CANADIAN COMPETITION LAW DEVELOPMENTS

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BUREAU VICTORY IN NOVA SCOTIA CASE

On April 24, 1991, the Nova Scotia Court of Appeal released a unanimous decision overturning a decision of the Trial Division which had struck down the conspiracy provision of the *Competition Act*. The lower court had ruled that the conspiracy provision was contrary to the *Charter of Rights and Freedoms* in that it did not require *mens rea* to be proved for all elements of the offence. It also found the section to be contrary to the Charter because the requirement in the section to show an "undue" lessening of competition was vague and uncertain.

The Court of Appeal, in a judgment written by Chief Justice Clarke, found that the lower court had erred in finding that *mens rea* was not required for all elements of the conspiracy offence. Although this seemed a victory for the government, it was perhaps a Pyrrhic victory only.

The Court of Appeal also disagreed with the lower court on the issue of vagueness and uncertainty.

Mens Rea

The Court first looked at the intent required under the conspiracy section by analyzing the past cases. Here, the Court of Appeal took a different view of the existing law from the lower court. The latter had found that the case law required the Crown to prove only that the accused had intended to enter into an agreement, and not that it had entered into that agreement with the intent that it would lessen competition unduly.

Chief Justice Clarke reviewed all of the leading cases on the question of intent under the section, but placed final and conclusive weight on the decision of the Supreme Court of Canada in the *Atlantic Sugar* case (1980) 115 D.L.R. (3d).

He quoted from Mr. Justice Pigeon who, writing for the majority, made a number of statements which could be interpreted as requiring the Crown to prove an intent to lessen competition unduly. Although it is clear that such an interpretation is contrary to a series of decisions prior to *Atlantic Sugar*, which found the *mens rea* element only went to the agreement, Chief Justice Clarke concluded that the latter Supreme Court decision is the present state of the law. He also relied on the strong dissent by Mr. Justice Estey in the *Atlantic Sugar* case as an indication that the majority of the Supreme Court knew it was overruling the previous decisions.

Chief Justice Clarke then analyzed the necessary elements of intent under the conspiracy section and found that *mens rea* must be proved with respect to an intention to enter into the agreement or conspiracy and also the intention that the agreement, if implemented, would have the effect of lessening competition unduly.

Having established the necessary *mens rea* required to obtain a conviction, the Court discussed whether that requirement was consistent with provisions of the Charter. It concluded:

> It is evident from the above authorities that, where a statutory provision creates an offence and imposes the possibility of imprisonment as a penalty upon conviction, some degree of *mens rea* must attach to each essential element of the offence if the provision is to comply with s. 7 of the Charter.

As stated earlier, the Supreme Court of Canada's interpretation of subsection 32(1)(c) in *Atlantic Sugar* puts a *mens rea* requirement on both the entering into of the agreement and the effect the agreement would have if implemented. The burden on the Crown is,

therefore, to prove the accused had the intention to enter into the agreement or conspiracy and, in addition, to prove the accused had the intention to unduly lessen competition through the implementation of that agreement or arrangement. Thus *mens rea* attaches to each essential element of the offence created by subsection 32(1)(c).

On this basis the Court upheld the section as being consistent with the Charter. However, the result was to reverse the Crown's position as to the degree of *mens rea* required under the section. The Crown has long argued that it is only necessary to prove that the parties had intended to enter into the agreement.

In its judgment, the Nova Scotia Court of Appeal also considered the effect of the 1986 amendment to the section which states that the "double-intent" doctrine is not the law. The Court primarily considered whether this provision should be given retrospective application. It concluded that it should not, because it would have a "prejudicial effect" on the accused, and also that it created a "substantive" change to the law which would call into play the normal statutory interpretation presumption against retroactivity.

In conclusion, the Crown overturned the lower court decision on this aspect, but in a manner which is contrary to the long-held position of the government. The government has been concerned about the double-intent requirement because of the difficulty of proving that the parties intended to lessen competition unduly. One reason the Crown has been so leery of such a finding was the uncertainty of when the threshold of "undueness" was passed. The argument has been that to show the accused had in mind the point at which the effect on competition would be undue was asking every businessman to become a judge. It relied, on part, on the old doctrine that ignorance of the law is no excuse.

