# CANADIAN COMPETITION LAW AND POLICY DEVELOPMENTS

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## UPDATE ON COMPETITION TRIBUNAL HEARING: *DIRECTOR OF INVESTIGATION AND RESEARCH* v. *THE D & B COMPANIES OF CANADA LTD.*

The Competition Tribunal hearing resumed on April 10, 1995 for the presentation of The D & B Companies of Canada Ltd.'s ("Nielsen") evidence followed by closing argument made on behalf of the Director, the Intervenor, Information Resources Inc., the Intervenor, the Canadian Council of Grocery Distributors and the Respondent, Nielsen and concluded on April 28, 1995. The Tribunal has reserved its decision.

Staff

## FREIGHT FORWARDERS CONSPIRACY CASE STATUS

The Freight Forwarders case currently before the Ontario Court (General Division) is based on allegations of conspiracy in contravention of section 45(1)(c) of the *Competition Act*. The five accused parties, Clarke Transport Canada Inc., Consolidated Fastfrate Transport Inc., Cottrell Transport Inc., Northern Pool Express Ltd. and TNT Canada Inc. have been charged with conspiring to unduly lessen competition in the supply of freight forwarding services through the means of the Canadian Pool Car Operators Association. Alleged acts of conspiracy mentioned in the Crown's case date as far back as 1976 although the case actually arose from a customer's complaint made in late 1985. The accused freight forwarders' business involved the consolidation and transportation of less-than-carload freight shipments to destinations in western Canada using railway-owned boxcars.

Following a six week trial at which the defence elected not to call any evidence, the Crown delivered written submissions to the Court on May 16, 1995. At the time this issue of the *Record* went to print, the defence was expected to deliver its written submissions by June 9, 1995, with oral argument scheduled for June 22-23, 1995.

A fine of up to $10 million could be assessed against any of the corporate accused that are found to have contravened section 45(1)(c) which is treated as an indictable criminal offence under the Act. A future issue of the *Record* will contain a more detailed report on this matter.

Staff

CANADIAN COMPETITION RECORD

## MILK CASE IS REFRESHING*

There was a recent article in *Legal Alert*[1] addressing a recent trend in comparative advertising law. The cases noted there[2] suggested that there was little judicial reluctance to grant injunctions preventing comparative advertising in the face of allegations of misleading claims. These cases further suggested that the market leader enjoyed a preferred position in obtaining an injunction against a new entrant, or in avoiding having its own advertising enjoined.

### *Beatrice Foods v. Ault Foods*

Almost immediately after the *Legal Alert* article appeared, however, the Ontario Court decided the case of *Beatrice Foods Inc.* v. *Ault Foods Limited*[3] which declined to enjoin alleged misleading advertising in respect of Ault Foods' Lactantia PurFiltre™ Milk.

### The Facts

The facts of the case are relatively straightforward. Ault is Canada's largest dairy, and accounts for about 33% of Canadian milk sales. Beatrice is a major competitor with about 27% of sales. Ault invented a process for the micro-filtration of milk, which has the effect of removing 99.9% of the bacteria found in milk prior to pasteurization. By contrast, pasteurization kills approximately 99.4% of such bacteria. The difference in the level of bacteria in milk which has "only" been pasteurized versus that which has first been micro-filtered is irrelevant to the safety of the milk. However, because the micro-filtration process removes more bacteria, such milk spoils more slowly when it is left in an unopened carton on the shelf.

Having invented the micro-filtration process, Ault wished to market and sell its milk as a premium product. In order to do so, it wished to advertise the superiorities of the micro-filtered product, so as to be able to differentiate it and command a premium price. Its competitors, particularly Beatrice, became aware of this plan and brought an injunction challenging Ault's proposed advertising. The injunction was heard three days prior to the commencement of Ault's campaign. Beatrice's complaints related to claims that the PurFiltre™ product was more "pure", tasted fresher, had a longer shelf life and had 92 times less bacteria than ordinary pasteurized milk.

The Court found that there is 0.5% difference in the number of live bacteria in micro-filtered milk versus those in milk that has only been pasteurized. However, this difference is insignificant for health and safety, even though there are, on average, 92 times fewer live bacteria in the Ault product than in milk that has only been pasteurized.

Beatrice argued that the advertisements would cause consumers to be misled as to the safety of pasteurized milk, and that there would be a loss of sales as a result of misleading advertising. It argued that Ault's use of the word "bacteria" created an impression that pasteurized milk was unsafe. The Court concluded that there was nothing in the advertising materials that suggested that pasteurization was inadequate. Rather, the advertisements stated that micro-filtration used in conjunction with pasteurization resulted in certain specified benefits.

### Survey Evidence

Beatrice introduced a survey by Angus Reid, which purported to show that consumers who were exposed

to Ault's advertising would question the quality and safety of regular pasteurized milk, and might be concerned about its use by infants and young children. The Court stated:

> The nature of the questions asked as part of the study, the four shopping malls in Southern Ontario in which they were asked, as well as the sizes of the samples utilized suggest to me that the research conducted was of modest extent.[4]

This comment, which is somewhat cryptic, suggests that surveys in respect of advertising copy will have to be carefully constructed and fairly extensive as to geographic scope and sample size in order to be given weight by the courts[5]. The Court also suggested that experts must be careful not to over-reach in their conclusions. Mr. Justice Wilkins stated:

> Should there be a 'scare tactic' involved, I would think it might more relate to those comments by Dr. Angus Reid than to any of the proposed advertisements that were shown to me.

In any event, because the draft advertisements which Dr. Reid used in his surveys were not the advertisements or claims before the Court, no reliance was placed on the surveys by the Court.

## Test for Interlocutory Injunction

The Court then turned to the applicable test for the granting of an interlocutory injunction. The Court noted first that the facts were not seriously in dispute and in those circumstances the plaintiff must establish a strong *prima facie* case that it will suffer irreparable harm if the injunction is not granted.[6] The Court determined that the facts were not seriously in dispute because the question to be determined was not one of fact but one of interpretation. Having found that the survey evidence of Angus Reid was inadmissible and unhelpful, it was incumbent on the Court to interpret the words itself.

This approach by the Court is important. If the onus on the applicant is simply to show that there is a dispute as to whether an advertisement may be misleading or not, the applicant will usually be able to make out a case on the basis that the advertisement may be open to a possible misleading interpretation.[7] If, on the other hand, the courts regard the question of interpretation of the advertisement not as a disputed fact, but rather a matter for judicial interpretation,[8] then the applicant will have to meet a higher test as to the likelihood of success to obtain an injunction. If that higher test must be met, the likelihood of a successful injunctive challenge to comparative advertising is much lower. A route to challenge such advertisements which may become more common is an expedited trial on the merits.[9]

## *Trade-marks Act*

The first challenge to Ault's advertisement was made under section 7(a) of the *Trade-marks Act*[10] which prohibits the making of false or misleading statements tending to discredit the business, wares or services of a competitor. Because Beatrice was not mentioned in Ault's advertisements, the Court concluded that Beatrice could not show that its business was discredited.

## *Competition Act*

A claim was also based on section 52(1)(a) of the *Competition Act*,[11] which prohibits the making of materially false or misleading misrepresentations. Mr. Justice Wilkins stated:

> In my view, there is no direct or indirect misrepresentation to the public in the advertising that is false or misleading in a material respect. The promotion of Ault's product is, in my opinion, no greater a detractor from the products of its competitors than any other advertising campaign which asserts that one product is better and, consequently, by inference, another product is not as good.
>
> The advertising campaign states that the micro-filtration process removes bacteria and, when combined with the pasteurization process, results in milk which contains fewer bacteria than milk which has solely been pasteurized according to government standards. Whether or not the ultimate consumer chooses to pay more for milk which is older in shelf life and which may or may not taste fresher to that consumer than the pasteurized milk which the consumer has always purchased, and may still purchase, is a decision that should be made in the marketplace and not the court room.

Consequently, the Court concluded that the plaintiff had not made out a strong *prima facie* case or even shown that there was a serious question to be tried. The Court did not comment on the availability of an injunction for breach of the *Competition Act*. There has been considerable debate on this point,[12] and a recent case has rejected the availability of an injunction for such breach.[13]

## Injurious Falsehood

Another ground of attack by Beatrice was that the advertisements constituted injurious falsehood. The Court noted that Beatrice is not identified in the advertisements. It also noted that the advertising text had been reviewed by Industry Canada and the Canadian Advertising Foundation,[14] and was approved by the Canadian Advertising Foundation. The Court noted that in order to determine whether there was a strong *prima facie* case, or a serious question to be tried, it had to determine whether a reasonable person viewing the advertisement would interpret it as a serious denigration of the goods of Beatrice. The Court noted that in a claim for injurious falsehood it is essential that the plaintiff or its wares be identifiable from the allegedly offending statements. In the baking soda case,[15] the Court noted that denigration, where one competitor enjoys an 80% market share, may occur without specifically identifying the competitor. However, that situation did not exist in the present case.

The Court found that Beatrice had not demonstrated a strong *prima facie* case or that there was a serious issue to be tried with regard to injurious falsehood. The reasoning was somewhat ambiguous. The result appears to be based on the facts that Beatrice was not identified in the advertising, and also that a case had not been made out that the advertising, read in a fair way, was in fact false.

In addition to the finding in respect to the strength of the plaintiff's case, the Court found that, given the marketplace for milk in Canada, the plaintiff would not suffer irreparable harm, as any decline in sales could be quantified by use of historic market share and sales figures.

## Court's Views

After dismissing Beatrice's challenge of Ault's advertising, the Court commented critically on Beatrice's timing in bringing the injunction. Beatrice had been aware that the advertising was planned for a considerable period of time, but it waited to bring the application until the Friday before the scheduled Monday launch of the advertising campaign. The Court pointed out that if the injunction had been improperly granted, Ault, as well as others not party to the litigation, would have been significantly inconvenienced, and irreparable harm

could have been done to the marketing of the new product. Part of that harm would have been the result of the chaos resulting from the last minute prohibition.

