CANADIAN COMPETITION LAW DEVELOPMENTS

The articles in this section were written by Lawson A.W. Hunter, Paul K. Lepsoe, Susan M. Hutton and Sonia M. Yung of Fraser & Beatty, Ottawa.

SUPREME COURT UPHOLDS CONSPIRACY SECTION

On July 9, 1992, the Supreme Court of Canada, in a unanimous judgment written by Mr. Justice Gonthier, upheld as not contrary to the *Canadian Charter of Rights and Freedoms*, the basic conspiracy section of the *Competition Act*.[1] The well-reasoned judgment will have two important impacts on competition law enforcement in Canada. First, it will allow the Director of Investigation and Research to proceed with a number of pending investigations being conducted under the conspiracy section. To that end, shortly after the decision, the Attorney General of Canada laid charges in a long-standing inquiry involving freight forwarders. Second, and perhaps more important, the reasoning of the Court will clearly assist in future judicial considerations of the conspiracy section, as well as the entire *Competition Act* itself. The judgment is a ringing endorsement of the importance of competition laws to the economic policy of Canada and displays a sophistication about the purposes of the Act which, many have argued over the years, were not well understood by the Canadian judiciary.

There were two aspects of the case on appeal. First, because the conspiracy section only makes anti-competitive agreements illegal if they "unduly" lessen competition, was it so vague that it contravened section 7 of the *Charter*? Section 7 states:

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

The Court spent most of its time dealing with this aspect of the case. The second issue was whether the *mens rea* requirement of the conspiracy law infringed section 7.

The case originally arose in Nova Scotia as a result of charges against the Pharmaceutical Association of Nova Scotia, the Nova Scotia Pharmaceutical Society and a number of pharmacists. It made its way through the Trial Division and Court of Appeal of Nova Scotia to the Supreme Court of Canada. The charges related to the sale and offering for sale of prescription drugs and pharmacists' dispensing services from 1974 through 1986.

Vagueness

Gonthier, J., in considering the arguments with respect to vagueness, considered the eight cases in which the Supreme Court has discussed this doctrine under the *Charter*. In summarizing those cases, the Justice found that vagueness clearly raised a section 7 issue since it is a principle of fundamental justice that laws not be too vague. The doctrine of vagueness is also an aspect of the rule of law. The factors to be considered in determining whether a law is too vague include:

(a) the need for flexibility and the interpretive role of the courts;
(b) the impossibility of achieving absolute certainty, a standard of intelligibility being more appropriate; and
(c) the possibility that many varying judicial interpretations of a given disposition may exist and perhaps co-exist.

He also found that, with respect to vagueness and section 1 of the *Charter*, the relevant concept is whether the legislative provision overreaches or is overly broad in its impairment of the rights and freedoms of Canadians.

Gonthier, J. also stated that the doctrine of vagueness is often mingled and confused with "over-breadth" in Canadian decisions, a result

he thought might arise from the influence of American authorities. In considering these concepts, he concluded that "over-breadth" is no more than an analytical tool to establish a violation of a *Charter* right. It has no independent judicial significance. In other words, it is not a separate doctrine. The proper doctrine is that of "vagueness" which is essentially an aspect of section 7, but can also be part of a section 1 concern with respect to whether the provision is "prescribed by law".

With respect to vagueness itself, he found that there are two rationales supporting a concern over vagueness. The first is the need to give fair notice to citizens. The second is the desire to have some limit on the enforcement discretion of the state. His conclusion with respect to vagueness was as follows:

> The doctrine of vagueness can therefore be summed up in this proposition: a law will be found unconstitutionally vague if it so lacks in precision as not to give sufficient guidance for legal debate. This statement of the doctrine best conforms to the dictates of the rule of law in the modern state, and it reflects the prevailing argumentative, adversarial framework for the administration of justice.

