

CANADIAN COMPETITION LAW DEVELOPMENTS

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HISTORIC SUPREME COURT DECISION UPHOLDS FEDERAL COMPETITION LEGISLATION

On April 20, 1989, the Supreme Court of Canada issued its long awaited judgments in two cases testing the constitutional validity of the civil damage provisions of the *Combines Investigation Act*, as contained in s. 31.1 of that Act as it then was. The two cases were argued before the Supreme Court in May of 1988. The first, on appeal from the Ontario Court of Appeal, was *General Motors of Canada v. City National Leasing*. The second, on appeal from the Federal Court of Appeal, was *Québec Ready Mix Inc. et al. v. Rocois Construction Inc.*

The Supreme Court, in a judgment written by Chief Justice Dickson and concurred in by five other members of the Court, unanimously found that the federal legislation was valid. There were two constitutional questions stated by the Court:

- a) Is the *Combines Investigation Act*...either in whole or in part within the legislative competence of the Parliament of Canada under ss. 91(2) of the *Constitution Act, 1867*, and
- b) Is s. 31.1 of the *Act* within the legislative competence of the Parliament of Canada?

The Court quickly zeroed in on whether the legislation was valid under the so-called general trade and commerce head of federal jurisdiction. The Court noted that the general trade and commerce power is usually analysed in conjunction with the provinces' general authority over property and civil rights. In reviewing past decisions under the general trade and commerce head, Chief Justice Dickson stated:

The true balance between property and civil rights and the regulation of trade and commerce must lie somewhere between an all pervasive interpretation of s. 91(2) and an interpretation that renders the

general trade and commerce power to all intents vapid and meaningless.

To uphold federal legislation under the general trade and commerce power, the Court adopted five general principles. Three of those principles arose from the judgment of Chief Justice Laskin in the *Vapour Canada* decision. Those three criteria are:

- a) the impugned legislation must be part of a general regulatory scheme;
- b) the scheme must be subject to continuing oversight by a regulatory agency; and
- c) the legislation must be concerned with trade as a whole rather than a particular industry.

To those three criteria, Chief Justice Dickson added two others which he had enunciated in the *Canadian National Transportation* case where the authority of the Attorney General of Canada to prosecute criminal matters under the *Combines Investigation Act* was in issue. The two additional factors are:

- i) the legislation should be of a nature that the provinces jointly or separately would be constitutionally incapable of enacting; and
- ii) failure to include one or more provinces or localities in the legislative scheme would jeopardize the successful operation of the scheme elsewhere in the country.

In considering the five criteria, Chief Justice Dickson stated:

In total, the five factors provide a preliminary checklist of characteristics, the presence of which in legislation is an indication of validity under the trade and commerce power. These indicia do not, however, represent an exhaustive list of traits that will tend to characterize general trade and commerce legislation. Nor is the presence or absence of any of these five criteria necessarily determinative....On any occasion where the general trade and commerce power is advanced as a ground of constitutional

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validity, a careful case by case analysis remains appropriate.

Having set out the general principles, the Court then proceeded to analyze the constitutional questions stated by it in a three part analysis. The first step was to determine whether the impugned provision intruded upon provincial powers, and, if so, to what extent. The second issue facing the Court was to determine whether the Act, or a part of it, was valid federal legislation. If the legislation or provision is declared valid, the Court must then determine whether the impugned provision is so integral to the scheme that it could be upheld by virtue of its relationship, even though it intrudes upon provincial powers.

Does Section 31.1 Encroach on Provincial Powers?

The first issue the Court analyzed was whether the civil damage provision in the *Combines Investigation Act* encroached on provincial powers and to what extent. On this point the Court stated:

As s. 31.1 creates a civil right of action it is not difficult to conclude that the provision does, on its face, appear to encroach on provincial power to some extent. The creation of civil actions is generally a matter within provincial jurisdiction under s. 92(13) of the *Constitution Act, 1867*. This provincial power over civil rights is a significant power and one that is not lightly encroached upon. In assessing the seriousness of this encroachment, however, three facts must be taken into consideration. The first is that s. 31.1 is only a remedial provision; its purpose is to help enforce the substantive aspects of the Act, but it is not in itself a substantive part of the Act. By their nature, remedial provisions are typically less intrusive vis-à-vis provincial powers. The second important fact is the limited scope of the action. Section 31.1 does not create a general cause of action; its application is carefully limited by the provisions of the Act. The third relevant fact is that it is well-established that the federal government is not constitutionally precluded from creating rights of civil action where such measures may be shown to be warranted.

The Court then concluded this point by stating: In sum, the impugned provision encroaches on an important provincial power; however, the provision is a remedial one; federal encroachment in this manner is not unprecedented and, in this case; encroachment has been limited by the restrictions of the Act.

The Presence of a Regulatory Scheme in the Combines Investigation Act

The Court next analyzed whether the *Combines Investigation Act* contained a regulatory scheme as required to be upheld under the general trade and commerce power. The Court stated:

The presence of a well-orchestrated scheme of economic regulation is immediately apparent on examination of the *Combines Investigation Act*. The existence of a regulatory scheme is in evidence throughout the entire Act.

The Court concluded this analysis by stating:

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 of 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.

Having found the existence of a regulatory scheme, the Court then considered whether that scheme was valid under the remaining criteria or factors necessary under the general trade and commerce power. The Court found that the legislation met the criteria. They found the control over the enforcement process exercised by the Director of Investigation and Research and the Restrictive Trade Practices Commission met the requirement that there be "vigilant oversight of the administration of a regulatory scheme." With respect to the remaining criteria the Court stated:

These criteria share a common theme: all three are indications that the scheme of regulation is national in scope and that local regulation would be inadequate. The Act is quite clearly concerned with the regulation of trade in general, rather than with the regulation of a particular industry or commodity.

Chief Justice Dickson further stated:

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It is evident from this discussion that competition cannot be effectively regulated unless it is regulated nationally. As I have said, in my view combines legislation fulfills the three *indicia* of national scope as described in *Canadian National Transportation*: it is legislation "aimed at the economy as a single integrated national unit rather than as a collection of separate local enterprises", it is legislation "that the provinces jointly or severally would be constitutionally incapable of passing" and "failure to include one or more provinces or localities would jeopardize successful operation" of the legislation "in other parts of the country".

Having found the *Combines Investigation Act* to be a regulatory scheme under the factors identified for general trade and commerce legislation, the Court then turned to the question whether s. 31.1 was sufficiently integral to that scheme to be supportable as federal legislation. In discussing this point, Chief Justice Dickson stated:

...I do not think that a strict test, such as "truly necessary" or "integral", is appropriate. On the other hand, it is not enough that the section be merely "tacked on" to admittedly valid legislation. The correct approach in this case is to ask whether the provision is functionally related to the general objective of the legislation, and to the structure and the content of the scheme.

In analyzing s. 31.1 in this light he stated: I am of the opinion that the necessary link between s. 31.1 and the *Act* exists. Section 31.1 is an integral, well-conceived component of the economic regulation strategy found in the *Combines Investigation Act*. Even if a much stricter test of fit were applied—for instance, one of "necessarily incidental"—s. 31.1 would still pass the test. Under the test of "functionally related" the section is clearly valid.

Having completed its analysis, the Court then found that the *Combines Investigation Act* was valid legislation under the general trade and commerce head of power, and that s. 31.1 was also validly enacted as part of that regulatory scheme.

This decision, by a majority of the Supreme Court of Canada, is undoubtedly the most significant constitutional decision in the 100-year history of competition legislation in Canada. For much of that century, combines legislation has been upheld only as an exercise of the federal government's criminal law power. Much of the efforts to amend the legislation have been designed to devise a scheme which could be supportable

outside of the criminal law head. This case clearly establishes that not only can that be constitutionally accomplished, but that, in all likelihood, the scheme contained in the present legislation fits the bill.

The Supreme Court's decision is important from a competition law perspective for a number of reasons. First, the decision should clearly be applicable to the 1986 amendments to the legislation which created the Competition Tribunal. The general nature of the scheme, as well as the substantive provisions, have not been so altered as to raise serious doubt as to their constitutional validity. Second, the decision removes the uncertainty that plaintiffs have faced as to whether the civil damage provisions created by the amendments of 1975 could be relied upon to found a damage action. With that uncertainty removed, it may be that more plaintiffs will seek the use of the civil damage provisions, although certain financial disincentives still remain.

