CANADIAN COMPETITION LAW AND POLICY DEVELOPMENTS

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PRIORITIES FOR BUREAU OF COMPETITION POLICY IN 1995

The following is an excerpt from a speech given by Francine Matte, Q.C., Senior Deputy Director of Investigation and Research, Mergers Branch of the Bureau of Competition Policy, on January 25, 1995 at the Toronto offices of Fraser & Beatty. The client seminar at which Ms. Matte spoke was entitled "Recent Developments at the Competition Bureau and Priorities for 1995" and the excerpt sets out the Bureau's priorities for 1995.

1. Enhanced International Cooperation

One subject that is receiving a great deal of attention is the Bureau's present and future role in international cooperation and enforcement of antitrust laws. In my opinion, the historical approaches to information sharing are not functional in the current economic environment. Enhanced cooperation is not simply desirable it is *necessary*.

With increasing global integration of economies, cross-border movements of products, services and information, political and regulatory boundaries between many industries have been, and continue to disappear. Consequently, anti-competitive practices in one regime may be found to be occurring in other countries and have cross-border effects.

Antitrust activities are no longer confined to one regulatory regime. In this ever increasing complex environment, antitrust authorities must have the ability to coordinate and conduct joint-investigations and have the tools available to address and remedy anti competitive activities.

The outcome of the *Mitsubishi* case referred to previously certainly is an indication of where enhanced cooperation with the U.S. can lead us.

In this regard, on November 2, 1994 President Clinton signed into law the *International Antitrust Enforcement Assistance Act*. This Act enhances the ability of U.S. antitrust agencies to assist foreign competition authorities in the enforcement of their own competition laws.

The provisions of this Act are accompanied by extensive safeguards to make sure that confidential business information that is obtained from American firms will not be misused or improperly disclosed by foreign antitrust authorities.

It is expected that there will be increasing communication between the Bureau and the U.S., including increased numbers of joint-investigations.

It should be noted that the assistance provided by the U.S. antitrust authorities under this Act is conditional upon the foreign governments' providing reciprocal assistance to U.S. authorities. While this recent addition to U.S. legislation expands the ability for international cooperation, it should also be recognized that the current scope for cooperation between Canada and the U.S. under the Mutual Legal Assistance Treaty ("MLAT") and the Memorandum of Understanding ("MOU") is significant.

In recent years, the Bureau has been engaged in a number of successful cooperative initiatives with the U.S. antitrust agencies.

The Bureau is committed to cooperating with the U.S. antitrust agencies. We will continue to explore additional opportunities for enforcement cooperation and avenues for increasing the effectiveness of such cooperation. In this regard, we are currently in the process of reviewing the 1984 MOU with the United States.

While I have discussed what is transpiring vis à vis the U.S., we should not ignore the efforts with respect to the European Union. We hope to have the draft agreement on competition policy between Canada and the European Union move ahead over the coming year.

The formal conclusion of the agreement has been on hold as a result of France's legal challenge of the 1991 United States-European Union agreement on competition policy on a question of the Commission's jurisdiction. This matter has recently been resolved, and the Canadian as well as the United States European Union agreements should proceed to the European Union Council of Ministers for approval in the near future.

2. Review of the MEGs Merger Agenda

For the most part I believe the current system of merger review is successful in achieving a quality product in a timely fashion.

Certainly, a large part of the success of our ability to review mergers has been due to the development and implementation of the Merger Enforcement Guidelines.

As many of you know, these guidelines were developed through a process of intense consultation with members of the Bar, business groups, academics and other antitrust officials. The Director of Investigation and Research, George Addy, has recently requested a review of our guidelines for the purposes of determining if any improvements can be made.

To this end, there is a group of officers examining the Merger Enforcement Guidelines and preparing an internal report for the Director.

This group will report to the Director sometime in the spring. At some point after this, the Director will in all likelihood seek input from the Bar, the business and academic community. I think that it is fair to say that the analytical framework and the underlying philosophy behind the guidelines will not change as a result of this internal review. However, we will collaborate on certain topics and hopefully provide some better guidance on merger related

matters which may not have been dealt with in the current version of the guidelines. A number of process issues in merger review will also be addressed.

For example, divestiture resolutions in merger matters have not always been effective, particularly in regard to private undertakings with the Bureau where the parties to the transaction were required to divest after the merger transaction had closed. Some of the problems identified include failure to designate a viable business or asset package for divestiture, failure to divest to a competitive entity and, third, failure to divest in a timely fashion.

We also hope to revitalize Consent Order proceedings before the Competition Tribunal, and to standardize the terms and conditions of Divestiture Orders.

Last week, the Bureau obtained an interim injunction on consent that will hold separate the Maclean Hunter Publishing Businesses from Quebecor Printing Inc. for a period of 21 days to allow the Director to complete his examination of the competitive impact of the transaction.

Rogers Communications Inc. agreed to sell these businesses to Quebecor Printing Inc. following its successful acquisition of Maclean Hunter.

Many of the terms and conditions in the Quebecor hold separate agreement were reflected in the March 1993 order of the Competition Tribunal requiring divestiture by Southam Inc. of acquired publications in the North Shore of Vancouver.

As the Director confirmed in his speech to the Canadian Bar Association last fall, we believe the Consent Order process will be used more frequently in instances where some remedial action is required. Voluntary undertakings by parties to a proposed transaction should be fashioned in the form of a Consent Order to ensure their enforceability.

3. Information to be Provided under Oath

Overall, we have generally been very pleased with the level of cooperation between parties to a proposed transaction and Bureau staff.

However, in order to enhance the quality of information upon which assessments are based, the Merger Branch has adopted a policy announced by the Director of Investigation and Research at the last CBA Competition Conference in Montreal, that parties to a transaction are now requested to respond to information requests under oath. In this regard, third parties, typically competitors of the parties proposing a merger, will also be asked to respond to information requests under oath. This will bring more certainty and rigour to the process.

4. Enforcement in the Face of Fiscal Restraint

As you know, the Bureau has devoted significant resources to public education and compliance and is also committed to vigorous enforcement of the Act.

However, in this era of resource constraints we are focusing our enforcement priorities on conspiracy and bid-rigging, mergers and abuse of dominant position: areas which present the greatest potential for broad harm to competitive rivalry in markets.

To that effect, the Director has adopted a selective enforcement strategy. It focuses on cases with the

greatest economic impact. This approach benefits all Canadians.

Our strategic approach to case selection is based on a variety of objective economic and legal factors. We look at the amount of:

- commerce affected;
- the nature of the conduct;
- the market power of the parties in question; and
- the potential impact of a remedy.

Success is measured not by the number of individual cases brought to the courts, but by deterrence achieved through select high profile cases where significant penalties are imposed.