Vagueness and the Conspiracy Provision of the Act

The principal question with respect to the vagueness doctrine was whether the word "unduly" was too vague. In this analysis, Gonthier J. briefly reviewed the many decisions on the meaning of "unduly" including the list commonly referred to from the judgment of Mr. Justice Anglin in *Weidman* v. *Shragge*.[2] In defining "unduly" he chose to adopt the reasoning of Clarke C.J.N.S. of the Nova Scotia Court of Appeal:

> While the word "unduly" is not defined by statute and 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.[3]

This interpretation in and of itself may have great significance to the Canadian conspiracy law. Arguably, something which is affected in a serious or significant way is a lower threshold of intervention than the notion of virtual elimination of competition, which has been sometimes used. It also moves the meaning of "unduly", arguably, closer to the common test used in many other provisions of the Act, namely, substantial lessening of competition. In one sense it may even be argued to be a lower threshold than "substantial" since an effect might be "serious" but not "substantial".

Gonthier, J. then went on to put "unduly" in the context of Canadian public policy reflected by the *Competition Act*. He stated:

> [I]t must be noted that the Act is central to Canadian public policy in the economic sector, and that s. 32 is itself one of the pillars of the Act.[4]

He also stated that the Act can be seen "as a central and established feature of Canadian economic policy". In continuing his analysis, Gonthier J. made a number of points with respect to the public policy reflected in the conspiracy provision. He noted:

1. The conspiracy provision is the oldest provision in the Act and remains at the core of the criminal part of the Act.
2. The conspiracy provisions rest on the substratum of values, a finding which is relevant in undertaking a vagueness analysis.
3. Private gains by parties to the agreement or even efficiency gains by the public lie outside the inquiry under the conspiracy provision. "Competition is presumed by the Act to be in the public benefit. The only issue is whether the agreement impairs competition to the extent that it will attract liability."[5]
4. In comparing the Canadian conspiracy provision to the American provision in the *Sherman Act*, the Court found that the Canadian law lies somewhere on the continuum between a *per se* rule and a rule of reason. The Court stated:

> It does allow for discussion of the anti-competitive effects of the agreement, unlike a *per se* rule, which might dictate that all agreements that lessen competition attract liability. On the other hand, it does not permit a full-blown discussion of the economic advantages and disadvantages of the agreement, like a rule of reason would. Since "unduly" in s. 32(1)(c) leads to a discussion of the seriousness of the competitive effects, but not of all relevant economic matters, one may say that this section creates a partial rule of reason.[6]

5. The underlying objectives of the Act give a clear idea of what is meant by "unduly" lessening competition and that it, therefore, represents an

intelligible principle which carries meaning and has conceptual force.

In this element of the judgment, Gonthier, J. found that even without considering the rest of the Act and the case law, he would be inclined to find the standard in the conspiracy section as sufficiently precise to meet the constitutional vagueness test. However, he did not stop there and went on to consider the content of an inquiry with respect to "unduly" under the Act. He indicated that:

> In the context of this *Charter* inquiry into the alleged vagueness of s. 32(1)(c) of the Act, a survey of the rest of the section, together with lower court decisions and of doctrinal writings, will show that adjudication under s. 32(1)(c) follows a definite process that eliminates any vagueness that might remain.[7]

In elaborating on this, he said there are two major elements to the inquiry under this section by the courts. The first relates to the structure of the market and the second to the behaviour of the parties to the agreement. He also noted that definition of the relevant market is always required.

With respect to market share, the plaintiffs had argued that since there was no clear market share number that would determine legality under the section, it must therefore be too vague. However, Gonthier, J. found that reliance on market structure and market share alone would result in the section losing some of its effectiveness. He stated that market share alone is not determinative of legality. He pointed out that the importance of market structure is to ascertain the degree of market power of the parties to the agreement. In determining market power, factors apart from market share are relevant. They include, according to his list: (1) the number of competitors and the concentration of competition; (2) barriers to entry; (3) geographical distribution of buyers and sellers; (4) differences in the degree of integration among competitors; (5) product differentiation; (6) countervailing power; and (7) cross-elasticity of demand.

