CANADIAN COMPETITION LAW AND POLICY DEVELOPMENTS

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TRIBUNAL APPROVES INTERAC CONSENT ORDER: SUMMARY OF COMPETITION TRIBUNAL DECISION

Background

The Application and proposed Draft Consent Order (the "DCO") in the case of *Director of Investigation and Research* v. *Bank of Montreal et al.* - CT-95/2 (the "*Interac* case") were filed with the Competition Tribunal on December 14, 1995. The Respondents, being the charter members of Interac as well as Interac Inc., were alleged by the Director to have abused their dominant market position in the market for shared electronic network services necessary to supply consumers with shared electronic financial services.

The case was brought on consent. Interested parties, including the Retail Counsel of Canada, the Canadian Life and Health Insurance Association, four independent investment companies, and Telpay, a telephone bill payment service, intervened opposing the granting of the Order. Most of the Intervenors called evidence during the hearing of the matter in March and April, 1996. The Tribunal released its decision and reasons on June 25, 1996. It approved the Order as sought by the Parties.

The nine charter members of Interac are the only participants in Interac able to directly connect to the inter-member network. Additional members, called sponsored members, of which there were approximately 18 at the time of the Application, must connect through charter members. The Interac network offered two services at the time of the application, shared cash dispensing through ABM machines, and point of purchase transactions. At the time of the Application members could acquire transactions and issue cards, or issue cards only. They were not permitted simply to acquire transactions without also acting as card issuers. Fees to join Interac were high - at least for some sorts of potential members.

A peculiar aspect of the market definition in the case was that the shared electronic financial services market was defined as services which allow a consumer using a card issued by a Financial Institution (defined, essentially, as a Canadian Payments Association (the "CPA") member - which includes banks, trust companies and other deposit-taking institutions, but does not include insurance companies or investment companies) to access accounts held by the Financial Institution. Thus the definition, in some sense, is circular insofar as the Intervenors argued that the Order failed to eliminate the substantial lessening of competition

because only Financial Institutions as defined could issue cards to access accounts. The Intervenors argued that without permitting insurance companies, for instance, to issue cards which would access funds held by the insurance company, the DCO would not eliminate the substantial lessening of competition. In a technical sense, the accounts of these other institutions were outside the market as defined because they were not held by Financial Institutions, so defined. The Tribunal noted this in its reasons, although neither the Director nor the Respondents emphasized that aspect of the market definition as part of their argument. The decision did not turn on this distinction.

What the Parties did emphasize in argument, however, was that the market with respect to which the Intervenors were concerned was not the market for shared electronic financial services, even if that included access to accounts held by, for instance, insurance companies. Rather, the market which most concerned the Intervenors was the market for retail financial services generally, including the provision of accounts. That more general issue was not expressly addressed by the Tribunal.

The Application alleged that Interac members had engaged in anti-competitive acts by enacting by-laws with an exclusionary purpose and effect, and precluding competition in the market for the supply of network services to other potential participants in the network, including establishing rules as to eligibility for membership; setting high fees; excluding service suppliers other than financial institutions from providing network services; requiring those acquiring transactions to also be card issuers; and establishing rules which limited innovation and introduction of new services.

Test for Approval

The Tribunal noted that the test for approving the Draft Consent Order in a merger case was established in the *Air Canada* case. There the Tribunal held that the Tribunal's role is not to ask whether the Consent Order is the optimum solution, but rather whether it meets a minimum test. That is whether the merger, as conditioned by the Consent Order, results in a situation where the substantial lessening of competition which will presumably arise from the merger has in all likelihood been eliminated. In the present case, the Tribunal held that in an abuse of dominance case the test is whether the Consent Order would in all likelihood eliminate the substantial lessening of competition which is presumed to result from the practice of anti-competitive acts identified in the Application. The Tribunal stated that the Parties, and in particular the Director, bear the ultimate burden of proving that the DCO meets the minimum test, but as a practical matter the Tribunal regards the Director's proposal with deference initially and assumes that the Order will meet its stated objectives. Consequently, evidence that the DCO is not adequate will come one way or another from the Intervenors. That is, once the Director makes out a *prima facie* case, which is easy for him or her to do, the Intervenors must point out the flaws in the proposal. Therefore, the burden of proving the case, while remaining in law on the Parties, as a practical matter falls on the Intervenors. That analysis indicates the importance of Intervenors being able to adduce evidence, because failing their ability to do so it will be very difficult for them to demonstrate that the DCO is not adequate.