A third significant result of the decision is that it would appear to give the federal government considerable latitude to enact other competition-based provisions, whether substantive or procedural, to further an integrated market economy of Canada. Such provisions might include rules with respect to class actions or general provisions relating to marketing practices.

The decision also has significance for the federal government since the criteria enunciated by the Court to uphold general trade and commerce legislation is in no way tied to the subject matter of competition. It could equally be applied to other types of legislation. However, it must be remembered that the Court made it quite clear that the general applicability of competition legislation met one of the important hallmarks of the general trade and commerce power. The approach might not work where, as in the *Labatt's Special Light* case, the legislation attempted to regulate a particular industry or trade. Nevertheless, the decision has clearly breathed considerable life into the long dormant general trade and commerce power. And it may well signal a new well-spring of jurisdiction for the federal government in controlling the national economy.

L.A.W.H.

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RESERVEC SETTLED, TRIBUNAL APPROVAL SOUGHT FOR CONSENT ORDER

The Competition Tribunal's hearing of the Director's application to dissolve the Gemini merger was to have opened on April 3, 1989. (Gemini is the computer reservation system (CRS) created by the merger of Air Canada's CRS known as Reservec and Canadian Airlines' CRS known as Pegasus). However, on that date, the Director advised the Tribunal that he had reached agreement with the Respondents on the terms of a proposed consent order (the "order") and that he would be seeking the Tribunal's approval of the order pursuant to section 105 of the *Competition Act*.

One week later, the order was filed on the public record and served on those who had intervened in the contested proceedings. The order contemplates that the Gemini merger will remain intact but provides for electronic links between competing CRSs in Canada and rules for the operation of such CRSs. In the Impact Statement he filed with the Tribunal, the Director submitted that the combination of links and rules would reduce the anti-competitive impact of the merger such that it would no longer cause a substantial lessening of competition in the CRS market.

The Tribunal heard the Director's application for approval of the order in the week of April 24th. The first hearing day was taken with argument about the role intervenors were to play in the consent proceedings and the use to be made of documents, experts' reports and transcripts generated prior to the settlement. The Tribunal ruled that intervenors could call both expert and factual evidence directed to the issue of whether the order should be approved with or without change. However, it also ruled that no use was to be made of documents unless they were relevant and formally proved, no use was to be made of transcripts and prior experts' reports were to be used only if their authors were called as witnesses in the consent proceeding.

In so ruling, the Tribunal was careful to distinguish the Reservec case, where there had been lengthy contested proceedings prior to a

settlement, from cases which might begin as consent order applications. The Tribunal's Chairman, Madame Justice Barbara Reed observed that it should not be taken as a rule that it is always the role of the intervenors in a consent proceeding to be given the right to adduce evidence.

In the result, the Tribunal heard three witnesses. An expert called by the Director and an expert and a factual witness called by the intervenor, American Airlines. American took the position that the order should only be approved if certain changes were made. Argument by the parties and all intervenors concluded on Friday afternoon, April 28th.

At the close of the hearing, the parties asked the Tribunal to adopt the procedure contemplated by Rule 36(2)(b) if it felt that changes to the order were appropriate. Accordingly, the Tribunal issued a Direction to Appear at a Post Hearing Conference which included suggested changes to the order and questions from the Tribunal. The Post Hearing Conference was held on May 23 and 24 at which time the parties and intervenors addressed the matters raised by the Tribunal. At the conclusion of argument, the Tribunal gave a clear indication of the changes it would require and asked the parties to submit an order in those terms if agreement could be reached.

On June 2, 1989, a revised order was submitted to the Tribunal. At the time of writing, the Tribunal's decision as to whether to approve the order is reserved. S.J.S.

FIRST ABUSE OF DOMINANCE CASE BEFORE TRIBUNAL

On June 1, 1989 the Director of Investigation and Research filed a Notice of Application with the Competition Tribunal requesting orders against the NutraSweet Company under the abuse of dominant position, exclusive dealing, and tied selling provisions of the *Competition Act*. This is the first application to the Tribunal arising from the abuse of dominance provision of the *Act* which came into force in 1986.

The Tribunal may make an order under the abuse of dominance provision only if it finds that:

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- (1) one or more persons substantially or completely control, throughout Canada or in any area thereof, a class or species of business;
- (2) the person or persons have engaged in or are engaging in a practice of anti-competitive acts; and
- (3) the practice has had, is having, or is likely to have the effect of preventing or lessening competition substantially in a market.

NutraSweet is the principal supplier in Canada of aspartame, an intense sweetener used as a substitute for sugar in a variety of food products. The application alleges that NutraSweet controls about 95% of the market for aspartame in Canada and that its principal competitor TOSOH Canada Ltd., a subsidiary of Holland Sweetener Company of the Netherlands, supplies approximately 3% of the market.

The application contends that aspartame constitutes a distinct product market from sugar and other artificial sweeteners for a variety of reasons: it provides an alternative to sugar for diabetics and weight-conscious consumers; it is not harmful to the teeth; it is non-caloric unlike other bulk sweeteners; and it is distinctive from other intense sweeteners such as saccharin and cyclamates because of the much greater range of food products and applications for which it has been authorized under Food and Drug Regulations.

The alleged anti-competitive acts, exclusive dealing and tide selling requirements flow from the same set of alleged contractual provisions which, as a whole, the Director contends have prevented the creation of a separate Canadian market for the sale of aspartame, constitute predation, and constitute sophisticated price discrimination practices.

The anti-competitive acts alleged by the Director include:

1. Use of NutraSweet's U.S. position to foreclose competition in other countries through entering into worldwide exclusive supply contracts of several years' duration with the parent companies of the largest purchasers of aspartame in Canada (principally soft drink manufacturers).
2. Inducing exclusivity through the structure of its supply contracts. The relevant provisions include customer obligations to purchase their

entire supply of aspartame from NutraSweet, customer obligations to use aspartame as the sole sweetener in their products, and a variety of fidelity rebates which the Director alleges are designed to induce customers to purchase all of their aspartame requirements from NutraSweet. These fidelity rebates are alleged to include volume discounts, incentives for encouraging others to purchase aspartame from NutraSweet, and allowances for the display of NutraSweet's trademark or brand name on a customer's packages. The Director contends that, in order to remain competitive, a NutraSweet customer must take advantage of all the rebates offered by NutraSweet under its supply contracts and that as a result the customer is effectively forced to purchase its entire supply of aspartame from NutraSweet and to affix NutraSweet's trade mark to its packaging.

3. Extending patent rights through exclusive contracts. The Director contends that, immediately prior to the expiration of its Canadian patent, NutraSweet negotiated a number of long term exclusive supply contracts for aspartame which the Director alleges ensured the maintenance of NutraSweet's dominant position in the Canadian market regardless of whether its patent had expired.
4. Creation of market transparency to control competition. The Director has alleged that, through contractual terms with its customers which are ostensibly aimed at maintaining the customers' competitiveness, NutraSweet is able to obtain knowledge of its competitors' activities and to meet the competition in a fashion that substantially lessens competition. The Director contends that these agreements take several forms: "Meet or release" clauses (also known as English clauses) which allow customers to obtain competitive offers for aspartame but also permit NutraSweet to meet the competitor's price if presented with a lower bona fide offer or to release the customer from the supply contract if NutraSweet elects not to meet the offer; an "extended release" clause which permits one customer to source aspartame elsewhere in the event that another third-party customer of NutraSweet aspartame is released from its

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supply contract; a "most-favoured nation" clause which requires NutraSweet to ensure that the customer is not charged a price for aspartame which places it at a competitive disadvantage in its own industry.

5. The combination of most favoured nation and fidelity clauses. The Director alleges that the combination of these terms induce customers to purchase their entire supply of aspartame from NutraSweet because customers can become free riders on the lower prices obtained by other aspartame customers and therefore have no incentive to seek lower prices on their own:

Because of the respondent's overwhelming market share and since the respondent has historically never failed to meet a competitive price, customers of the respondent feel confident in placing their entire order with the respondent because the price which they will pay for this aspartame will be at or near the lowest price anywhere in the industry for the entire length of the contract.

6. Abuse of trademark. The Director contends that NutraSweet's practice of providing allowances to customers which place NutraSweet's trademarks on their products creates barriers to entry since the competitor's price must both justify the cost of removing the trademark and cover the foregone trademark display allowance.

7. Selling below acquisition cost or long-run average cost. The Director has also alleged that the net prices charged to certain Canadian customers after all of the above discounts, allowances, and rebates are less than NutraSweet's average acquisition cost or long run average cost in production of aspartame.

