CANADIAN COMPETITION LAW DEVELOPMENTS

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PROVISIONS OF COMPETITION ACT RULED UNCONSTITUTIONAL

On April 6, 1990, Mr. Justice Jacques Philippon of the Quebec Superior Court ruled that certain provisions of the *Competition Act* were unconstitutional as being contrary to the *Canadian Charter of Rights and Freedoms*.

The case involved several parties to a merger in the meat rendering business which had been challenged before the Competition Tribunal by the Director of Investigation and Research. The case, hereinafter referred to as the *Couture* case, began as an application in Quebec Superior Court to stay the proceedings of the Competition Tribunal pending the disposition of the constitutional questions. The plaintiffs obtained the stay at first instance and the Order staying the proceedings was upheld by the Quebec Court of Appeal. In the meantime, the plaintiffs had agreed to a hold separate agreement to maintain the status quo pending disposition of the proceedings.

The plaintiff's action was a wide ranging attack on federal jurisdiction to proscribe substantive laws with respect to anti-competitive mergers, as well as the process of adjudication created under the *Act*, in particular, the composition of the Competition Tribunal.

Mr. Justice Philippon's reasons address all of these points. In particular, the judgment reviews whether the federal government has jurisdiction to control mergers under the general trade and commerce power. It particularly addresses whether those provisions can reach mergers which are intra-provincial in nature. The judgment reviews all of the recent decisions in this area, including the Supreme Court of Canada decisions in *Canadian National Transportation* and *Rocois*. It also reviews the Supreme Court decision in *General Motors of Canada Limited* v. *City National Leasing*. This decision of the Supreme Court in 1989 upheld as constitutional the civil damage provision contained in the *Competition Act*.

In considering the constitutional argument, the Court listened to the arguments that competition was a matter which fell within the jurisdiction of the provinces, in particular the provinces' right to deal with civil matters.

One of the key issues analyzed by Mr. Justice Philippon was whether there was truly a national interest in controlling anti-competitive mergers, as this is an important factor in applying the "general trade and commerce" jurisdiction. He concluded as follows:

> The national interest is clearly apparent, in our opinion, and we come back to the constitutional balance sought by the Supreme Court in *City National Leasing* between ss 91(2) and 92(13).... Plaintiffs' first argument thus cannot succeed and, in terms of the division of powers, the federal government can validly establish a system of control over competition using penal sanctions, as it always has, but also by other means such as supervision of mergers like the one at issue here.

The Court also dealt with the argument raised by the plaintiffs and the Quebec government that the scope of the merger provisions should be restricted to interprovincial and international mergers. The Court dealt with this issue as follows.

> Because of the foregoing and because of this conclusion, there is no need to examine the application of the doctrine of limited interpretation, by the which the power of the federal government is recognized as having over competition does not allow it to regulate purely provincial commercial activities. It seems clear that the Supreme Court includes such activities among those which are the subject of national jurisdiction under s 91(2).

The next argument dealt with by the Court was whether the activities of the meat rendering business were subject to regulation by the Province of Quebec such as to remove it from the purview of the *Competition Act*. This would be based on the so-called regulated conduct doctrine which has arisen in interpreting the *Competition Act*. Mr. Justice Philippon reviewed the means by which the Province of Quebec regulated the meat rendering business. He noted that pursuant to the *Agricultural Products, Marine Products and Food Act*, a licence is necessary to operate a meat rendering plant. A licence is issued directly by the Minister on the basis of whether to issue the licence would be in the public interest. It is clear that part of the purpose of the legislation is to protect consumers from unsound products or confusion resulting from labelling or other representations.

The Court also found that some of the limits imposed by the provincial legislation had some effect on competition, for example, the number of permits issued, the number of trucks authorized to be used and limits on the quantity of daily slaughter authorized.

The Court concluded as follows:

> However, the provincial legislation only affects competition incidentally, and that is not the purpose of the regulations or indeed of the *Act* under which the regulations were adopted. The *Act* does not provide that the issuing of permits is connected to competition, nor do the regulations and the forms adopted under the *Act*.
>
> In our opinion, therefore, it can be said that, though regulated by a provincial statute, no inconsistency affecting competition will be found between federal and provincial legislation in respect to this industry.

Mr. Justice Philippon therefore found that the regulated conduct exemption would not apply to this industry. The Court's judgment on this matter is in keeping with recent jurisprudence under the *Act* in that it clearly focuses on the purpose of the particular regulatory legislation in deciding whether it would preclude the application of competition legislation.

The Court then moved to the issues raised under the *Canadian Charter of Rights and Freedoms*. The first issue addressed by the Court was the argument that the merger provisions of the *Competition Act* are contrary to the guarantee of freedom of association contained in subsection 2(d) of the *Charter of Rights and Freedoms* and subsection 1(e) of the *Canadian Bill of Rights*.

The Court, in reviewing decisions with respect to freedom of association, in particular the *Public Service Employee Relations* case dealing with union activities and the *Black* decision dealing with the right of lawyers to associate with other lawyers in other provinces, took a broad view of the meaning of association.

The Court concluded as follows:

> As can be seen in *Public Service Employee Relations*, only lawful activities enjoy *Charter* protection. Since we have found that Parliament had jurisdiction to regulate competition, plaintiffs can protect their activities which are not unlawful, that is, which are not in restraint of competition.

The Court then found that the powers granted to the Tribunal to order the dissolution of a merger or to prevent it from proceeding deprived the plaintiffs of the right of association protected by the *Charter of Rights and Freedoms* and the *Canadian Bill of Rights*. The Court also found that the mere possibility of an infringement of the *Charter* would result in a finding of *ultra vires*.

The Court's conclusions are not entirely satisfactory in that it is not clear what the Court means by saying that only "lawful" activities enjoy *Charter* protection. Could it not be argued that a merger which could be the subject of an order by the Competition Tribunal is not a "lawful" activity?