The decision is no comfort to the Crown's concerns in this regard and, indeed, may point up an inconsistency in the Crown's arguments, since on the second issue the Crown argued that the law was not void for vagueness.

"Unduly" is Too Vague a Standard

The second issue was whether the requirement that only agreements which "unduly" lessen competition are illegal was void as being too vague.

The Court reviewed many Supreme Court of Canada decisions on the notion of void for vagueness, as well as the case law on the meaning of "unduly" arising from the conspiracy section. The Court concluded:

> After a careful consideration of the decision of the trial judge and the arguments presented by counsel of all parties it is my opinion that the use of the word unduly in the Combines Investigation Act does not permit a "standardless sweep" which precludes a person from knowing "in advance with a high degree of certainty what conduct is prohibited and what is not".

In reaching this decision, Chief Justice Clarke reviewed the legislative context of section 32 and, in particular, the parameters in the section which provide guidance to potential accused. Among these he included the exclusions in subsection 32(2) with respect to statistics, products standards, credit information, trade terms, research and development agreements and advertising as well as the retraction of these exemptions under subsection 32(3). He also relied on the provision of subsection 32(1.1) which states that it is not necessary to prove a complete or virtual elimination of competition. He relied on this to make the point that the amount of lessening need not be virtual elimination of competition, but must be a substantial lessening.

The decision states:

> I am unable to agree with the position of the respondents that the word unduly can be given no "sensible meaning", and that it is "impermissibly vague", and that it creates a "standardless sweep". While the word is admittedly imprecise, it has been given meaning by the courts for a long period of time and convictions and acquittals have been entered under s. 32(1)(c) of the Combines Investigation Act as well as under its predecessor provisions in the Criminal Code. Further, the inclusion of the word unduly is of benefit to the accused. Without it, proof of any lessening of competition to any degree would result in a conviction. But the use of the word unduly places a higher onus on the Crown. It obliges the Crown to prove beyond a reasonable doubt that the effect or likely effect of an agreement to lessen has an undue or excessive impact on competition in the market-place. Any doubt as to whether the lessening is undue must be resolved in favour of the accused.

Further in the judgment Chief Justice Clarke makes the following statement.

> While the word unduly is not defined by statute and it defies precise measurement, it is a word of common usage which denotes to all of us in one way or another a sense of seriousness. Something affected unduly is not affected to a minimal degree but to a significant degree. The type of conduct to which the Act is directed and the goals of the Act are well known and are set out in the enactment itself. No one is in a better position to know the likely effect of a particular agreement on competition than the parties to that agreement who know the market in which they deal. Parties who enter an agreement with the intention to lessen competition unduly cannot complain that they are caught by surprise when a trier of facts finds the competitive effect of their agreement is undue. The culpable activity is targeted by the Act and the various considerations that will come into play are enumerated in case law.

The Crown, therefore, was successful in appealing the lower court decision on this point.

It is difficult to know who really won this round. Although on its face the Crown appeared to win on all major points, it has done so in a manner which increases the burden on the Crown with respect to *mens rea*. But since the Crown argued strenuously that "unduly" was not vague and was a knowable standard, the Crown's concern about having to prove intent to lessen competition unduly, because of the difficulty of knowing precisely when undueness arises, seems, to say the least, inconsistent.

One final comment is that this is the first decision where a Court has found that the *Atlantic Sugar* decision overturned the previous jurisprudence on *mens rea*. During the amendments to the legislation in the mid-1980s, the legal and business community had argued that the *Atlantic Sugar* case did not overturn the previous jurisprudence. The government had insisted that at the very least it created considerable uncertainty. It was on this basis that the provision was added to the *Act* in 1986 to clarify that the law remained unchanged. Chief Justice Clarke has now supported the government's position at that time. But he has made it clear that there is a strong likelihood that the clarification contained in the 1986 amendments will be ruled unconstitutional in the future.

