

CANADIAN COMPETITION LAW DEVELOPMENTS

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FORMER DIRECTOR PASSES AWAY

T. D. MacDonald, the Director of Investigation and Research for almost ten years in the 1950's, passed away in Ottawa in late September, 1989. Mr. MacDonald was the first Director appointed under the *Combines Investigation Act* which was amended to create that position after the *McQuarrie Report* in the early '50's.

It was during Mr. MacDonald's tenure that the important *Canadian Breweries* and *Western Sugar* prosecutions were brought. It was the government's failure to win either of these prosecutions which has been cited as the stimulus to amend the merger provisions. This process started in the 1960's and only culminated in the new law passed in 1986.

After serving as Director, Mr. MacDonald became Assistant Deputy Attorney General in charge of criminal law in the Department of Justice and then the first Deputy Solicitor General when that department was created in the 1960's. He always had a strong interest and, indeed, played an important role in the development of competition policy in Canada. He was involved in every effort to amend the *Competition Act*, starting with Bill C-256. Indeed, he was the principal draftsman for the first stage amendments to the *Combines Act* which were passed in 1975. His role continued with the stage two amendments to the legislation, and he was an advisor to the Director on the new legislation passed in 1986.

Mr. MacDonald, who was 81 when he passed away, continued to work in a number of capacities almost until his death. In addition to being an advisor to the Department of Consumer and Corporate Affairs and subsequent Directors on competition matters, he was also a Foreign Claims Commissioner for many years after he retired from the government.

Mr. MacDonald had a sound view of the

economics of competition policy in this country. He has to be considered as one of the principal architects of the present law. He also was a man of great civility and had a wonderful sense of humour—he always saw the humorous side of things and could tell great stories about his experiences in the federal government. Mr. MacDonald was a Nova Scotian and remained a loyal bluenoser to the end. He came to Ottawa in the late '40's after he had served with the Attorney General's department in Nova Scotia. He was appointed Superintendent of Bankruptcy at that time and from that post was named the Director of Investigation and Research.

T. D. will be remembered by his many friends as a fine human being, an exemplary public servant and someone truly dedicated to a free market economy. The Director of Investigation and Research, Mr. Wetston, is considering creating an annual conference on competition law and policy to be named in Mr. MacDonald's honour.

L.A.W.H.

DIRECTOR'S ANNUAL REPORT TABLED

The *Annual Report* of the Director of Investigation and Research for the year ending March 31, 1989, was tabled in the House of Commons on November 20, 1989, by the acting Minister, Mr. Harvie Andre. The report highlights a number of issues affecting the administration of the *Competition Act* during the year. In the Director's overview, Mr. Goldman stated:

During 1988-89, one aspect of this broader interest in competition policy focused on the relationship between competition law and trade liberalization. Over the course of the past year,

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the question has been asked whether, in an environment of trade liberalization, the *Competition Act* would be able to serve the diverse interests of consumers and business; whether it would be strong enough to protect domestic competition, or be flexible enough to allow businesses in Canada to restructure in order to reap the full benefits of trade liberalization and globalization of certain markets.

As is demonstrated in this Report, the *Competition Act* is well suited to the delicate task of balancing the need to ensure a competitive domestic environment and the need for certain industries to reposition themselves to meet increasing global competition. Indeed, the purpose clause of the *Act* makes it clear that the legislation is designed to achieve a number of objectives. The balancing of these sometimes conflicting objectives is an integral part of the manner in which we approach the administration of various sections of the legislation. This is particularly so in our analysis of certain types of mergers where both domestic and international competition issues arise.

The report indicates that in fiscal 1988-89, the Bureau reviewed 182 mergers. This was an increase of 36% over the number reviewed in 1987-88. Of the mergers reviewed since the passage of the *Competition Act* in 1986, over 85% raised no issue under the legislation.

Mr. Goldman also commented on the use of consent orders, stating:

Finally, with respect to merger cases, we have confirmed an intention to make greater use of applications to the Competition Tribunal for consent orders in appropriate cases. A consent order will likely be sought in situations where:

- (i) the case has economic significance;
- (ii) there is a need to ensure immediate or long-term enforceability;
- (iii) variation of the order may be required;
- (iv) the case or proposed resolution is unique;
- or
- (v) the order would be of precedential value.

It would be interesting to see whether the new Director, Mr. Wetston, continues this policy, particularly in light of the Imperial Oil-Texaco situation.

The statistical information in the report is interesting in that it reveals a shift in the allocation of the Bureau's resources. For example, the number of complaints received under the *Act* has declined steadily from 1984-85 and is down almost 25% from that year. However, the number of preliminary examinations commenced has increased significantly, presumably because of the number of merger cases being reviewed. The

number of inquiries in progress at the end of the year is down significantly from the previous year and is at a level comparable to five years ago. The number of matters referred to the Attorney General, although up from the previous year, it is still significantly below that of a decade ago. This presumably indicates less criminal law enforcement activity than has been the case in the past.

The statistics in the report also indicate a drop-off in the enforcement activity under the misleading advertising provisions. Although the total number of complaints received is at a high and steady level, the number of matters referred to the Attorney General is lower than it has been for many years. Also, the number of proceedings commenced during the year is at the lowest level in many years. The same is true for the number of convictions obtained.

The change in the level of enforcement of the criminal provisions may well reflect a diversion of resources as well as the Director's compliance oriented approach to the law.

Although the general level of criminal enforcement was down, the total amount of fines recovered was substantial, in the three million dollar range, principally because of the high fines received in the business forms bid rigging cases in Saskatchewan and Nova Scotia. L.A.W.H.