The last issued dealt with by the Court was whether the presence of lay members in the composition of the Competition Tribunal was irregular and made the statutory provisions creating the Tribunal invalid.

In reviewing the composition of the Tribunal, the Court pointed out the provisions relating to lay members, the fact that there is a set term of office for lay members, and that the lay members are appointed during good behaviour. The Court also pointed out that it was possible to remove a lay member for cause, but that there was no specification as to what would constitute cause.

The Court also pointed out that the appointment of lay members was subject to normal public service rules and that the lay members were subject to evaluations, as are other members of federal administrative tribunals.

The Court also pointed out that one of the lay members acted part-time in another capacity and that another member also served as a member of

the Restrictive Trade Practices Commission.

The Court reviewed cases by the Supreme Court with respect to the necessary independence and impartiality of judicial appointments and courts. The Court also considered the argument that the Competition Tribunal was not a Court but an administrative tribunal where the rules with respect to independence and impartiality are different.

In conclusion, Mr. Justice Philippon stated:

> Despite certain characteristics of an administrative tribunal such as its description, the presence of lay members and the power of acting informally and expeditiously (s.9(2)), in our view the powers conferred on the Tribunal go well beyond the purely administrative function and bring the organization into the class of courts which have wide powers....
>
> In our opinion Parliament does not have jurisdiction to grant the powers which the Act confers on the Competition Tribunal, treating it like a superior court of record with all the powers of a true court, without giving the Tribunal the characteristics essential to independence.
>
> The deficiency is apparent here in terms of the tribunal's structure, in the choice of lay members, their function, the process of removal on the connection which by a transitional provision of the *Act* continues to exist with the executive branch of our system, to say nothing of the possible perception of bias by a reasonable person because of that continuing connection and the partial nature of the duties of one member.

The Court thereupon found the Competition Tribunal unconstitutional. The judgment does not identify which particular provisions of the *Charter* or the *Constitution* were the basis of this decision.

This judgment obviously has wide-ranging implications for the application of the *Competition Act*. The federal government has appealed the decision. In addition, the arguments have been raised by NutraSweet in connection with the application by the Director under the dominance provisions of the *Competition Act*. The Competition Tribunal will hear the constitutional arguments on July 10 in the *NutraSweet* case (see below). In addition, Xerox has raised the issue in the pending refusal to deal application before the Competition Tribunal. The Tribunal will also hear Xerox on the point (see below).

In the meantime, the Director has announced that he intends to proceed as usual in bringing applications to the Tribunal until such time as the Tribunal itself or specific orders are granted in each case preventing the Tribunal from acting.

L.A.W.H.

INVESTIGATIVE POWERS UNDER COMBINES INVESTIGATION ACT UPHELD

In a judgment rendered on March 29, 1990, the Supreme Court of Canada dismissed an appeal by Thomson Newspapers Limited challenging the constitutional validity of section 17 of the *Combines Investigation Act*. The Court also released the decision in the companion case raising the same issues brought by Stelco Inc. Five judges sat on the appeal and each wrote separate judgments. The decision is very complex and, although the appeal was dismissed, the reasons are anything but clear. Indeed, Thomson has sought to have the matter re-heard before the Supreme Court.

The issues in the case dealt with whether section 17 of the old *Combines Investigation Act* is contrary to sections 7 and 8 of the *Charter of Rights and Freedoms*. Section 17 of the *Act* was the investigative provision whereby the Director, on order of a member of the Restrictive Trade Practices Commission, could order an individual to appear and answer questions before a member of the Commission and also to produce documents. The section has been widely used by the Bureau of Competition Policy over the years as a means not only of obtaining documentary evidence by means of a subpoena, but also to obtain oral testimony from individuals. The individuals might themselves be subject to an investigation under the *Act* or simply might have relevant evidence.

The legislation clearly authorized the compulsory taking of evidence. Pursuant to section 20 of the *Act*, an individual could not refuse to answer questions, but any testimony given could not be used against him in any subsequent criminal proceedings. In that sense, the provisions were similar to section 5 of the *Canada Evidence Act*. The issues in the case revolved around two main points. The first was whether the forcing of testimony from an individual

who might subsequently be the subject of a criminal prosecution was contrary to section 7 of the *Charter*. Section 7 guarantees that:

> Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principals of fundamental justice.

In analyzing the section 7 argument, the Court had to take into consideration section 11(c) of the *Charter* which states:

> That any person charged with an offence has the right...
> (c) not to be compelled to be a witness in proceedings against that person in respect of the offence;

Section 13 is also relevant. It states:

> A witness who testifies in any proceedings has the right not to have any incriminating evidence so given used to incriminate that witness in any other proceedings, except in a prosecution for perjury or for the giving of contradictory evidence.

The question which arose was whether section 7 contains any residual content beyond that provided by sections 11(3) and 13.

Mr. Justice La Forest and Madame Justice L'Heureux-Dubé found that section 17 was not inconsistent with either section 7 or section 8 of the *Charter*. Madame Justice Wilson disagreed and dissented with respect to both sections of the *Charter*. Mr. Justice Lamer did not reply with respect to section 7 but found that section 17 was contrary to section 8 of the *Charter*. Mr. Justice Sopinka found that section 17 was not inconsistent with section 8, but found that section 17 was contrary to section 7 of the *Charter* to the extent that it authorizes an order to be made for an examination under oath of a person, not a corporation. In analyzing the various decisions, the appeal failed because a majority of three of the five justices found that section 17 was not contrary to section 8 of the *Charter* which contains a protection against unreasonable search and seizure. With respect to the section 7 argument, the appeal failed because although two justices found the provision not inconsistent with section 7, Mr. Justice Lamer refused to reply to the question. Since he refused to participate, the appellant Thomson did not receive the support of a majority of the five judges.

