CANADIAN COMPETITION LAW DEVELOPMENTS

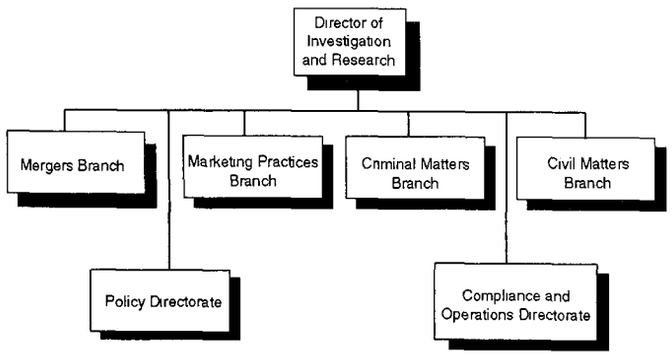
The articles in this section were written by Lawson A.W. Hunter, Paul K. Lepsoe and Susan Brown of Fraser & Beatty, Ottawa and Eric A. Milligan, Milligan & Company, Ottawa.

STRUCTURAL CHANGE FOR THE COMPETITION BUREAU

Howard Wetston, Director of Investigation and Research, has made changes to the internal organization of the Competition Bureau. Mr. Wetston anticipates that the new structure will permit the development of procedural and enforcement expertise and enhance the Bureau's ability to focus on its priority initiatives.

Under the old internal organization (see Fig. 1, below), the Bureau was structured on a sectoral basis. This arrangement reflected the belief that expertise in specific industries was the primary criterion for grouping staff.

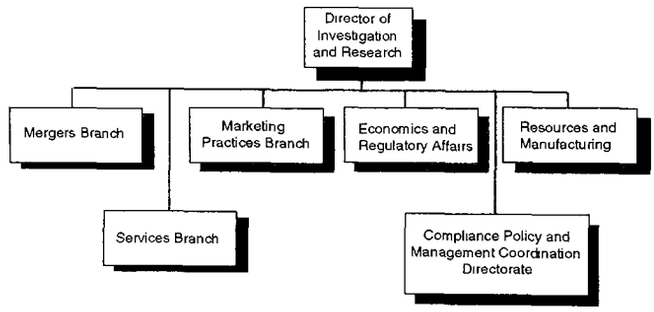
Fig. 1



Under the new organization, the Bureau's enforcement branches are organized on a functional rather than sectoral basis. The Resources and Manufacturing and Services Branches have been restructured as a Criminal Branch and a Civil (Reviewable) Branch. Each Branch consists of two divisions (A and B), which will no longer be identified by industry sector. This new arrangement reflects a belief that expertise in specific areas of the *Competition Act* and types of commercial activity should be the predominant factor for grouping staff. It more closely reflects the operational reality of the Bureau in which "teams" (including staff with industry-specific expertise) are assigned to individual cases. Bureau staff previously assigned to the civil and criminal divisions of the Resources and Manufacturing and Services Branches have moved to the new Civil and Criminal Branches. The staffing changes involved no lay-offs of permanent employees.

Figure 2 below shows the new organizational structure for the Bureau. Most of these responsibilities became effective on September 3, 1991 and the restructuring within the branches took place early in the fall.

Fig. 2



The Bureau has two new deputy-directors—Rachel Larabie-Lesieur (Investigation and Research, Marketing Practices) and Gilles Ménard (Investigation and Research, Services)—and James Bocking has been appointed Chief, Division B of the Mergers Branch. Klaus Decker, the long-serving Deputy Director of Marketing Practices, is retiring from the government at the end of January 1992.

Ms. Larabie-Lesieur, who replaces Mr. Decker, obtained a Bachelor's Degree in Law

from the University of Ottawa in 1979 and was admitted to the Québec Bar in 1980. She brings considerable experience to her new functions. Before entering the Public Service, Ms. Larabie-Lesieur worked nine years with the Civil Law Department of the University of Ottawa. She joined the Department in 1980 as a Commerce Officer with the Bureau of Competition Policy. That same year, she joined the Departmental Secretariat as Departmental Assistant Secretary until 1989 when she was appointed Director of Compliance, Corporate Affairs and Legislative Review.

Mr. Ménard, who studied Economics at the University of Ottawa, receiving a Master's Degree in 1977, brings considerable expertise to his new functions. Having begun his career in the Public Service in 1970 as an economist with the Bureau of Competition Policy, he has since held progressively more responsible positions within the same Bureau, including Chief, Legislative Development Unit and Chief, Division B, Mergers Branch.

Mr. Bocking received his Master's Degree in Economics from Queen's University in 1972. After teaching at Queen's for a year, Mr. Bocking joined the Bureau of Competition Policy in 1972 as a Commerce Officer and has held a variety of more senior positions within the same Bureau, most recently as Acting Deputy Director of Investigation and Research (Services). *E.A.M.*

DIRECTOR RELEASES ANNUAL REPORT

On December 12, 1991, the Minister of Consumer and Corporate Affairs, the Honourable Pierre Blais, tabled the Director's Annual Report for the period ending March 31, 1991 in the House of Commons. Mr. Blais stated:

> Canada needs competition in its domestic economy if it is to compete more effectively in the international marketplace. Vigorous enforcement of the Competition Act ensures and promotes a competitive environment that can contribute to a stronger and more prosperous domestic economy.

