

CANADIAN COMPETITION LAW DEVELOPMENTS

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HISTORICAL NOTE: 100th ANNIVERSARY OF CANADA'S COMPETITION LAW

1989 marks the 100th anniversary of Canada's competition law. The first Canadian anticompetitive legislation was introduced as a private member's bill in 1888 and was passed by Parliament in 1889 after considerable emasculation. Intended merely as a declaration of the existing common law on conspiracies and agreements in restraint of trade, it proved to be much more - or much less depending on one's point of view.

By 1888, the Conservative government of Sir John A. Macdonald had firmly embedded the assortment of protective tariffs and policies known as the "National Policy," ignoring the protests of the Liberal Party "free traders." But problems had surfaced. Business combinations sprouted in a wide variety of industries and public demand for countervailing action by the government of the day grew more strident. Despite Opposition charges that the National Policy had led directly to the existence of the problem, the Conservative majority supported a resolution in the House of Commons to establish a Select Committee to examine the "nature, extent and effect" of business combinations in Canada. A Conservative backbencher, N. Clarke Wallace, who had raised the original motion, was appointed Chairman of the Select Committee.

Approximately three months after its establishment, the Committee reported back to the House. The report, which ran 750 pages with 80 exhibits was tabled in the House on May 16, 1888. It concluded that the "injurious tendencies and effects...justify legislative action for suppressing the evils arising from these and similar combinations and monopolies." Although the Select Committee adopted the report

unanimously, it could not reach agreement on a bill which had been presented to it (apparently by Chairman Wallace) at its last sitting. Wallace decided to advance the bill on his own in the House of Commons after the Committee had reported.

On May 18, 1888, Mr. Wallace introduced a private member's bill that covered a wide variety of supposedly anti-competitive practices including "unreasonably enhancing the market price of any article or commodity which is an object of trade." The bill was supported by the Conservative government and was given First Reading, but died on the Order Paper at the end of the session.

A second attempt was made in February of the following year when Mr. Wallace introduced an identical bill. After receiving Second Reading, the bill was referred to the House Committee on Banking and Commerce where considerable pressure was apparently exerted by business interests. Between First and Second Readings, Wallace apparently had second thoughts about some of the provisions in his bill and gave notice of another bill to amend the first. Wallace's second bill (never actually given First Reading) would have made substantial changes which have perhaps improperly been ascribed to the House Committee. In fact, Wallace apparently "withdrew" the body of the original version of his bill at Committee Stage and advanced a new version which he stated would be merely declaratory of the existing law on the subject.

The bill which the Committee reported back to the House substantially altered the content and effect of Wallace's original proposals, dropping two clauses covering the granting or refusing of special considerations and inserting the words "conspire" and "unlawfully" in the introductory part of the main operative section. This latter provision was by far the most serious since it was

clearly intended to make the legislation merely declaratory of the existing common law concerning conspiracies and agreements in restraint of trade.

The bill was given Third Reading and passed by the House of Commons on April 23, 1889. In the Senate, amendments added the words "unduly" and "unreasonably." Despite Opposition cries that the resulting legislation was a total sham and the evident unhappiness of Mr. Wallace, the House accepted the Senate's amendments and the bill became law on March 20, 1889.

Opposition concerns about the potential effectiveness of the legislation proved to be correct. Ten years passed from the date of its enactment without a successful prosecution. In 1899, the legislation, by then incorporated in the *Criminal Code*, was amended by a House of Commons private member's bill to delete the words, "unduly" and "unreasonably"—in effect, undoing what the Senate had done in 1889. The following year, the House reinstated "unduly" and "unreasonably" but dropped "unlawfully" as per the Senate's suggestion. The 1900 version of the combines provisions remained unchanged in the *Code* until 1960 when they were incorporated into the *Combines Investigation Act*.

E.A.M.

FEDERAL COURT EXPANDS INTERVENER RIGHTS IN RESERVEC

(The decision of Mr. Justice Barry Strayer, presiding for the Competition Tribunal, to limit interveners' participation in the Reservec/Gemini case was reviewed in the June 1988 CCPR.)

American Airlines, supported by the Consumers' Association of Canada, appealed the Tribunal's decision to the Federal Court of Appeal contending that the Tribunal erred in law in interpreting subsection 9(3) of the *Competition Act* as having the effect of preventing the Tribunal from permitting interveners to participate in examination for discovery, calling evidence and cross-examining witnesses. Subsection 9(3) 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.

As presented in the Reasons for Judgment of Chief Justice Frank Iacobucci, the issue before the court was whether subsection 9(3) restricts interveners in this fashion or whether subsection 9(3) gives the Competition Tribunal discretion to decide the role interveners will play.

The Federal Court in a judgment rendered November 10, 1988, allowed the appeal and set aside the Tribunal's decision.

The principal reason of the Chief Justice for allowing the appeal was that he did not find that the plain meaning of the operative words "make representations" in section 9 or the context of the section and of proceedings under the *Competition Act* are sufficiently clearly expressed to eliminate the Tribunal's inherent authority over its own procedure and discretion to permit interventions in terms and conditions it considers to be appropriate in the circumstances. The Chief Justice observed that:

The principle of a court's authority and discretion over its procedure is so fundamental that, in my view, only clearly expressed language in a court's constating statute or other applicable law should be employed to take away that authority and discretion.

The Chief Justice disagreed with the Tribunal's conclusion that the term "representation" should be restricted to "argument" and did not encompass proof, and consequently that facts or reasons relied on by interveners to present their arguments can only be provided by the Director or the respondent(s). First, the Chief Justice noted that the *Shorter Oxford Dictionary* defines representations as meaning, among other things, "a formal and serious statement of facts, reasons, or arguments made with a view to effecting some change...." Second, the Chief Justice noted that, in his view, it was possible for the Tribunal to reconcile allowing interveners to have "an effective and meaningful intervention to ensure how they could be affected by an order" with the adversarial and justiciable nature of proceedings before the Tribunal. Third, the Chief Justice referred to the purpose clause of the *Competition Act* (section 1.1 which notes that the effect of anti-competitive behaviour can be widespread) to support the conclusion that subsection 9(3) should be viewed as being permissive rather than restrictive:

In...matters [before the Competition Tribunal], Parliament has provided for the Director to serve

CANADIAN COMPETITION POLICY RECORD

as the guardian of the Competition ethic and the initiator of Tribunal Proceedings under Part VII of the *Competition Act*; but Parliament has also provided a means to ensure that those who may be affected can participate in the proceeding in order to inform the Tribunal of the ways in which matters complained of impact on them. I would ascribe to Parliament the intention to permit those interveners not only to participate but also to do so effectively. A restrictive interpretation of section 9(3) could in some cases run counter to the effective handling of disputes coming before the Tribunal.