With respect to the section 7 argument, Mr. Justice La Forest found that, given the nature of offences and the need for broad investigative tools on the part of the state, the section did not infringe the provisions of the *Charter*. Neither would he apply the strict criteria in *Hunter v. Southam* with respect to the safeguards necessary in the conduct of criminal investigations. However, he did express concern with respect to the use of derivative evidence which may be derived from the use of section 17. Although he found that direct testimony was clearly protected under section 20 of the *Combines Investigation Act*, let alone sections 7, 11 and 13 of the *Charter*, he found that the use of derivative evidence as a result of compelled testimony might well give rise to claims under section 7 of the *Charter*. However, he was not inclined to strike down the entire section because of the potential difficulties arising from derivative evidence. His conclusion was:

> In my view, derivative evidence that could not have been found or appreciated, except as a result of the compelled testimony under the *Act* should in the exercise of the trial judge's discretion be excluded since its admission would violate the principles of fundamental justice. As will be evident from what I have stated earlier, I do not think such exclusions should take place if the evidence would otherwise have been found and its relevance understood.

He therefore found that the use of derivative evidence obtained through the use of the section 17 power would not automatically affect the fairness of subsequent trials. He stated:

> It follows that complete immunity against such use is not required by the principles of fundamental justice. The immunity against use of actual testimony provided by s. 20(2) of the *Act* together with the judge's power to exclude derivative evidence where appropriate is all that is necessary to satisfy the requirements of the *Charter*.

Madam Justice L'Heureux-Dubé in her reasons dealt with the issue of the right of corporations under section 7 of the *Charter*. She found that section 7 did not provide protection to corporations and, further, that it could not be invoked by individuals acting as representatives of the corporation. She was alone in the latter findings since Mr. Justice La Forest disagreed that individuals acting as corporate representatives could not have the benefit of section 7 protections.

Madame Justice L'Heureux-Dubé found that fundamental justice under section 7 does not afford witnesses any constitutional "right to remain silent," nor does it require a constitutional immunity over derivative evidence. She found that the right to remain silent does not extend to proceedings such as those created by section 17 of the *Act*. She also found that derivative evidence, which would be real evidence in most cases, should not be equated with self-incriminating evidence.

In dissenting, Madame Justice Wilson found that section 7 guarantees are confined to individuals but can be successfully invoked by individuals who are representatives of corporations. She further found that if section 17 was found to be of no force and effect, corporations would have the benefit of such a finding.

Madame Justice Wilson also found that the state-imposed compulsion under section 17, which is linked to the criminal process, touches on an individual's reasonable expectation of privacy and also upon his physical integrity. She also found that the violation of an individual's right to liberty and security of the person is not in accordance with the principles of fundamental justice. She further found that section 7 contains additional protections beyond those contained in sections 11(c) and 13 of the *Charter*. She therefore found that section 17 was contrary section 7 of the *Charter*, and that subsection 20(2) of the *Act* is not sufficient to protect against the use of derivative evidence and subsequent criminal prosecutions.

Madame Justice Wilson also found that section 1 of the *Charter* could not save section 17. She did not find evidence that the government's objections would be frustrated if individuals were afforded derivative use protection under section 7 of the *Charter*.

Mr. Justice Sopinka, in dealing with the section 7 argument, found that the right to remain silent during an investigative stage of a criminal process has the status of a principle of fundamental justice and is protected under section 7. He found that the right to remain silent is a right not to be compelled to answer questions of police officers or others who are investigating the commission of criminal offences. He recognized that many of the uses of section 17 would not violate the right to remain silent. However, since the *Act* does not distinguish between its uses, he found that the whole provision with respect to compelling testimony was contrary to section 7. He also agreed with Madame Justice Wilson that the section could not be justified under section 1 of the *Charter*. Mr. Justice Sopinka did not agree with Madame Justice Wilson that the provisions of section 17 requiring production of documents would contravene section 7 of the *Charter*.

Mr. Justice Lamer refused to answer the section 7 argument because he found that it was section 20 of the *Combines Investigation Act* and not section 17 which took away the common law right to refuse to give incriminating answers. Because the wrong section of the *Act* was at issue before the Court, and also because to answer the question would inferentially decide the constitutional validity of section 5 of the *Canada Evidence Act*, Mr. Justice Lamer refused to decide the section 7 issue without a direct challenge to the constitutional validity of section 20 and section 5 of the *Canada Evidence Act*.

The second major issue before the Court was whether section 17 was contrary to section 8 of the *Charter*. Section 8 provides protection against unreasonable search and seizure. The question was whether the forced production of documents amounted to a "seizure" under section 8 of the *Charter* and, if so, whether the means by which the seizure was affected was unreasonable. In answering this question, Mr. Justice La Forest found that although production of documents constituted a "seizure" within the meaning of section 8, it was not unreasonable. In analyzing the situation, he concluded that the *Combines Investigation Act*, although enacting criminal sanctions, is essentially a regulatory statute. He found that in this situation, the ability of the enforcers of the *Act* to have access to internal business records was an important investigative tool. He also found that there is unlimited expectation of privacy with respect to such business records and that, therefore, section 17 did not infringe this limited expectation. He also found that the stringent standards of reasonableness articulated in the *Hunter* case would be inappropriate to determine the

reasonableness of seizures under section 17 because of the limited scope of orders to produce documents under section 17.

Madame Justice L'Heureux-Dubé also found that the production of documents under section 17 did not infringe section 8 of the *Charter*. She found that it may constitute "seizure" but that it would be not unreasonable. She considered a number of factors in reaching this decision, including the regulatory nature of the conduct being controlled by the *Act*, the importance of the *Act's* underlying purpose, the necessity of impairing privacy interests, and the absence of alternate investigatory means. She found that a subpoena is a significantly less intrusive means of investigation than other alternatives. She also agreed with Mr. Justice La Forest that the expectation of privacy in the case of corporations is relatively low with respect to requests for documents of the nature covered by section 17.

