COMMENT AND ANALYSIS

Editor's Note:

The amendments to Canada's merger law came into effect in June of 1986. We have, therefore, been living for three years with these new merger provisions, so long in gestation. It is timely, therefore, to reflect on how the new law has been functioning both substantively, and on a procedural basis. It is also timely to reflect on how the Director's office has coped with this greatly increased responsibility.

This issue of the Canadian Competition Policy Record includes three comments about the new law. First, the Director's recent speech to a conference organized by the Law Society of Upper Canada is reproduced in this issue of the Record. On discussing these issues with Mr. Goldman, he indicated he is keen to ensure the widest possible discussion about the implementation of new law. The second comment is by Ivan Feltham, a member of the Record's Advisory Board and also a participant on the industry side at the time the new law was being developed. Mr. Feltham's comment addresses the role of discretion in the law. A third perspective will be presented by Lawson A.W. Hunter who comes from two backgrounds: first as the Director of Investigation and Research during the time the competition legislation was being developed, and second, as a practitioner representing private sector interests over the past three and a half years.

RECENT EXPERIENCE WITH MERGER REVIEW IN CANADA: NOTES FOR AN ADDRESS TO THE LAW SOCIETY OF UPPER CANADA PROGRAM ON COMPETITION LAW

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Toronto, May 16, 1989

I am pleased to be here today to discuss with you our recent experience with merger review in Canada. Mergers and acquisitions have grown in number and size not only in Canada, but also in the United States and in Europe. For many of you, whether or not you currently practice in this area, the opportunity may present itself in the not-too-distant future. When it does, it will be important to be fully informed about one of the key differences between pre-1986 and the present in the merger area—I am speaking, of course, of the *Competition Act*.

I have spoken in the past at some length on the merger provisions of the *Competition Act*, our approach to merger review and some of the results achieved since the *Act* was passed in June 1986. Today I will initially discuss the framework for merger review and our compliance-oriented approach to it, and then focus on some recent developments which we are confident are enhancing the merger review process.

Some of you who follow the Competition Bureau's work closely may have noticed in recent months more extensive news releases and backgrounders regarding decisions not to challenge certain mergers. For mergers in which a challenge is appropriate, I have made a public announcement of my intention to file an application before the Competition Tribunal. As well, you may have observed that more merger cases are proceeding to the Competition Tribunal on a consent order basis. I would like to speak about each one of these developments. But first, I would like to offer some general comments on merger review under the *Competition Act*.

Merger Review under the Competition Act

The *Competition Act* specifically establishes the standard against which mergers are to be examined. We must determine whether the merger prevents or lessens, or is likely to prevent or lessen, competition substantially in a relevant market. The Director is authorized to seek a remedial order from the Competition Tribunal when this standard has been reached.

In our assessment of the impact of a merger under the *Competition Act*, we abandon tunnel vision. The competitive implications of a merger cannot be assessed solely on the basis of industry concentration or the market shares of the participants. Simple quantitative criteria such as concentration ratios are not determinative. The *Act* requires us to consider a whole range of other "qualitative" factors. These include the extent of effective foreign competition; the possibility of a failing business; the availability of acceptable product substitutes; the existence of any trade, regulatory or other barriers to entry; the extent of effective competition remaining in the market; whether the merger is likely to result in the removal of a vigorous and effective competitor; the nature and extent of innovation and any other factor that is relevant to competition in a market. In addition, it is not only the negative effects on competition which are considered in merger review, but also the benefits for the Canadian economy flowing from more efficient industry. An efficiency exception for mergers was incorporated in the 1986 revisions. Mergers are not to be blocked if they bring about gains in efficiency that will be greater than, and will offset, the effects of any lessening of competition resulting from the merger, and if such efficiency gains would not likely be attained if an order were made. In short, the *Act* requires that we examine a merger from a practical and real-world economic perspective. The overwhelming majority of mergers do not give rise to significant competition issues, and in fact we have only opened files on a small proportion of the mergers that have taken place in Canada. We open files for examination purposes only when time spent by an officer on a transaction exceeds two days; this inevitably includes all requests for Advance Ruling Certificates (ARCs) and notification filings under Part VIII of the *Act*. The number of ARC requests and notification filings have been increasing significantly, and these now constitute the great majority of the files opened for purposes of merger examinations.[1] A significant number of the files opened pertain to those proposed mergers which are the subject of a compulsory notification filing under Part VIII.

From June 19, 1986, until May 4, 1989, 402 files have been opened regarding examinations which required two days or more of officer time or which pertained to ARC requests or notifiable transactions. Of these merger examinations, 321 were concluded as posing no issue under the *Act*; many of them were resolved after a few days of officer time. In 26 cases the decision was to monitor the actual effects of the merger within the three-year period provided under the *Act*. In three other cases we decided not to launch a challenge because the competition concern was removed by a pre-closing restructuring of the transaction. In six other cases we decided not to challenge the merger because the parties undertook to restructure the transactions after closing so as to alleviate competition concerns. Seven others were voluntarily abandoned by the parties for reasons, in whole or in part, related to our concerns. An additional five merger applications have gone to the Tribunal for consideration— and we have recently announced an intention to file applications before the Tribunal in another two cases. The remaining files involve ongoing examinations. The assessment of a merger involves an in-depth understanding of the business and competition dynamics of the particular industry in question. This requires substantial information on both the market and its participants. Our analysis of the likely impact of the merger typically addresses each relevant competitive dimension such as price, level of service, quality, product choice and innovation. To assist in this assessment, we augment our staff expertise by bringing in outside economists, lawyers, accountants, and independent industry experts as required.