Accordingly, the Director contends that these alleged anti-competitive acts have foreclosed the aspartame market in Canada to potential alternative suppliers mainly because the Canadian market is not open to competition at all due to the existence of worldwide contracts negotiated outside Canada which require exclusive use of NutraSweet's aspartame in Canada or alternatively provide no incentive to seek alternative sources of supply as a result of the price preferences and other measures noted above.

The Director has also relied on the contractual provisions which he alleges constitute anti-

competitive acts as the basis for asserting that NutraSweet has practiced both exclusive dealing and anti-selling.

To establish exclusive dealing, the Director's application refers to the alleged presence of exclusive worldwide supply contracts, exclusive supply provisions in individual contracts and the affixing of the NutraSweet trademark on customers' product labels as well as exclusive dealing inducements through the presence of English clauses, most favoured nation clauses, trademark display allowance provisions, cooperative marketing rebate schemes, fidelity rebates and free product clauses in NutraSweet's arrangements with its customers.

The Director alleges that tied selling has occurred because NutraSweet has adopted a practice of requiring customers to affix the NutraSweet trade mark to customers' products and to refrain from using in conjunction with NutraSweet's brand of aspartame, another brand of aspartame as conditions for the supply of NutraSweet's aspartame. The Director also has alleged that the provision of substantial trade mark display allowances in a number of NutraSweet's supply contracts together with other fidelity clauses constitute inducements to meet these conditions.

The orders requested by the Director relating to abuse of dominant position, exclusive dealing, and tied selling are similar and involve the prohibition of world-wide contracts with multinational customers governing the supply of aspartame to Canadian affiliates, and prohibition from requiring customers to purchase their entire supply of aspartame from NutraSweet, selling aspartame to Canadian customers at below acquisition cost and from granting customer price concessions and other allowances not available to competitors of the customer for the same agreed volume of aspartame.

As well the Director has applied for a declaration that the contractual provisions noted above which are alleged to have foreclosed competition are of no force in effect and may not be judicially enforced by NutraSweet. The Director has also requested the Competition Tribunal to order NutraSweet to include a most favoured nation clause in all supply contracts of customers which compete with each other in selling products con-

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taining aspartame if a most favoured nation clause is included in a contract of any one of them.

Finally, the Director is seeking a declaration that any contracts entered into by NutraSweet or its affiliates pursuant to worldwide contracts are of no force or effect insofar as they affect the supply of aspartame in Canada and that NutraSweet may not require minimum exclusive annual volume commitment in any supply contract which is greater than 50% of a customer's total annual volume requirements of aspartame.

It is worth noting that NutraSweet's supply contracts have been previously (1986) the subject of a formal investigation by the European Commission under Article 85 of the Treaty of Rome which contains a prohibition against abuse of dominance similar to that of the *Competition Act*. Specifically the European Commission acted on complaints from European manufacturers who were commencing the construction of plants for the production of aspartame to compete with NutraSweet. The complaints related to the exclusive worldwide contracts entered into by NutraSweet with the Coca-Cola Company and with Pepsico Inc.

Following discussions with the Commission, NutraSweet amended its worldwide contracts so that exclusive supply clauses no longer applied to the European community. However, the amended contracts provided that Coke and Pepsi would be required to purchase a fixed quantity of aspartame from NutraSweet for a period of two years. This quantity was set to ensure that Coke and Pepsi were able to purchase a substantial quantity of aspartame from any source.

Upon receipt of these amended contracts, the European Commission discontinued its formal inquiry under Article 85.

Comment

This first application under the dominance provisions of the *Competition Act* indicates that the Director is willing to challenge practices engaged in by dominant suppliers which are commonly used in many industries in Canada. It is not uncommon, for example, for supply contracts to give the customer the right to purchase elsewhere if he can obtain a better price, provided the first supplier has the option of meeting that

price. The Director in this application alleges that that practice by a dominant supplier induces a degree of transparency in the market that is anti-competitive.

The application also alleges that NutraSweet's use of clauses ensuring that its customers obtain the lowest possible price in the marketplace can be anti-competitive when used by a dominant supplier. It will be interesting to see how the Tribunal reacts to this type of allegation since to ban a dominant supplier from using such a practice could well prevent it from meeting competition in the marketplace. One of the great difficulties in the dominance section has been to ensure that the law is not used to prohibit pro-competitive behaviour.

The application also raises interesting questions about the relationship between the dominance section and the price discrimination and predatory pricing provisions of the *Act*. For example, it alleges that for NutraSweet to sell products below its acquisition cost is an anti-competitive act. Although at one point in the application it alleges that NutraSweet sold product below its acquisition cost or long run average cost, the order seeks only to prohibit NutraSweet from selling products below its acquisition cost. If the Tribunal accepts sales by a dominant supplier of products below its acquisition cost as sufficient to found an abuse of dominance practice, it will significantly lower the threshold whereby predatory behaviour can be found under Canadian competition law.

The application also seeks to prohibit price discrimination between competing customers under the abuse of dominance provisions rather than the criminal price discrimination provisions of the *Act*. Since price discrimination is not a listed practice under the dominance section, it will be interesting to see how the Tribunal reacts to the duplication between the civil and criminal provisions of the law.

The application also would appear to seek orders under the dominance, exclusive dealing and tied selling provisions of the legislation where the factual and evidentiary basis supporting the allegations order are the same in all three instances. Whether the Tribunal will countenance the exposure of a company to various orders for the same behaviour will also be worth observing.

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Finally, the Director's application in all three instances shows a willingness to seek remedies beyond the basic cease and desist order contemplated by the law. The application seeks additional remedies for each of the dominance, tied selling and exclusive dealing allegations.

J.F.B. and L.A.W.H.

DIRECTOR PASSES ON PWA-WARDAIR MERGER

The Director of Investigation and Research, Calvin S. Goldman, Q.C. announced on April 24, 1989, that the acquisition of Wardair Inc. by PWA Corporation would not be challenged at that time.

The Director's decision was reached after a thorough investigation of the merger by the Director's staff and was made after the Director announced on April 14, 1989, that he believed Wardair to be a failing firm and that in those circumstances the merger would be challenged only if a viable third party came forward and was willing to acquire Wardair. In the week that followed the Director's announcement on April 14, there were other expressions of interest in Wardair, including a possible joint offer between American Airlines, the large U.S. based carrier in conjunction with certain Canadian partners. However, in the final analysis, no offer was forthcoming by any third party. In making his announcement the Director stated:

Although potential bidders have expressed some interest in acquiring Wardair, no firm written offers have been brought forward. This is in spite of potential bidders' awareness of the situation since the acquisition was originally announced on January 19, 1989, and extensive recent publicity surrounding the companies' April 6th announcement, that the Bureau had reaffirmed the requirement to clearly demonstrate that there were no viable alternatives to the proposed merger.

In addition to the analysis the Director's staff would normally have conducted on a merger with this significance to competition, the Director's office also received, on March 23, 1989, the six resident application sponsored by the Consumers' Association of Canada which required the Director, pursuant to s.10 of the *Competition Act*, to conduct a formal inquiry.

It is clear from the background information provided by the Director, that the acquisition raised serious concerns in the Director's mind. For example, the Director viewed Wardair as a vigorous and effective competitor. The background information document stated:

Overall, in markets where it participated, Wardair was often the price leader, offering effective competition to the two established national carriers in all classes of service.

The Director also had concerns that effective competition would not remain in the domestic airline service industry after the acquisition. The background document stated that most scheduled airline service in Canada will be provided by Air Canada and Canadian Airlines International Ltd. and that consumers have little countervailing power to deal with such a "duopoly."

The Director also indicated there were other reasons to expect less competition subsequent to the merger. In particular, he said that the stock market reaction, which had led to higher stock prices for both Air Canada and PWA, was a sign investors expected increased profits for the rivals of Wardair. Also, he cited statements by officials of Wardair and PWA that capacity in the industry would be reduced and that the availability of discounted seats would become more restricted.

The Director was also concerned with the existence of barriers to entry to the domestic airline industry in the short to medium term. The Director indicated that:

Recent economic analysis of the industry indicates that the industry reflects the presence of economies of scope which give scheduled carriers offering a range of fare types cost advantages over scheduled carriers offering one-fare, one-class service, and over chartered carriers that can offer only restricted fares with travel conditions on return dates and itinerary changes.