It is worth noting that there are 20 officers involved in Mergers Review. The number of transactions to be reviewed is increasing. Cases are getting more and more complex. With this in mind, it is important that we be afforded adequate time to conduct our examination of proposed mergers. While strenuous efforts are made to examine proposed transactions as quickly as possible, contentious transactions require extensive resources, consultation and time to review. In such circumstances, it is not always easy or possible to adopt your own timetable.

Also keeping resources and time constraints in mind, we are not always able to conduct an examination of a non-contentious merger in a matter of a few days. This is critical in instances where the parties have requested an ARC and stand the risk of having to pre-notify. If we do not have the time required to complete our examination prior to an anticipated closing date, complications can occur. Therefore, I urge you to come forward with proposed transactions as early as possible to seek the Bureau's views.

No doubt, in this period of fiscal restraint, we will need to reevaluate how we do business and explore ways to get the most out of our budgets and people. For example, we are expanding the use of computers in case management as well as in litigation.

5. Dealing with Criminal Matters

In this area the Bureau is working towards securing larger fines in conspiracy and bid-rigging offences and is urging the Attorney General of Canada to consider seeking imprisonment in cases where it may be warranted. This effort is based on our firm belief that larger fines, against both corporations and individuals, and imprisonment for certain egregious offences, are necessary to punish offenders and to deter firms and individuals who may be contemplating conduct which would contravene the Act.

While I cannot speak for the Department of Justice, I can say that in addition to stiffer penalties, the Bureau will be looking to the Department of Justice and the courts for consistent sentences. To assist in this process, the Bureau has been assembling sentencing principles which we hope to present to the Department of Justice in the near future.

Expect that we will continue to pursue charges against individuals and significantly higher fines as well as imprisonment for individuals accused in conspiracy and bid-rigging matters. Our objective is to move the level of fines in conspiracy cases closer to the statutory maximum of $10 million/5 years imprisonment. It is important that there is clear deterrence.

6. Regulatory Agenda

The Bureau intends to stay at the forefront in promoting competition in regulated industries. As industries become de-regulated they come under the ambit of the *Competition Act*, and we are doing a lot of work in these key sectors such as telecom and transportation. Competition issues emerging from the convergence of technologies in the telecommunications, cable television and computer industries (the "information highway") is one of the major priority items facing the Bureau.

Telecommunications is the major area where we foresee the Competition Tribunal and the courts having a further opportunity to clarify the application of the *Competition Act* to industries subject to regulation.

7. Strategic Alliances Bulletin

Developing insight into the significance of strategic alliances from both an economic and competition law perspective is an area that the Bureau has proactively pursued for the past couple of years.

Through the efforts of the Economics and International Affairs Unit in particular, the Bureau has been active in furthering discussion on the subject within the business, government, academic and legal communities. While such cooperative ventures are still evolving, the Bureau wanted to dispel any apprehension by business that the Act was predisposed to block such alliances.

In fact, the treatment of cooperative ventures under Canada's antitrust laws is generally quite favourable. To signal this to the business community, the Bureau recently issued a draft bulletin which explains in general terms the Bureau's enforcement approach to strategic alliances under the *Competition Act*.

The Bulletin provides guidance on permissible and impermissible forms of cooperation - information sharing and transactions, such as joint ventures between competitors.

We have received a wealth of comments on the Strategic Alliances Bulletin and hope to have it finalized for release in the spring.

8. Confidentiality Bulletin

Also, as many of you know, we recently released the first draft of a bulletin on confidentiality. The purpose of this draft was to facilitate an open and frank discussion on this matter. The Bureau received comments from the CBA, many members of the Bar and the business sector. These views are being considered in consultation with the Department of Justice.

What I can tell you about the Director's position on this matter is that he takes confidentiality of information very seriously. The Director of Investigation and Research is sensitive to the concerns expressed by the Bar and the business community on the treatment and communication of the information provided to the Bureau. However, as mentioned previously, increasing cooperation with foreign antitrust authorities is viewed as a critical tool to the effective administration and enforcement of the Act.

In this era of cross-border activities, the Director of Investigation and Research must cooperate with other antitrust authorities to more effectively target and investigate antitrust activities.

Conclusion

I hope my speech has provided you with a better insight into the current priorities facing the Bureau at the present time. The messages I hope I have conveyed to you are:

- Enhanced international cooperation between antitrust authorities is a necessity given the current market environment.

- After a number of years of use, the Director of Investigation and Research has asked the Bureau to examine the MEGs with a view to proposing improvements.

- Revitalization of Consent Order proceedings before the Competition Tribunal.

- In order to enhance the quality of information upon which assessments are based, the Mergers Branch has adopted a general policy that parties are now requested to respond to information requests under oath.

- As public resources shrink, the Bureau will be under greater pressure to provide its clients with service with less resources. To the extent possible, we would ask the Bar and the business community to assist us by affording us plenty of time to conduct our reviews. The earlier the Bureau is notified about a proposed transaction the sooner we can initiate and complete our review.

- The Bureau will continue to call for sentences and fines that serve as a deterrent to contraventions of the criminal provisions of the *Competition Act*.

- The Bureau will stay at the forefront and plan an active role in those areas of the economy where deregulation is ongoing. At the present time there is a lot of activity in the area of telecommunications and transportation.

- The Bureau will be finalizing its policy on Strategic Alliances and on Confidentiality this spring.

F.M.

UPDATE ON COMPETITION TRIBUNAL PROCEEDINGS IN NIELSEN CASE

On April 5, 1994, the Director of Investigation and Research initiated proceedings before the Competition Tribunal against Nielsen (The D & B Companies of Canada Ltd.) under the abuse of dominance provisions of the *Competition Act*. The Director is seeking an order to prevent Nielsen from engaging in allegedly anti-competitive conduct which prevents Nielsen's competitors from obtaining access to scanner-based sales information generated by large Canadian retailers and to customers for scanner-based market tracking services. Information Resources Inc. ("IRI"), which made the initial complaint to the Director regarding Nielsen's market conduct, was granted intervenor status in the proceedings before the Tribunal. The Application, related pleadings and initial proceedings respecting various procedural matters are described in the last two issues of the *Record*.[1]

Various preliminary issues relating to the terms of access by the parties and the intervenor, and their respective counsel and experts, were dealt with by

the Tribunal in a Confidentiality Order dated July 26, 1994. A pre-hearing conference was held on September 14, 1994 to deal with several additional discovery issues raised by the parties. Among these issues was whether Nielsen could obtain disclosure of certain documents over which the Director had claimed "public interest" privilege and litigation privilege. These documents included the original complaint, correspondence and submissions of IRI, all notes and materials prepared by the Director or Bureau staff in connection with meetings with IRI, and finally, any statements, notes, material and correspondence obtained or prepared by the Director or his staff from discussions with Canadian and U.S. packaged goods retailers, manufacturers and market research companies. In arguing that disclosure of these documents was appropriate, Nielsen relied on the decision of the Supreme Court of Canada in *R.* v. *Stinchcombe*,[2] where it was held that the Crown must disclose all the "fruits of the investigation" to the defence in a criminal proceeding. Nielsen also relied on subsequent case law which applied *Stinchcombe* in non-criminal contexts.