The initial source of information for the assessment comes from the parties themselves. They are encouraged to provide as much information as possible on the transaction and its competitive impact. However, that information alone may not be sufficient to achieve a full and objective understanding of

the potential impact of the transaction. To do that often requires the input of others who will be affected. We actively seek information from suppliers, competitors, customers and consumers. The privacy and confidentiality provisions of the *Act* and common sense dictate that these consultations be discreet. Discreet though they are, they may nevertheless be extensive. The greater the economic significance of the merger, the more expansive our consultations with third parties will be.

Compliance-Oriented Approach

I think it is fair to say that parties to proposed mergers generally desire as much certainty as possible on the timing, terms and legality of the transaction. Thus, in most instances, the parties try to ensure that the proposed merger complies with the *Act*. It is not surprising, therefore, that we have such a high degree of compliance with the notifiable transactions provisions of the *Act*. We find as well that a great number of mergers below the notification thresholds are brought to our attention early on by the parties themselves. They need to know on a timely basis if the transaction they propose may give rise to competition concerns.

In those cases where potential concerns are identified, the parties themselves are usually willing to seek ways to bring the transaction within the terms of the *Act*. In those few cases where the parties are determined to proceed with their transaction notwithstanding our competition concerns, there is of course the availability of proceedings before the Tribunal on a contested basis.

The approach which we have adopted to the enforcement of the merger provisions of the *Act* gives businesses every reasonable opportunity to arrange their affairs to ensure compliance with the *Act*. This is what we call our compliance-oriented approach. The doors of the Bureau are open to business people who wish to discuss contemplated transactions. The doors are open to discussions and consultations throughout the examination process. As I mentioned earlier, there is also consultation with affected third parties. Where potential competition concerns are identified, we discuss them with the merging parties, thereby providing an opportunity to address their concerns. This may involve a further factual analysis regarding specific issues or a review of various options available under the *Act*. If the parties put forward a reasonable proposal which is designed to alleviate the competition concerns, that proposal will also be examined and a further round of consultations, including those with affected third parties, may take place. The compliance-oriented approach relies on resort to the Tribunal to enforce the *Act* on a contested basis only where that course of action proves necessary to achieve the objectives of the *Act*.

This compliance-oriented approach is both expeditious and workable. In almost all cases where competition concerns are identified, the parties can take steps to comply with the *Act*. The small number of applications brought before the Tribunal is not, as some might suggest, a sign of an ineffective merger law or insufficient enforcement. Quite the contrary, it is, in my view, a reflection of the realistic and flexible framework of the *Act* and the success of the compliance program.

During my three years with the Bureau, I have publicly discussed at some length the range of alternatives available to address merger cases under the *Act* including: advance ruling certificates; advisory opinions; monitoring; pre-closing fix-it-first resolutions; post-closing restructuring, including undertakings and consent orders; and finally, contested applications to the Competition Tribunal. Today, as I indicated earlier, I would like to focus on three recent developments in our compliance approach:

1. The enhancement of our public information program through the elaboration of reasons not to challenge a merger.
2. The announcement of an intention to file an application before the Tribunal in those merger matters in which a substantial lessening of competition has been identified.
3. The increased use of consent order proceedings before the Competition Tribunal.

Each of these developments is part of our ongoing effort to ensure that the merger review process is carried out in a manner that is well understood by the various communities we serve, and to provide all available opportunity to interested and affected parties to make their views known. Each of these

developments has been put into place having regard to the limitations of the confidentiality provisions of the *Act*.

The Information Program

Since the passage of the *Act*, a high priority has been placed on providing information to the public about the new legislation and the administration of it. Information on what we do and how we do it permits everyone to better appreciate, understand and evaluate the approach taken by the Bureau. It also permits businesses to better integrate *Competition Act* considerations into the planning stages of a merger.

Since the summer of 1986, I and senior members of the Bureau have given about 100 speeches, over 30 of which are available to the public in written form, on the new provisions of the *Act*, on our enforcement of the *Act*, and detailing the merger review process itself.

The Annual Report to the Minister, which is tabled before Parliament, has been prepared in a new, more readable format. It now contains an overview of the activities of the Bureau for the year and a specific chapter on mergers.

We have also tried to anticipate questions relating to new developments and to provide timely and useful materials to address these questions. For instance, subsequent to the notification provisions of the *Act* coming into force in July 1987, an information kit was produced and widely distributed. This was designed to inform the business community of the new notifiable transactions requirements and to assist them in meeting these requirements.

We also initiated the publication of a series of information bulletins on various provisions of the *Act*. To date, we have released one on the Merger Provisions and a second on Advance Ruling Certificates. A bulletin on our Program of Compliance is to be issued in June, to be followed by bulletins addressing the efficiency exception, the failing firm factor, barriers to entry, and the merger review process. The volume of work within the Bureau has not enabled us to meet our original schedule of bulletins, but we are striving to complete the ones I just mentioned before the end of the year.

