CANADIAN COMPETITION LAW AND POLICY DEVELOPMENTS

The articles in this section were written by staff of the Record; Paul Collins and Subrata Bhattacharjee of Stikeman, Elliott, Toronto; Karen Groulx of Fraser & Beatty, Toronto; and staff of the Competition Bureau.

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Staff

BILL C-67 AND THE PROPOSED CIVIL REGIME FOR DECEPTIVE MARKETING PRACTICES - A POSTHUMOUS ANALYSIS*

Bill C-67, "An Act to amend the *Competition Act* and another Act in consequence" (the "Bill") received first reading in the Canadian House of Commons on November 7, 1996. However, the timing of the Federal election means that the Bill has died on the Order Paper. For this reason, observers will have to wait until the next sitting of Parliament to see if a bill amending the *Competition Act* will be tabled again. Presumably, however, none of this should alter substantially the focus of any future amendments to the Act, as related to marketing practices, from those that were proposed by the Bill. This focus was arrived at through extensive deliberations dating back to the *Report of the Standing Committee on Consumer and Corporate Affairs on the Subject of Misleading*

Advertising (June 1988) (the "Collins Report") and, more recently, the *Report of the Consultative Panel on Amendments to the Competition Act* (the "Consultative Panel Report"). There is, therefore, substantial merit in examining what the Bill sought to address in the context of marketing practices.

In the area of misleading advertising and deceptive marketing, the amendments essentially sought to convert what is a pure criminal regime into a hybrid regime with both civil and criminal elements. Pursuant to the Bill, most instances of misleading advertising and deceptive marketing practices that are currently prosecuted in the criminal courts by the Attorney General of Canada were to be addressed under the proposed civil regime. Furthermore, the Bill provided for the Director under the Act to bring civil advertising matters before the Competition Tribunal, the Federal Court - Trial Division or the superior court of a province.

This paper will examine and comment upon six key changes that were proposed by the Bill:

- the hybrid regime generally;
- the civil monetary penalty;
- the public corrective notice penalty;
- the temporary cease and desist order;
- the consent order; and
- the test for ordinary price representations.

The Proposed Hybrid Regime

The Bill proposed to change the focus of the Act's provisions respecting misleading advertising and deceptive marketing practices from punishment and deterrence to timely and efficient compliance through the creation of a hybrid criminal/civil regime. With respect to the criminal regime, a criminal sanction with a subjective mental element would remain in place to deal with the most egregious cases of misleading advertising. A variety of civil remedies were also added to address less serious cases.

The Consultative Panel Report stated that the rationale for this two-tiered approach was as follows:

> ... s.52(1)(a) [should] be maintained as a criminal provision to deal with the most egregious cases but that it be changed by adding a subjective *mens rea* requirement. In the Panel's view, subjective *mens rea* includes intentional or knowledgeable conduct or recklessness in egregious cases. Because of the seriousness which such a change from the current strict liability regime would signal, the severity of penalties upon conviction should be increased.[1]

The key provisions for implementing these amendments were the proposed subsections 52(1) and 52(1.1) which stated that:

> 52(1) No person shall, for the purpose of promoting, directly or indirectly, the supply or use of a product or for the purpose of promoting, directly or indirectly, any business interest, by any means whatever, *knowingly or recklessly,* make a representation to the public that is false or misleading in a material respect (emphasis added).
>
> (1.1) For greater certainty, in establishing that subsection (1) was contravened, it is not necessary to prove that the accused intended to deceive or mislead any person or was reckless as to whether any person was deceived or misled, or that any person was deceived or misled.

Arguably, the amended language of section 52 attempted to codify the decision of the Supreme Court of Canada in *R* v. *Wholesale Travel Group Inc.*[2] In that case, the defendant challenged the constitutionality of the misleading advertising section and its statutory due diligence defence on constitutional grounds. The Supreme Court of Canada found that misleading advertising was a "regulatory offence" and confirmed that the Crown need not prove that the advertiser acted intentionally or knowingly in making the false or misleading representation or that members of the public were actually misled or deceived.

The specific issue facing the Court in *Wholesale Travel* was whether the misleading advertising provisions of the Act violated Section 7 of the *Charter of Rights and Freedoms* as they did not require proof of subjective *mens rea* as a necessary element of the offence. The Court concluded that subjective *mens rea* was constitutionally required for offenses which carry a certain stigma associated with their commission. However, in classifying misleading advertising as a "regulatory offence", the Court concluded that negligence was sufficient in this context.

The Court revisited a similar issue in *R.* v. *Nova Scotia Pharmaceutical Society et. al.* ("*PANS*").[3] This case dealt with the criminal conspiracy section of the Act (section 45) which, in terms of its drafting, is somewhat analogous to section 52 of the Act. The Court in *PANS* concluded that section 45 required proof of two fault elements: one subjective, and the other objective. The Court stated that:

> To satisfy the subjective element, the Crown must prove that the accused had the intention to enter into the agreement and had knowledge of the terms of that agreement. Once that is established, it would ordinarily be reasonable to draw the inference that the accused intended to carry out the terms in the agreement, unless there was evidence that the accused did not intend to carry out the terms of the agreement.
>
> In order to satisfy the objective element of the offence, the Crown must establish that on an objective view of the evidence adduced the accused intended to lessen competition unduly.[4]

Applying the analysis in *PANS*, it would appear that the subjective element of section 52 was addressed by requiring the Crown to prove that the accused intended to make the representation to the public for the purpose of promoting directly or indirectly, the supply or use of a product or for the purpose of promoting, directly or indirectly, any business interest. Once this requirement was met, the analysis would then shift to a consideration of whether, on an *objective* view of the evidence adduced, the accused intended to mislead or deceive the public.

As drafted, subsection 52(1) of the Bill provided a clear indication of the type of conduct which would attract sanction, namely, reckless or intentional conduct. This was consistent with a subjective *mens rea* requirement. Unfortunately, subsection 52(1.1) muddled this somewhat by stating that proof of intent, recklessness, or actual deceitful or misleading representations were *not* necessary for the purpose of subsection 52(1). Assuming that subsection 52(1) had some deterrent value by virtue of its clear standard, subsection 52(1.1) detracted from this and should have been removed, or in the alternative, amended to provide only that it would not be necessary to prove that any person was deceived or misled to establish a contravention of subsection 52(1).

Administrative Remedies

The Bill also contained a number of administrative remedies for breach of its misleading advertising provisions. These included the imposition of a civil monetary penalty, a temporary cease and desist order, and posting of a public corrective notice, as well as the availability of a consent order.

The Civil Monetary Penalty

A key element of the proposed civil regime was a civil monetary penalty for deceptive marketing practices. This penalty was set out in subsection 74.1(1). If, upon application by the Director, a court, or the Tribunal, it was determined that a person was engaging in or had engaged in "reviewable conduct", it could order the person to pay an "administrative monetary penalty". The amount of such penalty, however, could not exceed:

- in the case of an individual, fifty thousand dollars and, for each subsequent order, one hundred thousand dollars; or
- in the case of a corporation, one hundred thousand dollars and, for each subsequent order, two hundred thousand dollars.

According to subsection 74.1(3), no civil monetary penalty could be awarded against a person establishing the exercise of due diligence to prevent the deceptive marketing from occurring.

The Bill made conduct presently dealt with under the criminal provisions of the Act subject to a civil regime. This dramatic change in the regulation of misleading advertising and deceptive marketing practices points to the question of whether such change was and is appropriate given the nature of the conduct sought to be enjoined and the purposes of the Act. This is an issue that was explored in both the Collins Report and the Consultative Panel Report. The conclusions and reasoning contained in these two reports point to the rationale and underpinnings of the proposed hybrid regime.

The Collins Report concluded that criminal sanctions might not be the most effective approach to most misleading advertising offenses. The Report suggested that though penal sanctions were appropriate in certain misleading advertising cases, such as those involving intentional, fraudulent or repeated violations, they were not necessarily appropriate in other cases.

The Consultative Panel Report further developed the justification for the proposed hybrid system. After stating that the prohibitions against misleading or deceptive advertising have been generally effective, the Consultative Panel Report set out the reasons why a greater variety of enforcement mechanisms would allow more appropriate and effective responses to these problems in the marketplace. The reasons listed were as follows:

- the criminal law process could be inappropriate to some instances of misleading advertising;
- the stigma of the criminal process could encourage an adversarial response and preclude the informal resolution of many of the cases;
- the offensive conduct could continue throughout the course of the lengthy criminal process (even where there is no undue delay);

- the evidentiary requirements of the criminal process could unnecessarily increase the costs of preparing for trial; and
- the criminal burden of proof could be inappropriate in some circumstances of misleading advertising.[5]

Furthermore, the Consultative Panel Report suggested that the stigma of a criminal conviction may be too excessive in dealing with an advertiser who merely failed to exercise due diligence, stating that recourse to the criminal law should be avoided where other, less severe, processes could be just as effective.[6]

Even though the stigma associated with criminalization would have been eliminated from most instances of deceptive marketing under the proposed scheme, the proposed regime as a whole would have still been a step toward more effective deterrence of misleading advertising. Under the current criminal regime for misleading advertising, all prosecutions are subject to the criminal burden of proof. This standard makes it more difficult to obtain convictions against violators. The danger is that in a significant number of cases, persons who engage in conduct that is contrary to the Act are not convicted, whether as a result of a successful defence, or because it is thought that the evidence is such that these persons are not worth prosecuting at all. Thus, although the stigma of a criminal conviction is itself a major deterrent, the lower probability of conviction could dilute that effect.

