CANADIAN COMPETITION LAW DEVELOPMENTS

The articles in this section were written by Lawson A.W. Hunter, John F. Blakney, Nick J. Schultz and Deborah Barrington of Fraser & Beatty, Ottawa.

DRAFT MERGER GUIDELINES RELEASED

In November 1990, the Director of Investigation and Research, Mr. Howard Wetston, released comprehensive proposed Merger Enforcement Guidelines. A preliminary assessment of the draft Guidelines prepared by Lawson A.W. Hunter, Q.C. of Fraser & Beatty is contained in the *Comment & Analysis* section of this edition. Also in that section is a summary comparison prepared by William Rowley of MacMillan Binch of the draft Guidelines with the U.S. Department of Justice Merger Guidelines.

The Guidelines will not bind the Director and will not be determinative before the Competition Tribunal or the courts. They are not intended to represent a significant change in the current enforcement policy adopted by the Director. The Director will be conducting consultations on the draft Merger Guidelines with interested parties in the early part of 1991.

WETSTON FILES MERGER CASE

On November 29, 1990, Mr. Howard Wetston filed his first case as Director under the merger provisions of the *Competition Act*. The case involves the acquisition by Southam Inc. of certain newspapers in the Lower Mainland in British Columbia. The application seeks an order from the Tribunal requiring Southam to dispose of or not to acquire an interest in the businesses of publishing the *Vancouver Courier*, the *North Shore News*, the *Real Estate Weekly* and the proposed acquisition of Yellow Cedar Properties Ltd.

This transaction has been under review by the Bureau for almost a year. The transaction was not large enough to require prenotification, but was investigated by the Director nevertheless. It is understood that discussions have been contentious over much of the period of review. Since the application was filed, Southam has launched a challenge to the constitutional validity of the Competition Tribunal in the Ontario courts. It is seeking a stay of the hearing before the Tribunal until such time as the issues raised in its court challenge are resolved.

Southam has long had an interest in daily newspapers in the Lower Mainland in British Columbia as the publisher of the only two dailies, the *Vancouver Sun* and *The Province*.

The acquisitions involve community newspapers serving the same geographic area. Community newspapers tend to be, according to the application, "controlled-distribution publications". This means they are delivered free of charge to a particular target group in the community. There are more than thirty community newspapers distributed in the Lower Mainland in British Columbia. Southam's acquisitions resulted in their acquiring thirteen community newspapers including the two largest, the *Vancouver Courier* and the *North Shore News*. In addition to seeking the divestiture of the businesses of these two newspapers, the application also seeks the disposal of Southam interests in the *Real Estate Weekly*.

The Director's concern with respect to competition relates to the market for newspaper advertising. Newspaper advertising consists of three categories: classified advertising, which appears in the classified section; display advertising, which appears on the normal pages of a newspaper; and insert or flyer advertising. The latter is inserted into the newspaper and circulated along with it in its normal distribution. Inserts or flyers are often distributed separately

from newspapers as well, usually by independent companies engaged in the distribution and, sometimes, the printing of such advertising materials. The Director has defined the relevant advertising market as the supply of newspaper retail advertising services. By so doing, he has excluded advertising which is undertaken through flyers distributed independently of the distribution of newspapers. Southam has vigorously contested this definition of the market as being inappropriate.

The Director argues: first, with respect to the *Vancouver Courier* merger, that competition will be substantially lessened in newspaper retail advertising services in the City of Vancouver. He alleges that Southam's market share after the merger would account for approximately 86.5 per cent of all advertising revenues in the Vancouver newspaper retail advertising market.

The Director's application analyzes whether there are acceptable substitutes in the market, and refers to other advertising vehicles such as television, radio, magazines, billboards and free-standing flyers. The application states:

> These alternate advertising vehicles are not included as products in the Vancouver Newspaper Retail Advertising Market because they are not acceptable substitutes for newspaper retail advertising services. A significant price increase in newspaper retail advertising services would not result in a significant shift to these products. Television and radio advertising, billboards and signage have limited information content and information retention value. Magazines and directories cannot be used for time-sensitive retail advertising messages. Specialty and foreign-language publications have limited readership. Classified advertising restricts the format in which an advertising message can be conveyed. Free-standing flyers are less attractive than flyer inserts as retail advertising because of the high desirability of distribution of flyers in a newspaper.

