CANADIAN COMPETITION LAW DEVELOPMENTS

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CONSPIRACY SECTION RULED UNCONSTITUTIONAL

On September 5, 1990, Madam Justice Elizabeth Roscoe of the Trial Division of the Supreme Court of Nova Scotia, ruled that section 45 of the *Competition Act* is unconstitutional.

The case arose from charges brought in Nova Scotia against twelve pharmaceutical firms alleging that they had illegally conspired between January, 1974 and June, 1986 to lessen competition in the sale and provision of prescription drugs and dispensing services. The defendants brought a motion to have section 45 ruled invalid as being contrary to ss. 7, 11(a), and 11(d) of the *Canadian Charter of Rights and Freedoms*.

The first issue raised by the defendants is that the *mens rea* required to obtain a conviction under the conspiracy provisions of the *Competition Act* are contrary to ss. 7 and 11(d) of the *Charter*.

Madam Justice Roscoe first considered what the law is with respect to *mens rea* under the section. She reviewed the lengthy series of cases dealing with *mens rea*, including the most recent Supreme Court decisions in *Aetna Insurance* and *Atlantic Sugar*. She also considered the amendment to the *Act* in 1986 which attempted to clarify the intent element required for conviction.

In the final analysis Madam Justice Roscoe found that the statement by Mr. Justice Kerwin in the *Container Materials* case, [1942] 1 D.L.R. 529 S.C.C. is a correct statement of the law. She stated:

> It was argued that it was not sufficient for the Crown to show an agreement or arrangement, the effect of which would be unduly to prevent or lessen competition, but that the agreement or arrangement must have been intended by the accused to have that effect. This is not the meaning of the enactment upon which the count was based. Mens rea is undoubtedly necessary but that requirement was met in these prosecutions when it was shown that the appellants intended to enter, and did enter, into the very arrangement found to exist.

Madam Justice Roscoe found that the subsequent Supreme Court decisions did not directly overrule this statement and, therefore, that single *mens rea* is all that is required. She stated:

> Although, as indicated above, the majority decision in Atlantic Sugar is far from precise, I have come to the conclusion, based on their approval of Aetna, that they restored the acquittal of the Trial Judge because the Crown failed to prove that the tacit agreement had the result of lessening competition unduly. As stated above, if the intention of the Court was to reverse its decision in Container Materials, which does, in fact, provide a clear statement, with respect to the requirement of mens rea, it would have said so.
>
> With respect, then, to the interpretation of s.32(1)(c), I agree with the Crown's submission that it is only necessary to prove that the accused intended to enter into an agreement, the effects of which, if carried out, would be to lessen competition unduly.

The court then went on to consider the effect of this statement of the law from the viewpoint of s.7 of the *Charter*. The defence argued that if only single intent is required, then the section violates s. 7 which states:

> 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 principles of fundamental justice.

The defendants also relied on s. 11(d) of the *Charter* which states:

> Any person charged with an offence has the right...
>
> (d) to be presumed innocent until proven guilty according to law in a fair and public hearing by independent and impartial tribunal;

The defence argued that in a criminal offence, the Crown must prove *mens rea* for each element

of the *actus reus*. Madam Justice Roscoe found that the *actus reus* of the conspiracy offence contained two elements. First, an agreement to which an accused was party, and second, that the agreement, if implemented, would have the effect of limiting competition unduly in the sale of a product.

Madam Justice Roscoe reviewed the Supreme Court decisions in *R.* v. *Vaillancourt*, [1987] 2 S.C.R. 636 and Reference Re Section 94(2) of the *Motor Vehicle Act*, (1985), 23 C.C.C. (3b) 289. In particular, she quoted from Mr. Justice Lamer in the *Vaillancourt* case where he stated:

> It may well be that, as a general rule, the principles of fundamental justice require proof of a subjective mens rea with respect to the prohibited act, in order to avoid punishing the 'morally innocent'.