The Report itself has been shortened and streamlined, presenting only essential information and less detail on some matters. In the preface to the Report the Director, Mr. Wetston, stated:

> With respect to mergers and acquisitions, as markets become more international in scope, there is a tendency to believe that mergers between domestic firms are necessary to achieve the size to compete worldwide. However, increased size alone will not assure success in the global marketplace. Economies of scale are not the only source of efficiency. Size alone will not guarantee that firms will innovate or improve their productivity. Efforts to achieve economies of scale must be complimented by vigorous domestic competition which also plays an important role in assisting Canadian companies to become stronger in foreign markets.

This comment seems to be Mr. Wetston's rebuttal to the arguments of some that Canadian businesses should be allowed to merge for the sole reason of obtaining a minimum "critical mass" size. Mr. Wetston seems to directly challenge this thesis as being applicable in all cases. He also obviously believes domestic competition can be an important component of ensuring international success, a thesis which is accepted by Michael Porter and advocated in his report on competitiveness in the Canadian economy.

In commenting on some of the Bureau's important initiatives, the Director has singled out the efforts to develop workable case screening and prioritizing criteria. It is clear that the economic impact of the alleged anticompetitive practice will be a very important criterion.

Mr. Wetston also commented on efforts to make the Bureau's enforcement policies more transparent. In the year concluded, the Director released merger enforcement guidelines and also had consultations on predatory pricing and price discrimination guidelines. He is presently hoping to finalize both the predatory pricing and price discrimination guidelines in the current year.

Mr. Wetston also commented on the characterization of competition law by recent Supreme Court of Canada decisions. He stated:

> Recent decisions of the Supreme Court of Canada have recognized the role of competition law as public welfare legislation, that is to say legislation which prohibits specific conduct as a means of achieving broader economic goals. The public welfare characterization appears to support our philosophy of flexible or pragmatic enforcement, our ongoing emphasis on resolving competition concerns in areas such as mergers through early

> discussion of those concerns, and a continuing development of modern enforcement tools such as alternative case resolution in appropriate cases.

This appears to be a reaction to the Supreme Court decision in the *Thomson* case where the Court characterized the competition statute as a regulatory statute and not a strictly criminal statute. Although this characterization is undoubtedly accurate, presumably the Director is not indicating that competition laws should become too intrusively regulatory of private business.

The Director also commented on the difficulties the Bureau is having with the *Charter of Rights and Freedoms*. He stated:

> It is clear that the manner in which the law is enforced and applied must continue to evolve to accommodate new legal standards being developed under the Charter of Rights and Freedoms, and to reflect the realities of law enforcement in the 1990s. The Bureau is now managing a number of Charter challenges which have been raised regarding certain provisions of the Act. These challenges have affected law enforcement in some areas this year, although we proceeded with a number of significant investigations and continue to defend the viability of the law before the courts.

Mr. Wetston has obviously felt the impact of the *Charter* challenges, particularly to the conspiracy section, in the past year. The statistics on the number of criminal prosecutions brought by the government for the year ending March 31, 1991, as well as the level of fines in the non-misleading advertising area of the *Act*, are at very low levels. This is certainly due in part to the *Charter* challenges, but in part to a diversion of resources away from more traditional law enforcement areas into merger enforcement, compliance and other policy initiatives of the Bureau. It also reflects, to some degree, an effort by the Director to bring only the most significant cases.

Without saying so, the Report also reflects a lack of resources. The Bureau is clearly in a situation where it cannot enforce the *Act* as aggressively, particularly in the criminal areas, as it did in the past. Since the new legislation was passed in 1986, there has been no increase in the Bureau's financial and personnel resources. This has resulted in a substantial diversion of resources away from criminal enforcement into merger enforcement. It may well be reaching the point where reliance on the Director alone to enforce the law is not sufficient. In particular, it may be appropriate for the government to consider allowing private parties to enforce certain civil provisions of the *Act* directly, rather than having to rely on the Director.

With respect to the misleading advertising and deceptive marketing practices provisions of the *Act*, the Report indicates that the Director is still considering which recommendations to make to the Minister concerning legislative amendment. It will be recalled that in a draft report entitled "Effective and Equitable Enforcement," a working group had recommended non-criminal adjudication of certain matters by the Tribunal, an expansion of the types of remedies available under the sections and the use of assurances of voluntary compliance. Whether the government will proceed with legislative amendments seems debatable, given the priority accorded to other legislative initiatives and the complexity of attempting to open up the *Competition Act* once again.

Although the number of convictions and prosecutions brought under the misleading advertising and deceptive marketing practices provisions has been on a downward trend in the last few years, the number of complaints received continues to be steady and the total fines collected shows an upward increase. Fines of over one million dollars were imposed in the fiscal year ending March 31, 1991. *L.A.W.H.*

SUPREME COURT VALIDATES BURDEN ON ADVERTISERS IN WHOLESALE TRAVEL DECISION

The Supreme Court of Canada recently ruled on the constitutional validity of the misleading advertising provisions of the *Competition Act*. The Court held unanimously that an offence involving mere negligence did not necessarily offend the *Charter*, even where a prison sentence was a possible punishment. The Court divided on the

constitutional validity of placing the burden of proving due diligence on the accused, although all judges agreed that the requirement that a misleading advertiser place a correction in order to avoid conviction went too far.