In discussing market power he stated:

> Market power is the ability to behave relatively independently of the market. This is precisely what s. 32(1)(c) of the Act seeks to prevent. As this Court has always held in its previous judgments, the aim of the Act is to secure for the Canadian public the benefit of free competition. Excessive market power runs against the objectives of the Act. When it occurs in the context of a conspiracy to restrict competition, s. 32(1)(c) will apply. It can be presumed that Parliament did not wish s. 32(1)(c) to apply in the absence of market power. Absent such power, agreements to restrict competition would either benefit the public by allowing small firms to consolidate their position and be more competitive, or dissolve under competitive pressures.[8]

He also discussed the level of market power necessary under the conspiracy section compared to other sections of the Act. He particularly noted the dominance section which requires that the parties have a dominant position in that they substantially or completely control a class or species of business. Gonthier, J. said that the required degree of market power under the dominance section comprises "control" and not simply the ability to behave independently of the market as is required under the conspiracy section. In this sense, he seems to be finding that the threshold of intervention under the conspiracy section is lower than that under the dominance section. This may have some bearing on the Tribunal's future decisions since, in its dominance decisions, it has basically found that the notion of substantial or complete control is the same as market power.

Gonthier, J. also made an interesting comment on the degree of market power necessary under the section. He stated:

> Parties to the agreement need not have the capacity to influence the market. What is more relevant is the capacity to behave independently of the market, in a passive way. A moderate amount of market power is required to achieve this.[9]

This may raise an interesting enforcement question in that it seems to imply that a lower degree of market power than has traditionally been thought to be the case would bring about a conviction under the section.

Turning to the second aspect of "unduly" as discussed by the courts, namely the behaviour of the parties, the Supreme Court noted that it is relevant to consider the facet of competition affected by the agreement and whether it is something that is of prime concern to the buying public. In this regard, he indicated that price, quality, and service among other aspects would

be relevant. He also noted that the object of the agreement would be the most important behavioural element but others may be important as well, such as the manner in which the agreement would be carried out.

Gonthier, J. then pointed to the subsections of the conspiracy section which give guidance as to the sort of behaviour which might or might not be injurious to competition. In particular, he referred to the permissible fields contained in subsection 32(2) of the old Act and the impermissible fields in subsection 32(3). These are the exclusions with respect to standards, exchanges of information, etc., but which do not apply if they affect output, prices or entry, for example.

In considering both market power and behaviour, the Court concluded that in addition to some market power, some behaviour likely to injure competition is necessary to obtain a conviction. "It is the combination of the two that makes a lessening of competition undue." However, even here the Court adopted a rather flexible approach. It stated:

> The agreement could either have an "internal" effect, in consolidating the market power of the parties (as is the case with price-fixing) or have an "external" effect in weakening competition and thus increasing the market power of the parties (as is the case with market-sharing). Market power may also exist independently of the agreement, in which case any anti-competitive effect of the agreement will be suspicious. A particularly injurious behaviour may also trigger liability even if market power is not so considerable.[10]

Having concluded this analysis, Gonthier, J. stated in conclusion:

> In summary, I find that s. 32(1)(c) of the Act and its companion interpretive provision section 32(1.1) do not violate s. 7 of the *Charter* on grounds of vagueness. The word "unduly" as such carries a connotation of seriousness. Considering further that s. 32(1)(c) of the Act is one of the oldest and most important parts of Canadian public policy in the economic field, and that it mandates a partial rule of reason inquiry into the seriousness of the competitive effects of the agreement, Parliament has sufficiently delineated the area of risk and the terms of debate to meet the constitutional standard. Moreover, the rest of the Act and the case law have outlined a process of examination of market structure and behaviour under s. 32(1)(c) of the Act, thus making it even more precise.[11]

Mental Element and Section 7 of the Charter

The Court then turned to the *mens rea* aspect of the appeal. They had little difficulty in finding that the section met the *Charter* requirements for *mens rea*. They reiterated that a minimum fault requirement is required with respect of every criminal or regulatory offence to satisfy the requirements of section 7. They found that the conspiracy provisions of the *Competition Act* set out two mental fault elements, one subjective and the other objective.