Obviously these issues will end up before the Supreme Court of Canada. In the meantime the government's enforcement efforts under the conspiracy section continue to be stymied.

L.A.W.H.

DIRECTOR ACCUSED OF SCUTTLING FLOUR MERGER

In September 1990, Maple Leafs Mills Limited and Ogilvie Mills Ltd., the two largest flour millers in the country, announced that they were entering into a partnership which would effectively merge the two businesses. Maple Leaf would own sixty per cent and control the new entity, with Ogilvie owning the remaining forty per cent.

Since the announcement of the merger, the Bureau of Competition Policy has been reviewing the merger under the provisions of the *Competition Act*, and has also held extensive discussions and negotiations with the parties. As a result of his assessment, the Director concluded that the merger would prevent or lessen competition substantially. After the Director made this initial finding on March 19, 1991, he held further discussions with the parties until May 16, 1991. The Director had set out certain conditions which had to be met before he would be prepared to let the transaction proceed.

After the parties were made aware of the Director's position and had discussions with him, they announced that his conditions were unacceptable and that they were abandoning the merger.

The parties alleged that their plan was necessary for the efficient operation of the Canadian flour milling industry and that the Director's decision was preventing the industry from restructuring to be viable in the long run. As a result of these public concerns, the Director has received criticism in the press and at the political level for not being sensitive to Canada's need to be internationally competitive. This old theme continues to raise its head at a time when international competitiveness is an increasingly important aspect of federal government policy. As

a result of the expressed concerns, the Director issued a background document explaining the basis on which the Bureau had arrived at its decision. Even with this information, however, it is obvious that many commentators in Canada appear to favour letting any merger proceed, even if the facts would not support the contention that the merger is necessary to achieve international competitiveness. It might also be pointed out that domestic rivalry is one of the key points in Michael Porter's study for the Business Council on National Issues on how to achieve competitiveness for Canada. Porter has long argued that tough domestic competition laws are very important in ensuring long run international competitiveness.

The Director's backgrounder provides an overview of the flour milling industry, including the fact that it is highly concentrated, with the three largest millers controlling 75 per cent of milling capacity. The third largest miller after Maple Leaf and Ogilvie is Robin Hood Multifoods Inc. The Director's study indicated that Canadian milling capacity has been increasingly underutilized in recent years and, as a result, the industry has been reducing capacity by closing smaller, less efficient mills. Also, on May 10, 1991, American wheat and wheat products were allowed into Canada under a provision of the *Canada-U.S. Free Trade Agreement*. This was the first time since 1940 that American flour millers had been allowed to export to Canada, while at the same time providing Canadian millers with access to U.S. markets. As part of opening Canada-U.S. markets, the Canadian Wheat Board changed its pricing policies in January 1991 to end the historical price differential which has been maintained between Canadian domestic wheat prices and prevailing U.S. and international prices.

With respect to the competitive concerns, the Director indicated that the transaction raised a concern in the hard wheat flour category, which accounts for 82 per cent of all wheat milled in Canada. The Director had defined this market as being divided into three distinct geographic markets: Western Canada, Ontario and Québec and Atlantic Canada.

In deciding that the merger would substantially lessen competition, the Director concluded that:

(a) there were no substitutes for hard wheat flour;
(b) it was unlikely that new entrants would establish flour mills in Canada;
(c) the partnership removed a vigorous and effective competitor from the Canadian market;
(d) the remaining competitors are small or emphasized the retail market (in the case of Robin Hood);
(e) the flour millers have engaged in anti-competitive practices in the past, undoubtedly alluding to the recent bid-rigging charges;
(f) there is a high degree of vertical integration between the Canadian millers and bakeries which precludes new competitors or foreigners from gaining access to customers; and
(g) concentration will increase as a result of the merger.

The parties to the merger had argued that because of the impact of free trade, competition would continue to exist in Canada from U.S. millers. In assessing this competitive threat, the Director focussed not on the absolute size of U.S. milling companies, but on the location and cost structure of individual mills operated in the United States. He concluded, after analyzing these costs, that Maple Leaf and Ogilvie are of comparable capacity and efficiency to U.S. mills which could be a competitive threat. Also, he concluded that there was limited excess capacity available within the U.S. mills closest to Canada, and that vertical integration would reduce the likelihood of them seeking to enter the Canadian market.