The Director argued that in an abuse of dominance case the test for the approval of a Draft Consent Order should be somewhat different than in a merger

case, because in an abuse case the Order itself does not sanction any conduct which has an anti-competitive effect. The Tribunal disagreed, in that the DCO need not, and in the *Interac* case did not, address all of the anti-competitive acts identified. So long as the DCO eliminates the substantial lessening of competition as a whole, that is sufficient. In that sense then, the DCO could be argued to sanction the remaining anti-competitive acts. Although the Tribunal was not able to understand what consequence, if any, would flow from the difference between a merger case and an abuse of dominance case in this regard, it indicated in both cases that the Tribunal's inquiry would generally focus on the substantial lessening of competition, and whether it has been cured.

In addition, with regard to the distinction between a merger and an abuse of dominance case, both the Director and the Respondents argued that aspects of the remedy proposed in the *Interac* case involved not only prohibitions but mandated action to overcome some aspect of the abuse. Pursuant to section 79(3) of the *Competition Act* any mandatory Order is to be made in such terms as will, in the Tribunal's opinion, interfere with the rights of any person to whom the Order is directed, or any other person affected by the Order, only to the extent necessary to achieve the purpose of the Order. The Tribunal acknowledged that if there are alternatives available to it in achieving the goal of eliminating the substantial lessening of competition the Tribunal is required to adopt the least intrusive course of action. The Respondents argued that therefore the Intervenors challenging the DCO must show that the changes they seek are both necessary and reasonable before the Tribunal can refuse to sign the DCO as it is proposed. The Tribunal, however, indicated that if it is of the view that the DCO does not meet the required test of curing the substantial lessening of competition then the Order should not be issued. There is no additional burden on the Intervenors. In any case, section 79(3) only arises when the Tribunal is fashioning a remedy, which it does not have the power to do in a Consent Application.

Scope of Attack Available to the Intervenors

The Parties argued that it was not open to the Intervenors to argue that the case brought by the Director was too narrow. They cited the case of *United States* v. *Microsoft* (the "*Microsoft* case") for this proposition. The Tribunal expressly referred to the *Microsoft* case and found that:

> To the extent that *Microsoft* held that the government's formulation of the issues to be addressed in a consent proceeding is completely immune from any judicial review and that the rule of the court in reviewing a consent decree is narrowly circumscribed, based in part on issues arising from the division of powers, we do not adopt the decision. There are significant differences, constitutional and statutory, in our respect systems.

The Tribunal found that:

> [I]t is open to third parties participating in consent proceeding to challenge the Director's formulation of an abuse of dominance case brought on consent on the grounds that, for example, the Director has artificially or simply mistakenly drawn the boundaries of the relevant markets, has wrongly omitted some practice from the list of anti-competitive acts and, thus, has neglected to describe fully the effective substantial lessening of competition.

It noted, however, that since the Tribunal begins with a presumption that the Director is acting in the public interest, compelling evidence will be required to overturn his or her judgment on this basis.

That is an interesting proposition, which suggests that Intervenors in a Consent Application may, in an appropriate case, successfully challenge the basis of the Director's case once it is launched, and effectively expand the case. In the *Southam* case, a journalist sought to intervene on the basis that the merger would result in a substantial lessening of competition in the market for journalism services. This intervention was rejected on the grounds that the Intervenor was addressing a market not addressed in the Director's application. This aspect of the *Interac* decision offers greater scope for Intervenors to challenge the basis of the Director's approach.