By retaining criminal liability for the most egregious cases, those involving representations that are knowingly or recklessly misleading, and moving all other cases to a civil enforcement regime, the Bill arguably sought to effect a compromise that was optimal from the point of view of deterrence. The reduced civil burden of proof proof on a balance of probabilities would likely have resulted in more cases being pursued and more cases resulting in some form of sanction. Moreover, although not criminal in nature, the administrative remedies that were proposed carried a significant deterrent effect.

The proposed changes also considered the fact that not all incidents of misleading advertising are of the same magnitude. If the existing regime can be said to focus on deterrence, the Bill attempted to soften this somewhat for good reason. There is a social value to advertising, which brings sellers of goods and services together with consumers of such goods and services. The threat of a criminal conviction may deter some innovative and other beneficial forms of advertising. The benefit of a more flexible, civil system was recognized in the Discussion Paper on Competition Act Amendments issued by the Bureau of Competition Policy in June 1995 (the "Discussion Paper"):

> Non-criminal adjudication of misleading advertising cases would alleviate some of the shortcomings of the criminal process identified above, thereby enhancing certainty for businesses, advertisers, consumers and enforcement authorities. Uncertainty can inhibit businesses from engaging in conduct that might be legal and advantageous from a business standpoint and beneficial to a competitive marketplace. The availability of a non-criminal alternative would also provide more flexible remedies, while criminal prohibitions would remain in place to deal with more egregious transgressions.[7]

Still, with the loss of the stigma associated with criminalization for most kinds of misleading advertising and deceptive marketing, the civil monetary penalty had a critical role under the proposed system in establishing an alternative credible deterrent. This is consistent with

the view expressed in the Consultative Panel Report as to the rationale for a civil monetary penalty:

> There arises the question of how to encourage businesses to exercise due care to avoid making misleading or deceptive misrepresentations. The Panel concluded that the adjudicator should have the authority to order the payment of a civil monetary penalty in an amount appropriate in the circumstances giving rise to the breach of the relevant provision.[8]

For a civil monetary penalty to work as it should, it is necessary for the amount of the penalty to be appropriately set in an amount sufficient for deterrence, but not so great as to be excessive. The proposed regime seemed to address these concerns in subsection 74.1(4), which stated that the terms of an order against a person, including a civil monetary penalty, were to be determined with a view to promoting conduct by that person that is in conformity with the purposes of the Act's deceptive marketing provisions. Furthermore, an order was not to be made with a view to punishment, thereby tailoring the order to what is required by specific deterrence. Awards were capped at the upper end by the lesser of the amount found necessary to encourage compliance by the offending party, and for a corporation, by $100,000 (for the first offence).

Subsection 74.1(5) contained a list of specific factors that were to be taken into account in determining the amount of the monetary penalty. These factors were:

(a) the reach of the conduct within the relevant geographic area;

(b) the frequency and duration of the conduct;

(c) the vulnerability of the class of persons likely to be adversely affected by the conduct;

(d) the materiality of any representation;

(e) the likelihood of self-correction in the relevant geographic market;

(f) injury to competition in the relevant geographic market; and

(g) the history of compliance with the Act by the person who engaged in the reviewable conduct.

In addition, the court was given a general power to take into account any other relevant factors.

Under subsection 74.1(5), the adjudicator, however, presumably would have been in a position to take into account the profits made since permitting the retention of ill-gotten profits would not be consistent with promoting compliance. One problem which may have arisen, however, was that profits from misleading advertising may have exceeded $100,000. It is arguable that this problem was addressed to an extent by the Bill, which provided for a maximum penalty of $200,000 in the case of subsequent awards, after a first award has been given.

Public Corrective Notice

Subsection 74.1(1) of the Bill also provided for the publication and dissemination of a notice "to bring to the attention of the class of persons likely to have been reached or affected by the conduct" a description of the offending conduct, the period and area to which the conduct in question related and a description of

how the representation or advertisement was disseminated. It should be noted that the placing of a public corrective notice can be an expensive process, as the cost of additional advertisements for compliance purposes would certainly have been placed upon the person or concern found to have engaged in the reviewable practice.

The Temporary Cease and Desist Order

The Bill proposed that a temporary cease and desist order be made available to deal with deceptive marketing practices. As envisaged by the Discussion Paper, these orders were akin to interim injunctions, intended to be used in urgent situations involving substantial harm to the marketplace.[9] Subsection 74.11(1), the operative section, essentially provides for a three part test. An interim cease and desist order would have been available where, on application by the Director, a court or the Tribunal:

(1) found a strong *prima facie* case that a person was engaging in reviewable conduct (that is, deceptive marketing practices);

(2) was satisfied that unless the order was issued, serious harm would be likely to ensue; and

(3) was satisfied that the balance of convenience favoured issuing the order.

The proposed test for a temporary cease and desist order bore some resemblance to the three part test for an interlocutory injunction at common law. For this reason, comparing and contrasting the two tests provides some insight into the operation of the proposed statutory test.

The leading Canadian case on the availability of interlocutory injunctions is the Supreme Court of Canada decision in *RJR-MacDonald Inc.* v. *Canada (Attorney General)*[10] which adopts the well known test in the House of Lords decision of *American Cyanamid Co.* v. *Ethicon Ltd.*[11] The requirements under this test are:

(1) a preliminary assessment must be made of the merits of the case to ensure that there is a serious question to be tried;

(2) it must be determined whether the applicant would suffer irreparable harm if the application were refused; and

(3) an assessment must be made as to which of the parties would suffer greater harm from the granting or refusal of the remedy pending a decision on the merits; that is, an assessment of the balance of convenience.

The first requirement for an order under section 74.11 was that there be a strong *prima facie* case that reviewable conduct that is deceptive marketing practices was taking place. This requirement of a strong *prima facie* case is what the common law position was prior to the *American Cyanamid* decision. In *American Cyanamid*, Lord Diplock stated that an applicant for interlocutory relief would no longer have to demonstrate a strong *prima facie* case, but merely that "the claim is not frivolous or vexatious; in other words, that there is a serious question to be tried". According to *RJR-MacDonald*, this more permissive standard is the one generally accepted by the Canadian courts.[12]

The second requirement for an order under section 74.11 was that serious harm would be likely to ensue. This contrasts with the common law test, which requires the applicant to demonstrate that irreparable harm will result if the relief is not granted. According to *RJR-MacDonald*, irreparable

harm under the common law test refers to the nature of the harm suffered and not to the magnitude of harm.[13] To satisfy the test, the harm should be such that it cannot be quantified in monetary terms or cannot be cured. Irreparable harm would arise, for example, if a party suffers permanent market loss or irrevocable damage to business reputation. The purpose of the common law requirement of irreparable harm is to ascertain whether the issues at stake in an application for injunctive relief are of a nature that necessitates interim relief, or instead can be dealt with at trial with compensation in the form of damages.

In contrast, the requirement of serious harm under section 74.11 required a certain magnitude of harm to be present. However, the section did not require the harm suffered to be such that it could not be compensated with money, or could not be cured.

The "seriousness" requirement of section 74.11 arguably has a different purpose than the common law irreparable harm requirement. The inclusion of the term "serious" was clearly intended to limit the availability of temporary orders, and not whether a matter would be better dealt with in the interim, or upon final disposition at trial. Though the statutory test is similar in form to the *Cyanamid* test, the principles relating to irreparable harm are of limited relevance for interpreting what constitutes "serious" harm.

The third requirement for an order under section 74.11 was that the balance of convenience favoured issuance of the order. The common law test also requires a determination of the balance of convenience, in the form of an assessment of which side would suffer greater harm from the granting or refusal of the remedy pending a decision on the merits.

There were aspects of section 74.11 which sought to ensure that the temporary cease and desist order was not abused. Again, the nature of the interlocutory injunction is illustrative in this regard. In many cases, disposition of applications for interim injunctive relief have the ultimate result of settling the issue between the parties before going to trial. Though interim, in effect, such remedies are often final. The proposed amendment, however, made it clear that the relief granted was truly interim. First, subsection 74.11(2) created a time limit for the operation of such an order. An interim cease and desist order was limited to a duration of 14 days, unless extended by consent. Second, subsection 74.11(3) provided that at least forty-eight hours notice was to be given of an application for a temporary cease and desist order (or extension) to the person in respect of whom the order (or extension) was sought. However, it should be noted that, pursuant to subsection 74.11(4), the court or the Tribunal could proceed *ex parte* under certain circumstances. These situations would arise where the ordinary notice provisions could not reasonably be complied with or where the urgency of the situation is such that service of notice would not be in the public interest. An *ex parte* order would be operative for no greater than 7 days. The order could be extended for an additional 21 days by application.

The Consent Order

Another important innovation contained in the Bill was a mechanism for consent orders to deal with deceptive marketing practices. The advantage of that consent order process clearly was its expediency, as noted by both the Consultative Panel Report and the Collins Report. The disadvantage was the potential for abuse of process. Nonetheless, the

advantage of speed appeared to outweigh the potential for abuse when viewed in the light of the subject matter of the provision. As most advertising is invariably time-sensitive, misleading advertising often must be stopped quickly to avoid harm to consumers. For this reason, the availability of consent orders was, in our submission, appropriate. Subsection 74.12(1) stated that where an application for an order is filed on consent, the order agreed to was to be filed with the court or the Tribunal for immediate registration. This would be so even if the terms of the order could not otherwise have been imposed by the court or the Tribunal under the deceptive marketing regime. According to subsection 74.12(2), the effect of registration (which takes place upon filing) was to give the order the same force and effect as if the order had been made by the court or the Tribunal. The Bill did not contemplate a review function for the court or Tribunal.