The Court also commented that the proposed advertising campaign by Ault was parallel in many respects to other well known campaigns for products, such as beer or gasoline, which purport to demonstrate that on some technical scientific or other ground the more expensive product is better. Mr. Justice Wilkins noted that higher octane gasoline, for instance, has significant superiority as to measured combustion, although that may be of little practical difference to motorists. The fact was that the PurFiltre™ Milk does have 92 times less bacteria. The advertisements reviewed by the Court showed that Ault intended to suggest that the micro-filtration process enhanced the quality of pasteurized milk, but did not suggest that pasteurization was inappropriate, unacceptable or substandard. The Court noted that, particularly where for a long period competition has not been based on product differentiation, there is bound to be substantial fear if a competitor develops a new process and attempts to market that product based on its alleged superiorities. In those circumstances it is appropriate that the determination as to whether consumers will pay for the premium product be made by the marketplace.

In conclusion, Mr. Justice Wilson stated:

> It is my view that this application was probably brought more for the purpose of using the court as an arm of commercial competition than out of palpable concern that an injustice was about to be perpetrated. Ault was offering the micro-filtration process to the industry on a licensing basis. It was open to Beatrice to obtain a license and go head-to-head in competition for the micro-filtered milk market. It elected to bring this proceeding instead.

## Comment

Mr. Justice Wilkins' decision in the PurFiltre™ milk case is welcome. It is a step back from the earlier cases[16] which suggested that injunctions with respect to comparative advertising were becoming the rule rather than the exception. It effectively establishes somewhat higher hurdles in relation to the proof necessary to obtain an interlocutory injunction to prevent comparative advertising.

In instances where a strong case can be made out that the advertising is falsely disparaging or materially misleading, injunctive relief in respect of such advertising is likely to be available and appropriate. However, it is difficult to understand a policy rationale for discouraging advertisements in which the comparison reflects favourably on the advertiser's product, but the statements are not likely to be found to be inaccurate. That is particularly so where the advertiser is a new entrant - often with an improved product - who is challenging the position of a market leader. In such a case, comparative information is particularly valuable to consumers. The decision in the PurFiltre™ case is welcome for its explicitly stated preference for market forces, rather than litigation, as the determinant of marketplace success.

J.B.M.

### Notes

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1 P. Tackaberry, J. Musgrove and J.D. Wilson, "Canada in Need of a Rational Competitive Advertising Policy", *Legal Alert*, December 1994, Vol. 13, No. 9.

2 In particular, *Church & Dwight Ltd.* v. *Sifto Canada Ltd.* (1994), 20 O.R. (3d) 483 (Gen. Div.); *Unitel Communications Inc.* v. *Bell Canada* (15 June 1994), (Ont.

Gen. Div.) [unreported]; and *Maple Leaf Foods Inc.* v. *Robin Hood Multifoods Inc.* (29 September 1994), (Ont. Gen. Div.) [unreported].

[3] *Beatrice Foods Inc.* v. *Ault Foods Limited* (6 January 1995), (Ont. Gen. Div.) [unreported], reasons released March 1, 1995.

[4] For a detailed discussion of survey evidence in Canadian law see J. D. Wilson, "Survey Evidence in Trade Mark Proceedings" (1994) Canadian Journal of Marketing Research, Vol. 13, p. 55, and various papers in *Survey Research in Litigation* - Insight Conference, April 5, 1995.

[5] See also *Unitel Communications Inc.* v. *Bell Canada*, *supra*, note 2, and *Purolator Courier Ltd.* v. *United Parcel Service Canada Ltd.* (3 April 1995), (Ont. Gen. Div.) [unreported].

[6] *RJR-MacDonald Inc.* v. *Canada*, [1994] 1 S.C.R. 311 and *Dialadex Communications Inc.* v. *Crammond et al* (1987), 34 D.L.R. (4th) 392 (Ont. H.C.). But see R. Kwinter and E. McNaughton. "Available Remedies for Misleading Advertising", Canadian Bar Association Ontario Conference "Getting To Market", March 31, 1995, which suggests that the practical difference between the "strong prima facie case" test, and the "serious issue to be tried" test may be illusory as a practical matter.

[7] But see the case of *947101 Ontario Ltd.* v. *Barrhaven Town Centre Inc.* (9 January 1995), 86135/94 (Ont. Gen. Div.), for a more restrictive interpretation of the serious issue to be tried test.

[8] See *R.* v. *Total Ford Sales Ltd.* (1987), 18 C.P.R. (3d) 404 (Ont. Dist. Ct.) for the proposition that interpretation of an advertisement is a matter of law alone. See also *R.* v. *R.M. Lowe Real Estate Ltd.* (1978), 39 C.P.R. (2d) 266 (Ont. C.A.), for the proposition that, at least in the criminal context, but not necessarily restricted to that context, if an advertisement is capable of two reasonable interpretations, the advertiser is entitled to avoid conviction for misleading advertising so long as one such interpretation is not materially false or misleading. See, however, D. Young, "Comparative Advertising Does It Have a Future in Canada", Canadian Bar Association Ontario Conference "Getting To Market", March 31, 1995, which suggests that defendants in civil proceedings may not have the benefit of the doubt in cases of ambiguous meaning.

[9] See *Purolator* v. *U.P.S.*, *supra,* note 5, for the first major civil action for misleading advertising under the *Competition Act*.

[10] *Trade-marks Act* , R.S.C. 1985, c. T-13, as amended.

[11] *Competition Act* , R.S.C. 1985, c. C-34, as amended.

[12] See Neil Finkelstein and Robert Kwinter, "Section 36 and Claims to Injunctive Relief" (1990) 69 Can. Bar. Rev. 298; and James Musgrove "Civil Actions and the *Competition Act*" (1994) 16 Advocates' Quarterly 94.

[13] *Supra,* note 7.

[14] It appears, however, that the Court may have confused the Canadian Advertising Foundation's pre-approval process for food advertisements with its Trade Dispute Procedure, which was not engaged.

[15] *Church & Dwight Ltd.* v. *Sifto Canada Inc., supra,* note 2.

[16] *Supra*, note 2.

# *BRITISH COLUMBIA SECURITIES COMMISSION* v. *BRANCH*: IMPLICATIONS FOR SECTION 11 OF THE *COMPETITION ACT*

## Introduction

The recent Supreme Court of Canada decision in *British Columbia Securities Commission* v. *Branch*[1] confirms that regulatory bodies can compel disclosure and testimony even in circumstances where future criminal proceedings are possible. As a result, *Branch* raises serious implications for the operation of section 11 of the *Competition Act*[2] (the "Act"). The purpose of this comment is to briefly address these implications. Toward this end, this article will first review section 11 and its application in three recent decisions. It will then provide an overview of the salient features of the *Branch* decision and the implications of *Branch* for future section 11 cases.

## Section 11 of the *Competition Act*

### The Statutory Provisions

The rules regarding the commencement of an inquiry by the Director of Investigation and Research (the "Director") are set out under Part I of the Act. Section 10 establishes the grounds upon which an inquiry shall be made by the Director. Once

an inquiry is commenced, the Director may seek a section 11 order to facilitate the collection of information relevant to the inquiry. Subsection 11(1) reads as follows:

> Where, on the *ex parte* application of the Director or the authorized representative of the Director, a judge of a superior or county court or of the Federal Court is satisfied by information on oath or solemn affirmation that an inquiry is being made under section 10 and that any person has or is likely to have information that is relevant to the inquiry, the judge may order that person to
>
> (a) attend as specified in the order and be examined on oath or solemn affirmation by the Director or the authorized representative of the Director on any matter that is relevant to the inquiry before a person, in this section and sections 12 to 14 referred to as a "presiding officer", designated in the order;
>
> (b) produce a record, or any other thing, specified in the order to the Director or the authorized representative of the Director within a time and at a place specified in the order; or
>
> (c) make and deliver to the Director or the authorized representative of the Director, within a time specified in the order, a written return under oath or solemn affirmation showing in detail such information as is by the order required.

In addition, it is noteworthy that, subject to certain exceptions, subsection 11(3) provides a form of statutory use immunity in that, while it prohibits a person from refusing to comply with an order under subsection 11(1), "... no testimony given by an individual ... shall be used or received against that individual in any criminal proceedings thereafter instituted against him... ."

**Recent Jurisprudence**

The Director's ability to use his section 11 powers to compel testimony in criminal inquiries was potentially restricted significantly in three recent decisions of the Federal Court (Trial Division).[3] Specifically, two of these decisions suggest that a suspect's right to silence in a criminal case restricts, and may even prevent entirely the use of section 11 of the Act to compel testimony from the "targets" of a criminal inquiry.[4] The remaining decision establishes that once criminal charges have been laid, the Director cannot use section 11, or the other formal powers available to him on inquiry, at all.[5] Each of these decisions is discussed below.

In *Samson* v. *Canada*, the Director sought to compel testimony from several notaries in the province of Quebec who were suspected of having agreed upon a scheme to fix the prices of real estate related services, which is an indictable offence under section 45(1)(c) of the Act. The court found that the Director had already concluded that an offence had been committed and had identified the parties to the offence. Madame Justice Tremblay-Lamer held that since the Director had already concluded that the persons subject to the section 11 orders had participated in an offence, they could not be compelled to testify.

In the *Canada* v. *Luxottica Canada Inc.* case, Joyal J. granted a stay of proceedings brought by the Attorney General for an injunction pursuant to section 33 of the Act. The stay was granted as the Court found, in part relying on *Sampson*, that in order to respond to the injunction application, the defendants would be required to present evidence which might then be used against them in subsequent criminal proceedings. The Crown had conclusively identified the potential accused parties, but had not decided whether criminal charges would be laid. The Court held that the Crown was seeking to gain testimony through civil discoveries which would not have been available to it on a criminal inquiry.

In *TNT Canada Inc.* v. *Director of Investigation and Research,* Teitlebaum J. found that once charges have been laid, the Director's inquiry has ended and as such, there can be no use of section 11, or any of the other formal powers the Director has on inquiry. TNT Canada and several other parties had been charged with conspiracy in the supply of pool car freight forwarding services. The Director obtained orders under section 11 for the examination of six witnesses in connection with the charges after the evidence had been referred to the Attorney General and, in fact, after the accused corporations and individuals had been ordered to stand trial at the conclusion of a preliminary hearing. The Court held that while an inquiry does not end when the Director refers the matter to the Attorney General, it ends when the purpose of the inquiry has been attained, namely, the bringing of charges against the persons who had been the subject of the investigation.