The Court made these rulings in its judgment in *R.* v. *Wholesale Travel Group Inc.*, released on October 24, 1991 (now reported in (1991), 84 D.L.R. (4th) 161). Wholesale Travel had been charged in Ontario with false or misleading advertising, contrary to section 36 (now section 52) of the *Competition Act*, R.S.C. Section 52 provides as follows:

> (1) No person shall, for the purpose of promoting, directly or indirectly, the supply or use of a product or for the purpose of promoting, directly or indirectly, any business interest, by any means whatever,
> (a) make a representation to the public that is false or misleading in a material respect;
> ...
> (5) Any person who contravenes subsection (1) is guilty of an offence and liable
> (a) on conviction on indictment, to a fine in the discretion of the court or to imprisonment for a term not exceeding five years or to both; or
> (b) on summary conviction, to a fine not exceeding twenty-five thousand dollars or to imprisonment for a term not exceeding one year or to both.

A defence of due diligence for an accused is provided in section 60(2):

> (2) No person shall be convicted of an offence under section 52 or 53, if he establishes that
> (a) the act or omission giving rise to the offence with which he is charged was the result of error;
> (b) he took reasonable precautions and exercised due diligence to prevent the occurrence of the error;
> (c) he, or another person, took reasonable measures to bring the error to the attention of the class of persons likely to have been reached by the representation or testimonial; and
> (d) the measures referred to in paragraph (c), except where the representation or testimonial related to a security, were taken forthwith after the representation was made or the testimonial was published.

Before the trial, Wholesale Travel brought a motion for a declaration that sections 52(1) and 60(2) were of no force because of inconsistency with sections 7 and 11(d) of the *Charter*. Section 7 provides:

> 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.

Section 11(d) provides that any person charged with an offence has the right "to be presumed innocent until proven guilty according to law..."

Courts in Canada have previously used section 7 to strike down provisions that do not require proof of subjective *mens rea* (the criminal law concept of a "guilty mind" or intent), at least where sentence to a term of imprisonment is possible. Section 11(d) has been used to strike down "reverse onus" provisions which place at least a partial burden on the accused to do something beyond merely raising a reasonable doubt in order to avoid conviction.

Unfortunately, the nine judges of the Supreme Court wrote five separate judgments in the *Wholesale Travel* decision. It remains to be seen whether more confusion than clarity will result in this complex but often-visited area of the law.

All of the judges accepted that, at least for some offences, the requirement of proof of negligence alone, without subjective *mens rea*, would not necessarily offend section 7 of the *Charter*, at least as long as there was a due diligence defence available to the accused. For Cory and L'Heureux-Dubé JJ., and to some extent La Forest J., the test was whether the offence was "regulatory" or criminal in character. Referring to previous decisions of the Court, Cory J. wrote that it was "clear that the *Competition Act* in all its aspects is regulatory in character." Lamer C.J.C., supported by Sopinka and McLachlin JJ., rejected an explicit distinction between types of offences. For them, some offences would require proof of subjective *mens rea* while others would not, seemingly depending on the stigma attached to conviction. Iacobucci J., supported by Gonthier and Stevenson JJ., refrained from addressing the question of a dichotomy of offences, although he agreed with Cory J. that "what is ultimately involved in this appeal is the ability of federal and provincial governments to pursue social ends through the enactment and enforcement of public welfare legislation."

In terms of the specific provisions of the *Competition Act* in question, all judges agreed that the requirement of a timely retraction contained in sections 60(2)(c) and (d) operated to deprive the

accused of a due diligence defence, and was therefore unconstitutional.

The Court was very divided over the constitutional validity of the reverse onus provision in section 60(2). For Cory and L'Heuruex-Dubé JJ., the Crown should not be required to prove a lack of due diligence in a regulatory offence since it would be "virtually impossible," and therefore the provision did not offend section 11(d) of the *Charter*. For Iacobucci, Gonthier and Stevenson JJ., a provision requiring the accused to do more than raise a reasonable doubt offended section 11(d), but in this case was saved as being a reasonable limit under section 1 of the *Charter* because of the practical necessity for the government to be able to prosecute public welfare offences. For both Cory and Iacobucci JJ., leaving proof of due diligence in the hands of the accused was not an unfair burden. The remaining four judges found that the shifting of the burden offended section 11(d) and was not saved by section 1.

In the result then, the misleading advertising provisions, with the exception of the requirement of timely retraction, were upheld by a 5:4 majority of the Court.

The decision in *Wholesale Travel* will probably have an impact on the pending judgment in the appeal of *R.* v. *Nova Scotia Pharmaceutical Society* (1991), 80 D.L.R. (4th) 206 (see (1991), 12:2 *C.C.P.R.*, p. 1). In the latter case, the Supreme Court must rule on whether the conspiracy provisions of the *Competition Act* offend section 7 of the *Charter*. The case was argued before the Court on December 4, 1991. *P.K.L.*

VICTORY FOR COMPETITION BUREAU IN COUTURE APPEAL

With its reversal of the *Couture* decision of the Québec Superior Court, the Québec Court of Appeal has removed any doubts about the constitutional validity of the exercise of the powers of the Competition Tribunal. [1]

The case arose in 1987 when the Director of Investigation and Research filed an application with the Tribunal in which he sought orders to dissolve a series of related mergers involving various companies in the meat rendering business in Québec, including Alex Couture Inc. and Sanimal Industries Inc. The companies involved then commenced an action in the Québec Superior Court to have the *Competition Act* declared unconstitutional. The application before the Tribunal was stayed by the Court pending its disposition of the action.