The Crown argued that the *Vaillancourt* case was not applicable because the conspiracy offence does not carry the stigma associated with murder and that offences under the *Act* are not really crimes. Madam Justice Roscoe did not accept this argument. In conclusion, the Court found:

> I find that s.32(1)(c) creates a truly criminal offence and I agree with the defence argument that an accused person could be convicted of an offence, under s.32(1)(c), and be liable to imprisonment for five years, even if the anti-competitive effect of the agreement he entered into was completely unintended and unforeseen and, in fact, even if it were shown that his intention was to increase competition. Because it does not require a subjective mens rea, it allows, in my opinion, the possibility of conviction of the "morally innocent". The section, therefore, fails the acid test in Vaillancourt. It violates the principles of fundamental justice and is contrary to s.7 of the *Charter*. The second issue raised by the defence was that the conspiracy section is contrary to the *Charter* because it is too vague for a criminal offence. They argued that the word "unduly" violates the accused's rights in that it gives insufficient notice of the legal standards of the offence and, therefore, offends section 7 of the *Charter*. Also, once a defendant is charged, he has insufficient notice of the legal elements of the crime he supposedly committed, therefore denying him the right to make a full answer in defence and to have a fair trial, rights which are guaranteed in subsections 11(a) and (d) of the *Charter*.

The defence argued that the law with respect to vagueness was decided by the Supreme Court in *Reference Re ss. 193 and 194.1(1)(c) of the Criminal Code*. This is a decision of the Supreme Court of Canada dated May 31, 1990, as yet unreported. In that case Chief Justice Dickson stated:

> I agree with Lamer J. that vagueness should be recognized as contrary to the principles of fundamental justice. Certainly in the criminal context where a person's liberty is at stake, it is imperative that persons be capable of knowing in advance with a high degree of certainty what conduct is prohibited and what is not. It would be contrary to the basic principles of our legal system to allow individuals to be imprisoned for transgression of a vague law.

The court then reviewed the various decisions and meaning which has been given to the word "unduly" since it was first enacted in 1889.

The court also reviewed the 1976 amendment to the conspiracy section which stated that it was not necessary to prove a virtual elimination of the competition in order to obtain a conviction. The court stated:

> As indicated in Reference Re s.193, *supra* the test, for determining whether or not a law is vague, as stated by Chief Justice Dickson and quoted earlier, is whether a person is capable of knowing, in advance, with a high degree of certainty, what conduct is prohibited and what is not. In my opinion, the virtual monopoly definition, of Mr. Justice Cartwright, provided some degree of certainty, but Parliament has eliminated that definition. The Crown says it is a question of degree, and that evidence at the trial would prove that the degree of lessening competition was so extensive that it would be shown to be undue, but this does not answer the "knowing in advance" portion of the Reference Re s.193 test.

The Nova Scotia Court therefore found that the section did not provide the degree of certainty necessary, was too vague, and contrary to the *Charter*.

The court considered the defence argument with respect to full answer and defence and a fair trial, i.e., the s. 11 arguments under the *Charter*. Having found that the basic section was void for vagueness, Madam Justice Roscoe had no difficulty in concluding that it would not be possible for the Crown to provide sufficient information in an indictment in order to ensure a full and fair trial. She then found that the section was contrary to these provisions of the *Charter* as well.

The Nova Scotia decision also reviewed whether section 1 of the *Charter* could be used to sustain the provisions. That section states:

> The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

In reviewing the cases considering s.1, the Nova Scotia Court quoted, in particular, from a decision of Mr. Justice Graham of the Ontario Court of Appeal in *R. v. Seaboyer* (1987), 20 O.A.C. 345 (O.A.C.) where he stated:

> I think it would be a most unusual result that a law which offends s.7 in that it deprives an accused person of making full answer and defence could ever be found 'to be demonstrably justified in a free and democratic society'.
>
> In conclusion, Madam Justice Roscoe stated:
>
> This is not one of the rare or exceptional cases such as a war or an epidemic where a s.7 violation can be justified under section 1. Nor is the vagueness and uncertainty, contained in this section, a limitation prescribed by law.

Having come to these conclusions, the Nova Scotia Court then struck down the present sections 45(1)(c) and 46 as being contrary to the *Charter*. She also quashed the indictment in its entirety even though it dealt with events which took place prior to the passage of the *Charter* in 1982.

