "control over or significant interest in the whole or a part of a business of a competitor, supplier, customer or other person."

In this case, at least initially, Nova was seeking to acquire only 25 percent of Polysar. It was also seeking to have board representation. It was clear that Nova would not, through the acquisition of 25 percent, obtain *de jure* control of Polysar. The question remained, however, whether the acquisition of the 25 percent interest constituted a "significant interest" in Polysar. Mr. Goldman, in making his announcement with respect to the transaction, indicated that, in his opinion, the 25 percent interest as well as board representation did meet the test of being a "significant interest" under the merger definition. *L.A.W.H.*

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## WESTERN TRUCKING CASE RESULTS IN PROHIBITION ORDER

One of the longest proceedings in the history of competition legislation in Canada came to an end on the March 29, 1988, when an order of prohibition was entered against a number of trucking firms and the Western Trucking Association under ss.30(2) of the *Competition Act*.

The firms had been charged with violations of the conspiracy section of the law. The inquiry on which the charges were based had commenced in the 1960's. Following the laying of the charges, a number of legal challenges to the proceeding had been brought by the defendants. Perhaps the most notable of these was the application to deny the authority of the federal Attorney General to prosecute the case in Alberta. The Supreme Court of Canada finally resolved that issue in a decision which clearly established the right of the federal Attorney General to prosecute any criminal offence, in addition to the rights of the provincial Attorneys General. Three judges of the Supreme Court in that decision also found that federal competition legislation could be sustained under the general trade and commerce power of the federal government.

To bring the matter to an end, the respondents consented to the order issued under ss. 30(2). Orders under that provision of the law do not require the accused to plead guilty.

The substantive terms of the prohibition order include provisions prohibiting the respondents from agreeing with any other motor carrier to:

a) fix or co-ordinate single line rates in the market;
b) enforce adherence to single line rates in the market as published by the Western Tariff Bureau or any other motor carrier tariff bureau or motor carrier industry association;
c) develop, adopt or utilize any policy, plan or program to respond in any specified way to rates established by any motor carrier operating in the market;
d) attempt, directly or indirectly, by threat, promise or any like means, to influence upward or to discourage the reduction of, the price at which any other motor carrier supplies or offers to supply single line services in the market or;
e) restrict or impede in any manner the entry of any motor carrier competitor or potential motor carrier competitor in the market.

An additional provision of the prohibition order prohibits each of the respondents from using the Western Transportation Association, or any other motor carrier industry association, for the purpose of signalling to another motor carrier competitor an intention to adopt a single line rate prior to the adoption of that rate, unless such notification is made available to the public by

some other means. It also prohibits the taking of any discriminatory action against another motor carrier because of any rate offered by that other carrier.

The prohibition order specifically addresses the activities of the Western Transportation Association, its officers and employees, and prohibits them from:

a) initiating tariff rate proposals, docketing its own tariff rate proposals or making any recommendations whether to adopt, reject or otherwise dispose of tariff rate proposals before the Western Transportation Association applicable to the market;
b) initiating or developing any collective response among the members of the Western Transportation Association to rates proposed or charged by any motor carrier operating in the market.

The order specifically indicates that it is not intended to prohibit agreements among any of the respondents or other motor carriers whose sole purpose is:

- to provide interline services or rates;
- to prohibit any act or thing expressly authorized by valid federal or provincial legislation or any regulatory authority created under such legislation; or
- to prohibit two or more motor carriers from jointly opposing applications before a motor transport board or commission.

These latter two exclusions clearly permit the respondents to jointly appear before regulatory authorities where, for example, that board was considering an application for entry by another carrier.

The order also contains provisions dealing with continuing monitoring and compliance by the respondents and their employees.

Since the terms of the order differentiate between single line rates and interline rates, the order contains a definition of those terms. A single line rate is defined to mean:

> a rate proposed or offered by a single motor carrier that is applicable only over a route in the market for which the transportation is to be provided solely by that motor carrier.

An interline rate is defined to mean:

> a rate agreed to by two or more carriers for the movement of general merchandise over a continuous route, different portions of which are to be serviced by each of those carriers.