On April 6, 1990, Mr. Justice Jacques Philippon held that although the Parliament of Canada had the jurisdiction to enact the *Competition Act* under the general trade and commerce power of section 91(2) of the *Constitution Act, 1867*, the power of the Tribunal to order the dissolution of a merger offended the guarantee of freedom of association contained in section 2(d) of the *Canadian Charter of Rights and Freedoms*. Additionally, he held that the creation of the Tribunal was *ultra vires* because its members were not sufficiently independent relative to the powers they exercised. He did not state the constitutional grounds for this conclusion.[2]

The Court of Appeal upheld the finding of Philippon J. that the *Competition Act* is *intra vires* Parliament under the trade and commerce power. It reversed his findings of unconstitutionality with respect to freedom of association and the independence of the Tribunal. The Court also rejected an additional argument by the companies, that they were not subject to federal competition law because they were part of a provincially-regulated industry. The judgment, released on September 9, 1991, was written by Rousseau-Houle J.A. and concurred in by her colleagues Bisson C.J.Q. and Dussault J.A.

Division of powers

Until the 1989 Supreme Court of Canada judgment in *General Motors of Canada Ltd.* v. *City National Leasing*[3], competition law in Canada had generally been upheld under the federal criminal law power. The so-called "second" or "general" branch of the federal trade and commerce power (the first branch being international and interprovincial trade) was generally seen as moribund since the famous line of Privy Council cases early in this century, principally authored

by Viscount Haldane L.C., that had narrowed it almost out of existence. In *General Motors*, the Supreme Court considered the constitutional validity of a civil remedy that had been added to the *Combines Investigation Act* in 1976. The criminal law power was out of the question as a basis for jurisdiction. On behalf of a unanimous court, Dickson C.J.C. upheld the provision on the basis of the general trade and commerce power. He wrote that evaluating the validity of such provisions, which would otherwise be considered to be within the jurisdiction of the provinces over property and civil rights, involves a two-step process. First, the existence of a regulatory scheme must be determined, which includes a regulatory agency that is concerned with trade as a whole rather than a particular industry and which the provinces would be incapable of enacting jointly even though the successful operation of the scheme requires national coverage. Second, it must also be determined that the provision in question "is sufficiently integrated with the scheme that it can be upheld by virtue of that relationship."

Chief Justice Dickson's judgment was clearly based on his separate concurring opinion in the earlier case of *Attorney-General v. C.N. Transportation.*[4] In that case he, unlike the majority, would have founded federal jurisdiction for the offence of conspiracy to lessen competition unduly on the trade and commerce power as well as the criminal law power.

After a careful analysis of the merger provisions of the *Competition Act*, which manifestly could not be upheld under the criminal law power, Rousseau-Houle J.A. upheld them under the general trade and commerce power by applying the tests of Dickson C.J.C. in *General Motors*, *supra*. Thus the new civil provisions of the *Competition Act*, enacted in 1986, survived their first challenge on the basis of the division of powers in a provincial appellate court.

The "Regulated Industries" Defence

It is well established in the case law concerning various criminal provisions of the *Competition Act* or its predecessor that conduct which is specifically mandated or authorized by provincial law is not subject to prosecution under the federal *Act*. This is the so-called "regulated industries" defence or doctrine. It has been variously described as quasi-constitutional in terms of paramountcy and the division of powers, or mere statutory interpretation under the principle that wherever possible, statutes should be interpreted as not conflicting. The simplest explanation is that some of the cases concerned charges of conspiring to lessen competition "unduly," and the courts would not find that adherence to provincial law was "undue."

The companies pleaded that they could use the regulated industries defence, such that the *Act* would not apply to their mergers, because of the numerous provisions in provincial law and regulations concerning their industry. Rousseau-Houle J.A. analyzed these provisions extensively, including the requirement for each company to have a permit to operate from the provincial Minister of Agriculture. She rejected the applicability of the defence in this case "since no functional or operational incompatibility exists between the *Competition Act* and the provincial legislation applicable to the...industry."

It has been a matter of some debate whether the regulated industries doctrine would have less weight in the context of civil provisions upheld as part of a national regulatory scheme. The judgment in *Couture* might give this proposition some validity, as it arguably uses a higher threshold for the application of the doctrine than existed under the criminal provisions. The record showed that the Minister of Agriculture had acted in the past to limit the number of participants in the industry. However, the Court concluded that the only grounds for doing so were health and public safety, in terms of the capacity to monitor operators. The Court found that the régime was not designed to control the efficiency of the market or to regulate competition in it, and in particular it was not intended to prevent or sanction anti-competitive monopolistic practices. Therefore, there was no incompatibility between provincial and federal laws and the doctrine was inapplicable.

Freedom of Association

Given the widespread doubt whether Philippon J. was correct in his finding that the merger

provisions offended the *Charter* right of freedom of association, the extensive treatment of this issue by the Court of Appeal is perhaps surprising.