The Proposed Effect of the Draft Consent Order

The DCO requires changes to the Interac Memorandum of Association, By-Laws and Shareholders' Agreement, to achieve four broad goals. The first is increased access to the Interac network. This would be achieved by permitting direct connection by non-charter members; by permitting any Financial Institution to apply to be a direct connected card issuing member; by permitting any commercial entity to be a direct connected provider of communications and related services; and permitting any commercial entity to be a direct connected acquirer of transactions. As well, the DCO eliminated the requirement for acquirers to also be issuers of cards. The DCO, however, permits Interac to continue to require that issuers of cards be deposit-taking Financial Institutions (i.e., CPA members). However, the DCO would eliminate Interac's prohibition on sweep, zero balance and pass-through accounts found in the previous By-Laws. Such accounts might be used to permit non-Financial Institutions to have indirect access to the Interac network. Those accounts were not defined in the DCO or materials with any precision, and in fact there was confusion in the evidence as to just what they are. However, the Tribunal noted that by simply prohibiting the restriction on any such arrangements the way is left clear for Financial Institutions and non-financial institutions to negotiate a variety of commercial arrangements to provide access to Interac for non-financial institutions, so long as the arrangements comply with the rules of the CPA.

The second aspect of change proposed in the DCO was to the governance structure of Interac. Decisions involving enhancement of shared services, new shared services, and interchange fees, are, pursuant to the DCO, to be made by simple majority vote. The Board is to determine the vote required, up to two-thirds majority, for other matters except those involving fundamental change. Fundamental change will require a two-thirds majority. The Board will be composed of fourteen members, nine of which are to be appointed by direct connected Financial Institutions; two by direct connected non-Financial Institutions; and three appointed by indirectly connected participants in shared services. The election of directors from amongst the various classes will be based on the annual message volume of each member of those classes.

The third type of change mandated by the DCO was designed to make it easier to introduce new services, both shared and bilateral/multilateral. Proponents of a new service must demonstrate to the management of Interac that the new service requires on-line access to Financial Institution accounts via Interac; that it is not already a service offered by Interac; and that it will not have a negative technical impact on the inter-member network. The Board cannot overturn the decisions of management unless it is of the view that management did not investigate the proposal adequately.

Finally, the DCO significantly changes the Interac fee structure. Member fees will not be shared amongst the charter members, although new members will have to pay the actual cost of admitting them as new members. Interac's revenue will be derived entirely from a switch fee to be charged on a per message basis to all members, new and old, to recover the cost of developing and maintaining the inter-member network. As well, the prohibition on charging a surcharge for cash dispensing and point-of-sale transactions would be eliminated.

Regulatory Environment

The key to the Tribunal's decision was the effect of statutory and regulatory rules affecting the payments system. The Tribunal noted that Parliament, in its wisdom, in the *Canadian Payments Association Act* established the CPA as the body charged with establishing and operating a national clearing and settlement system, and planning the evolution of the national payments system.

The Tribunal indicated that the test which it must address in considering a DCO is whether the DCO is likely to cure the substantial lessening of competition which is presumed to arise from the anti-competitive acts identified by the Director. In the *Interac* case because of the presence of constraints in the form of the CPA and its rules, and related policy implications, a further issue arose as to whether the adequacy of the DCO should be measured within or outside the scope of these constraints. The Tribunal noted that if the Director was suggesting that the DCO was adequate irrespective of these constraints, the Tribunal could not agree. If, on the other hand, the Director was suggesting that he acted adequately within these constraints, then the Tribunal accepted that he did so.

The Tribunal commented critically that it had difficulty understanding the Director's position in respect of this issue. In the Tribunal's view, the Director should have ensured that the Tribunal fully understood the nature of the application and the position of the Director. The Tribunal suggested that the Director was not "up front" and comprehensive in presenting the case in that regard. The CPA received only passing mention in the materials filed by the Director, and there was no reference in the materials to a possible remedy of forcing Interac to clear and settle transactions outside the CPA regime. The Tribunal noted that it should not have been required to piece together a coherent approach to a consent application from the statements made here and there by counsel for the Director during oral argument.

Ultimately, the Tribunal concluded that it would attribute to the Director the only position which in the Tribunal's view was capable of leading to the approval of the DCO. That position was that, given that there are significant and pervasive regulatory and policy restraints operating in the payments system, with particular relevance to the question of most importance to the Intervenors - access to Interac - those restraints effectively limited the Director's ability to act, and thus restricted the scope of the remedies which could have been placed before the Tribunal. The restraints arose from the presence and operation of the CPA. The Director chose to devise a remedy within the existing CPA framework for clearing and settling financial transactions, and therefore subjected his proposed remedy to the constraints created by the CPA's control over the payments system. The Director decided he was not going to challenge the continued use of the CPA clearing and settling mechanism by Interac as an anti-competitive act. As well, he concluded that

attempting to create an Order which would permit non-financial institutions to be card issuers would implicate policy concerns in allowing such institutions to permit customers to transfer money held by them directly to a third party.