The Director also cited the preference of business travelers to choose an airline with an extensive network and frequent flights, the loyalty generated by frequent flyer programs, and the preference for on line travel which is facilitated by commuter alignments by the two largest carriers.

The Director also cited the limited ability of Transport Canada to provide new carriers with landing rights at Pearson International Airport in Toronto. The Director stated that:

At Pearson International Airport, the most critical public resource at the moment is the take-off and

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landing times at peak hours. These are currently limited to 70 per hour. Accommodating new entrants at this juncture will be difficult. Nevertheless, Transport Canada has recently reaffirmed to the Bureau that every effort will be made to do so.

As a final entry barrier the Director noted the restrictions on foreign ownership which allow non-Canadians to hold a maximum 25% voting interest in a Canadian scheduled carrier. He also noted the cabotage rules which prohibit foreign carriers from offering point to point scheduled service within Canada. The Canadian cabotage rule is similar to that in the United States.

Concerned as the Director clearly was with the effect on competition of the merger, the question of the failing firm factor under the merger law remained. He noted that there were two significant issues the Director must assess in considering the failing firm issue. First is the extent to which the failure is, in fact, likely to occur and second, whether there are alternatives to the merger that would be less restrictive of competition.

With respect to the first factor, the Director stated:

A firm that is facing certain and imminent financial failure will cease to exercise any competitive influence in the market after its failure. Therefore, the loss of this influence in the marketplace cannot be attributed to the merger.

The Director retained the accounting firm of Peat Marwick to review the financial evidence provided by Wardair. That firm reviewed a number of options which might have prevented the failure of Wardair. These included deferring principal payments, loans on existing fixed assets, the sale of a minority interest and reversion to a chartered carrier status. The Director's background statements indicated that these scenarios were either unattainable or unworkable in the circumstances of Wardair.

With respect to alternatives, the Director considered third party buyers and also liquidation of the failing firm. With respect to the liquidation scenario, the Director concluded that the most likely result of liquidation would be the withdrawal of Wardair's assets from the Canadian market. The background statement indicates:

There now exists considerable excess capacity in the market and Wardair's A310 aircraft are not

compatible with the fleets of other airlines in Canada.

Having weighed all of these factors, the Director concluded that the significance of the failing firm factor outweighed the negative assessment of the other competition based factors in the Act. He, therefore, decided not to challenge the merger.

It is clear that the Director's decision was an extremely difficult one. The effect on competition of the withdrawal of Wardair from the airline industry in all likelihood will be palpable. Already, the two remaining scheduled carriers have announced fare increases. The failure of Wardair has also raised serious questions about the viability and effectiveness of airline deregulation in Canada. The Director's own background statement highlights two of the reasons why deregulation may not have been as successful as it was expected to be when first announced in the early part of this decade. The first is the notion that economies of scope are a significant barrier to entry into the scheduled airline business. The common view when the United States, and laterally Canada, deregulated airlines was that economies of scale were small in the industry and that economies of scope were not significant. Since that time, it is clear the significance of economies of scope is much more important than previously thought. Second, restrictions on foreign ownership and foreign operations in Canada give the federal government the means to inject competition in the domestic market if they wish to do so. Whether the Department of Transport will relax these requirements, however, remains to be seen.

It should be noted that the Wardair acquisition by PWA was found by the National Transportation Agency not to be against the public interest. The NTA's (NTA) decision was based largely on the financial health of Wardair, as was the Director's decision. The Agency in its decision indicated that it was in no way interfering with the review by the Director under the *Competition Act* of the acquisition. The NTA stated that the purpose of its review was different from that being conducted by the Director under the *Competition Act*. It is believed this is the first time the NTA has explicitly recognized the separate jurisdiction of the Director to review the same merger transaction.

L.A.W.H.

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DIRECTOR SEEKS CONSENT ORDER FOR ABB—WESTINGHOUSE MERGER

On April 26, 1989, the Director of Investigation and Research announced he had applied, on consent, to the Competition Tribunal for an order with respect to the proposed acquisition of the electric power transmission and distribution business of Westinghouse Canada Inc. by Asea Brown Boveri Inc. (ABB).

The Director had previously announced that he intended to challenge the acquisition but that he was continuing discussions with ABB. The consent application filed would allow the acquisition to proceed provided certain conditions are met. The consent order is innovative in that it is the first time the Director has sought a conditional order. It is also the first time an order from the Tribunal has been sought in a situation requiring possible divestiture. With respect to divestiture, the order sets out the procedure to be followed in such a case and, for that reason, will likely set a precedent in future divestiture cases.

With respect to the competitive effect, the Director alleged that the acquisition would likely lessen competition substantially in the high end of the transformer business, namely, transformers with a power rating of 40 megavolt amperes (MVA) or greater. In particular, ABB would be the only manufacturer in Canada of power transformers rated more than 400 MVA. It would reduce the number of suppliers in the 40 MVA to 400 MVA range from three to two. After the acquisition, Federal Pioneer would be the only other Canadian manufacturer.

To alleviate the Director's concerns in this part of the market, the order would allow ABB to acquire the Westinghouse business carried on by Westinghouse's subsidiary Transelectrix Technology Inc. (TTI) if ABB is able to obtain full duty remission of all tariffs for at least five years on the importation of power transformers into Canada with a rating of more than 400 MVA. The duty remission or removal of duties would apply to importations from any other country. In addition, ABB must obtain an accelerated reduction of tariffs on imports from the United States of transformers rated between 40 MVA and 400 MVA.

With respect to the smaller sized transformers, the order would require ABB to obtain reductions in tariffs applicable to U.S. imports to a maximum of 6% effective January 1, 1990; 3% effective January 1, 1991; and 0% effective January 1, 1992.

In the event ABB is not able to obtain the accelerated reduction on U.S. imports, then the order requires it to divest the Hamilton business of Westinghouse being acquired in the acquisition. If ABB is not able to obtain the removal of duties on the over 400 MVA transformers, then it must divest of the entire TTI division being acquired. Because the order is conditional upon events occurring by January 1, 1990, it requires ABB to hold separate the TTI business until that time and specifies how the business is to be managed during the hold separate period and also the degree to which ABB can obtain the information as to the operations of TTI during that time.

With respect to the possibility of divestiture under the order, the consent arrangement specifies the manner in which the divestiture is to occur. It allows ABB in the first instance to attempt to divest the businesses itself. It specifies the manner in which that is to be done and the reporting necessary to the Director during the divestiture. The order gives ABB 120 days to accomplish the divestiture and if it has not then occurred, the Tribunal, on application from the Director, may appoint a trustee nominated by the Director to divest of the businesses.

The order also contains the terms under which a trustee sale would take place. It gives the trustee 60 days to effect the sale and the sale is to be "at the most favourable price and on the most favourable terms and conditions available." It clearly does not require the trustee to sell the business at fair market value. It also makes it clear that the sale will be conducted at ABB's expense.

The procedure for divestiture looks very similar to that normally employed under U.S. antitrust laws in divestiture situations. For example, trustee sales are not uncommon in the United States if the parties are not able to accomplish a sale within a certain period of time. Also, the provision that the trustee has full power to sell at whatever price he can achieve is not uncommon in the United States.

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The hearing by the Competition Tribunal on the draft order was held on June 15, 1989, and the order was issued by the Tribunal on the same day. Mr. Justice Strayer, who issued the order, indicated that reasons would be issued at a later date.

L.A.W.H.

DIRECTOR CLEARS DOMGLAS/ CONSUMERS PACKAGING MERGER

On April 25, 1989, the Director of Investigation and Research announced that he would not challenge the proposed acquisition of the assets of Domglas Inc. by Consumers Packaging Inc. Consumers and Domglas are major Canadian manufacturers of glass containers, used primarily as packaging in the food and beverage industries. The Director's press release on the matter indicates that his analysis of the merger concluded that the various alternative rigid-walled packaging materials, notably aluminum and steel cans and rigid plastic, are substitutable for many glass container end uses. As a result, he concluded that the market power of the merged firm will be constrained by the ability of customers to substitute over a wide range of end use applications. The combined market share of Consumers and Domglas of the total Canadian rigid-wall container industry is less than 25%.

The parties to the merger also gave the Director assurances that customers which are committed to glass for functional or marketing reasons would receive long term supplies at equitable terms and conditions. And in order to enhance the viability of competition from U.S. glass container manufacturers, the parties have also formally applied to eliminate the tariff on U.S. imports over a five year period rather than the present ten year period under the *Canada-U.S. Free Trade Agreement*.

