CANADIAN COMPETITION LAW DEVELOPMENTS

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ROLE OF INTERVENORS CIRCUMSCRIBED IN COMPETITION TRIBUNAL DECISION

On July 18, 1988, Mr. Justice B. L. Strayer, the presiding judicial member of the Competition Tribunal, rendered an important precedential decision with respect to the role of intervenors in proceedings before the Tribunal.

The matter arose in respect of the Director's application to dissolve the merger between the airline computer reservation systems of Air Canada and Canadian Airlines International Ltd. That application was filed on March 3, 1988. Subsequently, the Consumers' Association of Canada (the CAC), American Airlines, Inc. and Wardair Canada Inc. sought leave to intervene in the proceedings pursuant to subsection 9(3) of the *Competition Tribunal Act*.

In rendering the Tribunal's decision, Mr. Justice Strayer not only set out important principles with respect to the right of intervention, but also dealt with a number of general issues related to the Tribunal's function in the review of mergers.

The first issue addressed by the Tribunal was the meaning of the specific authority to intervene contained in subsection 9(3) of the *Competition Tribunal Act*. That subsection states:

> Any person may, with leave of the Tribunal, intervene in any proceedings before the Tribunal to make representations relevant to those proceedings in respect of any matter that affects that person.

Neither the Director nor the respondents in the proceedings objected to the intervenors being granted the right to participate as such. Nevertheless, the final decision to allow interventions clearly rests with the Tribunal. In considering whether to grant leave to intervene, Mr. Justice Strayer stated:

> In doing so it is important to note that subsection 9(3) imposes a very low threshold for the granting of such leave. The subsection does not require that such "person" have an "interest", whether direct or indirect. By implication it requires only that there be some matter involved which "affects that person", as it is only in respect of such a matter that an intervenor can "make representations".

The Tribunal considered the various matters which might affect the proposed intervenors and found that they all had issues which clearly fell within the ambit of matters which "affected" them. Mr. Justice Strayer went on to consider, however, whether the matters which might affect the intervenors would "legitimately be within the purview of Tribunal consideration." He stated:

> It should be noted, however, that some of the matters referred in the requests for intervention may not be within the proper purview of the Tribunal.
>
> While it would be premature to seek to define at this time the relevance of such issues for the Tribunal, it is important to underline that the Competition Tribunal has a particular responsibility to deal with competition issues and not to oversee the furtherance of a variety of public policies howsoever worthy they may be.

Mr. Justice Strayer concluded his consideration of this issue by saying that the primary function of the Tribunal as assigned it by Parliament is that of "protecting and furthering competition with due regard to possible efficiency gains which may result from a merger. These are essentially economic goals."

Mr. Justice Strayer then turned to the question of the role intervenors should be allowed to play in the proceedings. The role sought by the CAC and American Airlines was very broadly cast. They wanted to be able to take part in the discovery process, to be able to call evidence at the hearing,

to cross examine the witnesses of other participants and to present final argument. Wardair did not seek to participate in discovery proceedings but to perform all of the other roles sought by the CAC and American Airlines.

Considering the scope of intervention, the Tribunal decided that intervenors cannot be a party to proceedings under the merger provisions. The Tribunal analysed the provisions of the legislation and came to the conclusion that the legislation clearly contemplated that only the Director and participants to a merger may be parties to proceedings before the Tribunal. Mr. Justice Strayer felt that the role requested by the CAC and American Airlines would be tantamount to making them a party. In particular, he noted that seeking to take part in the process of discovery is something usually reserved only to parties to litigation.

The Tribunal then turned to the more difficult issue of the meaning of "representations" in subsection 9(3) of the *Competition Tribunal Act.* He noted that the intervenors had submitted voluminous arguments as to why they should be allowed to call evidence and cross examine witnesses, citing jurisprudence and practice with respect to other administrative tribunals. However, Mr. Justice Strayer noted:

> Unfortunately most of this debate is irrelevant to the determination of what the Competition Tribunal is authorized by its own particular statute to allow. No truly similar legislation was brought to our attention in respect of other tribunals.