This decision obviously has the most profound potential implications for competition law in this country. It has ruled as unconstitutional the first section of the *Act* which was passed in 1889. The argument made by the defence in this case is also being raised by the defence in a case involving pharmacists in Québec. The motion of the defence in that case will be heard in October of this year. The Crown, needless to say, has launched an appeal of the case in Nova Scotia.

The case raises a number of interesting issues for the government. For example, should it now refer the whole issue to the Supreme Court of Canada to avoid the length of time it will inevitably take to have the issue ultimately resolved by the Supreme Court? Should the government start preparing amendments to the law now? Should the government, in fact, introduce amendments to the law now? If the government were to amend the law, what should it contain? The most likely result would be an attempt to enact a *per se* conspiracy offence for certain practices such as price fixing, market sharing, boycotts, etc. If the government constitutionally could move in that direction, then the end result might be a law which is significantly tougher than the present conspiracy provisions. In that sense, the private sector might have won the battle but lost the war in arguing these matters before the courts.

These recent developments have to count as among the most significant in the entire history of competition law in this country. They once more demonstrate the difficulty of implementing these laws in Canada. They also will test the will and strength of commitment of the government and federal political parties to competition policy in Canada. *L.A.W.H.*

PALM DAIRIES SAGA CONTINUES

On August 28, 1990, Howard Wetston, the Director of Investigation and Research, announced that he would not challenge the acquisition by Beatrice Foods Ltd. of the Palm Dairies Limited processing facilities in Thunder Bay, Ontario. Beatrice had acquired the facilities as part of the sale of all of the Palm Dairies' assets in Alberta, Saskatchewan, and Ontario. The Director had previously turned down the proposed acquisition of these facilities by co-ops operating in western Canada. His refusal to allow the acquisition by the western dairies had allowed Beatrice to gain a significant position in western Canada for the first time. However, the acquisition by Beatrice of the Thunder Bay facility had raised serious competition issues for the Director.

While allowing the Thunder Bay acquisition to proceed, the Director indicated that he intended to closely monitor the effect of the acquisition during the three-year limitation period in the *Competition Act*. The acquisition of the Thunder Bay facility removed a competitor from that market, but the Director was of the view that viable new entry was possible. He also believed that the Palm Dairies facility might not be a viable operation. For that reason, he believed that new entry into Thunder Bay would occur through the establishment of a new processing facility or through distribution from other existing operations in Thunder Bay rather than through the acquisition of the Palm Dairies facility by another purchaser.

The Director indicated that the acquisition by Beatrice of the Palm Dairies business, coupled

with recent transactions in the dairy business, showed that the structure of the Canadian dairy industry is changing substantially. He indicated that these changes will likely result in substantial efficiency gains which should benefit consumers and others. What Mr. Wetston is saying is that there has been considerable consolidation and concentration in the dairy business in Canada in the last few years, but that these changes should produce efficiency results. *L.A.W.H.*

XEROX UPDATE: CONSTITUTIONAL ARGUMENTS HEARD

In the course of its hearing on the Director's application for orders against Xerox Canada Inc. for refusal to supply (see *CCPR*, June 1990), the Competition Tribunal heard application by Xerox to terminate the proceeding on the basis that the refusal to supply provision of the *Act* (s. 75) was *ultra vires* Parliament.

Xerox's constitutional argument is based on the contention that for s. 75 to validly form part of the *Competition Act*, and thus be supportable by the federal Trade and Commerce power, the Tribunal must only be capable of issuing a remedial order under this section if the Tribunal has first concluded that the practice of refusing supplies which the Director has complained of has affected competition adversely. In other words, Xerox contends that, if the Tribunal can make an order under s. 75 whether or not the subject practice has been found to have an effect on competition, then the section is unconstitutional as it must be directed at the regulation of individual contractual relations rather than establishing general rules for competitive behaviour.