Finally, the Chief Justice concluded that "permitting interveners to play a wider role than simply presenting argument is also a fairer way of treating them" and that fairness is a relevant consideration in interpreting subsection 9(3) since subsection 9(2) requires the Tribunal to deal with matters before it as informally and as expeditiously as the circumstances and fairness allow. In particular, the court noted that it would be fairer to provide the Tribunal with the jurisdiction to decide whether evidence of interest to an intervener could be addressed by that intervener rather than leaving it to the Director (or another party to decide in each case).

The court referred the matter back to the Tribunal on the following basis:

- (a) that the Tribunal is not precluded in exercising its inherent discretion from allowing interveners to fully participate in the proceeding before it, including if it determines, the right to discovery, the calling of evidence and the cross-examination of witnesses; and
- (b) that the specific role of the intervener in this proceeding should be left to the Tribunal to decide, in the circumstances of the case, but in accordance with fairness and fundamental justice and subject to the requirements of subsection 9(3) that the intervener's representations must be relevant to the proceeding.

The court's decision is significant in that it creates the possibility that Competition Tribunal proceedings could evolve into multi-party proceedings in which the level of participation of interveners and formal parties can be quite similar. Multi-party proceedings are common in communications and energy regulation matters. Where several interveners wish, in addition to the Director and the respondent(s), to be active in the

prehearing exchange of particulars, in the presentation of evidence at the hearing and in cross-examination, the Tribunal will be faced with difficult choices in balancing the competing requirements of subsection 9(2) of the *Act* of treating participants fairly and proceeding as informally and expeditiously as possible. There will be an incentive to obtain a clear definition of interveners' interests and the evidence relevant to presenting those interests at an early stage of the proceeding. The Tribunal may also find that it will have to exercise a tight rein on the evidence adduced by interveners and the questions they may ask in cross-examination.

J.F.B.

RESERVEC UPDATE

Director Files Amended Application

On December 7, 1988, the Director filed an amended application requesting the Competition Tribunal to order Air Canada and Canadian Airlines International Limited (CAIL) not to proceed with the PARS merger or, in the alternative if that merger is complete, to order its dissolution. (The plans of Air Canada and CAIL to merge the Gemini system with PARS were reviewed at pages 9-10 of the September 1988 CCPR.)

The Director's application contends that the PARS merger, in addition to the Gemini merger, enables Gemini and its airline owners to sell a share of their near monopoly in Computer Reservation Systems (CRS) in Canada to another company in exchange for the PARS CRS technology without diluting the market power that flows from the Gemini merger. The Director contends that the PARS merger does not reduce either the incentive or the ability of Gemini to exercise that market power to prevent or lessen competition in Canada. Further, the Director alleges that the PARS merger makes it even more likely that Gemini will maintain or increase its "overwhelming market dominance" as follows:

As long as Air Canada and CAIL refuse to allow direct access links to other CRS systems from their completed inventorial schedule, fare rules, seat classes and seat availability, the enhanced functionality of PARS over Gemini makes it even

more unlikely that any other CRS will be able to effectively compete in Canada...

The PARS merger will also eliminate additional possibilities for enhanced CRS competition and entry in Canada. PARS could have sold its CRS software to either Reservec or Pegasus; become an independent entrant in Canada; or more likely become a joint venture partner with one of the Gemini airline owners with the other free to operate independently or join with one of the other major U.S. or European CRS's as a second major CSR competitor in Canada.

The Director also alleges that the PARS merger supports his position that the Gemini merger is not necessary to obtain state-of-the-art CRS technology for Canada in that such technology would appear to be readily available in the U.S. and elsewhere and Air Canada or CAIL individually could acquire such technology by a joint venture or by hardware or software purchases from a number of CRS vendors. Consequently, the Director notes that Gemini does not need a "near monopoly" in Canada in order to build a "made in Canada" CRS and that indeed with the PARS merger it has chosen not to do so.

With respect to the impact of the PARS merger on competition in the airline industry the Director contends that Air Canada and CAIL will continue to have the incentive and ability to prevent or lessen competition in airline markets and that the PARS merger does not alter this at all. In addition, the Director contends that the remaining partners in PARS, TWA and Northwest Airlines, will have no incentive to stop this prevention or lessening of competition within Canada because they do not serve domestic Canadian city pairs and would not be adversely affected by any reduction in domestic airline competition. The Director also notes that the U.S. Civil Aeronautics Board rules, requiring non-discriminatory CRS access, are not applied to the operation of PARS in Canada and as a result PARS would be able to engage in CRS abuses in Canada without being subject to any CRS rules or regulations.

Finally, the Director's application contends that the current PARS data display is ordered in such a way that inter-lined connections are penalized and given a lower priority in the display as compared to on-line connections. No inter-line "penalty" is imposed on connections between Air Canada/CAIL and their respective affiliates. The

Director contends that the inability of inter-lined carriers, such as Wardair, to have their flights and fares displayed without the substantial "penalty" imposed through the PARS merger prevents such carriers from competing with the two dominant Canadian carriers Air Canada and CAIL. The application contends that the PARS "penalty" against inter-lined connections heightens the barrier to entry into Canadian city fair markets by increasing the control of Air Canada and CAIL over feed traffic.

Competition Tribunal Announces Revised Hearing Schedule

Further to a session of the pre-hearing conference held on November 7, 1988, the Competition Tribunal has ordered that the hearing of the Director's revised application regarding the Gemini/PARS merger will commence on April 3, 1989. All preliminary motions regarding confidentiality and privilege must have been brought on January 9, 1989. By January 23, 1989, all examinations for discovery must be held and by February 28, 1989, all expert reports must have been filed.

J.F.B.