These recent cases on self-incrimination and the rights of suspects seem to establish that a person must at least show that he or she has been identified as a suspect and is under investigation to ascertain whether his or her actions constituted a crime in order to be successful in quashing a subpoena order. Under section 10 of the Act, the Director's authority to commence an inquiry depends upon his either receiving a complaint or being of the belief "on reasonable and probable grounds", that an offence has been committed. However, once the Director has such a belief, it follows that the people he believes to have participated in the offence are then "suspects". Consequently, an extrapolation of the *Samson* and *Luxottica* cases may be that the Director is prohibited from using section 11 to compel testimony or affidavit evidence from a "target" or suspected party. If the *TNT Canada* case stands, the Director will not be able to use his powers to compel testimony or the production of documents from an accused, or to search the premises of the accused once charges have been laid.

## ***BC Securities Commission v. Branch:*** **An Overview**

The *Branch* decision addresses the issue of the compellability of an individual outside of the criminal justice system. Specifically, it sets out the legal test to resolve the following issue: can an individual who might subsequently be charged with a criminal or quasi-criminal offence be compelled to give testimony and produce documents?

### The Facts

- Terra Nova Energy Inc. ("Terra"), a British Columbia company, was listed on the Vancouver Stock Exchange (the "VSE"). The appellants, Bruce Douglas Branch ("Branch") and Arthur Levitt ("Levitt") were directors of Terra from the time of its incorporation until December 1988.

- Annual financial statements for Terra were published in July 1987. However, due to deficiencies in the control, documentation and approval procedures of Terra, the auditors were unable to express an opinion as to whether the financial statements accorded with generally accepted accounting principles. The VSE halted the trading of Terra shares ten days after the financial statements were released and, soon after, suspended trading pending further clarification.

- In October 1987, Branch, Levitt and other former officers were ordered by the British Columbia Securities Commission (the "BCSC") to cease

trading in Terra shares. In November 1987, the BCSC appointed three individuals to conduct an investigation.

- In June 1988, summonses were served on Branch and Levitt compelling their attendance for examination and documentary production. On the advice of their counsel, Branch and Levitt relied upon their apparent right to remain silent based on their contention that the investigation appeared to be preliminary to possible criminal or quasi-criminal charges.

- The appellants sought, but were denied by the Supreme Court of British Columbia, a declaration to the effect that the empowering provision of the provincial securities legislation violated sections 7, 8, 9 and subsection 15(1) of the Charter. The British Columbia Court of Appeal dismissed the appeal.

**The Issues**

The issues to be resolved in *Branch* were as follows:

1. Does section 128(1) of the *Securities Act*[6] (the "BCSA") violate sections 7 or 8 of the Charter?

2. If the answer is yes, is the limitation one which is reasonable, prescribed by law, and demonstrably justified pursuant to section 1 of the Charter?

**A Synopsis of the *Branch* Decision**

i. A Clarification of *R. v. R.J.S.*[7]

Prior to turning to the specific facts in *Branch*, the Court reviewed certain aspects of its recent decision in *RJS* in an effort to clarify and provide further guidance with respect to issues surrounding compellability, particularly in regard to derivative-use immunity and exemptions from the compulsion to testify. However, the Court was also careful to point out that *RJS*, unlike *Branch*, concerned issues of compellability within the criminal justice system.

Specifically, the Court asserted that based on its decision in *RJS*, section 7 of the Charter required that persons compelled to testify be provided with "derivative-use immunity" to supplement the "use-immunity" guaranteed to them under section 13 of the Charter. Derivative evidence refers to "...evidence which could not have been obtained or the significance of which could not have been appreciated, *but for* the testimony of a witness ..." (emphasis added).[8] Turning to the issue of derivative-use immunity, the Court confirmed that the accused must first meet the burden of showing a plausible connection between the compelled testimony and the evidence sought to be adduced. Once this is established, the burden shifts to the Crown to satisfy the court that those undertaking the inquiry/ investigation would have discovered the impugned derivative evidence absent the compelled testimony. However, the Court reiterated that derivative-use immunity may only be claimed by a witness in a subsequent proceeding where he or she is an accused subject to penal sanctions.

The Court also confirmed that under certain circumstances, a court may grant an exemption from compulsion altogether, namely, where it amounts to a colourable attempt to compel the evidence of a witness. In *RJS*, it had not been necessary for the Court to determine conclusively when such exemptions were available and there had therefore been no agreement on the precise test to be applied.[9]

The test for an exemption from compulsion established in *Branch* is discussed below.

Building on its decision in *RJS*, the Court in *Branch* stated that the legal test with respect to compellability is as follows:

> ... the crucial question is whether the predominant purpose for seeking the evidence is to obtain incriminating evidence against the person compelled to testify or rather some legitimate public purpose. This test strikes the appropriate balance between the interests of the state in obtaining the evidence for a valid public purpose on the one hand, and the right to silence of the person compelled to testify on the other.[10]

The first step in applying this test is to determine the predominant purpose for which the evidence is being sought. Essentially, this will require a consideration of the purpose of the statute in question and the nature of the inquiry it permits. However, as noted by the Court, the fact that an inquiry under a statute has a legitimate purpose is not determinative as an inadmissible purpose may be revealed that the statute did not intend. Finally, the burden of proof regarding the predominant purpose of the compelled testimony rests with the witness asserting a breach of the Charter.

Furthermore, the Court determined that grounds could exist for granting an exemption from compulsion. Extrapolating from the decision, two conditions must exist for a court to grant such an exemption. First, it must be established that the predominant purpose is not to obtain relevant evidence for the instant proceedings, but rather to incriminate the witness.[11] Second, the prejudice that the witness will incur as a result of compulsion must extend beyond the potential prejudice to the right of the witness against self-incrimination, since derivative-use immunity will provide protection to the witness in this regard. The position of the Court is summarized in the following passage:

> ... if it is established that the predominant purpose (for seeking the evidence) is not to obtain the relevant evidence for the purpose of the instant proceeding, but rather to incriminate the witness, the party seeking to compel the witness must justify the potential prejudice to the right of the witness against self-incrimination. If it is shown that the only prejudice is the possible subsequent derivative use of the testimony then the compulsion to testify will occasion no prejudice for that witness. The witness will be protected against such use. Further, if the witness can show any other significant prejudice that may arise from the testimony such that his right to a fair trial will be jeopardized, then the witness should not be compellable.[12]

Although the legal test appears relatively straightforward, its practical application will largely depend on inferences drawn by courts as to the purpose behind calling a particular witness.[13]

ii. <u>The Section 7 Challenge in *Branch*</u>

Turning specifically to the facts in *Branch*, the Court first turned its attention to the alleged breach of section 7 of the Charter in the context of testimonial and documentary compulsion.[14] With respect to the former, the Court confirmed that the liberty interest is engaged at the point of testimonial compulsion and that, once engaged, it must be determined whether or not there has been a deprivation of this interest in accordance with the principles of fundamental justice. In this regard, the Court concluded that the predominant purpose of the inquiry at which the witness is being compelled to attend must be ascertained. After considering the purpose of the legislation and inquiry in question, the Court held that securities regulation is of "paramount importance" and that an inquiry of the type in *Branch* legitimately compels testimony. As

a result, it was held that the predominant purpose of the inquiry was to obtain the relevant evidence for the purpose of the instant proceedings.

With respect to documentary compulsion, the Court held that like oral testimony, the documents were compellable subject to a possible claim against their subsequent use which is subject to the "but for" test. The Court also held that circumstances could exist where one would be exempt from documentary compulsion based on the principles noted above. However, the Court was careful to note that an exemption from documentary compulsion was available *only* in connection with communications which were brought into existence "... by the exercise of compulsion by the state and not to documents that contain communications made before such compulsion and independently thereof."[15]

Finally, with respect to the claim of derivative use immunity in a subsequent proceeding, the Court held that the protection afforded by such immunity depends on the applicability of section 7 of the Charter, which the Court has held previously, in *Irwin Toy Ltd.* v. *Quebec (Attorney General)*,[16] is not available to corporations.

iii. The Section 8 Challenge in *Branch*

In addressing the section 8 challenge,[17] the Court affirmed the notion from its decision in *Hunter* v. *Southam*[18] that the guarantee of security from unreasonable search or seizure only protects a reasonable expectation of privacy. What amounts to a reasonable expectation will depend on the context within which the alleged violation takes place. In this regard, the following passage is most telling:

> Therefore, it is clear that the standard of reasonableness which prevails in the case of a search and seizure made in the course of enforcement in the criminal context will not usually be the appropriate standard for a determination made in an administrative or regulatory context. The greater the departure from the realm of the criminal law, the more flexible will be the approach to the standard of reasonableness. The application of a less strenuous approach to regulatory or administrative searches and seizures is consistent with a purposive approach to the elaboration of section 8.[19]

Turning to the specific context in *Branch*, the Court concluded that the key factors militated in favour of its conclusion that there would not exist a high expectation of privacy. As such, the Court held that subsection 128(1) of the BCSA did not offend section 8 of the Charter.

## The Implications of *Branch* for Section 11 of the Act

The *Branch* decision raises significant implications for the application of section 11 of the Act in regard to two issues: compellability of a witness and subsequent use immunity. It is clear from *Branch* that the question of compellability arises at the initial point of testimonial compulsion, *i.e.* the subpoena stage. By contrast, a claim for derivative use immunity arises *only* in subsequent proceedings involving potential penal sanctions. In the context of an inquiry under the Act, whether a person will be exempted from compulsion will require a determination of the predominant purpose of the Act and, more importantly, the inquiry at which a witness is being compelled to attend. Presumably, section 1.1 of the Act will sufficiently address the first point whereas the purpose of the inquiry will likely be derived on the basis of its foundation (*e.g.* under Part VI or Part VIII of the Act).

It is submitted that the outcome of this purposive analysis will vary significantly in accordance with the nature of the inquiry. That is, since the Director may commence an inquiry further to a Part VI offence or Part VIII practice, the purpose of an inquiry will range between criminal/quasi-criminal and purely administrative. Moreover, one can reasonably infer from *Branch* that in attempting to strike the appropriate balance between the interest of the state in obtaining the evidence for a valid public purpose and the right of the person not to be compelled, the balance will move in favour of the state as the purpose of the inquiry moves away from the criminal/quasi-criminal realm to one that is purely administrative. Also, as noted in *Branch*, the burden rests with the witness to show that the predominant purpose is not to obtain the relevant evidence for the purpose of the instant proceeding, but rather the self-incrimination of the witness.