The Director also stated that bakery customers were concerned about product quality and service from U.S. flour millers. Factors such as just-in-time delivery and transportation costs were also limiting. Customers expressed concerns that U.S. flour is not similar to the higher—protein Canadian wheat and that the equipment used by Canadian bakeries could not tolerate different U.S. grades.

The Director, therefore, concluded that new entry by U.S. millers on a sufficient scale to alleviate his concerns was not likely anywhere except in the lower mainland of British Columbia.

The parties had advanced a substantial efficiency gain claim in their discussions with the Director. The efficiencies would have arisen in production, distribution and administration and would have resulted in mill closures and

consolidation of head office administrative functions. Although the Director accepted that the merger would achieve efficiency gains, he stated that the simple achievement of efficiencies is not enough.

The backgrounder states:

> The Act requires that the gains must result from a real savings of resources as opposed to a redistribution of income, in addition to not being achievable if the merger were challenged. In the case of the partnership, the Director determined that the majority of claimed gains would likely be attained by the parties acting independently without a consequent substantial lessening of competition. As a result, these gains were not included in the trade-off analysis outlined in the Act.

The Director concluded that the overall efficiency gains would not outweigh the anti-competitive effects of the merger. He also found that the merger would give the parties the ability to raise materially the price of hard wheat flour in Canada.

The backgrounder then refers to the proposed resolution the Director had discussed with the parties. The Director had originally asked the parties to defer the transaction for six months after the removal of the U.S. import barriers to determine whether U.S. entry would actually occur. The parties would not agree to this suggestion. The Director, next, was prepared to accept a resolution which would encourage and maintain domestic competition while allowing the parties to rationalize plants and make cost savings. He was willing to do this by means of an informal undertaking without resorting to a hearing before the Competition Tribunal.

In order to encourage domestic competition, the Director proposed that he would not challenge the transaction if the parties would divest of a mill in Medicine Hat and one ongoing operation in Montreal. In other words, the Director wanted to create domestic competition in Canada by requiring divestiture of certain mills rather than by allowing the parties merely to close the mills and remove that capacity from the market. The parties were not willing to accept these conditions and therefore abandoned the merger.

This is the first major merger test Mr. Wetston has faced since he became Director. Although it appears from the his backgrounder that he was attempting to reach a compromise with the parties, his terms were not sufficient. This has also raised the political question of whether international competitiveness concerns should have extra weight in merger analysis. Unfortunately, the extra weight that many parties wish to give to international competitiveness would appear to mean that any merger should be allowed where the proposed rationale is to achieve international competitiveness. This is certainly not the law under the existing merger provision, but it does raise an important policy question which the government will have to address if it wishes to lighten the hand of regulation arising from the merger provisions of the *Competition Act*.

L.A.W.H.

SECOND ABUSE OF DOMINANCE CASE FILED

On March 22, 1991, the Director of Investigation and Research filed an application against Laidlaw Waste Systems Ltd., alleging that it had engaged in certain abuse of dominance practices on Vancouver Island.

This is the second dominance application made by the Director since the new *Competition Act* was proclaimed in 1986, the first being in the *NutraSweet* case. It is also the second time that Laidlaw has been the subject of enforcement activity under the new Act (Laidlaw was forced to divest itself of certain waste disposal companies it had acquired in the acquisition of Tricil in late 1989).

The application concerns the supply of commercial waste haulage and disposal services in three municipalities on Vancouver Island—Nanaimo, Campbell River and Cowichan Valley.

The application defines the product as being the provision to commercial customers of the service of containerized solid waste haulage and disposal. Excluded from the product definition was the provision of disposal services to residential customers and non-containerized disposal to commercial customers. The application states that:

> There is no reasonable substitute to which a significant number of customers could turn in

response to a small but significant and non-transitory price increase in commercial containerized haulage service. For the purposes of the Act, commercial containerized haulage services constitute a distinct class or species of business.