The New Test for Ordinary Price Representations

The Bill provided clarification in the highly controversial area of "ordinary price" representations. Ordinary price representations are currently dealt with in subsection 52(1)(d) of the Act. This provision reads as follows:

> 52. (1) No person shall, for the purpose of promoting, directly or indirectly, the supply or use of a product or for the purpose of promoting, directly or indirectly, any business interest, by any means whatever,
>
> ....
>
> (d) make a materially misleading misrepresentation to the public concerning the price at which a product or like products have been, are or will be ordinarily sold, and for the purposes of this paragraph a representation as to the price is deemed to refer to the price at which the product has been sold by sellers generally in the relevant market unless it is clearly specified to be the price at which the product has been sold by the person by whom or on whose behalf the representation is made.

It would seem that members of the retail industry, as well as consumer interests expressed concern that the above section was not sufficiently clear.[14] The Collins Report noted these concerns and recommended that this confusion be dispelled, by statutory amendments if necessary.[15] The interpretation developed by the courts in the face of this uncertainty has been that the ordinary selling price of a product required a substantial volume of sales to have occurred at the represented price during the time period in question. The Director's position has also been that sales volume was the relevant test.[16]

Under the new civil scheme governing ordinary price representations, it was proposed that ordinary price representations would involve a clarified hybrid test, considering both volume and time. The new provision was contained in subsection 74.01(2). Under this provision, a price representation would be misleading if suppliers generally in the relevant geographic market, having regard to the nature of the product:

> (a) have not sold a substantial volume of the product at that price or a higher price within a reasonable period of time before or after the making of the representation, as the case may be; and
>
> (b) have not offered the product at that price or a higher price in good faith for a substantial period of time recently before or immediately after the making of the representation, as the case may be.

Thus, a seller could not be liable for a misleading price representation so long as the represented price was consistent with the price at which a substantial volume of product was sold, or the price at which the product was sold for a substantial period of time. This test, creating a clear mandate to consider both sales volume and time clarified the existing uncertainty.

Conclusion

We conclude that although the proposed regime made a good attempt at balancing issues of deterrence and compliance with expeditious and pragmatic enforcement, a number of changes would be desirable in the next version of the proposed legislation. In particular, although the amendments sought to establish a hybrid system in the interest of imposing a sanction proportionate to the impugned conduct, it is essential to clearly distinguish the criminal and civil avenues of recourse for deceptive marketing practices. This is particularly true with respect to subsections 52(1) and 52(1.1), where the latter provision, although ostensibly added to clarify the requisite proof under subsection 52(1), obscures the precise nature of the conduct which will attract sanction. It is to be hoped that the next version of the proposed amendments will take such considerations into account.

P.C. and S.B.

Notes

* The authors thank Ken Pogrin, student-at-law, for his able assistance in the preparation of this article.

1 Consultative Panel Report at 18.
2 (1991), 38 C.P.R. (3d) 451.
3 (1992), 43 C.P.R. (3d) 1.
4 *Ibid.* at 38.
5 Consultative Panel Report at 16.
6 *Ibid.*
7 Discussion Paper at 15. For analysis of the Discussion Paper and other commentary on the proposed amendments to the Act, see (1995) 16:2 Can. Comp. Rec. 1; (1995-1996) 16:4 Can. Comp. Rec. 66; and (1996-1997) 17:3 Can. Comp. Rec. 1.
8 Consultative Panel Report at 20-21.
9 Discussion Paper at 16.
10 [1994] 1 S.C.R. 311.
11 [1975] A.C. 396.
12 *Supra*, note 10 at 335.
13 *Ibid.* at 341.
14 Discussion Paper at 18.
15 Collins Report at 43-44.
16 Discussion Paper at 18.

*DIRECTOR OF INVESTIGATION AND RESEARCH v. TELE-DIRECT (PUBLICATIONS) INC. ET AL.**

Editors' Note: For ease of reference, pinpoint references to the Yellow Pages decision have been placed in parentheses in the text.

The Application

The Application commenced against Tele-Direct (Publications) Inc. and Tele-Direct (Services) Inc. (hereinafter, collectively "Tele-Direct") concerned allegations that Tele-Direct had engaged in a practice of tied selling by requiring advertisers which purchase space in its Yellow Pages directory to also acquire advertising services, including advice, design and administration from Tele-Direct's internal sales forces. Tele-Direct was alleged to have engaged in this practice by limiting the type of accounts on which it would pay outside advertising agencies a commission to certain very large or "national" accounts.

Tele-Direct was also accused of abusing its dominant position by a practice of anti-competitive acts in relation to three groups; publishers of telephone

directories which are not affiliated with a telephone company (independent publishers); advertising agencies; and consultants.

Tele-Direct (Services) Inc. publishes telephone directories under contract for non-Bell Canada telephone companies with discrete territories within Ontario, in parts of Quebec and for other telephone companies outside of Ontario and Quebec. Tele-Direct (Publications) Inc. is owned by Bell Canada and BCE Inc. It is comprised of two parts: a "directory" division and an "other business" division. The directory division provides the directory publishing operations for Bell Canada in its territory, which covers most of Quebec and Ontario. The other business division is made up of various companies partly or wholly owned by BCE Inc., one of which is Tele-Direct (Services) Inc. (pp. 4-5).

The Tribunal's Conclusions

Thankfully the Tribunal's conclusions were summarized at the beginning of this mammoth decision and are as follows:

(1) Telephone directory advertising is a distinct advertising medium without close substitutes and therefore is the relevant product market. The geographic markets are local, corresponding to the scope of each of Tele-Direct's directories.

(2) Tele-Direct has control or market power since the condition of easy entry required to overcome the presumption of market power arising from Tele-Direct's extremely high market share was not satisfied. The direct indicators of market power such as the level of profits and method of pricing, reinforce this conclusion.

(3) Telephone directory space and telephone directory advertising services constitute two separate products solely for national and regional advertisers. Tele-Direct has tied the supply of advertising space to the acquisition of advertising services for these customers. In this regard, the Tribunal determined that there was no demand for separate products for smaller advertisers (whose annual sales were less than $10,000).

(4) Tele-Direct has not engaged in a practice of anti-competitive acts against entrants into telephone directory publishing in the Sault Ste. Marie and Niagara regions by targeting these competitors through such actions as price cutting and freezing, incentives, product improvement and increased advertising which the Tribunal determined were competitive responses that benefitted consumers.

(5) Tele-Direct has not engaged in a practice of anti-competitive acts directed against agents resulting in a substantial lessening of competition because Tele-Direct does not have market power in the commissionable advertising services market.

(6) Tele-Direct has engaged in the practice of discriminatory anti-competitive acts against consultants which has or is likely to result in a substantial lessening of competition. Tele-Direct was ordered to cease the practice.

(7) Tele-Direct's refusal to license its trade-marks to certain competitors is not an anti-competitive practice or act because Tele-Direct's right to refuse the license of its trade-mark is protected from being an anti-competitive act by section 79(5) of the *Competition Act* as a legitimate exercise of one's rights under the *Trade-marks Act*.

Introduction

The Tribunal panel, composed of Mr. Justice Marshall Rothstein, Dr. Frank Roseman and Ms. Christine Lloyd, heard the Application commenced by the Director of Investigation and Research under sections 77 and 79 of the Act against Tele-Direct with respect to "Yellow Pages" advertising.

The Notice of Application was filed December 22, 1994 and the Hearing commenced in September of 1995, ending in March of 1996. The Tribunal's decision took over 11 months to be issued. The Tribunal felt compelled to explain the reason for the lengthy period of time between the conclusion of the Hearing and the release of its decision and in so doing stated the following:

> There is no doubt that this has been the most complex case presented to the Tribunal since its inception.

In the Application, described by the Tribunal as "complex", the Tribunal indicated that the issue of tying was "troubling" in that this was the first case in which tying had been raised as a "principal" or substantial allegation. The Tribunal noted that this was a particularly difficult issue when related to services and stated that there has been considerable debate among competition lawyers, economists and jurists about the difficulty of addressing alleged anti-competitive activity without adversely affecting efficiency in the context of tying (p. 8).

Both the complexity and length of the Yellow Pages decision make it difficult to produce a concise and complete overview of the issues, the parties' various positions and the conclusions reached by the Tribunal. There is no doubt that the Yellow Pages decision has taken on the proportions of a phone book. The record consisted of 15,000 pages of transcripts taken over 70 days involving 58 witnesses including 5 expert witnesses, 36 volumes of documents produced in the joint book, 166 exhibits, over 600 pages of written argument and oral argument which lasted 11 days. The Yellow Pages decision itself consists of 371 pages. This case brief is not intended to be a complete summary of the entire decision but, instead touches upon what I view to be the highlights of the Yellow Pages decision.

Background Facts - Telephone Directory Advertising

Some general background outlining the facts of the case is necessary to appreciate the issues considered by the Tribunal and contested by Tele-Direct. These facts, set out at the beginning of the Yellow Pages decision are as follows. Telephone companies are required by the Canadian Radio-Television and Telecommunications Commission (the "CRTC") to distribute up-to-date telephone directories for their district, both White and Yellow Pages to telephone subscribers at no additional charge. Tele-Direct pays the various telephone companies for subscriber listing information and the right to publish and distribute the directories to subscribers. Tele-Direct makes its profits from net advertising revenues and publishes the directories annually (p. 11).

According to the evidence led at the hearing, revenues from the telephone directory business in Canada amount to about $900 million to $1 billion annually. The majority of these are generated by the telephone company affiliated directories. Apart from the Tele-Direct directories and other directories published by or on behalf of telephone companies, there are over 250 independent directories published

in Tele-Direct's territories. These directories are independent in the sense that they have no connection to the provider of the telephone service (p. 14).

Telephone directory advertising services, including the sale of space in Tele-Direct directories, are provided by three groups: Tele-Direct's internal sales force; advertising agencies; and consultants. Services similar to those provided by Tele-Direct's internal sales force are also offered by outside advertising agencies who are remunerated through a commission paid by the publisher as a percentage of the value of the advertising purchased. Agencies are restricted in the accounts that they can service as Tele-Direct only pays commission on accounts which meet certain criteria.