Assuming, however, that a witness is successful in meeting this burden, he or she may still be compellable. In such an instance, the Director would need to justify the potential prejudice to the right of the witness against self incrimination. Based on *Branch*, however, if the only prejudice is the possible subsequent derivative use of the testimony, the witness will be protected against such use. Put another way, derivative use immunity will ensure that prejudice does not arise in this regard. As a result, in order to quash a subpoena and thereby be exempt from compulsion, the witness must show that prejudice exists, beyond that prejudice related to subsequent derivative use, which is significant enough to jeopardize his or her right to a fair trial. Again, this will largely, if not exclusively, depend on the nature and status of the particular inquiry.

If a witness satisfies the test in *Branch*, and is exempted from section 11 compulsion, the question of derivative use immunity becomes moot. However, in the more likely event that the witness is compelled, he or she will have the right to raise a claim of derivative use immunity at the time of a subsequent proceeding that involves the potential for penal sanctions. Based on *Branch*, the scope of this immunity will extend to all evidence which would not have been obtained, or the significance of which could not have been appreciated, *but for* the testimony of the witness. In this context, the burden will rest with the Director to show that those undertaking the inquiry would have discovered the impugned derivative evidence absent the compelled testimony.

What will be the likely impact of *Branch* on the ability of the Director to gather evidence under section 11 of the Act? The outcome is mixed. On the one hand, it is submitted that following *Branch*, the likelihood that a witness will be compellable under section 11 is substantially higher than existed under the *Samson* decision. In *Samson* it was evident that the subsequent use of the evidence gathered was a primary concern for the Court. Curiously, the Court in *Samson* made no reference to the immunity granted under subsection 11(3) of the Act. One could infer from this that while subsection 11(3) was considered, it was deemed inadequate to address the concerns of the Court. It remains to be seen whether the provision of derivative use immunity would address such concerns, although a compelling argument could be made to this effect. On the other hand, the availability of derivative use immunity will impose a significant constraint on the ability to pursue criminal charges against compelled individuals.

Based on this assessment of *Branch*, it follows that its most significant impact may fall upon corporations that are the subject of an inquiry. The basis for this contention is as follows. While the decision in *Branch* arguably enhances the testimonial and documentary compulsion powers of the Director, as compared to *Samson*, the immunity potentially available to a witness has unquestionably been broadened. However, since the protection of derivative use immunity is a right arising under section 7 of the Charter, and it has been held that section 7 does not apply to corporations, it follows that corporations cannot benefit from this broader notion of immunity. A further implication of *Branch*, assuming that it is viewed as raising the likelihood of compulsion under section 11, is that it will likely lead to a greater impetus for cooperation with the Director once an inquiry is commenced.

## Conclusion

There is little doubt that, at least on its face, section 11 of the Act has the potential to be a powerful tool to be used by the Director for the purpose of obtaining relevant information in the context of an inquiry. However, it is this very characteristic that has led parties to contend that its application breaches certain Charter rights. Despite the recent decisions in *Samson*, *Luxottica* and *TNT*, the law in this area remains unsettled and many questions need to be resolved. Although the *Branch* case may raise more questions than it provides answers, it is certain to contribute to the debate.

P.C.

### Notes

1 [1995] S.C.J. No. 32 (13 April 1995).

2 R.S.C. 1985, c. C-34.

3 The discussion regarding recent jurisprudence draws extensively from Donald B. Houston and Kathleen Traynor, "You Win Some, You Lose Some: Recent Developments in the Director's Investigatory Powers Under the *Competition Act*" The Canadian Institute (March 31, 1995).

4 See *Samson* v. *Canada* (1994), 55 C.P.R. (3d) 19 (F.C.T.D.) and *Canada* v. *Luxottica Canada Inc.* (21 December 1994), No. T-1460-94 (F.C.T.D.). Although not a section 11 case *per se*, the decision in *Luxottica* relied on certain elements of *Samson*. While a Notice of Appeal was filed in the Federal Court of Appeal by the Crown and the respondent in the *Samson* case, the appeal has been abandoned. An Appeal has also been filed by the Crown in the *Luxottica* case.

5 See *TNT Canada Inc.* v. *Director of Investigation and Research* (16 March 1995), Ottawa T-2531-94 (F.C.T.D.). A Notice of Appeal was filed by the Director on April 11, 1995 (Court file # A-221-95).

6 S.B.C. 1985, c. 83. Section 128(1) states as follows:

> An investigator appointed under section 126 or 131 has the same power
>
> (a) to summon and enforce the attendance of witnesses,
>
> (b) to compel witnesses to give evidence on oath or in any other manner, and
>
> (c) to compel witnesses to produce records and things
>
> as the Supreme Court for the trial of civil actions, and the failure or refusal of a witness
>
> (d) to attend,
>
> (e) to take an oath,
>
> (f) to answer questions, or
>
> (g) to produce the records or things in his custody or possession
>
> makes the witness, on application to the Supreme Court, liable to be committed for contempt as if in breach of an order or judgment of the Supreme Court.

7 (1995), 177 N.R. 81 (S.C.C.).

8 *Ibid.*, headnote, per Iacobucci J.

9 Interestingly, Lamer C.J. provided the following hypothetical in his judgment:

> As an example of a situation where a judicial exemption from compellability would, in my view, be warranted, the following hypothetical case can be considered. Suppose that the members of a trade association in a particular industry met and agreed upon a scheme to fix the prices of the goods they produced, an indictable offence under s. 45(1)(c) of the (Act). Suppose further that the Director of Investigation and Research obtained documents clearly indicating the persons involved and the nature of their involvement - for example, an agreement to fix prices signed by the parties. If the Director commenced an inquiry and obtained subpoenas compelling the

> signatories to testify, it would, in my view, be open to the signatories to apply to the court for an exemption from compulsion to testify. In such a case, where the facts revealed that the Director has already concluded that an offence had been committed and had identified the parties to the offence, the court would be justified in concluding that forcing the suspects to testify would violate their s. 7 rights. In these circumstances, I believe the court should have the discretion to declare the subpoenas to be of no force and effect, thereby excusing the suspects from testifying. *Ibid.* at 215.

10 *Supra*, note 1 at para. 7.

11 The Court acknowledged that, although it would be rare indeed, instances may arise where the evidence sought cannot be shown to have relevance other than to incriminate the witness. The Court conceded that in such instances, it would be difficult to justify compellability. See, *ibid.* at para. 9.

12 *Ibid.*

13 For example, see *ibid.* at para. 10 wherein it states the following:

> We recognize that the purpose of calling a particular witness will not be readily apparent and that such purpose must be inferred in many cases from the overall effect of the evidence proposed to be called. If the overall effect is that it is of slight importance to the proceeding in which it is compelled but of great importance in a subsequent proceeding against the witness in which the witness is incriminated, then an inference may be drawn as to the real purpose of the compelled evidence. If that relationship is reversed then no such inference may be drawn.

14 Section 7 of the Charter states as follows:

> 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.

15 *Supra,* note 1 at para. 43.

16 [1989] 1 S.C.R. 927.

17 Section 8 of the Charter states as follows:

> Everyone has the right to be secure against unreasonable search or seizure.

18 [1984] 2 S.C.R. 145.

19 *Supra*, note 1 at para. 52.

## PUROLATOR DELIVERS SPEEDY DECISION

The case of *Purolator Courier Ltd.* v. *United Parcel Service Canada Ltd.*[1] involves the first significant civil action under the *Competition Act* for misleading advertising which has gone to trial.[2] It was a challenge by Purolator seeking an injunction and damages against UPS in respect of radio and television commercials. The central issue was whether the claim in the advertisement that UPS' rates were "usually up to 40% less than other couriers charge" was false or misleading in a material respect.

The claim was made both under sections 36 and 52 of the Act. There was a claim under section 57 of the Act for bait and switch selling. There was also a tort claim for unlawful interference with economic relations.

### Facts

The evidence was that each of Purolator, Priority Post and Federal Express hold approximately one quarter of the market in Canada for guaranteed overnight deliveries. UPS had about 5% of that market. The Court noted that since the competitors offer essentially the same service, price is a major aspect of competition amongst them. Since the courier market is mature, the only way to gain market share is to capture it away from competitors.

The marketplace is broken down into low frequency users who send fewer than 20 shipments a day and high frequency users who send more than that. Low frequency users tend to pay the published price and have no prearranged contract with the courier company. High frequency users negotiate discounts and have a written contract. Mass advertising,

including the disputed television and radio commercials, is generally designed to reach low frequency users, as high frequency users are contacted directly by the competing suppliers.

**Reference to Competitors**

The advertisement in dispute made no specific reference to Purolator, or to other courier companies. Rather, the comparison was to other courier companies generally. The first legal issue raised was whether to be actionable the advertisements had to specifically refer to the plaintiff. The Court referred to the *Unitel*,[3] *Church & Dwight*[4] and *Maple Leaf Foods*[5] cases, but noted that unlike the *Church & Dwight* case, the tort of injurious falsehood was not being advanced in this case. In addition, the Court cited the English case of *Knupffer* v. *London Express Newspaper Ltd.*,[6] where it was stated that "there are cases in which the language used in a reference to a limited class may be reasonably understood to refer to every member of the class, in which case every member may have a cause of action". The Court concluded that in the present case, where there were three major courier competitors, all three were referred to in the comparison reference. Because Purolator was a member of that small class, the Court found that the advertisement was a comparison to Purolator, even though Purolator was not named. Finally, the Court noted that there is no express requirement under the Act stating that a competitor must be identified in advertising for it to be misleading, or to give the competitor a cause of action.

**Literal Truth**

The next, and central, issue raised was what the claim meant. UPS argued that the claim was true on the basis of the plain and ordinary meaning of the words; that is, UPS' rates for a 10:30 a.m. delivery were, more often than not, less than the rates charged by other courier companies, by as much as 40%. The overall evidence, although it was somewhat confused, showed that in 80% of possible shipments, UPS' rates were lower than Purolator's rates, and that in approximately 16% of the total possible shipments, UPS' rates were at least 30% lower than Purolator's rates. However, because Purolator had various discount services, including in particular FlitePak, the Court concluded that in many situations UPS is cheaper than Purolator and conversely in many situations Purolator is cheaper than UPS.