In his argument, counsel for the Director of Investigation and Research urged the Tribunal to adopt the approach of determining the constitutionality of individual provisions of the *Competition Act* taken by the Supreme Court of Canada in the *City National Leasing* case (see *CCPR* June 1990). The Supreme Court's approach considers the following factors:

1. The legislation must be part of a general regulatory scheme;
2. The scheme must be monitored by the continuing oversight of a regulatory agency;
3. The legislation must be concerned with the economy as a whole rather than with a particular industry;
4. The legislation ought to be such that the provinces would be constitutionally incapable of enacting it; and
5. Failure to include one or more provinces or localities in the scheme which jeopardize the successful operation of that scheme in other parts of the country.

Specific points raised by the argument of the Director include the following:

1. Section 75 is no more intrusive of provincial civil rights power than is the civil remedies section upheld by the Supreme Court in *City National Leasing*. All competition law remedies must affect exercise of property and civil rights.
2. The refusal to supply section is rationally connected to the scheme of the *Act* which is the promotion of competition. An order can only be made if there has been a substantial effect on the business refused suppliers or the business is prevented from carrying on: supplies must not be available elsewhere in unusual trade terms, or adequate supplies are not available because of insufficient competition among suppliers. The customer must be willing and able to meet unusual trade terms. Finally, the product must otherwise be an ample supply. These conditions, it is argued, establish that a remedy is only available where the power is exercised to harm a particular business. In short the conditions define a course of conduct found by Parliament to be adverse to competition.
3. Many other sections of the *Competition Act* do not require a finding that competition has been reduced or related only to intent rather then the effect of practice. Many of these sections have been found by the courts to be valid enactments of Parliament.
4. The evidence in this case indicated that the application was directed to preserving competition in the servicing of photocopiers, established that such competition would benefit customers, and that practice complained of was national in scope.
5. The discretion of the Tribunal not to issue an order even though all the conditions of this

section have been established is its assurance that the section will be enforced consistent with the scheme and objectives of the *Competition Act*.

As at the date of writing the Tribunal had not issued its decision with respect to either of the institutional application of Xerox or the Director's application for remedial order against Xerox Canada. *J.F.B.*

FEDERAL COURT CLARIFIES COMPETITION TRIBUNAL'S PROCEDURAL AND CONTEMPT POWERS

The Federal Court of Appeal in a July 10, 1990 judgment on an appeal by Chrysler Canada Ltd. has ruled that the Competition Tribunal does not have the power to punish for contempt those who may have breached final orders of the Tribunal.

The appeal arose from proceedings initiated before the Competition Tribunal by the Director of Investigation and Research for an order punishing Chrysler for contempt. The Director alleged that Chrysler was in breach of an earlier, October 13, 1989 order made under s. 75 of the *Competition Act* in connection with a "refusal to deal" complaint against Chrysler. The order required Chrysler to accept a Québec distributor of auto parts as a customer for the supply of Chrysler parts on trade terms usual and customary to its relationship with that distributor as those terms existed prior to August 1986. Chrysler objected to the jurisdiction of the Tribunal to enforce the order in the manner proposed. The Chairman of the Tribunal heard that objection as a preliminary matter and concluded that the Tribunal did have the necessary jurisdiction.

The nub of the dispute was whether the *Competition Tribunal Act* clearly conferred on the Tribunal the power to enforce final orders made under Part VIII of the *Competition Act* by means of contempt proceedings. There was no dispute that the Tribunal was in law an inferior tribunal which did not possess any inherent authority to punish for contempt in the circumstances unless the statutory provisions governing the Tribunal conferred this authority.

The Federal Court of Appeal's judgment is interesting both in the approach taken to statutory interpretation and the light which is shed on the procedural powers of statutory bodies like the Tribunal. Judicial reluctance to permit the power of statutory bodies to be broadened by implication constitutes an important check on the exercise of executive authority. The jurisprudence governing the power of inferior tribunals to punish for contempt has recognized the need in the case of some inferior tribunals to punish for contempt committed in the very face of the tribunal. Actions committed elsewhere, that is, out of the face of the inferior tribunal, are beyond the direct power of the tribunal to punish for contempt although there have been cases where a superior court has lent aid to the inferior body through the exercise of the superior court's inherent jurisdiction to punish for contempt.