Finally, the Director noted that the parties expected to achieve \$53.9 million annually in efficiency gains arising from production and operating savings, such as rationalization of excess capacity and reduction of freight costs. The parties have agreed to make every effort to implement the claimed efficiencies within the three year merger review limitation period.

The market definition adopted by the Director in this case is particularly relevant since it emphasizes functional substitutability, a standard adopted by American anti-trust law. Were the market to be defined to include only glass containers the result could well have been different. Together Domglas and Consumers Packaging account for approximately 90% of the Canadian glass container market.

In the background information provided with the Director's press release the Bureau of Competition Policy explained that its selection of rigid-walled packaging materials as the relevant product market was based on the fact that the food and beverage industries are also important customers in alternate packaging materials, notably aluminum and steel cans, and multi-layer barrier and PET (polyethylene terephthalate) plastics. The food and beverage industry in Canada accounts for over 95% of Consumers' and Domglas' sales. The backgrounder concluded:

There are numerous examples in the marketplace where different packaging materials directly compete for the same customers. The empirical evidence clearly shows that intermaterial competition is ongoing and dynamic and continues to intensify with technological innovation.

The Director's market analysis also identified several market segments where the demand for glass containers is relatively inelastic: distilled spirits, beer, wine, pickles, mayonnaise, and soluble coffee. With respect to these segments the Bureau concluded that most customers within each of these segments are major buyers with significant countervailing market power. But there are also some purchasers whose glass container orders are too small to obtain a competitively priced supply in the U.S. or elsewhere and who lack the short-term flexibility to switch to alternate packaging materials. The merging parties' assurance of adequate long term supplies on equitable terms is directed at this small-volume segment.

U.S. glass containers account for 90% of all imports: about \$48 million. The import duty on glass containers prior to June 1, 1989 was 11.4%. The U.S. glass container companies operated a total of nine plants within three hundred miles of the Canadian border. Information available to the Bureau indicated that these companies are,

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at present, primarily interested in high volume business where they enjoy a cost advantage ranging from between 10% and 30% due to their more extensive use of larger, high productivity manufacturing equipment. Use of similar equipment has been limited in Canada where Consumers and Domglas supply smaller and more fragmented markets.

The Director's analysis indicated that many companies in diverse end-use segments in Canada consider U.S. manufacturers to be viable alternative suppliers for their Canadian requirements and that this option had served as an important constraint on domestic pricing.

Accordingly, the Director concluded that as the Canadian tariff is phased out, U.S. glass suppliers will become increasingly attractive to many more Canadian customers.

With respect to the calculation of efficiency gains arising from the merger noted previously, the Director received detailed submissions from the merging parties which estimated that the merger would result in a total efficiency increase of 10% at current production levels and that these gains were essential to the industry's long-term survival in the face of increasing intermaterial and U.S. import competition. The Director's backgrounder indicated that these gains had been carefully scrutinized by his office and were verified by an independent industry expert. The Director concluded that the parties would not likely achieve these gains without the merger. As well, the Director concluded that the specialization agreements or the unilateral rationalization of excess production capacity were impractical options to a merger and were unlikely to occur in the context of the Canadian glass container industry.

J.F.B.

DIRECTOR ADDRESSES CANADIAN BAR ASSOCIATION

In an address to the Canadian Bar Association (Ontario) program on the professions on April 25, 1989 the Director of Investigation and Research, Cal Goldman, provided a number of insights on the current approach being taken within the Bureau of Competition Policy to claims that certain

conduct may be exempted from the *Competition Act* by virtue of government regulation. In addition, Mr. Goldman commented on a number of enforcement issues of particular relevance to the professions: the use of suggested fee schedules and fee surveys by professional bodies, the relationship between professional standards and fees, restrictions of the emergence of new professions by established professions, and professional advertising restrictions.

Mr. Goldman's review of the "regulated conduct defence" cases and the relevance of new case law to the scope of that defence points to an increasingly restrictive approach by the Bureau to the availability of this defence.

Mr. Goldman noted that the 1956 *Canadian Breweries* decision has been most frequently cited for its elaboration of the regulated conduct defence. The decision stands for the proposition that where provincial legislation has conferred on an independent body power to regulate an industry and to fix prices, and that power has been exercised by the authorized body, the court should assume that the power has been exercised in the public interest, precluding application of the *Competition Act*. Subsequent cases have been regarded as establishing that the *Competition Act* does not apply to conduct while specifically authorized or required by a regulatory body. However, all regulated conduct defence decisions have related to criminal matters under the competition law.

Mr. Goldman noted that concerns raised as to the general applicability of this defence to the civil reviewable practices of the *Act* have become more timely in view of the Supreme Court of Canada decisions in the *City National Leasing* and *Rocois Construction* cases which have upheld the *Combines Investigation Act* as valid federal legislation under the general trade and commerce power. A possible implication of these decisions is that the *Competition Act* in civil matters creates regulatory controls over business conduct which are national in scope and have as a primary purpose the elimination of activities that reduce competition. Accordingly, the *Competition Act* can be viewed as establishing a parallel set of rules to local or provincial regulations which retain their force even in the event of a functional overlap.

Mr. Goldman also stressed that, in his view, the 1982 decision of the Supreme Court of Canada

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in the *Jabour* (Law Society of British Columbia) case did not extend the scope of the regulated conduct defence beyond that articulated in *Canadian Breweries* and that the statements of the Supreme Court on the applicability of the *Competition Act* to the legal profession should be carefully considered in terms of the facts of this case.

First, the Supreme Court concluded that the conspiracy section of the *Combines Investigation Act*, as it was then worded, did not apply to the actions of the benchers of the Law Society of British Columbia undertaken pursuant to their statutory authority to make rules with respect to professional advertising. In this respect, the Court held that the conspiracy section is directed to conduct which "unduly" lessens competition and held that compliance with the provincial measure validly enacted in the public interest cannot by definition be said to be undue and therefore illegal.

Second, an equally valid reason for the Court's conclusion was its finding that the conspiracy section contemplates voluntary agreements or combinations, and that the B.C. Law Society could not be seen to be voluntarily agreeing when acting to discharge responsibilities assigned by statute.

Further, Mr. Goldman observed that subsequent cases have narrowed the implications of the Supreme Court's *Jabour* decision and are consistent with the proposition that a clear statutory direction or authorization of prohibited acts that would displace the need for voluntary agreement would be necessary to invoke the regulated conduct defence with respect to conspiracy cases. Mr. Goldman concluded as follows:

In my view these decisions suggest that the courts are becoming increasingly willing to narrowly construe the scope of regulatory statutes, in order to give greater recognition to competition policy objectives. This view is reinforced by a decision issued just a few weeks ago by the British Columbia Supreme Court in the matter of *Mortimer and the Corporation of Land Surveyors of the province of British Columbia*.

The *Mortimer* case involved an appeal by a land surveyor who had been found guilty by the Board of Management of the Land Surveyors Corporation of failing to observe the tariff fees for

professional services then in effect. While the *Land Surveyors Act* empowered the corporation to pass by-laws, "not inconsistent with the Act, with regards to the tariff of fees for professional services," the by-law in question required members to observe the standards set out in a booklet containing tariffs of fees for professional services. In allowing the appeal and quashing the conviction, the Court held that the *Land Surveyors Act* was insufficiently clear to allow the imposition of a mandatory minimum tariff of fees "which was the practical effect of the by-law." In reaching its decision, the Court noted that, where bodies have been given the power to engage in monopolistic practices that would be illegal if carried out by anyone else, a strict construction of the enabling legislation is a reasonable approach.

With respect to suggested fees schedules, Mr. Goldman drew a number of inferences from the Waterloo and Kent County Law Association cases (reported in the December 1988 *CCPR*). Mr. Goldman observed that, in response to a number of inquiries from county law associations following the issuance of prohibition orders in these cases, he has taken the position that the development and issuance of a fee schedule which is genuinely only a suggested schedule would not in itself provide him with grounds to initiate an inquiry. He noted that a genuine suggested fee schedule is one which is issued merely for professional information purposes, without raising any intention or expectation whatsoever that the membership will adopt the schedule and their practices. Accordingly, members must feel that they are free to deviate from the schedule without the fear of recrimination or sanction and that should be born out by subsequent facts. Mr. Goldman cautioned that unless there are disciplinary measures to enforce a fee schedule, it is not easy to formulate and implement a fee schedule without risking violation of the conspiracy provisions. This risk arises, he contended, because of the ease with which a schedule may be used to establish or facilitate an agreement on prices or promote adherence to a specific level of fees:

An association may foster intentions or expectations that members will follow the suggested fee schedule, without obtaining the direct agreement of the members and without

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reference to the imposition of sanctions. The language of the fee schedule itself may have this effect if it conveys the impression that adherence is expected and that deviations would be inappropriate. If such a fee schedule were promulgated and information was brought to our attention that a significant number of lawyers were adhering to the fee schedule, I would likely be obliged to commence an inquiry.