**General Impressions - Misleadingness**

Having concluded that the advertisement was not *prima facie* false, the Court then turned to determining whether or not the representation was misleading in a material respect, considering the general impression conveyed by the advertisement. The Court indicated the general impression depends on a combination of factors, including "the understanding of those who have listened to the commercial, as presented through survey evidence; the use of the qualifiers, 'usually' and 'up to'; the nature of the consumers; and the nature of the medium".

Purolator commissioned a survey by Peter Atkinson as to the impression created by the advertisement. Mr. Atkinson focused on Purolator customers who shipped overnight deliveries to destinations in Canada. He took a sampling of 100 Purolator customers in Metropolitan Toronto who had used Purolator in recent months. The UPS radio advertisement was played to the Purolator customers

twice over the telephone and they were asked a series of questions.

The survey was challenged by UPS on the basis of the universe from which the samples were taken, the difficulty in projecting those results to the universe of recipients of the advertising, the lack of adequate controls, and the failure to eliminate a variety of biases. A number of the respondents who had the advertisement played to them over the telephone had difficulty hearing the tape. As well, the fact that 29% of the respondents thought the advertisement said that other companies would be cheaper than UPS, when there was nothing in the advertisement to suggest that, indicated to the Court that there might well have been hearing or perceptual distortions affecting the respondents. The Court concluded that this made the entire survey suspect.

Purolator also called Gerald Gorn, a professor of consumer behaviour at the University of British Columbia, to explain the general impression that would be conveyed by the advertisement. He testified that people do not process everything that they see or hear, but select information to form certain impressions. This is particularly so when people are not paying close attention to the specific content, which is often the case when people hear television and radio ads. Consequently, he indicated that consumers were more likely to pay attention to and recall the 40% figure, rather than the qualifier "up to". As well, he indicated that a concrete number such as 40% would suggest to consumers that the comparison has a factual basis, and thereby the credibility of the claim would be increased by use of a particular number. Professor Gorn also testified that use of the word "usually" would convey to the consumer something in the two-thirds or three-quarters range, rather than just in excess of 50%.

The Court, however, was somewhat skeptical with respect to this evidence. Mr. Justice Lederman commented that it was not clear why Professor Gorn would conclude that the audience for the commercial would effectively ignore the "up to" qualifier, but would pay considerable attention to the "usually" qualifier.

## Disclaimers

The Court concluded that the qualifiers "usually" and "up to" are disclaimers found in the advertisement which provide additional limiting information with respect to the main representation. That conclusion was based on the discussion of the Ontario Court of Appeal in the *International Vacations*[7] case, which indicates that a discerning traveler who reviewed the advertisement carefully would understand the disclaimer to be an important part of the advertisement itself, and not treat it as separate from the primary representation. In *National Hockey League* v. *Pepsi-Cola Canada*[8] the Court commented that the disclaimer in the television advertisement was somewhat difficult to read, but was clear on the printed material. The Court in the *NHL* case noted that the prominence given to a disclaimer must, to some extent, depend on the likelihood of a false impression being conveyed to the public if there is no disclaimer. The greater the likelihood, the more prominent must be the disclaimer. Since the likelihood of a false impression being created by the television advertisement in the *NHL* case was minimal, the disclaimer was sufficient.

The Court in the present case noted that at least on the face of the advertisement UPS gave as much prominence to the qualifiers "usually" and "up to",

as to any other part of the message. Nevertheless, the Court noted that a disclaimer does not automatically nullify a misleading impression. The effect of the disclaimer will depend on several factors including the degree to which the representation misleads the public without the disclaimer, the prominence to which it is given in the context of the entire advertisement, the degree of sophistication that the public to whom the advertisement is directed has, and the likelihood that the audience would recognize the disclaimer. It is a question of fact whether in the circumstances a disclaimer is sufficient to ensure that the representation is not otherwise misleading. The Court noted that in the present case the qualifiers explained or restricted the generality of the representation. It was significant that they formed a part of the primary representation, rather than appearing elsewhere in the advertisement in small print.

**Audience and Medium**

The Court examined the question of to whom the advertisement was directed. It noted that the consumers in question are not totally naive, rather they are business people who make decisions every day based on service and price. It noted that the qualifier "up to" is commonly used in advertising parlance, and that common sense would dictate that the "up to" qualifier is of great significance in the context of courier rates.

The Court also noted that if some listeners misinterpret the advertisement it does not mean that the advertisement itself is necessarily misleading. It may turn on the degree of attention paid by the listener, and the environment in which he or she hears the advertisement. The fact, however, that television advertisements tend to be fast paced, that consumers do not pay as much attention to them as they do to print advertisements, and that some people do not listen as keenly as others and perceive the message incorrectly, does not mean that the commercial is misleading.

**Conclusion**

The Court stated that there is nothing wrong with the aggressive promotion of one's own goods or services, so long as there is no untruthful disparagement of a competitor's products. Here the advertisement had the effect of raising awareness in business consumers as to UPS' offering, which might lead them to compare rates. Advertising is unfair when claims are made which lack a reasonable basis, but that was not the case here. The Court noted that by its nature advertising is one sided and usually does not convey a full and balanced analysis. However, there must be a reasonable basis for the representation that is made. So long as that is so, competitors may complain that the advertisement does not depict the whole picture, but they are themselves equipped to tell their side of the story in the marketplace. Courts should be reluctant to intervene in the competitive marketplace unless the advertisements are clearly unfair.

Procedurally, the *Purolator* case is of note because it represents an interesting compromise. Instead of determining at the preliminary stage whether or not the advertising would be enjoined, the Court here proceeded on the basis of an expedited trial. Hearing of the action was completed within a few weeks of the commencement of the proceeding. While that may be a difficult and exhausting undertaking for both counsel and the parties, it is in some respects superior to interlocutory injunction proceedings where the issue is not clear. Interlocutory injunctions

are decided without full knowledge of the facts or the ability to assess witness credibility. Since the interlocutory injunction may, in many cases, have the practical effect of bringing the litigation to a close, it is preferable that if the issue is not clear such a determination be made after trial, even if the trial is undertaken on an expedited basis.

The *Purolator* case is also a useful addition to the substantive jurisprudence in respect of misleading advertising. It provides guidance as to the sort of expert evidence which may, or may not, be persuasive to a court in respect of whether an advertisement is misleading. It adds to the jurisprudence with respect to the literal truth of claims, the use and nature of disclaimers, and with respect to the sophistication of the target audience. Finally, it is a useful reminder that advertising, while it may not be false or clearly misleading, is at the same time not required to tell both sides of a story. It is by definition one person's story. The decision emphasizes that commercial matters are best played out in the marketplace unless the claims are, in the words of Mr. Justice Lederman, "clearly unfair".

J.B.M.

### Notes

1 (3 April 1995), (Ont. Gen. Div.) [unreported].

2 But see the Small Claims decision in *Petley* v. *Van Arnhem Construction Limited* (1982), 67 C.P.R. (2d) 212.

3 *Unitel Communications Inc.* v. *Bell Canada* (15 June 1994), (Ont. Gen. Div.) [unreported].

4 *Church & Dwight Ltd.* v. *Sifto Canada Ltd.* (1994), 20 O.R. (3d) 483 (Gen. Div.).

5 *Maple Leaf Foods Inc.* v. *Robin Hood Multifoods Inc.* (29 September 1994), (Ont. Gen. Div.) [unreported].

6 [1944] A.C. 116 (H.L.).

7 *R.* v. *International Vacations Ltd.* (1980), 124 D.L.R. (3d) 319 (Ont. C.A.).

8 (1992), 92 D.L.R. (4th) 349 (B.C.S.C.); [1995] B.C.J. No. 310 (B.C.C.A.).

## INJUNCTIVE RELIEF UNDER SECTION 36 OF THE *COMPETITION ACT*

### Overview

Since the Supreme Court of Canada upheld the constitutionality of section 36 of the *Competition Act*[1] (the "Act") in *General Motors of Canada* v. *City National Leasing,*[2] courts have struggled to define the scope of relief available under section 36. The recent decision in *947101 Ontario Ltd.* v. *Barrhaven Town Centre Inc. et al.*[3] provides further evidence that this issue remains unsettled. Specifically, it was held in *Barrhaven* that injunctive relief is not available to a party against a breach or prospective breach of the predatory pricing provision, section 50 of the Act, unless that party can also establish that the conduct complained of would give rise to a cause of action in favour of the plaintiff which is *independent* of any rights the plaintiff may have to damages under section 36 of the Act.

Turning to section 36(1), it reads as follows:

> Any person who has suffered loss or damage as a result of
>
> (a) conduct that is contrary to any provision of Part VI, or
>
> (b) the failure of any person to comply with an order of the Tribunal or another court under this Act,
>
> may, in any court of competent jurisdiction, sue for and recover from the person who engaged in the conduct or failed to comply with the order an amount equal to the loss or damage proved to have been suffered by him, together with any additional amount that the court may allow not exceeding the full cost to him of any investigation in connection with the matter and of proceeding under this section.

The plaintiff in *Barrhaven* sought an interlocutory injunction pursuant to, *inter alia*, sections 36 and 50 of the Act. This comment focuses exclusively on this ground for the injunction. Thus, for the purposes of this comment, the issue raised in *Barrhaven* was whether the relief available under section 36 should be restricted to damages or whether it should be broadened to also include injunctive relief.

## The *Barrhaven* Decision

### The Facts

- The plaintiff owns and operates a pharmacy in the Barrhaven Town Centre (the "Shopping Centre") located in Nepean, Ontario.

- The defendants to the action were as follows:

  (1) the owner of the Shopping Centre, Barrhaven Town Centre Inc. (the "Landlord");

  (2) Loblaws Supermarkets Limited ("Loblaws"), a large retail grocery store tenant in the Shopping Centre; and

  (3) Wadland Pharmacy Limited ("Wadland") an Ontario corporation which carries on the business of a pharmacy in numerous Loblaws stores throughout Ontario including the Shopping Centre Loblaws store. Wadland and Loblaws are wholly-owned subsidiaries of Loblaws Companies Inc.

- For all intents and purposes, Wadland operates as a part of the Loblaws retail store. That is, Loblaws built the pharmacy and paid for all associated construction costs; Loblaws is responsible for all operating costs of Wadland including all salaries and benefits; Loblaws receives all revenues from sales by Wadland and records all sales as its own; and, Wadland does not keep separate financial records of its sales or operations.