This statement is interesting in that it appears to apply the market definition test the Director had used in the Merger Guidelines to the dominance section as well. It is also interesting that the Director has defined the class or species of business, which is a necessary aspect of the dominance section, but has not equated that definition with the proper definition of the product market. It may be recalled that in the *NutraSweet* case the Tribunal found that the proper definition of class or species of business was the same as the proper definition of the product market.

With respect to the geographic market, the Director's application states that because it is not economically efficient to travel long distances between landfill sites and customers, the market for solid waste haulage is generally very local. Also, municipal regulations prevent trans-shipment from one municipality to another. The Director's application indicates that solid waste haulage markets are generally limited to a range of twenty to thirty miles from their base.

At the present time, the Director alleges that Laidlaw's market share by revenue in the three markets concerned is as follows: Cowichan Valley 99 per cent; Nanaimo, 90 per cent; Campbell River, 88 per cent.

Laidlaw is alleged to have performed many anti-competitive acts, which the Director claims were used to substantially lessen competition and attain a dominant position in the markets, to maintain and abuse such dominance and to prevent competition within the markets.

Among the anti-competitive acts alleged are the following:

(a) the acquisition of existing or new competitors in the markets and the use of unreasonable non-competition clauses subsequent to the acquisitions;
(b) the use of standard form contracts which bind commercial customers to exclusivity with Laidlaw. Often the contracts are alleged to have automatic renewal rights that can only be voided with difficulty;
(c) the use of unreasonable means to cause customers to enter into standard form contracts;
(d) the use of actual or threatened litigation against customers and potential or actual competitors, thereby discouraging customers and competitors from considering alternate supply sources;
(e) entering into a reciprocal agreement with a competitor in another territory whereby each refrained from entering areas where the other was already dominant;
(f) selectively offering price reductions to customers approached by new entrants. The respondent is also alleged to have sold its product below average variable cost through selective price cutting;
(g) requiring customers to reveal terms of any competing bids so that it could meet prices from competitors;
(h) engaging in various anti-competitive practices to build and maintain barriers to entry into the market, such as engaging in deceptive practices in order to obtain business, misdescribing the nature of its standard form contract, threatening to refuse to supply unless a written contract was entered into, and threatening poor service to customers should they ever have to return to the respondent for business in the future;
(i) requiring customers to face a substantial penalty for early termination of contracts; and
(j) engaging in real or threatened nuisance litigation against competitors.

The application also discusses the various acquisitions made by Laidlaw in the affected markets. In each of the markets, Laidlaw had entered by acquiring most, if not all, of the existing competitors. In each case it also obtained extensive non-competition clauses from the businesses acquired. In one case, the non-competition clause extended for ten years.

Having set out the anti-competitive acts alleged to have occurred, the Director sets out a lengthy series of orders he wishes the Tribunal to make. He seeks an order prohibiting Laidlaw from entering into or continuing any agreement for providing the service which:

(a) has automatic renewal rights;

(b) requires notice of termination;
(c) is for a term greater than one year;
(d) grants a right of first refusal in favour of Laidlaw;
(e) obliges a customer to reveal competitive bids or other sensitive information to Laidlaw;
(f) requires granting exclusivity to Laidlaw; and
(g) requires a customer to pay a penalty on early termination.

The application further seeks an order declaring any similar provisions in existing agreements to be unenforceable.

The proposed order would also prevent Laidlaw or any of its affiliates from acquiring any competitor in the affected markets for a period of seven years. It would mitigate and reduce the effects of existing non-competition clauses with former competitors in the markets by having them declared null and void or reduced to reasonable limits.

Another feature of the proposed order would be to declare null and void any agreement between Laidlaw and any other person or competitor to fix territorial limits or allocate markets. It is interesting that the Director is seeking to have the Tribunal deal with a horizontal market allocation agreement through the dominance section, rather than the conspiracy section.