Services are also provided by Yellow Pages consultants who write advertisements for Yellow Pages advertisers and advise them on where and to what extent they should advertise in the Yellow Pages. Consultants allegedly obtain cost savings on behalf of advertisers by promoting the purchase of smaller or less colourful advertisements, more limited geographic placement of advertisements or redesigning the advertisement. Consultants are not recognized by Tele-Direct who refer to them as "cut agents" and do not receive a commission but are paid by the advertiser out of the savings in advertising expenditures resulting from the consultant's advice (p. 16).

Trade-marks

The Director alleged that Tele-Direct, by refusing to licence its trade-marks, such as the words "Yellow Pages" and "Pages Jaunes" and the Walking Fingers Logo, to competing suppliers of advertising services, had engaged in a practice of anti-competitive acts contrary to section 79 of the *Act*. The Director sought an order that Tele-Direct licence, on commercially reasonable terms and conditions, the trade-marks registered for Tele-Direct's use in relation to telephone directories (p. 29).

The Tribunal held that the selective refusal to licence the trade-mark was not an anti-competitive act (p. 30). Nevertheless, the Tribunal determined that Tele-Direct licenced the use of its trade-marks to certified marketing representatives (the "CMRs") and other telephone affiliated directory publishers while refusing to licence other advertising agencies or consultants.

Section 79(5) of the Act provides as follows:

> For the purpose of this Section, an act engaged in pursuant only to the exercise of any right or enjoyment of any interest derived under the *Copyright Act*, *Industrial Design Act*, *Integrated Circuit Topography Act*, *Patent Act*, *Trade-marks Act* or any other Act of Parliament pertaining to intellectual or industrial property is not an anti-competitive Act (p. 31).

The Director's position was that section 79(5) of the Act does not preclude a finding of "abuses" of intellectual property rights and that Tele-Direct's practice of selective licencing is an abuse of Tele-Direct's trade-mark rights. Tele-Direct argued that as the owner of trade-marks it has the statutory right to decide to whom it will licence those trade-marks including the right to refuse to licence where it is not in its best interests to do so.[1] Tele-Direct argued that there was no evidence that it had adopted a policy of refusing to licence trade-marks to competitors for the purpose of restraining competition and that it does not make sense for it to licence its trade-mark to consultants whose

business is based on the premise that Tele-Direct "rips off its customers" (p. 31).

The Tribunal held that there must be more than the mere exercise of statutory rights, even if exclusionary in effect, before there can be a finding of misuse of a trade-mark and held that "Tele-Direct's refusal to licence trade-marks falls squarely within their prerogative" (p. 34).

Market Definition

Pages 35 to 111 of the Yellow Pages decision relate to the Tribunal's review of the facts and law concerning market definition. The market must be defined to consider the allegations of abuse of dominance and tied selling. Under section 77(2) of the Act, the Tribunal must find that "tied selling, because it is engaged in by a major supplier of a product in a market...is likely to" have a number of detrimental affects. If Tele-Direct is found to have market power, it would qualify as a "major supplier" (p. 35).

In reviewing the test, the Tribunal noted that it was decided in *Director of Investigation and Research* v. *D & B Companies of Canada*[2] that "class or species of business" means "product market", and "control" means "market power".

Tele-Direct's primary position was that advertising services and space form an inseparable package for reasons of efficiency and revenue growth and that the market comprises all local advertising media including direct mail, commercial newspapers, daily newspapers, flyers, trade magazines, signage, etc.

The Director defined the relevant market as advertising in Tele-Direct Yellow Pages directories and in telephone directories produced by independent (non-telephone company affiliated) publishers. The Tribunal noted that the goal in defining the market is to determine whether it provides competitive discipline for Tele-Direct in respect of Yellow Pages pricing and output decisions. The parties in this case agreed that the fundamental test for determining the relevant product market is substitutability, as the Tribunal has consistently held in previous decisions, including the three abuse of dominance cases.[3]

Direct Evidence of Substitutability

The Tribunal held that what first must be considered is any direct evidence of substitutability and noted that the Director did not adduce any statistical evidence. Tele-Direct referred to two "Elliot" reports which were studies conducted for Tele-Direct in early 1993 for purposes other than the competition proceeding (the "Elliot Reports"). The Tribunal, in rejecting the Elliot Reports as direct statistical evidence of demand cross-elasticity noted that such a study would have to be undertaken for the purpose of determining cross-elasticity between the products alleged to be in the market and must be conducted in a rigorous fashion to meet the test of statistical significance (p. 39).

Indirect Evidence of Substitutability

Both the Director and Tele-Direct organized their evidence of market definition using the headings similar to those set out in the *Merger Enforcement Guidelines*[4] including: end use, physical and technical characteristics, views, strategies, behaviour and identity of buyers, trade views, strategies and behaviour (inter-industry competition), price relationships and relative price levels and switching costs.

Functional Interchangeability and Inter-Industry Competition

The Director's position was that "end use" and "physical and technical characteristics" are both related to the question of functional interchangeability. The Director argued that the directory advertising was a directional reference tool which limited the "functional interchangeability" of directory advertising with other media. Tele-Direct's position was that all local advertising has the same end use: to increase business at a particular location and argued that characteristics of the various media should not be considered in determining functional interchangeability.

Some of the evidence reviewed by the Tribunal included Tele-Direct's own documents including training course material created by Tele-Direct for its sales representatives which drew a distinction between traditional advertising media and media used by an advertiser to direct the buyer where to buy or use a product or service. This evidence included a letter sent to the Director by Tele-Direct during the course of the Director's investigation into the industry which was intended to provide industry background and stated:

> The Yellow Pages traditionally is viewed as a 'directional' or 'considered purchase' advertising medium, which provides consumers with information on where they can purchase the goods and services they want ... Directional advertising is most attractive to local advertisers, particularly local retailers, who seek to motivate customers to visit their stores or to use their services ...
>
> ... by contrast, the other major advertising media outdoor, newspapers, radio, television and magazines - are classified as 'creative' advertising media, which create awareness of and demand for products and services... (pp. 51-52).

The Tribunal noted that counsel for Tele-Direct attempted to convince the Tribunal to attribute no weight to this letter on the grounds that it was not prepared with the assistance of an economist. The letter was written by Tele-Direct's Vice-President of Marketing with the assistance of a number of lawyers and was signed by the President of Tele-Direct. Tele-Direct resisted production of this letter during the discovery process on the grounds that it was protected by settlement negotiation privilege. The Tribunal ruled that the letter did not fall within that privilege and ordered it produced (p. 51, note 55).

Views, Strategies, Behaviour and Identity of Buyers

The Director's position was that advertisers did not consider there to be any close substitutes for Yellow Pages advertising. Tele-Direct argued that all advertisers, including Yellow Pages advertisers, operate on a fixed advertising budget which is allocated amongst various media, based on the highest returns that can be obtained from the advertising expenditure.

At pages 63 and 64 of the decision, the Tribunal in referring to the *cellophane fallacy* stated that any firm or group of firms that have fully exploited their market power might see some substitution that develops if the price of their product increases. Their inability to raise the prices without buyers switching "at the margin" is, in these circumstances, because they have already exercised the market power not because they have no market power in light of the presence of close substitutes.

Current Tele-Direct Customers

The Tribunal stated that if all media were close substitutes, the media perceived as providing better

value and price would be purchased in preference to others. The Tribunal, however, found that there was evidence that dissatisfied Tele-Direct customers continued to advertise in the Yellow Pages despite their opinion that other media were as good or better value and lower priced (p. 73).

Price Discrimination

The Tribunal stated that price discrimination allowed the firm with market power to secure higher profits (strictly, price less marginal cost) on sales to some customers as opposed to sales to other customers. In this regard, a firm without the ability to price discriminate may be disciplined by the ready ability of at least some of its customers to switch if prices are increased. However, where a firm has found a way to price discriminate, no weighing need be considered. In this case, the prices for customers who might switch will be left at a level where they will continue to purchase. However, for those customers who are so relying on the firm that they cannot switch, the firm may extract higher prices and, therefore, higher profits on sales to them (pp. 80-81).

The Tribunal held that Tele-Direct price discriminates against those who tend to spend more on Yellow Pages advertising by buying larger advertisements or colour advertisements. Specifically, the Tribunal found that those customers are charged much more than can be explained by the additional costs associated with producing and servicing the enhanced advertisement (pp. 81-82).

Trade Views, Strategies and Behavior (Inter-Industry Competition)

Tele-Direct argued that evidence of "broad competition" placed all local media in the same product market. Tele-Direct's position was that differences in the type or intensity of response to different (competitors) should not eliminate some "competitors" from the relative market. The Tribunal's position was that the type and intensity of the alleged competitive response are elements for consideration in determining if the products argued to be in the same market are close substitutes. One example referred to by the Tribunal was the situation where a broadly-scoped independent directory entered into Tele-Direct's territory in the Niagara Region and Sault Ste. Marie area wherein Tele-Direct responded with zero price increases, an advertiser incentive programme, promotional campaigns and improvements to its own directories (pp. 86-87). The Tribunal determined that there was no evidence of a response to other media that bore any resemblance to the focused and intense response of Tele-Direct to the competing directory publishers.

Pricing - General Policy

The Tribunal also considered the general pricing policy of Tele-Direct and specifically, whether the prices of other media influenced Tele-Direct's pricing. After reviewing all of the evidence including the testimony of Tele-Direct's representatives as well as documentary evidence, the Tribunal concluded that prices of other media had little or no influence on Tele-Direct's pricing policies in the 1990s.