The Court held that the merger provisions did not interfere with freedom of association for several reasons. First, the provisions of the *Act* were sufficiently detailed that there was little room for arbitrariness in their application. Second, Rousseau-Houle J.A. applied the judgment of the Supreme Court in *R. v. Skinner*,[5] which upheld the anti-soliciting provisions of the *Criminal Code*. On this basis, "the mere fact that the provisions limit the possibility of commercial activities or agreements is not sufficient to show a *prima facie* interference with the section 2(d) guarantee."

Most importantly, the Court stated "freedom of association considered in its broad acceptance, that is the exercise in association of the *lawful rights* of individuals, is not prevented" by the provisions. It is this concept of activities that are illicit (because they lessen competition substantially) and therefore not entitled to *Charter* protection that Philippon J. did not analyse.

Although it was not necessary for it to do so, the Court said that in any case a *Charter* infringement would be justifiable in these circumstances on the basis of the tests to be applied to determine a reasonable limit under section 1. First, Rousseau-Houle J.A. noted that merger control was a "pressing and substantial" objective. In term of the proportionality test for a *Charter* infringement, she wrote:

> It appears to me that the merger provisions of the *Competition Act* reasonably establish a balance between the private interests of the individuals affected by these measures and the state's interest.

Independence of the Tribunal

Given that Philippon J. did not clearly indicate the basis on which he reached his conclusion that the Competition Tribunal was not sufficiently independent and therefore unconstitutional, the Court of Appeal had to canvass a number of issues with respect to judicial independence.

The Court ruled, first, that the Competition Tribunal is more akin to an administrative tribunal than a superior court. This means that the presence of lay members on the Tribunal, in addition to the judges of the Federal Court, did not offend the requirements of sections 96 to 100 of the *Constitution Act, 1867* concerning the appointment, tenure and salary of superior court judges.

Second, even though no one charged with an offence appears before the Tribunal, Rousseau-Houle J.A. considered that section 11(d) of the *Charter* was relevant because of the power of the Tribunal to punish for contempt, at least *in facie*.[6] Section 11(d) provides that anyone charged with an offence has the right to a "hearing by an independent and impartial tribunal."

On the basis of the decisions of the Supreme Court of Canada in *R. v. Lippe*[7] and *R. v. Valente*[8] concerning section 11(d), she analyzed the membership of the Tribunal in terms of security of tenure, financial security, institutional independence and institutional impartiality. She found that the provisions concerning the Tribunal were adequate to protect independence in each area.

Conclusion

The decision of Philippon J. at trial was widely thought to be incorrect, and thus the judgment of the Court of Appeal is probably unsurprising for most. However, the complete dismissal by a unanimous provincial appellate court of challenges to the *Competition Act* on the basis of both the division of powers and the *Charter* will doubtless produce some hesitation about mounting such challenges in the near future.

An application for leave to appeal to the Supreme Court of Canada, filed by the companies, is now pending. *P.K.L.*

Notes

[1] *Procureur général du Canada* c. *Alex Couture Inc.*, [1991] A.Q. No. 1604, now reported in translation as *Alex Couture Inc.* v. *Canada (Attorney-General)*, 83 D.L.R. (4th) 577, reversing [1990] R.J.Q. 266869 D.L.R. (4th) 635.

[2] The judgment of Philippon J. was reviewed in Lawson A.W. Hunter, "Provisions of *Competition Act* ruled unconstitutional" (1990), 11:2 CCPR, pp. 1-3.

[3] 58 D.L.R. (4th) 255.

4 [1983] 2 S.C.R. 206.
5 [1990] 1 S.C.R. 1235, 56 C.C.C. (3d) 1.
6 The question of its power to punish for contempt *ex facie* is now before the Supreme Court of Canada with the appeal of *Chrysler Canada Ltd.* v. *Canada (Competition Tribunal)*, [1990] 2 F.C. 565 (F.C.A.). The appeal is to be argued January 30, 1992.
7 (1991), 128 N.R. 1, 64 C.C.C. (3d) 513.
8 [1985] 2 S.C.R. 673, 24 D.L.R. (4th) 161.

DIRECTOR'S DECISION NOT REVIEWABLE BY FEDERAL COURT

On October 2, 1991, the Federal Court of Appeal dismissed an application brought by Robert Gauthier and other applicants to quash a decision by the Director of Investigation and Research not to cause an inquiry to be made under subparagraph 10(1)(b)(ii) of the *Competition Act*. The application was brought under section 28 of the *Federal Court Act* because the Director had refused to conduct an inquiry. It is novel for a refusal by the Director to conduct an inquiry to be challenged in the courts.

The matter had arisen from a letter sent by the applicants to the Director informing him of certain facts which they believed were sufficient to cause the Director to conduct an inquiry. The Director ultimately wrote to the applicants informing them that he would not cause an inquiry to be made because his preliminary investigation did not lead him to believe that the *Competition Act* had been contravened. It was this "decision" of the Director which was challenged under *Federal Court Act*. The Director moved to quash the application for review on the basis that the decision was not one which fell within the jurisdiction of section 28 of the *Federal Court Act*. The Court agreed with the Director's application to quash and stated as follows:

> We are all of the view that this motion to quash must succeed. In the light of the decision of the Supreme Court of Canada in *M.N.R.* v. *Coopers and Lybrand*, [1979] 1 S.C.R. 495, and in *Syndicat des employés de production du Québec et de l'Acadie* v. *Canadian Human Rights Commission*, [1989] 2 S.C.R. 879, no other conclusion can be reached but that the "decision" in question is purely administrative, not required by law to be made on a judicial or quasi judicial basis and, as a consequence, not reviewable under section 28 of the *Federal Court Act*.