Mr. Goldman also noted that use of fee surveys has been raised on a number of occasions as an alternative to rigid fee schedules. Mr. Goldman noted that the fact that a fee survey does not require or specifically promote adherence to a particular fee level is an important distinguishing feature. Again he cautioned that surveys, like schedules, may be used by a professional organization or its members to facilitate an agreement on prices and that for this reason his office has indicated in advisory opinions regarding fee surveys that it would closely follow any situation in which, following distribution of a fee survey, a substantial number of members of a professional group of a particular market were observed to move to the highest price recorded from a situation of price variation.

With respect to the argument that minimum fees are necessary to maintain adequate professional standards and integrity, Mr. Goldman noted that, in his view, there is no necessary correlation between price competition and lower standards of quality and integrity. In any event, standards of integrity and competence can be adequately addressed by law societies under their provincial mandates. Mr. Goldman observed that high standards of integrity may exist in circumstances where healthy price competition exists. Conversely, higher prices do not necessarily impede those who are so inclined from cutting corners to benefit from a higher level of profit. In other words, higher fees do not necessarily ensure the highest standard of service nor do below average fees necessarily provide proof of shoddy work.

In support of his position, Mr. Goldman referred to a 1970 report of the United Kingdom Monopolies Commission which concluded that, after a survey of a large number of professional occupations including legal services, a recommended scale of charges does not, in itself, remove temptations to reduce costs and increase profits by cutting the quality of the services. The

Supreme Court of the United States has also rejected submissions that prohibitions on competitive bidding should not be prohibited under U.S. anti-trust law because they were necessary to protect the public from poorly constructed buildings and because price competition would result in poor quality engineering and workmanship.

Mr. Goldman noted that although we have no such similar categorical statements to rely on in Canadian jurisprudence it has long been established by Canadian courts that the public interest in free competition takes paramountcy over other business considerations. He referred to the reasons of the Supreme Court of Canada in *Howard Smith Papers et al v. The Queen*, a conspiracy conviction in which Mr. Justice Kellock commented that the *Combines Investigation Act* "proceeds upon the footing of that the preventing or lessening of competition is in itself an injury to the public. It does not concern with the public injury or public benefit from any other standpoint."

Finally, Mr. Goldman concluded that lower fees may well reflect cost reducing innovations and that the more appropriate approach to professional bodies to address poor quality service that might undermine public confidence in the profession is on a case-by-case basis through resort to established lawful disciplinary channels rather than through broad restraints on price competition which may only address the problem indirectly, if at all.

With respect to restrictions on the emergence of new professions, Mr. Goldman observed that in many cases paraprofessional entry into service niches is dependent upon the cooperation of members of the established professions through referrals, training, consulting, or direct supervision. This dependency creates a potential for abuse in the established professions for reasons of self-interest and to retard the growth of these competitors. Accordingly, he noted any sort of group boycott arising from such independency situation may run afoul of competition policy by denying the public the lower prices and other benefits that might be derived from the competition generated by new entry. Under American anti-trust law such boycotts have been found to be illegal. Mr. Goldman observed that such exclusionary activity in Canada may be subject

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either to the criminal conspiracy provisions or the non-criminal abuse of dominance provisions of the *Competition Act*.

Finally, with respect to professional advertising restrictions Mr. Goldman observed that, from a competition policy perspective, advertising reduces barriers to entry by removing reliance on word of mouth which tend to favour established firms thereby enabling new firms to make their presence widely known. He also indicated that a recent decision of the Ontario Court of Appeal [*Rocket et al v. The Royal College Dental Surgeons of Ontario et al*, (1988), 64 O.R. (2nd) (353)] which found that a prohibition on advertising by dentists violated the *Charter of Rights and Freedoms* guarantee of freedom of expression may further promote advertising barriers. J.F.B.

HOFFMANN-LA ROCHE, LIMITED PLEADS GUILTY TO PRICE MAINTENANCE

On April 4, 1989, the Criminal Division of the Provincial Court of the province of Ontario, entertained a guilty plea by Hoffmann-La Roche (Roche) and entered a prohibition order, on consent, against the company.

The company pleaded guilty to a single charge under the Price Maintenance Provision contained in paragraph 61(1)A of the *Competition Act*, for attempting to influence upward the price at which United Pharmacists Enterprises Ltd., a wholesaler in the province of Saskatchewan, sold "Redoxon" brand vitamins during the period from April 17, 1985 to September 25, 1985.

Although the agreed Statement of Facts in the case does not make it clear, it appears that a Roche sales representative applied pressure to United Pharmacists to raise the prices at which it was selling Redoxon products to its member retailers because their low prices during times of the year when Roche was conducting promotional deals was causing difficulties for other retailers. In particular, the Roche representative indicated that certain small United Pharmacist Retail members were purchasing Redoxon products from United Pharmacists at prices lower than larger retailers could purchase them directly from Roche.

The Roche representative tried to get United Pharmacists to enter into a particular form of arrangement with Roche and when United Pharmacists would not agree, Roche would not sell the products to United Pharmacists at price levels commensurate with their quantity purchases. When the matter was brought to the attention of senior Roche officials, they quickly indicated that the firm's policy was not to dictate to any purchaser the price at which they resold the product. The isolated nature of the infraction may be why no fine was asked for or imposed.

The order entered by the Court prohibits Roche from engaging in activities contrary to the price maintenance section, from refusing to supply a product because of the low pricing policy of any person, from practicing any price discrimination behaviour and from suggesting resale prices to a purchaser unless it is clear that the purchaser is under no obligation to accept the suggestion.

In addition to the general prohibitions, the order contains a specific prohibition preventing the company for one year from making any suggestion of a retail resale price of Redoxon by any manner to a purchaser even if it is made clear to the customer that he is under no obligation to follow the suggestion. In addition, the order specifically prohibits Roche from preticketing Redoxon sold by it to any of its customers provided that the corporation is not prohibited from suggesting maximum resale prices.

The order also requires Roche to provide the Director with pricing policies for Redoxon. Roche also must give a copy of the prohibition order to its senior management and sales representatives and to all its wholesale customers in the province of Saskatchewan. It also must provide an instruction seminar to all of its senior management and sales representatives regarding the provisions of the *Competition Act* within 120 days of the order. L.A.W.H.

GOLDMAN ANSWERS HIS CRITICS

In his concluding remarks to the Natural Resources Section of the Canadian Bar Association in Calgary, March 29, 1989, the Director of Investigation and Research responded to public misconceptions of the merger review process.

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The Director stated that the success of the merger review process cannot be measured by the number of cases before the Competition Tribunal. The small number of cases before the Tribunal in fact demonstrate the success of the process. They are the remnants of a much larger body that started the process but did not reach the Tribunal because the reasons to oppose them were removed during the review process through consultation and restructuring. Other mergers were abandoned early in the process after the proponents were made aware of impending difficulties. Mr. Goldman also stated that increased awareness of the *Competition Act* itself and of the Bureau's commitment to enforce it have deterred other mergers. In many cases, he said, mergers do not give rise to competition concerns in the first place. Mr. Goldman noted that between June 19, 1986, and the middle of March, 1989, the Bureau of Competition Policy had completed the review of 335 mergers—approximately 10% of the total that occurred in Canada. Of these, 300 posed no problem under the *Act*. In 19 cases the decision was to monitor. In 9 other cases, the parties restructured the merger so as to alleviate anti-competitive concerns. In 7 cases, the parties voluntarily abandoned the merger in whole or in part after noting the concerns of the Bureau. In addition, 4 cases were sent to the Tribunal. During this same June 1986 to March 1989 period, the Bureau received 118 requests for Advanced Ruling Certificates (ARCs). Of these 87 ARCs were issued. Advisory opinions were issued in 13 cases and 5 were still under review. The remainder were either abandoned following the request or were not pursued when the parties were given a negative response.