The Director also seeks an unusual order prohibiting Laidlaw from *exiting* the affected markets for a period of five years unless otherwise ordered by the Tribunal. The Director is obviously concerned that Laidlaw may threaten to withdraw from the market and, because of its dominance, cause harm to the commercial businesses on Vancouver Island. However, it seems an extreme type of order to require a competitor to continue in business even if this might detrimentally affect its economic performance.

The Director is also proposing an order prohibiting Laidlaw from charging a price in the market where the purpose of charging that price is to meet or undercut the price of the competitor, unless the price is applied uniformly to all similarly situated customers. In other words, the Director is seeking to prevent Laidlaw from selectively reducing prices, even if the purpose is to meet the price of a competitor to a limited number of Laidlaw's customers.

To create transparency in the market, the Director is seeking an order requiring Laidlaw, for five years, to circulate a price list to its customers.

All in all, the application is aggressive, particularly with respect to the types of relief sought. It illustrates one of the difficulties of controlling non-structural, anti-competitive behaviour, namely, that it leads the government and the Tribunal into a very regulatory environment. It also raises the age-old problem in antitrust policy of how to distinguish between competitive and anti-competitive behaviour. It would seem likely that Laidlaw will argue that the economies of scale and efficiencies related to the provision of commercial waste disposal services mandate the sort of contracting procedures it has adopted in these areas. This would be tantamount to advancing a natural monopoly theory, and it will be interesting to see how the Tribunal responds to such a defence.

The Director's application alludes only briefly to any role municipalities may have played in creating the structure and practices of the industry. It is possible that municipal regulations have a significant effect on competition as well.

L.A.W.H.

SOUTHAM (B.C. NEWSPAPERS) UPDATE

On March 22, 1991, Mr. Justice Max M. Teitelbaum issued the Competition Tribunal's Reasons for approving the revised Interim Order to hold separate the B.C. newspapers acquired by Southam (see March 1991 *CCPR*).

In his Reasons, Mr. Justice Teitelbaum adopted the principal criteria governing injunctive relief as set out by the Supreme Court of Canada in *A.G. Manitoba* v. *Metropolitan Stores (MTS) Ltd.*, i.e., that there should be a serious issue for trial, a prospect of irreparable harm absent an Interim Order, and a balance of equities between the parties to the litigation.

Mr. Justice Teitelbaum had no difficulty finding that the Director's application raised serious issues with respect to the market influence resulting from the merger. In respect to irreparable

harm, Mr. Justice Teitelbaum accepted the Director's main contention that the more integrated and coordinated the operations of the various publishers to the merger, the less likely that the publishers are to be actively competing in their markets, and the less likely that the acquired companies would be viable, independent units in the event that the merger were disallowed. The Tribunal noted,

> Protecting divestiture as a valid remedial option will always be a strong impetus for interim relief in merger cases. The futility of attempting to "unscramble the eggs" upon a later finding that the merger will indeed likely lessen competition substantially is apparent. The legislative scheme attempts to guard against this eventuality by, for example, instituting a regime for pre-notification of some mergers and allowing the Director to apply for interim relief under sections 100 and 104.

With respect to the balance of convenience, the Tribunal focussed on the most contentious feature of the draft Order: the appointment of independent supervisors to monitor compliance with the remainder of the Order by the managers of the publications owned by the merging companies. The Director's proposal involved the ability of the supervisors to veto expenditures over $10,000, and the implementation of a hold-separate agreement which required the businesses to be maintained in a competitive, independent and separate state. The respondents had objected that this arrangement was too onerous and was, moreover, unnecessary to safeguard the public interest in preserving the businesses as independent competitive entities for divestiture. The respondents proposed that an arrangement similar to the original hold-separate undertakings should be sufficient.