In conclusion, the Tribunal held that telephone directory advertising was a distinct advertising medium without close substitutes in that it was a directional medium with a function distinct from that of creative media. There was no dispute between the parties that the geographic market was local in nature, corresponding roughly to the scope of each of Tele-Direct's directories (p. 109).

Control: Market Power

Indirect Approach: Market Structure

Tele-Direct's November 1995 revenue estimates for independent publishers operating in its market and the data on the record regarding its own published revenues for Ontario and Quebec for 1994, demonstrated that Tele-Direct has approximately 96 percent of the telephone directory revenues in Ontario and Quebec (p. 113). The Tribunal went on to note that even in Tele-Direct's worse case scenario regarding growth of independents, it would still be left with a market share of 90 percent. Based on the evidence of Tele-Direct's overwhelming market share, the Tribunal held that Tele-Direct has market power in the supply of telephone directory advertising. The Tribunal went on to state that proof of easy entry would overcome the initial determination that Tele-Direct has market power.

Barriers to Entry

In determining whether or not there were barriers to entry, the Tribunal considered the evidence under three headings:

(a) Observed Entry and Exit;

(b) Sunk Costs; and

(c) Incumbent Advantages.

Observed Entry and Exit

The Tribunal noted that observed entry into a market can provide some indication of the existence or non-existence, and the nature of, barriers to entry. Tele-Direct argued that because White and DSP managed to enter in particular markets in the Niagara Region and Sault Ste. Marie and have remained in business, entry barriers are low enough that Tele-Direct has no market power. However, the Tribunal was not willing to place so much emphasis on two instances of entry in answering this question. Instead, the Tribunal went on to consider the issue of sunk costs.

Sunk Costs

The Tribunal, in reviewing the issue of sunk costs noted that the decision in *Director of Investigation and Research* v. *Southam Inc.*,[5] held that neither sunk costs nor economies of scale were themselves sufficient to create an entry barrier but that together they were. The Tribunal went on to state that the important question is whether or not the potential entrant faces the risk that the post-entry conditions will be less favourable than pre-entry conditions because of the likely response of the incumbent. The Tribunal concluded that the potential entrant incurred substantial sunk costs and in doing so considered the fact that both DSP and White entered by publishing a "prototype" directory which offered advertising in the directory at no charge in order to provide the publisher with a history of usage and to give it credibility in selling advertising in its next directory. The Tribunal noted that when White and DSP entered into Tele-Direct's market with broadly-scoped directories, Tele-Direct responded with a price freeze, incentive programs, enhancements and promotional campaigns.

Incumbent Advantages

The Tribunal concluded that the incumbent directory publishers' reputation or affiliation with the telephone company constitutes a significant barrier to entry into publishing a competing broadly-scoped directory.

The conclusion reached by the Tribunal was that even with subscriber listings available to independent publishers on reasonable terms, significant entry barriers in the form of the reputation effects and sunk costs remained and that the condition of easy entry required to overcome the presumption of market power arising from Tele-Direct's extremely large market share was not satisfied.

Other Evidence of Market Power

The Tribunal also considered other evidence of market power such as the profits earned by Tele-Direct. The Tribunal noted that Tele-Direct pays 40 percent of its collected revenues directly to Bell Canada as a return for access to subscriber lists and for billing services. The Tribunal noted that the presence of this payment to Bell Canada indicated that Tele-Direct has revenues of at least 40 percent over its recorded costs (p. 133). The Tribunal also concluded that the payment to the telephone companies by Tele-Direct is a form of "economic rent" whose value depends on the surplus that can be earned from publishing a directory associated with a telephone company. The cost to the telephone companies of providing the subscriber listings and doing the billings was determined to be minimal. The Tribunal therefore concluded that evidence of economic rents provides a direct indication of Tele-Direct's market power.

The Tribunal refused to consider evidence of dissatisfied customers in determining whether or not Tele-Direct exhibited market power because of "the practical difficulties in applying such a subjective test".

Tied Selling

The Director alleged that Tele-Direct had engaged in a practice of requiring or inducing customers for advertising space in telephone directories (the tying product) to acquire another product, telephone directory advertising services (the tied product) from Tele-Direct. The Director further alleged that this practice of tied selling has impeded entry into or expansion of firms in the market resulting in a substantial lessening of competition.

The fundamental requirement of tying as set out at p. 163 of the Yellow Pages decision is the existence of two products, the tied product and tying product. The Tribunal stated that the demand for separate products and efficiency of bundling are the two "flip sides" of the question of separate products.

Background Facts

Some of the relevant background facts as set out in the Yellow Pages decision are as follows. Tele-Direct offers a commission to outside agents on accounts meeting their "National" definition and on "grandfathered eight market accounts"[6] and services the remainder of the accounts themselves. Tele-Direct does not offer a commission, or price space and services separately, for those "local" accounts which amount to over 90 percent of Tele-Direct's revenue (p. 159).

The Director's position was that non-commissionable customers have a choice of obtaining services from Tele-Direct as part of the "package" price that they pay for their advertising or paying twice for the services - once as part of the package price charged by Tele-Direct and once directly to the service provider. Tele-Direct's position was that there is no product known as "advertising services" which is separate from a product known as "advertising space". Tele-Direct argued that the sales advice provided by their own internal sales force forms an

inseparable package with the space which Tele-Direct supplies in its directory and that how advertisements in their directories are sold is a business decision to be made solely by Tele-Direct and is not justiciable (pp. 159-160).

The Single Product Test

Tele-Direct argued that advertising services are an "input" into Yellow Pages advertising and not a separate product.

Both parties referred to American jurisprudence and in particular, the 1984 decision of the Supreme Court of the United States in *Jefferson Parish Hospital District No. 2* v. *Hyde*.[7] In *Jefferson Parish*, the Court provided a extensive definition of the "single product" test. The issue in the case was the validity of an exclusive contract between the hospital and a firm of anesthesiologists. Any patient who chose to have an operation performed at that hospital was required to use an anesthesiologist employed by the firm in question. The court had to decide if this constituted an illegal tying arrangement. The Tribunal adopted the test applied in the *Jefferson Parish* case in determining the question of separate products as follows:

> ... in this case no tying arrangement can exist unless there is a sufficient demand for the purchase of anesthesiological services separate from hospital services to identify a distinct product market in which it is efficient to offer anesthesiological services separately from hospital services.

The Tribunal noted that demand is critical in that it would be pointless to require the two products to be offered separately if there was no demand. However, the Tribunal also noted that efficiency is also critical and that the demand for separate products should not govern if providing the products separately would result in higher costs that would outweigh the benefits to those who want to purchase them separately.

Tele-Direct attempted to persuade the Tribunal that if a supplier presents two products as a package or, if they are being marketed together, the Tribunal must conclude that there is a single product.

Tele-Direct also argued that there was an exception to tying recognized in the American jurisprudence where the seller of the alleged tying product did not receive an "additional economic benefit" from the sale of the tied product. In this regard, Tele-Direct argued that it receives no additional economic benefit from the sale of services because there is no "separate charge" for the services. The Tribunal rejected this argument and determined that a rational firm would not provide something for nothing and concluded that the precise form of that compensation or benefit was not an issue (p. 190). The Tribunal also noted that:

(1) the test of lack of any financial interest in the tied market or economic benefit from the sale of the tied product is based upon American law of the *per se* nature of tying which is not applicable to the Canadian law which is based on a different standard that of "substantial lessening of competition" (p. 189); and

(2) the question of economic benefit from the tied product only arises when two separate corporate entities are involved in the supply of the tying and tied products.

The Tribunal noted that the Yellow Pages case being considered was "unique" and refused to "fit" it into any of the American cases cited by Tele-Direct. Tele-Direct's position was that the concept of tying only

applies where the customer pays separately for the alleged tied and tying products. After reviewing the decision in *Jefferson Parish*, the Tribunal stated that the fact of separate billing is one factor to consider in determining whether or not there are two separate products but is not determinative of the issue.

Demand by Advertisers

Here, the issue was whether the advertisers, that Tele-Direct has defined as non-commissionable, were interested in purchasing the services associated with creating and placing a Yellow Pages advertisement from a source other than Tele-Direct. The Tribunal concluded that there was evidence of separate demand because, given a choice, advertisers prefer to use agents rather than Tele-Direct for services (pp. 196-197). The Tribunal also noted that there was no reason to believe that the line drawn by Tele-Direct between commissionable and non-commissionable accounts accurately reflects the boundary of demand. Nevertheless, the Tribunal noted that they did not "hear" from any small advertisers. Most of the witnesses who testified spent at least $10,000 annually on Yellow Pages advertising (representing about 2 percent of Tele-Direct's total advertisers and one-third of its advertising revenue). The Tribunal noted that for smaller advertisers it was "highly doubtful" that a separate demand for advertising services existed apart from advertising space given the fact that the lowest cost advertisements do not contain much creative content. At p. 205 of the Yellow Pages decision, the Tribunal indicated its reluctance to draw the line below which there was no evidence of buyer demand for services from independent advertising service providers but stated that there was evidence of buyer demand for advertising services for suppliers other than Tele-Direct for "larger" advertisers.

Agents' Views

The Tribunal concluded, after reviewing all of the evidence with respect to efficiency and cost comparisons between agents and Tele-Direct's internal sales force, that advertising space and advertising services are separate products with respect to large local and regional advertisers and a single product for small advertisers purchasing $10,000 or less per year. In this regard, the Tribunal concluded that Agents are primarily interested in customers with a minimum size ranging from $10,000 to $50,000 in annual expenditures on Yellow Pages advertising (p. 213).