REAL ESTATE INDUSTRY GETS NEW CODE OF CONDUCT

On December 20, 1988, Mr. Justice Addy of the Federal Court of Canada issued a sweeping prohibition order which establishes an entire competitive code of conduct for the real estate industry in Canada. The order of prohibition issued by the court ended a number of inquiries into the practices of real estate boards across the country. Boards which had been under inquiry were: Chambre d'Immeuble de Saguenay-Lac St. Jean Inc., Chambre d'Immeuble de Québec, Chambre d'Immeuble de Montréal, Chambre d'Immeuble de l'Outaouais Inc., Association of Regina Realtors Inc., Calgary Real Estate Board Co-Op Ltd., Fraser Valley Real Estate Board, Windsor-Essex County Real Estate Board, and the London and St. Thomas Real Estate Board.

All of the boards under investigation are named as respondents in the prohibition order. In

CANADIAN COMPETITION POLICY RECORD

addition, the Canadian Real Estate Association is named as a respondent, even though it had never been the subject of an inquiry under the *Act*.

The form of prohibition order granted by the court did not require any of the respondents to plead guilty to having committed any offences under the *Act*. It governs only their future conduct.

The prohibition order was the result of extensive negotiations between the Director and the respondents. There has been much publicity surrounding those negotiations in the media in the last several months. The Director, in announcing the prohibition order, indicated that it was an acceptable solution, even without fines or other punitive remedies, because "the strong terms and stringent requirements of the order of prohibition will provide an effective and immediate remedy to anti-competitive practices in the industry." It is also evident that the Director, and presumably the Attorney General, were motivated to accept a prospective prohibition order in part because it covers other real estate boards not subject to the Director's inquiries. The order covers all real estate boards in Canada through the inclusion of the Canadian Real Estate Association as a respondent. Since the Canadian Real Estate Association controls the Multiple Listing Service (MLS) trademark used by all real estate boards, and has other means of controlling the activities of local boards, its adherence to the order in effect forces all member real estate boards across the country to comply with the terms of the order. In this sense, the order is without precedent in Canadian competition law.

Ian Nielsen-Jones, the Deputy Director of Investigation and Research in charge of the Real Estate Inquiry stated:

The value of this comprehensive order is that it accomplishes in one proceeding, rules for the entire industry. U.S. antitrust authorities have spent fifteen years and a host of proceedings to get near the same position.

Statement of Facts

The statement of facts presented to the court reveals the basis on which inquiries were being conducted under the *Act*. The practices of the various respondent local boards under investigation varied somewhat across the country. The Saguenay-Lac St. Jean Board had adopted

rules which established the minimum commission due to a selling broker. They had also fixed the absolute percentage amount due to a selling broker on an MLS sale. The Québec Board had adopted rules which required an equal split between a selling broker and a listing broker, and it also determined minimum percentage rates which the listing broker must give to the selling broker. The Montréal Board had fixed a minimum percentage commission due to the selling broker for MLS sales. The Outaouais Board had also adopted a regulation concerning MLS sales which provided a minimum percentage commission due to a selling broker. The statement of facts alleges that all of these practices were acts or things directed toward the commission of offences under the conspiracy and resale price maintenance provisions of the *Competition Act*.

The Regina Board had adopted rules and regulations concerning advertising which prevented members from offering any incentive to the public to list or purchase a property unless that incentive was approved by the Board of Directors of the Regina Board. Similarly, the Calgary and the Fraser Valley Boards had established rules preventing the offering of incentives or inducements to list or purchase properties. The statement of facts alleges that these practices to control incentives and inducements were acts or things directed towards the commission of conspiracy and resale price maintenance offences under the *Competition Act*.

The Windsor Board had adopted rules and regulations which prevented anyone from becoming a member of the Board unless they were engaged full time in the real estate business. The statement of facts alleges that this rule was an act or thing directed towards the commission of a conspiracy offence under the *Competition Act*. The Windsor Board had also interpreted the general Code of Ethics and Standards of Business Practices, promulgated by the Canadian Real Estate Association, to the effect that members were discouraged from advertising dual real estate commission rates at different levels. It was alleged that this interpretation and implementation of the Canadian Real Estate Association code was an act or thing directed toward the commission of an offence under the resale price maintenance provisions of the *Competition Act*.

The London Board had adopted rules and regulations with respect to MLS which prohibited publicly advertised inducements to the listing or selling of real estate, fixed the minimum commission payable to a selling broker at not less than 60 percent of the total commission payable by the vendor of the real estate, and prohibited membership in the London and St. Thomas Real Estate Board unless the applicant undertook to carry on a full-time business in real estate. The statement of facts alleges that the adoption of these rules and regulations were acts or things directed toward the commission of conspiracy and resale price maintenance offences under the Act.

Order of Prohibition

The terms of the order of prohibition issued by Mr. Justice Addy follows the usual pattern that has been developing in industry-wide orders under the *Competition Act* in recent years. The order, in its most general terms, prohibits the commission of offences by all of the respondents, including the Canadian Real Estate Association, under sections 45 (conspiracy) and 61 (price maintenance) of the Act. (Note that in the newly proclaimed *Revised Statutes of Canada, 1985*, the *Competition Act* has been consolidated and most of the sections renumbered.)

The specific prohibitions contained in the order prohibit the respondents from "fixing, establishing, maintaining, suggesting or controlling in any manner":

- a) the commission, rates or fees for services rendered by members of boards or non-members; and
- b) any percentage or division of commissions or fees between selling and listing brokers.

The order also specifically prohibits the respondents from requiring or agreeing with an independent publisher, such as a newspaper, or any other independent supplier of advertising services, to refuse any type of advertising from a member or non-member of a board or from recommending the type of advertising to be accepted by a publisher or supplier. To have obtained such an order, it would seem logical that there would be a factual base to assert that the respondents had in fact been coercing publishers or agreeing with them to refuse certain types of

advertising. However, the statement of facts introduced in court contains no specific factual allegations to that effect.

The order also contains a list of 14 behavioural practices in which the respondents are prohibited from engaging. These practices include such matters as prohibiting or discouraging co-operation or co-brokering with non-members; preventing or restricting the offering or advertising of rates, inducements, incentives, gifts, etc.; preventing or restricting the offering or advertising of "For Sale by Owner"; setting as an obligation to membership the requirement to work full time in the real estate business; and rejecting a listing submitted into the MLS system by a member on the basis of price, commission, rate or fee contained in a listing.