Gonthier, J. stated that to satisfy the subjective element,

> [t]he Crown must prove that the accused had the intention to enter into the agreement and had knowledge of the terms of that agreement. Once that is established, it would ordinarily be reasonable to draw the inference that the accused intended to carry out the terms in the agreement, unless there was evidence that the accused did not intend to carry out the terms of the agreement.[12]

With respect to the objective *mens rea* requirement, the Court held:

> [T]he Crown must establish that on an objective view of the evidence adduced the accused intended to lessen competition unduly. This surely does not impose too high a burden on the Crown. Section 32(1)(c) requires that the Crown demonstrate that the effect of the agreement will be to prevent competition or to lessen it unduly. Once again, it would be a logical inference to draw that a reasonable business person who can be presumed to be familiar with the business in which he or she engages would or should have known that the likely effect of such an agreement would be to unduly lessen competition. Thus in proving the *actus reus* that the agreement was likely to lessen competition unduly, the Crown could, in most cases, establish the objective fault element that the accused as a reasonable business person would or should have known that this was the likely effect of the agreement.[13]

For these reasons, the Court found that the *mens rea* elements of the Act were sufficient to withstand *Charter* scrutiny. The Court's analysis of the *mens rea* element should satisfy the Crown's anxiety about double intent. The Court has basically reiterated the traditional notion of intent to enter into the agreement, but added the gloss

that objectively the business person must have known the effect that the agreement would have. This analysis is quite consistent with the view often held that the agreement must be of a nature or kind such that a reasonable person would have known it to have a seriously limiting effect on competition.

Conclusion

The Supreme Court judgment is one of the most significant decisions in the recent history of competition legislation. Arguably, the Court went well beyond that required to uphold the constitutionality of the provisions and has provided considerable assistance to lower courts in interpreting the conspiracy provision. The discussion of market power and behaviour is one of the most lucid and understandable discussions of this subject, in the context of the conspiracy provisions, ever to come from the Supreme Court. It makes sense from an economic point of view and perhaps, once again, demonstrates that the enforcement of competition laws in Canada is moving from challenges based on technicalities to an understanding of the substantive economic impact of anti-competitive behaviour. It is a trend much to be endorsed.

L.A.W.H.

Notes

1 *R.* v. *Nova Scotia Pharmaceutical Society et al.* (July 9, 1992) unreported Decision No. 22473.
2 (1912) 46 S.C.R. 1
3 *R.* v. *Nova Scotia Pharmaceutical Society, supra,* note 1 at 38.
4 *Ibid.* at 43.
5 *Ibid* .at 44.
6 *Ibid.* at 47.
7 *Ibid* .at 49.
8 *Ibid* .at 52
9 *Ibid.*
10 *Ibid.* at 56.
11 *Ibid.*
12 *Ibid* .at 60.
13 *Ibid.*

CHRYSLER DECISION CONFIRMS ENFORCEMENT POWERS OF COMPETITION TRIBUNAL

In a decision released on June 25, 1992, the Supreme Court of Canada upheld the jurisdiction of the Competition Tribunal to enforce its orders through contempt proceedings.[1]

The case arose from a proceeding at the Competition Tribunal against Chrysler Canada for a "refusal to deal", contrary to section 75 of the *Competition Act.* This led to an order by the Tribunal in October 1989 requiring Chrysler to accept Richard Brunet of Montreal as a parts customer.[2] The following year, the Director of Investigation and Research filed a motion with the Tribunal for Chrysler to appear and show cause why it should not be held in contempt of the Tribunal's order, that is, to face potential punishment by the Tribunal for not treating Brunet as the Tribunal had mandated. On the day the motion was to be heard, counsel for Chrysler objected that the Tribunal had no jurisdiction to hear the motion on the grounds that it had no power over contempt committed "*ex facie curiae*", meaning outside the presence of the Tribunal. At common law, only superior courts have this serious and potentially far-reaching power. The issue, then, was whether the wording of the applicable statutes conferred such a power on the Tribunal, which is not a superior court.