The Director asked the Tribunal to unbundle the products across the board — and stated that if agents are more efficient, they will end up servicing the accounts. In refusing to follow this request, the Tribunal noted at p. 245 that "this implies a simple solution to a complex problem" and concluded that telephone directory advertising space and telephone directory advertising services constitute separate products down to the six market level and a single product below that level.[8]

Tying Condition

The next step taken in the analysis deals with the issue of the "tying condition". Having determined that there are separate products over at least part of the spectrum of Yellow Pages advertisers, the Tribunal then had to consider whether or not those advertisers were somehow forced to buy products together rather than from separate sources. The Director had to establish that the two products were tied together as set out in subsection 77(1) of the Act. In this regard the Tribunal noted that the "conditions" or coercion referred to in section 77 mean

more than contractual terms — they may be economic conditions which have the effect of precluding the choice of a supplier. The question of whether or not customers have an effective choice or not is the question of fact to be determined on the evidence and not the specific legal nature of the purchase agreement (pp. 249-251).

The Tribunal's conclusion was that the lack of commission in the non-commissionable local market operated as a powerful inducement to acquire both space and services from Tele-Direct.

Substantial Lessening of Competition

In considering this issue, the Tribunal noted that there was no purpose in comparing the six to eight-market accounts with all other accounts that are currently bundled (the non-commissionable local accounts) because the Tribunal determined that both demand and efficiency considerations dictated a single product for the smaller advertiser operating below the six market account level. Rather, the Tribunal compared the size of the existing commissionable market to the six and seven market accounts that were being serviced by Tele-Direct. After estimating the accounts found by the Tribunal to be tied and the dollar value of the revenues to be obtained from those accounts, the Tribunal determined that there was a substantial lessening of competition based both on the amount of revenue affected by the tie and the percentage of the market subject to the tie. Specifically, the Tribunal's estimate of the accounts which were found to be tied; namely six, seven and eight market accounts, that would be added to the commissionable market was about $19 million (p. 254). The Tribunal noted that the combined total of the accounts found to be tied adds up to well in excess of 50 percent of the current commissionable market.

Remedy

The Tribunal prohibited Tele-Direct from continuing to engage in tied selling for six, seven and eight market accounts and ordered that the advertising space and advertising services be unbundled. In making the order, the Tribunal noted that the "unbundling" could take the form of separate prices or an expanded definition of commissionable accounts. Under this scenario, advertisers would either deal with Tele-Direct for space and services or with an agent for services and through an agent with Tele-Direct for space. The Tribunal noted that the prohibition on tying, however, did not carry with it a requirement that Tele-Direct pay a specified commission to agents. Tele-Direct would determine the commission rate applicable to agents. However, the prohibition on tying meant that the price charged by Tele-Direct for its space and services together could not induce customers to use Tele-Direct services rather than the agent's services. The Tribunal also noted that the intervenor agents and the Director had asked the Tribunal to order Tele-Direct to pay a minimum 15 percent commission to agents. In noting that the Tribunal had no difficulty with Tele-Direct voluntarily complying with the Tribunal's Order by paying a minimum 15 percent commission, the setting of a commission rate by the Tribunal was not envisioned in the powers given to it under section 77 of the Act regarding tying or in the general jurisdiction given to the Tribunal under section 8. The Tribunal noted that it was not a rate-setting body and that to grant the remedy the Tribunal would be required to hold itself open to revise the 15 percent rate.

Abuse of Dominant Position

The Director put forward two abuse of dominance cases: one involving the alleged market for the supply of advertising space and the second the

alleged market for the supply of advertising services. The case involving advertising space concerns the response of Tele-Direct to the new entry by competing broadly-scoped publishers in local markets, particularly the entry of White in the Niagara Region and DSP in Sault St. Marie.

The second case is that Tele-Direct has market power in the market for the supply of telephone directory advertising services or that they are leveraging their market power in the space market into the services market. Among the anti-competitive acts alleged to form a practice affecting this market are acts directed at agents and at consultants. One of the alleged anti-competitive acts is the bundling of space and services (restricted commissionability rules for agents) which formed the basis of the tying portion of the Application. Another example is the alleged refusal by Tele-Direct to deal with consultants.

The Test

Reference was made by the Tribunal to the *Nutra Sweet* case where the common feature of the anti-competitive acts included in section 78 was that they were performed for a "purpose" namely "an intended negative effect on the competitor that is predatory, exclusionary or disciplinary" (p. 34). The Tribunal at p. 261, also made reference to the approach taken in the *D & B* case in assessing whether acts are anti-competitive as follows:

> ... in evaluating whether allegedly anti-competitive acts fall within section 78, the Tribunal must determine the "nature and purpose of the acts which are alleged to be anti-competitive and the effect that they have or may have on the relevant market." The required analysis will take into account the commercial interests of both parties to the conduct in question and the resulting restriction on competition. The decision in *Laidlaw* makes it clear that, although such proof may be possible in a particular case, it is not necessary for the Director to prove subjective intent to restrict competition in the relevant market on the part of the respondent. The respondent will be deemed to intend the effects of its actions.[9]

As noted in the *D & B* case,[10] a "business justification" must be a "credible efficiency or pro-competitive" business justification for the act in issue. Further, the Tribunal noted, the business justification must be weighed "in light of any anti-competitive effects to establish the overriding purpose" of the challenged act.

Market for Advertising Space - Publishing

The Tribunal considered whether or not Tele-Direct should be obliged to recognize advertising in independent directories as counting toward Tele-Direct's commissionability requirements to establish a National Account. The Tribunal noted that "as a general proposition, competitors should not be required to assist one another" (p. 281). However, the Tribunal then noted that this general proposition may be inapplicable where, in a given section 79 case, the "act" of the respondent meets the elements of the section and is an anti-competitive act leading to a substantial lessening of competition.

The Director alleged that Tele-Direct engaged in activities described as unlawfully targeting its competitors. The Tribunal, in considering this issue, noted that the Director did not attempt to explain what was meant by targeting in any detail. The Tribunal, however, noted that Tele-Direct behaved differently in the competitive markets. In this regard, the Director alleged that the actions of Tele-Direct constituted the anti-competitive act of targeting because its actions in markets in which broadly-scoped entry by competing publishers was

occurring were different from those in markets where no such entry had occurred. The Tribunal rejected this argument and noted that targeting, in the sense of a differentiated response to competitors, is a normal competitive reaction. Among the actions engaged in by Tele-Direct in response to the entry by DSP in Sault Ste. Marie and White in Niagara were price freezing or cutting, incentives, product improvement, and increased advertising. In this regard, counsel for the Director suggested that Tele-Direct was using its monopoly rents from other markets to cross-subsidize its responses in competitive markets. The Tribunal accepted that Tele-Direct's actions made it more expensive for the entrant than if it had accommodated them. However, the Tribunal's position was that seizing market share from a rival by offering a better product or lower prices is not, in general, exclusionary since consumers in the markets concerned are made better off (p. 287). The difficulty that the Tribunal had with the Director's argument concerning "targeting" was the Director did not advance any "objective" criteria by which the Tribunal could assess whether Tele-Direct's responses in the competitive markets had an over-all anti-competitive character or "purpose" required for section 79. Accepting that Tele-Direct had market power, the Tribunal refused to find that Tele-Direct's conduct with respect to pricing, promotion and changes to its directories in the competitive markets, in particular in the Sault Ste. Marie and Niagara areas, was anti-competitive. At p. 294 of the Yellow Pages decision, the Tribunal noted that:

> Decisions by the Tribunal restricting competitive action on the grounds that the action is of overwhelming intensity would send a chilling message about competition, that is, in our view, not consistent with the purposes of the *Act*, set forth in Section 1.1. We are concerned that in the absence of some objective test, firms can have no idea what constitutes a "competitive" verses and "anti-competitive" response when responses like those used by Tele-Direct in this case are involved (e.g., price freezing or cutting, incentives, product improvements, increased advertising).

On the other hand, the Tribunal found that Tele-Direct used its bargaining power, stemming from its dominant position in the market for the supply of telephone directory advertising, to pressure a supplier named Perception to withhold supply from DSP for the purpose of frustrating or negatively impacting DSP's attempt to enter the market in Sault Ste. Marie. Perception provided the audiotext information for a talking telephone directory. The Tribunal determined that the only possible effect of Tele-Direct's actions on consumers and advertisers was a negative one. This kind of conduct was found by the Tribunal to be within the class of anti-competitive acts against which section 79 is meant to guard. Further, the Tribunal determined that this was not an isolated act but a practice engaged in by Tele-Direct which resulted in a substantial lessening of competition in the Sault Ste. Marie market. The Tribunal noted that the audiotext problem was a serious setback for DSP in its initial effort to attract paid advertising and credibility with advertisers. However, the Director did not request a specific remedy to the audiotext problem and no remedy followed from the finding (p. 310).

Market for Advertising Services

One of the alleged anti-competitive acts is the tying of the provision of advertising services to advertising space (the allegation dealt with in the tying portion of the decision). Another alleged anti-competitive act is also included under the heading "squeezing", namely, further restricting the availability of commission to other service providers over time.

The Tribunal noted at p. 313 that it was not appropriate to combine the effects of tying with the

effects of the practice of other anti-competitive acts. The issue was whether there had been a substantial lessening of competition where agents have historically been competing. In the case of tying, the allegation was that the extent of the market itself has been limited. The finding that Tele-Direct had engaged in tying does not act as a springboard for a finding of substantial lessening in the market segment where the agents have been competing. A finding of substantial lessening of competition in the historically commissionable market should be based on the practice of Tele-Direct's acts with respect to that market.