THE ONGOING SAGA OF THE IMPERIAL OIL/TEXACO MERGER

On November 10, 1989 the Competition Tribunal issued a decision which is both rare and, when some sharp-tongued comments are looked through, innovative. Innovative, in that the Tribunal communicated its conclusions on key parts of the proposed consent order without taking the next step of dismissing the consent order application. This left the parties free to bring a revised consent order back to the Tribunal in the context of the same proceeding. The Tribunal's jurisdiction is to either approve or dismiss consent order applications. The decision is rare, not because many will savour it, but because of its lack of formality and the insight to

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the thinking of Tribunal members at a critical point in the proceeding which that informality gives. Rendered just two days after the conclusion of oral argument in a complex case, the decision is not really a formal decision at all but rather, by its own terms, is "an informal set of comments" designed to give parties the opportunity to meet the Tribunal's concerns if they wish to do so. Short and to the point, the Tribunal's comments reflect the state of mind and thought processes of Tribunal members after many days of wading through a substantial paper record and hearing a considerable amount of oral evidence. This is a point in the decision-making process which is seldom seen by the public because it is usually submerged in the preparation of formal reasons.

The Tribunal's decision demonstrates that the journey to a successful consent order can run over a rocky road. In our last issue, we contrasted the smooth disposition of the consent order in the *Air Canada* case with the stoney reception given the Director of Investigation and Research in *Palm Dairies*. The comments of the Tribunal in *Imperial Oil* contain elements of both these earlier judgments suggesting that the establishment of a *modus vivendi* between the Director and the Tribunal is a two step forward, one step backward process.

The Tribunal continues to chafe at any suggestion that it is a mere rubber stamp. During the negotiation process, the Director imposed a hold separate and apart agreement on Imperial. This agreement was lifted when the consent order was brought to the Tribunal for approval. The Tribunal commented that the message which some might take from this is that the Director had determined to approve the merger regardless of what the Tribunal decided. One Tribunal member wished it to be noted that the member regarded this to be "highly presumptuous, if not arrogant." The decision does not, however, note that the interim order approved by the Tribunal when the consent order was brought forward contemplated the termination of the hold separate and apart agreement. Perhaps the Tribunal's comments can be understood on the assumption that this aspect of the interim order was not sufficiently impressed on the Tribunal.

Two other issues which led to the demise of the consent order in *Palm Dairies* related to the

precision of the terms of the proposed order and the enforceability of those terms. Both of these concerns emerge in the present Tribunal decision.

A key section of the proposed consent order deals with the assurance that independents will have access to supply. The supply assurance provisions of the proposed order arise from the Director's decision not to force Imperial to divest either the Nanticoke or Sarnia refineries in Ontario. The Director is persuaded that there are efficiency gains associated with bringing the Sarnia-Nanticoke refinery complexes under common ownership and operation. These provisions require Imperial to make available quantities of gasoline for sale to independents on "reasonable commercial terms" during a future seven- to ten-year period. The Tribunal considered that "reasonable commercial terms" was too vague and general a concept. Specifically, it was insufficiently precise to act as a mechanism for ensuring a competitive price. The Tribunal also concluded that the supply assurance provisions of the proposed order were not sufficiently precise to be enforceable. The supply assurance provisions were found to be deficient for other reasons. Imperial would be able to adjust the volume available for sale upward or downward on the basis of the volumes purchased during the previous year by independents. As a result, to the extent that independents imported supply, their access to supply from Imperial would decrease. Imports can increase competition and the supply assurance provisions, as initially proposed, could act as a disincentive to exercise the import option. The Tribunal also found that the base volume proposed had not been demonstrated to be adequate to cover the amount of gasoline presently being sold to independents under Texaco and Imperial contracts. In addition, the upper limit established by these provisions was not substantially higher than the base volume.

The proposed consent order contemplated that most of Texaco's assets in the Atlantic Region were to be divested by Imperial. This reflects the clear and severe anti-competitive effect of the merger in the Atlantic Region. It was the Director's preference that the assets be sold as a bundle but the proposed consent order contained no requirement in that regard. While the Tribunal had some concern that not all of the Texaco assets

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would be divested, the Tribunal was especially concerned that the order as proposed would not result in the sale of these assets to a purchaser who could ensure the continued viability of these assets. The Tribunal, therefore, was not satisfied with this aspect of the proposed consent order.

The Tribunal indicated that, on the whole, it was satisfied with the plan of divestiture in other regions. The Tribunal accepted that the geographic definition of retail markets is difficult and that arbitrary definitions, boundaries, and criteria had been adopted for the purposes of the consent order. The Tribunal also recognized that these difficulties led, in some cases, to anomalies. The Tribunal also noted that there was some unfairness in the way in which the divestitures had been handled. However, the Tribunal did not consider that these imperfections were sufficient to justify refusing the approval of the consent order. In this respect, the Tribunal's deference in an area where people acting in good faith could reasonably differ is similar in approach to the *Air Canada* decision.

The Tribunal commented that many of the expert witnesses were not as thorough and as objective in their analysis as the Tribunal would have wished. The Tribunal noted that it was "presented, initially, with very, very strongly held conclusions which often turned out, on examination, to be unwarranted." The Tribunal found it very disquieting that expert witnesses seemed to take on the role of advocates and that it would be refreshing if expert witnesses would school themselves to act a bit more as *amicus curiae*. It is difficult to comment on such a statement without the detailed reasons which led the Tribunal to make this observation and without having been present at the hearings. Certainly, experience suggests that there is a vast difference between experts who are retained because they hold views on a matter and experts who form their views because they are retained. It is the former which is the norm. Obviously, the Tribunal did not find some of the expert evidence to be as helpful as the Tribunal would have wished. It would seem from the *amicus curiae* comment that the Tribunal is looking for expert evidence which discusses various possibilities leading to a conclusion as to the better or preferred solution. Experience also suggests that when a decision-maker expects something of the evidence and the

witnesses it is because the decision-maker needs that evidence. If so then, bruised feelings aside, the Tribunal's message should be taken to heart.

N.J.S.

1. *Canadian Competition Policy Record* Vol. 10, No. 3, September 1989.