With respect to the prohibition concerning membership, the order contains an exception in that a board may terminate membership if it has received complaints from the public about members who have proven not to be available to the public on a regular and consistent basis. It also allows a board to refuse membership where the applicant fails to meet uniform and reasonable financial and educational criteria. It would appear from the manner in which the exceptions with respect to membership are phrased that they were intended to fall within the exception contained in s.45(7) of the Act. That subsection says that the court cannot convict an accused if it finds that a conspiracy or agreement "relates to a service and to standards of competence and integrity that are reasonably necessary to the protection of the public" in a practice of a trade or profession relating to a service.

It should be noted that many of the practices contained in the order are somewhat general in their language and will certainly require ongoing interpretation in their application.

The order also contains a list of 15 exceptions to the specific prohibitions it contains. Within these exceptions, one allows the respondents to require listing brokers to indicate the commission available to a selling broker with respect to a particular transaction. Another deals with a situation where a listing broker could also be the selling broker. If, in that situation, the listing broker is willing to reduce the commission rate, a board may require the listing broker to disclose

CANADIAN COMPETITION POLICY RECORD

any such reduction to all brokers competing for the sale. The argument here is to encourage competition among selling brokers. Another exclusion permits individual firms or companies to establish firm-wide policies with respect to commission rates, advertising, incentives and employment. This particular section allows an individual firm or company to require its sales persons to follow the company's policies "provided such policies are not reached through agreement or arrangement with any other firm or company." This particular provision would appear to be somewhat over-reaching in that it would prevent a company with five employees from agreeing to adhere to particular policies with, for example, another company of five employees. Any such agreement would be unlikely, in a large urban market, to have an "undue" lessening effect on competition.

The remaining provisions of the order deal with ongoing monitoring of the activities of the Canadian Real Estate Association and the respondent member boards. One provision contained in the order requires the respondents to use their best efforts to provide the Director information regarding commission rates or fees charged clients for a specific transaction for services to the extent that such information is available. This particular provision would appear to be mandatory rather than prohibitory. In addition it contains no time limit as to its application. Therefore, it would appear to be available to the Director in perpetuity or until such time as the order is vacated or amended.

The order also contains provisions requiring the local boards and the Canadian Real Estate Association to publish the details of the order in appropriate newspapers. It also contains provisions, which operate for a period of seven years from the date of the order, with respect to providing the Director with information concerning individuals who have been refused membership in a local board or expelled from a local board. The order also requires that the executive officer and president of each board provide the Director, for a seven-year period, with a statement that the respondent boards have not contravened the provisions of the *Competition Act*. The final provision of the order states that:

THIS COURT SHALL retain jurisdiction over the parties to these proceedings for the purposes of varying or rescinding any of the provisions of this Order, upon the application of any of the parties.

The CCPR believes this is the first time such a specific provision has appeared in a prohibition order under the *Competition Act*. It is logical that such a provision might be necessary since the terms of the order are bound to raise ongoing questions of interpretation.

It is interesting to note, as well, that some of the order's provisions impose obligations on the respondents for a period of seven years, while others appear to contain both prohibitory and mandatory provisions which extend potentially well beyond seven years, if the order continues in existence at all.

The benefits the government saw in the order are perhaps best reflected in the Director's statement at the time the order was issued. He said:

This solution and its acceptance by the real estate industry will benefit consumers by ensuring that fair and unfettered competition will exist in the delivery of real estate services in Canada. The Order will ensure that there is little possibility for constraints or impediments to a fully competitive Canadian real estate market. Furthermore, widespread compliance with the *Competition Act* has now been achieved across Canada without the uncertainty of extensive, lengthy and often costly litigation.

The Director has not asserted that the order will result in lower commission rates although in an accompanying background document to the press release it is stated that:

The terms of the Order will encourage more competition in the real estate industry, which may in turn lead to lower commission rates and new and innovative real estate services benefiting the consumer.

The order certainly raises a number of interesting issues regarding the use of comprehensive prohibition orders in criminal matters. First, the order is largely of a behavioral nature. It undoubtedly will require interpretation as it is implemented. The Federal Court had no difficulty whatsoever in issuing such a prohibition order, doing so in less than half an hour. The court apparently found no objection to the regulatory nature of the order it was issuing, nor to the fact that it might well require further intervention by the court. Indeed, the court

agreed to include a provision which gave it ongoing jurisdiction. In that sense, the order raises the possibility of a judge at Federal Court playing a role not dissimilar to that played by Judge Green in the AT&T divestiture case in the United States.

Second, it is arguable that the order contains mandatory, as opposed to prohibitory, provisions. The jurisdiction under section 34(2) of the *Act* allows a court to "prohibit the commission of the offence or the doing or continuation of any act or thing by that person or any other person constituting or directed towards the commission of an offence." The language appears to contemplate orders containing prohibitions only, particularly since under that subsection no guilty plea is required. Section 35 of the *Act* does allow a court, only where a conviction has been entered, to require the person convicted for three years to submit information with respect to the business to the court or presumably the Director. However, that section clearly does not apply to prohibition orders issued under s.34(2) since, in those instances, no conviction is entered. The provisions of the order in this case clearly require ongoing information disclosure and well beyond the three years contemplated in section 35.

Third, the manner in which the order is constructed means that, for all practical purposes, it is binding on every local real estate board in Canada, even though there were no allegations of impropriety by those boards. This raises a question whether it is appropriate to obtain such orders. The section, however, would appear to be broad enough to allow it. Section 34(2) allows a court to issue a prohibition order against any person who has done or who is about to do or likely to do any act constituting an offence and also against "any other person." Nevertheless, the court presumably has discretion to decide how broadly its order should be applicable to parties who have never been suspected of wrong-doing.

L.A.W.H.

CHRYSLER CANADA SUBJECT TO REFUSAL TO SUPPLY APPLICATION

On December 14, 1988, the Director of Investigation and Research filed a Notice of Application with the Competition Tribunal for an

order requiring Chrysler Canada Ltd. to accept Richard Brunet as a customer on the trade terms that had applied between Chrysler Canada and Mr. Brunet until 1986. The application also seeks an order requiring Chrysler to reverse all steps taken to dissuade persons from conducting business with Brunet with respect to Chrysler parts and restraining Chrysler from arranging to hinder Mr. Brunet's access to Chrysler parts supply in the future.