The Tribunal noted that Tele-Direct did not have direct control or market power in the currently commissionable advertising services market but, rather, had a modest market share of approximately 25 percent (p. 315). The Director argued that Tele-Direct used the market power it had in the telephone directory advertising market, as a publisher of advertising space, as a lever to obtain market power in adverting services through alleged anti-competitive acts. The Tribunal agreed that if proven, this theory would fall within the parameters of section 79 of the Act. Among the acts alleged to be anti-competitive by the Director and engaged in by Tele-Direct against agents were:

(a) squeezing the return available to agents by transferring functions to, or withholding services from and making the terms of supply to agents more onerous; and

(b) discriminating against agents by providing space to them on less favourable terms than available to Tele-Direct's internal sales force including:

  (i) group advertising prohibiting advertisements containing the name of more than one local advertiser, i.e. franchisees;

  (ii) issue billing requiring agents to pay for advertising on behalf of their clients at the time of issue as opposed to payment on a monthly basis; and

  (iii) closing dates - requiring that agents submit advertising for publication earlier and the date applicable to Tele-Direct's sales personnel.

The Tribunal, at p. 316, noted that a detailed act by act analysis was not necessary because the Director had not demonstrated that these acts had or were likely to prevent or lessen competition substantially in the relevant advertising services market. In this regard, the Tribunal was satisfied that the market share of about 75 percent for agents and 25 percent for Tele-Direct of the market defined as the "commissionable advertising services market" was accurate. The Tribunal noted that a high market share for the agents and a correspondingly low market share for Tele-Direct would suggest that even if Tele-Direct had engaged in anti-competitive acts, it had not been successful in obtaining market power in the advertising service market. In addition, the Tribunal noted that there was no evidence of a declining trend in market share for agents or increasing trend in market share for Tele-Direct over any period of time. In concluding, the Tribunal noted at p. 319 that the Director has the burden of proving a substantial lessening of competition.

Consultants

The Director alleged that Tele-Direct had engaged in anti-competitive acts by providing advertising space to consultants on less favourable terms than to its own sales staff, including rejecting or delaying orders based on alleged orders or other problems

which would not result in delay or rejection of orders from Tele-Direct's own sales representatives. The Tribunal noted that both consultants and Tele-Direct participate in the broad telephone directory advertising market and that Tele-Direct controls that market. The Tribunal then went on to review the various acts undertaken by Tele-Direct with respect to consultants such as rejecting orders submitted by consultants on behalf of various advertisers; refusing to deal with advertisers using consultants; the implementation and adoption of various policies and guidelines which provided that Tele-Direct would not accept or act upon information sent or given by "cut agents" or consultants on behalf of customers; and that any packages received from consultants would be returned to the cut agents.

The Tribunal concluded at p. 364 that the competitive effectiveness of consultants has been reduced as a result of Tele-Direct's practice of discriminatory acts and that their ability to attract new business has been negatively effected by Tele-Direct. The Tribunal noted that although consultants currently service a small portion of the total telephone directory advertising revenue, they are competitively significant in that Tele-Direct was forced to respond to the presence of consultants by improving its servicing of its customers. Also, the Tribunal at p. 365 noted that in circumstances where a firm with a high degree of market power is found to have engaged in anti-competitive conduct, smaller impacts on competition resulting from that conduct will meet the test of being "substantial" than where the market situation was less uncompetitive to begin with. In other words, given Tele-Direct's overwhelming market power, even a small impact on the volume of consultants' business must be considered substantial.

Remedy

The Tribunal ordered that Tele-Direct be prohibited from rejecting any order submitted by a consultant on behalf of an advertiser and that Tele-Direct may not delay until close to the closing date for submitted orders for a directory to contact a customer about alleged problems in the order. On the other hand, no order was made by the Tribunal for Tele-Direct to deal with the consultants directly on behalf of advertisers given the increased costs proven to be a consequence of making such an order.

K.G.

Notes

* *Canada (Director of Investigation and Research)* v. *Tele-Direct (Publications) Inc.*, CT/94-3, http://www.ct-tc.gc.ca/english/cases/tele-dir/tele-dir.htm (hereinafter, the "Yellow Pages decision").

1 Section 19 of the *Trade-marks Act*, R.S.C. 1985, c. T-13 provides that the owner of a trade-mark has the exclusive right to its use. Section 50(1) provides that the owner of a trade-mark may licence another to use that trade-mark and that use is deemed to have the same effect as use by the owner.

2 (1995), 64 C.P.R. (3d) 216 (Comp. Trib.). For discussions of the decision in this case, see (1995) 16:3 Can. Comp. Rec. 15 and 52.

3 *Canada (Director of Investigation and Research)* v. *The Nutra-Sweet Company* (1990), 32 C.P.R. (3d) 1 (Comp. Trib.); *Canada (Director of Investigation and Research)* v. *Laidlaw Waste Systems Ltd.* (1992), 40 C.P.R. (3d) 289 (Comp. Trib.); and *Canada (Director of Investigation and Research)* v. *D & B Companies of Canada*, *ibid.* For a discussion of these three cases, see (1995) 16:3 Can. Comp. Rec. 52.

4 Consumer and Corporate Affairs Canada, Director of Investigation and Research, Information Bulletin No. 5, Supply and Services Canada, March 1991.

5 (1992), 43 C.P.R. (3rd) 161 at 281-82 (Comp. Trib.).

6 In January 1976, Tele-Direct introduced the "eight-market rule" which required the advertiser to purchase advertising with a minimum value of a "trade-mark" in eight markets defined by Tele-Direct. Pursuant to this rule, a trade-mark was reproduced on the advertisement which had a specified monetary value. Tele-Direct specified the value of the advertisement which could qualify for commission under

the eight-market rule which was equivalent to the average value of the trade-mark in the market. In this regard, Canada was divided into 19 markets (with 6 in Quebec and 7 in Ontario). The entire United States constituted the 20th market. If the account qualified and the agency provided completed art work, Tele-Direct would pay a 15 percent commission on the eight market accounts. All accounts which met the eight-market rule as of July 1993 were "grandfathered" by Tele-Direct but once the account ceases to qualify under the 8-Market Rule it cannot be requalified (p. 157).

Tele-Direct introduced the "National Definition" effective July 1, 1993 which required the advertiser to advertise in at least 20 directories in two provinces with a minimum value of a "trade-mark" (p. 158). Tele-Direct also required the advertiser to place 20 percent of its advertisements in directories outside of Tele-Direct's territory. Also, in order to receive the 20 percent commission on "National Accounts" the agency had to be a Certified Marketing Representative ("CMR") and a member of the Yellow Pages Publishers Association ("YPPA").

7 1466 U.S. 2.

8 The eight-market rule was not specifically designed to deal with the needs of regional advertisers. Tele-Direct designated seven markets in Ontario and six in Quebec. An advertiser covering all the markets in a province would be considered "regional" although such an adviser would not be commissionable under the eight-market rule. At a minimum a firm that covers an entire province the size of Ontario or Quebec should qualify (pp. 243-244).

9 *Supra*, note 2 at 257.

10 *Ibid.* at 261.

AMENDMENT TO LICENSING AGREEMENT RESOLVES COMPETITION CONCERNS ON INTELLECTUAL PROPERTY RIGHTS AND ANCILLARY RIGHTS FOLLOWING MERGER BETWEEN CARNAUDMETALBOX, S.A. AND CROWN CORK AND SEAL INC.

The Acting Director of Investigation and Research, Francine Matte, Q.C., announced on January 30, 1997 that her concerns over the impact of a merger between the two largest Canadian producers of metal vacuum closures, Crown Cork and Seal Inc. ("Crown") and CarnaudMetalbox, S.A., had been alleviated by amending a licensing agreement. The amendment resulted from a series of negotiations between the two parties over the last several months, prompted in part by the Competition Bureau's concerns. It removes impediments that would have otherwise existed on the ability and incentive of a major competitor in the United States, Continental White Cap, to compete in the Canadian market. The Acting Director hailed the development as "a fine example of the Competition Bureau's alternative case resolution approach" in a complex merger matter involving intellectual property rights.

In February 1996, Crown completed a multi-billion dollar, world-wide acquisition of CarnaudMetalbox, S.A. The merger integrated the only two significant suppliers for Canadian manufacturers of food and drinks that use metal vacuum closures as an input. These devices are metallic caps that are used with glass containers to ensure that a tight seal and vacuum are formed. For many practical reasons related to shelf-life of products and processing methods, no substitutes were considered adequate enough to alleviate customers' concerns. Thus, metal vacuum closures were determined to constitute the relevant product market.

There were no significant tariffs or other regulatory barriers to imports and thus the relevant geographic market was determined to be North America. However, the Acting Director was of the view that competition remaining after the merger from other U.S. manufacturers was not sufficient to constrain the ability of the parties to exercise market power in Canada after the merger. The largest U.S. manufacturer of metal vacuum closures, Continental White Cap, was prevented from selling into Canada by the licensing agreement; Anchor Hocking, the second largest U.S. manufacturer, is the U.S. arm

of one of the parties to the transaction, and as such, was not considered a potential competitor in Canada; the third largest, SILGAN, has the capability to supply only a very limited amount of metal vacuum closures for some of the product lines (in particular, baby food closures).

Given the impediments to foreign competition as well as significant barriers to entry including sunk costs, the Acting Director concluded that the merger of the largest and second largest metal vacuum closure manufacturers in Canada with about 99% of the Canadian portion of the relevant market would likely lead to a substantial lessening of competition. Absent the resolution of competition issues arising from territorial exclusive licensing and several transfer of technology clauses, the Acting Director had considered an application to the Competition Tribunal for an order requiring the abandonment of Crown's rights under the licensing agreement, thus allowing Continental White Cap to enter the Canadian market. In the circumstances, the likely effects of the exclusivity clause contained in the licensing agreement combined with Crown's continued use of White Cap closure technology, trade secrets, patents and trademarks resulted in a substantial lessening of competition.