2. *Director of Investigation and Research v. Air Canada et al.*, July 7, 1989, Competition Tribunal file CT-88/1.

3. *Director of Investigation and Research v. Palm Dairies Ltd. et al.*, (1986) 12 C.P.R. (3d) 540.

ORDER ISSUED IN CHRYSLER REFUSAL TO DEAL CASE

In the first fully litigated case under the reviewable practice of refusal to deal (first introduced on the 1976 *Combines Act* amendments), the Competition Tribunal, on October 13, 1989 ordered Chrysler Canada Limited to commence to supply Chrysler automobile parts again to R. Brunet Company (RBC) a Canadian automobile parts exporter. (*Editor's note: The pleadings in this case were reported in the June 1989 CCPR. The Hearing took place between July 4 and July 18. Final argument was delivered on July 21, 1989.*)

RBC had its first dealings with Chrysler Canada in 1977 and continued to buy from the company until Chrysler took steps to prevent RBC from obtaining further supplies from Chrysler or its dealers in Canada. These events led to the Director of Investigation and Research's application.

Up to the time that Brunet was cut off, the resale for export of Chrysler Canada parts constituted approximately 1/3 of his gross sales. His principal product line, however, consisted of purchases from a single source of supply in the United States on behalf of a particular customer. RBC sales data indicates that, over the 1983 to 1989 period, resale of parts purchased from Chrysler in the United States, other Canadian suppliers, and Chrysler Canada's Bulk Purchase Division, Interparts Master Distributors, occupied

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a relatively small portion of its total business. Following the Chrysler Canada cutoff, RBC sales data indicates that Brunet was able to source parts from Chrysler Canada dealers for some time but that this source of supply had fallen off considerably in 1988 and 1989.

Chrysler Canada did not contest that, prior to the cutting off supplies to RBC, Brunet was encouraged by it to expand the sale of Chrysler Canada auto parts in the domestic market. The Tribunal found that a number of actions were taken by Chrysler Canada in its treatment of RBC to assist RBC in meeting the requirements of its customers with respect to exchange controls and import permits with time deadlines.

In October, 1986 Brunet was advised that Chrysler Canada would no longer accept export orders from him and that future export orders would be handled through the U.S. Chrysler Sales Export Sales Office. Subsequently Brunet approached to several U.S./Canada dealers in order to source parts for his customers. Chrysler Canada spotted this indirect sourcing by Brunet through computer monitoring of dealer orders involving large volumes of unusual parts. In 1988, Chrysler Canada began imposing, as a term in Canadian dealership agreements up for renewal, a condition that parts be supplied only for use in the Canadian market.

To issue an order under the refusal to deal provision, the Tribunal must make several findings:

1. the person is substantially affected in his business or is precluded from carrying on business due to his inability to obtain adequate supplies of a product anywhere in the market on usual trade terms;
2. that person is unable to obtain adequate supplies of the product because of insufficient competition among suppliers of the product in the market;
3. the person is willing and able to meet the supplier's usual trade terms; and
4. the product is in ample supply.

There was no serious dispute over the third or fourth elements. No evidence was led to the effect that Brunet was not willing and able to meet usual trade terms or that the product was not in ample supply. In order to address the first two elements, it was necessary for the Tribunal to

establish the meaning of "product" and "market" for the purpose of this application.

Product

Significantly, the Tribunal concluded that the relevant product is Chrysler auto parts. The Tribunal noted that products in markets can only be meaningfully defined in a particular context and for a particular purpose. For example, the Tribunal indicated that the definition of these terms may be entirely different in a merger case where the ultimate test is whether the merger will substantially lessen competition and the definition must be consistent with the attempt to determine whether the merger will have this effect. The Tribunal concluded that, in the case of a refusal to deal, the ultimate test concerns the effect on the business of the person refused supplies.

The Tribunal indicated that, where products are purchased for resale, the effect on the business of the person refused supplies will depend on the demand of the person's customers and whether substitutes are acceptable to them. Therefore, the Tribunal found that the starting point for the definition of product under the refusal to deal provisions is the buyer's customers. The test is whether RBC's customers treated Chrysler auto parts as a distinct product or as one for which they would readily accept substitutes.

The Tribunal found that the evidence showed RBC responded to direct orders of customers, that customers specified that they wanted genuine Chrysler parts, and that they used numerical codes specific to Chrysler's parts system when ordering. In the Tribunal's view, there was no question of substituting parts for the suppliers for those of Chrysler. An additional factor leading the Tribunal to this conclusion was that Brunet's customers primarily ordered Chrysler "service" parts from him.

These are parts used to repair automobiles after an accident or a malfunction and are distinguished in the trade from "aftermarket" parts which are used for routine maintenance. In addition, Brunet's customers ordered mainly "captive" parts, i.e. parts which were manufactured only by Chrysler. However, the Tribunal stressed that no part of its decision depended upon a distinction between captive and competitive Chrysler parts. Brunet's customers ordered

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competitive parts in the same way as captive parts (as a seven digit number) and with the same insistence on genuine Chrysler parts.

Market

The Director contended that the relevant market in which RBC bought Chrysler auto parts comprised Canada, and, therefore, that Chrysler Canada is the sole supplier and that Brunet in the event is the sole buyer. Chrysler Canada submitted that the market consisted of both U.S. and Canada, that Chrysler U.S. is the supplier and exporters of Chrysler auto parts are the buyers. The Tribunal concluded that the relevant market is Canada and that the U.S. and Canada are separate markets. The Tribunal's conclusion in this respect is developed through its examination of purchasers from Chrysler Canada and from Chrysler U.S. in small and large volumes.