Mr. Justice Strayer concluded as follows:

> Subsection 9(3) of the *Competition Tribunal Act* authorizes any person, with leave of the Tribunal, to "intervene...to make representations...." The equivalent expression in the French version is "intervenir...afin de présenter des observations...." The first point to note is that the authority is given to intervene for a particular purpose only, and one therefore cannot derive any broader authority by reference to other meanings which the term "intervene" may have in other contexts. The term "to make representations" in normal English usage would suggest the presentation of argument; that is, persuasion rather than proof. If there is any lingering ambiguity of this term in the English version, it appears to be clarified in the French version which states the purpose of a permitted intervention as "afin de présenter des observations". The term "observations" is most commonly applied to the presentation of comments or argument before a court or tribunal.

Mr. Justice Strayer was further strengthened in his conclusion by the distinction between the language in subsection 9(3) of the *Competition Tribunal Act* and the language of sections 97 and 98 of the *Competition Act.* Those sections of the *Competition Act* permit the Director to participate in proceedings before administrative tribunals. The language used in those sections is "make representations to and call evidence before the Board...." In other words, they clearly make a distinction between representations and the calling of evidence.

In considering whether there were other more general reasons to allow a broader intervention, Mr. Justice Strayer reviewed the functions of the Tribunal in adjudicating merger cases. His comments on this process are important as they illustrate the Tribunal's general view of its function. He stated:

> It would appear from this that Parliament has assigned to the Tribunal the determination of an essentially justiciable question rather than a political question. The issues for determination under sections 64 and 65 are similar to issues which courts deal with regularly. Even section 68, requiring a balancing by the Tribunal of loss of competition *versus* gains in efficiency, involves a function not dissimilar to that now performed by courts in relation to many provisions of the *Canadian Charter of Rights and Freedoms.*

The Tribunal also contrasted the provisions of the current *Act* with those in the previous *Combines Investigation Act* with respect to mergers. In commenting on the change from a test of "detriment to the public" to "lessening of competition," the Tribunal concluded that:

> It would appear that Parliament in adopting the present section 64 was seeking to define more precisely an issue which would be more amenable to judicial-type determination.

Mr. Justice Strayer also found that the inclusion of judges of the Federal Court on the Tribunal underlined the justiciable nature of the questions the Tribunal has to determine. He noted that the presence of non-judicial members did not necessarily mean that the issues were any less justiciable. He stated that under the legislation it is expected that the Tribunal will determine issues:

> ...essentially on the basis of its findings of law and fact and not on the basis of some broad concept of public policy which the Tribunal may develop. This stands in contrast to the role of many administrative tribunals which are expected to give meaning to such broad concepts as "public convenience and necessity." It is also significant that unlike certain other federal tribunals, the decisions of the Competition Tribunal are in no way subject to approval, rescission, revision, or reference back to the Governor in Council.

Mr. Justice Strayer found that the justiciable nature of the questions assigned to the Competition Tribunal encouraged a narrow interpretation of subsection 9(3). This was so primarily because in the legislation Parliament has created a *lis* between the Director and the parties to the merger. In such a situation he found that it would not be unreasonable to limit the role of intervenors.

Mr. Justice Strayer also considered subsection 9(2) of the *Competition Tribunal Act* which states that proceedings before the Tribunal are to be conducted:

> ...as informally and expeditiously as the circumstances and considerations of fairness permit.

In considering this subsection Mr. Justice Strayer stated:

> The requirement for expeditious determination of questions under Part VII is particularly significant in relation to mergers. The Tribunal can take notice of the fact that merger negotiations are by their nature frequently of a transitory nature requiring relatively quick decisions and action. If the Tribunal is to be relevant to the control of mergers, as Parliament obviously thought it should be, it must be prepared and able to act as quickly as possible in reaching a decision on the permissibility of any given merger. A prolongation of Tribunal proceedings, by the multiplication of witnesses and of cross-examination through the participation of intervenors with such rights, can only serve to delay decision-making by the Tribunal and thus discourage resort to it.

Mr. Justice Strayer also did not think that the interests of intervenors would necessarily be ignored. He noted that if intervenors had issues or evidence that would be relevant and helpful to any party to a case before the Tribunal, presumably that party would take steps to have it brought to the Tribunal's attention. But he stated this in the context that it must be the Director and the other party to the litigation which ultimately will determine the issues to be brought to the Tribunal's attention.

As a final matter, Mr. Justice Strayer commented on the utility of restricting intervenors to making argument only. He noted that Attorneys General participate in important constitutional issues at the appeal level frequently and that this has proven to be a useful role. He, therefore, did not think that the presentation of argument only was of no importance.