The Chairman of the Competition Tribunal, Madame Justice Barbara Reed, ruled that the Tribunal did have the necessary jurisdiction. Before the hearing on the substance of the Director's allegations proceeded, Chrysler appealed the ruling of Reed, J. to the Federal Court of Appeal. In July 1990, that Court unanimously reversed Reed, J. and ruled that the Tribunal did not have jurisdiction.[3] The judgment of the Court of Appeal was written by the Court's then-Chief Justice Frank Iacobucci, who has subsequently been appointed to the Supreme Court.

The Director then appealed to the Supreme Court. The majority judgment of the Court was given by Mr. Justice Gonthier, concurred in by La Forest, L'Heureux-Dubé, Sopinka, and Cory, JJ.

Gonthier, J. began his judgment by emphasizing that the issue was confined to the question of jurisdiction over failure to comply with an order of the Tribunal, that is, civil contempt, and not over a more general criminal contempt power. He noted that in the Supreme Court decision in *CBC v. Quebec Police Commission*,[4] it was held that statutory wording had to be "express" or "clear and unambiguous" in order to overcome the common law restriction of the power to punish for contempt *ex facie curiae* to a superior court.

The judgment is essentially an exercise in statutory interpretation, specifically of section 8 of the *Competition Tribunal Act*, which reads:

> 8. (1) The Tribunal has jurisdiction to hear and determine all applications made under Part VIII of the *Competition Act* and any matters related thereto.
>
> (2) The Tribunal has, with respect to the attendance, swearing and examination of witnesses, the production and inspection of documents, the enforcement of its orders and other matters necessary or proper for the due exercise of its jurisdiction, all such powers, rights and privileges as are vested in a superior court of record.
>
> (3) No person shall be punished for contempt of the Tribunal unless a judicial member is of the opinion that the finding of contempt and the punishment are appropriate in the circumstances.

Gonthier, J. analyzed the scheme of the *Competition Act* and the *Competition Tribunal Act* in order to provide the context for section 8. Noting that it was an offence under s. 74 of the *Competition Act* to breach an order of the Tribunal, he wrote:

> The expertise of the Tribunal is lost in proceedings under s. 74. If it is only possible to prove a breach of an order through a process comparable in complexity to the issuance of the order, as is often the case, some violations may well escape scrutiny and remedial action, if the expertise of the Tribunal is not available at the enforcement stage. Given the complexity of orders under Part VIII, monitoring their application could not be made a completely separate process, before a court of general or criminal jurisdiction, without a corresponding loss of effectiveness.

He then analyzed the specific wording of s. 8. He held that the words in subsection 8(1), "any matters related thereto", or in French, "toute question s'y rattachant", may encompass such matters as "the enforcement of an order made pursuant to [an] application." He noted the Tribunal's "express" power over "the enforcement of its orders" in s. 8(2). Finally, he noted the "unique" requirement of s. 8(3) concerning the concurrence of a judicial member in any finding of contempt.

The power to punish for contempt *ex facie curiae* may have enormous consequences for the liberty of the subject, and this is thought to be an historical reason for the common law limitation on the power to the superior court level. While acknowledging this principle, Gonthier, J. wrote:

> ...it can safely be left to the Tribunal to deal with breaches of its dispositive orders, since they involve issues analogous to those arising when the order first issued, and are similarly circumscribed. In terms of expertise, the Tribunal is in fact better suited than a superior court to decide these matters.

Madame Justice McLachlin wrote the lone dissenting judgment. It is surprisingly bad-tempered, and is almost a point-by-point refutation of the judgment of her colleague. She argued principally that the particular wording of s. 8 was not specific enough to overcome the common law rule. She also relied on a very technical argument about the constitutionality of such a power for the Tribunal under the provisions of sections 96 to 101 of the *Constitution Act, 1867*, which concern superior courts. The issue had not been seriously pursued by the parties in argument.