Perhaps the most contentious statement in this part of the application is the assertion that free-standing flyers are less attractive than flyers distributed with newspapers. In other parts of the country free-standing flyers often have wider circulation that newspaper flyer inserts.

With respect to the *North Shore News*, the Director's analysis is similar. It argues that the merger would substantially lessen competition in newspaper retail advertising in the North Shore of the Lower Mainland.

With respect to the *Real Estate Weekly* merger, the market definition is different from the other two cases. The Director alleges that the merger would lessen the competition substantially in the supply of print real estate advertising services in the Lower Mainland other than the North Shore, and in the North Shore. He alleges that as a result of the merger, Southam through the *Real Estate Weekly*, *The Province* and *The Vancouver Sun* would account for the most significant part of the market for the supply of print real estate advertising services in the Lower Mainland. The only distinction with respect to the North Shore is that there, the *North Shore News*, which would become a Southam publication, would account for substantially all of the advertising together with the *Real Estate Weekly*. The analysis of market definition is somewhat different for print real estate advertising as the Director alleges that the only alternative to print advertising available to realtors is cable television. He argues that cable has apparent capacity limitations and is not an adequate substitute.

Conclusion

In conclusion, the Director seeks to have Southam dispose of its interest in the three principal papers it was acquiring in the Lower Mainland. It appears that Southam will vigorously challenge the application. There is no question that the market definition issue will be significant in any hearing which is conducted. *L.A.W.H.*

XEROX CANADA ORDERED TO SUPPLY COPIER PARTS

On November 2, 1990, the Competition Tribunal concluded that the decision by Xerox Canada in 1988 to cut off supplies of Xerox copier parts to certain independent service organizations constitutes refusal to supply under section 75 of the *Competition Act*. The Tribunal therefore ordered Xerox Canada to accept the complainant, Exdos Corporation, as a customer for the supply of Xerox copier parts, manuals and related resources.

Exdos had been established in the early 1980s by a former Xerox Canada employee with the blessing of Xerox to assist Xerox in reducing its inventories of older, used copy machines. The Exdos business expanded to include newer model lines over the course of the 1980s and to include the purchase, refurbishing and sale/servicing of used Xerox copiers and the servicing of new copiers sold by Xerox. The Tribunal found that this business expansion did not constitute a breach of the original sales arrangement between Xerox and Exdos and that Xerox was well aware of the expanding business of Exdos and other Independent Service Organizations (ISO).

Based on customer evidence, the Tribunal found that the Canadian ISO sector in many cases offered better service and lower prices than established Xerox Canada servicing arrangements. The Tribunal found that Xerox was the largest Canadian copier supplier, that it occupied a dominant position in the high volume end of the market and that it held a very significant position in the medium volume sector. However, the Tribunal noted that Xerox charged higher prices for its parts than did competing photocopier manufacturers and that Xerox Canada's parts prices were not set in relation to competitive forces, but rather in relation to the landed Canadian price from the U.S. parent. The Tribunal also noted that the principal indication of competition in the sale of large photocopier machines was the vendor's success in having customers upgrade their equipment.

Xerox Canada's 1988 refusal to continue to supply parts to Exdos was based on policy established in 1987 by its U.S. parent of refusing to supply to ISOs for its then current (10 Series) photocopiers. The Tribunal found that this policy was designed to undercut ISO competition and that to be effective it required worldwide implementation.

The main issue in this case was the definition of "product market" since from this determination would easily flow whether competition was or was not sufficient in the relevant market. More specifically, the Tribunal considered whether section 75 applied where a product is proprietary and there is a single source of manufacture.

With respect to preliminary issues, the Tribunal concluded that there was no dispute that the parts in question were in adequate supply, that Exdos was willing and able to meet the usual trade terms and that Exdos was unable to obtain adequate supplies of these parts. The Tribunal also found that Exdos' business was substantially affected by its inability to obtain the parts since each of the three aspects of Exdos' overall business (purchase and sale of used photocopiers, refurbishing and servicing) required access to Xerox copier parts in order to survive.

The question facing the Tribunal in determining the product market was whether Xerox parts should be considered to be a relevant product market for the purposes of section 75. The Director had argued that (in the same fashion as was successful in the *Chrysler Canada* case) lack of technical substitutability between functionally similar parts and the presence of the purchasers and sellers be given activity over time to identify Xerox parts as a discrete product market. Xerox argued that the Tribunal should focus on the end user market, which in this case comprehended the supply of all photocopying activities.