Mr. Justice Sopinka also agreed that section 17 was not contrary to section 8 of the *Charter*. He found that the requirements to produce documents under section 17 did not even constitute a "seizure" within the meaning of section 8 of the *Charter*. He found this because of the opportunity which existed for persons subject to a section 17 order to challenge the validity and extent of the demand before producing the documents. He found that such a demand, which would not at that point be enforceable, would be a minimal intrusion in this era of widespread government intrusion into the affairs of the private sector.

In dissent, Mr. Justice Lamer and Madame Justice Wilson found that section 17 was an unreasonable seizure, contrary to section 8 of the *Charter*. They found that any compulsory production of documents by the state would constitute a seizure. They, therefore, found that the tests for reasonable seizure articulated in *Hunter* v. *Southam* must be applied, and that the possibility of challenging an order under section 17 prior to producing documents would not meet the standards set out in *Hunter*. They found that, since the *Combines Investigation Act* is akin to traditional criminal law, departures from standard set in the *Hunter* case should be allowed only in extreme cases. They further found that section 1 of the *Charter* would not save section 17.

This is obviously a decision of widespread significance not only for combines enforcement, but also for police enforcement generally. It raises important issues with respect to the rights of corporations against self-incrimination, both directly and through employees, standards which should applied in the production of documents by subpoena in criminal and regulatory proceedings, and the protection individuals have against compelled testimony and "the right to remain silent" in investigative as opposed to judicial proceedings.

Section 17 of the *Combines Investigation Act* is not identical to the new counterpart in the *Competition Act*. In particular, the standard to obtain an order to compel testimony and produce documents in the new legislation is more stringent than that contained in section 17. However, it does not go, arguably, as far as the standard articulated for searches and seizures in the *Hunter* decision. The decision also does not address the power contained in both section 17 and section 9 of the *Competition Act* to have parties prepare answers to questions submitted by the Director. There has always been an issue about the use of such created answers since it could be argued that to require the party under investigation to create evidence which may incriminate him would be contrary to the principles of national justice.

It is unfortunate that the Supreme Court has not more clearly answered many of these questions. Undoubtedly, these questions will be raised again before the Court, and it will be some time before there are clear answers as to the scope of the powers contained in the *Competition Act*.

L.A.W.H.

CHARGES LAID IN QUÉBEC PHARMACISTS' CASE

After a two-year inquiry, price-fixing charges have been laid under the conspiracy provisions of the *Competition Act* against the Québec Pharmacists Association, certain pharmacy chains, and individual pharmacists. It is alleged that, between December 1, 1987, and September 30, 1988, the accused conspired to fix prices and dispensing fees for certain prescription drug products in the province of Québec.

In a preliminary constitutional motion, the accused have argued that the conspiracy provision as amended by section 45(2.2) of the 1986 competition law revisions is of no effect by operation of the *Charter*. The argument advanced is that this amendment has the effect of not requiring the Crown to prove intention with respect to a key element of the offence - undue lessening of competition. Taking this to be the case, the accused contend that the provision is contrary to the guarantee that the liberty of the person shall not be infringed except in accordance with the principles of fundamental justice set out in section 7 of the *Charter*. It is also argued that this result is contrary to the presumption of innocence guaranteed for persons charged with an offence under section 11(d) of the *Charter*.

At the time of writing the hearing date for this constitutional motion had not been set; nor had a date for the preliminary hearing on the charge been established. *J.F.B.*

TRIAL SET IN NOVA SCOTIA PHARMACISTS' CASE

On March 22, 1990, Mr. Justice Ross B. Archibald, of the Nova Scotia Provincial Court, following a Preliminary Inquiry, committed all accused to stand trial with respect to conspiracy charges relating to alleged price fixing of pharmaceutical dispensing fees and prescription drugs prices for insured and cash sales in Nova Scotia for the period 1974 to 1986. Charges were initially laid in 1987. The preliminary hearing began in January, 1988. The final argument in the preliminary inquiry was not presented until September, 1989.

The commencement of the trial is presently scheduled for October 7, 1990. However constitutional arguments with respect to several issues are expected to be heard commencing August 21, 1990. The accused, among other matters, intend to argue that the undueness test of the conspiracy provision is too vague and is therefore an inoperative provision of criminal law having regard to the due process guarantee of the *Charter*. *J.F.B.*

NUTRASWEET/XEROX UPDATE

As a result of the *Couture* decision (see above) the respondents in the two undecided applications before the Competition Tribunal (NutraSweet and Xerox, see March 1990 *CCPR* at page 6) have obtained leave from the Competition Tribunal for a hearing on the constitutionality of the Tribunal adjudicating on the Director's application in each case.

Although the hearing on the merits of the Director's application in the NutraSweet case has concluded and the Tribunal is in the process of writing its decision, the Tribunal has set July 10, 1990 as the date for a supplementary hearing on the constitutional questions raised by NutraSweet. It appears that no decision in this case can be expected prior to the resolution of these constitutional questions by the Tribunal.

NutraSweet's arguments in its motion of a constitutional question adopt the arguments of the Quebec Superior Court in the *Couture* decision with respect to the alleged structural failure of the *Competition Tribunal Act* to assure that the Tribunal has the necessary level of judicial independence and impartiality to satisfy the *Constitution Act* and the *Canadian Bill of Rights*. As in the *Couture* decision, NutraSweet's arguments focus on the appointment of lay members of the Tribunal by the Minister after consultation with an Advisory Counsel, the ability of the Governor in Council to remove lay members from the Tribunal during their term for cause, and the fixed maximum term of seven years for appointments to the Tribunal without criteria for reappointment. NutraSweet argues, as well, that the appointment of a lay member who is also a member of the Restrictive Trade Practices Commission is inconsistent with the alleged constitutional requirements of independence and impartiality for this Tribunal given that the Restrictive Trade Practices Commission continues theoretically to exercise duties of an investigative nature.