In the *Chrysler* case, the Federal Court of Appeal determined that it would require clear statutory language to indicate an intention by Parliament to confer a broader power on the Tribunal to punish for contempt. While the *Competition Tribunal Act* did expressly refer to the jurisdiction of the Tribunal to make contempt orders, the Federal Court of Appeal concluded that that power was in essence restricted to enforcing procedural orders made by the Tribunal in the course of hearing and determining applications under Part VIII of the *Competition Act* and did not extend to the enforcement of the final orders made under Part VIII. This conclusion is of interest because it suggests that statutory bodies like the Tribunal may have the authority to enforce procedural orders by way of contempt in cases where the non-compliance has occurred outside the face of the statutory body.

The *Competition Tribunal Act* establishes the Tribunal as a court of record and confers on the Tribunal jurisdiction to hear and determine all applications made under Part VIII of the *Competition Act* and "any matters related thereto". The *Act* goes on to confer on the Tribunal "all such powers, rights and privileges as are vested in a superior court of record" with respect to the attendance, swearing and examination of witnesses, the production and inspection of documents, "the enforcement of its orders and other matters necessary or proper for the due

exercise of its jurisdiction". Although this language in the *Act* does not deal with the issue of contempt, the *Act* does contain a limitation on the Tribunal's power to punish for contempt. That limitation is that no person is to be punished for contempt of the Tribunal unless a judicial member of the Tribunal is of the opinion that the finding of contempt and the punishment are appropriate in the circumstances. This language clearly suggests that the more general jurisdictional language in the *Act* was intended to confer the power to punish for contempt.

Apart from the language which restricts the making of a contempt order to circumstances where a judicial member has passed judgment on the appropriateness of the order, the general language conferring jurisdiction and powers on the Tribunal is similar to that found in other statutes such as the *National Energy Board Act*. The Federal Court of Appeal's reasoning as to the scope of such jurisdiction and powers would seem, therefore, to be equally applicable to these other statutory bodies.

The Federal Court of Appeal determined that the enforcement of final orders by way of contempt proceedings did not fall within the catch-all "any matters related thereto" language found in the provision of the *Competition Tribunal Act* conferring jurisdiction on the Tribunal. The court determined that this catch-all language referred back to the hearing and determination of applications and did not encompass the enforcement of the final orders made as a consequence of the determination of applications under Part VIII of the *Competition Act*.

The Court of Appeal also construed the language granting the Tribunal all the powers that are vested in a superior court of record to confer, in essence, the broad procedural powers necessary to exercise the Tribunal's jurisdiction. That jurisdiction was confined to the hearing and determination of applications under Part VIII of the *Competition Act*. As a result, although the enforcement of orders is expressly included in the powers conferred on the Tribunal, the court concluded that the powers granted were for the purpose of exercising the Tribunal's jurisdiction and did not extend the Tribunal's substantive jurisdiction. In that regard, the court noted an earlier Federal Court of Appeal Judgment on a reference from the National Energy Board which determined that similar language in the *National Energy Board Act* did not confer substantive jurisdiction but instead conferred "evidence gathering powers". In the *National Energy Board* case, the court was asked to rule on whether or not the National Energy Board had the authority to award costs to parties as a matter "necessary or proper for the due exercise of its jurisdiction". Superior courts have long exercised the jurisdiction to award costs and have characterized that jurisdiction as "inherent". The Court of Appeal, on the *National Energy Board* reference, confirmed that the Board had no inherent powers and that the general language conferring powers on the Board did not extend the Board's substantive jurisdiction such that the Board could award costs.

In the *Chrysler* case, the court stated that the power to enforce its orders referred only to the enforcement "of the many orders that the Tribunal may make in order to ensure that the applications made under Part VIII of the *Competition Act* are disposed of in a fair and rational manner. The enforcement of these orders is certainly necessary or proper for the due exercise of the Tribunal's jurisdiction." In saying this, the court appears to be suggesting that the Tribunal may have the power to enforce a procedural order by way of contempt even where the non-compliance with the procedural order has occurred out of the face of the Tribunal. The matter is not, however, entirely free from doubt since other comments in the Judgment appear to turn on a broad distinction between the power to punish for contempt in the face and contempt out of the face of the Tribunal.