In a decision dated September 22, 1994, the Tribunal refused to order production on the grounds that such documents had been held by the Tribunal in previous cases to be protected from disclosure by a public interest privilege.[3] The Tribunal accepted the Director's argument that extending privilege to this class of documents was justified on public policy grounds because the Bureau often starts a case in virtual ignorance of the industry and must rely on the cooperation of industry participants to gain general background information and to evaluate a complaint. The Tribunal noted that Nielsen had already been provided with summaries of these documents and, thus, had been given ample opportunity to know the case it had to meet, without obtaining the actual documents. The decision of the Supreme Court of Canada in *Stinchcombe*, it was held, did not apply to an administrative tribunal exercising an economic regulatory function. Nielsen appealed this decision to the Federal Court of Appeal by Notice of Appeal dated September 28, 1994.

As Nielsen was unable to obtain a stay of proceedings from the Federal Court of Appeal, the hearing of the Director's Application before the Tribunal commenced on October 17 and proceeded to November 4, 1994, as originally scheduled, with an adjournment on November 3, 1994 to allow counsel to argue the appeal. During that period, the Director and IRI completed the presentation of their evidence to the Tribunal, and Nielsen made its opening statement and called one witness. The hearing was scheduled to recommence December 7, 1994.

The Federal Court of Appeal issued its judgment on November 7, 1994, dismissing the appeal of Nielsen from the Tribunal's order of September 22, 1994. The Court of Appeal held that the Tribunal had correctly followed and applied prior jurisprudence in finding that the documents in question fell within a class of documents that is subject to public interest privilege. In addition to the evidence before the Tribunal, the decision noted that courts have reached such a conclusion on the basis of an analysis of the purpose of the legislation and its functioning. And there was evidence to the effect that the documents had been obtained in confidence. Finally, the Court found that the Tribunal's decision was not inconsistent with recent decisions of the Supreme Court of Canada dealing with the scope of discovery. The Court held that *Stinchcombe*, which required very broad disclosure by the Crown in criminal proceedings, does not apply to proceedings before the Competition Tribunal because they do not have

the dire consequences for a party as does a prosecution for an indictable offence. Nor was the Tribunal's decision inconsistent with the principles relating to privilege set out by the Supreme Court of Canada in *R.* v. *Gruenke*[4] (which confirmed that there may be a class privilege for documents or that they may be found privileged on a case by case basis).

The Court of Appeal emphasized the importance of judicial deference to the decisions of tribunals when the issue in question, whether factual or legal, is within the particular expertise of the tribunal, even on a statutory appeal. The establishment and definition of a class of documents subject to privilege involves the balancing of the interest in full disclosure for the proper administration of justice with the interest of protecting sources necessary for the administration of the law, and this is best done in this instance by the Tribunal in the context of a proceeding under the *Competition Act.*

By Notice of Application dated November 18, 1994, Nielsen sought leave to appeal to the Supreme Court of Canada. The Notice of Application noted that the Supreme Court of Canada has never considered the pre-hearing disclosure obligations of the Director, nor the "public interest" class privilege recognized by the Tribunal and the Federal Court of Appeal. By Order dated December 2, 1994, the Supreme Court of Canada granted a stay of the proceedings of the Tribunal pending the Court's determination of the Application for leave to appeal. If leave is granted, Nielsen will have to apply again for a further stay of proceedings. If it is denied, the stay will automatically lapse.*

I.C.S.
B.M.G.

Notes

* **Editor's Note**: On February 23, 1995, the Supreme Court of Canada dismissed Nielsen's application for leave to appeal. The stay of proceedings before the Competition Tribunal is therefore no longer in effect and the Tribunal has fixed April 3, 1995 for the resumption of the hearing.

[1] Bruce M. Graham, "Director Files Application against Nielsen under Abuse of Dominance Provisions" (1994) 15:2 Can. Comp. Rec. 6 and Bruce M. Graham, "Nielsen Abuse of Dominance Case Developments" (1994) 15:3 Can. Comp. Rec. 1.

[2] [1991] 3 S.C.R. 326.

[3] *Director* v. *The Nutra Sweet Company et al.*, November 29, 1989, (unreported); *Director* v. *Southam Inc. et al.* (1991), 38 C.P.R. (3d) 68; *Director* v. *Hillsdown Holdings (Canada) Limited et al.*, July 11, 1991, (unreported).

[4] [1991] 3 S.C.R. 263.

DIRECTOR BRINGS APPLICATION BEFORE COMPETITION TRIBUNAL REGARDING YELLOW PAGES PUBLISHERS

On December 22, 1994, the Director of Investigation and Research (the "Director") commenced an Application pursuant to sections 75, 77 and 79 of the *Competition Act* (the "Act") against Tele-Direct (Publications) Inc. ("T-D Pub") and Tele-Direct (Services) Inc. ("T-D Services") alleging that the Respondents had engaged in anti-competitive restrictive trade practices which substantially lessen competition in the telephone directory advertising services market and the telephone directory advertising space market in the geographic areas in which the Respondents operate.

The Respondents are both wholly owned by BCE Inc. and are the authorized directory publishers for telephone companies in Ontario, almost all of Quebec, New Brunswick, Newfoundland and Labrador, the

Yukon Territory and the Northwest Territories. T-D Pub is the authorized telephone directory publisher for Bell Canada (its affiliate), while T-D Services is the authorized telephone directory publisher for a variety of independent telephone companies.

The Director alleges three types of anti-competitive acts by the Respondents:

(a) Refusal to Deal (section 75 of the Act);
(b) Tied Selling (section 77 of the Act); and
(c) Abuse of Dominance (sections 78 and 79 of the Act).

The following is a summary of the Director's position, the Respondent's position and the Order sought by the Director.

Refusal to Deal

The Director

Each telephone company maintains a listing of its subscribers. Pursuant to telecommunications legislation and regulations, each telephone company must provide each subscriber, free of charge, with a copy of a directory which lists the subscribers in alphabetical order, and a listing of the business customers. The telephone companies can either publish the directories themselves, or enter into contract with a third party. Bell Canada contracts with T-D Pub to publish the customer listings for all Bell Canada subscribers. T-D Services has a publishing contract with other telephone companies to publish listings of their subscribers.

The Director alleges that the telephone companies provide the Respondents with access to the subscriber listing information in a commercially readable form, which is used by the Respondents to publish the telephone directories. The Director acknowledges that Bell Canada makes certain subscriber listing information available to unaffiliated third parties pursuant to a tariff established by the CRTC. However, the Director alleges that subscriber information so supplied is not in a commercially usable form, and as a result, no third parties have made requests for information pursuant to the tariff. The Director says that these third parties are willing and able to meet the trade terms of the tariff.