Perhaps the most important ongoing element of our public information program is the simple press release. While always mindful of the confidentiality provisions of the *Act*, we believe it is necessary to provide timely information on merger case decisions and resolutions through press releases. In some of the more significant cases, we have also issued accompanying backgrounders.

We devote much time and effort to finding ways to maximize the public dissemination of information on specific merger cases and their resolutions. In discussions with the parties to certain mergers, the need to put appropriate information in the public domain is often addressed and we have occasionally encouraged parties to assist us in keeping the public informed. The need to provide sufficient and timely information to the general public arises essentially in the context of those mergers which have already become public knowledge and which are of economic significance. A balancing process is therefore required. The information program has been developed in the context of the need for confidentiality in business affairs. Nothing that is being done in the area of public communications is intended to alter that foundation.

In recent months we have engaged in consultations with representatives of the business and legal communities and consumer groups. Consultative meetings of this nature are certainly not new to the Bureau. It was generally acknowledged that we should continue to try to increase the information provided to the public on the resolution of particular cases. This information will assist the public to better understand the *Act* and the administration of it. It will ensure the public has timely information. A better informed public is able to participate more effectively in the process. In addition, the business and legal communities in particular are better equipped to plan future transactions within the framework of the *Act*; and the antitrust community as a whole, including the academic community, is better able to analyze the administration of the *Act*. As a result, some recent press releases have been accompanied by backgrounders which have provided greater detail on transactions and on the

considerations giving rise to the decision not to challenge a transaction.

I would note that the question of how such information is to be disseminated publicly has been the subject of much advice and many opinions since my arrival in Ottawa. It was the subject of a lively debate at my first Consultative Forum in September 1987 with private sector lawyers, economics, and business and consumer representatives convened to discuss the implementation of the merger provisions. It has also been the subject of numerous discussions between members of the Bureau and counsel from the Department of Justice in relation to the scope and operational limitations of the new confidentiality provisions of the 1986 legislation.

In certain recent announcements we have endeavoured to indicate not only which factors were given significant consideration in our assessment, but to provide even greater guidance on our interpretation of the various factors identified in the *Act*. The extent to which we provide this more detailed information depends upon the nature and significance of the merger, which therefore enables us to allocate our resources in an effective manner on a case-specific basis.

I would like to highlight two recent case examples. The first was the decision not to challenge the completion of the proposed acquisition of Wardair Inc. by PWA Corporation. In the context of that particular merger assessment, an eight-page backgrounder accompanied one of the news releases and provided information on how the Bureau considered the section 93 factors of:

- failing business
- barriers to entry, including regulatory control over entry
- potential foreign competition
- effective remaining competition, and
- the removal of an effective and vigorous competitor.

A considerable portion of the backgrounder was devoted to the application of the failing firm factor to the situation in that case.

The proposed acquisition of the assets of Domglas Inc. by Consumer Packaging Inc. was a second case in which the public announcement not to challenge the transaction was accompanied by a four-page backgrounder offering further details on the Bureau's assessment. In particular, the backgrounder provided information on how we examined the factors of product substitutability, import competition and potential efficiency gains resulting from the merger. Copies of the news release and the backgrounders in both the Wardair and Domglas matter can be obtained from the Bureau. For those of you who would like to obtain copies today, I have brought several copies of each for distribution.

Intention to File

We have recently adopted a practice of publicly announcing the intention to file an application before the Tribunal in situations where I have determined that competition is likely to be lessened substantially within the meaning of the *Act* should the transaction proceed as proposed. These announcements are only made in cases involving mergers that the parties have already publicly announced. This practice allows all parties affected by the merger to have timely relevant information and puts investors, both large and small, on an equal information footing. This announcement will also provide an additional opportunity for affected or interested persons to communicate to the Director any relevant information they may have if they have not already done so, before the application is actually filed with the Tribunal. Therefore, the notice of intention will assist in ensuring that the administration of the merger provisions of the *Act* is done in a fair and effective fashion.

I should note that a similar practice has been followed for many years by the Antitrust Division of the U.S. Department of Justice in relation to merger cases before them. They have found that such announcements have tended to expedite the resolution of merger cases in certain instances.

The notices will contain a statement of my intention to make an application to the Tribunal together with a very brief statement of the circumstances supporting this intention. There will be no disclosure of confidential information. Nor will the general theory of the case be provided. The full basis for the

application would only become available when the application is filed with the Tribunal. It would, of course, be our intention to file the application as soon as reasonably possible after issuing the notice. The expected time is in the range of two to four weeks.

It is our belief that parties will not be prejudiced by this initiative. Merger proposals that are only being contemplated by a party or parties and are not yet proceeding publicly, will not be the subject of these announcements, unless and until the parties decide to go forward publicly with their proposal.

Before the notice is given, the Bureau staff would have thoroughly explained to the merging parties their assessment of the transaction and their views of the competition issues raised. The parties will have had an opportunity at that stage to discuss staff concerns, to provide evidence by way of rebuttal or to put forward proposals to alleviate competition concerns. Where staff recommend that an application be made to the Tribunal, the parties will have an opportunity to meet with me personally to discuss the matter. Where I am of the view that concerns under the *Act* still exist and that proposals, if any, submitted by the parties have not alleviated those concerns, parties are encouraged to consider again whether their objectives can be carried out while at the same time addressing competition issues that would otherwise require initiating contested proceedings before the Tribunal. However, where it is my intention to make an application to the Tribunal, the parties will be informed of that decision before the announcement of the intent to file is made. The public announcement of my intention will generally be made shortly after the parties are informed of my position, usually within two to three days.

