CANADIAN COMPETITION LAW DEVELOPMENTS

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GOLDMAN TO LEAVE COMPETITION BUREAU: WETSTON NAMED NEW DIRECTOR

On August 29, 1989, the Prime Minister's Office announced that Calvin Goldman, Director of Investigation and Research of the Bureau of Competition Policy, had decided to leave the federal public service effective October 29th to return to the private sector. Mr. Goldman will join the Toronto law firm of Davies, Ward & Beck. Howard I. Wetston, now the Senior Deputy Director and Head of the Bureau's Merger Branch, was named to succeed Mr. Goldman, effective October 30th.

Mr. Goldman, appointed as Director of Investigation and Research in May 1986, was the first Director under the new *Competition Act* which came into force in June of that year. Mr. Goldman is credited with overseeing a smooth transition to, and orderly development of, the new law. His tenure as Director came at a time when merger activity increased significantly in Canada, placing onerous demands on the Bureau.

Mr. Goldman restructured the Bureau of Competition Policy, creating the Merger Branch, strengthening its capacity to assess the consequences of commercial transactions subject to the legislation, and augmenting its enforcement capability. His term as Director will probably be most noted for the approach that was instituted for dealing with transactions that raised competition concerns under the legislation. Mr. Goldman stressed the importance of achieving the objectives of the *Competition Act* in a manner that was expeditious, provided certainty to the parties, and did not raise unnecessary obstacles to commerce. He strongly believed that a "compliance" approach to enforcement was preferable, in which parties should be encouraged and given an opportunity to bring their transactions into conformity with requirements of the *Competition Act*.

Harvie Andre, acting Minister of Consumer and Corporate Affairs, praised Mr. Goldman's contribution as Director stating that, in his view, Mr. Goldman had laid "a solid foundation for the continued development of a realistic, effective and open approach to the administration and enforcement of competition law in Canada." The Minister commented that Mr. Goldman had been particularly successful in "balancing the need to maintain competition in Canada, and the need to increase our ability to compete internationally, two broad national interests that are so important at this point in our country's history."

The new Director, Mr. Howard I. Wetston, was originally recruited by Mr. Goldman. Mr. Wetston joined the Bureau of Competition Policy in October, 1986 and played a key role in the development of the Merger Branch and in the handling of the major merger cases by the Bureau.

Mr. Wetston's professional background makes him eminently suited to his new position which, as in the past, combines the statutory position of Director with a public service position as an Assistant Deputy Minister in the Department of Consumer and Corporate Affairs. Mr. Wetston has extensive experience in all areas of competition policy as well as in economic regulatory matters, an area of increasing activity for the Director of Investigation and Research in the last few years. He comes to the job with hands-on litigation experience as a lawyer in the federal government, in independent federal regulatory agencies, and in the private sector.

Mr. Wetston obtained his law degree from Dalhousie University and is a native of Nova

Scotia. Subsequent to obtaining his law degree, he joined the federal public service as a lawyer in the Department of Justice. In that capacity he served as counsel to the Department of Consumer and Corporate Affairs and also was coordinator of all criminal competition matters in the Criminal Competition Law Section of the Federal Department of Justice. He also acted as prosecutor for the Federal Attorney General in the *Albany Felt* case, the only contested conspiracy case since 1976 in which the Crown was successful.

In 1981, Mr. Wetston left the Justice Department to become General Counsel to the Consumers' Association of Canada's Regulated Industry Program. As General Counsel, he represented the Consumers' Association before many federal boards and tribunals such as the Canadian Transport Commission, the CRTC, and the NEB.

On leaving the Consumers' Association, Mr. Wetston became Assistant General Counsel to the National Energy Board. After a short term in that position, he was promoted to the position of General Counsel to the Canadian Transport Commission. He remained in that position until 1985, when he joined the Ottawa office of Burnet, Duckworth & Palmer, a Calgary-based law firm.

E.A.M.

UPDATE: IMPERIAL OIL LIMITED/ TEXACO CANADA MERGER

The Imperial Oil Limited/Texaco Canada merger will be considered by the Competition Tribunal in hearings to begin on October 16, 1989, in Ottawa. The Director is seeking the Tribunal's approval of a draft consent order which provides for the divestiture of 197 service stations, specified terminals and bulk plants and the Eastern Passage Refinery in Atlantic Canada. The order further provides for the divestiture of 346 gasoline stations in Ontario and Québec. Lastly, the order contains provisions intended to guarantee a supply of gasoline to independent marketers in Ontario and Québec during the next ten years. The order does not provide for the divestiture of Texaco's Nanticoke refinery.

The hearing will take approximately two weeks. The Director and Imperial are expected to call eight expert witnesses. In addition, expert and factual evidence will be presented by a number of intervenors including the Attorney General of Québec, the Atlantic Refining and Marketing Employees' Association and Pioneer Petroleums. At the time of writing, six parties have intervenor status and several additional applications to intervene will be considered on October 16, 1989. The Tribunal allowed the interventions on differing terms. Some of the intervenors have been given leave to call evidence while others' participation has been restricted to cross-examination and argument. The Liberal Party of Canada was denied intervenor status at the pre-hearing conference held on August 25, 1989.

S.J.S.

DIRECTOR APPROVES MERGER OF MOLSON AND CARLING O'KEEFE

On July 6, 1989, the Director of Investigation and Research, Mr. Calvin S. Goldman, announced that he was approving the merger of Molsons' and Carling's brewing operations in Canada. He stated that he did not intend to apply to the Competition Tribunal at this time but would monitor the effects of the transaction during the three year statutory limitation period. Mr. Goldman indicated that although the merger would increase concentration significantly, other factors inclined him against challenging the merger.