The Tribunal concluded that as a matter of statutory interpretation, section 75 was not limited to final product markets and that, by implication from the *Act*'s reference to the promotion of an equitable opportunity for small and medium sized enterprises to participate in the Canadian economy, the *Competition Act* actually contemplated the preservation of competition in intermediate markets. The Tribunal also found comfort in U.S. and European Economic Community competition law cases which identified spare parts markets as separate product markets.

While Xerox contended that Xerox parts and equipment constituted a single vertical integrated market, the Tribunal found that this contention was not factually supported and was founded primarily upon theoretical arguments relating to industry efficiency. The Tribunal also noted that the market had previously not been entirely vertically integrated, since Xerox Canada had itself assisted in the establishment of Exdos, and that the vertical integration now being proposed was, in fact, motivated by an attempt to cut off

competition from ISOs. Accordingly, the Tribunal concluded that Xerox parts constituted a separate product market.

With respect to the constitutionality of section 75, the Tribunal first noted that the *City National Leasing* case had clearly established that the general scheme of the *Competition Act* was constitutionally valid under the federal trade and commerce power. However, in this case, Xerox Canada contended that orders made under section 75 must have a demonstrable effect on competition in order for section 75 to form a valid part of this scheme.

In approaching this contention, the Tribunal examined, in accordance with the principles of *City National Leasing*, the extent to which section 75 intrudes upon provincial jurisdiction relating to property and civil rights. In this regard, the Tribunal concluded that section 75 amounted to no greater interference with provincial jurisdiction than did the *Competition Act* civil remedy provision (section 31.1) upheld in *City National Leasing*, and that it certainly met the "rationally and functionally" tests which section 31.1 passed in that case. The Tribunal went on to state as follows:

> Section 75 can certainly be characterized as ancillary to the main purpose of the legislative scheme, as well as having an intimate connection thereto. The immediate effect of an Order to supply is to open up channels of distribution and free competitive forces hindered by lack of access to supplies. The section's objective is to promote or preserve competition. Section 75 operates within the same regulatory perimeters as do the other provisions of Part VI. Only the Director may bring an application to require that an order to supply be issued, the Director does so after investigation and in the context of the common enforcement policy of the Act with which he is charged.

The *Xerox Canada* case complements the Tribunal's decision in *Chrysler Canada* in establishing a clear role for section 75 of the *Competition Act* in regulating efforts by suppliers of parts for which there are no ready substitutes to control the development of secondary markets relating to the maintenance of the overall product which the part supplier manufacturers. As in the *Chrysler* case, the Tribunal has opted for reliance upon evidence of practical business realities over theoretical economic analysis in determining whether the requirements of section 75 have been met. Taking the two decisions together, manufacturers of assembled products are provided with considerable guidance, regarding the circumstances under which the efforts of suppliers to curtail the development or expansion of secondary service or parts suppliers may offend section 75 and result in a Tribunal order to resume supplies. *J.F.B.*

FREIGHT FORWARDERS CHARGED

On September 24, 1990, the Attorney General laid charges under the conspiracy provision of the *Competition Act* against five freight forwarders. They were alleged to have conspired to fix prices of freight forwarding services throughout most of Canada. The charges followed extensive inquiries and searches by the Director over the last few years. The original searches resulted in challenges to the new search provisions of the *Competition Act*. These issues ultimately went the Supreme Court of Canada and have been resolved in the Director's favour. Those decisions were reported previously in the *Canadian Competition Policy Record*.

Since the charges were laid, a hearing has been held before a trial court to set a date for the preliminary hearing. The Director sought to have a preliminary hearing date firmly set. Counsel for the accused argued that in light of the constitutional challenges to the conspiracy section, it would be inappropriate to proceed with the preliminary hearing at this time. The judge hearing the case in essence agreed with the respondents and set the matter over until early March 1991 for further hearing as to when to set a date for the preliminary hearing.

This may well indicate the sort of reaction the Director and Attorney General will face in all matters involving the conspiracy section over the next while until the Nova Scotia and Québec cases are resolved. *L.A.W.H.*

WETSTON DELIVERS MEREDITH LECTURE ON CONSPIRACY LAW

On November 30, 1990, Howard Wetston delivered the Meredith Memorial Lecture at McGill University on Current Issues in Canadian Conspiracy Law and Enforcement.