The Tribunal favoured the Director's approach. It was concerned that in the event that a divestiture order is made "there must be still something to be divested in order to remedy substantial lessening of competition". The Tribunal concluded that this could only occur if the businesses were kept separate "and operated, to the fullest extent possible, separate from each other and separate from Southam". The Tribunal also concluded that this objective could only be achieved if the supervisors' principal loyalty was not to the Southam group. However, the Tribunal noted that, since the supervisors were to report any breach of the Interim Order to the Director, they should be paid by the Director and not by the respondents. The Tribunal also observed that the independent supervisors should only supervise and not interfere with the operation of the businesses. The sole function of the supervisor is to ensure that the three newspapers do not in any way cooperate with each other. Finally, the Tribunal noted that, whatever the inconvenience of the interim relief to the respondents (which was not in fact specifically addressed in argument), the commitment of the Tribunal to expeditious proceedings should ensure that this arrangement will be in place only for a relatively short period of time. *J.F.B.*

WETSTON INDICATES NEXT STEPS IN PRICE DISCRIMINATION GUIDELINES

Speaking at a Canadian Institute conference on May 27, Mr. Howard Wetston, Director of Investigation and Research, discussed the responses the Bureau has received to the draft Price Discrimination Guidelines issued last year, as well as his intended future plans to finalize the guidelines.

In general, Mr. Wetston indicated that the response by the business community to the guidelines had been positive. In particular, the overall thrust of the guidelines, which is to provide more flexibility to suppliers and purchasers under the law, was widely perceived as being necessary and appropriate. Mr. Wetston did indicate that there had been some concerns expressed about whether the Director was stretching the language of the price discrimination legislation to achieve an objective beyond that intended by Parliament. He indicated that the Bureau was in the process of reviewing all of these reactions. His present plan is to release another draft of the guidelines, probably this fall, for further consultation. Although there may be some changes to the guidelines in the future, the impression left was that there would be no significant changes at this time.

The remainder of the Canadian Institute conference dealt with a number of price discrimination issues. In particular, two panels considered hypothetical fact situations to test the limits of the proposed guidelines and the existing law. It was apparent from these discussions that under the draft guidelines, many practices which in the past would have been challenged now will not be. In particular, Mr. Robert Weist, who has been the principal author of the guidelines, participated in both panels and generally found little to object to in most practices addressed by the hypothetical fact situations.

It seems unlikely that the Bureau will enforce the price discrimination section aggressively. This leaves private enforcement as the only risk faced by businesses if they adopt some of the practices the Director now says will be permissible. Time will tell whether there will be an increase in private enforcement under the section beyond the almost total lack of private enforcement to date.

L.A.W.H.

MERGER EXAMINATIONS UNDER THE COMPETITION ACT
STATISTICAL SUMMARY

	1986-87[1]	1987-88	1988-89	1989-90	1990-91	1991-92[2]
MERGER EXAMINATIONS COMMENCED[3]	40	146	191	219	194	51
EXAMINATIONS CONCLUDED						
Concluded as posing no issue under the Act[4]	17	120	166	204	193	35
Concluded with monitoring only[5]	5	7	10	13	9	4
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	1
TOTAL EXAMINATIONS CONCLUDED	26	133	182	223	204	36
EXAMINATIONS ONGOING AT END OF PERIOD	14	25	32	31	39	34
INTENT TO FILE APPLICATION ANNOUNCED	–	–	2	–	–	–
APPLICATIONS BEFORE TRIBUNAL						
Concluded[8]	1	–	2	3	–	–
Ongoing	–	2	2	1	3	3

Notes

1 Statistics commenced on June 19, 1986.
2 Statistics to July 5, 1991.
3 Two or more days of review. Includes 363 prenotifications since July 15, 1987 of which:
– in short-form (s. 121); 1987/88 44; 1988/89 50; 1989/90 - 89; 1990/91 - 40; 1991/92 - 29.
– in long-form (s. 122); 1987/88 21; 1988/89 42; 1889/90 - 20; 1990/91 25; 1991/92 - 3.
4 Includes:
249 Advance Ruling Certificates -
1986/87 2; 1987/88 - 26; 1988/89 - 59; 1989/90 72; 1990/91 - 74; 1991/92 - 4.
28 Advisory Opinions
1986/87 3; 1987/88 - 10; 1988/89 - 6; 1989/90 3; 1990/91 - 2; 1991/92-0.
5 All advisory opinions.
6 All advisory opinions.
7 One Advance Ruling Certificate and six Advisory Opinions.
8 These matters are counted under examinations concluded.