He singled out the provinces of Québec and Alberta as areas of greatest concern in the Bureau's review of the merger. He indicated that an extensive monitoring program had been agreed to between the Bureau and the merged entity to enable the monitoring to be effective in the three year period, particularly in Alberta and Québec.

One of the factors that was clearly significant to the Director in his decision was the dynamic, if not declining, nature of regulatory controls over the interprovincial and international movement of beer. The Director cited recent *GATT* decisions, as well as evidence of increased imports from the United States into British Columbia, Alberta and Ontario, to support his analysis. The Director also noted ongoing discussions between the federal and provincial governments to further reduce

restrictions on the interprovincial movement of beer. In particular, the requirement that only beer brewed in a particular province may gain access to the distribution system controlled by that provincial government is being reversed. The parties obviously had advanced the view that these barriers would decline in future years. The Director indicated that the parties' representations on these matters would be carefully monitored in the future.

Another significant factor in the Director's assessment was the present extent of provincial regulation of the industry. To the extent that the industry is regulated, it may limit the opportunity for free markets to operate in the sale and distribution of beer. The Director's staff reviewed the regulatory systems in each of the ten provinces. The degree of regulation was particularly significant in Ontario where effective price competition is prevented by the provincial regulatory scheme, according to Mr. Goldman's assessment. On the other hand, in some provinces, particularly in the west, a discount beer segment has become a significant competitive force.

It will be recalled that one of the leading cases establishing the regulated conduct defense under the *Combines Investigation Act* was the merger prosecution of Canadian Breweries in 1960. In that judgment, Mr. Justice McRuer, found that price competition was effectively regulated by the provinces, leaving the breweries the opportunity to compete only on service, advertising, consumer preference, etc.

Although, the Director did not conclude that the *Competition Act* was not applicable to the present transaction because of the regulated conduct exemption, the degree of regulation was clearly an important factor in his decision whether the merger would substantially lessen the competition.

Another important factor in the Director's assessment was the efficiency savings advanced by the parties. Although the Director's publicly released information does not indicate the magnitude of the efficiencies claimed, it is clear that rationalization to achieve longer production runs was a major argument advanced by the parties. The Director indicated that his review of the transaction indicated that it was unlikely these efficiencies would be realized by means other than the merger. For example, the Bureau had examined co-packing arrangements and the independent rationalization of production facilities. However, they concluded that neither appeared to be practical or of long-term value.

In the two markets of particular concern, Alberta and Québec, the Director indicated that a monitoring program will be particularly important. In Alberta the merger would give Molsons' more than 50% of beer sales. It would also be approximately twice the size of Labatts, its next largest competitor. However, there is a strong regional brewer in Alberta and imports from the United States have been a significant factor in recent years. Nevertheless, the large size of the merged entity obviously continued to present concerns to the Director.

Québec was indicated as being the market of greatest concern to the Director. In that province, the merged entity would have approximately 60% of the market. The Director also pointed out that there are no regional brewers in Québec and that import competition is practically non-existent. Furthermore, Québec's distribution system is through thousands of local grocery and convenience stores. Gaining access to the distribution system would be particularly important to new entrants. The only province-wide systems for beer distribution in Québec are those controlled by Labatts and the merged entity. As an additional factor, Québec prohibits the sale in these stores of non-provincially brewed beer. This is one reason why imported beers represent such a small percentage of sales in the province of Québec. Coupled with the fact that Carling O'Keefe had been the largest brewer in Québec, these factors raised considerable concerns as to the impact of the merger on competition in Québec.

Countering these concerns was the fact that Labatts has been steadily increasing its market share in Québec as consumers have shifted from ales to lagers. Carling O'Keefe has been the leading brewer in the ale segment of the market, whereas Labatts is particularly strong in the lager segment.

Furthermore, the merging parties agreed to provide access to their distribution system in Québec for Canadian produced beers, except for Labatts, on a fee-for-service and not-for-profit basis. They agreed to provide such access for a

minimum of three years following the closing of the transaction. They also informed the Director that they will make the distribution system available to micro brewers in Québec immediately. They also indicated that the system would be available to out of province Canadian and foreign brewers with respect to beer produced by them in Canada, should Québec change its regulatory system.

Overall, the Director concluded:

> The merger raises potential competition concerns in Alberta and in Québec. However, the beer industry is undergoing dynamic changes in many areas of Canada. Accordingly, I have emphasized to the parties that in view of the rapidly evolving nature of the industry, the Bureau intends to monitor developments in the industry, and particularly in the provinces of Alberta and Québec, during the three-year period provided for under the *Competition Act*. I will not hesitate to seek an appropriate remedial order, if necessary, from the Competition Tribunal, should it subsequently be determined that the merger prevents or lessens competition substantially.

The Director's decision in the brewery case, concludes the assessment of the trilogy of major mergers facing his office since the beginning of the year. In the brewery case and the merger of Canadian Airlines and Wardair, the mergers were allowed to proceed. With respect to the acquisition of Texaco Canada by Imperial Oil, the Director allowed the transaction to proceed, subject to conditions contained in a consent order pending before the Competition Tribunal.

L.A.W.H.

COMPETITION TRIBUNAL CREATES FERTILE GROUND FOR CONSENT ORDERS

Two and one-half years after stoning the Director's first attempt at a consent order in the *Palm Dairies* case,[1] the Competition Tribunal, in its July 7, 1989 *Air Canada* decision[2] on the merger of the airline computer reservation systems of Reservec and Pegasus, took care to enunciate principles which will foster the consent order process.

The Tribunal has now explained that the problem in *Palm Dairies* was the fundamentally vague and unenforceable character of the consent order proposed. As a result, the order proposed in *Palm Dairies* could not meet the minimum test of Tribunal approval, namely, whether the merger as conditioned by the terms of the consent order results in a situation where the substantial lessening of competition, which is presumed to arise from the unconditioned merger, has, in all likelihood, been eliminated. The Tribunal, in *Air Canada*, has reaffirmed the test which was enunciated in *Palm Dairies* in these terms:

> It is incumbent on the tribunal to satisfy itself that the order sought meets a critical threshold of effectiveness, namely, that of eliminating the likely prevention or lessening substantially of competition that gave rise to the application for the order.