With its jurisdiction confirmed, the Director's motion for a show-cause order was considered by the Tribunal. On September 22, 1992, with Reed, J. dissenting, the majority of the Tribunal held that there was insufficient evidence to justify issuing the order.

The competition law bar can perhaps be grateful to Chrysler for helping to clarify an aspect of the Act, even if Chrysler may now be regretting having commenced the string of appeals which appear to have been pointless for it.

P. K. L.

Notes

1 *Chrysler Canada Ltd.* v. *Canada (Competition Tribunal)* 25 June 1992 (unreported).

2 *Director of Investigation and Research* v. *Chrysler Canada Ltd.* (1989), 27 C.P.R. (3d) 1 at 28 (Competition

Trib.). Chrysler unsuccessfully appealed this decision to the Federal Court of Appeal (1991) 38 C.P.R. (3d) 25, leave to appeal to the Supreme Court of Canada refused on April 9, 1992.

3 [1990] 2 F.C. 565 (Fed. C.A.).

4 [1991] 2 S.C.R. 6.

SUPREME COURT REFUSES TO HEAR COUTURE APPEAL

Of the various appeals concerning the *Competition Act* at the Supreme Court this year, *Couture* was potentially the most significant. The case arose when the Director challenged a merger involving Alex Couture Inc. and other companies in Quebec. The companies then challenged the constitutionality of the Act in Quebec Superior Court, calling into question the merger provisions of the Act under the division of powers, and the composition of the Competition Tribunal under the Charter. The companies were successful at trial,[1] but then lost in the Quebec Court of Appeal when the Director appealed.[2] In January 1992, the companies applied for leave to appeal to the Supreme Court of Canada.

The Supreme Court refused leave on July 2, 1992.[3] The Court does not give reasons for its decisions on leave applications.

P.K.L.

Notes

1 *Couture (Alex) Inc.* c. *Canada (Procureur général)* [1990] R.J.Q. 2668. See also "Provisions of Competition Act Ruled Unconstitutional" (1990) 11:2 C.C.P.R. 1.

2 (1991) 41 Q.A.C. 1, reported in translation as *Alex Couture Inc.* v. *Canada (Attorney-General)*, 83 D.L.R. (4th) 577. See also "Victory for Competition Bureau in Couture Appeal" (1991) 12:4 C.C.P.R. 5.

3 [1991] C.S.C.R. No. 448.

BUREAU RELEASES FINAL PRICE DISCRIMINATION ENFORCEMENT GUIDELINES

The Director of Investigation and Research released the final version of the "Price Discrimination Enforcement Guidelines" on September 14, 1992. These Guidelines outline the Director's approach to the enforcement of section 50(1)(a) of the *Competition Act*. They are the result of a consultative process including the circulation by the Director of a discussion paper in July 1990, and the release of draft guidelines in January 1992.[1]

The final Price Discrimination Enforcement Guidelines were released after the publication deadline for this issue of the C.C.P.R. A detailed analysis of the Guidelines will appear in the December issue.

Copies of the Guidelines can be obtained from the Resource Centre, Bureau of Competition Policy, Consumer and Corporate Affairs Canada, 50 Victoria Street, Hull, Quebec K1A 0C9 or by calling (819) 994-0798.

S.M.H.

Notes

1 Comment by Lawson A.W. Hunter, Q.C., "Price Discrimination Guidelines Near Final Stretch" (1992), 13:1 C.C.P.R. 10.

CRIMINAL CHARGES LAID BY COMPETITION BUREAU

The Bureau of Competition has laid criminal charges against two companies in Quebec. The two companies, Autostock Inc. of Montreal and Tenneco Canada Inc. of Toronto, were charged following the investigation of a complaint made by Club Zap, an auto parts dealer, and its sister company Entrepôt Dépanneur.