The Director alleges that the Respondents refuse to supply the subscriber listing information in a commercially useable form to any other company which requires it to publish a competing directory. According to the Director, the Respondent's refusal to sell this information has substantially affected the business of potential competitors or prevented them from carrying on business. The Director says that since the Respondents are the sole supplier of the customer listing information, the other potential competitor publishers have no cost-effective means of obtaining the information.

The Order sought by the Director pursuant to section 75 of the Act would require the Respondents to accept competing publishers as customers for subscriber listing information in a commercially useable form, on usual trade terms.

The Respondents

The Respondents dispute the Director's jurisdiction on the issue of customer listing information. The Respondents say that the CRTC has exclusive jurisdiction over the obligation of Bell Canada to provide subscriber listing information to any third parties, including the Respondents. The

Respondents, as contracting parties with Bell Canada, are bound by the regulatory requirements imposed on Bell Canada, as dictated by the CRTC. The Respondents say that the Director participated as an intervenor in proceedings in 1990 and 1992 which resulted in the requirement that Bell Canada provide subscriber lists to third parties in machine-readable form pursuant to a tariff. In new proceedings initiated in 1994, the tariff is being reviewed by the CRTC, and no decision has been released. Since the Director did not challenge, and in fact endorsed, the CRTC's mandate to regulate this aspect of telecommunications, the Respondents say that the Competition Tribunal has no jurisdiction over this issue.

The Respondents also contend that it is the telephone companies, not the publishers, who own the "raw" subscriber listing information. It is the owners of the information who decide on what terms, and to whom, the information is sold. The usual trade terms imposed by the telephone companies require a publisher such as T-D Pub or T-D Services to pay the telephone company a minimum of 40% of the gross revenues earned by the publisher from directory advertising. The Respondents say that the "other publishers" referred to by the Director have not been prepared to abide by the trade terms required by the telephone companies, which is the reason they have not acquired the subscription information.

Further, the Respondents say that the form of the customer listing information which the Director seeks to compel the Respondents to sell, is in fact protected by copyright. The Respondents purchase the "raw" information from the telephone company, and then manipulate the information into a compilation which, together with additional information, becomes the directory. The Respondents say that their refusal to sell a compilation which is protected by intellectual property rights cannot be characterized as an anti-competitive act.

Tied Selling

The Director

As part of their publishing business, the Director says the Respondents provide two products: advertising space and advertising services. The Director alleges that the Respondents' practice of selling these two products as a package (for one price), and their refusal to "unbundle" the two products so that they are sold at separate prices, constitutes tied selling. The Director further alleges that the Respondents have imposed arbitrary measures to determine whether a particular account will be "commissionable". The Director alleges that the Respondents' rules governing commissions for external advertising agencies mean that 90% of the market does not meet the Respondents' commissionability criteria. Thus, the customers must choose between paying an additional charge to obtain advertising services elsewhere; or obtain those services from the Respondents, as part of the price they have already paid for advertising space. The Director alleges that the Respondents' practices have impeded the entry or expansion of advertising agencies in the telephone directory advertising services market.

The Director seeks an Order pursuant to section 77 of the Act requiring the Respondents to offer and supply advertising services and advertising space at separate prices. Further, the Director seeks an Order requiring the Respondents to expand their commission criteria so that all independent advertising agencies certified by the Respondents qualify for a specified commission.

The Respondents

The Respondents deny that advertising services and advertising space constitute separate products or markets. The Respondents say that the advice which their internal sales staff provide to customers is inseparable from the sales staff advising customers of the fact that space is available. Further, the Respondents say that the decision as to which customers will be targeted by internal salespersons or by commissioned accredited agents is a legitimate business concern of the Respondents. The Respondents contend that it is their business prerogative to decide how advertisements will be sold, and that issue is not justiciable.

The Respondents also allege that the Director's allegations about commission structure for accounts ignores the Consent Order dated November 18, 1994, which affects the Respondents' conduct in relation to national advertising (advertising placed in telephone directories of two or more publishers).[1]

Abuse of Dominance

The Director

The Director contends that the Respondents substantially control the advertising services business, in that they provide these services to over 90 percent of the market. The Director also contends that the Respondents control the advertising space market. The Director alleges that the Respondents have engaged in anti-competitive acts which constitute an abuse of dominance, including (not an exhaustive list):

- refusing to deal directly with consultants who act as agents for customers;
- providing advertising space to independent advertising agencies on terms less favourable than those afforded to internal sales staff (including earlier deadlines for orders, different payment terms and not providing promotional programs);
- squeezing the return available to independent agencies;
- refusing to licence trade-marks to competing suppliers of advertising services;
- threatening legal action to restrict potential competitors of advertising space from obtaining subscriber listing information; and
- targeting price reductions in areas where competitors have entered or are attempting to enter the market.

The Director seeks an Order prohibiting the Respondents from continuing the anti-competitive practices.

The Respondents

The Respondents dispute that they control or substantially control the space of services in "telephone directories", which they say is the correct market definition. The Respondents say that they do not, in fact, compete with the targets of the alleged anti-competitive acts complained of by the Director: publishers of consumer directories, accredited agents and non-accredited agents.

The Respondents do not deny that they engage in some of the practices identified by the Director, but they contend that those practices have been

implemented for sound business reasons, and that the purpose, intent and effect of these practices is not anti-competitive. In their Response, the Respondents set out the business reason or rationale of the practices attacked by the Director.

D.A.C.

Notes

[1] For a copy of the Director's Press Release on the Consent Order, see "Director Welcomes Competition Tribunal's Decision Regarding Yellow Pages Publishers", *infra*, at 16.

THE *POLAROID CANADA* CASE: RECENT LAW ON PROHIBITIVE EXPORT PRICING

On November 15, 1994, the Ontario Court of Justice (General Division) released its decision in *Polaroid Canada Inc.* v. *Continent-Wide Enterprises.*[1]

Facts

Polaroid Canada established a mechanism to discourage the export of its film products from Canada by its dealers. The mechanism was a "two-price" policy, whereby purchases for consumption within Canada would be at one price, and purchases for export would be at a higher price. The export price was so high that it effectively prohibited exports of products that were purchased at the higher price.

The court found that Polaroid Canada's policy was introduced for two reasons. The first reason was to avoid shortages and disruptions within Canada, when Canada was an attractive region for purchase for export. This was Polaroid Canada's primary motivation. The second reason, being the primary motivation of Polaroid Corporation internationally, was to prevent transshipment of goods from one market to another, so as to disrupt the market and depress prices internationally. The court found that both of these motivations were factors in establishing the two-price policy.

Polaroid sued the defendant, Continent-Wide Enterprises, for purchases of products made at the domestic price but which were actually exported. Continent-Wide, plaintiff by counterclaim, alleged that there was no contract for payment of the higher price and counterclaimed for damages for termination of the dealership arrangement. It also alleged that the two-price policy was contrary to public policy pursuant to the conspiracy, price maintenance and refusal to deal sections of the *Competition Act* ("the Act"). Pursuant to section 36 of the Act, Continent-Wide sued for damages under the conspiracy and price maintenance provisions, although it ultimately did not argue the conspiracy issue.