It is, of course, possible that between the time of the announcement of intent to file an application and the time that the application is actually filed, the parties may submit a revised proposal which addresses the concerns giving rise to the application. If these proposals are in fact successful in removing the basis for challenging the merger, there would be a further announcement to the public pertaining to the resolution of the matter. Such a second announcement could involve a true "fix-it-first" resolution, which means a restructuring before closing, thereby obviating the basis for any application to the Tribunal. Or it could involve a post-closing restructuring which may necessitate an application to the Tribunal on a consent order basis, or possibly undertakings to my office in those cases where an immediate application to the Tribunal would not be necessary.

Recently, I have issued such a notice with respect to the acquisition by Baxter Foods Limited of the dairy processing business of McKay's Dairy Limited. As well, a notice was issued in the acquisition of the electric power transmission and distribution business of Westinghouse Canada Inc. by Asea Brown Boveri, Inc.

The Asea Brown Boveri acquisition of Westinghouse Canada is currently before the Competition Tribunal on the basis of a proposed consent order. The first public announcement in this case was the notification of an intention to file an application with the Tribunal. Subsequent to the initial announcement, a second public statement was made indicating a proposed resolution would be submitted to the Tribunal on the basis of an application for a consent order. Because the matter is now before the Tribunal, I do not propose to discuss it further at this time. Copies of both announcements are available from the Bureau. Copies of the draft consent order and the competitive impact statement submitted in support of that order are available from the Competition Tribunal Registry.

Increased Use of the Tribunal

As I indicated in some of my earlier speeches, greater use of alternatives to contested litigation, including the consent order route, can achieve timely, less costly and effective results in appropriate circumstances. Over the past two years, we have been successfully making greater use of the prohibition order provisions on a consent basis in relation to the criminal sections of the *Act*. I hope we can achieve similar success in relation to the non-criminal sections of the *Act*.

It is likely therefore that greater use will be made of applications to the Competition Tribunal on a consent order basis in appropriate merger cases. Recently, filing for such orders has been made not only in the ABB case just referred to, but also in the Gemini case which involves the merger of the airline

computer reservation systems of Air Canada and Canadian Airlines International. While I will retain flexibility in some situations involving post-closing restructuring to accept written undertakings, I think it is likely that we will see an increasing number of these post-closing resolutions being processed by the Tribunal on a consent order basis. The Tribunal rules of practice and procedure afford an opportunity for public proceedings. Increased use of the consent order process will provide a body of precedent which will, over time, contribute both certainty and predictability to the voluntary compliance program.

I should emphasize once again that pre-closing restructuring– that, is those mergers that are resolved on a true "fix-it-first" basis– generally will not be the subject of a Tribunal application because the legal foundation for such application will not arise. It is essentially resolutions involving post-closing restructuring or other post-closing conduct which may be the subject of a consent order application or undertakings. I should also add that, where undertakings are accepted, they will usually be backed up by a signed consent of the parties to an order in the same terms, which order will only be sought if the undertakings are not fulfilled. That is a practice we have made use of over the past two years.

Factors which we may consider in the selection of cases which will proceed on the basis of an application for a consent order, as opposed to the acceptance of undertakings, include:

a) the economic significance of the case;
b) the need to ensure long-term enforceability, that is, beyond the three-year limitation period provided for in the law;
c) the need for certainty of immediate enforceability;
d) the anticipated need for possible variation in the future;
e) the precedential value of the order sought; and
f) the unique character of the case or the proposed resolution.

As I have stated earlier, the Tribunal consent order process is fully consistent with the compliance-oriented approach. Unlike contested proceedings, the consent order process was intended by Parliament to afford an expeditious means of disposing the cases without the evidentiary requirements of a contested application. The consent order process should not be unnecessarily encumbered by the uncertainty, time considerations and high costs associated with contested proceedings.

Addressing Some Misconceptions

It must be stressed that the voluntary compliance program is intended to support the prevalent desire of business people to reorganize their affairs to ensure compliance with the *Act* and thereby achieve more certainty in their business transactions. In those cases where the parties to the merger are determined to proceed with their transaction notwithstanding competition concerns, I remain fully prepared to pursue the matter on a contested basis before the Tribunal.

Let me repeat, however, that the *Act* does not contemplate that every merger ought to be brought before the Tribunal for a determination of whether or not the merger substantially lessens competition. Nor is it appropriate for the Director to make an application to the Tribunal simply because the application may raise interesting questions of some public interest. The statutory standard against which mergers are to be examined is a substantial lessening or prevention of competition in a relevant market. It is a substantial lessening of competition which must be proved and, if there is no basis for an application on that ground, the case cannot proceed to the Tribunal. Equally, if the parties organize their affairs so that the foundation for an application is removed, there is no case to take to the Tribunal, i.e. as in the case of a true "fix-it-first" resolution.

Let me also confirm that there is no reluctance on our part to go to the Tribunal if that is what it takes to solve the problem. However, from our experience over the past three years, there is a reluctance on the part of most of the businesses concerned– based on their desire to avoid public scrutiny of their future plans and the inevitable delay, expense and uncertainty of the full litigation process. Litigating

the future effects of a proposed merger is simply not the same as litigation over past conduct. And from my discussions with my OECD counterparts, I can tell you that the reluctance of businesses to embark on a contested adversarial proceeding in relation to a proposed merger is similar in other industrialized nations.