With respect to small volume purchases of individually packaged parts, the Tribunal pointed out that, although the parts themselves were physically identical, Chrysler Canada and Chrysler U.S. each published separate price lists for these parts and that prices in Canada were established with respect to market conditions in Canada. Customers tended to buy exclusively or primarily from Brunet those parts that were cheaper to source through Chrysler Canada. As well, the evidence indicated that there were distinctions between Chrysler Canada and Chrysler U.S. as sources of supply. Chrysler Canada offered Brunet and therefore his customers "price protection" against changes in prices between the time of order and delivery. Chrysler Canada responded to orders with "an availability report" identifying the parts that were immediately available and the length of the delay that would be required in supplying the remaining parts.

The Tribunal emphasized that, in its view, price differences alone do not establish two distinct sources of supply. Insofar as Brunet's customers were concerned, Brunet was a preferred source of supply primarily for parts that were cheaper to source in Canada. On the other hand, the Tribunal concluded that separate price lists intended to respond to different market conditions "strongly implies the existence of separate markets." The

Tribunal was not convinced by the evidence of Chrysler's economics expert that it should focus solely on the outward utility of auto parts and thereby conclude that there was a single North American source of supply for such identical parts. The critical factor to the Tribunal would appear to be that some Chrysler auto parts were consistently cheaper in Canada than in the United States and these price differences had been maintained by Chrysler for its own purposes.

With respect to parts purchased in large volume, the Tribunal found that physically identical parts purchased through the U.S. Interparts programs and parts from Chrysler Canada were not generally substitutes for each other and therefore were not in the same market despite being physically identical. This conclusion was based on several distinguishing features of the U.S. Interparts programs relative to Chrysler Canada's sales practices: very large minimum purchase requirements; orders must be placed in advance for later manufacture (leading to a longer time to fill orders); parts packaged in bulk rather than individually; and parts prices much lower than for parts ordered in small volumes.

Business Substantially Affected

Given that RBC's business was not completely dependent upon the export of Chrysler Canada parts and that RBC had, through dealers, been able to obtain an indirect source of supply of Chrysler Canada parts since the formal 1986 manufacturers cut-off, the Tribunal carefully analyzed the question whether the combined cut-off practices of Chrysler Canada substantially affected Brunet's business.

A majority of the Tribunal agreed with Chrysler Canada that the effect of the refusal should be assessed with reference to the entire business of the "refusal" party, not simply with reference to the specific product line. The Director's position was rejected by the Tribunal principally because the Tribunal found that adopting it could preclude a proper understanding of the effects of the refusal to supply.

However, the Tribunal emphasized that the effect of a refusal to supply is not necessarily established solely by examining the overall sales

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and profit figures of the person refused supplies. The Tribunal's reasons set out several questions to be answered in this regard:

1. Does the product in issue account for a large percentage of the overall business?
2. Is the product easily replaced by other products sold by the business?
3. Does the sale of the product use up capacity that could be devoted to other activities?
4. Is the product used or sold in conjunction with other products and services so that the effect on the overall results of the business may be much greater than indicated by the volume of the product purchased?

The Tribunal stated that reliance on an examination of overall business results may be appropriate where it is difficult to do a more disaggregated analysis. However, the Tribunal found that RBC's business as it is very small, has few customers, and permits inquiry into the relationship between transactions, was one where a disaggregated analysis was possible and appropriate. As a result, in this case the Tribunal concluded that the figures on the overall business provide information only for an initial step in the evaluation. On this basis, the Tribunal placed a low weight on much of the expert accounting and economics evidence adduced by the parties on this issue and relied primarily on the evidence of Brunet himself.

Based on Brunet's evidence, the Tribunal was satisfied that the gross sales and profits earned from the sale of other products is totally unrelated, by way of the utilization of capacity or by way of demand, to the sale of Chrysler parts. Chrysler had relied on large sales and resulting gross profits from Brunet's sales to a single customer in 1987 and 1988 to support its position that the cut-off did not have a substantial effect on Brunet's business. In fact, overall sales and gross profits did not fall after 1986. Moreover, the Tribunal concluded in this respect as follows:

The most recent figures submitted show that overall sales and gross profits are much lower, on an annual basis, than before the cut off. This illustrates the danger of relying on aggregate data if more specific and relevant information is available. The Tribunal is satisfied that the evidence shows that both the increase in the sale of auto parts and the subsequent decline are

unrelated to the extent to which Chrysler parts are available to Brunet in Canada. (p. 34)

The Tribunal also found that Brunet was affected in his business as a result of the Chrysler Canada cut-off even though he could source indirectly through dealers because of the high price Brunet had to pay dealers and, in some cases, needed to split orders among dealers in order to avoid detection by Chrysler.

Finally, the Tribunal found that the evidence did not support Chrysler's proposition that large changes in sales experienced by Brunet were caused by variations in demand that were unrelated to the cut-off. Under the disaggregated analysis applied by the Tribunal in this decision, the Tribunal stated that it would have expected a benchmark to be provided against which changes in Brunet's sales of service parts might be measured such as the total exports of Chrysler service parts from North America during the years in question. Neither party presented evidence to assist the Tribunal in this regard. Consequently, it was not possible to identify, or factor in, exogenous demand changes.

The Tribunal's reasons also provide assistance in defining the term "substantially affected." The Tribunal accepted the submission of Chrysler that substantial should be given its ordinary meaning: more than something just beyond *de minimis*, and concluded that, while terms such as "important" were useful synonyms, further clarification can be provided only through evaluation of actual situations. The Tribunal found that the cut-off resulted in a sales decline of over \$200,000 between 1986 and 1988. The decline and profits between 1986 and 1988 from sourcing Chrysler parts in Canada was in excess of \$30,000. The Tribunal concluded:

Losses of the order of magnitude of \$200,000 in sales and \$30,000 in gross profits constitute a substantial effect for a small business such as Brunet's. The figures for more than a third of 1989 and the fact that Chrysler Canada has put in place contracts that will permit it to discipline dealers who sell for export suggest that even greater losses may be anticipated in the future.

Accordingly, the Tribunal concluded that Brunet's business had been substantially affected by the refusal.