- Among several other submissions made by the plaintiff was an allegation that the pricing policy of Wadland with respect to dispensing fees contravened the predatory pricing provisions (section 50) of the Act.

- The plaintiff sought an interlocutory injunction restraining Wadland from using any part of the premises at the Shopping Centre for the dispensing of prescription drugs or the operation of a pharmacy.

### The Issue

Can a party obtain an interlocutory injunction under section 36 of the Act against a breach or prospective breach of the Act's predatory pricing provisions?

### The Result

Mr. Justice Spence declined to grant an interlocutory injunction on essentially two intertwined grounds. First, Spence J. held that as section 36 does not provide for *any* relief other than damages, a person seeking an injunction must be able to establish that the conduct complained of would give rise to a cause of action in favour of the plaintiff which is *independent* of any rights that plaintiff may have to damages under section 36.

Second, Mr. Justice Spence interpreted the Act as legislation that implements public policy and that

has its own enforcement infrastructure addressing a range of considerations, such as the definition of markets, which may be difficult to establish satisfactorily in general proceedings between private parties. However, Spence J. did not view this interpretation of the Act as being inconsistent with provisions, such as section 36, which provide for damages where a loss has been suffered as a result of certain prohibited conduct. In what is arguably the most telling passage in the decision, Mr. Justice Spence states as follows:

> ... to construe section 36 as supporting an independent right to injunctive relief would give rise to the prospect of proceedings which might result in the enforcement of the Act by way of injunction in circumstances where those charged with responsibility for the proper administration of the Act would consider that no such proceedings were warranted. The court should be wary of endorsing a statutory interpretation that would have that result.[4]

The plaintiff was also denied an interlocutory injunction with respect to those grounds unrelated to the Act.

## Analysis

The first ground cited by Mr. Justice Spence raises a fundamental question of jurisdiction: can a provincial superior court grant an interlocutory injunction under section 36 of the Act, when section 36 expressly stipulates only a damages remedy? In my view, there is persuasive authority to suggest that a superior court of general jurisdiction retains ancillary power to grant an interlocutory injunction despite it not being explicit in the statute which creates the *lis*. Such authority is reviewed by Finkelstein and Kwinter in what is the most detailed consideration of this issue to date.[5] Specifically, Finkelstein and Kwinter address this issue in regard to the jurisdiction of both a provincial superior court and the Federal Court. With respect to the former, they persuasively argue that *Jabour* v. *Law Society of British Columbia*[6] stands for the proposition that "...a superior court retains jurisdiction to grant an interlocutory injunction if such relief is necessary either to retain the *status quo* or otherwise ensure the effectiveness of its orders."[7] This leads them to conclude that the general rule of exclusivity of remedies[8] does not apply to section 36.[9]

Finkelstein and Kwinter also argue persuasively that even if their initial conclusion is wrong, a request for injunctive relief under section 36 would represent an exception to the general rule of exclusivity of remedies. They cite authority for two such exceptions: the "injunction exception" and the "statute as a whole exception." The former refers to an exception based on the inherent prospective quality of injunctive relief. The latter refers to the consideration of the statute as a whole to determine whether the explicit statutory remedy is exclusive.

Turning to the second ground cited by Mr. Justice Spence, there are a number of points which render it problematic. For example, although the Act is clearly legislation "...which implements public policy...and is the subject of an enforcement infrastructure...,"[10] Parliament deemed it appropriate to also provide a civil right of action to arise from the contravention of certain provisions of the Act. As a result, it is reasonable to assume that Parliament intended to extend the "range of considerations" beyond the Act's so-called enforcement infrastructure. Furthermore, it is unclear why private parties, in ordinary proceedings, would have particular difficulty in satisfactorily addressing relevant considerations such as market definition. One would, after all, expect participants

in a particular market to be in an ideal position to define its breadth from both a product and geographic perspective.

A further problem in the gounds given by Justice Spence is his notion that to construe section 36 as supporting an independent right to injunctive relief, would be tantamount to the enforcement of the Act in a manner that was not intended by Parliament. There are three related points to make in this regard, each of which accord with the "statute as a whole exception" referred to above. First, once a matter pursuant to the Act has come before a court, *any* decision made by the court will have implications for the ultimate enforcement of the Act. Put another way, once engaged, a court cannot defer the enforcement of the Act to "...those charged with responsibility for its proper administration...". That is, even doing apparently nothing is doing something.

Second, the denial of an interlocutory injunction under section 36 forces the party to do indirectly what it should be able to do directly. As astutely noted by Musgrove, the issue can be circumvented relatively easily:

> One way to avoid the difficulty presented by the uncertainty surrounding the right to injunctive relief is to sue under the Act, and also allege other or related causes of action. The nature of such causes of action will depend upon the facts, but civil conspiracy or interference with economic interest may be appropriate claims in a number of cases.[11]

While this is sound practical advice, it will only perpetuate the uncertainty surrounding the right to injunctive relief. Consider the following example. In the recent decision of *Church & Dwight Ltd.* v. *Sifto Canada Inc.*,[12] the plaintiff sought an interlocutory injunction to prevent the defendant from launching an allegedly misleading advertising campaign. Again, the issue arose as to whether the court had jurisdiction to grant this injunction under the Act. However, following a consideration of two admittedly inconsistent decisions,[13] Mr. Justice Jarvis concluded that it was not necessary to address this issue since false advertising is also actionable as the tort of injurious falsehood, which presumably had also been plead. By contrast, the Court in *Unitel Communications Inc.* v. *Bell Canada*[14] considered the granting of an injunction pursuant to, *inter alia*, section 36 without any reference to the jurisdictional question.

In order for a plaintiff to establish an independent cause of action, it will often be the case that the court will ultimately return to a consideration of the Act. For example, in *Barrhaven* it was also argued that the pricing policy of Wadland constituted intentional interference with the economic relations of the plaintiff. However, to prove this point, the plaintiff was required to show that Loblaws "without just cause or excuse, deliberately interfered with the trade or business" of the plaintiff and did so by "unlawful means". Ironically, in this case, the unlawfulness stemmed from the alleged predatory pricing under the Act, and the Court was forced to address the substantive elements of section 50.

Third, rather than inhibit or interfere with the enforcement of the Act, it is more likely the case that the granting of injunctive relief under section 36 will *enhance* the proper enforcement of the Act. One can easily posit a number of scenarios where this would be plausible. The most obvious situation is one where the repercussions of a continuing offence would render a subsequent remedy of damages insufficient as a result of the injury to, or actual elimination of a competitor, from the market. In

the absence of injunctive relief, it is conceivable that a plaintiff could be forced to undertake multiple actions to constrain a single course of conduct. The granting of an interlocutory injunction in such cases would at least preserve the *status quo* until the substantive issues are finally resolved. Moreover, the rigorous common law test for obtaining an interlocutory injunction should ensure that its granting in a particular case will be consistent with the proper enforcement of the Act.[15]

## Conclusion

At the end of the day, it is unlikely that a result arising from a request for injunctive relief under section 36 will turn on the position of the court regarding this issue. Practically speaking, it is more likely that where the facts merit, an applicant or plaintiff will obtain its injunction on tort grounds. Nevertheless, the issue of injunctive relief under section 36 remains an important legal question as it ultimately goes to the issue of the enforcement of the Act. In addition, the discrepancies between the factors required to establish a particular tort and those related to an alleged contravention of the Act may, in fact, alter the result in a particular matter.

P.C.

### Notes

1 R.S.C. 1985, c. C-34.

2 [1989] 1 S.C.R. 641, (1989), 58 D.L.R. (4th) 255.

3 (9 January 1995), 86135/94 (Ont. Gen. Div.).

4 *Ibid.* at 18.

5 See Neil Finkelstein and Robert Kwinter, "Section 36 and Claims to Injunctive Relief" (1990) 69 Can. Bar Rev. 298.

6 (1978), 40 C.P.R. (2d) 286 (B.C.S.C.), aff'd (1978), 44 C.P.R. (2d) 68 (B.C.C.A.).

7 Finkelstein and Kwinter, *supra*, note 5 at 304.

8 *Ibid.* at 300. The rule of exclusivity of remedies refers to the concept that where a statute provides a remedy, there exists a rebuttable presumption that the remedy is intended to be the only one.

9 *Ibid.*

10 *Supra*, note 3 at 18.

11 James B. Musgrove, "Civil Actions and the Competition Act" (1994) The Advocates' Quarterly, Vol. 16, 94 at 112.

12 (1994), 20 O.R. (3d) 483 (Gen. Div.).

13 *Ibid.* Specifically, Jarvis J. compared the decisions in *Aca Joe International* v. *147255 Canada Inc.* (1986), 10 C.P.R. (3d) 301 and *Purolator Courier Ltd.* v. *Mayne Nickless Transport Inc.* (1990), 33 C.P.R. (3d) 391.

14 (1994), 56 C.P.R. (3d) 232 (Ont. Gen. Div.).

15 Leading decisions setting out the test for the granting of injunctive relief include the following: *American Cyanamid Co.* v. *Ethicon Ltd.*, [1975] 1 All E.R. 504 at 510-11, [1975] A.C. 396 (H.L.); *Metropolitan Stores (MTS) Ltd.* v. *Manitoba (Attorney General)*, [1987] 1 S.C.R. 110, 38 D.L.R. (4th) 321; *RJR-MacDonald Inc.* v. *Canada (Attorney General)*, [1994] 1 S.C.R. 311 at 334, 111 D.L.R. (4th) 385.

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## TENNANT WIRE LIMITED FINED $100,000 FOR CONSPIRACY OFFENCE UNDER THE *COMPETITION ACT*

*The following is a News Release issued by the Bureau of Competition Policy on February 20, 1995, and is reproduced with permission.*

OTTAWA, February 20, 1995 — George N. Addy, Director of Investigation and Research for the Bureau of Competition Policy, announced today that Vancouver-based Tennant Wire Limited pleaded guilty to one charge of conspiracy under section 45(1)(c) of the *Competition Act* related to the sale and distribution of pulp baling wire and was fined $100,000 in the Supreme Court of British Columbia in Vancouver, B.C.

The Court also issued a Prohibition Order against Tennant under section 34(1) of the Act that forbids the company from engaging in criminal activities of this nature in the future. James Walker, a U.S. resident who was in a position to influence the conduct of Tennant in the market, was also made subject to a Prohibition Order under section 34(2) of the Act.