The lecture was timely in that the conspiracy provisions under the *Competition Act* are subject to serious constitutional challenge at the moment. Indeed, in the week following the Director's appearance, the Québec Superior Court struck down the basic conspiracy provision in section 45 for constitutional and *Charter* reasons. That decision, when coupled with the similar Nova Scotia decision involving pharmacists, will likely have a crippling effect on the Bureau's ability to move forward with section 45 cases.

The Director's lecture covered a wide sweep of the effects of collusion, the particular circumstances of the Canadian marketplace, and the Bureau's enforcement policies at the present time.

The overall tone of the Director's paper was one reflecting serious concern with collusive behaviour in the Canadian economy. In emphasizing this, Mr. Wetston stated:

> Unlike other conduct addressed by competition law, bid-rigging, price-fixing and related activities are widely recognized to be unambiguously harmful. There are no redeeming social benefits. In many cases, the conduct of conspirators amounts to a form of theft from the public on a multi-million dollar scale.

Mr. Wetston proceeded to analyze the economic harm resulting from collusive behaviour and concluded by noting that Robert Bork and Richard Posner, both sometime critics of U.S. antitrust policy, have always supported *per se* restrictions against collusive behaviour.

With respect to investigative issues, the Director indicated that conspiracy and bid-rigging activities historically have accounted for one-third of the Bureau's workload and that he anticipates this will continue into the 1990s. He stated:

> Despite increased efforts to promote awareness and understanding of the law, some Canadian firms continue to engage in conspiratorial behaviour. Seven major conspiracy investigations are currently underway in the Bureau relating to price-fixing or bid rigging-activities.

With respect to constitutional challenges, Mr. Wetston outlined his view of the Nova Scotia case. He concluded:

> Challenges such as (Pharmacists' Association of Nova Scotia) are not, however, wholly unexpected, given that the courts are continually expanding the jurisprudence pertaining to procedural rights protected by the *Charter*. These are significant issues in competition law cases. Furthermore, it is not surprising that corporations that possess the financial resources to test the limits of the law choose to do so.
>
> At this point in time, challenges such as this raise obstacles of a practical nature. They inevitably deflect effort and resources from the fundamental task of investigating such crimes. However, despite these matters, the Bureau is proceeding with investigations of collusive activities in Canada, and intends to continue referring evidence of offences to the Attorney General of Canada.

As mentioned above, the Québec Superior Court has also now struck down this section. Although the Director may wish to continue investigative activities, he should anticipate that every attempt to enforce the conspiracy provisions in section 45, whether through the laying of charges or the initiation of searches, will be met with resistance by those under investigation. In practical terms, it seems likely that the Bureau's ability to enforce the conspiracy provisions effectively will grind to a halt until such time as the two cases are overturned or the matter is ultimately resolved at the Supreme Court of Canada. If the provisions are ultimately found to be unconstitutional at the Supreme Court level, the government will have no choice but to seek legislative amendment.

Mr. Wetston spent a considerable part of his lecture discussing penalties under the conspiracy provisions. In particular, he commented that the maximum penalties available under these provisions have seldom been used by the courts. He stated that it can be argued that the fines imposed to date have functioned as little more than a licence fee. He also noted that few individuals have been convicted of competition offences.

> These penalties stand in sharp contrast to the heavy fines and prison sentences which are frequently awarded to individuals found guilty in

conspiracy and bid-rigging cases in the United States.

With respect to his philosophy on appropriate penalties, he stated:

> Greater compliance with antitrust laws will come about only when penalties are sufficient not only to appropriately punish collusive behaviour once detected, but also to deter other persons from engaging in such activities. Successful deterrence of such crimes requires that penalties be greater than the expected profits from successful collusion. If the penalties only equal the actual profits reaped by the defendants in individual cases, they will not be sufficient. We know that the crime of robbery would not be adequately deterred if convicted persons merely faced the prospect of having to return their stolen property to society.
>
> Collusion is also unlikely to be adequately deterred if the penalties awarded in such cases are paid directly or indirectly by the corporations involved, rather than by the executives responsible for the decision to break the law. As indicated, the prosecution and conviction of individual corporate offenders, and the potential for severe penalties for such individuals, are part of the deterrence package available under law. These measures must be seen to be real risks of illegal behaviour, rather than mere symbolic penalties.

