CANADIAN COMPETITION LAW AND POLICY DEVELOPMENTS

The articles in this section were written by Barry Zalmanowitz, Milner Fenerty, and staff of the Competition Bureau.

ALBERTA COURT OF QUEEN'S BENCH DISMISSES CROWN'S APPLICATION TO CHALLENGE DISCHARGE OF ALBERTA LAND SURVEYORS ON PRICE FIXING CHARGES

In *R.* v. *Bayda and Associates Surveys Inc.*,[1] Mr. Justice Ritter dismissed the Crown's certiorari application to quash the decision of the Provincial Court Judge who, after the preliminary inquiry, discharged Alberta land surveyors charged with price fixing under section 45(1)(c) of the *Competition Act*.

Background

In January 1996, several land surveying firms and individuals were charged under section 45(1)(c) with conspiring to fix the price for residential real property reports in the Edmonton area. Some of the accused waived their rights to a preliminary inquiry, but those who did not were discharged on October 24, 1996 by Provincial Court Judge Tilley after a preliminary inquiry that took approximately 3 days.

Land surveying is a profession regulated by the *Land Surveyors Act* (Alberta). A real property report is a certification of location of improvements in relation to the boundaries of a parcel of land and is usually required when purchasing a home or placing a mortgage on it. Under the *Land Surveyors Act* (Alberta), a real property report may only be prepared by a registered member of the Alberta Land Surveyors Association.

After the preliminary inquiry, Judge Tilley delivered brief oral reasons, concluding that there was no evidence upon which a reasonable jury properly instructed could conclude that there was an agreement or conspiracy.

The Crown's theory was that the conspiracy had taken place at a meeting at a golf and country club in Edmonton. The evidence included parallel pricing behaviour, statements made to Competition Bureau officers by some of the accused, and oral testimony of one of the participants at the meeting. Judge Tilley found that the direct evidence of the Crown witness who described what happened at the meeting negated the existence of an agreement.

The Crown applied to the Alberta Court of Queen's Bench for certiorari to quash Judge Tilley's decision. On August 13, 1997, Justice Ritter delivered written reasons for judgment dismissing the Crown's application.

While in most conspiracy cases, the Crown is not able to lead direct evidence of what was said on the occasion on which it is alleged that the conspiracy was entered into, here, such evidence

was given by a witness, Mr. Robertson, who at the time of the alleged offence was employed by one of the accused as general manager and was involved in organizing the meeting. He testified that in September and October 1994, he attended three meetings of Edmonton area land surveyors. The initial and main purpose of these meetings was to discuss new standards established by the governing body of land surveyors concerning the preparation of real property reports. Those attending the meeting were of the view that the new requirements entailed significant additional work, and the purpose of the meeting was to discuss how best to meet the objectives of the new directives. The discussion wandered onto costs and prices but those topics occupied a relatively small portion of the meeting. The surveyors discussed what it would cost to meet the new requirements and make a profit, and a few of the participants at the meeting expressed their views. The witness said that general consensus was arrived at that an increase of $90.00 to $100.00 would be acceptable to the public, but he also made specific reference to a statement made by one of the land surveyors who said he was "... going to charge whatever the .... he wanted".

Decision of Court of Queen's Bench

Justice Ritter considered two issues:

1. whether the Provincial Court Judge made a jurisdictional error justifying certiorari; and

2. whether the Crown was beyond the limitation period for serving its notice of motion for certiorari (the Crown served its notice of motion beyond the six-month limitation period provided in the Alberta Rules of Court).

Whether the Provincial Court Judge made a Jurisdictional Error Justifying Certiorari

It was clear that Judge Tilley properly instructed himself on the correct test which is set out in *United States of America* v. *Sheppard,*[2] which is whether there is any evidence upon which a reasonable jury properly instructed could convict. It is also clear from *Dubois* v. *The Queen*[3] that certiorari only lies from a decision of a Provincial Court Judge at a preliminary inquiry where he commits a jurisdictional error. That is, whether the Provincial Court Judge in effect performs a function other than that assigned to him, such as determining whether there is reasonable doubt as to guilt, which is usually the function of a trier of fact. Justice Ritter stated that the difficulty in the matter, both before him and the Provincial Court Judge, was while some of the evidence led by the Crown might permit an inference that there was an agreement, the direct evidence presented by the Crown as to what happened on the occasion on which it was alleged that the surveyors conspired tended to negate the existence of an agreement. The Crown's position was that Judge Tilley improperly embarked on the process of weighing the evidence and committed a jurisdictional error. Justice Ritter held:

> [w]hile a Preliminary Inquiry judge who enters into a process of weighing and balancing of evidence commits a jurisdictional error as he is usurping the function of trial judge or jury there is some process of weighing of evidence involved in the proper exercise of the function of the Provincial Court Judge at a Preliminary Inquiry. That is because no properly instructed jury could ever reasonably convict an accused on the basis of a mere scintilla of evidence linking the accused with a crime (*R.* v. *Whynot* (1994), 129 N.S.R. (2d) 347 (N.S.C.A.); *United States of America* v. *Sheppard* (1976), 30 C.C.C. (2d) 424 (S.C.C.)). This proposition arises from the statement of the test for a committal/discharge of an accused.[4]

Justice Ritter concluded that Judge Tilley was entitled to consider the direct evidence that tended to negate the existence of an agreement for the purposes of determining whether a properly instructed jury could ever reasonably convict, and that this was a case where the Provincial Court Judge properly considered all of the evidence heard at the preliminary inquiry, and not simply the evidence the Crown considered most favourable to its position in making his decision.[5]

Justice Ritter said that he had little difficulty in concluding that the Provincial Court Judge came to the correct decision with respect to the surveyor who said "he was going to charge whatever the .... he wanted".[6] Concerning the others, Justice Ritter said that while he may well have come to a different decision than the Provincial Court Judge, he was satisfied that the Provincial Court Judge's decision was a reasonable one and as such, certiorari was not available.