"This decision concludes a long standing case in a key sector of the B.C. economy," Addy stated. "Anti-competitive agreements of this type will be pursued by the Bureau against all participants regardless of size."

This prosecution concludes the Bureau's inquiry into anti-competitive agreements during the 1980s among suppliers and manufacturers of pulp baling wire to the British Columbia and Alberta pulp mills. On November 5, 1992, Tree Island Industries Ltd., Titan Steel & Wire Co. Ltd., Davis Wire Industries Ltd. and Gerrard Oval Strapping (Ell Limited) pleaded guilty to one charge each of conspiracy under section 45(1)(c) of the Act, and were fined a total of $1.6 million. These companies were ordered subject to Prohibition Orders under section 34(1) of the Act. In addition, a number of corporate officials undertook to the court to be bound by the prohibition order entered into by the corporate accused.

Pulp baling wire is used by the pulp and paper industry to bale bundles of wood pulp as it is produced and to group the bales into larger bundles suitable for transportation.

## DIRECTOR OF INVESTIGATION AND RESEARCH WILL NOT CHALLENGE TELUS CORPORATION'S ACQUISITON OF EDMONTON TELEPHONE CORPORATION

*The following is a News Release issued by the Bureau of Competition Policy on February 28, 1995, and is reproduced with permission.*

OTTAWA, February 28, 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 Telus Corporation ("Telus") of Edmonton Telephone Corporation ("ED TEL"). Telus through its wholly owned subsidiary, AGT, provides telecommunications services throughout Alberta, except for local telephone service in the City of Edmonton provided by ED TEL.

The Director's decision follows an extensive examination of the likely competitive consequences of the acquisition. This transaction is occurring in an environment of rapid technological and regulatory change.

"In rapidly changing industries such as telecommunications, it is important to look forward, and consider if a transaction would likely 'prevent' future competition that might otherwise come about as the result of technological change and innovation," Mr. Addy stated. "The impact of the merger on a potential prevention of competition was a significant factor in my examination of this matter."

The Director noted that the potential emergence of competitive alternatives, both from cable companies and from wireless technologies, such as cellular,

Personal Communication Systems (PCS) and other developing technologies, 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, a process in which the Director is participating.

Given the impact of the emergence of competitive alternatives, Mr. Addy also considered the issue of access to communications space on hydro and telephone support structures. Open access and non-restrictive use of those support structures are important because they allow competing technologies, such as cable, to use the facilities they need to build a system capable of competing with the telephone companies. Telus has indicated to the Director that, between the closing of the transaction and the release of the CRTC's decision on access to support structures, it will permit coaxial and/or fibre optic networks owned by any other party to be placed in or on available space within support structures located anywhere in Alberta.

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. Given the rapidly changing regulatory and technological environment, the Director intends to closely monitor the effects of this transaction including access to support structures 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, the Director would take appropriate action at that time.

## DIRECTOR OF INVESTIGATION AND RESEARCH WILL NOT CHALLENGE SMITHBOOKS' ACQUISITION OF COLES BOOK STORES LIMITED

*The following is a News Release issued by the Bureau of Competition Policy on March 21, 1995, and is reproduced with permission.*

OTTAWA, March 21, 1995 — Following an extensive examination of the proposed merger of SmithBooks, operated by FICG Inc., and Coles Book Stores Limited ("Coles"), a subsidiary of Southam Inc., George N. Addy, Director of Investigation and Research under the *Competition Act*, announced today that he will not challenge the proposed transaction before the Competition Tribunal.

"Based on the information currently available to me, I have determined that there are not sufficient grounds, at this time, to warrant an application to the Competition Tribunal in respect of this proposed merger," Mr. Addy stated. "However, given the fact that SmithBooks and Coles are the two largest retail book chains in Canada and given the concerns expressed in the industry, I will closely monitor the effects of this merger for the three year period provided for in the Act."

During the course of the Director's examination, information was obtained from the parties to the transaction, and from numerous industry participants, including publishers and retailers. The examination focused particularly on the impact of the transaction on Canadian publishers and exclusive agents and the potential impact on book prices and selection.

The Director concluded that the relevant market comprises the English language trade book retailing services provided by book stores in Canada. The available evidence indicated that the merged entity would account for approximately half of the sales of Canadian publishers and exclusive agents in this market. Even if one were to accept the argument that the relevant market should be expanded beyond book stores to encompass all stores which sell books, the market share would still exceed the 35% threshold set out in the Merger Enforcement Guidelines as requiring a more detailed analysis.

The information currently available to the Director regarding barriers to entry does not, at this time, warrant a conclusion that the merged entity would likely be able to exercise market power for any length of time without attracting competitive entry. A significant entry barrier identified in the examination was the existence of restrictive covenants in many of the leases of Coles and SmithBooks which precluded other book retailers from obtaining access to prime retail locations. However, the parties to the merger have advised the Director that the existing restrictive covenants will be waived prior to closing the transaction and that any future leases will not contain provisions which would preclude access to retail locations. The Director is of the view that this will improve access to prime retail locations. The evidence regarding the remaining conditions for entry does not, at this time, justify a determination that the merger is likely to prevent or lessen competition substantially.

The situation will be closely monitored for the three year period in order to assess the competitive impact of the merger, particularly with respect to the buying power of the merged entity relative to publishers. As part of this monitoring program, the Director is requiring the parties to provide, on a quarterly basis, detailed information about their trade terms with publishers. If within the three years evidence emerges to indicate that the acquisition causes, or is likely to cause, a substantial lessening or prevention of competition, the Director will not hesitate to take appropriate enforcement action at that time.[1]

### Notes

[1] See "Proposed Merger of SmithBooks and Coles Book Stores Limited", *infra*, for background information.

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## PROPOSED MERGER OF SMITHBOOKS AND COLES BOOK STORES LIMITED

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

This backgrounder provides detailed information on the decision of the Director of Investigation and Research (the "Director") under the *Competition Act* (the "Act") not to challenge the proposed merger of SmithBooks and Coles Book Stores Limited before the Competition Tribunal at this time.

### Proposed Transaction

The proposed transaction is the merger of SmithBooks, operated by FICG Inc., and Coles Book Stores Limited, a subsidiary of Southam Inc. The transaction will be implemented by the subscription for shares of Coles Book Stores Limited by the controlling shareholder of FICG Inc., Canadian General Capital, the exchange of shares of FICG Inc. for shares of Coles by the present shareholders of FICG Inc.,

and the amalgamation of Coles and FICG Inc. at closing. Southam Inc. will retain a 12.5% interest in the continuing entity.

## Examination by the Director

This matter has been the subject of an extensive examination by the Bureau of Competition Policy. Substantial documentary evidence and submissions were obtained from the parties. In addition extensive industry contacts were made, including a significant number of interviews with publishers, independent book store operators and other industry participants.

## Merger Provisions of the *Competition Act*

Mergers are examined under the Act with a view to determining whether or not there are grounds for the Director to apply to the Competition Tribunal for a remedial order pursuant to section 92 of the Act. That section empowers the Tribunal, on application by the Director, to make a remedial order when it finds that a proposed or completed merger will, or is likely to, prevent or lessen competition substantially in any relevant market. The Act provides that a finding of a substantial lessening or prevention of competition by the Tribunal cannot be made solely on the basis of evidence of market share. Section 93 of the Act lists a number of factors that the Tribunal may consider in arriving at its conclusions with respect to any particular merger transaction. These factors include, among others, entry barriers to a market, removal of a vigorous and effective competitor, effective remaining competition and the extent of change and innovation in the relevant market.

## Merger Enforcement Guidelines

The Merger Enforcement Guidelines (the "Enforcement Guidelines") issued in 1991, set out the policy and general enforcement approach with respect to merger review by the Bureau of Competition Policy. Under the Enforcement Guidelines, a merger will be found to be likely to prevent or lessen competition substantially when the parties to the merger would likely be in a position to exercise a materially greater degree of market power in a substantial part of the market for two years or more, then if the merger did not proceed in whole or in part. In general, a prevention or lessening of competition will be considered to be substantial where the price of the relevant product is likely to be materally greater in a substantial part of the relevant market, than it would be in the absence of the merger and where this price differential would not likely be eliminated within two years by new or increased competition from foreign or domestic sources. In respect of mergers affecting the supply side of a market, the test is whether the merged entity would likely be able to depress the price it pays for a product below that which would likely prevail in the absence of the merger.

Under the Enforcement Guidelines, a relevant market is generally defined as the smallest group of products and the smallest geographic area in relation to which sellers, acting as a hypothetical monopolist, could impose and maintain a significant and non-transitory price increase above levels that would likely exist in the absence of the merger. In most contexts, the Bureau considers 5% to be significant and a one year period to be non-transitory.

In dealing with the issue of entry, the Enforcement Guidelines indicate that where future entry or expansion by firms within the market would likely occur on a sufficient scale within two years to ensure that a material price increase (or decrease with respect to the supply side) could not be sustained beyond this period in a substantial part of the relevant market, the Bureau would likely conclude that the merger does not require enforcement action.

**Market Definition**

The issue of market definition in this matter is complex. In the first instance, the examination entailed an assessment of both the supply side (publishers' sales to book retailers) and demand side (book retailing services to consumers) of the market. For the supply side, the issue under examination was the likely effect of the merger on trading terms (e.g. discounts, rebates, advertising support, etc.) available to book retailers. For the demand side, the issue is the likely effect of the merger on prices and selection of books.

In the Director's view, the relevant geographic market for the supply side of the market is national. For the retail side of the market, the relevant market for competition law purposes is likely local in nature. However, the market power issues raised by the merger stem from the national market presence of the parties, rather than their position in any particular local market.

The Director concluded that the relevant product market comprises the English language trade book[1] retailing services provided by book stores,[2] including both chains and independents.[3] In the Director's view, these outlets represent a combination of services to both publishers and consumers which is not adequately duplicated by other retailers that sell books. In particular, these outlets carry a far greater range of titles than do other retail outlets, which tend to carry only a limited range of best selling titles. These outlets also offer customer services, such as special orders, which are not available in non-bookstore outlets. For publishers, they represent the only reasonable outlet for a large percentage of titles in trade books. On the basis of this market definition, the combined market share of the parties is approximately half of the market on the supply side. The market share on the demand side may be, at most, a few percentage points lower due to imports.