Result

The court found that the two-price policy was lawful and enforceable, and awarded damages to Polaroid in the amount of the price differential between the domestic and export prices.

Discussion

Restraint of Trade

Continent-Wide argued that the export price policy constituted an illegal contract, or a contract in restraint of trade, and was therefore unenforceable.

Interest of the Parties

The court found, based on *Tank Lining Corp* v. *Dunlop Industrial Ltd.*,[2] that parties seeking to enforce a restraint of trade must demonstrate that the restraint is reasonable in the interest of the parties. That is, the restraint must be intended to protect some legitimate interest of the party seeking to enforce it, and must not go beyond what is adequate to accomplish that end. In this case, Polaroid's goal was to eliminate or reduce interruptions to and disruption of supply to Canadian customers and to reduce grey marketer selling in foreign markets, disrupting prices and distribution in those markets. That is, to preserve and maintain stability for customers of Polaroid products in Canada and preserve the international distribution and pricing system of Polaroid. The court found, based on the evidence of the economists, that the most likely result of grey market export sales from Canada, carried on at a significant level over an extended period, would be to increase Canadian prices towards U.S. prices. The court also found that Polaroid had a proper commercial interest in avoiding the increase of prices in Canada, and in defending the viability of its international distribution and pricing policy. Thus, the restraint was reasonable in the interest of the parties.

Public Interest

Continent-Wide argued that the two-price policy was not reasonable in respect of the public interest. It had the onus to prove that allegation. In this case, all of the submissions as to the interest to the public were based on provisions of the Act.

Competition Act

Market Restriction

Polaroid argued that its two-price policy constituted a market restriction within the definition of section 77(1) of the Act. The court accepted this characterization, and noted that market restriction was not an offence under the Act, but rather reviewable conduct. The court pointed out that unless there was an application by the Director to the Competition Tribunal, no action may be taken under the Act in respect of market restriction.

Price Maintenance

Continent-Wide argued that there was discrimination against it contrary to section 61(1)(b) of the Act, which prohibits discrimination against those with a low pricing policy. Polaroid argued that there was no discrimination on the basis of pricing policy, but rather that any discrimination was on the basis of the dealer's intended place of resale (which was why the conduct constitutes a market restriction). The court accepted that submission.

Continent-Wide also argued that there was a refusal to deal, contrary to section 61(1)(b), because the export prices were so high as to make such sales uneconomic. The court rejected that allegation as well, finding that "a prohibitive effect alone does not necessarily constitute a refusal to deal", as Polaroid was always willing to supply product at the export prices. As well, the court found that the restraint was unrelated to the pricing policy of the purchaser. It applied to all dealers who proposed to export, regardless of their resale pricing policies. Thus, the allegation that Polaroid violated the price maintenance provision (section 61(1)(b) of the Act),

the allegation that the two-price policy was an unreasonable restraint of trade because it was contrary to section 61(1)(b) and the counterclaim based on breach of the Act, were all rejected.

Continent-Wide also alleged that Polaroid breached section 61(6) of the *Competition Act*, by attempting to induce another supplier (Treck Photographic) to refuse to supply a product to Continent-Wide because of Continent-Wide's low pricing policy. Again, however, there was no evidence that the refusal was because of Continent-Wide's price policy, but had to do entirely with its intended place of resale. This allegation was also rejected.

Refusal to Deal

Continent-Wide argued that the two-price policy constituted a refusal to deal within the meaning of section 75 of the Act and, for that reason, the policy should be found to be unreasonable in respect of the interests of the public. The court rejected this argument, noting that for section 75 to apply there must be a finding by the Tribunal with respect to a number of things, including the availability of supply in a market and the lack of sufficient competition in the market. The court stated that it was not satisfied that it should make a determination on such points in the absence of a finding by the Tribunal: "To do so might be improperly pre-emptive of the jurisdiction of the Tribunal to make such determination."

As well, there was no evidence that the two-price policy was not an aspect of Polaroid's usual trade terms. Section 75 only requires that an order be made if the supplier will not supply on its usual trade terms. That is, the usual trade terms could include a prohibition on exports, or a higher price for exports.

The court also pointed out that in this situation where no Tribunal order has been granted, or no application has been made to the Tribunal, the mere possibility of those outcomes in the future cannot justify a determination that the conduct is contrary to the public interest. The scheme of the Act obviously contemplated that the Tribunal may properly decide to make no order. In taking that decision, the Tribunal would be obliged to direct its attention to Section 1.1 of the Act which sets out the purpose of the legislation. That section focuses on the benefits to Canadians. Based on the evidence of economic experts, absent the two-price policy, the result over time would be that prices in Canada would trend upward, which is at odds with the basic purposes of the Act.

Other Public Interest Concerns

The court noted that detriment to the public can occur outside the parameters of the Act. In the present circumstances, however, the court noted that a finding of detriment to public interest would be difficult given the fact that Canadian prices would likely rise in the absence of the two-price policy. The court stated that the policy against contracts in restraint of trade must be directed at ensuring that the public enjoys the benefits of trade, including competitive activity tending against price escalation.

Summary Thoughts

By way of summary, a number of positive points come out of the *Polaroid Canada* decision including:

- the fundamental importance of low prices to Canadians, as a goal of the Act;

- the need to demonstrate that the cause of the refusal to supply is the low pricing policy of the terminated or discriminated against dealer, rather than some other factor; and

- the importance of the Tribunal making a finding under the reviewable conduct provisions of the Act before a civil court will draw any conclusions about such alleged conduct.

On the other hand, the decision is somewhat disappointing in that:

- it fails to conclude absolutely that a market restriction cannot constitute price maintenance (that is, if there were evidence to suggest that the market restriction were imposed because of the low pricing policy of the dealer);

- it avoided deciding the question of whether price maintenance can ever apply in respect of sales outside of Canada;

- it is not as clean and clear on the question of reviewable conduct not being the basis of a civil action as is the *Harbord Insurance* case;

- it is not entirely clear what the statement "a prohibitive effect alone does not necessarily constitute a refusal to deal" means; and

- the reliance on the question of lower prices in Canada suggests that another result might be obtained if the market restriction were in respect of sales into, rather than out of, Canada, so that it had the effect of increasing Canadian prices (i.e. the *Caterpillar* case).

Staff

Notes

[1] (15 November 1994), 18189/187 (Ont. Ct. Gen. Div.).
[2] (1982), 68 C.P.R. (2d) (Ont. C.A.).

CANADIAN LAWYER ELECTED AS SECRETARY-TREASURER OF INTERNATIONAL BAR ASSOCIATION'S SECTION ON BUSINESS LAW

The following is a Press Release issued by the International Bar Association on November 17, 1994, and is reproduced with permission.