The Tribunal noted that the Director had a choice in bringing the Application, as to whether it was necessary to eliminate the substantial lessening of competition to require Interac to clear and settle Interac's financial transaction outside of the CPA, or whether to permit it to continue to use the CPA mechanism. The Tribunal, in considering whether that decision was appropriate, noted that in order to force Interac to clear and settle outside the CPA the case would have had to have been contested, as the Respondents would not consent to such a remedy. That would have created significant uncertainty as well as expense and delay, and would have been a difficult case given underlying jurisdictional and policy concerns, and the potential application of the regulated conduct defence. The Tribunal noted that broader policy issues which will be addressed in the upcoming general review of financial institutions are also implicated by this Application.

The Tribunal concluded that while choosing between a contested and a consent application is a delicate balance, it could not conclude that the Director's decision to proceed as he did was inappropriate, although the Tribunal specifically noted that the Director's argument that it would cost too much to establish an alternate settlement mechanism outside the CPA regime was unconvincing. Any additional cost of an alternate system would have to be weighed against the increased economic efficiency of greater competition in the marketplace, in order to determine whether or not an alternate settlement system was efficient or inefficient.

The Tribunal also stated that it would be naive if it failed to recognize that charter members of Interac control the Board of Directors of the CPA. It stated that this is not an arm's length or neutral third party, and therefore in making decisions to clear and settle Interac transactions under the umbrella of the CPA, and thus incorporate the CPA restrictions into the network, the Respondents may have had several motivations.

Ultimately, while the Tribunal indicated that in appropriate circumstances it had the authority to conclude that the Director was wrong in not challenging the CPA clearing and settlement mechanism, nevertheless the Director is accorded considerable deference in setting the scope of the Application. In a consent application this deference becomes a barrier that is difficult to overcome. Thus, the Tribunal concluded that the fact that the DCO may prove ineffective because another body, presumably in the legitimate pursuit of its objects, cannot accommodate it is irrelevant to the Tribunal's assessment of the DCO.

Frankly, that is a startling proposition. If the Tribunal concluded that the Director had not demonstrated that the DCO was likely to eliminate the substantial lessening of competition - that it may prove ineffective - then that is relevant to the Tribunal's assessment of the DCO. In those circumstances, it is arguable that the Tribunal should have challenged the Director's decision not to insist that Interac clear and settle outside of the CPA system.

The Tribunal's Conclusions as to the Likely Effect of the Order

Membership

The Tribunal first noted that one undoubted result of the DCO would be to permit other Financial Institutions (as defined) to become members of

Interac on virtually the same terms as the charter members. Similarly, the ability of members to issue cards, insofar as it was previously restricted by the fees charged by Interac, would be significantly improved. However, other than those Financial Institutions which were already members of Interac the Tribunal expressed skepticism that any or many would join. It noted:

> While there are over 100 FIs in existence who meet the criteria for membership, there is no indication in the material filed or the evidence that these other FIs will be eager to join. The most that can be said is that the opportunity will be open to them.

Governance

The Tribunal noted that even the Parties to the Application claimed very modest improvement to the governance structure of Interac as a result of the changes contemplated by the DCO. The Respondents' control over the Board would not be removed. While there was a *possibility* for a shift of control from the nine respondents, they were likely to have a dominant or substantial majority of the votes on the Board for the foreseeable future. Consequently, while the Order guaranteed representation on the Board to other institutions, and therefore promoted heterogeneity on the Board, it did not achieve more than this limited goal.

New Services

The Tribunal noted that the mechanism in the DCO for introducing new services could yield significant benefits if it succeeded in accelerating the introduction of such services. However, the Tribunal stated that there was nothing in the Statement of Grounds and Material Facts or evidence which indicated that the present By-Laws had had the effect in impeding innovation with respect to shared services. However, a source of improvement from the DCO in respect of new services was noted to be from the introduction of bilateral/multilateral services, in that the charter members had had an incentive to discourage those types of offerings which might compete with them.