Mr. Wetston indicated that the Bureau is actively gathering evidence with a view to charging individuals in appropriate cases. In this regard he pointed out that charges were laid against seven corporate officers in the pharmaceutical price-fixing case which is the subject of the constitutional challenge in Québec.

Mr. Wetston also commented on the enforcement approach being used by the Bureau. In particular, he indicated that the Bureau was making every effort to handle inquiries in a prompt and unequivocal manner. He indicated it has been adopting new approaches which include the use of computerized document processing and analysis techniques, improved officer training and investigative techniques, greater reliance on a team or multi-disciplinary approach and, where possible, early involvement of legal counsel in the investigative process. He indicated that use of lawyers at an early stage has saved time by identifying weakness in cases and also allowing the use of witness immunity and other plea bargaining techniques. Mr. Wetston euphemistically stated "this means the Bureau has opened its doors to accused parties before the evidence is all in, in the interest of promoting discussions of benefit to both sides".

There is no doubt that the Bureau and the Department of Justice officers working with them have become much more aggressive in recent years in actively promoting plea bargaining among parties under investigation. At times the process seems similar to the classic "prisoner's dilemma" where the state tends to pick off the parties under investigation one at a time.

Mr. Wetston also signaled that although prohibition orders have been used to resolve conspiracy cases in recent years, "these and other forms of compliance resolutions will be less available in cases under the conspiracy and bid-rigging provisions". He stated, "While future cases will, of course, be judged on their own merits, we continue to view conspiracy and bid rigging as the most serious of competition law offences, and the ones most deserving of full enforcement measures." This latter phrase presumably means litigation before the courts rather than consent or prohibition arrangements.

Mr. Wetston, in talking about the future, looked at the international dimensions of collusive arrangements. He stated:

> [b]usiness arrangements of an international dimension create enhanced potential for the incidence of conspiracies involving multi-country participants. The cost and complexity of conspiracy detection may well rise as evidence-gathering becomes a multi-country project. The Bureau may need to build on existing cooperative arrangements with antitrust authorities in OECD countries and develop links with other national antitrust authorities to enable successful investigations of international scope. The *Canada-United States Mutual Aid Legal Trade Treaty*, which provides a formal mechanism to obtain assistance in the investigation and prosecution of indictable offences in either country, is a good example of international cooperation in this regard.

In conclusion, the general tone of Mr. Wetston's remarks was that the Bureau will give new and heightened importance to investigating conspiratorial activities. The language used was strong indeed. However, the challenges to the basic conspiracy section will likely mean the Bureau will be hampered in its ability to fulfil Mr. Wetston's desire in the short term. The Bureau

may then turn its attention to increased enforcement of the *per se* offences under the *Act*, in particular the bid-rigging section and possibly the price maintenance section. There is some evidence the Bureau is currently considering relying on the general provisions of the price maintenance section in place of the section 45 offences. The language in the price maintenance section appears to be broad enough to encompass horizontal agreements to raise prices. However, the Bureau has not seriously attempted to apply the law in that way in the past. Frustration may lead to new efforts. *L.A.W.H.*

PREDATORY PRICING GUIDELINES UPDATE

The Bureau of Competition Policy is continuing to process the forty or so substantive comments received on its draft Predatory Pricing Guidelines. A second draft is currently being prepared, incorporating these comments. Bureau staff anticipate that the redraft will be available in the New Year or early spring. *D.B.*

ULTRAMAR CANADA AND ISLAND PETROLEUM ACQUIRE TEXACO CANADA'S ATLANTIC ASSETS

Under the terms of the consent order issued by the Competition Tribunal in connection with the acquisition by Imperial Oil of Texaco Canada Inc., Imperial was required to divest Texaco Canada assets in the Atlantic Region. These assets included the Texaco refinery in Dartmouth, Nova Scotia; terminal facilities in Charlottetown, Prince Edward Island, St. John and Chatham, New Brunswick, and Longpond, Newfoundland; 224 retail gasoline outlets throughout the region; and Texaco Canada's interest in Great Eastern Oil Limited.

Ultramar Canada Inc. sought to acquire the Texaco assets in the three Maritime provinces, while Island Petroleum Company Inc. sought to acquire the Newfoundland assets and Texaco's interest in Great Eastern Oil Limited. Under the terms of the consent order, the proposed acquisitions by Ultramar and Island Petroleum had to be submitted to the Director of Investigation and Research for approval. The Director announced on October 5, 1990, that he would not oppose the proposed sale, having received written undertakings from Ultramar and Island Petroleum.