J. William Rowley, Q.C., of Toronto was confirmed as Secretary-Treasurer of the International Bar Association's Section on Business Law from 1994 to 1996, at the Association's 25th Biennial Conference held in Melbourne between October 9 and October 14, 1994.

Mr. Rowley is a senior partner in the Canadian law firm of McMillan Bull Casgrain. Prior to joining that firm he was one of the legal secretaries to the Supreme Court of Canada, and before that was employed as a special assistant to the Director of Investigation & Research, Bureau of Competition Policy, in Ottawa. Mr. Rowley is a noted author and speaker on international competition law and policy issues. He is a member of the Advisory Board of the Antitrust and Trade Regulation Report, Washington D.C. and of the Global Forum on Competition Policy, Santa Barbara, Tokyo and Toronto. He is co-author with Donald I. Baker of *International Mergers - The Antitrust Process* (Sweet & Maxwell, 1991). Mr. Rowley is the immediate

past Chairman of the Antitrust and International Trade Law Committee (Committee C) of the International Bar Association's Section on Business Law and is currently a Country Representative for Canada.

The Section on Business Law is the largest of the Association's three Sections with over 12,500 members in 163 countries. The IBA itself is the world's largest and most prestigious organization of lawyers engaged in international law, with over 16,000 members worldwide.

Other Officers elected to serve the Section on Business Law are Francis Neate as Chairman (Slaughter & May, England) and Willem Calkoen as Vice-Chairman (Nauta Dutilh, Netherlands).

DIRECTOR WELCOMES COMPETITION TRIBUNAL'S DECISION REGARDING YELLOW PAGES PUBLISHERS

The following is a News Release issued by the Bureau of Competiton Policy on November 21, 1994, and is reproduced with permission.

OTTAWA, November 21, 1994 — The Director of Investigation and Research of the Bureau of Competition Policy, George N. Addy, confirmed today that the Competition Tribunal has issued a Consent Order in relation to the sale of national advertising in the Yellow Pages. National advertising means advertising placed in the Yellow Pages of two or more publishers.

This Consent Order is the first resulting from an application under the abuse of dominance provisions of the *Competition Act*. This is also the first joint dominance case brought before the Tribunal by the Director. The Consent Order was issued on November 18, 1994 within two months of the Director's filing of the application.

"The Consent Order in this matter enables independent selling companies to enter the market for national advertising and allows for competition among the publishers in the sale of national advertising in Yellow Pages directories," Mr. Addy stated. "I believe that the decision in this case demonstrates that the Consent Order process is an effective way to resolve civil matters under the *Competition Act*," he added.

The Publishers subject to this order are:

- Anglo Canadian Telephone Company carrying on its directory publishing business through Dominion Directory, an operating division, in British Columbia and parts of Quebec;
- AGT Directory Limited which publishes on behalf of AGT Limited for all of Alberta except for the City of Edmonton, and the Saskatchewan portion of the City of Lloydminster;
- Edmonton Telephone Corporation which publishes for the City of Edmonton;
- DirectWest Publishers Ltd. which publishes on behalf of Saskatchewan Telecommunications for the Province of Saskatchewan, except for the City of Lloydminster;
- The Manitoba Telephone System which publishes for the Province of Manitoba;
- Tele-Direct (Publications) Inc. which publishes on behalf of Bell Canada for most of the Provinces of Ontario and Quebec;
- Tele-Direct (Services) Inc. which publishes on behalf of The New Brunswick Telephone Company, Limited, Newfoundland Telephone

Company Limited and Northwestel Inc. for parts of Ontario and Quebec, New Brunswick, Newfoundland and Labrador, the Yukon and the Northwest Territories; and

- MT & T Holdings Incorporated which publishes on its own behalf and on behalf of The Island Telephone Company Limited for the Provinces of Nova Scotia and Prince Edward Island.

The Consent Order is on file with the Competition Tribunal.*

***Editor's Note**: The Consent Order affects each division, subsidiary, officer, director, employee or agent of any of the Respondents, and remains in effect for a period of 10 years.

The Respondents are required to submit all minutes of all meetings of the Canadian Yellow Pages Service to the Director until July 1, 1998. Further, the Respondents must provide the Director with a standard form of trademark licensing agreement, until July 1, 1998.

In selling national advertising in Yellow Pages telephone directories, each Respondent is prohibited from:

- maintaining the rule whereby national advertisers' business was allocated among the Respondents on the basis of whose territory the national advertiser was located;

- refusing to deal with any selling company which places national advertising into the Yellow Pages telephone directories;

- discriminating among any selling company which places national advertising in Yellow Pages telephone directories;

- refusing to license selling companies for the proper use of Yellow Pages trademarks for the purpose of selling advertising in Yellow Pages telephone directories;

- agreeing with any other Respondent on the rate of commission payable (after June 25, 1995); and

- denying any selling company access to any rates and data book style of publication that is compiled by the respondents.

DIRECTOR WILL NOT CHALLENGE ROGERS COMMUNICATIONS INC. PROPOSED TRANSACTION

The following is a News Release issued by the Bureau of Competition Policy on December 14, 1994, and is reproduced with permission.

OTTAWA, December 14, 1994 — After an examination of the proposed acquisition by Rogers Communications Inc. of Maclean Hunter Limited, George N. Addy, Director of Investigation and Research of the Bureau of Competition Policy, announced today that he will not be challenging the proposed transaction before the Competition Tribunal.

In arriving at his decision, the Director noted that, as a result of the exclusive licensing policy of the Canadian Radio-television and Telecommunications Commission, the two companies do not and cannot currently compete for cable subscribers.

"I have concluded that, based on the information available to me, there will not likely be a substantial lessening or prevention of competition in the relevant commercial markets as defined under the merger provisions of the *Competition Act*," Mr. Addy stated. "Given the rapidly changing regulatory and technological environment, I will closely monitor the effects of this transaction during the three year period set out in the Act. If the acquisition causes, or is likely to cause a substantial lessening or prevention of competition, I will take appropriate action at that time," he continued.

The Director noted that the potential emergence of competitive alternatives, both from wired competitors, such as telephone companies, and

from wireless technologies, such as direct-to-home broadcast satellites and multipoint distribution systems, was an important factor in his assessment of the long term competitive effects of the proposed transaction. The government is currently examining the regulatory framework with respect to these alternative and converging technologies and the Director will be participating in this review.[1]

Notes

[1] See "Proposed Acquisition of Maclean Hunter Limited by Rogers Communications Inc.", *infra*, for background information.

PROPOSED ACQUISITION OF MACLEAN HUNTER LIMITED BY ROGERS COMMUNICATIONS INC.

The following is an Information Backgrounder prepared by the Bureau of Competition Policy and is reproduced with permission.

On March 31, 1994, Rogers Communications Inc. ("Rogers") agreed to purchase Maclean Hunter Limited ("Maclean Hunter") for a total consideration of approximately $3.1 billion. The proposed acquisition is conditional on the approval of the Canadian Radio-television and Telecommunications Commission (the "CRTC") and is subject to review under the merger provisions of the *Competition Act*.