Those comments were made by the court in connection with the limitation on the power of the Tribunal to make a contempt order only where a judicial member has passed judgment on the appropriateness of the order. The court noted that this provision does not contain any language to indicate that the extent of the contempt power is not restricted to contempt in the face. Since Parliament specifically addressed its mind to the issue of contempt when inserting this provision, the failure to clearly indicate power to punish for contempt out of the face of the Tribunal was taken by the court not to have been an oversight.

If the Tribunal has the power to enforce its procedural orders but cannot do so by means of contempt proceedings where the non-compliance with the procedural order takes place out of the face of the Tribunal, it is not clear how in those circumstances the Tribunal could enforce its procedural orders. Contempt proceedings are the obvious and traditional means of securing compliance with orders. This difficulty does not arise if the court's comments with respect to the in-the-face/out-of-the-face distinction are confined to the context of the judgment, namely, a question about the power of the Tribunal to enforce its final orders. *N.J.S.*

CONSTITUTIONAL ARGUMENTS HEARD IN NUTRASWEET CASE

In a hearing commencing July 10, 1990, the Competition Tribunal heard arguments relating to NutraSweet's application that the Tribunal lacked jurisdiction to hear the Director's application for orders relating to alleged abuse of dominant position (see March and June 1990 *CCPR*s).

Two lines of argument brought by NutraSweet parallel those which found favour with the Québec Superior Court in the *Couture* case (see June 1990 *CCPR*). These arguments were that the structure of appointing, removing and reappointing lay members to the Tribunal offended a constitutional requirement for judicial independence on the part of the Tribunal as did appointing as a lay member a person who was also a member of a body (the Restrictive Trades Practices Commission (RTPC)) which had the statutory power to investigate.

In addition, NutraSweet argued that the Tribunal performs the functions of the Superior Courts of provinces as reserved by ss. 96 - 100 of the *Constitution Act* and that accordingly the Tribunal was *ultra vires* Parliament to establish. In support of its s. 96 argument, NutraSweet contended that the Tribunal's powers broadly conform to those of the s. 96 court especially with respect to the powers to grant injunctive relief and to enforce its orders. NutraSweet also argued that the Tribunal's functions were exclusively adjudicative and that the Tribunal was required to act judicially.

Counsel for the Attorney General and the Director of Investigation and Research argued that the performance of the judicial function alone does not provide any direction on the level of security of tenure or independence generally which the Tribunal's lay members must possess for the Tribunal to be structurally viable. As a result, counsel for the Attorney General and the Director examined the various bases upon which the appropriate level of independence might be determined.

First, it was argued that the judicial independence requirements of the *Charter of Rights and Freedoms* are not applicable to the matters on which the Tribunal may adjudicate under the *Competition Act*. Next, it was submitted that neither the *Bill of Rights* nor the *Constitution Act* present a specific standard for security of tenure. It was noted that questions of law in *Competition Act* matters must be determined by judicial members of the Tribunal alone. Finally, it was argued that the prevailing common and constitutional law standard on impartiality to be applied to lay members is essentially found in the rules of administrative law barring decisions by persons who present a reasonable apprehension of bias in a particular case where the rules of natural justice apply to the decision-maker. In this regard, counsel for the Attorney General on the Director noted that lay members are neither *ad hoc* appointees nor are given a particular advocacy role within the Tribunal. Moreover, they must take an oath of office which confirms their impartiality and their conduct is subject to judicial review in the event of absence of fairness or an apprehension of bias. Accordingly, the Attorney General's counsel concluded that the traditional principles for a judicial independence are not applicable to the work of the lay members of the Tribunal and that using administrative law principles, a constitutionally adequate level of impartiality is established in the structure of the Tribunal.

With respect to the appointment of a member of the RTPC to the Tribunal, counsel for the Attorney General contended that this matter was academic and irrelevant, since, in fact, the Tribunal member was neither involved in the work of the RTPC nor carrying out any investigative functions.