In comments from the Bench during the hearing, it was also clear that the Court was of the view that it would be difficult to envisage a decision of the Director which would fall within the "quasi judicial" ambit of section 28 of the *Federal Court Act*. This may leave open the question whether the Director's "decisions" can be challenged under section 18 of the *Federal Court Act*. However, even here, there is a dearth of challenges to the Director's powers under the *Act* in previous jurisprudence. *L.A.W.H.*

HEARING IN SOUTHAM MERGER CASE CONTINUES

The hearing before the Competition Tribunal into the acquisition by Southam of various community newspapers in the lower mainland of British Columbia will continue in Vancouver in January. Several weeks of hearings were held in the fall. There remains one week of evidence scheduled to commence on January 13. It is expected that final arguments will be held the following week.

As expected, one of the key issues in the hearing is market definition and the effectiveness of remaining competition in the marketplace.

L.A.W.H.

LAIDLAW HEARING CONCLUDES

On July 23, 1991, the Director of Investigation and Research filed a complaint under section 79 of the *Competition Act* against Laidlaw Waste Systems Ltd. The complaint alleged the prevention or lessening of competition in containerized solid-waste haulage and disposal services involving commercial customers in three regional districts on southern Vancouver Island: Campbell

River, Nanaimo and the Cowichan Valley. The Director argued that Laidlaw engaged in restrictive long-term container service agreements, selective pricing practices and the systematic acquisition of virtually all of its competitors. The complaint was interesting in that it characterized acquisition activities as anti-competitive behaviour, and in that the Director is using relatively small market areas to make his case.

After substantial procedural wrangling, the Competition Tribunal heard evidence in Victoria, B.C. over the period October 28 to November 19. Over 35 witnesses were called to testify. The Director submitted written arguments by November 29 and the respondent by December 11. A final day of hearings was held in Ottawa on December 16 to allow both sides to present their final arguments. The decision will follow in the new year. The members of the Tribunal who heard the case were Madame Justice Barbara Reed, Dr. Frank Roseman and Madame Marie-Hélène Sarrazin.

A ruling against the type of restrictive contracts used by Laidlaw Waste Systems Ltd. to capture commercial garbage customers could have far-reaching implications in other industry sectors. The Director has challenged a number of contractual practices, including five- to ten-year non-competition agreements with competitors bought out by Laidlaw, long-term contracts that provide for automatic renewal, forced disclosure of bids from competing garbage firms and heavy penalties for breach of contract. The Bureau of Competition Policy admits that Laidlaw is a test case for review of these widely used practices.

The Director's application also raises the use by Laidlaw of legal actions and threatened legal actions to raise the cost of entering into business in competition with them. If the Tribunal makes findings on this practice, it also could have far-reaching implications for the law, both with respect to threatened lawsuits and, at least potentially, to government lobbying efforts as well.

The Laidlaw case is the second "abuse of dominance" case brought by the Director, and the decision will clearly also be of important precedential value. One of the most interesting aspects of the case, if the Tribunal decides for the Director, is the opportunity to see what types of orders the Tribunal is willing to issue. The Director's application sought a laundry list of very intrusive orders. *L.A.W.H.*

FEDERAL COURT OF APPEAL UPHOLDS COMPETITION TRIBUNAL'S ORDER IN CHRYSLER CASE

On September 19, 1991, the Federal Court of Appeal, in a judgment delivered by Mr. Justice Mahoney for the Court, upheld the Competition Tribunal's order against Chrysler Canada Ltd. The Competition Tribunal's order had been made pursuant to the "refusal to deal" section of the *Competition Act* and was the first such order issued by the Tribunal.

The Court upheld the Tribunal's decision on all counts. Indeed, the Court had little difficulty in dismissing both the appeals brought by Chrysler under several provisions of the *Act* and the cross-appeal brought by the Director with respect to the scope of the order granted by the Tribunal.

The Court heard arguments from both parties on only two issues raised by the appellant. They were whether the term "product" as used in the refusal to deal section means the product of a specific supplier rather than a class of products. In other words, the question was whether a product could be defined in the refusal to deal section as branded products only, rather than products in the context of the proper definition of a product market. The second issue was whether the Tribunal had erred in that it had not inquired or made a finding of fact that the cause of the effect on the complainant's business was his inability to obtain adequate supplies of the product and not other factors.

With respect to the definition of "product", the Court relied on the following Tribunal finding:

> Virtually nothing turns on the finding of a distinction; no element of the decision depends on whether the product in question is "Chrysler" auto parts, captive and competitive, or exclusively captive "Chrysler" auto parts since the volume of competitive parts ordered from Brunet appears to have been minimal .... Given the foregoing and the fact that from Brunet's perspective (if not that of his customers insofar as they shop for cheaper sources of supply prior to ordering from

> Brunet) there is no difference between competitive and captive parts, the Tribunal makes no distinction between captive and competitive "Chrysler" parts.

Based on this finding by the Tribunal, the Court held that it was satisfied that the Tribunal did not err by refusing to exclude competitive parts from the scope of its order.