I might also note that there is nothing new in the acceptance of undertakings for post-closing restructuring to resolve competition concerns. Undertakings have been accepted by my predecessors since the 1960s. This practice is fully supported by the legal advice provided to the Bureau. In fact, undertakings were used in relation to the (criminal) merger provisions under the *Combines Investigation Act*. In addition, I would note that Mr. Justice Strayer, writing for the Competition Tribunal, acknowledged in a decision he wrote regarding intervenors in the Gemini case, that settlements may be reached between the Director and the parties to a merger in instances where there is no necessity of a consequent application to the Tribunal for a consent order.

Conclusion

I would like to conclude by emphasizing two points. First, the compliance-oriented approach to merger review continues to be an integral part of our administration of the *Act*. The approach gives business every possible opportunity to structure their affairs within the parameters of the law. Also, it relies on a broad range of remedies to address and to alleviate problematic situations under the *Act*. I continue to believe that the essential elements of an open-door, consultative and flexible approach will lead to realistic, properly informed and well-reasoned decisions. Additionally, I would stress that my commitment to seek "fix-it-first" solutions whenever possible is as strong as ever.

Second, the developments of the last number of months are simply enhancements to the fundamental compliance-oriented approach to merger review. More elaboration on reasons not to challenge certain mergers, announcements of an intention to file an application to the Competition Tribunal, and greater use of the consent order mechanism for post-closing restructurings are all part of the evolving process. These enhancements to our fundamental approach are consistent with our desire to make merger review in Canada second to none in terms of expeditiousness, effectiveness and fairness.

Postscript

I can't leave this discussion of recent developments in the administration of merger review without touching briefly on two decisions delivered a few weeks ago by the Supreme Court of Canada in the *City National Leasing* and *Rocois Construction* cases. In upholding the constitutional validity of section 31.1 of the *Combines Investigation Act*, which creates a civil cause of action, the Court upheld the *Combines Investigation Act* as valid federal legislation under the general trade and commerce power. The Court also noted that in numerous cases the *Act* had already been upheld under the federal criminal law power.

These decisions provide very strong constitutional support for the merger provisions and the provisions regarding reviewable matters which were enacted in the 1986 *Competition Act*. The scheme of competition regulation in the new legislation is even more complex than that contained in the *Combines Investigation Act*.

In addition, several of the comments of the Chief Justice in the City National Leasing case acknowledge the significant importance of the federal competition laws to the Canadian economy. Speaking for the Court, Chief Justice Dickson made the following comments:

> From this overview of the *Combines Investigation Act*, I have no difficulty in concluding that the *Act* as a whole embodies a complex scheme of economic regulation. The purpose of the *Act* is to eliminate activities that reduce competition in the marketplace. The entire *Act* is geared to achieving this objective. The *Act* identifies and defines anti-competitive conduct. It establishes an investigatory mechanism for revealing

> prohibited activities and provides an extensive range of criminal and administrative redress against companies engaging in behaviour that tends to reduce competition. In my view, these three components, elucidation of prohibited conduct, creation of an investigatory procedure, and the establishment of a remedial mechanism, constitute a well-integrated scheme of regulation designed to discourage forms of commercial behaviour viewed as detrimental to Canada and the Canadian economy. (p.32-3).
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> As I noted earlier, the purpose of the *Act* is to ensure the existence of a healthy level of competition in the Canadian economy. The deleterious effects of anti-competitive practices transcend provincial boundaries. Competition is not an issue of purely local concern but one of crucial importance for the national economy. (p.35).
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> In sum, the *Combines Investigation Act* is a complex scheme of competition regulation aimed at improving the economic welfare of the nation as a whole. (p.38).

These decisions confirm that our federal competition law is constitutionally positioned on a very solid foundation. Constitutional questions that have existed since the 1931 decision of the Privy Council in the *P.A.T.A.* case have now been addressed.

Notes

1. Since passage of the *Act* on June 19, 1986, to May 4, 1989, the Bureau has received 131 ARC requests, of which 99 have been granted. In fiscal year 1987/88, ARCs constituted about 18 percent of merger examinations, and in fiscal year 1988/89, this figure rose to approximately 31 percent. Since July 15, 1987, when provisions regarding notification filings came into effect, the Bureau received 65 such filings in fiscal year 1987/88, and received 92 such filings in fiscal year 1988/89. Additional notification filings and ARC requests have been received in the current fiscal year.

Expressed as a percentage, the number of notification filings and ARC requests have constituted approximately 62 percent of total merger examinations commenced in fiscal year 1987/88 and 79 percent in fiscal year 1988/89. This percentage is continuing to increase in the current fiscal year.

THE PUBLIC INTEREST AND ENFORCEMENT DISCRETION UNDER THE COMPETITION ACT

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The *Competition Act* begs the question of the extent to which the Director of Investigation and Research has a discretion as to whether to challenge a proposed or completed merger or a course of conduct under Part VIII of the *Act*. The *Act* is equally lacking in direction to the Competition Tribunal as to the considerations it may apply in determining whether to make an order. The issue is important because there may well be cases in which public-interest considerations should override effect-on-competition criteria.