Subject to the closing of the Maclean Hunter transaction, Rogers entered into an agreement with Shaw Communications Inc. ("Shaw") to sell to Shaw the cable systems operated by Rogers in Calgary and Victoria and the Maclean Hunter cable systems in Thunder Bay and Sault Ste. Marie. Shaw agreed to sell to Rogers its cable systems and licenses for the City of York in the Municipality of Metropolitan Toronto, as well as for Woodstock, St. Thomas, Tillsonburg and Strathroy, Ontario.

The CRTC held hearings into the proposed Rogers/ Maclean Hunter and Rogers/Shaw transactions from September 20 to 23, 1994 to determine if they would be in the public interest. The CRTC's decision is pending.

The Director of Investigation and Research under the *Competition Act* examined the likely impact of the proposed Rogers/Maclean Hunter transaction on a number of markets, including cable television distribution, paging, radio and television broadcasting, newspaper and magazine publishing and commercial printing.

As Rogers does not currently own any newspaper, magazine or commercial printing operations, the addition of the Maclean Hunter operations will not affect concentration in these markets. Similarly, the proposed transaction does not raise concern in radio and television markets because each firm owns radio and television stations that do not compete in the same geographic market, with one exception. This exception concerns the Toronto market where, following the transaction, Rogers would own two FM radio stations. Rogers, however, in accordance with CRTC policy prohibiting ownership of more than one FM station providing service in the same language in the same radio market, has agreed to sell one of these FM stations, CFNY, to Shaw. In terms of paging, the Director concluded that there would be effective competition remaining from Bell Mobility and from a number of other regional firms participating in the paging markets where Rogers and Maclean Hunter compete.

CANADIAN COMPETITION RECORD

In relation to cable markets, Rogers is Canada's largest cable television distributor with 14 cable television systems in and around metropolitan areas of Southern Ontario, Alberta and British Columbia. Following the proposed transaction with Maclean Hunter and the Shaw transaction, Rogers will increase its share of the total number of cable subscribers in Canada from approximately 26 percent to 36 percent.

The Director has found that the proposed transaction will not likely lessen or prevent competition substantially in any local cable market at this time. This finding is based in large measure on the long standing policy of the CRTC to grant cable licenses on an exclusive basis, creating territorial monopolies for cable service across the country. As a result of this policy, Rogers and Maclean Hunter do not and cannot compete in the provision of cable services to consumers. In addition, this policy also ensures that Rogers and Maclean Hunter do not compete in the purchase of programming from program suppliers for any local market.

The Director has also noted that the current lack of competitive alternatives for both program and non-program delivery to the home raises competition concerns in relation to access to the cable systems by suppliers of these services. These concerns are increased where the cable companies themselves provide programming and non-programming services, creating an incentive to impede competition by denial of access to the cable system or by granting access on discriminatory terms and conditions.

The CRTC has responded to these concerns by endorsing an "Access Commitment" developed by the Canadian Cable Television Association (the "CCTA") which commits cable systems with more than 6,000 subscribers to carry all licensed Canadian specialty, pay television and pay per view services, except where the cable licensee can demonstrate it has no available capacity. At the CRTC hearing, Rogers committed to carry all licensed Canadian services without limitation as to capacity. Under the CCTA access policy, disputes as to the terms of access are subject to mediation and, if necessary, determination by the CRTC.

The CRTC has also asked the CCTA to develop a code for access to cable systems by non-program suppliers. At the CRTC hearing into the proposed transaction, considerable attention was focused on the access policy for non-program suppliers offered by Rogers. As cable systems derive an increasingly larger revenue from these non-program services, many of which are not yet developed, it is likely that access and the terms of access will become more important and more difficult to regulate in the future.

In coming to his decision, the Director also relied on information provided by Rogers and other participants in the cable industry that cable companies face an imminent competitive threat from high powered direct broadcast satellites and, in the medium to long term, a strong competitive challenge from the Canadian telephone industry.

The Director noted that the potential emergence of competitive alternatives, both from wired competitors, such as telephone companies, and from wireless technologies, such as direct-to-home broadcast satellites and multipoint distribution systems, was an important factor in his assessment of the long term competitive effect of the proposed transaction. The Government is currently examining the regulatory framework with respect to these alternative and converging technologies and the Director will be participating in this review.

Given the rapidly changing regulatory and technological environment, the Director will closely monitor the effects of the Rogers/Maclean Hunter transaction on the provision of programming services, non-programming services and other informational and transactional services to consumers and business customers during the three year period set out in the *Competition Act*. If it becomes apparent that the merger is causing or will likely cause a substantial lessening or prevention of competition, the Director will take appropriate action at that time. It should also be noted that other provisions of the *Competition Act*, such as the abuse of dominance provisions, continue to apply and may be used to remedy anti-competitive conduct.

COLOR YOUR WORLD FINED $225,000 FOR ONE COUNT OF MISLEADING ADVERTISING UNDER THE *COMPETITION ACT*

The following is a News Release issued by the Bureau of Competition Policy on December 22, 1994, and is reproduced with permission.

OTTAWA, December 22, 1994 — George N. Addy, Director of Investigation and Research of the Bureau of Competition Policy, announced today that Toronto-based Color Your World Corp. pleaded guilty to one charge under section 52(1)(d) of the *Competition Act* and was fined $225,000 in Quebec Court (Criminal Division) in Montreal. The court also issued an Order against the company, and its officers and directors, prohibiting them from repeating misleading promotional practices and directing them to take measures to prevent repetition of the offence.

The nation-wide charge related to in-store signs, promotional flyers, and advertisements placed by Color Your World in major newspapers from November 1989 to November 1993 for the sale of certain stain, paint and wallcovering products. The company advertised these products at sale prices that were compared to "after sale prices" or to "regular book prices". The "after sale price" or "regular book price" did not reflect the price at which these products were ordinarily sold as the products were available at the sale price for more than 50% of the relevant time period and a substantial proportion of the products was not sold at the "after sale prices" or "regular book price".

"This case sends a clear message to the marketplace that misleading representations concerning the price at which products are ordinarily sold contravene the *Competition Act*," Addy said. "Before using a comparison price, a retailer should ensure that a substantial proportion of product has been sold at that price."

Color Your World cooperated with the Bureau throughout its investigation. In addition, the company is in the process of implementing a detailed written policy to ensure future compliance with the misleading advertising provisions of the Act.

AMBULANCE OPERATORS PLEAD GUILTY TO CONSPIRACY CHARGE UNDER THE *COMPETITION ACT*

The following is a News Release issued by the Bureau of Competition Policy on January 23, 1995, and is reproduced with permission.