The Court's finding, and indeed even the Tribunal's decision, seems not to deal with the issue head-on. The Court seems to be saying that, in the circumstances, the Tribunal's decision to consider only Brunet's business, which was essentially branded Chrysler parts, fit the definition of "product" in the *Act*. But if that is the test, then the definition of the term will always turn on the actual business of the complainant or person who has been refused supply. One might have thought that the term "product" should have had a broader and more general definition than that. Indeed, historically, the Director has refused to bring cases for captive parts under the refusal to deal section, mainly because he was not convinced that there was any effect on competition unless it could be demonstrated that the products in question represented a properly defined product market. It would also seem that under the Court's ruling, it will be easier to obtain orders under the section than has been thought the case in the past. This could be the result since requirement in the refusal to deal section to demonstrate insufficient competition among suppliers of the product should be relatively easy to prove in a situation where the "product" in question is captive parts.

With respect to the second issue, whether the effect on the complainant's business was due to the refusal to supply Chrysler or other factors, the Court held:

> The Tribunal did not find that, as a matter of fact, other factors had not substantially affected Brunet's business after Chrysler Canada had refused to deal with it. That, in my view, begs the issue. The purpose of the proceeding before the Tribunal was to determine whether, as alleged by the Director, there had been a refusal to deal which, in a manner otherwise offensive to s. 71(1), had substantially affected Brunet in his business. That the substantial effect on the business during the relevant period was not entirely due to other factors is implicit in the Tribunal's decision. It is not a requirement of the provision that the refusal to trade and the resulting inability to obtain adequate supplies be the only factors substantially affecting the business; it is sufficient that it have a substantial effect whatever the impact of other factors.

On that basis, the Court of Appeal upheld the Tribunal's decision.

The overall decision of the Court of Appeal seems to indicate that the Court is reluctant to interfere with the Tribunal's decisions. This is perhaps the first instance where the Court has had to consider substantive law issues. Previous matters brought to the Court of Appeal have tended to deal with procedural issues such as standing, confidentiality and discovery. However, in all the recent decisions of the Court of Appeal, the Tribunal's rulings have been upheld. Indeed, there appears to be a sense that the Court of Appeal is treating the appeals more like judicial review applications from a specialized tribunal. In that sense they are giving great deference to the expertise of the specialized Competition Tribunal, much as they would any specialized administrative tribunal. This is so even though the *Act* clearly contemplates appeals on both fact and law from the Tribunal's decisions. *L.A.W.H.*

WOLVERINE TUBE

In 1988, the Director of Investigation and Research decided not to challenge the acquisition by Wolverine Tube (Canada) Inc. (Wolverine) of substantially all the assets of Noranda Metal Industries Limited (NMI). Despite the fact that the merger would make Wolverine the only Canadian manufacturer of copper and copper-alloy piping, the Director said that the merger "should not only ensure that the assets in question will continue in production, but will enable Wolverine to realize significant efficiency gains, thereby becoming a more effective international competitor." The Director, however, stated his intention to monitor the merger and to commence an investigation within the three-year period following the merger, if required.

In April 1991, Wolverine closed down one of the plants involved in the merger and laid off all the employees of the mill located on Annacis Island in Delta, British Columbia. Wolverine's other plants in Montreal and London, Ontario remain in operation. The union at the B.C. plant,

the Canadian Association of Industrial, Mechanical and Allied Workers (Local 4), commenced picketing and attempted to purchase the plant. Wolverine has refused offers to buy the plant citing its reticence to facilitate the establishment of a competitor.

The union learned of Wolverine's intention to salvage machinery and equipment from, and demolish, the plant. On June 4, 1991, it submitted an application to the Director to investigate Wolverine's market dominance and conduct, and the merger with NMI. An investigation was commenced pursuant to sections 45, 79 and 92 of the *Competition Act*. Allegations of collusion contrary to section 45 were subsequently withdrawn. Wolverine undertook not to begin to dismantle the plant during the investigation.

Since the Director concluded that the merger between Wolverine and NMI had not resulted in any lessening or prevention of competition, and the three-year period following the merger specified in section 97 expired on October 31, 1991, Wolverine was released from its undertaking not to dismantle the plant. However, when Wolverine attempted to move some tooling equipment from the plant on November 2, 1991, union members threw up a picket around the flatbed truck on which the equipment had been loaded. The truck remained parked on the King George Highway in the Vancouver suburb of Surrey until November 14, when it returned to the Annacis Island plant.

Although the B.C. Supreme Court did issue a temporary injunction prohibiting the removal of equipment from the plant based on the union's concerns about the application of new payment in lieu of notice provisions in the B.C. *Employment Standards Act*, it refused to extend that injunction on November 13 when Wolverine posted a letter of credit. In another action, the Court issued a consent order that Wolverine give the union seven days' notice before disposing of its leasehold interests in B.C. The union also applied to the Federal Court of Canada for interim and interlocutory injunctions restraining Wolverine from disposing of its assets until an action could be heard requesting a writ of *mandamus* to require the Director to apply to the Competition Tribunal for a injunction against Wolverine pending the completion of the section 79 investigation. On November 15, the Federal Court refused to issue an injunction citing lack of jurisdiction and, by late November, Wolverine was successful in starting to dismantle its equipment.

Also on November 15, 1991, the Federal Court issued a search warrant to authorize representatives of the Director of Investigation and Research to enter the plant, administration and business offices of Wolverine located on Annacis Island to investigate allegations of false or misleading representations contrary to section 52 of the *Competition Act*. This investigation is the result of a separate application from the union alleging that Wolverine's representations that its copper tube meets industry standards (CSA and ASTM) with respect to copper content are false.