This is the fourth time since the enactment of refusal to deal as a reviewable practice in which the Director of Investigation and Research has made a refusal to deal application to the Competition Tribunal or its predecessor, the Restrictive Trade Practices Commission. The *Act* provides that the Tribunal may make a remedial order in a refusal to deal situation where it finds that a person is substantially affected in his business or is precluded from carrying on business due to his inability to obtain adequate supplies of a product anywhere in a market on usual trade terms, that the person is unable to obtain adequate supplies of a product because of insufficient competition among suppliers, that the person is willing and able to meet the usual trade terms of the supplier of the product and that the product is in ample supply.

Mr. Brunet operates a small trading house specializing in the sale of Chrysler parts to clients located in foreign countries excluding North America. The application contends that Chrysler Canada is a source of Chrysler parts distinct from its American parent taking into consideration that Brunet could generally obtain Chrysler parts from Chrysler Canada cheaper than from the U.S. parent and Chrysler Canada consistently provides a higher level of service in its delivery of parts. Lower shipping rates are available through the Canadian shipping industry to some foreign destinations and the attractiveness of the Chrysler Canada line of after-market parts provided under the trade name AUTOPAR (a line not available from its U.S. parent) are also cited in the application.

The application alleges that, since the late 1970's, Chrysler Canada encouraged Brunet in the development of an export business relying on Chrysler Canada parts. However, in October, 1986, Brunet was advised by officials of Chrysler

CANADIAN COMPETITION POLICY RECORD

Canada that they would no longer handle his orders in Canada. He was advised that Chrysler Canada lacked "organizational responsibility" regarding his orders and that the parent's Chrysler Export Sales Office located in Detroit, Michigan would handle all his requests in the future. As a result, Chrysler Canada refused to handle Brunet's purchase orders and now requires Brunet to obtain supply from the parent's export sales office.

The application contends that many Chrysler parts are priced by the parent at a higher level in the U.S. than the price available in Canada through the Chrysler Distribution System. As well, Chrysler parts obtained from the parent have to be received at U.S. locations. Consequently, the application contends that Brunet is unable to serve his clients upon a realistic basis if he is to purchase only from the parent. Since this decision, Brunet had carried on his export business by purchasing Chrysler parts from several franchise Chrysler dealers in Canada. However, in May, 1987, Chrysler advised all dealers and distributors that the sale of Chrysler parts was strictly reserved to its Canadian clients and was not for export. Those who regarded Brunet as a Canadian client and continued to supply to him, according to the application, "were subsequently dissuaded by Chrysler from taking purchase orders from Brunet, and more than one order was actually blocked."

The application contends that this Chrysler policy has had substantial adverse effects on Brunet's business through a loss of sales, making his marketing efforts valueless and damaging his business reputation, and precluding Brunet's ability to apply for duty drawbacks without the cooperation of Chrysler.

Finally, the application alleges that Brunet has been unable to obtain adequate supplies because of insufficient competition in the supply of Chrysler parts in that:

- (a) Chrysler is the sole source of new Chrysler parts in Canada;
- (b) Chrysler has exerted its control over the supply of parts by requiring its dealers not to supply parts for export purposes;
- (c) all of Brunet's customers require branded Chrysler parts;
- (d) most Chrysler parts cannot be substituted by those of another automaker; and

- (e) the option of purchasing service parts from the U.S. parent is not an adequate alternative because from the viewpoint of foreign clients it would make little sense to purchase U.S. sourced Chrysler products from a Canadian based trading house.

At the time of writing Chrysler Canada's reply had not yet been filed with the Tribunal. Previous refusal to supply cases in which a formal application to the RTPC had been made, the respondent supplier reached an agreement with the Director to renew supplies before the actual hearing of the application took place.

J.F.B.

DIRECTOR DECLINES TO CHALLENGE HOSTESS FRITO-LAY MERGER

On November 18, 1988, the Director of Investigation and Research announced that, as a result of a substantial divestiture, no challenge would be brought in relation to the proposed partnership between Hostess Food Products Limited and the Frito-Lay Division of Pepsi-Cola Canada Limited.

The Director concluded that the merger as originally proposed would likely result in a substantial provision of lessening competition in the salted snack food market in Ontario, Québec and Newfoundland. As a result, the parties were advised that he intended to file an application with the Tribunal for an order to prevent the completion of the merger.

Subsequently, Hostess and Frito-Lay proposed to divest Frito-Lay's Kitchener plant to Murphy's Snack Foods, together with a fleet of trucks, various other equipment and the rights to use four brands owned by Frito-Lay and two brands owned by Hostess. The proposal also included the licensing of the Lay's brand to Murphy's for seven years as well as an option to purchase the Hostess plant and equipment in Laval, Québec should Hostess decide to divest itself of this plant in the future.

The Director's press release notes that a principal factor contributing to the Director's decision not to make an application with respect to this restructured transaction was that major national and provincial food retailers, wholesalers,

and distributors indicated overwhelming support for the revised transaction:

They particularly welcomed the opportunity for Murphy's to become a more effective competitor in this market. Their support includes commitments that Murphy's will have access to considerable shelf space, which is critical to significant entry in this market. Murphy's will, in addition, receive substantial promotion and distribution support, as well as opportunities to supply private-label brands to major retail chains.

Finally, the Director's press release notes that Murphy's has acquired the Canadian rights to another significant line of salted snack food products to be manufactured and sold in Canada, and that this should enable Murphy's to become a viable competitor in this market. The Director concludes that with these acquisitions Murphy's, which has been successful in the salted snack food market in recent years, together with other remaining competitors should be in a position to effectively prevent the exercise of power by the merged firm.

J.F.B.

CANADA SAFEWAY DIVESTS OF ALBERTA FACILITIES

The Director of Investigation and Research, Mr. Calvin S. Goldman, announced on December 2, 1988, that Canada Safeway, pursuant to undertakings provided to the Director at the time of the acquisition of Woodward's, had agreed to divest of seven stores in Edmonton and one in Lethbridge, Alberta.