The Tribunal concluded by granting leave to the CAC, American Airlines and Wardair to intervene in the proceedings to present argument in respect of any matter that affects them. They were also permitted to attend and present argument on all motions and at all prehearing conferences and hearings on any matter affecting them.

The decision of the Tribunal is a significant one not only with respect to the role of intervenors, but also with respect to how it views its functions under the legislation.

American Airlines has instituted an appeal of the Tribunal's decision to the Federal Court of Appeal. However, it is not expected that the appeal will interfere with the Tribunal's hearing of the matter on the merits, which is presently scheduled to commence in November, 1988.

L.A.W.H.

HOUSE COMMITTEE RECOMMENDS MAJOR CHANGES TO MISLEADING ADVERTISING PROVISIONS

The Standing Committee of the House of Commons on Consumer and Corporate Affairs in late June issued a report to the House with respect to misleading advertising. The report followed an extensive study of various federal provisions dealing with the subject of misleading advertising, but concentrated in particular on the provisions of the *Competition Act* since those provisions are the most general federal prohibitions against false and misleading advertising in the media.

In the course of its study and examination, the Committee heard from several trade associations and witnesses in Canada, including officials of the Department of Consumer and Corporate Affairs. It also visited the Federal Trade Commission (the FTC) in the United States, Congressional officials and Ralph Nader.

The report is generally very complimentary to the program and activities of the Marketing Practices Branch of the Bureau of Competition Policy. The Committee's report supports the sensible manner in which the Branch has undertaken its mandate. However, the Committee noted that it believes the Branch may require additional resources for certain of its activities.

The Committee made, in total, 33 recommendations with respect to the program, most of them supporting a more aggressive approach to dealing with misleading advertising claims at the federal level. These recommendations, in many respects, pick up suggestions for enhanced powers and flexibility, on the part of both government and consumers, first advanced in Canada and the United States in the late '60's and early '70's. Indeed, many of the recommendations are similar to those contained in reports prepared by the federal Department of Consumer and Corporate Affairs in 1976 as part of an earlier study of amendments to competition legislation.

There has been very little discussion of amendments to the misleading advertising law in recent years. This is undoubtedly due to a number of factors, perhaps not the least of which has been a general decline in "consumerism" in the last ten years. In addition, there has been a major retrenchment in programs to deal with misleading advertising in the United States and, indeed, some considerable criticism of the over-zealous, if not over-intrusive, activities of the FTC in the early 1970's.

An additional uncertainty which had been a factor in past consideration of unfair trade practice legislation was whether the federal government had jurisdiction to legislate in this area, other than by way of the criminal law. The two cases pending judgment by the Supreme Court of Canada dealing with the constitutionality of the civil damage provision of the *Competition Act* may help to clarify this situation. It would seem unlikely that the federal government would move more extensively to regulate misleading advertising and unfair trade practices until the Supreme Court has rendered its decisions in these cases.

The Committee's report does not deal at length with the constitutional difficulties in extending the range of techniques available to the federal government in this area. It does very strongly, however, adopt the view that penal sanctions are very often inappropriate for misleading advertising type offences and recommends the adoption of a series of administrative law type remedies. These clearly would not be supportable as criminal legislation. If the federal government, under the trade and commerce power, is able to legislate with respect to all manner of misrepresentation, as well as all manner of remedies for both the government and consumers directly, it would seem to allow the federal government to largely duplicate provincial legislation not only with respect to unfair trade practices, but more broadly with respect to the sale of goods.

Another recommendation of the Committee which will undoubtedly be controversial is the recommendation that the *Competition Act* be amended to incorporate a class action procedure for misleading advertising offences. It may be recalled that proposed federal legislation in the late 1970's included such a procedure. It was not carried forward in the amendments to the legislation passed in 1986. The development of class action procedures in Canada has certainly not kept apace with that in the United States. Neither has there been considerable debate in the consumer movement about the desirability of class actions in recent years.

Although the report makes most of its recommendations in the area of strengthening the provisions of the *Competition Act* and broadening their flexibility, it also pays considerable attention to self-regulation by the industry. The Committee adopts self-regulation as a valuable part of the control of misleading advertising. It also encourages the Director of Investigation and Research to become, in essence, the focal point of industry self-regulation. It encourages self-regulatory groups to bring possible violations of the law to the attention of the Director of Investigation and Research, something which heretofore has not generally occurred.