The order is of considerable precedential value to truckers generally in that it, albeit in somewhat vague language, sets out areas of activity by motor carriers, and tariff bureaux in particular, that the competition authorities would attack. It clearly does not prohibit agreements with respect to interline rates and focuses its attention on collective activity with respect to single line rates. The provisions with respect to the permissible activities of the Western Trucking Association are not dissimilar to those adopted in the United States for the tariff bureaux following deregulation of the trucking industry there. What the order does not do is state the extent to which collective activity or price signalling is permissible to the activities of trucking tariff bureaux. *L.A.W.H.*

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## INVESTIGATION PENDING IN BANK AFFINITY CARDS CASE

The Canadian banking community is split over whether or not to authorize the issuance of affinity credit cards, bearing the names and logos of special interest groups such as universities, unions, and other associations. Affinity cards are big business in the United States where there are no restrictions on the use of affinity groups' names and logos on Visa, Mastercard and other credit cards. In Canada, Mastercard's issuing financial institutions are free to link up with other organizations to provide affinity cards. For example, the Bank of Montreal has affinity card programs with the University of Manitoba, Queen's University and Ducks Unlimited, a non-profit organization dedicated to the preservation of waterfowl habitat. Royal Trustco has a very successful relationship with Canadian Airlines, and Canada Trustco Mortgage Company of London, Ontario, has an affinity card program with the University of Western Ontario.

Affinity groups generally receive some benefits from their association with credit card issuers. For instance, university alumni associations often receive donations from their issuing financial institutions based on the number of cards issued and the transactions for which they are used.

Cardholders of Royal Trustco's Canadian Airlines' Mastercard receive frequent flyer points for signing up for a card and for every transaction for which it is used.

All financial institutions issuing Visa cards are members of the Canadian Bank Card Association (CBCA). Its members are prohibited, by an association by-law, from using the names or trade marks of non-financial institutions in their card designs. CBCA by-laws can be changed only by a unanimous vote of the members. A dispute has arisen within the CBCA as a result of the Toronto Dominion Bank's desire to issue affinity cards in an effort to enhance its market share. The Bank of Nova Scotia has also expressed interest in entering the affinity card market, however, its officials believe that Scotiabank could issue affinity cards without violating the CBCA by-law. The Royal Bank, in particular, and the Canadian Imperial Bank of Commerce are not interested in issuing affinity cards at this time.

The Toronto Dominion Bank sought and received an opinion from the Director of Investigation and Research concerning the CBCA's prohibition of the use of affinity cards. However, the Director's office has not disclosed publicly the content of the Director's opinion or whether or not a formal investigation has commenced. Reports in the press indicate that the Director has told the Toronto Dominion Bank that he will investigate other Visa issuing banks if they do not lift their restrictions on the use of affinity cards. The Toronto Dominion Bank is expected to take action soon to release its first affinity card. *D.P.S.*

## CONTROVERSY SURROUNDS APPLICATION OF COMPETITION ACT TO BANKS

The recent debate surrounding the practices of banks with respect to service charges and consumer services has raised the question of the application of provisions of the *Competition Act* to joint agreement among banks. This debate, which has largely taken place in hearings before the House of Commons Standing Committee on Finance and Economic Affairs, has not only concerned provision of information to consumers and the handling of consumer complaints and inquiries, but also the fees charged for certain bank services, as well as whether any fee should be charged at all for particular services.

In the amendments to the *Competition Act* 1986, the provisions with respect to agreements and arrangements among banks, which had previously been included in the *Bank Act*, were transferred to the *Competition Act*. They are now contained in s.33 of that *Act*.

The terms of s.33 make it illegal for any bank to enter into an agreement or arrangement with another bank with respect to, among other things, the amount of any charge for a service provided to a customer, or the kind of service to be provided to a customer. The offence created in s.33 is a *per se* offence in that it does not require proof of an undue effect on competition as is the case with respect to conspiracies in other industries. There are certain exceptions to the blanket prohibitions contained in s.33, but the prohibitions generally do not encompass agreements which would affect the price and nature of services provided to customers. As a result, it would appear that any agreement between two banks either jointly to agree as to services they would provide consumers or the level of any service charge would be *per se* illegal. The Canadian Bankers' Association had indicated that the *Competition Act* was an important factor in determining what could be jointly undertaken by banks in Canada.

In response to the comments made by the Canadian Bankers' Association to the Commons Committee, Mr. Harvie Andre, the Minister of Consumer and Corporate Affairs, wrote a letter to Mr. Robert MacIntosh, the President of the Canadian Bankers' Association and issued an accompanying press release. In his letter Mr. Andre stated that he believed there were ways the banking industry could help consumers without contravening the *Competition Act*. He stated:

> For example, interbank initiatives to better inform consumers by way of the standardization of banking terms, the adoption of plain language contracts and improved disclosure of service charge information...could be undertaken without violating the law.

He further added:

> Other areas that you might wish to consider would be the development of a code of ethics with respect to the handling of consumer inquiries and complaints, and access to banking services for the disabled.

Mr. Andre's suggestions clearly are of a different nature and quality than agreements among banks with respect to charges and the services to be provided. His letter and the accompanying press release did not directly address the question whether joint agreements with respect to these matters were permissible under the law. However, his press release did indicate that if the Bankers' Association approached the Director and the Director had any concern with respect to their proposed activities, Mr. Andre:

> ...would be prepared to explore ways to remove legal impediments to particular worthwhile interbank agreements with his colleague, the Minister of Finance.