Ultramar agreed to continue the operation of the Dartmouth refinery for at least seven years and also agreed to divest three retail gasoline stations in Nova Scotia and two in P.E.I. Ultramar is to sell its terminals in Dartmouth, Nova Scotia and Chatham, New Brunswick. The terminals are to continue in petroleum use. Island Petroleum has agreed to keep the Longpond, Newfoundland terminal in operation.

A major issue in the proceedings leading up to the consent order was the need to sell the Texaco assets to buyers with the ability to ensure the continued operation of those assets in competition with the assets retained by Imperial. In his announcement, the Director stated that Ultramar and Island Petroleum possess the financial soundness necessary to ensure the continued operation of the assets, that they have business plans for the continued maintenance and operation of the assets, and that they have available to them the technical and marketing expertise to continue the operation of the assets on an integrated basis. The Director concluded that Ultramar and Island Petroleum have the intention and the ability to be vigorous and effective competitors in the Atlantic Region.

Texaco's Eastern Passage refinery provides an alternative source of supply to independent resellers in the region. Ultramar has proposed to make large capital investments at the facility which, in the Director's judgment, would ensure that independent resellers continue to have access to this source of supply. *N.J.S.*

COMPETITION TRIBUNAL DECIDES FIRST ABUSE OF DOMINANCE CASE

(Editor's Note: The following is the unofficial summary of the Competition Tribunal's decision in the NutraSweet case prepared by the Registry of the Tribunal. An analysis of the decision by Lawson A.W. Hunter, Q.C. is presented in the Comment & Analysis Section of this edition.)

The Competition Tribunal handed down its reasons and order in the *NutraSweet* case on October 4, 1990. The order is signed by Mr. Justice Barry L Strayer on behalf of the unanimous panel which also included Mr. Justice Max M. Teitelbaum and Dr. Frank Roseman.

The Competition Tribunal ordered that The NutraSweet Co. (NSC) will no longer be able to enforce any of its existing Canadian supply contracts which require customers to buy all of their aspartame requirements from it. It cannot enter into new contracts which include such a term. Nor can it offer any sort of discount or allowance on the price of the aspartame it supplies which will induce Canadian customers to buy only from NSC.

The Tribunal has also dismissed a challenge by NSC that the Tribunal is unconstitutional. NSC argued that the non-judicial members of the Tribunal, who are persons versed in economics or business and who may sit on the Tribunal part time, are not sufficiently impartial or independent enough to meet constitutional requirements for a fair hearing. The Tribunal concluded that there was nothing in the Constitution of Canada which precluded persons with specialized knowledge (other than in law) from sitting on tribunals such as the Competition Tribunal.

In June 1989, the Director of Investigation and Research brought an application for an order against NSC to the Tribunal under section 77 (exclusive dealing and tied selling) and sections 78 and 79 (abuse of dominant position) of the *Competition Act*. NSC, a U.S. corporation, produces the low-calorie sweetener aspartame, which it markets under the brand name "NutraSweet", always displayed with the distinctive red and white "swirl" logo. In 1989, NSC had over 95% of the Canadian aspartame market. The Tribunal found that NSC was using its strength to keep other suppliers out of the Canadian market, with the result that competition was substantially lessened. NSC had persuaded most major Canadian buyers of aspartame (mainly diet soft drink makers) to buy solely from NSC by offering them price discounts which alternative suppliers could not match. This effectively tied up most of the Canadian market. *J.F.B.*

WETSTON REVIEWS MERGER EXPERIENCE

In a speech given to a Fordham University conference on October 19, 1990, Howard Wetston, the Director of Investigation and Research, addressed a number of important issues relating to merger law review in Canada. Among the points he made were the following:

- Prenotification filings do not always provide enough information for competitive assessment to be made and, indeed, some of the information has "little bearing on the preliminary concerns identified by Bureau staff". He indicated that, in most cases, parties voluntarily provide supplementary information to complete the assessment.
- Speaking of the Competition Tribunal, Mr. Wetston indicated that "the Tribunal has been most liberal in granting standing to intervenors in consent proceedings". He contrasted this with the situation in the United States.
- In commenting on the consent order process in merger cases, the Director stated that "there is a clear need to balance speed with a thorough review and full participation by affected parties". However, he recognized that concerns have been raised at the time taken to conclude the *Imperial Oil-Texaco* proceeding. He stated:

  In the face of these concerns, companies contemplating mergers which raise significant competition issues increasingly wish to settle cases with the Director alone, rather than run the risk of defending a merger either in contested proceedings or on consent before the Tribunal. I am most receptive to employing such an approach which avoids costly litigation to deal with situations that have ambiguous, minimal, transitory or very local economic effects.