With respect to the adequacy of competition, the Tribunal concluded that any restrictions placed

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by Chrysler Canada on its dealers clearly make them inferior sources of supply to Brunet and that they, therefore, do not provide adequate competition to Chrysler Canada.

Once the factual prerequisites of section 75 have been met, the Tribunal is given a discretion to issue an order requiring a respondent to resume supplying within a specified time on usual trade terms. Several factors were examined by the Tribunal with respect to this exercise of discretion. Underlying these factors is an inquiry as to whether Chrysler's refusal to deal was made for a legitimate business purpose or whether it could be more properly characterized as retaliation against a competitor.

The Tribunal also indicated that the effect on competition or efficiency of a refusal to deal would also, in an appropriate case, be a relevant factor in the exercise of this discretion. Competition and efficiency considerations were not, however, applied in this case.

The decision to discontinue supply to Brunet

The Tribunal accepted Brunet's evidence that there was no agreement between Chrysler and Brunet that Brunet would not sell to franchise dealers outside of North America in competition with Chrysler U.S. There was no documentary evidence to rebut Brunet's view of the arrangement. More importantly, the Tribunal found that dealings between Brunet and a Swedish dealer took place against a backdrop of a visit by that dealer to the Central Chrysler Canada Parts Depot. Brunet introduced the dealer to a Chrysler manager at a Chrysler warehouse and sent Chrysler officials a letter regarding his dealings with the foreign dealer. The Tribunal found it difficult to believe that Brunet would have been so open in presenting and discussing the dealer if he knew that sales to that company would have been in contravention of a condition of purchase from Chrysler Canada.

Consolidation of Control of Chrysler Exports

The Tribunal accepted that it would be easy to understand from a business perspective that Chrysler would want to consolidate control of exports in one country and not be concerned with pricing differences between Canada and the U.S.

affecting export markets. The Tribunal also indicated that it was easy to understand that Chrysler would want to make organizational changes that could better accommodate its changing distribution system in the 1980's. On the other hand, the Tribunal noted that Chrysler had not attempted to provide a cohesive explanation of the Chrysler distribution system and had not presented any evidence that the granting of an order pursuant to section 25 of the Act would disadvantage Chrysler. In other words, a potentially legitimate business reason that might favour not issuing an order had not been proven.

Brunet's Long Association with Chrysler Canada

The Tribunal also indicated that Chrysler's treatment of Brunet in 1986 in light of its previous encouragement of Brunet's business did not provide a reason not to exercise its discretion. The following passage suggests that the Tribunal is, in part, concerned with ethical business conduct particularly where a small distributor is dependent upon supplies from a very large worldwide company:

In spite of this long and friendly relationship, no attempt was made by Chrysler Canada to resolve any problems that they perceived in Brunet's selling to Karlson in Sweden or attempting to sell to Colonial Motors, an Interparts dealer in Peru. There was no warning that he might be cut-off and there was no face to face meeting to discuss the situation. Brunet was shown little consideration apart from Chrysler agreeing to fill orders received by him prior to the cut-off date.

However, the Tribunal found that its authority under Section 75 was limited to the issuance of an order requiring the respondent to supply a person under the usual trade terms, in this case, those trade terms that applied prior to October 1986.

In exercising its discretion the Tribunal accepted that Chrysler Canada and Chrysler U.S. do not occupy a very strong market position and that the companies may have been trying to protect legitimate business. Weighing against these considerations were Brunet's long relationship with Chrysler Canada, the manner in which sales to Brunet were terminated, and the fact that the respondent had not made any effort to establish that granting the order would prejudice it in any way.

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Finally, the Tribunal indicated that a proper balancing of the affected interests of this case could be accomplished with an order that was limited with respect to time or perhaps with respect to a category of buyers that would be open to Brunet, and that such an order could probably be best achieved through negotiations between the parties.

Conceivably, in future cases, the Tribunal might be persuaded that fair treatment of the person refused supplies might cause it not to exercise its discretion to issue an order to resume supplying. Unfair conduct presumably might, in an appropriate case, be offset by evidence that the refusal increased industry efficiency with the result that the Tribunal would decline to issue an order even if the section 75 prerequisites had been established.

J.F.B.

REFUSAL TO DEAL ORDER SOUGHT AGAINST XEROX CANADA

On November 16, 1989, the Director of Investigation and Research filed an application with the Competition Tribunal for an order pursuant to Section 75 of the *Competition Act* requiring Xerox Canada Inc. to accept Exdos Corporation as a customer for the supply of Xerox copier parts on its usual trade terms.

The application states that Xerox had supplied Xerox copier parts to Exdos beginning in 1983 but that in August, 1988 it had advised Exdos that it would cease supplying parts for its post-1983 copiers on the ground that continuing to supply such parts "would conflict with other marketing initiatives presently underway."

The application alleges that Xerox had encouraged Exdos to purchase refurbished, market, and service pre-1983 copiers. In 1983 Xerox introduced a new product line, the Marathon or "Ten Series" copier (termed post-1983 copiers). The application also states that, since 1985, Xerox has sold Exdos post-1983 copier parts and that such parts were used, with the knowledge of Xerox, to refurbish, market, and service post-1983 copiers obtained from Xerox and other sources.

Despite Xerox's termination of a supply agreement with Exdos in 1987, the application contends that Exdos continued to buy both pre-1983 and post-1983 copier parts from Xerox until it was notified in 1988 that Xerox would cease supplying post-1983 copier parts. The application contends that the only source of adequate supplies of Xerox copier parts is Xerox as other companies' copier parts are with few exceptions not substitutable for use in Xerox copiers.

A number of factors are cited in the application to support the proposition that Exdos has been unable to obtain other adequate supply alternatives either within or outside Canada:

1. grey market or other sources in the United States and elsewhere had proven to be too costly and too unreliable;
2. cannibalizing used copiers has been tried and proven to be uneconomical and impractical particularly for high turnover or consumable parts;
3. having end users order copier parts directly installed by Exdos is impractical due to ensuing machine down time, added costs, customer reluctance; and
4. independent suppliers or reconditioning companies can not be relied on to provide the majority of copier parts.