Finally, building on the findings in the *Couture* case that the Competition Tribunal exercised judicial functions, NutraSweet has argued that establishment of the Tribunal is an unconstitutional infringement of the entrenched

powers of the superior courts and that is engaged in a performance of superior court functions contrary to sections 96 to 100 of the *Constitution Act*.

The hearing of the Xerox Canada case began on June 11, 1990. This hearing includes the production of evidence with respect to the constitutional arguments of Xerox. The constitutional arguments are to be heard on July 15. Another constitutional argument in addition to those mentioned above that may be brought forward by Xerox is that the refusal to deal provisions of the *Competition Act* are not economic regulations within the meaning of the trade and commerce power of the *Constitution Act* and, therefore, not within the competence of Parliament to enact. Again, it appears doubtful that the Director's application in the Xerox Canada case will be disposed of on its merits by the Competition Tribunal prior to the Tribunal's adjudication of the constitutional questions being raised by Xerox Canada. *J.F.B.*

DIRECTOR REQUIRES DIVESTITURES IN WASTE REMOVAL MERGER

On June 5, 1990, the Director of Investigation and Research, Mr. Howard I. Wetston, announced that his review of the acquisition by Laidlaw Inc. of certain commercial waste removal operations of Tricil Limited had resulted in an agreement by Laidlaw to divest of the businesses acquired in Ottawa and Edmonton.

The Director was made aware of the merger in November of 1989, and the merger was completed on December 29, 1989. Pending the Director's review, Laidlaw had agreed to hold the operations and management separate and not to commingle the assets.

The businesses involved in the merger included commercial and industrial containerized waste removal services in Ottawa, Edmonton, Hamilton and Vancouver It also included liquid industrial and hazardous waste transportation and transfer station operations in Ontario.

The Director's staff conducted their usual inquiry and based on that inquiry, the Director concluded that the transaction was likely to lessen competition substantially in commercial containerized waste removal in Edmonton and Ottawa. The remainder of the merger did not raise concerns of likely substantial lessening of competition.

The Director arrived at his decision since the transaction would give Laidlaw a dominant share of the market in Edmonton and Ottawa both in the number of trucks and revenue. It would also remove Tricil as an effective competitor and reduce the number of competitors in the two markets from three to two.

To deal with these concerns, Laidlaw agreed to divest of the assets being acquired in Ottawa and Edmonton to viable third parties. Laidlaw undertook to provide the Director advance notice of any future acquisitions in the same businesses in Vancouver and Hamilton, as well as any future acquisitions in the transportation of hazardous and liquid industrial waste in Ontario until 1993.

Laidlaw has completed a divestiture in Ottawa to Browning Ferris Industries Ltd. Browning Ferris was an acceptable purchaser to the Director since it is a well-established and experienced operator in the waste management business and will be a new entrant in the Ottawa market.

The divestiture in Edmonton is still pending, but the Director indicated he expected it to be completed in the near future. *L.A.W.H.*

IMPERIAL-TEXACO SAGA CONTINUES

In what is clearly the most protracted proceeding under the new merger provisions of the *Competition Act*, new steps have been taken to re-open Imperial Oil's acquisition of the downstream assets of Texaco Canada. This time proceedings have been brought by an association entitled the Association for Fair Treatment of Divested Retailers. This association brought an application before the Competition Tribunal on May 14, 1990, to be allowed to intervene before the Competition Tribunal and present new evidence concerning the merger. As a result of the application and further discussions with counsel for the parties, the Tribunal, on June 6, 1990, ordered that it would receive written arguments

on whether the Tribunal has jurisdiction to entertain the request to intervene. The Tribunal further ordered that the arguments would be based on the assumption that the facts alleged in the request for leave to intervene were true. The Tribunal noted that this assumption would relate solely to the question of the Tribunal's jurisdiction, and that no conclusion other than jurisdictional would flow from acceptance of the facts as alleged. The parties will have short time periods to file argument and reply argument, with final reply argument filed for the association on June 21, 1990.

The application concerns the treatment of dealers being divested pursuant to the Tribunal's order by Imperial. Questions with respect to whether proper notice had been given to dealers to be divested, among others, have been raised by the association.

In addition to this proceeding, one of the parties to the initial hearing, Barron Hunter Hargrave Strategic Resources Inc., has filed an appeal with the Federal Court of Appeal of the Tribunal's decision allowing the merger on terms and conditions. *L.A.W.H.*

SOUTHAM ACQUISITION IN BRITISH COLUMBIA ON HOLD

On June 8, 1990, the Director of Investigation and Research announced that the Southam Newspaper Group, North Shore Free Press Ltd., and David Perks have agreed to hold separate the recently acquired publishing operations in the Lower Mainland Region of British Columbia. The hold separate agreement is to allow the Director time to complete his review of the merger and to ensure that the businesses are not commingled.

The hold separate agreement will be in effect until the Director's examination is concluded or until August 31, 1990, whichever comes first.

L.A.W.H.

BUREAU RELEASES DRAFT PREDATORY PRICING BULLETIN

On April 18, 1990, the Bureau of Competition Policy circulated for public comment a draft Bulletin laying out its enforcement policy with respect to the predatory pricing offence of the *Competition Act*. Section 50(1)(c) of the *Act* makes it an offence to engage in a policy of selling at prices that are unreasonably low, having the effect or tendency of substantially lessening competition or eliminating a competitor, or designed to have that effect.

The Bulletin notes at the outset that there is very limited jurisprudence on the interpretation of this provision and that in the past the Bureau has provided little public guidance on its enforcement policy regarding predatory pricing.

The Bulletin restyles the predatory pricing offence somewhat by defining it as the sale of products at prices so low as to cause injury to competition through the elimination of a competitor or the deterrence of entry or expansion of competitor. Injury to competition is defined as a situation where the alleged predator is regarded as having a reasonable expectation of recouping any of the profits foregone by its low pricing conduct. Accordingly, the Bulletin notes that instances of true predatory pricing are usually rare and would be limited to markets with specific structural characteristics that allow the alleged predator to increase prices without fear of encouraging effective competitive entry in response.