In Edmonton, there were some adjustments to the stores originally identified to be divested. Originally, five stores were to be divested in Edmonton. One of those stores was located in the Bonnie Doon shopping centre in South Edmonton. In the final analysis Canada Safeway divested of three stores in South Edmonton but not the Bonnie Doon store. The result, however, was that more stores were divested than originally contemplated.

The parties acquiring the facilities are all retail food operators. Bateman Foods Ltd., an IGA operator in Edmonton, acquired the three stores in South Edmonton. Horne & Pitfield Foods Limited, also an IGA operator, acquired two stores in Edmonton and a Canada Safeway store in

Lethbridge. Hulls Foods Ltd., presently an operator of retail food facilities in Winnipeg, Manitoba, acquired two stores from Canada Safeway in Edmonton. Although Canada Safeway has entered into agreements to sell these stores, the actual closing dates of the transactions did not occur prior to November 25, 1988, as originally contemplated by the undertakings. The closing dates of the transactions for the eight stores involved range from January 8, 1989, to June 3, 1989. It is understood that these dates were negotiated with the acquiring parties to facilitate their commencing operations at the facilities. With one exception, the divestitures complete Canada Safeway's obligations under its agreement with the Director. The one exception concerns Red Deer. Canada Safeway has until May 25, 1989, to divest of a facility in Red Deer.

The Director stated that he believed the divestitures would improve the competitive situation in Edmonton since the acquiring parties were all present retail food operators with experience in running the types of facilities being acquired.

Canada Safeway had previously divested of five stores in British Columbia pursuant to the terms of the undertakings. The Canada Safeway undertaking is the most extensive post closing agreement the Director has yet entered into since the passage of the merger provisions of the *Competition Act* in 1986.

L.A.W.H.

WOLVERINE ALLOWED TO ACQUIRE NORANDA METAL INDUSTRIES

On November 2, 1988, the Director of Investigation and Research announced that he would not at that time be applying to the Competition Tribunal for an order in respect of the acquisition by Wolverine (Canada) Inc. of substantially all the assets of Noranda Metal Industries Limited (N.M.I.).

Wolverine and N.M.I. are the only manufacturers of seamless copper tubing in Canada. Copper tubing is widely used in plumbing, construction and industrial applications. This was the principal area of overlap between the two companies, although other products were involved.

CANADIAN COMPETITION POLICY RECORD

For example, N.M.I. is a major producer of copper strip and rod products. Since Wolverine did not compete in the strip and rod operations, the Director noted that the acquisition did not raise any competition concerns for these products.

The difficulty the Director faced in analysing the merger was that, even though the two companies were the only producers of copper tubing in Canada, and imports were limited, N.M.I. had decided prior to the acquisition by Wolverine to close its tubing operations in Montréal and New Westminster. Apparently, N.M.I. had independently come to the conclusion that it had to exit the business. Furthermore, N.M.I. confirmed to the Director that there were no other viable purchasers of the tubing operations. In this situation, absent the merger, Noranda Inc., N.M.I.'s parent company, informed the Director that it would cease operations at the two tubing mills if it were not allowed to merge with Wolverine. If this had occurred, the result would have been a one-firm industry in Canada in any event.

By allowing the merger, the Director noted that "the assets in question will continue in production" and will also "enable Wolverine to realize significant efficiency gains, thereby becoming a more effective international competitor."

The Director also indicated that he would be closely monitoring the industry, including the extent to which imports provide effective and vigorous competition to Wolverine during the next three-year period.

This case is of significant precedential value in that it is the first time the Director has accepted the argument that a decision to exit a business by the vendor can be the basis on which a merger, which would otherwise significantly affect competition, will be allowed. It would appear from the Director's statement that that will be acceptable only where there is no other "viable purchaser" as an alternative to allowing a competitor to purchase the business. Presumably, as well, it is necessary to establish that the vendor had independently, and in advance of any merger discussions, come to a corporate decision to exit the business. Exiting the business presumably means the will to close the business, if it cannot be sold.

It is interesting to note the similarity between the rationale used by the Director in allowing this merger and that which lies behind failing firm

situations. The argument in each case is that, absent allowing the merger to proceed, the productive assets engaged in the business would cease operating.

L.A.W.H.

DIRECTOR CLEARS DOFASCO ACQUISITION OF ALGOMA

On September 30, 1988, the Director of Investigation and Research announced that he would not apply to the Competition Tribunal for an order with respect to the share acquisition by Dofasco Inc. of the Algoma Steel Corporation. However, the Director did indicate that he intended to monitor closely the impact of the merger on competition in Canadian steel markets, and particularly on the market for hot rolled steel and stripped steel products, over the next three years.

The Director's press release notes that, in arriving at this decision, he and his staff extensively analyzed the likely effects of the merger on the industry with the assistance of professional economists, legal counsel, and industry experts. The principal reason for not objecting to the merger, although Dofasco and Algoma are respectively Canada's second and third largest fully integrated steel makers, was that the two companies have concentrated a large proportion of their production at separate product markets. Nevertheless, both Dofasco and Algoma are major producers of hot rolled sheet and strip steel. In this regard, the Director noted that hot rolled steel is currently in tight supply worldwide. As a result a number of Canadian customers who are now on supply allocation welcomed Dofasco's announced expansion plans for Algoma's steel works in Sault Ste. Marie and at its own mills in Hamilton.

The press release also notes that, in reviewing the transaction, the Director considered a number of factors including the extent of present and potential foreign competition in the Canadian market for these types of steel, the likelihood of increased supplies as a result of the merger, the countervailing purchasing power of buyers of steel, the extent to which Algoma was an effective competitor in hot rolled steel, and effective

competition in the market. The Director also noted that Dofasco expects to achieve a number of efficiency benefits because of this acquisition. These efficiencies are expected to arise in relation to capital expansion and operating savings, such as rationalization of product lines and reduced freight costs.

Finally, the press release notes that the Director found that a number of steel customers consulted did not express concern that the merger would likely have a serious anti-competitive effect on the industry.

J.F.B.