The application alleges that the refusal to deal substantially affected Exdos business as:

1. post-1983 Xerox copiers constitute the great majority of Exdos' repair and maintenance revenues;
2. without adequate supplies from Xerox, Exdos is unable to continue to service post-1983 copiers; this harms its arrangements with most of its customers in Metropolitan Toronto;
3. Exdos is unable to refurbish post-1983 machines for resale or rent;
4. Exdos ability to sell, rent or lease Xerox copiers is related to its ability to provide service contracts which is inhibited by the refusal to deal;
5. Exdos personnel have been forced to devote time to locating alternative sources of supply;
6. Exdos reputation would be injured by the inability to service its customers; and
7. the ensuing uncertainty over Exdos liability makes it difficult to retain key employees.

J.F.B.

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TRIBUNAL DEFINES ROLE OF DISCOVERY STAGE

The provision in the Competition Tribunal's rules for discoveries between the Director of Investigation and Research and respondents in civil reviewable matters is proving to be an important procedural innovation. In the few litigated cases to date (Reservec/Gemini, Chrysler Canada, NutraSweet/Aspartame) both sides have tested the limits of the discovery process and the Tribunal has been called upon to adjudicate disagreements over the proper scope of questioning by counsel.

In recognition of the importance of the discovery stage in achieving the objective in the Tribunal's Act of dealing with proceedings "as informally and expeditiously as the circumstances and considerations of fairness permit" the Tribunal has, in two reasoned decisions pursuant to motions to direct the answering of questions on discovery, sought to provide guidance to parties on the role of discoveries in the Tribunal's proceedings.

Chrysler Canada

In an order dated July 5, 1989, the Tribunal examined the proper scope of the litigation privilege, i.e. exclusive from production of documents proposed in contemplation of litigation. The Tribunal found that, by virtue of the nature of the Director's role as the sole applicant to the Tribunal, he should have the right to receive communications from various sources to properly prepare his case. A litigation privilege in this case was found to exist for all letters and other types of communications between the complainant and the Director.

NutraSweet

At the outset of a lengthy decision released on November 29, 1989, the Tribunal noted that the difficulty experienced by the Director and respondents in determining the proper scope of discovery to a large extent has reflected the hybrid nature of Tribunal proceedings. The Tribunal observed that they are not criminal proceedings.

Parliament, in the 1986 competition law revision, had affirmed that criminal law did not provide an appropriate process or standard of proof to deal with certain economic conduct and structure issues. Nor are these proceedings on all fours with private civil litigation since private parties cannot apply to the Tribunal—only the Director can.

However, the Tribunal recognized, and in its reasons is clearly sensitive to the fact, that the Director, of necessity, must respond to complaints made to him and that:

...in the usual course of things, the Director is not likely to know as much about the industry being investigated as the industry themselves. (This is particularly true in an abuse of position case where much of the information will be with the person who holds the dominant position).

The Tribunal, therefore, accepted that the discovery stage may well look one-sided in favour of the Director and that the stage can form part of the Director's investigations. On the other hand, the Tribunal concluded that the Director, through his witness on discovery, should provide the respondent with the factual information which underlines the Director's application subject to exclusions on the grounds of relevance and privilege, and also to the exclusion of questions on discovery which call for an opinion or a statement of position.

Of fundamental importance in the Tribunal's reasons is the clear extension of the concept of "public interest privilege" to documents created at the investigation stage, including the complaint. Several requirements are generally presented in the case law for this privilege:

- (a) the communications must originate in a confidence that they will not be disclosed;
- (b) this element of confidentiality must be essential to the full and satisfactory maintenance of the relation between the parties;
- (c) the relation must be one which, in the opinion of the community, ought to be sedulously fostered; and
- (d) the injury that would ensue to the supplier of the information by the disclosure of the communications must be greater than the benefit thereby gained for the correct disposal of the litigation.

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The Tribunal found that the public interest in protecting the confidentiality of these documents in order to allow complainants to come forward in uninhibited fashion outweighs the respondent's right to have all relevant documents produced.

The Tribunal also affirmed that a litigation privilege extended to interview notes made by counsel for the Director when he interviewed customers, competitors, and others at the inquiry stage as "the dominant purpose of their preparation was for use in litigation". A litigation privilege was first expressly recognized by the Tribunal in the Chrysler Canada case noted above.

The Tribunal found that the arguments of the Director's counsel in support of non-disclosure of contractual documents known to the Director were unconvincing. Counsel for the Director argued that disclosure of the documents would disclose the identity of informants and that it would be preferable on discovery to require the respondent to produce all relevant contractual documents.

The Tribunal appeared to be uneasy with this tactical approach and observed that under the rules both parties should, prior to discovery, already have produced relevant documents and that in both cases an adverse inference could be drawn from a failure to do so.

NutraSweet had insisted that on discovery the Director should provide his definition of "acquisition cost" and "long run average cost." The Director had provided references to the economics literature where these concepts are discussed. The Tribunal found that questions on these concepts related to the Director's position as opposed to the facts upon which that position is based and that Director's witness was entitled to refuse to answer such questions. Equally, the Tribunal found that conclusions of fact (such as whether the respondent was underpricing or competing with certain firms) are not discoverable as they are questions of fact for the Tribunal to decide. Nevertheless, the Director would be obliged to provide the facts underlying such a conclusion such as the identity of customers and the time periods during which the alleged events occurred.

NutraSweet had also sought an order requiring production of the identity of customer contracts and the specific activities and contractual provisions forming the basis of the Director's

specific allegations. The Tribunal noted that there may be cases where the documentation is so complex that it would be appropriate for the Director's witness to point out the specific documentary basis for allegations. However, in this case, the Tribunal noted that the respondent had not established that the material was of such complexity. Nevertheless, the Tribunal did find that specific customers should be identified, if necessary, subject to a confidentiality order to protect the identity of informants.

