

## CANADIAN COMPETITION RECORD

# CANADIAN COMPETITION LAW AND POLICY DEVELOPMENTS

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## GEORGE N. ADDY CONFIRMED AS DIRECTOR OF INVESTIGATION AND RESEARCH

On December 21, 1993, Industry Minister John Manley confirmed that George N. Addy had been appointed Director of Investigation and Research for the Bureau of Competition Policy. Mr. Addy had been acting Director since the appointment of Howard I. Wetston, Q.C., to the Federal Court, Trial Division, on June 16, 1993.<sup>1</sup>

As Director, Mr. Addy is responsible for overseeing the activities of the Bureau of Competition Policy which, in turn, administers and enforces the *Competition Act*.

D.P.L.

### Notes

<sup>1</sup> See (1993) 14:3 Can. Comp. Rec. 1.

## CONSTITUTIONAL VALIDITY OF COMPETITION ACT SUBPOENA POWER CHALLENGED

Quebec Notaries have asked the Federal Court, Trial Division to determine the constitutional validity of section 11(1)(a) of the *Competition Act* (the "Act") in seeking to quash an order made under this section authorizing the examination of various Notaries under oath on the grounds that the provision infringes the rights guaranteed by the *Canadian Charter of Rights and Freedoms* (the "Motion").

This case involves an investigation being conducted pursuant to Part II of the Act regarding a price fixing agreement allegedly entered into by Quebec Notaries in contravention of section 45(1)(c) of the Act. The Notaries have been ordered pursuant to section 11(1)(a) to be examined under oath by the Director or an authorized representative of the Director to answer any question relevant to the inquiry before a "presiding officer". The Motion brought by the Notaries was heard by Madame Justice Danièle Tremblay-Lamer on February 1, 1994 who reserved judgment.

The constitutional validity of a similar provision in the *Combines Investigation Act*<sup>1</sup> was considered by the Supreme Court of Canada in *Thomson Newspapers Ltd. v. Canada*.<sup>2</sup> In this case, Thomson Newspapers Ltd. and several of its officers were served with orders to appear before the Restrictive Trade Practices Commission to be examined under oath and to produce documents. The orders were issued pursuant to section 17 of the *Combines Investigation Act* in connection with an inquiry to determine if there was evidence that the corporation had committed the offence of predatory pricing contrary to section 34(1)(c) of the *Combines Investigation Act*. Thomson Newspapers Ltd. challenged the validity of section 17 in light of the provisions in sections 7 and 8 of the *Charter of Rights and Freedoms*. The Supreme Court of Canada, in a split decision, held that section 17

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did not violate the guarantee to fundamental justice in section 7 of the *Charter* since a person compelled to testify pursuant to section 17 is not an accused charged with an offence within the meaning of section 11(c) and since no oral evidence given by the person under oath may be used or received against him in any criminal proceedings pursuant to section 20 of the *Combines Investigation Act*. The Supreme Court also considered whether or not section 7 of the *Charter* provided a residual right to silence over and above that provided by section 11(c) of the *Charter*. In this regard, Mr. Justice LaForest held that section 7 does not give an absolute right to silence or a generalized right against self-incrimination as in the American model. The Supreme Court of Canada also held that an order made under section 17 requiring the production of documents was not an unreasonable seizure within the meaning of section 8 of the *Charter* and therefore did not violate this provision of the *Charter*. This decision will no doubt be considered by Madame Justice Danièle Tremblay-Lamer in determining the constitutional validity of section 11 of the Act.

Unlike the former provisions, however, the new provisions require the powers to be exercised only with the prior approval of a judge of a Superior or County Court or of the Federal Court. The new provisions also contain additional safeguards in that there must be evidence presented to the judge issuing an order sufficient to satisfy him or her that there is, in fact, an inquiry underway, and that the person against whom production is sought has, or is likely to have, information that is relevant to the inquiry.

K.B.G.

#### Notes

<sup>1</sup> S.C. 1970, c. C-23.

<sup>2</sup> [1990] 1 S.C.R. 425.

### CHALLENGES TO COMPETITION TRIBUNAL DECISIONS IN SOUTHAM CASE PENDING IN FEDERAL COURT OF APPEAL

Appeals from decisions of the Competition Tribunal with respect to certain media acquisitions by Southam Inc. are presently before the Federal Court of Appeal.

On November 29, 1990, the Director of Investigation and Research brought an application to the Competition Tribunal under the merger provisions of the *Competition Act*, challenging the acquisition in May 1990 by Southam of 13 community newspapers, a real estate advertising publication, three flyer distribution businesses and two printing businesses in the lower mainland of British Columbia.<sup>1</sup> Southam, through wholly-owned subsidiaries, already owned the two Vancouver daily newspapers. The Director sought the divestiture of two of the community newspapers (namely the Vancouver Courier and the North Shore News) and of the real estate advertising publication (the Real Estate Weekly).

The Director contended that the joint control by Southam of these publications and the two Vancouver dailies would prevent or lessen, or likely prevent or lessen, competition substantially in the supply of newspaper retail advertising services and print real estate advertising services in the greater Vancouver area. The response filed by Southam with the Competition Tribunal principally disputed the Director's characterization of the product dimension of the relevant market.<sup>2</sup>

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Following numerous pre-hearing motions and a lengthy hearing<sup>3</sup>, the Competition Tribunal on June 2, 1992 released its Reasons and Order regarding the Director's application.<sup>4</sup> The Tribunal concluded that the acquisition by Southam of the Vancouver Courier and the North Shore News was not likely to prevent or lessen competition in the newspaper retail advertising services market on the north shore or throughout the lower mainland. This conclusion flowed from the key finding that the Vancouver dailies and community newspapers were weak substitutes for retail advertisers.