Surcharging for Cash Dispensing and Point of Purchase Transactions

Prior to the Application, Interac had a rule prohibiting ABM or point of purchase transaction acquirers from imposing a surcharge for the service. The DCO permits surcharges in respect of cash dispensing and point of purchase arrangements. The Tribunal commented that:

> While it is possible that this ability could lead to the placement of additional ABMs, as claimed by the Director, the evidence before us was that, on balance, it is unlikely.

The Tribunal reached this conclusion because the Intervenors called evidence that it was unlikely that there was significant unmet need for ABMs in Canada. In conclusion, the Tribunal found that the provisions of the DCO relating to individualized pricing of services to consumers at the terminal level appeared to offer minimal, if any, benefit to consumers.

Transaction Acquiring

The DCO permitted non-financial institutions to acquire Interac transactions without also being required to issue cards. The Tribunal concluded that the evidence in respect to the effect of that provision is largely inconclusive. The Director's evidence was from a United States expert. The Intervenors called

a Canadian expert who expressed reservations that such a business was viable. Ultimately, the Tribunal concluded that as no one appears to have been particularly prejudiced by the Interac prohibition, curing the prohibition cannot be seen as a strong point in support of the DCO. It stated that, "in the end, while removing the prohibition does no harm and may, although we are not convinced that it is not likely, do some good, it is hardly an essential part of the DCO".

Sweep Accounts

The key issue in dispute before the Tribunal involved the ability of non-Financial Institutions (i.e., insurance companies and investment firms) to provide their customers with cards which would access funds held by those institutions through the Interac network. The Intervenors argued that unless they were permitted to issue Interac cards, the substantial lessening of competition created by Interac would not be eliminated. The Tribunal noted that absent change to the CPA's rules, or absent an order requiring Interac to clear and settle transactions outside the CPA system, non-Financial Institutions could not effectively issue Interac cards because such transactions could not, due to CPA rules, be cleared and settled through the CPA system. As noted above, the Tribunal ultimately concluded that it would not second-guess the Director's decision to permit the continued use of the CPA clearing and settlement system.

Failing permitting insurance and investment firms to be Interac card issuers themselves, the Director argued that the DCO, by removing Interac's prohibition on sweep, zero balance and pass-through accounts (whereby Financial Institutions would issue cards to customers of a non-Financial Institution which would enable the customers to access funds held at the non-Financial Institution), would, indirectly through the intermediary of the Financial Institution, permit effective competition in shared electronic financial services. The Intervenors argued that such indirect access would not be effective. The Tribunal concluded that due to CPA rules there was little that could be done that the DCO did not do to provide efficient indirect access through such sweep accounts. It noted that at least potentially the provision regarding sweep accounts is one of the more important elements of the DCO, but that there is little the Tribunal can do to guarantee that the Intervenor's concerns can be met.

There are a wide range of possible sweep account arrangements, ranging from a situation where the Financial Institution facilitates the transaction but is largely invisible in the arrangement, to arrangements in which the financial institution is prominent in the relationship between the non-Financial Institution and its customer. In the United States the evidence was that the Financial Institutions are largely invisible in such arrangements. By contrast, the evidence was that Canadian arrangements required that the bank be prominent in the relationship and, as a result, the arrangements were not particularly efficient or effective. The Tribunal noted that while the Financial Institution need not be effectively invisible for a sweep arrangement to be a viable substitute for direct access to the Interac network, it was its view that one would have to be considerably beyond the arrangements which have been tried in Canada to consider such an arrangement a satisfactory substitute.

The Tribunal then noted that what the CPA may do in respect of sweep accounts was unclear. The CPA

had undertaken some discussion of such accounts and created a working paper which identified a Type 1 account as one in which an investor has an account relationship with a CPA member which provides chequing privileges and is supported by signing documentation and an overdraft facility. As well, the CPA member must make the pay/no pay decision and on a daily basis the balance in the customer's account is swept into an investment account at the non-financial institution. By contrast, Type 2 arrangements were described as arrangements in which a non-CPA member offered an investment program by holding an account with a CPA member. In such arrangements, investors do not have individual account relationships with the CPA member. The corporate entity makes the pay/no pay decision, which is in effect drawn on the CPA institution.