Mr. Goldman stated that there is no reluctance on the part of the Bureau to go to the Tribunal if that is what is required. It is business, he noted, that is reluctant to litigate disputes. The delay, expense, and uncertainty of the litigation process and the desire to avoid public scrutiny of future business plans provide a powerful incentive to businesses to organize their affairs so as to avoid conflict with the *Competition Act*. Mr. Goldman noted that, from his discussions with his OECD counterparts, the reluctance of business to embark on contested proceedings is not unique to Canada.

Another misconception addressed by Mr. Goldman is that the *Act* requires him to take all cases to the Competition Tribunal. He noted that the *Act* conferred on the Director a broad enforcement discretion and that it was not his intention to exercise that discretion by indiscriminately taking cases to the Tribunal. He argued that a rigid approach to merger review would produce counterproductive results in that a good number of proposed transactions which may have beneficial economic aspects and which might be readily restructured would run a significant risk of being abandoned. Earlier in his remarks Mr. Goldman reviewed the Bureau's record in light of several major mergers—Nabisco/Interbake, Hostess/Frito-Lay, MacLean Hunter/Selkirk, Safeway/Woodwards, among others—and noted that the resolutions in these cases created new opportunities for competition by smaller businesses and third party market entry or expansions, and saved jobs in operations which may have been closed. The Director confirmed that he intended to maintain a flexible approach and to use all the tools available to him in merger review. These include pre- and post-closing restructuring, the acceptance of undertakings, monitoring, and Tribunal consent or contested orders. Cases would be selected for the Tribunal's attention with strategic and careful deliberation and on a properly informed basis. Cases would not be put to the Tribunal merely to deal with interesting questions of some public interest in the absence of a proper factual and legal basis for an application to the Tribunal.

The Director also explained that his Office does not issue "orders." The Director's decision is whether or not to challenge a proposed merger. Any orders would be made by the Tribunal.

Mr. Goldman responded to criticism that the use of undertakings is new and without legal authority. He noted that undertakings have been used since the 1960s and that the advice given to the Bureau by the Department of Justice and other legal counsel is that undertakings are encompassed in the framework of the enforcement discretion given to the Director by various provisions of the *Act*.

Mr. Goldman reassured his audience that the long history of non-interference, political or

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otherwise, in the Director's process is alive and well and that the Bureau had the support and resources to exercise its independent authority effectively.

While the Director indicated that he was happy with the *Act* and the performance and professional commitment of Bureau staff, he acknowledged that the privacy and confidentiality provisions of the *Competition Act* constrain the Bureau's ability to communicate with the public. Mr. Goldman recognized the importance of maintaining public confidence in the enforcement of the *Act* through the timely disclosure of information about the Bureau's activities under the *Act*. He noted that this objective must be balanced with the importance of maintaining privacy and confidentiality and that it was not always possible to strike a perfect balance. Mr. Goldman stated that the Bureau makes every effort to communicate with the public and was currently examining with its legal counsel whether it can elaborate on the reasons for a decision by the Director without contravening the confidentiality and privacy provisions of the *Act*. The Director stated that he would be giving this issue top priority.

In a detailed review of the Bureau's track record, Mr. Goldman argued that the *Competition Act* is a modern, realistic, and effective law and that competition— a national resource— is being given the attention it deserves. N.J.S.

DIRECTOR ANNOUNCES CHALLENGE TO NEW BRUNSWICK DAIRY MERGER

On April 20, 1989, the Director of Investigation and Research advised Baxter Foods Limited of Saint John, New Brunswick, that he intended to file an application with the Competition Tribunal for a remedial order with respect to Baxter's acquisition of the dairy processing business of McKay's Dairy Limited.

Baxter had acquired McKay's on January 3, 1989. At that time Baxter had entered into a hold separate agreement with the Director to allow him to examine the transaction. The acquisition was not notifiable under the *Competition Act*.

After the Director's review, he concluded that the acquisition would likely prevent or lessen competition substantially in the fluid milk market in New Brunswick.

The Director noted that Baxter Foods is the largest processor of fluid milk and other dairy products in New Brunswick. The remaining competitors in New Brunswick have market shares considerably less than Baxter. The Director also noted that in addition to market share and concentration levels, the Director's decision was based on other factors such as the absence of foreign competition, barriers to significant entry into the market and the removal of an effective competitor.

An issue which arose in the transaction was the regulatory control by the New Brunswick government over fluid milk processors in the province. Indeed, the Director noted that the New Brunswick government is in the process of studying whether to reinstitute price or other regulatory controls over fluid milk. However, the Director noted that the industry has not been subject to specific effective regulations since 1983 and, therefore, the present situation would not preclude the application of the *Competition Act* at this time.

The New Brunswick government study is expected to be completed in June, 1989. If it does result in the reinstatement of price controls for wholesale fluid milk in New Brunswick, a different result might have occurred if the merger had taken place only a few months later.

When the Director announced his decision, he indicated that discussions with Baxter were continuing. As a result of those discussions, Baxter decided to sell McKay's Dairy and on June 12, 1989, Perfection Foods, a Prince Edward Island based dairy with operations in New Brunswick, acquired the shares of McKay's Dairy from Baxter Foods. That being the case, the Director announced that he would not pursue an application to the Competition Tribunal since the problem had been rectified. L.A.W.H.

PALM DAIRY'S SALE PROCEEDS

On March 31, 1989, the Director of Investigation and Research announced that he

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would not challenge at this time the acquisition of the Palm Dairies Limited facilities in British Columbia by Fraser Valley Milk Producers Co-operative Association and Island Farm Dairies Co-operative Association. Fraser Valley, a large co-operative operating throughout British Columbia acquired all of the Palm Dairies facilities on the mainland of British Columbia. Island Farms, a Vancouver Island based cooperative, acquired the Palm facilities on Vancouver Island.

Although the Director was concerned about the effect of the acquisitions on competition in fluid milk in British Columbia, he decided to allow the acquisition to proceed because the Palm Dairy business in British Columbia was failing. The Director indicated that he had received satisfactory answers from Peter Pocklington, the owner of Palm Dairies, and from independent financial institutions to satisfy him that the British Columbia operations of Palm were indeed failing and, furthermore, that no alternative buyers were available to acquire the businesses.

It will be recalled that the proposed acquisition of Palm Dairies in 1986 by, among others, Fraser Valley was the first matter brought before the Competition Tribunal. In that case, the Tribunal refused to accept the consent arrangement worked out between the Director and the parties. As a result, that transaction did not proceed. With the sale of its British Columbia operations, Palm Dairies is left with operations only in Alberta and Saskatchewan. L.A.W.H.

CHRYSLER CANADA REFUSAL TO DEAL—UPDATE

(Note: The Director's application to the Competition Tribunal for an Order against Chrysler Canada under the refusal to deal provisions of the Competition Act was reviewed in the December 1988 CCPR).

Following the filing on Chrysler Canada's response on February 3, 1989, and the Director's reply on February 17, parties have, pursuant to pre hearing conference Orders of the Tribunal, proceeded through the discovery and production of documents stage. The hearing is anticipated to commence in July.

Chrysler Canada's response raises a variety of defences. Principally, Chrysler Canada contends

that the relevant product should be Chrysler parts sourced both in Canada and in the United States. Accordingly, because Chrysler Canada contends that unlimited quantities of U.S. made Chrysler parts were available to the complainant from its parent Chrysler Corporation, Chrysler Canada submits that product in question were available in the market in ample supply and were available to the complainant on usual trade terms, which Chrysler alleges the complainant was not willing or able to meet. Chrysler Canada also contends that the business of the complainant, R. Brunet, a Québec-based parts exporter, was not substantially affected by Chrysler Canada's ceasing to supply Chrysler parts to him. Secondly, Chrysler Canada contends that any refusal to supply was the result of a lawful agreement between affiliated companies with respect to market sharing.

The Director's reply contends that Chrysler Canada should be estopped from relying on its market sharing agreement with Chrysler U.S. for three reasons. First, the Director alleges that Chrysler Canada continued to supply the complainant and encourage the complainant to purchase Chrysler Canada parts after the alleged agreement was made in 1980. Second, the Director contends that the complainant was not a party to the agreement and had no notice of it. Third, and most interestingly, the Director alleges that the Chrysler agreement was an unreasonable restraint of trade to which the Competition Tribunal should give no effect. The Director has also reiterated his contention that, because of differences in quality and promptness of delivery, Chrysler Corporation and Chrysler Canada are suppliers of different parts products.