The charges were laid pursuant to s. 61(1)(a) of the *Competition Act* which provides that persons shall not

> by agreement, threat, promise or any like means, attempt to influence upward, or to discourage

the reduction of, the price at which any other person engaged in business in Canada supplies or offers to supply or advertises a product within Canada.

The Bureau alleges that Autostock attempted to convince Tenneco, a supplier of brakes, mufflers and shock absorbers, to stop selling its products to Club Zap. Autostock is the leading auto exhaust, brake and steering repair specialist in Quebec with 267 outlets.

Club Zap, which operated on a membership basis, went out of business in January 1990 after 14 months of operation. Memberships were sold for $20 allowing the members to purchase from its stock of car parts. By the time it closed, the retailer had signed up 9,500 members. The chairman of Club Zap, Roger Duchesne stated in a news conference in September 1989 that the company had sold $1.3 million worth of parts after only 10 months. Club Zap was, he said, the only operation of its type in North America buying from manufacturers and selling directly to the consumer rather than going through a series of intermediaries. Mr. Duchesne alleged that major parts distributors were trying to put him out of business.

Subsection 61(9) of the *Competition Act* provides that a person who contravenes the price maintenance provisions is guilty of an indictable offence and, upon conviction, is liable to a fine at the discretion of the court or to imprisonment for a term not to exceed five years.

The charges were laid on May 28, 1992 in the Quebec Court in Longueuil, the place of business of Autostock's subsidiary, Autopoint Inc. Autostock, Autopoint, Tenneco and a Tenneco employee pleaded not guilty on June 16. The case was to be back in court July 28 for a pro forma hearing and to set a date for a preliminary hearing, but this has been delayed until October.

S.Y.

MISLEADING ADVERTISING CHARGES RESULT IN FINES

On July 6, 1992, Fuel Base Industries Inc. pleaded guilty to seven charges of misleading advertising under the *Competition Act*. On August 4, the Calgary-based company was fined a total of $50,000 for promoting a product which promised to increase fuel efficiency.

In March, 1990 Fuel Base manufactured and distributed a product called "Vitalizer". It retailed for $189 and was installed on the fuel line. It was claimed that the Vitalizer would boost fuel efficiency by 10 to 20 percent.

Crown evidence showed that the product did not reduce fuel consumption. The defence lawyer for Fuel Base argued that some tests indicated a seven percent increase in fuel efficiency but expert testimony cast doubt on that claim.

S.Y.

MISLEADING ADVERTISING BULLETINS RESUME PUBLICATION

The *Misleading Advertising Bulletins*, which were discontinued due to lack of funds last year, are now being printed again. The Bureau of Competition Policy has issued Bulletins 2, 3, and 4 from 1991 as well as a Bulletin for the first quarter of 1992.

Among the areas of focus is environment-related claims including recyclability and degradability made by manufacturers of consumer products. "Green marketing" has become a powerful tool in the era of environmental consciousness. Studies have shown that a consumer is willing to be a bit inconvenienced and even pay more to purchase a product that is "environmentally friendly". As a result, in 1991, Consumer and Corporate Affairs Canada issued *Guiding Principles for Environmental Labelling and Advertising*. These principles are designed to be used in conjunction with the misleading advertising provisions of the *Competition Act*. Representations made which are inconsistent with the principles may give the Director of Investigation and Research a basis for initiating

an inquiry under the Act.

It must be noted that the Guiding Principles are essentially self-regulatory. In order for sanctions to be levied, there must be a commission of an offence and subsequent conviction pursuant to the *Competition Act* or the *Consumer Packaging and Labelling Act*. No environmental claim has as yet been the subject of legal action since the publication of the Principles. The courts, however, are expected to refer to them when determining whether a representation is materially misleading. To that end, the Director may consider other methods of resolution such as the obtaining of a consent prohibition order pursuant to subsection 34(2) of the *Competition Act*, or an undertaking by an advertiser to desist from certain practices and implement corrective measures. The option of initiating criminal proceedings would remain for cases of flagrant and/or persistent infractions.