Mr. Wetston seems to be signalling his willingness to use undertakings to resolve issues rather than resorting to the Tribunal. The circumstances under which he will use such an approach, based on the statement above, would appear to indicate that the range may be quite broad.

- Mr. Wetston indicated that one of his principal objectives is the development of merger guidelines. He indicated he had three objectives in pursuing merger guidelines:
  (i) to promote a high level of public confidence in the Bureau's merger review process;
  (ii) to promote a better understanding of this process, in order to reduce any uncertainty or unpredictability that is associated with Bureau merger review; and
  (iii) to facilitate and influence business planning and practices.
- Mr. Wetston indicated he believes:
  [i]t is important that broadly similar economic and enforcement techniques be applied by anti-trust authorities to all provisions of the law... For example, if more relaxed rules and techniques are applied to mergers compared to an *(sic)* Research and Development joint venture being evaluated under the conspiracy provisions, two companies may be forced to consider a merger when a less formal agreement would better meet corporate needs and the economic goals of Canadian society. While merger activity plays an important role in a modern economy, there is a growing body of evidence in Canada, the U.S. and the U.K. that in some situations there are alternatives to mergers, including licensing, strategic alliances and greenfield investment, which may be better for corporations and the shareholders. I believe public policy should take a neutral stance between mergers and other forms of business organization.
- Mr. Wetston commented on the continuing importance of merger law review in Canada, particularity in the aftermath of the *Canada-U.S. Free Trade Agreement*. He stated:
  Some have argued that with the advent of freer international trade, anti-trust policy is becoming less important and necessary in countries like Canada. I do not agree. I view effective and pragmatic enforcement of anti-trust law as a complement to, not a substitute for, trade liberalization. Anti-trust enforcement which is responsive to global trends and the realities of the modern industrial economy is necessary to ensure that the economic gains and opportunities afforded by freer international trade are maintained and provide important economic benefits to consumers as well as to industry.

  He pointed out that many Canadians industries are shielded from international competition either by government regulation, trade barriers or the nature of those businesses. In these areas the strong enforcement of merger law is necessary "to protect consumers and the industrial customers of the merging parties".
- In commenting on the international corporation, he indicated that there is a growing number of international mergers which, when coupled with interlocking directorships, strategic alliances and other forms of business collaboration, present new and complex anti-trust issues on an international scale. He stated:
  These developments will require greater cooperation among national anti-trust authorities and over time, perhaps, greater standardization in economic and enforcement techniques.

  This last comment presaged the annual report of the OECD which has called for greater harmonization of merger laws around the world in the face of the increasing number of transnational mergers.

Mr. Wetston's speech demonstrates that he remains firmly committed to a vigorous enforcement of merger law in Canada and is not persuaded by those who argue that now is the time for less stringent merger enforcement in order to allow restructuring of the Canadian economy. However, it appears he is more willing to negotiate settlements with parties and avoid using the Competition Tribunal than was his predecessor, Mr. Goldman. Although the statements in his speech appeared to limit somewhat the circumstances when he would entertain voluntary undertakings, the direction of greater reliance on such arrangements is also clear. *L.A.W.H.*

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	144
EXAMINATIONS CONCLUDED					
Concluded as posing no issue under the Act[4]	17	120	166	204	134
Concluded with Monitoring only[5]	5	7	10	13	10
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	2
TOTAL EXAMINATIONS CONCLUDED	26	133	182	223	146
EXAMINATIONS ONGOING AT END OF PERIOD	14	25	32	31	40
INTENT TO FILE APPLICATION ANNOUNCED	–	–	2	–	–
APPLICATIONS BEFORE TRIBUNAL					
Concluded[8]	1	–	2	3	–
Ongoing	–	2	2	1	2

Notes

1 Statistics commenced on June 19, 1986.

2 Statistics to December 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 - 54.
22 Advisory Opinions
1986/87 3; 1987/88 - 10; 1988/89 - 6; 1989/90 - 3; 1990/91 11.

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.