The Bulletin proposes a two stage screening exercise to determine whether these requisite structural characteristics are present. Because of the emphasis on market structure, elimination of a competitor or evidence of intent to do so generally will not be sufficient on their own to cause the Director to exercise his enforcement discretion.

The first stage of the screening process is aimed at assessing the degree of short-run market power the alleged predator possesses. This includes an examination of whether the entry and exit conditions in the relevant market might permit that firm to recoup losses caused by

predatory pricing. The Bulletin makes it clear that if the market conditions do not exist for successful predation (that is the alleged predator is presumably only harming himself and not the alleged victim of predation in the market), the matter will not be pursued. The second stage of the screening process examines the pricing policy of the alleged predator in relation to cost information and would come into play only if the Stage 1 market conditions have been satisfied.

The first task in Stage 1 is to define, through objective measures, the market power of the alleged predator. As a preliminary step, the relevant product market would be defined by examining both current and potential substitutes for the product whose prices are being examined. The geographic market would be established by an examination of consumer options for relocating their purchases in the event of significant price increases. For a predatory pricing inquiry to proceed, the alleged predator must have sufficient short-run market power to restrict output and raise prices through unilateral conduct.

The principal measures for examining market power proposed by the Bureau are the market share of the alleged predator, the measures of concentration in the relevant industry, the overall number and distribution of firms serving the relevant market, and the volatility of market shares of these firms. As a rule of thumb, the Bureau has proposed that the alleged predator must have at least a 35% share of the relevant market and be at least twice as large as its next largest competitor. The Bureau has indicated that it would be unlikely to pursue any action against unilateral pricing conduct of a firm falling below these two thresholds. On the other hand, in the case of a firm falling above these thresholds, it would appear that other factors would be applied by the Bureau in determining whether to pursue the matter. The Bulletin indicates that such factors include the history and practices of the alleged predator, its overall size and financial strength, and any special advantages resulting from government intervention in the marketplace. Consideration would be given to whether the alleged predator is an incumbent firm or a new entrant.

The Bulletin indicates that, in the Bureau's view, predatory pricing behaviour is more likely to be engaged in by incumbent firms as they are more likely to have the incentive and ability to predate than do smaller entrants and may be in a better position to identify strategies to disadvantage their rivals.

This emphasis on relative market power as the initial screening device is consistent with the traditional notion that true anti-competitive low pricing will be practiced only by a significant incumbent firm to keep out vigorous new entry into its established market. Much will, therefore, turn in this initial stage on the definition of the relevant market. If the geographic and product markets are relatively narrowly defined in practice, this initial screening measure may result in a lack of interest on the part of the Bureau in low pricing behaviour by dominant or multi-product firms entering new markets with the objective of dominating the markets.

The second aspect of the first stage is an examination of conditions of entry and exit in the relevant market. The Bulletin notes that, for low pricing behaviour not to be a concern, the market must display the prospect of "effective entry", that is not simply theoretical entry but whether "timely, sufficient" entry is likely. When both effective entry and exit are easy, the Bulletin contends, the initial low price behaviour of a firm's short-run market power will not be viewed as representing a threat to the competitive process. The following factors would be examined by the Bureau to determine whether the conditions for effective entry are present in that particular market:

1. <u>Speed of Entry:</u>

This is regarded as the essential element for effective entry and the major focus of the Bureau's analysis. Speed of entry is defined to be the time required between identifying a business opportunity and selling in the relevant market. The Bulletin proposes that, as a general rule, a market is not exposed to effective entry if the minimum time required to enter exceeds 18 months. Accordingly, entry that would take several years to accomplish would not deter or prevent "supra-competitive pricing" by a firm possessing market power once its low pricing policy achieved its short-term results of reducing competition.

2. Sunk Costs:

These are investments the value of which could not be recovered in the event of business failure because they are either highly specialized or are not liquid. The presence of high sunk costs increases the financial risk of entry and reduces the expected short-run profitability upon entry.

3. Economies of Scale and Scope:

Economies of scale refer to the reduction of unit costs from increased volume of a firm's output. Economies of scope refer to reduction of a firm's unit costs through the production of more different products at a given level of total output. The two concepts are, in practice, inseverable for large multi-product firms. The presence of these factors is proposed to be essentially a supplementary factor shading the analysis in the favour of conclusion that barriers to entry exist if there is evidence of low speed of entry and/or high sunk costs.

It is hard to see how the presence of economies of scale and scope should count against a firm in terms of it becoming a candidate for predatory pricing action by the Bureau in Stage 1. A principal criticism of predatory pricing laws has been that they discourage pricing innovations which will help to generate increased firm efficiency through economies of scale and scope. Predatory pricing laws are not supposed to penalize efficient firms in undercutting the prices of inefficient firms, particularly where excess capacity exists or where efficiency increases with a firm's level of output.

In a technical sense, economies of scale and scope create a barrier to new entry. To become an efficient competitor, the new entrant must be capable of achieving the production volumes of the largest and hence the most efficient firm in the market. But, if in achieving its market foothold, the new entrant incurs higher unit costs than the established competitor and the competitor's output decreases while its unit costs increase, and if the Bureau's approach to predatory pricing inhibits incumbent pricing that may force out the less efficient new entrants, it is arguable that the result is to put the objectives of industry efficiency and consumer welfare in second place to the objective of increasing the number of visible competitors in the market.