As part of the examination of the proposed merger, the Director considered whether the product market definition should be widened to encompass all retail outlets that sell books. In the Director's view, the available information concerning the participation of other outlets selling books does not support their inclusion in the market definition for competition law purposes. The Director's examination included analysis of the book selling activities of non-traditional book retailers, especially mass merchandisers, such as Price Club/Costco, Zellers and Wal-Mart, which include books as a product offering in their stores. These outlets have attained a considerable volume of sales in a relatively short period of time, frequently by discounting their books. While it is anticipated that they will open new outlets, there is little indication, at this time, that they will expand their book retail operations beyond carrying best selling titles. In addition, these outlets do not offer the same overall package of services offered to consumers and publishers by traditional book stores. Available information indicates that the sales of SmithBooks and Coles have continued to increase, despite the addition of book sales to the product mix of mass merchandisers. This would

suggest that sales through these types of outlets represent, at least in part, sales which expand the overall market, as opposed to sales being taken directly away from book stores.

Other channels through which publishers dispose of their product, such as institutional sales, sales to book clubs, and direct sales to public are not considered acceptable substitutes for either publishers or consumers. The ability to expand sales through these outlets in response to demands for improved terms from the merged entity is limited by the nature of the business of these outlets. The Director also concluded that imports are not part of the relevant market for the supply side, where the issue is the availability of outlets through which Canadian publishers and exclusive agents are able to dispose of their product.

It should be noted that, even if the market definition were widened to include all retail stores that sell books, available information indicated that the market share would exceed 40%. The market share of the parties, which exceeds the 35% threshold set out in the Enforcement Guidelines, combined with other issues raised by this transaction, called for a more detailed analysis of the factors set out in Section 93 of the Act.

## Section 93 Factors

In this matter, the factors which were most relevant in the analysis were the removal of a vigorous and effective competitor, the remaining effective competition, and barriers to entry.

### Removal of an Effective and Vigorous Competitor

On the basis of the available evidence, the Director concluded that the merger will eliminate a vigorous and effective competitor from the market. Coles and SmithBooks are the only two national chains of book stores operating in Canada.

### Remaining Effective Competition

The remaining competition within the relevant market comes principally from a very large number of independent traditional book stores, which are very small in comparison to the merging parties. Most of these are one store operations, with only a few "mini-chains". Collectively, the independent book stores account for approximately one-half of the sales of books by Canadian publishers to book stores in Canada and have a significant presence in some local retail markets. However, the market share of these competitors, in respect of offering an effective outlet for publishers, is fragmented. The largest of these independents has only 8 stores in comparison to the approximately 420 stores of SmithBooks and Coles combined.

The other remaining competition comes from non-bookstore retail outlets, such as department stores and mass merchandisers. While not including them within the market, the Director does recognize that they provide some competitive discipline with respect to the range of titles they carry.

### Entry Barriers

An examination of entry barriers is central to assessing the competitive impact of a merger. It is the means by which the Director can assess whether

entry is likely to occur to discipline attempts by the merged entity to exercise market power. In the course of analyzing the present merger, several entry issues have been carefully considered.

Access to attractive retail locations is considered to be a significant barrier to expansion by independent book stores. The restrictive covenants in leases between the parties and landlords for many prime retail locations are seen as a particularly aggravating factor in this issue. The parties have advised the Director that all of these covenants will be waived prior to closing the transaction and that landlords will be informed by the parties that they will not take action to block access to retail sites by competing book stores. SmithBooks has also submitted that it will not seek restrictive covenants in any new leases it may enter. The proposed restructuring of the leases reduces the Director's concern in this area.

Some industry participants also consider that the more beneficial level of trading terms, particularly volume discounts, available to the chains constitutes an impediment to entry or expansion of other book retailers insofar as they cannot obtain books on commercially comparable terms. However, the available information concerning the volume discounts received by the largest independents and certain mass merchandisers from a number of the larger publishers does not appear to indicate that the scale required to obtain books on terms comparable to those received by the chains is such as to pose a significant barrier to entry or expansion. Nonetheless, the Director recognizes the importance of this issue and will closely monitor various trade terms between the merged entity and publishers for a period of three years.

The policy of the Canadian Government concerning the application of the *Investment Canada Act* to the book industry affects foreign entry in that current policy requires that book retailers in Canada be controlled, both legally and in fact, by Canadians. An exception arises if a book retailer is in financial distress and has no willing Canadian-controlled buyer. It would be premature to speculate that effective competition will emerge in the form of foreign book stores operating in Canada. This situation will be closely monitored.

## Conclusion

On the basis of the information available, the Director has determined that there are not, at this time, sufficient grounds to warrant an application to the Competition Tribunal for a remedial order in respect of the proposed merger. The available evidence does not allow the Director to conclude at this time that the merged entity would be able to exercise increased market power for a sustained period of time without attracting competitive entry. The removal of restrictive covenants on retail space reduces entry barriers for traditional book stores. Nonetheless, due to the fact that the two largest retail bookstore chains are merging and given the competition concerns raised in the course of his examination, the Director will closely monitor the competitive impact of the transaction for the three year period allowed by section 97 of the Act.

As part of the monitoring program for this matter, the parties are required to provide to the Director a complete summary of their current trading terms, including information on discounts, rebates, advertising support, return privileges, freight allowances, etc. In addition, they will provide the Director with a supplementary report every three

months, setting out any changes in these terms. This information which will be supplied under oath, will be examined, along with any information, received from the market place for any indication of the exercise of market power. If, during the three year period under section 97 of the Act, circumstances should lead to a conclusion that the merger will, or is likely to, result in a substantial lessening or prevention of competition, the Director will not hesitate to take appropriate enforcement action.

### Notes

[1] The chains' presence and market share in the French segment is significantly smaller. From an antitrust perspective, the English segment constitutes a distinct market since the presence of French books does not discipline a potential exercise of market power with respect to English books. The expression "trade book" is used here to encompass mass market paperbacks, trade paperbacks and trade hard cover books. The inclusion of "reference" and "professional and technical" books would not materially alter the chains' share of the book store market.

[2] "Bookstore" includes the trade sections of campus bookstores. A small number of non-traditional bookstore outlets, such as the book departments of a few specific department store outlets, offer title selection and service comparable to traditional bookstores. Inclusion of these outlets in the relevant market would not significantly alter market shares.

[3] This market definition may also be expressed more simply in terms of "English language trade book stores", without a significant variation of relevant market shares.

## DALFEN'S LIMITED FINED $100,000 FOR ONE COUNT OF MISLEADING ADVERTISING UNDER THE *COMPETITION ACT*

*The following is a News Release issued by the Bureau of Competition Policy on April 10, 1995, and is reproduced with permission.*

OTTAWA, April 10, 1995 — George N. Addy, Director of Investigation and Research under the *Competition Act*, announced today that Dalfen's Limited pleaded guilty to one charge under paragraph 52(1)(d) of the Act and was fined $100,000 in the Provincial Court of Newfoundland in St. John's. The court also issued an Order against the company and its officers and directors, prohibiting them from repeating misleading promotional practices.

The province-wide charge related to advertisements broadcast over radio and television stations throughout Newfoundland between August and December, 1990, regarding a "closing out sale" of the inventory of all Dalfen's Limited retail stores in Newfoundland and offered savings ranging from "15% to 90%" off wearing apparel. It was determined that these savings claims were untrue.

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

Paragraph 52(1)(d) of the Act prohibits misrepresentations of the prices at which products are ordinarily sold.

# CANADIAN COMPETITION RECORD

## K MART CANADA LIMITED FINED $200,000 FOR ONE COUNT OF MISLEADING ADVERTISING UNDER THE *COMPETITION ACT*

*The following is a News Release issued by the Bureau of Competition Policy on April 13, 1995, and is reproduced with permission.*

OTTAWA, April 13, 1995 — George N. Addy, Director of Investigation and Research under the *Competition Act*, announced today that K MART Canada Limited/Limitée pleaded guilty to one charge under paragraph 52(1)(a) of the *Competition Act* and was fined $200,000 in the Provincial Court (Criminal Division) in Brampton, Ontario. The court also issued an Order against the company and its officers and directors prohibiting them from repeating the offence.

The charge related to a series of advertisements published by K MART during 1991 in daily newspapers in Ontario, Quebec, New Brunswick and Nova Scotia, promoting a mattress sale which offered savings of "50% off" the after sale price. It was determined that the savings claims were untrue and that K MART sold most mattresses during the advertised "sales". In fact, mattresses were not items kept in stock after the sale had ended.

"This case is the latest example of a successful prosecution against a retailer involving misleading regular price claims," Mr. Addy said. "The enforcement action taken in this case is in line with the Bureau of Competition Policy's commitment to promote accuracy in advertising."

Paragraph 52(1)(a) prohibits materially misleading representations to the public in the promotion of a product.

## NATIONAL COMPETITION LAW SECTION 1995 CLE CONFERENCE NOTICE

**September 28 - 29, 1995**

This year's CLE Conference of the CBA National Competition Law Section will be held September 28-29, 1995 in Aylmer, Quebec (just across the river from Ottawa, Ontario). It builds on the success of the last two years and will be better than ever, with a number of "first time ever" events, including the first joint sessions with the Antitrust Section of the American Bar Association and an unprecedented level of participation by the Bureau of Competition Policy.

The conference comprises 1 1/2 days. The first half day (a Thursday afternoon) is devoted to competition law fundamentals. The program, which will include speeches and panel participation by members of the Bureau of Competition Policy, will be a great refresher for lawyers with background in competition law or as an introduction for lawyers new to the area.

Friday (September 29th) will be devoted to an in-depth discussion of the most topical issues in competition law. In selecting this year's topics, the Executive of the Section considered the requests made by persons attending prior conferences, as well as recent developments in this area. The result is a collection of topics that includes information sharing between governments, cross-border enforcement, the increasing role of intellectual

property in competition law and its interface with the information highway, the treatment of price maintenance and other vertical conduct, how to implement a competition compliance program, the regulated conduct defence and proposed amendments to the *Competition Act*.

In summary, this year's CLE Program promises to be the most interesting and informative program yet. Further details will be mailed to members of the National Competition Section and other selected sections of the Canadian Bar Association in June.

J.T.K.