OTTAWA, January 23, 1995 — The Director of Investigation and Research of the Bureau of Competition Policy, George N. Addy, announced

today that the Alberta Ambulance Operators' Association and three individuals have pleaded guilty in Alberta Court of Queen's Bench in Calgary to a charge that they conspired to lessen competition in the provision of ambulance services within Alberta. Chief Justice William Moore imposed fines of $25,000 against the Association and $5,000 against each of the three individuals, William Coghill, Andrew Moffat and Daniel Osborne.

The offence related to the period from 1984 to 1991 and resulted from rules and activities of the Association which prevented or discouraged ambulance operators from entering into territories already being serviced by other members of the Association. The three individuals were all on the Executive of the Association during the period that the offence was committed.

"This case highlights that associations which generally play an important role in maintaining and improving industry and professional standards must be careful not to stray into activities which can bring them into conflict with the *Competition Act*," Mr. Addy said.

In addition to the fines, the Court also issued a comprehensive prohibition order designed to encourage competition within the industry.

ORDER OF PROHIBITION ISSUED AGAINST BÉTON RÉGIONAL INC. AND BÉTON CARRIÈRE LTÉE UNDER THE *COMPETITION ACT*

The following is a News Release issued by the Bureau of Competition Policy on February 1, 1995, and is reproduced with permission.

OTTAWA, February 1, 1995 — George N. Addy, the Director of Investigation and Research of the Bureau of Competition Policy, announced today that the Federal Court of Canada has issued an order of prohibition pursuant to subsection 34(2) of the *Competition Act* following an inquiry into the ready-mix concrete market in the Saguenay-Lac St-Jean region of the province of Quebec. The Attorney General of Canada applied for the order with the consent of one of the parties.

The first group of companies covered by the order are Béton Régional Inc., Béton Carrière Ltée and Pavex Ltée, all part of a group of companies controlled by Walter Bélanger (the "Bélanger Group").

The second group of companies involved in the Director's inquiry includes Bétonnière d'Arvida Inc., Bétonnière du Golfe Inc., Alma Mix Ltée, Inter Cité Construction Ltée, Bétonnière La Baie Ltée, Bétonnière Lac St-Jean Inc. and Pavage du Golfe Inc., all part of a group of companies controlled by Réal Riverin (the "Riverin Group"). The companies belonging to the Riverin Group are not covered by this order.

The inquiry focused on negotiations between the Bélanger Group and the Riverin Group for the merger of parts of their companies. In the course of their merger negotiations, the parties entered into

an agreement on the sale prices of ready-mix concrete in the Saguenay-Lac St-Jean region. The order prohibits the Bélanger Group of companies from engaging in anti-competitive activities in the manufacture and sale of ready-mix concrete and concrete products. In addition, the order prohibits Béton Régional Inc. and Béton Carrière Ltée, in the event that they commence negotiations to complete a merger with any of the companies of the Riverin Group or with any other person, to enter into agreements concerning the prices of ready-mix concrete or concrete products or the allocation of customers prior to the completion of the merger.

"It is extremely important that parties to a proposed merger avoid co-ordinating their commercial activities prior to the completion of the merger," stated Mr. Addy. "Merger negotiations must not be used to shelter unlawful conduct."

Furthermore, in response to the Director's concerns regarding the inclusion in a proposed merger of market-sharing clauses for markets other than those covered by the merger, the companies are ordered not to enter into agreements containing such clauses without first obtaining the Director's approval.

The Bélanger Group and the Riverin Group, operating in the Saguenay-Lac St-Jean region, are involved in: the manufacturing and sale of ready-mix concrete and concrete products; highway construction; asphalt and related products; and gravel pits, sandpits and quarries. Some companies of the Riverin Group also operate in the Sept-Iles region.

THOMAS LIQUIDATION INC. FINED $130,000 FOR ONE COUNT OF MISLEADING ADVERTISING UNDER THE *COMPETITION ACT*

The following is a News Release issued by the Bureau of Competition Policy on February 7, 1995, and is reproduced with permission.

OTTAWA, February 7, 1995 — George N. Addy, Director of Investigation and Research of the Bureau of Competition Policy, announced today that American-based Thomas Liquidation Inc. pleaded guilty to one charge under section 52(1)(a) of the *Competition Act* and was fined $130,000 in Ontario Provincial Court (Criminal Division) in Toronto.

"This case is the first in which international agreements have been used to cause an American corporation and individual to attend a Canadian Criminal Court and answer charges under the *Competition Act*. It should send a message to advertisers that Canada will not hesitate to use the extradition process to enforce the Act. The action taken in this case is in line with the Bureau's commitment to international cooperation in detecting and fighting unfair and deceptive marketing practices," Addy said.

This case relates to representations contained in a letter circulated by Thomas Liquidation Inc. to approximately 700,000 Toronto-area residents between March and April 1992 regarding a liquidation sale of the inventory of Pascal's Furniture. The representations promoted a "court authorized store closing" and included statements that the company was "being forced to close both of its Toronto store locations and sacrifice inventory" and customers could "save as you have never saved before". It was determined that this savings claim was untrue.

Further, within the first two weeks of the five month sale, virtually all of the Pascal's inventory had been sold and the stock was being supplemented with merchandise obtained from other U.S. and Canadian sources. It was also determined that Pascal's Furniture was not forced into closing its stores nor was it required to sacrifice inventory.

DIRECTOR OF INVESTIGATION AND RESEARCH WILL NOT CHALLENGE MACLEAN HUNTER PRINTING LIMITED ACQUISITION

The following is a News Release issued by the Bureau of Competition Policy on February 7, 1995, and is reproduced with permission.

OTTAWA, February 7, 1995 — George N. Addy, Director of Investigation and Research of the Bureau of Competition Policy, announced today that he will not challenge the acquisition by Quebecor Printing Inc. ("QPI") of Maclean Hunter Printing Limited, Litho Plus Limited, The Jasper Printing Group Ltd. and Templeton Studio Ltd. from Rogers Communications Inc.

On January 16, 1995 a Consent Interim Order was issued by the Competition Tribunal Ordering QPI to maintain the acquired businesses separate from its operations for a 21 day period, so that the Director could complete his assessment.

"Our analysis disclosed that Quebecor will not be able to exert market power in the relevant printing markets," Mr. Addy stated.

The Director's decision follows an extensive examination of the likely competitive consequences of the acquisition. In the Bureau's assessment, the relevant product market was found to be heatset web offset commercial printing. This printing process is typically used to print catalogues, magazines and periodicals, advertising inserts and circulars, and general commercial material on coated or semi-coated papers. The geographic market is presently limited to Canada due to the current exchange rate which precludes effective U.S. competition.

QPI will continue to face vigorous and effective competition in all product market segments from its main competitor, G.T.C. Transcontinental Group Ltd., a printer of comparable size to QPI in Canada, as well as from some medium-sized regional competitors and from a number of smaller niche players.

In the event that serious competition concerns are subsequently brought to the Director's attention, section 97 of the *Competition Act* provides a three year period, following the substantial completion of a transaction, in which the Director may bring the matter before the Competition Tribunal.