SUPREME COURT TO HEAR COMBINES ACT S. 17 APPEALS

The Supreme Court of Canada has reserved its decision in the appeal of Thomson Newspapers from a decision of the Ontario Court of Appeal holding that section 17 of the *Combines Investigation Act* does not infringe the *Charter of Rights and Freedoms*. It has also reserved its decision in a similar appeal by Stelco from the Federal Court which was joined to, and heard at the same time as the Thomson appeal (see September and December 1986 and September 1987 CCPR).

The appellants have submitted that section 17, which provided for the compulsory examination and the production of documents before the Restrictive Trade Practices Commission, infringes the right to be free from unreasonable search and seizure guaranteed by section 8 of the *Charter*. Specifically, Thomson Newspapers takes issue with the finding of the Ontario Court of Appeal that the only rights against self-incrimination in the *Charter* are those contained in sections 11(c) and 13, which respectively provide a right against self-crimination for persons charged with an offence and a right of witnesses not to have incriminating evidence used to incriminate that witness in any other proceedings.

The appellant argues that the right against self-crimination is a longstanding common law right which is protected by the section 7 right to

security of the person and that the specific right listed in sections 8 to 14 of the *Charter* are essentially illustrations of the fundamental right established by section 7.

The appellants contend that this approach applies equally to the production of documents which they contend also amounts to a testimonial act.

In response, the factum of the Director and the Attorney General of Canada argues that the appellants' interpretation of section 7 of the *Charter* would result in investigative inquiries being frustrated by repeated disputes over whether the section 7 privilege against self-criminations was available in the circumstances and if so whether the requirement to testify constituted a reasonable limitation on the right that the effect of this approach is to trivialize section 13 of the *Charter* which, in effect, codifies the established immunity against subsequent use of testimony.

With respect to the section 8 right against search and seizure, the respondents have contended that a section 17 production order is not equivalent to a search warrant but is more in line with a *subpoena duces tecum* and therefore that the order did not constitute a seizure.

Finally, the respondents have argued that section 17 orders, if they infringe *Charter* rights are protected by section 1:

The *subpoena* power at issue in this appeal is rationally related to the legislative objective reflected in the Act. This information gathering mechanism is essential to the investigation of complex market behaviour including sophisticated trade combinations. The investigative program established in the Act must be read as a whole. A person who is subject to a section 17(1) order has all the protections, including the protection against subsequent use contained in section 13 of the *Charter*, which are available to anyone served with a *subpoena* in any other proceeding. Reference is made here to the facts set forth in paragraphs 9 to 13 above. The inconvenience caused to a person subject to a section 17(1) order is a comparatively small price to pay in return for a marketplace free of debilitating barriers to competition. All free and democratic societies recognize the need for the state to be in a position to obtain the testimony of any person, including the suspect of a criminal offence, in a fact-finding process.

J.F.B.

CANADIAN COMPETITION POLICY RECORD

DIRECTOR ANNOUNCES DECISION ON NEWFOUNDLAND DAIRY MERGER

On October 7, 1988, the Director of Investigation and Research, Calvin S. Goldman, announced that he would not apply to the Competition Tribunal for an order prohibiting the merger of Sunshine Dairies and Brookfield Ice Cream Limited, the second and third largest dairies in Newfoundland. After examining information from the parties, customers, and competitors as well as the Newfoundland Marketing Board and receiving advice from the Department of Justice, Mr. Goldman concluded that the merger would not likely "prevent or lessen competition substantially in the production and sale of dairy products in Newfoundland."

In a press release, the Director stated that although the merger would mean two of Newfoundland's three dairies would merge into one, he does not believe this will result in any lessening of competition. Instead, the Director was of the opinion there will be stronger competition between the merged dairy and the remaining number one dairy, Central Dairies. In making his decision, the Director felt that the activities of the two dairies would be restrained by two factors: the purchasing power of the dairies' major customers and the Newfoundland Milk Marketing Board's regulation of the activities of the two dairies with respect to the processing and pricing of fluid milk, the major product produced by both companies.

E.A.M.

WETSTON PROVIDES CLARIFICATION OF NOTIFIABLE TRANSACTIONS PROVISIONS

Howard I. Wetston, Senior Deputy Director of Investigation and Research, in an address to the annual meeting of the American Bar Association in Toronto last summer, set out the views of the Bureau with respect to certain provisions of the notifiable transactions provisions of the *Act*.

He noted that the provisions of the *Competition Act* apply to both foreign and domestic mergers. He indicated that the implementation of the *Free*

Trade Agreement should not have any impact on the size threshold levels in the *Competition Act*. He also noted that the notification provisions cover both direct and indirect acquisitions and that the thresholds, unlike Investment Canada, are identical for both direct or indirect acquisitions.

In providing statistics on the first full year of the provisions being enforced, he noted that there were 87 filings under the *Act* in that year. Of those, 53 were short-form filings and 34 were long-form filings. He indicated that of all the transactions subject to notification, approximately 20 were extensively reviewed by the Bureau of Competition Policy under the substantive competition test in the legislation. In comparison, he noted that less than five merger transactions not subject to the notifiable transaction provisions were subject to such extensive examination in the first year. In commenting on these figures he stated:

As you can see, the notification provisions have been effective in bringing the transactions most likely to raise substantive issues to the Director's attention prior to their completion, without unnecessarily hindering those unlikely to give rise to competition concerns.

Mr. Wetston also commented on a number of interpretations the Director has given of the provisions in the first year. One case he commented on dealt with the definition of "affiliate." One aspect of the definition of affiliate requires that a party own shares sufficient to enable it to elect a majority of the board of directors of a corporation. To illustrate how the Bureau interprets this provision, he gave the example where a company owned 60 percent of the voting shares of another company, but had entered into a shareholders agreement with another shareholder whereby the 60 percent shareholder had the right to elect one director, the other shareholder could elect one director and the third would be elected by mutual consent. The Director took the position that the party holding more than 50 percent of the voting shares could not elect a majority of the board. In that instance, therefore, an affiliated relationship did not arise.

In another case involving a partnership, the Director took the position that a situation where a general partner manages the day to day business affairs of a limited partnership does not give rise

to an affiliate relationship between the general and limited partnership. Since the general partner had only management, as opposed to an ownership interest, in the limited partnership, the definition was not met.

Mr. Wetston also indicated that the Director's position is that the acquisition of securities that are convertible to voting shares at some future date does not raise the question of notification until such time as the conversion takes place. The initial purchase of the convertible securities would not trigger a notification in and of itself.