However, the Tribunal has made it clear that *Palm Dairies* does not stand for the proposition that the Tribunal is not prepared to issue behavioural-type orders. Nor are the same standards of precision required of every term in a consent order. What is required is that those terms essential to the creation of a post-merger competitive situation be expressed with a sufficient degree of precision to permit effective enforcement.

The consent order approved in *Air Canada* imposes behavioural requirements on the respondents. A key part of the order sets out Computer Reservation System Rules governing the conduct of Gemini, the entity resulting from the merger of Reservec and Pegasus, and its owner airlines. The CRS rules are a code of conduct for the operation of CRSs intended, by their own terms, to "prevent unfair, deceptive, predatory and anti-competitive practices in air transportation and in the provision to subscribers of systems and services through such systems". These rules are binding on the respondents by virtue of their consent to the order. The rules contemplate application to other CRSs and their respective owner airlines as a matter of contractual obligation in the event that they enter into direct link agreements with Air Canada and Canadian Airlines. The CRS rules form a severable part of the order in the expectation that they are a temporary measure which will be replaced by legislation regulating the CRS industry in Canada.

In enunciating the test for approving a consent order, the Tribunal referred to *Sparling v. Southam Inc.*, (1988) 66 O.R. (2d) 255 (HC) at 230 and noted

that the principles enunciated in that case are "not totally inappropriate" to the consideration of a consent order application under the *Competition Act*. *Sparling* recognized that settlements are, by their very nature, compromises which need not and usually do not satisfy every single concern of all parties affected and that it is not the Court's function to substitute its judgment for that of the parties who negotiated the settlement nor to litigate the merits of the action. At the same time, it is not the function of the Court to simply rubber stamp the proposal. *Sparling* involved a case under the *Canada Business Corporations Act* and the Court recognized that the Director appointed under that *Act* is a public officer authorized, as *parens patriae*, not only to institute actions but also to compromise them. The Court stated that settlements proposed by the Director run with a strong initial presumption that they are reasonable and fair.

In considering the principles enunciated in *Sparling*, the Tribunal noted the responsibility of the Director, as a public officer, to craft settlements which serve the public interest. The Tribunal also noted that the Director, and the other parties to the settlement, will have access to many facts which are not before the Tribunal and that the Tribunal will normally be called upon to consider consent order applications without hearing all relevant evidence and without making all relevant findings of fact itself. The Tribunal reaffirmed that it is not a mere rubber stamp and must exercise an independent judgment with respect to consent orders. At the same time, the Tribunal noted that the legislation makes it clear that the Tribunal is not to take a detailed role in the crafting of consent orders. Section 92 of the *Competition Act* authorizes the Tribunal, on application by the Director, to order a party to a merger to dissolve the merger or to dispose of assets or shares but the Tribunal may only take other action with the consent of the person against whom the order is directed and with the consent of the Director. In addition, under s.105 of the *Competition Act* the Tribunal may either accept the proposed consent order or reject it. It has no jurisdiction to modify the order.

Noting that decisions as to whether a given situation will result in a substantial lessening of competition are speculative in nature and that there is no doubt more than one combination of terms and conditions which could achieve the desired result, the Tribunal stated that it does not consider it has been given a mandate to craft the best possible terms and conditions for protecting competition. Rather, the Tribunal's role is limited to vetting the order before it to ensure that the proposed terms and conditions are likely to be effective in eliminating any adverse effects of the merger.

In the proceedings leading to the approval of the consent order application, intervenors and the Tribunal expressed concerns about various elements of the proposed order. Some of those concerns were accepted by the parties to the settlement, namely, the Director and the respondents. However, not all the concerns expressed by the Tribunal and intervenors were met. The Tribunal acknowledged that had it crafted the order itself a different set of conditions would have resulted from those agreed to by the parties to the settlement. The Tribunal also stated that there was no doubt that some of the rejected provisions proposed by the intervenor, American Airlines, would have produced a more rigorous instrument for creating a post-merger competitive environment. However, the Tribunal concluded that the settlement as a whole would be enforceable and that the overall result would, in all likelihood, be consistent with the objectives of the *Competition Act*.

It was not a valid objection that some terms of the consent order would require diligent and continual surveillance by the Director. Nor was it any valid objection that changed conditions or effective enforcement of the order might require a return to the Tribunal for either changes to, or interpretations of, the order.

Although the Tribunal took care to reaffirm what it took to be the substance of *Palm Dairies*, the *Air Canada* decision is plainly different from *Palm Dairies* in tone and approach. In *Air Canada*, the discussion as to the appropriate test for approving consent orders comes after a lengthy discussion of the nature of the case and the proposed terms of the order in relation to the affected industry. In *Palm Dairies* the Tribunal ordered that the questions of principle and jurisdiction be dealt with first. In *Palm Dairies* the Tribunal appeared to be preoccupied with the

perpetual nature of the order sought and the long-term enforcement required of a complex and elaborate settlement. The Tribunal even held out the prospect in *Palm Dairies* that it might reject the order proposed and make another order, presumably an order prohibiting or dissolving the merger. It is fair to say that the Tribunal in *Air Canada* has sought to replace the November chill of *Palm Dairies* with a ray of July sunshine.