Presumably, the removal of any such legal impediments would have to include legislative or regulatory action, since the provisions of s.33 of the *Competition Act* seem clear and unequivocal.

To the knowledge of the *CCPR*, Mr. Goldman, the Director of Investigation and Research, has made no public comment on his interpretation of s.33 or the *Competition Act.* *L.A.W.H.*

## FREIGHT FORWARDERS CASE COMES TO AN END

Previous issues of the *CCPR* have reported on the legal action brought by certain freight forwarders subject to an inquiry under the *Competition Act* with respect to the Director's practice of keeping copies of seized documents without a retention order, and more generally with the requirements under the *Act* with respect to retention orders. At the lower levels, the Ontario courts had sustained the Director's position.

The parties under investigation sought leave to appeal the decision of the Ontario Court of Appeal, which was reported on in the March issue of the *CCPR*, to the Supreme Court of Canada. The Supreme Court of Canada refused to grant leave, bringing the case to an end, sustaining the decision of the Court of Appeal and upholding the Director's practices. *L.A.W.H.*

## MISLEADING ADVERTISING REVERSE ONUS PROVISION STRUCK DOWN BY ONTARIO COURT

In a recent decision of the Ontario District Court, Rogers, J. found that paragraph 36(1)(b) of the *Competition Act*, which requires an accused person to bear the burden of proof that a product performance claim is based on an adequate and proper test, violates sections 7 and 11(d) of the *Canadian Charter of Rights and Freedoms*. In *R. v. Kassabian*, the accused was charged with failing to conduct an adequate and proper test with respect to certain performance claims made about the efficacy of a fuel filter for use in motor vehicles. Counsel for the defence argued that paragraph 36(1)(b) contains a reverse onus provision imposing a legal burden on the accused to prove that any test performed prior to making a representation to the public was adequate and proper. The Crown had argued that paragraph 36(1)(b) merely shifted the evidentiary burden.

Rogers, J. held that paragraph 36(1)(b) violated section 11(d) of the *Charter* because it required an accused to disprove on a balance of probabilities the existence of a presumed fact which is an important element of the offence. He said:

> If an accused bears the burden of disproving, on a balance of probabilities, an essential element of the offence, it would be possible for a conviction to occur despite the existence of reasonable doubt.

Rogers, J. held further that the paragraph could not be upheld as a reasonable limit under section 1 of the *Charter*. There was no rational connection, he stated, between the requirement that the accused prove that an adequate and proper test had been conducted and the objective of protecting society from the evils associated with promoting one's business interests by making a representation to the public not based on a proper and adequate test.

Rogers, J. also found that paragraph 36(1)(b) violated section 7 of the *Charter* and held that the impact of this requirement, too, was out of

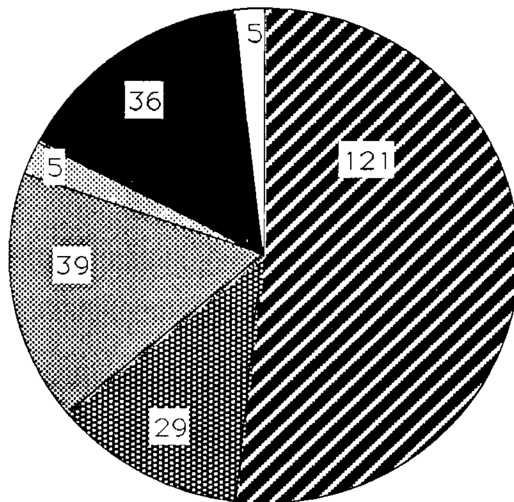
proportion to the public policy objective it was intended to fulfil.

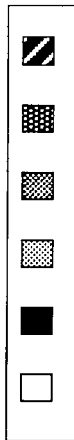
This case is significant in that as a decision of the District Court of Ontario, it is binding in any future provincial court prosecutions involving paragraph 36(1)(b). It is expected that the Director of Investigation and Research will launch an appeal of the *Kassabian* decision. *D.P.S.*

## MERGER STATISTICS UPDATE

The statistics maintained by the Merger Branch of the Bureau of Competition Policy show that, as of June 23, 1988, there were:

- 233 Mergers examined in a significant fashion
- 121 Closed conclusion of no issue under the *Act*
- 29 Proceeded under Program of Compliance
- 39 Proceeded under Advance Ruling Certificate
- 5 Parties abandoned merger as a result of Director's position
- 36 Examinations ongoing
- 5 Applications to Tribunal



Closed conclusion of no issue under the *Act*

Proceeded under Program of Compliance

Proceeded under Advance Ruling Certificate

Parties abandoned merger as a result of Director's position

Examinations ongoing

Applications to Tribunal