Mr. Wetston made a comment on the provision of the Act which allows a notifier to exclude information that is "not known or reasonably obtainable." Mr. Wetston said as follows:

Questions in relation to the former usually arise in respect to hostile takeover bids or non-negotiated takeovers. As mentioned earlier, the onus to notify is on the proposed acquirer of the shares. This differs from the *Hart-Scott-Rodino Act* where both parties to a transaction must file the required information. At times the only available information on the target will be that which is part of the public record. An acquirer should make every effort to obtain at least that

information. The Director has found that he has had no difficulty in obtaining further information from the party being acquired once the takeover is announced publicly.

In conclusion, Mr. Wetston commented that the notifiable transaction provisions had been implemented effectively, in his view, and were achieving their intended legislative purpose.

L.A.W.H.

COMPETITION ACT SECTIONS RE-NUMBERED IN NEW CONSOLIDATION

On December 12, 1988, the long-awaited *Revised Statutes of Canada, 1985* were proclaimed in force. All federal statutes, including the *Competition Act* have been consolidated and repromulgated; the provisions in most have been renumbered. A Table of Concordance for the "old" 1986 version of the *Competition Act* and the "new", updated, 1985 *Competition Act* is included with this copy of the *Canadian Competition Policy Record*.

MERGER EXAMINATIONS UNDER THE COMPETITION ACT STATISTICAL SUMMARY

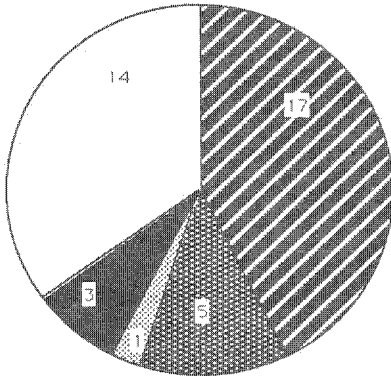
| | 1986-87 ¹ | 1987-88 | 1988-89 ² |
|--|----------------------|---------|----------------------|
| MERGER EXAMINATIONS COMMENCED ³ | 40 | 146 | 145 |
| EXAMINATIONS CONCLUDED | | | |
| Concluded as posing no issue under the Act ⁴ | 17 | 120 | 131 |
| Concluded with Monitoring only ⁵ | 5 | 7 | 4 |
| Concluded with pre-closing restructuring ⁶ | | 2 | 1 |
| Concluded with post-closing restructuring ⁷ | 1 | 2 | 3 |
| Parties abandoned proposed merger in whole or in part as a result of Director's position | 3 | 2 | 2 |
| TOTAL EXAMINATIONS CONCLUDED | 26 | 133 | 141 |
| EXAMINATIONS ONGOING AT END OF PERIOD | 14 | 25 | 29 |
| APPLICATIONS BEFORE TRIBUNAL | | | |
| Concluded ⁸ | 1 | | 1 |
| Ongoing | | 2 | 2 |

CANADIAN COMPETITION POLICY RECORD

Notes

1. Statistics commenced on June 19, 1986.
2. Statistics to January 5, 1989.
3. Two or more days of review. Includes 132 prenotifications since July 15, 1987 of which:
 -in short-form (s.121): 1987/88 - 44 and 1988/89 - 35;
 -in long-form (s.122): 1987/88 - 24 and 1988/89 - 29.
4. Includes:
 75 Advance Ruling Certificates: 1986/87 - 2; 1987/88 - 26; 1988/89 - 47
 19 Advisory Opinions: 1986/87 - 3; 1987/88 - 10; 1988/89 - 6
5. All advisory opinions.
6. All advisory opinions.
7. 1 Advance Ruling Certificate and 5 Advisory Opinions.
8. These matters are counted under examinations concluded.

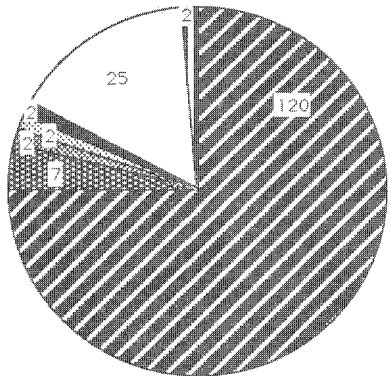
1986/87



| | | |
|--|--|----|
| | Concluded as posing no issue under the Act | 17 |
| | Concluded with Monitoring only | 5 |
| | Concluded with pre-closing restructuring | 0 |
| | Concluded with post-closing restructuring | 1 |
| | Parties abandoned merger as a result of Director's position* | 3 |
| | Ongoing Examinations | 14 |
| | Applications before Tribunal - Ongoing | 0 |

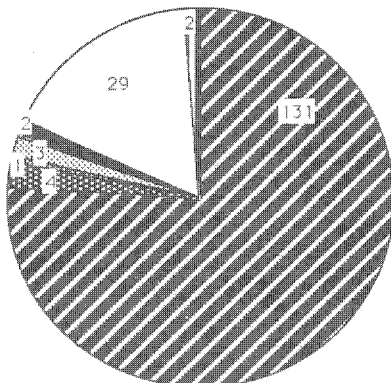
*One matter was the subject of an application before the Competition Tribunal

1987/88



| | | |
|--|--|-----|
| | Concluded as posing no issue under the Act | 120 |
| | Concluded with Monitoring only | 7 |
| | Concluded with pre-closing restructuring | 2 |
| | Concluded with post-closing restructuring | 2 |
| | Parties abandoned merger as a result of Director's position* | 2 |
| | Ongoing Examinations | 25 |
| | Applications before Tribunal - Ongoing | 2 |

1988/89



| | | |
|--|--|-----|
| | Concluded as posing no issue under the Act* | 131 |
| | Concluded with Monitoring only | 4 |
| | Concluded with pre-closing restructuring | 1 |
| | Concluded with post-closing restructuring | 3 |
| | Parties abandoned merger as a result of Director's position* | 2 |
| | Ongoing Examinations | 29 |
| | Applications before Tribunal - Ongoing | 2 |

*One matter, the subject of an application before the Competition Tribunal, was discontinued by the Director after provincial regulatory authorities prohibited parties from proceeding with the merger.