However, the Tribunal suggested that such "informant" protection should be regarded as exceptional:

...It should be noted that in the context of the Director's investigations, there is no reason to believe that much of the information collected is really of the "informer" type. The information which the Director collected through interviews, while technically given voluntarily, could have been obtained by using more formal means had voluntary disclosure not occurred...

Finally, the Tribunal counselled the parties that questions on discovery for which an order to answer is sought not be framed in a vague or open-ended fashion that leave room to conclude that they may be designed to elicit more than relevant facts. However, if a question is properly framed, it is no defence that answering it would be burdensome.

J.F.B.

NUTRASWEET UPDATE

The NutraSweet/Aspartame Abuse of Dominance proceeding was first reported in the June 1989 *CCPR*.

On October 12, 1989, the Competition Tribunal granted leave to intervene to Tosoh Canada Ltd. the Canadian subsidiary of NutraSweet's principal global competitor in the supply of the intense sweetener Aspartame. The Tribunal's order precludes Tosoh from participating in discoveries or being discovered against and permits it to lead its own evidence at the end of the Director's case only where the Director has himself refused to lead evidence.

NutraSweet objected to Tosoh's intervention on the ground that Tosoh's interests would be adequately addressed by the Director, that Tosoh would accordingly not contribute to the

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proceedings and that Tosoh would use its intervener status to conduct a fishing expedition to get competitively sensitive information from NutraSweet.

In seeking leave to intervene, Tosoh had contended that it was, as a principal competitor, directly affected. It relied on the Federal Court's reasons on intervenor's standing in the Reservec/Gemini case, arguing that granting party standing to the Director was no answer to a third-party request to participate at the hearing.

NutraSweet has sought leave to appeal this order to the Federal Court of Appeal.

NutraSweet is also seeking leave to appeal a subsequent decision of the Tribunal not to grant it 60 days additional time from the close of discovery to prepare its case.

The hearing of the Director's application is scheduled to commence on January 7, 1990.

APPLICATION MADE TO VARY ABB CONSENT ORDER

On June 15, 1989, the Competition Tribunal entered a consent order with respect to the Asea Brown Boveri Inc. (ABB) acquisition of the large transformer business of Westinghouse Canada Inc. (This matter was reported in the June and September 1989 issues of the *Canadian Competition Policy Record*). Pursuant to the Tribunal's order, ABB was required to seek tariff reductions on certain transformers, and also, if those reductions were not realized, to divest of a Hamilton facility in the first instance. If that divestiture did not prove viable, the Guelph facility being acquired was to be divested. The order also contained a stringent hold separate provision which minimized contacts between ABB and the operators of the facilities to be divested with a view to maintaining their competitive integrity.

By application dated November 8, 1989, ABB, with consent from the Director, sought to vary certain terms of the hold separate agreement. In particular, ABB sought an extension of the time period by which it must receive trade relief. It

initially was to have realized tariff reductions on imports from the United States by December 31, 1989. As that date is now not possible, the amendment would extend it to June 30, 1990. The application to vary would also remove the obligation to divest the Hamilton facility in the first instance and substitute the divestiture of the Guelph facility as the only divestiture in contemplation. Finally, the order would vary the provisions with respect to ABB's ability to manage the Guelph facility and give ABB much greater authority to rectify production problems at the Guelph facility. Under the amended provisions with respect to management of the Guelph facility, ABB would still be required to maintain the business with an integrity sufficient to allow its ultimate divestiture, if required.

The parties filed considerable evidence with the Tribunal justifying the proposed amendments. The principal change in the market identified by ABB is the increased presence by foreign suppliers in the Canadian market in 1989. By one estimate, foreign suppliers now account for close to one-quarter of Canadian purchases of large power transformers. This is an increase from almost zero in previous years. It is also noted that large utility purchasers, such as Québec Hydro and Ontario Hydro, have deliberately switched their purchasing patterns in response to the lessened competition in Canada and impending tariff changes by seeking foreign bidders.

The evidence also noted that although ABB has not been able to achieve the tariff reductions in the original consent order by year end, it is most likely that those changes will be forthcoming by April of 1990. Both Canada and the United States have agreed to the reductions proposed. With respect to the management problems at the Guelph facility, the evidence of both ABB and the Director indicates that orders have been cancelled due to delays in production at the Guelph facility. These delays are a cause of concern to purchasers and a number of the utilities interviewed have indicated no concern with ABB becoming more actively involved in the management of the Guelph facility.

Although the Director consented to the application to vary, he apparently did so reluctantly. The language used in the Director's reply to the

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application appears to indicate his ambivalence in its conclusion that:

On balance, the potential benefits to the market place, though not overwhelming, in the Director's view, outweigh the risks, which are qualified. The public interest, viewed from the standpoint of the promotion of competition through the relief sought, will, in the Director's submission, be protected.

A hearing on the application to vary was held on December 18, 1989, at which time the Tribunal granted the order as requested. The application to vary should not come as a great surprise. It is not unusual in complicated situations to require readjustment over time as circumstances change. The Director and parties should be aware of the inevitability of such changes when they are negotiating consent orders. In particular, care should be taken not to include overly detailed behavioural requirements which rigidify the ability of the parties and the market to respond to changing competitive conditions. L.A.W.H.

B.C. COURT GRANTS STAY

On July 5, 1989, Mr. Justice Oppal, of the Supreme Court of British Columbia granted a stay of an application by the Director to conduct oral examinations of parties under investigation pursuant to section 11(1)(a) of the *Competition Act*.

The case arose from an inquiry under the conspiracy section, s. 45, of the *Competition Act*. The inquiry concerns Barbecon Inc., Coast Paper Ltd., Crown Forest Industries Ltd., and Intercity Papers Ltd. All of the corporations sell fine paper at the wholesale level. The inquiry alleges that they have over 80% of the market for fine paper distribution in the provinces of British Columbia and Alberta and have unlawfully conspired by adopting identical pricing arrangements and policies.