As part of the discovery stage, relevant documents provided by the complainant to the Director were made available to Chrysler Canada, its counsel and expert witness subject to a confidentiality order. The complainant was also orally examined.

In late May, the complainant, in a letter to the Registrar of the Competition Tribunal raised directly with the Tribunal objections to the scope of discovery being obtained by Chrysler Canada pursuant to an order on outstanding discovery issues dated May 25, 1989, and the manner in which the order was implemented. That order

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provided that the Director's counsel "produce or arrange to permit" counsel for the respondent to inspect all files of Mr. Brunet that relate to his dealings with Chrysler Motor Corporation and Chrysler Canada Ltd. Mr. Brunet alleged that lawyers representing Chrysler Canada obtained direct access to Mr. Brunet's business office files without first providing him with a copy of the Order or apparently making prior arrangements with counsel for the Director.

Mr. Brunet also alleged, that Chrysler's lawyers had commenced a "fishing expedition" in files which on the surface bore no relation to the issues in the case, and cited as examples, files relating to his dealings with other manufacturers and overseas clients, pertaining to export permits.

Mr. Brunet particularly objected to a discovery order having been issued without direct notification to him of the prehearing conference at which the Order was given and the potential harassment and competition harm effects for himself and possible future refusal to deal complainants that could flow from the scope of discovery granted to Chrysler. Mr. Brunet also complained that it was unfair to put a burden directly on his shoulders to interpret the scope of a judicial order in a matter being carried by a public official. Finally, Mr. Brunet questioned the appropriateness of discovery of correspondence with the Director's officials complaining of Chrysler's conduct since he had assumed that "some element of privilege" attached to them.

The Competition Tribunal subsequently appointed an *amicus curiae* to make representations with respect to the scope of privilege which should attach to communications between the complainant and the Director and other questions of law that might arise.

The Tribunal's hearing will therefore take on additional significance as it will likely result in guidance on the extent to which the Tribunal and the Director should protect from disclosure communication from complainants designed to promote an inquiry to encourage its speedy conclusion and on the balancing of the principle of full case disclosure with the practical need to protect complainants from the threat of competitively sensitive information falling into the hands of respondents which are also their competitors.

J.F.B.

TWO MAJOR MERGER DECISIONS REMAINING

The Director's decision in the Wardair-PWA merger left the Molson/Carling O'Keefe merger and the Imperial Oil Limited/Texaco Canada mergers remaining to be decided by the Director. This triumvirate had dramatically increased the public attention on the Director's office when they were announced within a short period of time in early January, 1989. The two remaining mergers have been subject to intensive review by the Director's office. Mr. Goldman announced in Toronto in early June that he expected decisions to be reached in these matters by the end of that month. With respect to the Imperial Oil transaction, it is understood that it will result in a consent application to the Competition Tribunal. It will be recalled that Imperial had agreed at the time it was allowed to acquire the shares of Texaco Canada that it would divest of assets as required by the Director in the downstream operations of Texaco Canada. It seems likely there will be significant divestiture of retail gasoline stations. The issue which remains unresolved is whether the Director will require any divestiture with respect to refineries being acquired by Imperial: in particular, the state-of-the-art Nanticoke refinery in Ontario.

L.A.W.H.

CANADIAN COMPETITION POLICY RECORD

**MERGER EXAMINATIONS UNDER THE COMPETITION ACT
STATISTICAL SUMMARY**

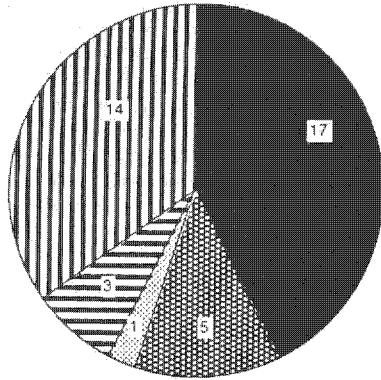
	1986-87 ¹	1987-88	1988-89	1989-90 ²
MERGER EXAMINATIONS COMMENCED ³	40	146	191	58
EXAMINATIONS CONCLUDED				
Concluded as posing no issue under the Act ⁴	17	120	166	49
Concluded with Monitoring only ⁵	5	7	10	4
Concluded with pre-closing restructuring ⁶	-	2	1	-
Concluded with post-closing restructuring ⁷	1	2	3	-
Concluded with consent order				1
Parties abandoned proposed merger in whole or in part as a result of Director's position	3	2	2	1
TOTAL EXAMINATIONS CONCLUDED	26	133	182	55
EXAMINATIONS ONGOING AT END OF PERIOD	14	25	32	36
INTENT TO FILE APPLICATION ANNOUNCED	-		2	
APPLICATIONS BEFORE TRIBUNAL:				
Concluded ⁸	1	-	2	1
Ongoing		2	2	3

Notes

1. Statistics commenced on June 19, 1986.
2. Statistics to July 6, 1989.
3. Two or more days of review. Includes 184 prenotifications since July 15, 1987 of which:
 in short-form (s.121): 1987/88 - 44, 1988/89 - 50; 1989/90 - 21.
 in long-form (s.122): 1987/88 - 21; 1988/89 - 42; 1989/90 - 6.
4. Includes:
 105 Advance Ruling Certificates -
 1986/87 - 2; 1987/88 - 26; 1988/89 - 59; 1989/90 - 18
 19 Advisory Opinions -
 1986/87 - 3; 1987/88 - 10; 1988/89 - 6; 1989/90 - 0
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.

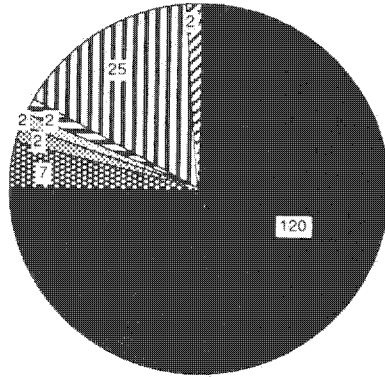
CANADIAN COMPETITION POLICY RECORD

1986/87



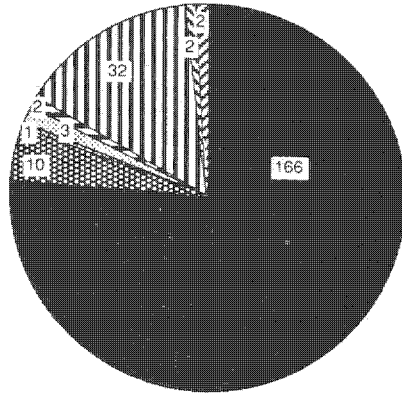
- Concluded as posing no issue under the Act
- Concluded with Monitoring only
- Concluded with pre-closing restructuring
- Concluded with post-closing restructuring
- Concluded with consent order
- Parties abandoned merger as a result of Director's position
- Ongoing Examinations
- Intent to file application announced
- Applications before Tribunal - Ongoing

1987/88



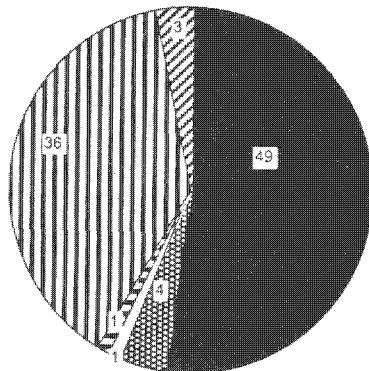
- Concluded as posing no issue under the Act
- Concluded with Monitoring only
- Concluded with pre-closing restructuring
- Concluded with post-closing restructuring
- Concluded with consent order
- Parties abandoned merger as a result of Director's position
- Ongoing Examinations
- Intent to file application announced
- Applications before Tribunal - Ongoing

1988/89



- Concluded as posing no issue under the Act
- Concluded with Monitoring only
- Concluded with pre-closing restructuring
- Concluded with post-closing restructuring
- Concluded with consent order
- Parties abandoned merger as a result of Director's position
- Ongoing Examinations
- Intent to file application announced
- Applications before Tribunal - Ongoing

1989/90



- Concluded as posing no issue under the Act
- Concluded with Monitoring only
- Concluded with pre-closing restructuring
- Concluded with post-closing restructuring
- Concluded with consent order
- Parties abandoned merger as a result of Director's position
- Ongoing Examinations
- Intent to file application announced
- Applications before Tribunal - Ongoing