The Tribunal ultimately concluded that the decision as to what sort of sweep account arrangements will or will not be permitted lies in the hands of the CPA. Nonetheless, it commented that none of the evidence presented to it indicated that the concerns about asset risk raised by the CPA working group with respect to a Type 2 arrangement could not be dealt with in a way which would allow such arrangements to operate effectively. The evidence indicated that the risk associated with such arrangements was low, and that it could be dealt with by commercial arrangements.

Ultimately, the Tribunal concluded that:

> Unfortunately, the scope of the application does not allow us to do anything more than assist the Intervenors with their valid concerns. Until the CPA acts, non-Financial Institutions and Financial Institutions alike will be unlikely to commit to any indirect access arrangement. The CPA may choose never to act. Or it may propose arrangements that limit permissible sweeps to Type 1. In either case, the DCO provision removing the prohibition against sweeps from Interac will have no effect. Consumers would thus reap little benefit from the DCO.
>
> Nonetheless, as we have concluded that the actions of the CPA in this matter are beyond the scope of this Application, there is little more that can be done in this forum. Despite the possibility that the sweep provisions of the Order will never be effective, and recognizing that it is an important element of the DCO, we must nevertheless issue the DCO as it accomplishes what can be accomplished at this juncture. In the event that the CPA takes a liberal approach to sweeps, the removal of the Interac prohibition, in conjunction with other provisions of the DCO which open up Financial Institution membership in Interac and place all Financial Institution members on equal footing, will be of considerable benefit to non-Financial Institutions seeking to enter into Interac access arrangements. The more Financial Institution Interac members there are who might want to offer such arrangement, the more likely it is that non-Financial Institutions can negotiate an arrangement which best meets their needs and those of their customers.

In summary, the decision of the Tribunal is peculiar. It acknowledges that most of the alleged benefits to be achieved by the DCO are marginal, or are unlikely to be achieved. Nevertheless, it concludes that the DCO is sufficient to eliminate the substantial lessening of competition which results from the anti-competitive acts, given that the key problems cannot be solved within the CPA clearing and settlement system. Although it acknowledges that one option the Tribunal had was to conclude that the restrictions created by use of the CPA clearing and settlement mechanism were such that the Tribunal ought not sign an Order which contemplates use of that mechanism, it nevertheless approved an Order which does include use of the CPA system. The decision, however, represents a fairly powerful indictment of the anti-competitive effects of the CPA clearing and settlement rules.

Staff

PRODUCTION OF DOCUMENTS BY AND EXAMINATION OF THE DIRECTOR IN A CIVIL ACTION

The issue as to whether or not the Director of Investigation and Research should produce, in a civil proceeding, documents obtained by the Director in the course of an investigation and prosecution pursuant to the *Competition Act* was considered by the Trial Division of the Court of Queen's Bench of New Brunswick in *Forest Protection Limited* v. *Bayer A.G., Chemagro Limited, Sumitomo Canada Limited et al.* a decision issued on May 10, 1996.

The action arose from an allegation that the Defendants were engaged in a conspiracy related to the supply of insecticides used by the Plaintiff in its business of forest protection contrary to the provisions of Part VI of the Act and that the Plaintiff suffered damages as a result. The Defendants, Sumitomo Canada Limited ("Sumitomo Canada") and Chemagro Limited ("Chemagro") previously pled guilty to and were convicted of offences contrary to Part VI of the Act following an investigation by the Director.[1]

The Plaintiff sought an Order requiring the Director to produce documents obtained in the course of the investigation and prosecution of the Defendants. The Plaintiff also sought an Order that it be granted leave to personally examine for discovery an employee of the Competition Bureau, with respect to information obtained in the course of the investigation. The Director consented to the Orders sought by the Plaintiff with respect to the production of documents in the possession of the Director obtained in the course of the investigation and the examination for discovery of the Bureau employee. The Defendants opposed the motion.