Prosecutorial Discretion

Before looking at the role of the Director and the Tribunal, it is useful to reflect on the traditional role of the Attorney General and the courts. It is established that the Attorney General has prosecutorial discretion which may take into account matters of public interest in determining whether it is appropriate to proceed with a charge in any case.

For example, under the *Competition Act*[1] , Section 45, it is an indictable offence to agree in a way that has the effect of unduly restraining competition. And, there are other criminal offences, including any attempt by agreement, threat or promise to influence upward the price at which someone else sells a product (price maintenance, Section 61) and engaging in a practice of discriminating among competitors as to the price of products in equivalent quality and volume (price discrimination, Section 50). At first glance, these provisions would appear to create straightforward offences– if a person is caught stealing, he should be convicted. After all, commission of these *Competition Act* offences is tantamount to stealing, from those who have an interest in our economy, some of their statutory rights to the benefits of competition. However, we know that the circumstances in which these offences may occur are often complex in terms of market factors and seriousness of effect. We do not confine ourselves to applying discretion in the amount of the punishment to be inflicted on conviction, but we recognize that there is room for discretion as to whether a charge should be laid in the first place. It may be in the public interest that the offensive behaviour be prohibited without proceeding to indictment. This is recognized in the *Competition Act* (Section 34 (2)) which confers upon a court the power to prohibit "the doing or continuation of any act or thing...constituting or directed toward the commission of the offence." This provision is in juxtaposition to the preceding provision which confers upon the court a similar power in a case where a person has been convicted of an offence. What the section is saying in plain language is that, when the Attorney General decides within the appropriate scope of his discretion that the public interest would be served, not by seeking a conviction, but rather by prohibiting the continuation of offensive behaviour, he may choose that route in one case while proceeding for a conviction in another. Generally, we expect that equal justice requires that those who have committed an offence be tried, convicted and subjected to a penalty appropriate to the person convicted and to the circumstances. However, we do recognize the desirability of prosecutorial discretion to be exercised judiciously. This reference is not intended to be a definitive analysis of that subject, but rather to help to define the role of the Director and the Tribunal under the *Competition Act*.

The Director

The *Competition Act* repeats over and over again the words "where, on application by the Director, the Tribunal finds... it may make certain orders." (Section 75 - refusal to deal; Section 76 - consignment

selling; Section 77 exclusive dealing, tied selling and market restriction; Section 79 abuse of dominant position; Section 81 - delivered pricing; Section 82 - foreign judgments and laws; Section 83 - foreign laws and directives; Section 84 - refusal to supply by foreign supplier; Section 92 - mergers). Nowhere does the *Act* dictate the reasoning process by which the Director is to determine whether he should apply for a Tribunal order. It is perhaps implied that he should do so when he thinks that on the criteria set out in the *Act* the Tribunal should make an order, and perhaps also in cases where he thinks that the Tribunal might make an order on reviewing the circumstances known to him.

In contrast, the *Competition Act* is specific in its requirement that whenever the Director has reason to believe that a person has contravened the *Act* or failed to comply with an order made pursuant to the *Act*, or that grounds exist for the making of an order by the Tribunal, or whenever he is directed by the Minister to inquire as to whether any of those circumstances exist, or whenever he is petitioned by six residents of Canada, he shall cause an inquiry to be made into all such matters as he considers necessary to inquire into with the view of determining the facts (Section 10). The Director has extensive powers to achieve that objective. At any stage of an inquiry, if the Director is of the opinion that the matter being inquired into does not justify further inquiry, he may discontinue the inquiry. On doing so, he must report to the Minister the reason for discontinuing (Section 22). Further, the *Act* provides that the Minister may at any time require the Director to submit an interim report with respect to any inquiry (Section 28). Consistent with the provision that gives the Minister power to direct an inquiry, he may, on receiving the Director's report of discontinuance, order the Director to make further inquiry. The Attorney General's discretion is reflected in Section 23, which provides that the Director may at any stage of an inquiry remit information to the Attorney General "for consideration as to whether an offence has been, or is about to be committed against this *Act* and for such action as the Attorney General of Canada may wish to take" (Section 21).

In summary, the inquiry responsibility of the Director can be activated by the petition of six Canadian residents or by his own view of the circumstances known to him or whenever he is directed by the Minister. In addition, the Minister can give further instruction, all toward the objective of ensuring that everyone interested is satisfied that alleged or perceived anti-competitive situations are the subject of appropriately full inquiry.

So much for information gathering. The question then is, what does the Director have to do with the information? It may be implicit that the Director should refer to the Attorney General any information which is judged by him (or might be judged by the Attorney General?) to constitute an offence under the *Act*. However, the same circumstances might be an appropriate foundation for an application for an order by the Tribunal, and it is surely implicit in the scheme of the *Act* that the Director should have some discretion as to which avenue to pursue to achieve the objectives of the *Act*.