Overall, the Committee's recommendations, a complete copy of which appears at the end of this note, would, if adopted, represent an extremely aggressive and increased role for federal legislation with respect to misleading advertising and unfair practices. One has to question whether the present legislation is so inadequate that it requires such major revision and expansion. The Minister of Consumer and Corporate Affairs has not indicated the extent to which he intends to pursue the recommendations of the Committee. However, it is understood that the recommendations are under review and that work is underway in the Department to bring forward a series of amendments to the marketing practices legislation.

LIST OF RECOMMENDATIONS

Enforcement and Education

2.1 The Committee recommends that the Director of Investigation and Research through the Marketing Practices Branch adopt a more pro-active role in establishing programs for educating consumers and the business community about misleading advertising and deceptive marketing practices and that the Department of Consumer and Corporate Affairs direct additional financial and human resources to such programs.

2.2 The Committee recommends that the Director of Investigation and Research consider a multi-media approach to informing consumers and the business community about misleading advertising and deceptive marketing practices. In particular, the effective use of film, television and radio should be examined.

2.3 The Committee further recommends that, where appropriate, the Director of Investigation and Research undertake information and education programs as joint ventures with the business community, consumer groups and other organizations.

2.4 The Committee recommends that the Minister of Consumer and Corporate Affairs work with his provincial counterparts (a) to coordinate and enhance information and education programs on misleading advertising and deceptive marketing practices, (b) to develop effective complaint-handling procedures, and (c) to coordinate enforcement activities.

Industry Self-regulation of Advertising

3.1 The Committee recommends that the Director of Investigation and Research continue to encourage both industry and individual businesses to develop standards of practice and guidelines for accurate advertising.

3.2 The Committee further recommends that, where appropriate, the Director of Investigation and Research refer to the relevant self-regulatory body complaints about matters within the ambit of the various advertising self-regulatory codes and not within that of the misleading advertising provisions of the *Competition Act.*

3.3 The Committee recommends that the Director of Investigation and Research through the Marketing Practices Branch promote uniform definitions, criteria and standards among various advertising self-regulatory codes and act as a coordinator to ensure that this goal is achieved.

3.4 The Committee recommends that the Director of Investigation and Research request organizations charged with administering codes and guidelines on advertising standards and practices to report to him relevant information and data with regard to the administration of those codes and guidelines.

3.5 The Committee further recommends that any report made to the Director include information as to the number and type of complaints received, the action taken with respect to them, the names of persons against whom complaints have been sustained and whether decisions have been complied with.

Administrative Approaches to Consumer Redress

4.1 The Committee recommends that the criteria established in the *Competition Act* for obtaining an interim injunction be modified to allow such injunctions to be more readily available in misleading advertising cases. Consideration should be given to lowering the burden of proof, and establishing threat to the public interest or the creation of a *prima facie* case as grounds for obtaining an injunction.

4.2 The Committee further recommends that the Director of Investigation and Research be empowered to apply direct to a court for an injunction under the *Competition Act.*

4.3 The Committee recommends that the *Competition Act* be amended to allow a court, in proceedings connected with misleading advertising, to order an offender to disclose essential facts previously omitted from a representation concerning a product or business interest.

4.4 The Committee further recommends that the affirmative disclosure remedy referred to in recommendation 4.3 be available in connection with both consent agreements (see recommendations 4.7) and criminal proceedings.

4.5 The Committee recommends that the *Competition Act* be amended to allow a court, in proceedings connected with misleading advertising, to order an offender to issue a corrective advertisement. The court should have authority to prescribe the methods of making a corrective advertisement, as well as its content, form, frequency and duration.

4.6 The Committee further recommends that the corrective advertising remedy referred to in recommendation 4.5 be available in connection with both consent agreements (see recommendation 4.7) and criminal proceedings.

4.7 The Committee recommends that the *Competition Act* be amended to empower the Director of Investigation and Research to enter into consent agreements or assurances of voluntary compliance with advertisers whereby the latter agree to cease and desist from engaging in misleading advertising or deceptive marketing practices.

4.8 The Committee recommends that the Director of Investigation and Research be required to maintain a publicly available record of all consent agreements or assurances of voluntary compliance and that this record should show the numbers of such agreements, a summary of their contents, the names of the parties involved and whether compliance has occurred.

4.9 The Committee recommends that the Director of Investigation and Research develop and publish guidelines for the use of consent procedures in connection with misleading advertising and deceptive marketing practices offences.