The Notice of Motion was amended at the hearing such that the Plaintiff no longer requested the documents created or prepared by the Bureau in the course of its investigation. Instead, the Plaintiff asked for production of the documents seized by the Bureau from Sumitomo Canada and an individual associated with Chemagro pursuant to search warrants issued by the Ontario Court (General Division) under the Act and documents obtained by the Director through means other than seizure, in the course of the investigation.

In ordering the production of the documentation in the Director's possession, the Court considered the confidentiality provision set out in section 29(1) of the Act which prohibits disclosure of information obtained by the Bureau during the course of an investigation. The Court noted the exception to the prohibition where disclosure can be made to a Canadian law enforcement agency or for the purpose of the administration or enforcement of the Act. The Defendants argued that the information gathered by the Bureau was for the sole purpose of the prosecutions it brought for conduct contrary to the Act and that it should not be permitted to be used for any other purpose. In rejecting the Defendants' submissions in this regard, the Court held that a plaintiff can only recover damages in an action commenced pursuant to section 36 of the Act where it has suffered loss or damage as a result of conduct contrary to Part VI of the Act and noted that the remedy has been held to be constitutional and is clearly intended to supplement the other remedial provisions of the Act. The Court held that the information was obtained by the Bureau for the purpose of a proceeding under the Act and that the Plaintiff's action was such a proceeding. The Court therefore came to the conclusion that an action

commenced pursuant to section 36 of the Act is a proceeding which relates to the enforcement of the Act.

The Court also rejected the argument that the doctrine of implied undertaking should limit the disclosure of information for any purpose other than the investigation and conviction of Chemagro and Sumitomo Canada. The Court held that the disclosure of the information sought from the Bureau would not violate the purpose for which the search warrants were issued which was for administering and enforcing the Act. The Court also rejected the argument that the release of the information would violate section 8 rights under the *Canadian Charter of Rights and Freedoms*.

The Court concluded, after reviewing the rule applicable in New Brunswick regarding the production of documents from a non-party, that the documents in the possession of the Bureau related to a material issue in the action and that it would be inequitable to require the Plaintiff to proceed to trial without having discovery of those documents. The Court also granted an Order allowing the Plaintiff to conduct an examination for discovery of the Bureau employee, which Order was consented to by the Director. The Court concluded that the examination of the Bureau employee would provide relevant information unlikely to be obtained from persons whom the Plaintiff was entitled to examine.

Leave to appeal the decision to the New Brunswick Court of Appeal was denied on July 2, 1996 with respect to those issues relating to the production of documents by the Director and the examination for discovery of the Bureau employee. It is anticipated that leave to appeal to the Supreme Court of Canada will be sought.

K.B.G.

Notes

[1] See "Statements Issued by the Bureau of Competition Policy: Sumitomo Fined $1.25 Million for Foreign-Directed Conspiracy" (1993) 14:4 Can. Comp. Rec. 10 and "Chemagro Fined Under S. 46 of *Competition Act*" (1993) 14:3 Can. Comp. Rec. 3.

NEW OJI PAPER COMPANY LIMITED PLEADS GUILTY OF CONSPIRACY UNDER THE *COMPETITION ACT* AND PAYS $600,000 FINE IN THE THERMAL FAX PAPER INQUIRY

The following is a News Release issued by the Competition Bureau on July 16, 1996, and is reproduced with permission.

OTTAWA, July 16, 1996 — Francine Matte, Q.C., Acting Director of Investigation and Research under the *Competition Act*, announced today that New Oji Paper Company Limited pleaded guilty to one charge of conspiracy to set prices in the thermal fax paper industry in violation of section 45 of the *Competition Act*.

The Company was sentenced in the Federal Court of Canada and was ordered to pay a fine of $600,000. The Court also issued a Prohibition Order against the company prohibiting further anti-competitive activity.

After an extensive investigation in Canada and abroad, conducted in cooperation with the U.S. Justice Department, Antitrust Division, it was concluded that the company, based in Japan, had

participated in an illegal conspiracy in 1991, to fix prices in Canada and the United States for thermal fax paper.