As part of the settlement, Air Canada and PWA Corporation entered into a Memorandum of Understanding with the Covia Partnership which, when the agreement is completed, would make Covia a one-third owner of Gemini. The Covia Partnership includes United Airlines, U.S. Air, British Airways, KLM, SwissAir, and Alitalia. Covia owns the Apollo CRS in the U.S. and is a founding member of Galileo, the European CRS consortium. Although the Tribunal questioned why the consent order should not require some degree of divestiture by Air Canada and PWA in the event that the agreement with Covia is not completed, the Director and the respondents declined to modify the settlement. The Tribunal noted that the failure to complete the agreement would permit the Director to seek a modification of the order pursuant to s.106 of the *Competition Act* on the ground that the circumstances in existence at the time of the making of the order had changed.

The CRS rules approved in the order are similar to those imposed on CRS vendors in the U.S. by the Civil Aeronautics Board in 1984 and which have since been administered by the Department of Transportation. The Tribunal also took note of the fact that the European Civil Aviation Conference has published a guiding set of principles for CRSs and that the Transport Directorate of the European Commission has proposed draft CRS regulations which, if adopted by the Council of Ministers, will be legally enforceable in the EC. The Tribunal was not, therefore, moving into entirely uncharted territory.

The consent order strikes a balance between preventing anti-competitive behaviour by Air Canada and Canadian Airlines and creating conditions which would give other carriers competitive advantages. So, for example, the consent order requires Air Canada and Canadian Airlines to provide other CRSs operating in Canada a direct access link to each of their reservation systems providing that the owner carriers of the other CRSs offer reciprocal access to Gemini. In addition, the recipient of direct access must not only offer reciprocal capability but must also agree to enter into a contract incorporating the terms and conditions for operating the links that are set out in the order and incorporating the CRS rules in their entirety. This further contributes to the level playing field concept. It also opens the possibility of parties to the link contracts enforcing these obligations by civil action for injunctive relief or damages. This would be in addition to the possibility of enforcing the consent order through contempt proceedings brought by an interested party or any third party who is a beneficiary of the order.

The Tribunal considered the possibility that monopoly prices could be charged to travel agents in smaller centres, particularly to those who are not affiliated with a large chain, as a result of the concentration resulting from the merger. Weighing against this consideration were the opportunities for entry into the market created by the provisions for direct access links and the CRS rules governing the terms of the travel agent subscriber contracts. The expert evidence put forward by the Director was to the effect that these provisions created enough potential for competitors to enter the market so that the post-merger situation could not be considered monopolistic. It was the Director's position that, although the settlement would not create competition for Gemini in each local CRS market in Canada, previously existing barriers to entry would be eliminated by the direct access provisions of the settlement.

The settlement also strengthened the "tying" provisions of s.77 of the *Competition Act*. This section prohibits tying between a supplier and a customer where tying results in a substantial lessening of competition. The CRS rules prohibit tying outright.

The proposed consent order originally submitted to the Tribunal attempted to deal with the possibility of collusion through a provision which prohibited directors, officers, managers, servants, employees, or agents of the respondents from sharing or exchanging commercially sensitive information through the Gemini operation for the purpose of facilitating or engaging in anti-competitive acts or collusive behaviour contrary

to the *Competition Act*. This provision had a ring to it similar to some of the general provisions which the Tribunal found excessively vague in *Palm Dairies*. The provision was re-drafted in response to suggestions made in the course of the hearing to delete the reference to anti-competitive behaviour contrary to the *Competition Act* and to add a non-exclusive list of information which was not to be shared through the Gemini operation.

The consent order in *Air Canada* is substantially more precise and specific, although not perfectly precise, than the order put before the Tribunal in *Palm Dairies*. The order in *Air Canada* was also supported by substantial expert evidence. The order had, as well, the support of most intervenors. Finally, the parties to the settlement made significant changes to the consent order initially proposed in response to concerns raised during the course of the hearing. This decision indicates that the Tribunal is prepared to afford a warm reception to parties who have crafted a defensible order which does a good, if not the best, job of eliminating the presumed substantial lessening of competition and who remain receptive to change in response to concerns expressed by the Tribunal and affected parties at the hearing of the consent order application.

Notes

1. *Director of Investigation and Research* v. *Palm Dairies Ltd. et al.*, (1986) 12 C.P.R. (3d) 540.
2. *Director of Investigation and Research* v. *Air Canada et al.*, July 7, 1989, Competition Tribunal file CT-88/1.

N.J.S.

NUTRASWEET UPDATE

The written pleadings stage in the NutraSweet abuse of dominance proceeding (see June 1989 *CCPR* for review of the Director's application) has been completed. The Competition Tribunal has established a schedule for discovery and further filings in anticipation of a January 9, 1990, hearing date. Finally, in a pre-hearing conference decision the Tribunal has provided an interpretation of its procedural rules relating to disclosure of documents by the respondent.

The NutraSweet response, filed on July 25, 1989, contends that the firm's success in the market is purely the result of innovation, risk-taking and superior competitive performance. The respondent contends that its superior competitive performance is the result of continuous research and development, testing of Aspartame to obtain approvals in various countries, intensive promotion, and a superior product and supply network, none of which have been undertaken by its competitors.

NutraSweet also contends that it has no market power in the supply of Aspartame for a number of reasons including:

(1) much in-house artificial sweetener R&D is now being conducted by manufacturers of food products;
(2) large food and beverage manufacturers can readily manufacture Aspartame once it comes off-patent;
(3) competition and supply of Aspartame will intensify towards the 1992 end of NutraSweet's U.S. patent;
(4) no barriers to entry exist in Canada for manufacturers that currently supply Aspartame.

NutraSweet also notes that its principal customers are large and sophisticated and can readily choose among competing suppliers, that prices for Aspartame have been declining rather than increasing, and that contracts for the supply of Aspartame are freely negotiated and have short time commitments that facilitate frequent competitive overtures from other suppliers.