As regards print real estate advertising services, the Tribunal accepted a distinction between resale home and new home advertising. It found that the dailies and the Real Estate Weekly were not close substitutes for print real estate advertising of older homes. However, the Tribunal found that they were the closest available substitutes for the advertising of new homes. Acknowledging Southam's concession that the real estate section of the North Shore News and the north shore edition of the Real Estate Weekly were in the same market, the Tribunal held that their acquisition had eliminated an effective competitor in a market where no effective competition remained. Therefore, the Tribunal found that the May 1990 acquisition had resulted in a substantial lessening of competition for print real estate advertising services on the north shore.

Unhappy with the overall outcome of the Tribunal's decision, the Director filed a notice of appeal on September 1, 1992 with the Federal Court of Appeal.

The Competition Tribunal had ordered that the parties reattend to submit evidence and argument on the appropriate remedy given the Tribunal's findings. At a hearing in November 1992, the

Director proposed that the test for a proposed remedy should be whether it would restore to the extent possible the pre-merger competitive situation. Southam countered that the test should be whether the proposed remedy would resolve the substantial lessening of competition identified by the Tribunal. On December 10, 1992, the Tribunal released its Reasons and Decision Regarding Remedy. Basically adopting the Director's position in the context of contested proceedings, the Tribunal ordered Southam to sell, at its option, either the North Shore News or the Real Estate Weekly.<sup>5</sup> Notice of appeal of the Tribunal's remedial order was filed with the Federal Court of Appeal by Southam on December 23, 1992.

Subsequently, a divestiture order was issued by the Tribunal on March 8, 1993.<sup>6</sup> The effect of this order has been stayed on consent of the parties pending the disposition of the appeals.

On July 27, 1993, in the Federal Court of Appeal, Linden J. ordered that the separate appeals launched by the Director and Southam be joined. The order further provided that the Director would be responsible for compiling the appeal book. The *Record* has learned that counsel for the Director and for Southam have agreed to exchange draft factums before any appeal book is filed with the court, so as to fix the scope of the case on appeal and to reduce the size of the appeal book. The parties anticipate that the appeal book will be filed sometime this spring.

M.W.

### Notes

<sup>1</sup> See (1990) 11:4 Can. Comp. Rec. 1.

<sup>2</sup> See (1991) 12:1 Can. Comp. Rec. 3. Regarding the revised Interim Order requiring Southam to hold separate its acquisitions pending final disposition of the Director's application, see (1991) 12:1 Can. Comp. Rec. 3 and (1991) 12:2 Can. Comp. Rec. 7.

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<sup>3</sup> See (1991) 12:3 Can. Comp. Rec. and (1991) 12:4 Can. Comp. Rec. 8.

<sup>4</sup> See (1992) 13:2 Can. Comp. Rec. 1. For the report of the decision, see *Canada (Director of Investigation and Research) v. Southam Inc.* (1992), 43 C.P.R. (3d) 161 (Comp. Trib.).

<sup>5</sup> See (1993) 14:1 Can. Comp. Rec. 6. For the report of the decision, see *Canada (Director of Investigation and Research) v. Southam Inc.* (1992), 47 C.P.R. (3d) 240 (Comp. Trib.).

<sup>6</sup> See (1993), 48 C.P.R. (3d) 224 (Comp. Trib.).

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### BID-RIGGING CHARGES DISMISSED

On March 30, 1994, Mr. Justice Chilcott of the Ontario Court, General Division in Ottawa dismissed charges of bid-rigging under section 47 of the *Competition Act* against Joad Industries Ltd. and Western Air Conditioning Ltd. These charges related to a 1991 Supply and Services Canada request for proposals for certain power supply equipment to be used by the Department of National Defence in a training installation in Chatham, New Brunswick.

Staff

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### BUREAU HAS EXAMINED MAIL-ORDER PHARMACISTS' ALLEGATIONS

The Bureau of Competition Policy has indicated, following a preliminary investigation, that allegations made by mail-order pharmacists against retail pharmacies and drug manufacturers and wholesalers will not be pursued at this time.

In May 1993, CBC Prime Time News reported allegations, made by a representative of MediTrust Pharmacy Inc., that certain retail pharmacies were putting pressure on drug manufacturers and wholesalers not to supply competing mail-order pharmacists. Later, a series of articles published in the *Globe & Mail* during the week of December 3, 1993 charged that Shoppers Drug Mart Ltd. had put pressure on the Toronto-Dominion Bank and the Ontario March of Dimes organization not to channel their employees' drug plan requirements to discount mail-order pharmacists. At that time, the representative of MediTrust specifically alleged that Shoppers had also put pressure on a number of drug manufacturers not to supply his business.

The Bureau confirmed that a preliminary investigation of the mail-order pharmacists' allegations was launched almost immediately after the CBC report. The investigation, which focused on possible "refusal to supply" and "price maintenance" activities in contravention of the civil and criminal provisions of the *Competition Act*, included interviews and information visits with representatives of the Ontario Pharmaceutical Association and the Canadian Pharmaceutical Association. The Bureau official stated that, based on information and evidence received at this time, there were insufficient grounds to launch a formal inquiry, but that the mail-order pharmacists' allegations would be re-examined should any additional information come to light.

M.W.

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