4.10 The Committee recommends that the *Competition Act* be amended to require advertisers to have a factual basis for advertising claims prior to their dissemination.

4.11 The Committee further recommends that, pursuant to the legal requirement referred to in recommendation 4.10, the Director of Investigation and Research establish an advertising substantiation program together with appropriate enforcement practices and procedures.

4.12 The Committee recommends that the Director of Investigation and Research encourage advertisers to provide consumers with advertising claims substantiation data or, where appropriate, plain language summaries thereof.

4.13 The Committee recommends that the *Competition Act* be amended to include specific authority for the Governor in Council to make rules and regulations which would define or specify acts or marketing practices which are misleading or deceptive.

Class Actions and Other Forms of Consumer Redress

5.1 The Committee recommends that the *Competition Act* be amended to allow

persons who have suffered loss or damage as a result of misleading advertising or deceptive marketing practices to sue collectively as a class.

5.2 The Committee recommends that the *Competition Act* include a code or procedure for regulating the commencement, maintenance and conduct of class actions.

5.3 The Committee recommends that the Director of Investigation and Research be given statutory authority to initiate a substitute action on behalf of a class of consumers where it is in the public interest to do so.

5.4 The Committee further recommends that any substitute action procedure provide that consumers be compensated from the judgment awarded by the court.

5.5 The Committee recommends that with respect to misleading advertising or deceptive marketing practices offences, the *Competition Act* be amended to allow a court in criminal proceedings to order an offender to compensate persons who have suffered financial loss or damage as a result of the offender's conduct.

5.6 The Committee further recommends that the Director of Investigation and Research be empowered to require restitution to consumers as a term and condition of a consent agreement.

Particular Issues under the *Competition Act*

6.1 The Committee recommends that the Director of Investigation and Research review paragraph 36(1)(d) of the *Competition Act* in order to dispel the confusion about pricing that appears to exist in the marketplace, and, if necessary, seek appropriate amendments to the *Act*.

6.2 The Committee further recommends that in the course of his review of paragraph 36(1)(d) the Director consult with all interested parties.

6.3 The Committee recommends that the *Competition Act* be amended to increase the maximum fine that can be imposed in a summary conviction proceeding:

(a) under sections 36, 36.1, 36.3, 36.4, 37, 37.1 and 37.2 of the *Act* to $100,000, and

(b) under section 36.2 of the *Act* to $25,000.

6.4 The Committee recommends that the Director of Investigation and Research develop general sentencing guidelines relevant to misleading advertising and deceptive marketing practices offences.

6.5 The Committee recommends that the *Competition Act* be amended to include specific authority for the Governor in Council to make regulations, prescribing, among other things, the location, size, content, duration and form of correction notices.

L.A.W.H.

TRAILMOBILE UNDERTAKINGS REVISED

On July 11, 1988, the Director of Investigation and Research announced that he had accepted revised undertakings from the parties to the Trailmobile/Fruehauf trailer van manufacturing merger as a sufficient basis not to make an application to the Competition Tribunal for an order.

The undertakings flow from a restructured merger plan involving a full merging of the trailer manufacturing operations of Trailmobile and Fruehauf. The continuing company will then produce trailers under the Fruehauf name. The companies have given an undertaking to the Director to sell the Trailmobile name and associated intellectual property, including drawings and designs used in the manufacture of vans.

The initial merger proposal was found to be unacceptable by the Director because it involved the continuing operation of the two van businesses separately but under common ownership and direction, without the possibility of production, management, or marketing efficiencies thereby arising. Following Trailmobile's acquisition of Fruehauf in January the company submitted a revised proposal.

The Director has indicated that this revised proposal was accepted to a significant extent because it involved prospective efficiency gains through full business integration and also because economic conditions in the Canadian trailer van manufacturing sector had changed since the original proposal was made. These market changes include American highway trailer manufacturers beginning to establish a greater presence in the Canadian market, the increased value of the Canadian dollar relative to the American dollar (narrowing the cost differential between Canadian and American manufactured vans), and a significant downturn in the overall demand for vans leading to aggressive pricing on the part of suppliers. A final reason for accepting the proposal noted by the Director was the proposed implementation of the *Canada-U.S. Free Trade Agreement* which will reduce tariff and non-tariff barriers to Canada/U.S. trade in manufactured products.