NutraSweet has denied that Aspartame might be regarded as a distinct product market. The firm suggests that Aspartame, as well as a large number of other natural and artificial sweeteners, compete for the same ultimate customers and that Aspartame fulfills the same purpose as all other sweeteners. NutraSweet also notes extensive research and development activity by drug and food companies to improve and invent artificial sweeteners. With respect to the geographic market, NutraSweet contends that Canada is not the appropriate geographic market, but that, rather, given the very low cost of shipping artificial sweeteners and the number of plants in existence in a variety of countries, the geographic market is global.

NutraSweet contends that the contractual practices which the Director regards as evidence

of policy to maintain market pre-eminence by ensuring exclusive dealing arrangements and contractual transparency are, in fact, all provisions sought by NutraSweet's customers to secure benefits for them or instead are normal commercial practices. NutraSweet claims that exclusive use and world-wide contracts have been negotiated by customers in order to obtain secure supplies and consistent high product performance. Volume discounts and cooperative marketing are regarded as normal commercial practices by NutraSweet. Trade mark display allowances provide a benefit to customers through cost reductions of Aspartame and, in turn, facilitate NutraSweet in protecting the goodwill of its trademark. "Meet or release" and "price protection" clauses, NutraSweet contends, were actually sought by its customers to permit them to maintain their own competitiveness, particularly in the soft drink market.

Finally, NutraSweet has alleged that the Competition Tribunal does not have jurisdiction to make certain orders requested by the Director including a declaration that certain contractual provisions are of no further force or effect, a requirement to use "most favoured nation" clauses in all contracts if they are used in some, and a declaration that world-wide contracts are of no force and effect with respect to Canada.

The first pre-hearing conference was held on August 18, 1989. Following it the Tribunal issued a direction with respect to disclosure of documents and scheduling of the proceeding.

The Tribunal's direction on disclosure provides interpretation of rule 14 (1) of the Competition Tribunal rules which states:

> Each party shall within twenty days after the exploration of the period set out in subsection 7 (1) or 12(1) for the filing of a reply or such longer period as the parties may agree among themselves, file and serve on each other an affidavit of the documents that each party has knowledge of and that might be used in evidence to establish or rebut any allegation of fact relevant to the matters in issue, together with a brief description of each of the documents.

Counsel for NutraSweet had argued that this rule should be interpreted as requiring a respondent to disclose only those documents that the respondent might use in evidence in presenting its case, as does the analogous rule of the Federal Court. The Competition Tribunal, however, confirmed the plain wording of the rule— that it is not restricted to documents that the producing party might use in its own case and that the rule requires disclosure of documents that may establish both the Director's and the respondent's case. In addition the Tribunal concluded that compliance with the rule does not require a prior determination of admissibility by the respondent. The Tribunal suggested strongly that, where a party is in doubt with respect to disclosing a document, it should err on the side of disclosure as this leads to a more expeditious resolution of the case. The Tribunal recognized that this broader approach to documentary disclosure adopted by the courts could be onerous on the respondent but as an offsetting consideration it must be recognized the respondent is in a better position to identify such documents, and that placing the responsibility on the respondent avoids the Director having to conduct a fishing expedition in order to secure further documentary evidence.

As noted, the scheduling order of the Tribunal provides for the commencement of the Hearing-in-chief on January 9, 1990. In addition, it establishes the following intermediate steps:

August 28, 1989	- File affidavit of documents.
September 15, 1989	File pre-hearing conference memoranda.
September 28, 1989	Pre-hearing conference.
October 2-27, 1989	- Discovery.
November 3, 1989	- File pre-hearing conference memoranda.
November 9, 1989	Pre-hearing conference.
November 21, 1989	- Serve and file expert affidavits.
December 13, 1989	- Serve and file expert rebuttal affidavits.
December 20, 1989	- File joint book of documents, agreed statement of facts, memoranda of law, and authorities.
December 22, 1989	- Serve and file expert reply affidavits.

J.F.B.

COMPETITION TRIBUNAL ISSUES REASONS IN ABB CASE

In the last issue of the *Canadian Competition Policy Record*, it was reported that the Competition Tribunal had approved the consent arrangement proposed to resolve the acquisition of the Westinghouse Transformer business by Asea Brown Boveri. At that time, however, the Tribunal had not issued its reasons for granting the consent order. On September 6, 1989, Mr. Justice B.L. Strayer, a judicial member of the Competition Tribunal released his reasons. He concluded:

> The Tribunal is satisfied that the measures proposed in the consent order are sufficiently well defined to be effective and to be enforceable, unlike the proposed order in *Director of Investigation and Research* v. *Palm Dairies Ltd.* These are not vague objectives which may continue in perpetuity in some indefinite state of achievement. If the tariff solution is proven impossible then the alternative of divestiture provides a final, definitive solution to any competitive problems.
>
> The Tribunal also notes that a serious effort was made to respond to the comments received through the public comment process and that this is reflected in the order as issued.
>
> The Tribunal believes that the measures proposed are adequate to meet the objectives of the *Competition Act* and that they are well within the range of reasonableness. The Tribunal is not, however, making a finding that these are the best possible remedies to solve the problem. Such a finding would be outside of its role.

Mr. Justice Strayer in his reasons set out the basic facts as presented by the parties to the Tribunal. He also commented on the responses received to the public comment procedure authorized under the rules of the Tribunal. Comments were received from a number of parties, including British Columbia Hydro and Hydro-Québec. He indicated that the Tribunal welcomed the written representations received from these parties. He also commented on the manner in which the Director and ABB accommodated the concerns raised by making technical adjustments to the draft order without altering its fundamental nature.