"This is an important precedent," Ms. Matte said. "It is the first prosecution and conviction in Canada of a Japan-based manufacturer for its participation in a conspiracy that directly affected the price at which thermal fax paper was sold to Canadian businesses and consumers. The joint investigation with the U.S. antitrust authorities resulted in a successful and speedy resolution of the illegal activity and we are confident that this conviction will re-emphasize to foreign companies doing business in Canada that they must comply with Canadian law."

The conviction in this case is part of an ongoing-investigation of the thermal fax paper industry that has already resulted in three prosecutions and Canadian fines totaling nearly $2.6 million against other fax paper companies in both Canada and the United States between 1994 and the present. The investigation into the conspiracy is continuing.

$5.8 MILLION FINE IMPOSED ON READY MIX CONCRETE PRODUCERS FOR CONSPIRACY IN METROPOLITAN AREA OF QUEBEC CITY

The following is a News Release issued by the Competition Bureau on August 19, 1996, and is reproduced with permission.

The Acting Director of Investigation and Research under the *Competition Act*, Francine Matte, Q.C., announced today that Ciment Québec Inc., Ciment St-Laurent Inc., Lafarge Canada Inc. and Béton Orléans Inc., pleaded guilty to one count of conspiracy and must pay a $5.8 million fine. The sentence was imposed by Mr. Justice Louis de Blois of the Québec Superior Court.

This is the second highest fine imposed on a group of companies for one count under the Act.

In addition to the fine, a prohibition order was imposed for 15 years. It ordered the companies to respect the provisions of the Act and obliged the accused to understand the law and to ensure that their officers and administrators comply with the law. The accused are also required to attend information sessions on the Act which will be prepared in collaboration with Competition Bureau staff and presented by the president and legal counsel for each accused.

The accused pleaded guilty to having entered into an agreement and collaborated with other persons to share the sales of ready mix concrete produced for projects requiring 300 cubic metres of concrete in Québec City and the metropolitan area.

"We are very pleased to learn that there was a reduction in the price of ready mix concrete following our investigation and this resulted in substantial savings for consumers and construction firms of the metropolitan area of Québec City," stated Ms. Matte.

A short time after the searches were commenced, the accused initiated meetings with representatives of the Bureau and of the Attorney General in order to better understand their responsibility, to cooperate with the inquiry and to begin the discussions leading to an eventual guilty plea.

CANADIAN COMPETITION RECORD

This inquiry began July 1995, following the publication of articles in a Québec regional newspaper alleging anti-competitive behaviour on the part of producers of ready mix concrete in the metropolitan area of Québec City.

The inquiry regarding allegations of conspiracy and bid-rigging by other producers of ready mix concrete in this region is continuing.

MICRO EAR 2000 FOUND GUILTY OF MISLEADING ADVERTISING UNDER *COMPETITION ACT*

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The Acting Director of Investigation and Research under the *Competition Act*, Francine Matte, Q.C., announced today that Mr. Jack Douglas, also known as Mr. John Lindsay Douglas, and 600620 Saskatchewan Ltd., carrying on business as Micro Ear 2000, have each pleaded guilty to six counts of misleading advertising under the *Competition Act*.

The illegal conduct involved representations that the product in question, a hearing device, could tune out background noise and "really" work in a crowd to enable one to hear "clear, crisp sound". Expert testing of the device showed these representations to be false. The representations were contained in flyers that were distributed across Canada through the mail.

Fines of $75,000 on the company and $5,000 on Mr. Douglas have been imposed by the Saskatchewan Provincial Court.

In addition to the fines, a Prohibition Order was imposed on both Mr. Douglas and the company for three years. The terms of the order require, among other things, that Mr. Douglas and the company not misrepresent to the public the sound quality or clarity of hearing devices. The Order specifically prohibits Mr. Douglas from incorporating or causing the incorporation of companies for the purpose of continuing or repeating the offence.

"Effective enforcement of the *Competition Act* benefits not only businesses but also consumers, particularly in circumstances where vulnerable groups, such as seniors, may have been victimized," Ms. Matte said. "This case also demonstrates that the Bureau is succeeding in obtaining appropriate penalties against individuals."

Mr. Douglas was also sentenced to probation for a period of three years during which time he is to perform 100 hours of community service and report to a Probation Officer.