As a result of the amendment to the licensing agreement, however, the transaction is no longer likely to lessen competition substantially. The amendment removes barriers to White Cap's ability to compete freely in Canada by specifying that Crown is a non-exclusive licensee. At the same time, it allows Crown to settle the issue of remaining rights under the licensing agreement through a paid-up non-exclusive license to use existing White Cap technology, until it completes its transition to another proprietary metal vacuum closure technology. White Cap will no longer be prevented by the exclusivity clause from selling into the Canadian market. Thus the amendment enhances the ability of White Cap to enter the Canadian market.

The amendment also enhances the incentive for White Cap to compete in Canada. In particular, it provides that Crown Canada irrevocably waives rights that it would have otherwise had under the agreement to the use of White Cap's future technology, trade secrets or other intellectual property. The elimination of the obligation to share future technology enhances the degree to which White Cap will achieve a competitive advantage relative to Crown Canada from cost savings it may achieve in the future, and thus benefit from any innovations. It also reduces the extent to which the production costs of Crown Canada and White Cap will be correlated in the future, and thus limits the degree of oligopolistic interdependence.

The resolution of this matter constitutes a precedent in Canadian merger policy, whereby competition concerns were resolved through a negotiated settlement between parties to an intellectual property agreement. Using the alternative case resolution approach, the Competition Bureau was able to facilitate a settlement that addressed competitive concerns by allowing Canadian users of metal vacuum closures access to a major supplier and thus allowing Canadian manufacturers of food and drinks and other firms access to necessary inputs at competitive prices.

Competition Bureau Staff

COMPETITION BUREAU WILL REQUEST A TRIBUNAL CONSENT ORDER WITH RESPECT TO ADM'S ACQUISITION OF FLOUR MILLS FROM MAPLE LEAF MILLS INC.

The following is a News Release issued by the Competition Bureau on February 28, 1997, and is reproduced with permission.

Konrad von Finckenstein, Q.C., Director of Investigation and Research under the *Competition Act*, today responded to the closing of the transaction that involved the acquisition by ADM Agri-Industries Ltd. ("ADM") of Toronto of certain flour milling assets of Maple Leaf Mills Inc. ("MLM") of Mississauga. ADM is acquiring MLM wheat flour mills in Calgary, Port Colborne and two mills in Montreal. ADM and MLM are the two largest wheat flour millers in Canada.

The Director, with the agreement of ADM, will be filing an application for a Consent Order before the Competition Tribunal shortly, seeking the divestiture of the MLM Oak Street mill in Montreal and requiring certain supply obligations by ADM to the eventual purchaser of the Oak Street mill. These remedies are aimed at resolving the substantial lessening of competition in the supply of bulk hard wheat flour in Quebec, New Brunswick, Nova Scotia, Prince Edward Island and Newfoundland ("Quebec/ Atlantic Canada") which would likely arise from the merger. The terms of the Consent Order are subject to approval by the Tribunal. Pending the filing of the application, the parties were permitted to proceed with the merger following the receipt of an undertaking from ADM to hold separate and apart from ADM the mill which is to be divested.

In the Director's view if the transaction were permitted to proceed as structured, ADM would likely be able to significantly raise prices for hard wheat flour in Quebec/Atlantic Canada and consumers in these locations would likely pay more for bread and other related bakery products.

In Ontario, the Director has concluded that the U.S. Milling Company in Buffalo would be a significant competitive presence in the foreseeable future. The Competition Bureau also did not find that the merger would substantially lessen or prevent competition in Western Canada in part due to planned or actual expansion by other flour mills in this market.

The Competition Bureau's review of the transaction involved the assistance of economic and industry experts and the cooperation of the parties. Information was also obtained from the flour milling industry, including Canadian bakers, Canadian and U.S. flour mills, associations and others related to the industry.

CONSENT ORDER SOUGHT FROM COMPETITION TRIBUNAL IN SOLID WASTE COLLECTION CASE

The following is a News Release issued by the Competition Bureau on March 5, 1997, and is reproduced with permission.

Konrad von Finckenstein, Q.C., Director of Investigation and Research under the *Competition Act*, filed an application today for a Consent Order with the Competition Tribunal with respect to non-hazardous solid waste collection in the Sarnia, Brantford, Ottawa and Outaouais markets. This Consent Order relates to the acquisition by Canadian

Waste Services Inc. of the non-hazardous solid waste business of Allied Waste Holdings (Canada) Ltd. The solid waste collection business in these markets includes residential, commercial front-end, industrial roll-off and recycling collection.

The terms of the proposed Consent Order, which were agreed to by Canadian Waste and the Director and which are subject to approval by the Tribunal, involve the divestiture of Allied's waste collection business in Sarnia; the Canadian Waste business in Brantford; and the assets acquired from WMI in the Ottawa and Outaouais markets. In order to facilitate the divestitures in the Sarnia and Ottawa markets, the proposed Consent Order requires that Canadian Waste provide the prospective buyer(s) access at a preferred price to landfills in these markets. Canadian Waste will not own a landfill or other disposal facility in the Brantford or Outaouais markets.

The competition issue in the Ottawa and Outaouais markets arose from Allied's earlier acquisition of Laidlaw Waste Systems Ltd. In September 1996, Laidlaw had acquired the solid waste business of WMI Waste Management Inc. in the Ottawa and Outaouais markets, which substantially lessened competition in these markets.

In the Director's view, if the transaction were permitted to proceed, Canadian Waste would be able to significantly raise prices in the Sarnia, Ottawa, Outaouais and Brantford markets. The Director did not find that the merger would substantially lessen or prevent competition in other markets examined.

FÉDÉRATION DES ARPENTEURS-GÉOMÈTRES DU QUÉBEC FINED $50,000 FOR MAINTAINING FEES

The following is a News Release issued by the Competition Bureau on March 10, 1997, and is reproduced with permission.

Konrad von Finckenstein, Q.C., Director of Investigation and Research under the *Competition Act*, announced today that the Fédération des arpenteurs-géomètres du Québec pleaded guilty to one count of price maintenance contrary to section 61 (1)(a) of the Act and must pay a fine of $50,000.

This is the first time a Canadian professional federation or association has pleaded guilty with respect to an agreement to enhance, maintain or discourage the reduction of professional fees among its members.

The sentence was imposed by Associate Chief Justice Gaston Desjardins of the Superior Court of Quebec in Quebec City.

Mr. Justice Desjardins also issued a Prohibition Order requiring the Fédération des arpenteurs-géomètres du Québec to comply with the Act.

The offence under the *Competition Act* relates to an agreement by members of the Fédération des arpenteurs-géomètres du Québec to enhance and maintain fee levels, and to prevent their reduction, in the regions of Quebec City, Trois-Rivières and Montreal's north and south shores, as well as in other areas of Quebec. The offence was committed over a one-year period from April 1993 to March 1994.

Certain services offered by land surveyors are, by provincial law, exclusively supplied by members of the profession. The corresponding tariffs were formerly regulated by the government. However, the government ended regulation a few years ago, preferring to have fees determined by market forces in a competitive environment.

The services directly affected by the agreement, such as building location certificates, layout, substitution and staking, are required before a building permit can be obtained or a residential, commercial or industrial property can be purchased. Therefore, the impact of the agreement would have been felt by the average home buyer and by any buyer or user of commercial and industrial buildings built or bought during the life of the agreement. Moreover other construction related entrepreneurs such as real estate agents, notaries and builders, who depend on the competitiveness of land surveyors to provide their own services, would also have been affected.

GASOLINE INQUIRIES FIND NO EVIDENCE OF ANTI-COMPETITIVE BEHAVIOUR

The following is a News Release issued by the Competition Bureau on March 18, 1997, and is reproduced with permission.

Investigations by the Competition Bureau into practices of several major gasoline companies have produced no evidence to support allegations of price fixing, anti-competitive behaviour and misleading advertising.

"Thorough investigations have been undertaken by Competition Bureau staff who were assisted by independent experts", said Konrad von Finckenstein, Q.C., Director of Investigation and Research, who is responsible for the administration and enforcement of the *Competition Act*. "No evidence of any competition offence was found."

During the Spring and Summer of 1996, four gasoline inquiries were initiated following the receipt of applications pursuant to section 9 of the Act.

There was an allegation that the major gasoline companies had engaged in a national price fixing conspiracy. The investigation determined that there was no evidence to support this allegation.

A second allegation was made that Ultramar Canada Inc.'s Value Plus marketing campaign was a predatory pricing practice aimed at eliminating the competition and was misleading. The investigation concluded that the price war which broke out in Quebec and the Maritimes in the summer of 1996 was initiated by a variety of firms, including independents, and that Ultramar initiated price decreases a relatively small percentage of the time. Overall, the investigation concluded that the price wars were an indication of healthy competition for market share.

A third allegation addressed the issue of abuse of dominant position as it related to Ultramar and other regional and national petroleum companies. The investigation found no evidence to support the allegations that the companies were squeezing the margins available to independent petroleum marketers with the intent of forcing the independents out of business. In fact, the margin between crude and retail prices has been shrinking for all firms over the past decade. The evidence indicated that declining margins being earned by large and small

Canadian petroleum companies are the result of competition and the restructuring in the industry.

The fourth allegation that the national and regional petroleum companies were selling gasoline at prices lower than acquisition costs was also investigated. The inquiry concluded that the pricing practices were not designed to eliminate or discipline gasoline retailers, but were as a result of the price wars at the retail level in Quebec.

There was a fifth allegation that Ultramar made false and misleading claims in its advertising campaign. The investigation found that the claims made by Ultramar did not raise any issue under the Act and that the statements made were not misleading.

"The role of the Competition Bureau is to examine and prevent anti-competitive behaviour, thereby ensuring a competitive marketplace", said Mr. von Finckenstein. "In fact, in the gasoline industry alone over the past number of years we have investigated close to fifty cases involving alleged anti-competitive behaviour and have prosecuted 11 of them, resulting in 9 convictions."