The reasons also commented on the role of the Tribunal in consent proceedings. Mr. Justice Strayer stated:

> The Tribunal has a somewhat limited role in the matter of consent orders. By virtue of the circumscribed nature of the proceedings and the limited evidence before it, the Tribunal must attach considerable weight to the fact that the parties, the companies directly affected and the Director, have judged these measures to be reasonable. It is also fully cognizant of the savings to be realized from the settlement of litigation and the service thereby to the public interest.
>
> That is not to say that the parties' judgment will be determinative and the Tribunal a mere rubber stamp; the Tribunal has a mandate to ensure that the proposed order is within a range which may be reasonably expected to meet the objectives of the *Competition Act*. This will obviously include some consideration of the appropriateness of these measures to combat an alleged substantial lessening of competition, their enforceability and the efforts that were made by those proposing the solution to meet the legitimate concerns of both producers and consumers in the relevant market.

The speed with which the consent proceeding advanced in this case should provide comfort that this process can operate efficiently under the *Act*. However, as evidenced by the large number of intervenors in the Imperial Oil/Texaco Canada consent proceeding, the speed with which consent order proceedings will advance will undoubtedly depend on the industry involved and the effect the proposed merger may have on third parties. Nevertheless, the ABB case should be viewed as a successful application of the consent and conditional order procedures under the legislation.

L.A.W.H.

PRINCIPAL OFFICERS FACE CHARGES UNDER *COMPETITION ACT*

Just over two years ago, the $1.2B Edmonton-based Principal Group Ltd. and affiliates declared bankruptcy. The casualties were high, with tens of thousands of investors losing as much as $200M.

Principal Group founder Donald Cormie and three other Principal Group officers now face eight charges of publishing false and misleading information under the *Competition Act*. The charges pertain to violations of subparagraph

51(1)(a) of the *Competition Act*, which prohibits the making of false or misleading representations to the public for the purpose of promoting a business interest. The federal government intends to proceed with the case by indictment, which can result in penalties of up to five years' imprisonment and unlimited fines.

In general, the charges against the four Principal Officers allege that they violated the *Competition Act* by misleading prospective clients of the Principal Group. Principal Group President Donald Cormie was charged with misrepresenting the company's real estate holdings and profits in its annual report, and claiming that the Principal Group had divested itself of its deeply troubled real estate portfolio when in fact it had not done so. Cormie and John Marlin, Senior Vice-President of Principal Group, were charged with misrepresenting the company's investments as having the same kind of protection as afforded by the Canadian Deposit Insurance Corporation, and that the Principal Group of companies were interdependent so that subsidiary companies such as First Investors Corporation and Association Investors Corporation were protected by the assets and financial strength of the Principal Group as a whole.

Marlin, along with Principal Group Vice-President Christa Ute Petracca were both charged with misstating the Principal Group's assets in its annual review. John Cormie, former President of Principal Savings and Trust Company, was charged with misrepresenting that company's financial position. Given the complexity of the case, the trial is expected to take at least several months to complete.

Shortly after the collapse, the federal government announced the establishment of a commission of inquiry into the Principal fiasco to be headed by Alberta lawyer William Code. The commission's mandate was to investigate only the business practices and the reasons for the failure of First Investors Corporation (FIC) and Associated Investors of Canada Ltd. (AIC)– two Principal affiliates that went bankrupt in June, 1987. Their collapse alone left more than 60,000 investors with a loss of approximately $160M. After conducting a two-year investigation, the commission released its report in late July of this year.

The *Code Report* condemns the management of the Principal Group as well as those charged with regulation of financial institutions, and concludes that the collapse of the real estate market in Western Canada contributed to the collapse of the Principal Group. It states that the reasons for the failure of FIC and AIC included the lack of independence by their Board of Directors from the parent company, the failure to move investments away from dependence on mortgage loans, higher costs of operations than comparable institutions offering comparable products, a capital structure which did not permit any margin of error in managing the investment portfolio, and an inability to deal with the impact of the real estate collapse on the investment contract companies' mortgage portfolios.

The *Report* also concludes that the evidence indicates that "the conduct of Donald Cormie and Marlin in permitting the sale of FIC and AIC products when they knew the companies were no longer viable was both dishonest and fraudulent."

In the *Report*, Mr. Code states that he is "struck by both the inability and the unwillingness of the regulators to ensure that the companies observed appropriate financial safeguards for the protection of investment-contract holders and prospective investors." The *Report* condemns former Minister of Consumer and Corporate Affairs Connie Osterman, who was responsible for the regulation of financial institutions. It states that Osterman was "in breach of her public duty" in not enforcing Alberta's *Investment Contracts Act* when the two subsidiaries did not satisfy the financial requirements of that *Act*, and concludes that she "was naive and misguided" or "even reckless" in refusing to act on specific recommendations from subordinates on the poor financial status of the two subsidiaries.

Meanwhile, the Alberta government is proceeding with its plans to introduce draft legislation to tighten up regulations to protect investors in financial institutions. The draft legislation will require firms to supply consumers with recently audited financial statements, and will also require financial advisors to meet training requirements. It will also permit dissatisfied consumers to initiate class-action suits and to rescind their purchase of financial service products within five days of the sale. *B.S.W.*

BUREAU SUMMARIZES COMPLIANCE POLICIES

In an Information Bulletin published in June, 1989 (Bulletin No. 3), the Bureau of Competition Policy has provided an overview of the various measures employed to achieve compliance with the *Competition Act* and has also, for the first time, given an indication of the enforcement approach and priorities that might be applied to specific types of cases under the *Act*.

The principal components of the Compliance Policy are:

1. Encouraging compliance with the *Act* through a program of communication and education;
2. Facilitating compliance with the *Act* through Advisory Opinions, Information Contacts, and Advance Ruling Certificates;
3. Monitoring compliance with the *Act*;
4. Responding to possible violations of the *Act* and reviewable matters.