In response to the s. 96 arguments of NutraSweet, counsel for the Attorney General submitted that the *Constitution Act* does not prevent the creation of additional courts and that functions assigned the Tribunal under legislation did not amount to an encroachment of jurisdiction reserved to provincial superior courts by the *Constitution Act*. Specifically, counsel noted that questions of law were within the exclusive competence of judicial members of the Tribunal and that there was no ouster of the courts on such matters since appeal to the Federal Court of Appeal on such matters had been expressly provided. Finally, it was argued that that Tribunal was not a substitute for private litigation since it essentially adjudicated applications made by a public official to implement the public economic policy of the *Competition Act*. While remedies applied were analogous to civil remedies, the use of these remedies was necessary to effect the public purpose of the Competition Act. *J.F.B.*

MUTUAL FUNDS ORDERED TO DEAL WITH DISCOUNT BROKERS

On July 3, 1990, the Supreme Court of Ontario issued prohibition orders under the resale price maintenance provisions of the *Competition Act* prohibiting four mutual fund management corporations from refusing to deal with brokers and dealers who provided discount from their commission on the sale of mutual funds to their clients. The four mutual funds subject to the order are A.G.F. Management Limited, Mackenzie Financial Corporation, Noram Capital Management, Inc., and Templeton Management Limited. All of the respondents consented to the orders.

The orders prohibit the mutual funds from refusing to deal with discount brokers or from attempting to discourage brokers and other dealers from reducing their commissions or even advertising that they will reduce their commissions. The respondents also agreed to take positive steps to make it clear that mutual funds sold by them may be sold on a negotiated basis with respect to commissions.

In noting the consent orders, the Director, Mr. Wetston, stated:

> The resolution of these matters represents an expeditious and fair resolution of complaints made to the Director's office in a manner that makes it clear to the securities industry at large that conduct which inhibits the ability of discount brokers to compete in connection with the sale of securities of mutual funds is not acceptable under the Competition Act. *L.A.W.H.*

BARBED WIRE MERGER RESOLVED

On July 9, 1990, the Bureau of Competition Policy announced that no application to the Competition Tribunal would be brought with respect to the merger between two wire manufacturers, Tree Island Industries and Davis Wire Industries. According to the Bureau's press release, the decision was made after Tree Island and its parent company, Georgetown Industries, provided the Director of Investigation and Research with written undertakings to sell all of the shares that they directly or indirectly own in Davis Wire. Undertakings had been provided after the Director advised the parties that the merger was likely to prevent or lessen competition substantially. Tree Island and Georgetown acquired the shares of Davis Wire as a result of the liquidation of its former United States parent in December 1989. At the time of that acquisition, Tree Island and Georgetown entered into a hold separate agreement with the Bureau and in completion of this merger assessment.

Undertakings require that Davis Wire would be sold as a continuing business to a purchaser who intends to continue the manufacture and sale of wire and wire products. In the event of a sale, Davis Wire will continue to be run by an independent manager and will continue to be held separate and apart from the operations of Tree Island. *J.F.B.*

PREDATORY PRICING GUIDELINES UPDATE

The Bureau of Competition Policy has received some 30 responses (predominantly from law firms) to its request for comments on its draft Predatory Pricing Guidelines (see June, 1990 *CCPR*). Although no deadlines have been set, Bureau staff anticipate that a final version of the guidelines could be available by the end of 1990. *J.F.B.*

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	146	191	219	102
EXAMINATIONS CONCLUDED					
Concluded as posing no issue under the Act[4]	17	120	166	204	86
Concluded with Monitoring only[5]	5	7	10	13	7
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	94
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 September 20, 1990.
3 Two or more days of review. Includes 305 prenotifications since July 15, 1987 of which:
– in short-form (s. 121); 1987/88 - 44; 1988/89 50; 1989/90 - 89; 1990/91 - 29.
– in long-form (s. 122); 1987/88 - 21; 1988/89 42; 1889/90 - 20; 1990/91 10.
4 Includes:
198 Advance Ruling Certificates -
1986/87 - 2; 1987/88 - 26; 1988/89 - 59; 1989/90 - 72; 1990/91 39.
22 Advisory Opinions
1986/87 - 3; 1987/88 - 10; 1988/89 - 6; 1989/90 - 3; 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.