Two examples are provided in the Bulletin to explain why economies of scale and scope might count against an alleged predator in this stage of the Bureau's analysis. First, it is suggested that large scale projects may require time-consuming plant construction that goes well beyond the period required by the predator to recoup any losses incurred from its predatory behaviour. However, if the new plant is more efficient than the predator's plant at a given level of output using average prices over the predation and post-predation time periods, the manner in which construction or start up costs are accounted for should not matter. The more efficient plant should be built if it can produce at costs below that average price. If up-front accounting costs do matter, this arguably reflects more on imperfections in financial markets and accounting techniques than on possible market failure through predatory pricing.

The Bulletin also suggests that the entry may not be effective because of difficulties in overcoming brand loyalty. Arguably, brand loyalties have nothing to do with economies of scale and scope; rather, they represent imperfections of consumer information or simple consumer unpredictability or irrationality on the demand side of the market as opposed to the supply side (which is germane to predatory pricing).

Finally, several other factors are mentioned as possible impediments to effective entry including institutional (patent, tariff or regulatory) barriers, established contractual arrangements of incumbent firms, and control over inputs by incumbent firms. The Bulletin also mentions that a firm with market power might signal to potential competitors that the market is unprofitable by pricing conduct, thus discouraging interest in the market.

In the event that this first stage analysis reveals "a potential danger of effective predation" the Bureau would proceed to the second stage which involves an examination of price-cost relationships. The Bulletin emphasizes that no single price-cost test or criterion would be employed. In a restatement of the jurisprudence

with respect to unreasonably low prices, the Bulletin suggests that whether certain prices are predatory depends on factors such as the duration of the period in which the low prices are maintained, whether they are adopted unilaterally or as a response to pricing policies of competing firms and the underlying intent of the alleged predator. Three general rules of thumb (again derived from the jurisprudence) are presented. First, a price at or above the average total cost of the alleged predator is unlikely to be regarded as predatory. Second, a price below the average variable costs of the predator is likely to be treated as predatory, unless there is clear justification. And third, a price below the alleged predator's average total cost but not lower than its average variable cost may or may not be treated as predatory depending on the surrounding circumstances.

Circumstances proposed for evaluating prices in this third or grey area include the intent of the pricing policy, the costs and financial weakness or strength of the target firm(s), the feasibility of re-entry of the market indicated by the Stage 1 analysis, the existence of excess capacity, and general demand conditions prevailing in the market.

In adopting this modified form of a variable cost threshold for anti-competitive prices, the Bureau has unfortunately provided only thin guidance to industry on how to determine variable costs. The practical steps for determining these costs have also been left unclear since it would appear that the only manner in which the Bureau could obtain useful evidence of the alleged predator's variable costs would be through the exercise of formal investigatory powers following the initiation of a formal predatory pricing inquiry under the *Competition Act* rather than in the course of a pre-inquiry screening analysis.

The Bulletin notes that variable costs include costs that may be varied with levels of output. With multi-product firms, of course, the exercise of identifying direct and indirect variable costs with particular product lines and output changes has proven to be a very difficult and generally arbitrary exercise. No specific guidance is provided on the appropriate principles of common or joint cost allocation. The Bulletin offers no guidance with respect to the period of time over which the variability of particular input costs with levels are to be determined. Over a sufficiently longer period of time, of course, costs are variable. Needless to say, no conventional cost-accounting framework provides a guarantee that all costs can readily be causally related to variation in a particular product line's output, even though all budgetted costs vary to a degree with the budgetted revenues of a firm.

The Bulletin does indirectly suggest that fixed costs include costs associated with investment in plant and machinery and fixed assets. On the other hand, the Bulletin suggests that "use-related plant depreciation" is a variable cost. It is hard to see the difference. Moreover, many firms' physical facilities and machinery can be incremented easily within the eighteen month period established by the Bulletin for assessing likely effectiveness of entry. Such plant investment may readily be traced to specific product lines or addition of volumes produced in existing product lines. Are these costs fixed or variable?

To further cloud the picture, the Bulletin suggests that its cost analysis would also be based on "reasonably anticipated rather than actual variable costs". The question arises then as to whether the Bureau, for whatever timeframe it selects to analyze the predatory behaviour, might unilaterally impose adjustments to the existing or recorded cost structure of the alleged predator taking into account, for example, inflation and increased excess capacity caused by a loss of market share from successful entry by the alleged victim of its pricing conduct, or, alternatively, whether the Bureau might cost assets at their current replacement cost as opposed to their recorded historical and depreciated cost.

Finally, the Bureau suggests that its price cost analysis need not be restricted to a static analysis and may take into account the possible future cost structure of incumbent firms if additional plant capacity is built in response to entry by the alleged victim of predatory pricing. Consequently, the Bulletin suggests that the timing of plant increments in relation to new entry would be a relevant consideration. The application of hypothetical costs from yet to be built or newly on stream capacity increments,

particularly where production technology is changing, may further cloud the price-cost analysis. This, in turn, will further reduce the ability of business planners to anticipate the reaction of the Bureau to low pricing conduct should a matter reach Stage 2 of the Bureau's preliminary analysis. *J.F.B.*

WETSTON'S FIRST SIX MONTHS

Howard Wetston has been the Director under the *Competition Act* for just over six months now. This period has been a time of changing emphasis and consolidation.

With respect to changed emphasis, the Bureau appears to have adopted a more aggressive enforcement philosophy. This applies particularly to the non-merger area and particularly, again, to the criminal law provisions of the *Act*. This apparent shift may, in part, be due to a general decline in merger activity as a result of the slowdown in the economy. However, it probably also reflects Mr. Wetston's views. He has, on more than one occasion, made it clear that he intends to aggressively enforce the criminal provisions of the *Act*, particularly the conspiracy provisions.

The first six months demonstrates that commitment to conspiracy enforcement. There have been two major prosecutions commenced during that time. One involved the flour milling industry, and the second involves pharmacists in the province of Quebec. In the latter case, a number of individuals have been charged. The Crown is insisting that it intends to prosecute individuals, whereas in the past, charges against individuals rarely proceeded to trial. There have been rumors of settlement of the flour milling case but as yet nothing has materialized. In addition, the *Canadian Competition Policy Record* understands that charges are close to being laid in two other major conspiracy cases. In both of them, negotiations are underway to resolve the matters without trial. One of these cases involves the Freight Forwarding inquiry, which produced important precedential court decisions with respect to the search provisions of the *Act*. The other case involves the wire and cable industry in the province of British Columbia.