The first two measures have been in place for some time although in recent years the number of public speaking appearances by the Director of Investigation and Research and his senior staff have progressively increased and the Bureau has placed much greater emphasis on providing detailed and informative advisory opinions (non-binding opinions on the application of the *Act* to specific fact situations, formerly termed the "Program of Compliance"). Information contacts have been frequently employed by the Marketing Practices Branch of the Bureau (which administers the misleading advertising provisions of the *Act*) for some time, particularly with respect to first time and isolated violations. Advance Ruling Certificates apply only to mergers. They constitute a binding opinion of the Director that, based on the facts presented to him, he would not have sufficient grounds on which to apply to the Competition Tribunal for a remedial order with respect to the merger.

The Bulletin provides new insights with respect to the Bureau's enforcement process and priorities. Some of the more important observations are:

1. The Director may be inclined to attempt to resolve cases having lesser economic consequence or those involving certain vertical restraints of trade in which correction of the practice can readily be verified through informal negotiation following an investigative visit.
2. The Director intends to continue to develop his practice of obtaining written undertakings in order to resolve merger cases.
3. The Director plans broader use of Consent Orders approved by the Competition Tribunal in order to achieve more effective timely and less costly case resolution than may arise.
4. Generally the Director considers that conspiracy, bid rigging and the abuse of dominant position are matters that should be normally addressed through prosecution or an order of the courts or the Competition Tribunal.
5. With respect to mergers, the Director's preference is for a "fix-it-first" approach, i.e. restructuring of a transaction before closing to alleviate competition concerns.
6. In order of importance the following factors will be addressed in determining the Director's approach:
   (a) Is there a history of anti-competitive activity?
   (b) Does the conduct involve a contravention of a Prohibition Order or a Tribunal Order or a failure to comply with a previous undertaking or to take voluntary corrective action?
   (c) Has the conduct in question significantly affected competition or is it likely to significantly affect consumers, competitors, suppliers, or others?
   (d) Was the conduct in question in keeping with the corporate policy of the companies involved, if not, was the conduct terminated as soon as senior company officials became aware of it?
   (e) Has the Director previously provided an Advisory Opinion or an information contact on the conduct in question?
   (f) Have the persons involved attempted to remedy the adverse affects of their conduct?
   (g) In what other respects does the conduct in question bear directly on one of the stated objectives of the *Competition Act*? For example: has the conduct in question reduced opportunities for Canadian participation and world markets?
   (h) What instrument for case resolution would restore competitive equilibrium to the market most effectively?

J.F.B.

DEPUTY DIRECTOR DISCUSSES CHARGES AGAINST INDIVIDUALS

In a speech to the Vancouver Board of Trade in April of this year, Wayne D. Critchley, Deputy Director of Investigation and Research for the Resources and Manufacturing Branch, discussed many aspects of the compliance policy used by the Director in resolving criminal cases. He recited a number of recent cases brought by the Bureau of Competition Policy which have been resolved either by consent orders or a conviction. Perhaps his most interesting comments dealt with whether the Bureau was satisfied with the level of deterrence achievable through such results. In this regard he stated:

> Many of these decisions have set new record levels of fines. But we are not satisfied that that is enough to fulfill the objectives of the *Act* in cases of knowledgeable criminal conduct. We are currently working with the Department of Justice to seek, in the more serious cases, higher fines, charges against individuals involved and even significant jail terms where appropriate. We are also working with Justice lawyers on a program of granting immunity to individuals who choose at an early stage to co-operate in giving evidence.

He emphasized, however, that the Bureau still prefers voluntary compliance and is promoting that approach vigorously. He also noted that the Bureau now has officers permanently located in three major centres outside of the national capital region: Vancouver, Toronto and Montreal. The first office was established some years ago in Vancouver. He stated that, "The obvious usefulness of that move led to its extension to the two other locations."

He concluded that the role of the Bureau in the enforcement process is:

> ...to enforce the law effectively and, above all, consistently. Businesses want to know that violations will be detected, that the lawbreakers will not have a competitive edge. We have all heard about that famous level playing field. Our job is to keep it level.

L.A.W.H.

CRITCHLEY ADDRESSES PRICING PRACTICES AND ENFORCEMENT POLICY

In a speech to the Law Society of Upper Canada on May 16, 1989, Wayne D. Critchley, Deputy Director of Investigation and Research for the Resources and Manufacturing Branch of the Bureau of Competition Policy, addressed various pricing practice provisions of the *Competition Act* as well as generally discussing the enforcement policy of the Director with respect to those practices. Mr. Critchley's comments touched on a number of enforcement policy questions. In his speech he stated that the Director continues to take the position that the Bureau will vigorously enforce all provisions of the *Act*. However, he went on to state that the compliance approach used by the Bureau and the significant increase in demands on the Bureau's resources in recent years have resulted in the Bureau having to refocus its priorities. He stated with respect to the Bureau's approach to compliance:

> A key part of the approach is the careful selection of cases to assure that we allocate our resources to those matters which have the greatest impact– economic and precedential. In the criminal areas of the *Act*, we have identified bid-rigging and price fixing conspiracies as our major priorities. These offences clearly have the potential for the greatest economic harm and may touch all consumers. The rigging of bids on government tenders is nothing short of defrauding the public.

Mr. Critchley went on to discuss alternate means of resolving cases under the criminal provisions of the *Act*. The first step in reviewing complaints involving criminal matters other than price fixing and bid rigging is to determine whether the matter has a high priority. He stated:

> For example, does it appear to be an isolated event rather than a company policy? Do the facts suggest that it is a first time problem or even the action of an overzealous junior employee? If so, it may be appropriate to resolve the matter with an information contact, an undertaking or some other alternate case resolution technique.

Mr. Critchley also commented that the Supreme Court decision in the National Leasing

case, which upheld the constitutional validity of the civil damage provision of the *Competition Act*, could be one criteria in establishing priorities if a private remedy would appear to be appropriate. He stated that:

> For example, if the harm from a particular practice impacts more on an individual business than on competition *per se*, would it be more appropriate to leave that matter to the aggrieved party for private resolution?