The outcomes of both the section 79 and section 52 investigations are still pending. *S.B.*

D.I.R. TOUGH ON PRICE-FIXERS

When he took the job as Director of Investigation and Research, Howard Wetston promised to pursue vigorously individuals involved in price-fixing activities. He is living up to that promise, as demonstrated by charges against individuals in the compressed gas price-fixing conspiracy.

Apparently the five companies who comprise nearly all of Canada's $200 million compressed gas industry (Union Carbide Canada Ltd., Canadian Oxygen Ltd., Canadian Liquid Air Ltd., Liquid Carbonic Ltd and Air Products Canada Ltd.) began discussions in June 1989 aimed at a price-fixing arrangement. In January 1990, the corporations executed an agreement which included the adoption of a common price schedule and the introduction of common transportation charges. When, as part of its investigation, the Bureau of Competition Policy executed search warrants at the facilities of Union Carbide and Canadian Oxygen in May 1990, they stopped abiding by the agreement and agreed to cooperate in the federal investigation.

During the fall of 1991, all five of the companies were charged under the *Competition Act* and all

have subsequently pleaded guilty to price-fixing. Negotiations between the companies and federal lawyers resulted in the largest fines ever levied under the competition statute. The fines, assessed by the Ontario Court (General Division), range from $1.7 million against each of Union Carbide, Canadian Liquid Air and Canadian Carbonic, to $700,000 against Canadian Liquid Oxygen, down to $200,000 against Air Products Canada. The fines reflect the size and market share of each company.

To date, two individuals have also been convicted. Vern S. Lorish and Kenneth H. Hibbert, both executives of Liquid Carbonic, were charged, pleaded guilty and were fined $75,000 each. The investigation is continuing and, with the exception of Air Products Canada, it is expected that individuals from each of the other companies involved will also be charged. *S.B.*

RETAIL GAS PRICE REVIEW

In March 1990, the Director of Investigation and Research initiated an investigation into the retail price of gasoline in the National Capital Region. In a letter dated November 1, 1991 to Mac Harb, the Ottawa MP who made the official complaint about Ottawa-area gas prices, the Director said that the investigation did not uncover any evidence of a widespread price-fixing conspiracy or price maintenance by petroleum suppliers. The Director did, however, raise concerns about supply arrangements to independent retail gasoline marketers and the ability of the major petroleum refiners to influence retail prices in local markets. He went on to say that he has made the major petroleum refiners aware of these concerns.

The Director also released a report commissioned from Dr. George Lermer of the University of Lethbridge entitled *Retail Gasoline Pricing in Ontario and Alberta: the Post-Kuwait Experience.* Dr. Lermer undertook an economic analysis of retail gasoline prices in several Ontario and Alberta communities after January 1987, following up on complaints from consumers in several smaller communities.

Dr. Lermer found that city size was not a factor in retail gas price behaviour *per se.* His study found that retail gas prices reflect the "unbranded rack price," an indicator of the price at which refiners generally supply gasoline to independent unbranded distributors as reported in the Oil Buyer's Guide, and the costs of distribution. He concludes that "short term volatility of gas prices within and between communities is more consistent with competition than with any theory of isolated markets and of any predatory strategy."

The results of these reports have not been greeted as conclusive. There are some indications that political concerns might generate hearings into gasoline pricing by the the House of Commons Standing Committee on Consumer and Corporate Affairs and Government Operations, chaired by Felix Holtmann. *S.B.*

YUK YUK'S NO JOKE FOR BUREAU

The Bureau of Competition Policy did not find Yuk Yuk's very funny.

Yuk Yuk's is a national chain of comedy clubs, founded in 1976. Several comics who perform at Yuk Yuk's complained to the Bureau that management was improperly taking advantage of its dominant position in the industry. Yuk Yuk's allegedly required performers to book through a related agency, and threatened them that they risked being cut if they performed at venues other than Yuk Yuk's.

Yuk Yuk's management avoided having to perform at the Competition Tribunal when it provided the Bureau with undertakings in October that it would not engage in the practices about which complaints had been lodged.

Although the Bureau has often accepted undertakings in merger cases, this was the first time they had done so regarding the abuse of dominant position or exclusive dealing provisions of the *Competition Act.* *P.K.L.*

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	141
EXAMINATIONS CONCLUDED						
Concluded as posing no issue under the *Act*[4]	17	120	166	204	193	118
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	121
EXAMINATIONS ONGOING AT END OF PERIOD	14	25	32	31	39	39
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 December 30, 1991.
3 Two or more days of review. Includes 380 prenotifications since July 15, 1987:
– in short form (s. 121): 1987/88 - 44; 1988/89 - 50; 1989/90 89; 1990/91 - 40; 1991/92- 43.
– in long form (s. 122): 1987/88 - 21; 1988/89 - 42; 1889/90 - 20; 1990/91 25; 1991/92- 14.
4 Includes:
276 Advance Ruling Certificates:
1986/87 2; 1987/88 - 26; 1988/89 - 59; 1989/90 - 72; 1990/91 - 74; 1991/92 - 47.
38 Advisory Opinions:
1986/87 3; 1987/88 - 10; 1988/89 - 6; 1989/90 3; 1990/91 - 2; 1991/92 4.
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.