In addition to these cases, the Director has also commenced major inquiries in the ready-mix industry in Ontario and the compressed gas business in a number of provinces. The latter case has been the subject of applications challenging the search warrants in Ontario.

Bureau officers were quoted at a conference of Corporate Counsel in Quebec City that they were finding evidence of widespread conspiratorial activity in some of the inquiries they are conducting. They indicated further that they were surprised by the kind of evidence they were finding. They thought industry had become more sophisticated than to keep detailed records of potential anti-competitive activity.

All of this enforcement activity indicates an increased willingness and desire to pursue criminal activities both at the enquiry stage and, undoubtedly, at the penalty stage as well.

There also appears to be a greater willingness to test the civil provisions of the legislation before the Competition Tribunal. Although no new cases have been filed during Mr. Wetston's first six months, it is understood that a number of applications are being prepared for submission to the Tribunal. The *Chrysler* decision, in particular, appears to have emboldened the Director and his staff to pursue more refusal to deal cases.

With respect to mergers, although no new merger cases have been filed with the Tribunal, the Director has been active during the period and has recently indicated his concern about the cooperation he is receiving from the private sector in the enforcement of these provisions. In particular, he is concerned that a trend is developing against informing his office, in a timely way, about mergers which have anti-competitive effect, but fall below the prenotification thresholds. In these instances he has warned industry that he will move swiftly under the *Act* to seek injunctive or other relief if he believes the case warrants it. He has also indicated that he is becoming frustrated with the failure of some parties to co-operate in providing his office with information. In these cases, he has raised the possibility of using the compulsory investigative powers under the *Act*. To date the Director's office has not resorted to the use of these powers in merger cases, but instead, has relied on the cooperation

of the private sector. A move to the use of compulsory powers would greatly complicate and formalize the merger review process in Canada. On the other hand, it would apply a standard used in the United States, where it is not uncommon to receive massive document requests in merger reviews.

The first six months have not been without difficulties for Mr. Wetston. First, the decision of the Quebec Superior Court in the *Couture* case has thrown into question the validity of the Competition Tribunal and the merger provisions of the legislation.

In another unsettling result, the Supreme Court of Canada decision in the *Thomson Newspaper* case provides anything but certainty with respect to the use of the subpoena powers under the new legislation. Although the government won the case, the decision is so unclear that Thomson Newspaper has asked for a re-hearing before the Supreme Court. In addition, the case leaves open many avenues to legal challenge in the future. If the use of this section becomes encumbered by court action, it may become difficult to use, particularly in merger review cases where it would be the most likely investigative tool.

The Director's office has also been busy over the past six months in preparing guidelines on important enforcement sections of the *Act*. In particular, the Director has released a draft guideline on the predatory pricing provisions of the legislation. He is nearing the stage where price discrimination guidelines will be released for consultation. He is also about to commence consultations on the merger guidelines. It is understood that a draft will be ready some time in June. The development of these guidelines is a significant accomplishment. Whether they will prove to be valuable tools to antitrust counsellors depends on the outcome of the consultations.

In summary, Mr. Wetston's first six months have been very demanding, demonstrating the great responsibility and difficulties associated with the Director's office. If any important shift is discernable during the first six months, the most important appears to be a decidedly more aggressive enforcement stance by the Director's office. This is evident in discussions with officers in the Bureau of Competition Policy as they obviously feel they are receiving encouragement to become more adventuresome in pursuing inquiries under the legislation. Perhaps the slowdown in major merger activity has allowed this shift to develop or to make it more apparent. Overall, the Director has taken on major tasks during his first six months which will have important consequences for Canadian business for some time to come. *L.A.W.H.*

CANADIAN COMPETITION POLICY RECORD

MERGER EXAMINATIONS UNDER THE COMPETITION ACT
STATISTICAL SUMMARY

	1986-87[1]	1987-88	1988-89	1989-90	1990-91[2]
MERGER EXAMINATIONS COMMENCED[3]	40	148	191	219	44
EXAMINATIONS CONCLUDED					
Concluded as posing no issue under the Act[4]	17	120	166	204	35
Concluded with Monitoring only[5]	5	7	10	13	–
Concluded with pre-closing restructuring[6]	–	2	1	–	–
Concluded with post-closing restructuring[7]	1	2	3	1	–
Concluded with Consent Order	–	–	–	3	–
Parties abandoned proposed merger in whole or in part as a result of Director's position	3	2	2	2	1
TOTAL EXAMINATIONS CONCLUDED	26	133	182	223	36
EXAMINATIONS ONGOING AT END OF PERIOD	14	25	32	31	39
INTENT TO FILE APPLICATION ANNOUNCED	–	–	2	–	–
APPLICATIONS BEFORE TRIBUNAL					
Concluded[8]	1	–	2	3	–
Ongoing	–	2	2	1	1

Notes

1 Statistics commenced on June 19, 1986.
2 Statistics to June 21, 1990.
3 Two or more days of review. Includes 284 prenotifications since July 15, 1987 of which:
- in short-form (s. 121); 1987/88 26; 1988/89 - 50; 1989/90 - 89; 1990/91 11.
- in long-form (s. 122); 1987/88 21; 1988/89 - 42; 1889/90 - 20; 1990/91 - 6.

4 Includes:
174 Advance Ruling Certificates
1986/87 - 2; 1987/88 26; 1988/89 59; 1989/90 - 72; 1990/91 15.
22 Advisory Opinions -
1986/87 3; 1987/88 10; 1988/89 - 6; 1989/90 - 23; 1990/91 0.
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.