The Director apparently takes the position that his discretion is confined to criteria identified in the *Competition Act* as relevant to competition. Put another way, his position appears to be that he is confined to exercising his judgment as to whether those criteria justify or indeed require an order by the Tribunal to achieve the objectives of the *Act*. However, in implementing those objectives, he has emphasized the desirability of negotiating a solution where he perceives there is a problem and would, in the absence of a negotiated solution, be prepared or feel obliged to proceed to the Tribunal. Unlike the situation with regard to the criminal offence provisions of the *Competition Act*, with respect to which the Attorney General of Canada and presumably the Attorneys General of the provinces may act on information from any source, and with respect to which private damage action may be instituted (*Competition Act*, Section 36, introduced in 1976), the matters reviewable by the Tribunal may only be advanced to the Tribunal by the Director. He is thus exclusively in command of the situation. The Tribunal has no power to require that a matter be brought before it, although it has indicated in the *Palm Dairies*[2] decision that, when a consent order is applied for, it will exercise its discretion as to whether the consent order reasonably meets the requirements of the *Act* and is appropriate in the circumstances.

The Tribunal

With regard to the powers of the Tribunal, the *Act* consistently uses the word "may." For example, with respect to mergers, Section 92 says that the Tribunal may make a variety of orders depending on the circumstances. It does not say that, if substantial lessening of competition is found, the Tribunal shall make an order. The *Act* offers no criteria for the exercise of discretion except indirectly by reference to the factors relevant to substantial lessening (Section 93). What is to prevent the Tribunal from considering evidence of public-interest factors beyond those relating to competition? The *Act* says that the Tribunal shall not make an order where it finds (essentially a matter of discretion) that efficiency gains outweigh the adverse effects on competition (Section 96). Does this one specific public-interest criterion imply that others are to be excluded?

The logic of the provisions is not self-contained. The lacuna must have been obvious to the draftsman and was perhaps intended to leave discretion to the Tribunal to rely on broader public-interest considerations. In comparison, Bill C-13 of 1977 would have made the list of factors relevant to deciding whether to make an order (not merely, as in the *Competition Act*, to whether competition has been or is likely to be prevented or lessened substantially), and a basket clause would have confined other factors not listed to those relevant to competition in a market affected by the merger.[3] An earlier bill, C-42[4], also made the factors relevant to the decision whether to make an order but that version of the proposed section did not contain the basket paragraph.

Section 92(1)(f)(iii)(A) provides considerable flexibility in imposing conditions on the operation of a merged enterprise or in other matters, and the flexibility is further expanded in Section 99 (conditional orders) which is a straightforward addition of flexibility to Section 92. In the same vein, the power to vary orders under Section 106 implies that the Tribunal will have continuing jurisdiction to rescind or vary any order or part thereof.

Similar wide powers are given to the Tribunal with regard to the other matters within its jurisdiction. For example, with regard to exclusive dealing and tied selling, the Tribunal "may make an order directed to all or any of the suppliers against whom an order is sought prohibiting them from continuing to engage in such exclusive dealing or tied selling and containing any other requirement that, in its opinion, is necessary to overcome the effects thereof in the market or to restore or stimulate competition in the market" (Section 77 [2]). Note also subsection 3 with regard to market restriction and Section 79 with regard to abuse of dominant position. Having regard to the wide range of powers given to the Tribunal to make orders appropriate to the circumstances, does it follow that the Tribunal must make some order when an application is brought by the Director and it concludes that the essential requirements of the *Act* are present, or does the use of the word "may" stipulate or, at least, imply that the Tribunal may take into account public-interest criteria other than those strictly related to measuring competition?

When one reads the statute from cover to cover, it appears reasonably clear that where Parliament intended "shall" it used that word, and where it used "may" one may infer that it intended to confer some discretion on the Tribunal. As noted, whether that discretion is to be exercised among the items on the menu provided in the statute, or whether it permits the Tribunal to act on other considerations is an open question.

Presumably, the appropriate discretion of the Tribunal is an issue of law which might be determined on appeal (as provided in Section 13 of the *Competition Tribunal Act*[5]), and possibly under the *Federal Court Act*[6] (Section 28) as involving the fundamental issue of the jurisdiction of the Tribunal. If it should be determined by the appropriate courts that the Tribunal does have discretion beyond the criteria set out in the *Act*, based on the use of the word "may" with respect to its power to make orders, it might be thought that it would be difficult, if not impossible, for a decision of the Tribunal to be reviewed on appeal. However, the position of the court would not be different from the position of the trial court and therefore of the appellate courts under the *Combines Investigation Act* as it stood before the 1986 amendment. Under the old *Act*, a merger was prohibited when competition was, or was likely to be

"lessened to the detriment or against the interests of the public, whether consumers, producers or others" and a monopoly was prohibited when the monopolist had operated the business or was likely to operate it "to the detriment or against the interest of the public, whether consumers, or producers or others"[7] In *R.* v. *Canadian General Electric, Westinghouse Canada and Sylvania* (1976)[8] the parties were charged and convicted under Section 32 and they were also charged under Section 33.[9] In dismissing the charge under Section 33, the trial judge concluded that the fact of a conviction under Section 32 was not of itself evidence of the operation of a monopoly to the detriment of the public. Similarly, in *R.* v. *K.C. Irving* (1976), the Supreme Court of Canada unanimously concluded that no presumption of detriment to the public arises from the fact that one group has obtained complete or substantial ownership of a particular industry In the result, the courts held that it had not been shown that the monopoly in the newspaper business that was the subject of the prosecution in the case had been, or was likely to be, operated against the public interest. None of the courts appeared to shrink from determining the public interest.