This case illustrates the problems faced by the Bureau of Competition Policy in accepting post-closing merger undertakings. Unless such undertakings are formally adopted in a Consent Order approved by the Competition Tribunal, there is little constraint, once the deal has closed, against the parties proposing a substantially different set of undertakings to the Bureau of Competition Policy based on claims of substantially changed circumstances or the infeasibility of implementing the original undertakings.

There is little that the Bureau of Competition Policy can do but to review the proposed new undertakings with a view to negotiating a solution which least deviates from the outcome envisaged by the original merger undertakings. Apart from renegotiation, the only other option available to the Bureau if the original undertakings are not followed is to commence a formal proceeding for a divestiture order or an order requiring compliance with the original undertakings before the Competition Tribunal - an option that would entail considerable time and expense before reaching a conclusion over which period the merger would remain in effect.

J.F.B.

DIRECTOR ADDRESSES AMERICAN BAR ASSOCIATION MEETING

Calvin S. Goldman, Q.C., Director of Investigation and Research, addressed the annual meeting of the American Bar Association held in Toronto in August speaking about bilateral aspects of Canadian competition policy. The address compared and contrasted the various features of Canadian and U.S. antitrust law. It also emphasized the importance of the interlinks between the Canadian and American economies in the application of Canadian competition law.

The speech touched on the question of extraterritorial jurisdiction under Canadian competition legislation. Mr. Goldman stated that the 1985 Supreme Court of Canada decision, *Libman* v. *The Queen*,

> ...appears to widen the doctrine of territoriality by providing that a sufficient nexus may be established between an offence and Canada when merely an element of an offence is carried out in Canada.

He did not comment on whether the Supreme Court decision, in his view, incorporates the "effects" doctrine in Canada. A reading of the decision seems to imply that effects in Canada could provide the element of the offence necessary to found jurisdiction in some cases.

Mr. Goldman stated that, in his view, it would be easier to apply the civil provisions of the *Competition Act* extraterritorially than the criminal provisions. He stated that although the general rule in non-criminal statutes is the doctrine of territoriality, "the presumption of territoriality is somewhat easier to rebut than is the case in criminal law."

He noted that certain features of the *Competition Act* clearly contemplate extraterritorial application. In particular, he referred to two of the investigative provisions dealing with production of evidence and searches of computer records. He did not indicate whether either of the two specific provisions have yet been employed in an extraterritorial fashion since their enactment.

In a concluding comment, Mr. Goldman noted that the implementation of the *Canada-U.S. Free Trade Agreement* will require giving greater consideration to transborder pricing practices. He noted that the issue of the relationship between

domestic competition laws dealing with pricing and antidumping laws will be addressed under the *Canada-U.S. Free Trade Agreement* over the next five years.

L.A.W.H.

COMPETITION TRIBUNAL DISPLEASED WITH DELAYS BY COUNSEL IN RESERVEC CASE

In her opening remarks at the July 26, 1988, prehearing conference in the Reservec case, Madame Justice Reed cautioned counsel that the Tribunal was displeased that little could be accomplished at the session because counsel were not prepared. She noted that when the Competition Tribunal was created, one of the major concerns of the business community was that they would experience serious delays in proceedings before the Tribunal. Recognizing this concern, the Tribunal had tried to organize its practice and procedures to minimize delays and expedite disposition of cases brought before it.

Justice Reed cautioned that because the Director of Investigation and Research has been given a special status under the *Competition Act* to initiate and settle actions before the Tribunal, he must avoid any appearance of pressuring parties to settle and, if not successful in this respect, of delaying the proceedings. She was careful to note, however, that she was not suggesting that the Director had employed such strategy in the Reservec case.

The brunt of Madame Justice Reed's displeasure fell on counsel for the respondents in the case. Justice Reed commented that in May of this year, officials of the respondents were reported by the press to be annoyed that the hearing in the case would not be held until late summer, implying that the Tribunal could not hear the matter earlier. In fact, the delays were attributable to the parties and their counsel, said Justice Reed.

The Justice noted that in the first prehearing conference held on June 8, all parties agreed that the July 28 session would deal with issues regarding examinations for discovery, expert evidence, and a draft Agreed Statement of Facts which had been prepared by the Director. However, she noted that prior to the July 28 session, counsel for the respondents informed the Tribunal they were not yet ready to address the issues.