Mr. Critchley's comments are a sign that the Bureau is willing to take a less aggressive stance to the enforcement of criminal provisions of the *Act* other than the conspiracy sections. For many years, the Bureau has adopted an information visit and alternate compliance approach to the misleading advertising provisions. However, it has never officially sanctioned such an approach for the other criminal provisions of the *Act*. It seems particularly appropriate that it be applied to provisions such as price discrimination and temporary allowances. It is not without its risks, however, because an information visit can be a threatening experience for any business. The Director should be particularly vigilant to ensure the approach is operated in a way that cannot be construed as putting a gun to the head of business. The Director will also have to be careful in areas of the law as vague as the price discrimination provisions to ensure that he is not having the effect of stopping businesses from engaging in behaviour that is perfectly legal out of fear of investigation by his staff.

L.A.W.H.

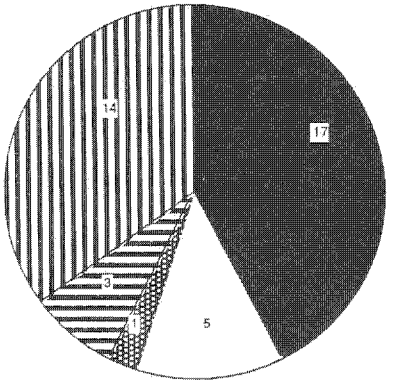
MERGER EXAMINATIONS UNDER THE COMPETITION ACT STATISTICAL SUMMARY

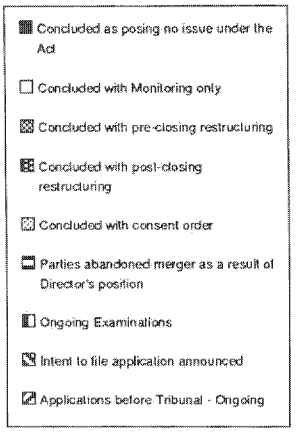
	1986-87[1]	1987-88	1988-89	1989-90[2]
MERGER EXAMINATIONS COMMENCED[3]	40	146	191	116
EXAMINATIONS CONCLUDED				
Concluded as posing no issue under the *Act*[4]	17	120	166	95
Concluded with Monitoring only[5]	5	7	10	10
Concluded with pre-closing restructuring[6]	-	2	1	-
Concluded with post-closing restructuring[7]	1	2	3	1
Concluded with Consent Order	-			2
Parties abandoned propsed merger in whole or in part as a result of Director's position	3	2	2	1
TOTAL EXAMINATIONS CONCLUDED	26	133	182	109
EXAMINATIONS ONGOING AT END OF PERIOD	14	25	32	41
APPLICATIONS BEFORE TRIBUNAL				
Concluded[8]	1		2	2
Ongoing		2	2	2

Notes

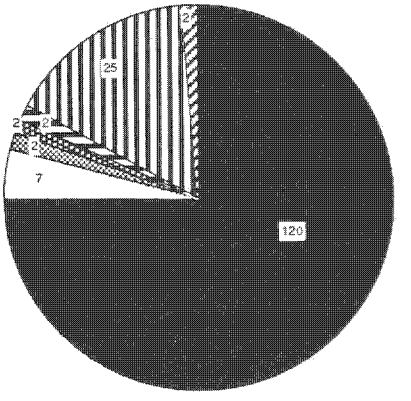
1. Statistics commenced on June 19, 1986.
2. Statistics to September 28, 1989.
3. Two or more days of review. Includes 317 prenotifications since July 15, 1987 of which:
   -in short-form (s.121): 1987/88 - 44 and 1988/89 - 50; 1989/90 - 47.
   -in long-form (s.122): 1987/88 - 24 and 1988/89 - 42; 1989/90 - 13.
4. Includes:
   120 Advance Ruling Certificates
   -1986/87 - 2; 1987/88 - 26; 1988/89 - 59; 1989/90 - 33.
   21 Advisory Opinions
   -1986/87 - 3; 1987/88 - 10; 1988/89 - 6; 1989/90 - 2.
5. All advisory opinions.
6. All advisory opinions.
7. 1 Advance Ruling Certificate and 6 Advisory Opinions.
8. These matters are counted under examinations concluded.

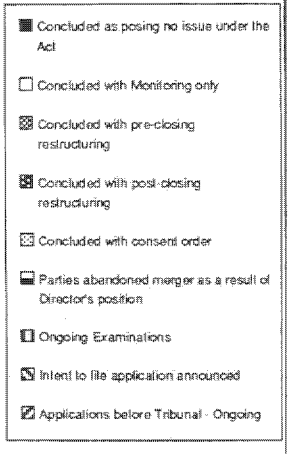
1986/87





1987/88





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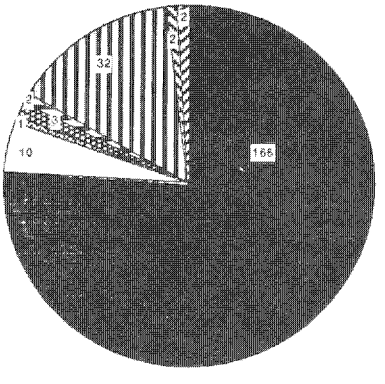

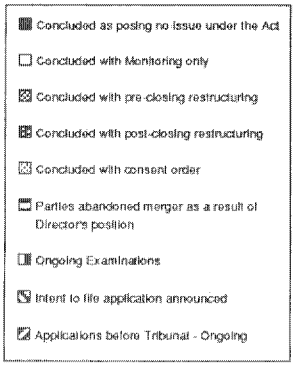

1989/90