In October, 1987, the Director had obtained search warrants under the *Act* and presumably executed them. On May 9, 1989, the Director made application under section 11(1)(a) of the *Act* and obtained an order from Mr. Justice Spencer requiring the attendance of various officers of the companies to appear before a presiding officer to

be "examined on oath or affirmation on matters relevant to the inquiry."

The respondent companies brought an application to have the oral examinations stayed. The basis of the argument was that section 11(1)(a) of the *Act* is contrary to the *Charter of Rights and Freedoms* and of no force or effect. A similar issue is pending decision from the Supreme Court of Canada in the case of *Thompson Newspapers Ltd. et al. v. The Director of Investigation and Research et al.* (1987), 57 O.R.(2d), 257, and *Stelco Inc. et al. v. Attorney General of Canada et al.* (1988), 83 N.R. 193. The cases before the Supreme Court concern section 17 of the *Combines Investigation Act*, which is similar in some respects to paragraph 11(1)(a) of the *Competition Act*. Mr. Justice Oppal, in considering this stay, viewed the principles to be applied in an application for a stay of proceedings to be similar to those for the granting of an interlocutory injunction. In particular, he reviewed the Supreme Court of Canada decision in *Attorney General of Manitoba v. Metropolitan Stores (MDS) Ltd.*, [1987] 1 S.C.R. 110.

In that case, the Supreme Court enunciated three tests:

- a) whether there was a serious question to be tried as opposed to a frivolous or vexatious claim,
- b) the question of irreparable harm, and
- c) the balance of convenience.

In all three matters, Mr. Justice Oppal found that the applicants should prevail in the case before him.

Mr. Justice Oppal concluded:

I cannot accede to the argument in this case that by granting a stay of proceedings in this case would lead to a cascade of applications for similar types of relief.

While the public interest is a matter to consider, in my view the potential harm which may result to these applicants outweighs any potential harm to the public by the granting of a stay. For these reasons an order for a stay of proceedings is granted.

It is interesting to note that the Justice equated section 17 of the *Combines Investigation Act* with the new provisions of the *Competition Act*. Although there is considerable similarity between the sections, safeguards were added in the new law to protect the rights of individuals against the granting of such orders. L.A.W.H.

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WETSTON SETS OUT HIS PRIORITIES

The Director of Investigation and Research, Mr. Howard I. Wetston, in a speech in early December, as well as in talks with a number of lawyers and businessmen since he became Director, has outlined his priorities in his new position.

He stated that he has three principal priorities. First, he will continue with vigorous enforcement of the *Competition Act* but with greater selectivity as to how the Bureau's enforcement resources are deployed. On the criminal law side, conspiracy and bid-rigging will be his main priorities. The merger provisions will continue to be a priority and he expects that the compliance-oriented project adopted by his predecessor will continue.

Mr. Wetston indicated that he has two other priorities. One is to become more actively involved in regulatory proceedings, exercising the Director's powers under the *Act* to intervene in both federal and provincial regulatory matters. Also, he wants the Bureau of Competition Policy to play a greater policy role in microeconomic policy making within the federal government.

Mr. Wetston also has other priorities in mind. In particular, he is very interested in the possibility of issuing merger guidelines under the law. He expects to work on these during the next year and to consult with the private sector before any final guidelines are adopted. He is mindful not to create too rigid guidelines at this time. However, he has stated he believes there is enough experience with the new law that guidelines would be an asset to the private sector.

Mr. Wetston also wants to issue other policy positions with respect to other sections of the *Act*. In particular, work is under way at the Bureau at this time to create guidelines on predatory pricing and price discrimination. In both instances the Bureau will consult with the private sector before the guidelines are finally adopted. With respect to the predatory pricing and price discrimination guidelines, Mr. Wetston is hopeful to have them available for consultation by March of 1990. The predatory pricing guideline may be available before that on price discrimination.

The Bureau is presently undergoing an intensive review of both of these areas of the law. Clearly, guidelines on the Bureau's interpretation and enforcement policy with respect to price discrimination will be of great assistance to the private sector. Already there are signs that the Bureau's stance on enforcement of the section has changed significantly. Practices which have long been thought to be contrary to the law and subject to enforcement by the Director if brought to his attention, now seem to be of less concern to the Director's office. In these circumstances, it is obvious an early statement from the Director's office is very important to ensure that businessmen and their advisors are aware of the Director's current thinking.

The price discrimination section probably receives more attention than any other provision of the law because of its constant impact on decisions of businessmen. It is refreshing, indeed, that the new Director has decided to make public his views on this most important aspect of the law.

L.A.W.H.

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**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	167
EXAMINATIONS CONCLUDED				
Concluded as posing no issue under the Act ⁴	17	120	166	148
Concluded with Monitoring only ⁵	5	7	10	11
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 proposed merger in whole or in part as a result of Director's position	3	2	2	1
TOTAL EXAMINATIONS CONCLUDED	26	133	182	163
EXAMINATIONS ONGOING AT END OF PERIOD	14	25	32	38
INTENT TO FILE APPLICATION ANNOUNCED			2	
APPLICATIONS BEFORE TRIBUNAL				
Concluded ⁸	1		2	2
Ongoing		2	2	2

Notes

1. Statistics commenced on June 19, 1986.
2. Statistics to January 4, 1990.
3. Two or more days of review. Includes 249 prenotifications since July 15, 1987 of which:
-in short-form (s.121): 1987/88 - 44 and 1988/89 - 50; 1989/90 - 75.
-in long-form (s.122): 1987/88 - 21 and 1988/89 - 42; 1989/90 - 17.
4. Includes:
137 Advance Ruling Certificates
-1986/87 - 2; 1987/88 - 26; 1988/89 - 59; 1989/90 - 50.
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.