Madame Justice Reed dismissed suggestions that counsels' delay was attributable to the complexity of the case and volume of documents, noting that the case had been under examination by the Director for almost a year and there had been communication with both respondents. The Justice also observed that both the applicant and the respondents have the resources to deal with the case expeditiously. Counsel, she said, have a professional responsibility to adopt a schedule and stick to it.

The session then moved on to establish a new schedule for filings and exchanges of information among parties. With the hearing scheduled for November 15, 1988, additional prehearing conferences were set for Sept. 1 and Sept. 29, 1988.

At the prehearing conference held Sept. 1, 1988, it was agreed that the parties would provide estimates of the duration of the hearing, the number of witnesses they would call, the most expeditious and convenient means of treating exhibit evidence including consideration of advance filing of documents, and their view on the filing of memoranda of law and jurisprudence prior to the hearing. Witnesses for the respondents to be examined for discovery were identified and further progress was made on claims of privilege and confidentiality for certain documents. Finally, it was agreed that the fourth and fifth sessions of the prehearing conference procedure would be held on Sept. 29 and Oct. 27, 1988.

Air Canada and Canadian Airlines Seek Adjournment in Reservec Case

The fourth prehearing conference session in the Reservec case, scheduled for Sept. 29, 1988, was postponed until Oct. 13, 1988, at the request of the parties. The delay was sought as a result of new developments in the matter.

In a press release dated September 28, 1988, the GEMINI GROUP Automated Distribution Systems of Toronto, and PARS of Kansas City, Missouri, announced plans for their owners to become partners in an expanded computer

reservation system (CRS) organization. According to the release, the new partnership will become the largest operating, multi-hosted computer reservation system in the world, comprising over 3,500 GEMINI and more than 6,300 PARS travel agency locations.

Agreement in principle on combining the two CRS systems was reached in Toronto by GEMINI owners Air Canada and PWA Corporation (the parent of Canadian Airlines International), in conjunction with NWA Inc. (the parent of Northwest Airlines), and Trans World Airlines, co-owners of PARS. The parties announced that specific plans for marketing the new system will be disclosed later this year, subject to necessary regulatory approvals and execution of a formal agreement.

Under the new combined system, subscribing Canadian and U.S. travel agencies will be offered a combination of both the GEMINI and PARS products. By the second quarter of 1989, direct link access between the PARS and GEMINI systems will be available to Canadian and U.S. travel agencies. Cutover of Canadian travel agencies to the fully integrated system will commence in the fourth quarter of 1989, with a complete system conversion expected by the fourth quarter of 1990.

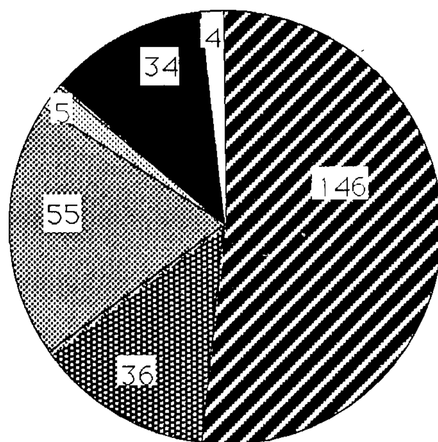
In April of this year, PARS was selected by ABACUS, the Asia-Pacific CRS owned by Singapore Airlines, Thai International, and Cathay Pacific Airways, as the primary software supplier for the ABACUS system. Upon conclusion of an agreement, it is anticipated that ABACUS carriers will also participate in the ownership of the partnership. The combination of GEMINI and ABACUS with PARS will provide a global CRS with coverage throughout Canada, United States, Asia, and Europe.

Integration of GEMINI, PARS, and ABACUS may strengthen the respondents' case that the relevant market for computerized reservation services is world-wide, not domestic. Certainly, the economic analysis, evidence, and witness line-up for both sides in a hearing of this case may be affected by this new development. A delay in the hearing date, perhaps until 1989, seems a definite possibility at this point.

E.A.M.

MERGER STATISTICS UPDATE

The statistics maintained by the Merger Branch of the Bureau of Competition Policy show that, as of September 29, 1988, there were:



280 Mergers examined in a significant fashion

- 146 Closed conclusion of no issue under the *Act*
- 36 Proceeded under Program of Compliance
- 55 Proceeded under Advance Ruling Certificate
- 5 Parties abandoned merger, in whole or in part, as a result of Director's position
- 34 Examinations ongoing
- 4 Applications to the Tribunal