Under the *Competition Act*, a party who is found to have made a false or misleading representation will be held responsible. However, any reasonable measures taken by advertisers to ensure that the declarations of their suppliers are true will be taken into account in determining whether enforcement action is warranted. Inspectors from the Consumer Products Branch of the Consumer Bureau, Consumer and Corporate Affairs Canada will check for compliance with the Guiding Principles during their visits to business premises and refer to the Marketing Practices Branch any cases which, in their opinion, would raise an issue under section 7 of the *Consumer Packaging and Labelling Act* which prohibits the labelling of any prepackaged product with false or misleading representations.

An Advisory Opinion by the Competition Bureau indicates that the use of a Möbius Loop to identify environmentally friendly products which includes the proper qualifying statement "where facilities exist/ là où les installations nécessaires existent" will not raise an issue under the *Competition Act* so long as recycling facilities are available to at least one third of the population in the area where the product is being marketed. For a product with national distribution, recycling facilities must be available to a cumulative population of 6.5 million or more.

Products which are advertised as biodegradable but which will inevitably end up in disposal facilities where the conditions necessary for the degradation process to function are absent, may be subject to an inquiry by the Director. Where a product is partially degradable, any statement regarding degradability must indicate the degree of degradation. Failure to do so could raise an issue under the *Competition Act*. Products indicating that they are "biodegradable if composted" could also raise an issue if collection or drop-off facilities are, again, not available in the relevant market area. However, such a claim may be acceptable for those products which may be composted in backyard composters. Finally, any general environment-related claims on a product should be qualified by an indication of what specific product characteristics relate to the claimed benefit.

The *Misleading Advertising Bulletin* will become a primary tool in promoting voluntary compliance with the Guiding Principles. To that end, it will now be a priority to report in future issues of the Bulletin, opinions on the use of environmental claims given in the Program of Advisory Opinions.

S.Y.

MERGER EXAMINATIONS UNDER THE COMPETITION ACT
STATISTICAL SUMMARY

	1986-87[1]	1987-88	1988-89	1989-90	1990-91	1991-92	1992-93[2]
MERGER EXAMINATIONS COMMENCED[3]	40	146	191	219	193	194	90
EXAMINATIONS CONCLUDED							
Concluded as posing no issue under the Act[4]	17	120	166	204	170	171	14
Concluded with monitoring only[5]	5	7	10	13	10	5	0
Concluded with pre-closing restructuring[6]	–	2	1	–			0
Concluded with post-closing restructuring[7]	1	2	3	1	2	1	0
Concluded with Consent Order	–	–	–	3	–		0
Parties abandoned proposed merger in whole or in part as a result of Director's position	3	2	2	2	1	1	0
TOTAL EXAMINATIONS CONCLUDED	26	133	182	223	183	178	79
EXAMINATIONS ONGOING AT END OF PERIOD	14	25	32	31	39	41	40
APPLICATIONS BEFORE TRIBUNAL							
Concluded[8]	1	–	2	3	-	1	1
Ongoing	–	2	2	1	3	2	–

Notes

1 Statistics commenced on June 19, 1986.

2 Incomplete preliminary statistics for April 1, 1992 to August 31, 1992.

3 Two or more days of review. Includes 415 prenotifications since July 15, 1987 of which:
- in short-form (s. 121); 1987/88 44; 1988/89 - 50; 1989/90 - 89; 1990/91 - 49; 1991/92-61.
- in long-form (s. 122); 1987/88 21; 1988/89 - 42; 1889/90 20; 1990/91 24; 1991/92 - 15.

4 Includes:
Advance Ruling Certificates 1986/87 - 3; 1987/88 - 26; 1988/89 59; 1989/90 - 72; 1990/91 - 70; 1991/92 - 64.
Advisory Opinions 1986/87 8; 1987/88 21; 1988/89 - 20; 1989/90 - 71; 1990/91 12; 1991/92 7.

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.