Notes

1. All references, except as noted, are to the *Competition Act*, Revised Statutes of Canada, 1985, Chapter C-34, as amended, in particular by Statutes of Canada, 1986, Chapter 26.
2. Tribunal decision November 27, 1986.
3. Canada, House of Commons, November 1977,C-13, Section 31.71 (4).
4. Canada, House of Commons, March 1977, Bill C-42.
5. Statutes of Canada, 1986, Chapter 25.
6. Revised Statutes of Canada, 1985, Chapter F-7
7. *Combines Investigation Act*, R.S.C. 1985, Chapter 34, Section 2.
8. 75 D.L.R. (3d) 664 (1976).
9. Of the *Combines Investigation Act*, R.S. of Canada, 1985, Chapter 34.

MERGER LAW SCORECARD—FIRST THREE YEARS

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In preparing these comments, which were originally presented to a conference organized by the Law Society of Upper Canada, certain assumptions were made. Perhaps the key assumption is that the reality of the merger review process, contained in the *Competition Act*, gives the Director very considerable power. The office performs very much the role of investigator, prosecutor and, to a large degree, judge.

With that assumption in mind, the new law is working just about as well as could have been expected. Over the past three years there have been many comments, if not criticisms, of the new law, which, it may be argued, are based on certain unrealistic and untenable assumptions. There are three such comments to be challenged.

First, it was unreasonable and unrealistic to expect there would be many litigated merger cases. This has not been the situation anywhere in the world under a competition-based merger review. Therefore, those who are critical of the system because there have not been enough litigated cases are not recognizing the realities of merger and acquisition activity.

Second, it was inevitable that the Director of Investigation and Research would become the most dominant force in the administration of the law. That partly flows from the disincentive to litigate merger cases, but it also stems from the fact that the private sector wants quick decisions with certainty, and the only way that can be achieved is by dealing with the gatekeeper to the process.

Third, the law enforcement model, which the law reflects, remains far better than the alternative of an open-ended, politically-oriented investment review process. The business community, if asked today, would still overwhelmingly prefer the model Parliament adopted.

Growing Pains

This should not be taken as saying there have been no growing pains in implementing the new law. Some of the areas where there have been some difficulties in the first three years are outlined below.

First, many business leaders still have some difficulty in understanding that mergers can be reviewed on competition grounds alone. Perhaps this reflects the general view that important decisions in Canada should be made on a broad rather than a narrow basis. It may also simply reflect the fact that we do not have a strong history of applying rigorous analysis, on a competition basis, to mergers. Therefore, in the first three years we have seen many lawyers and businessman stymied by the fact that the Bureau of Competition Policy is driven by the economic theory underlying competition policy and not by a broader public interest concern.

A second area of growing pains has been the frustration that certain business leaders and lawyers have found in their inability politically to affect the Director's decisions. The Director's office is largely immune from political interference, at least in a direct, overt way. That is not to say that the Director is insensitive to broader political and social concerns, but the CEO pounding on the Minister's door saying "get this man off my back" does not work and will not work.

A third area of growing pains has been the lack of sophistication among the business community and their advisors, be they lawyers or investment bankers, about the policy and theory of competition law. The level of sophistication in Canada in merger review, even though it may have improved immeasurably during the three years the law has been in effect, is a far cry from that of the United States. There, businessmen and lawyers are used to the more established U.S. law, even if weakened during the Reagan administration. There clearly has been difficulty in getting Canadians up to snuff on the economic analysis side.

A fourth growing pain, which is related to the previous one, is the fact that many businessmen and their advisors fail to recognize the need to get more sophisticated about the merger review process. There has been some reluctance to engage economists in these cases, although that seems to be declining. Also, there has been a concern in the business community about being open with the Bureau and disclosing confidential matters to the bureaucrats.

A fifth growing pain has been the difficulty, both in the Director's office and the business community, to come to grips with the vagueness of the standard in the law. The substantial lessening of competition test, in the context of prospective decision making, is an extremely difficult one. This has lead to considerable frustration. Although the frustration arises on both sides, the greater onus has to rest on the Director to try to articulate clear standards.

A sixth growing pain, at least for the private sector, has been the surprising audacity of the Bureau of Competition Policy. The officers of the Bureau have been diligent, hardworking and determined to understand the industries they are reviewing. Personal experience has been that at the end of a merger review, the officers of the Bureau are very knowledgeable about the competitive dynamics of the industry affected by the merger.

The final growing pain has been the overwhelming workload faced by the Bureau of Competition Policy, in the merger branch in particular. Although some of the workload has been self-generated, the Bureau will get more efficient in its reviews as time goes on.

Areas of Improvement

Having looked at the overall implementation of the legislation, there are three areas where improvement can be achieved in the next short while. First, the Director should start issuing clearer guidelines on how he and his staff interpret the test set out in the legislation. Second, the business community should adopt a policy of being more open with the Director's staff. Third, the business community needs to make sure it is well educated about competition merger review since that will clearly improve their chances of obtaining positive results.

Conclusion

Having reflected on the first three years of the law the Director, his staff and the new law deserve a score of B+. There are areas for improvement but, by and large, the system has worked largely as one should have expected. All of this begs the question whether Canada needs a competition-based merger law at all. In other words, is it humanly possible to make judgments prospectively, without mistake in a sufficiently high percentage of cases, on a standard such as substantial lessening of competition. So far, the results are mixed. In the next three years we will have to assess more carefully whether such a law really improves the efficient operation of the economy.

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