Another point raised in this case is whether the Crown is bound by rules of Court imposing limitations on the availability of certiorari, a prerogative remedy, that do not expressly state that they apply to the Crown. Justice Ritter concluded that the six-month limitation period in the Alberta Rules of Court was also applicable to the Crown by necessary implication. Justice Ritter found that the limitation period was not one he could extend, but even if he could, he would not have done so in these circumstances because the only explanation for the Crown's delay in initiating its proceedings until almost six months after the discharge at the preliminary inquiry was a bureaucratic process of review.

Comment

The Crown has advised that it does not intend to pursue the land surveyors any further. While the accused were successful, this case is a good example of the level of scrutiny that the Competition Bureau can focus on a group of professionals or businessmen who permit a discussion at a legitimate meeting to wander onto issues of costs and prices.

It also illustrates the difficulty that the Crown faces in satisfying a Court (even at a preliminary inquiry) that accused conspired, combined, agreed or arranged within the meaning of section 45(1)(c) of the Act. Courts have held that each of these words require the act of agreeing or a meeting of the minds, e.g. *R.* v. *Nova Scotia Pharmaceutical Society et al.*[7] and *R.* v. *Canada Packers Inc.*[8]

From a practical perspective, the Crown, by direct or circumstantial evidence, must establish that the accused in effect communicated to one another that they would raise their prices in exchange for the others agreeing to do the same. While it is unwise for a group of professionals to get together to discuss their prices, most Courts would not convict them of an indictable offence for discussing their views on what might be a reasonable price increase without making some kind of commitment or promise to behave in a certain way in the future. When parallel pricing behaviour follows such a discussion, there is always a question of whether they agreed to raise their prices or whether independent decisions followed an exchange of information. However, each case turns on its own peculiar circumstances.

B.Z.

Notes

1 [1997] A.J. No. 806 (Alta. Q.B.).
2 (1976), 30 C.C.C. (2d) 424 (S.C.C.).
3 (1986), 25 C.C.C. (3d) 221 (S.C.C.).
4 *Supra,* note 1 at para. 52.
5 *Ibid.* at para. 55.
6 *Ibid.* at para. 58.
7 (1992), 93 D.L.R. (4th) 36 at 60 (S.C.C.).
8 (1988), 19 C.P.R. (3d) 133 at 144, 145 (Alta. Q.B.).

COMPETITION BUREAU REQUESTS A STAY OF PROCEEDINGS CHALLENGING THE MERGER BETWEEN CAST NORTH AMERICA INC. AND C.P. LIMITED

The following is a News Release issued by the Competition Bureau on September 9, 1997, and is reproduced with permission.

The Competition Bureau announced today that it is seeking a stay of proceedings with respect to an application challenging the acquisition of Cast North America Inc. by Canadian Pacific Limited.

On December 22, 1996 an application was filed with the Competition Tribunal challenging the merger between Cast and C.P. Limited alleging that it substantially lessened or prevented competition in container shipping between Montreal and Northern Europe.

The merged companies operate fully integrated intermodal container shipping services known as Cast and Canada Maritime.

The application for the stay was filed in response to the planned entry of a competing service in the market by a consortium consisting of Maersk Line, Sea-Land Service Inc., and P&O Nedlloyd Container Line Ltd.

The stay would allow the Director the opportunity to assess the competitive impact of the proposed entry.

Editors' Note: The stay referred to above was granted in September 1997. The Order provides that if the Director does not move to lift the stay by March 31, 1998, the section 92 application will be dismissed. The Director has not moved to lift the stay to date.

COMPETITION BUREAU INTRODUCES FEE CHARGING POLICY

The following is an Information Bulletin issued by the Competition Bureau on October 20, 1997, and is reproduced with permission.

The Competition Bureau announced today that it will begin charging fees for some of the services and regulatory processes it provides under the *Competition Act*. Fees will become effective November 3, 1997 after the proposal is published in Part I of *The Canada Gazette*.

The Bureau's initiative is consistent with the government's Cost Recovery and Charging Policy, which is to ensure that fees are targeted only to those parties who obtain direct benefit, over and above that received by the general public.

After extensive consultations and feedback from interested stakeholders, a limited number of activities under the *Competition Act* have been identified as suitable for fees:

- Pre-Merger Notification filings;
- Advance Ruling Certificates;
- Advisory Opinions; and
- Photocopies in certain instances.

The Bureau will charge a fee of $25,000 for Advance Ruling Certificates and for those matters requiring Pre-Merger Notification filings. Written Advisory Opinions on Sections 52 to 60 of the Act will cost $500. Requests dealing with other Sections will cost $4,000. Photocopies will cost 25 cents per page.

A fee and standards regime will make the Bureau's services more efficient. Companies and individuals paying the fees will benefit from more informative reviews and opinions and, in most instances, quicker turn-around times.

The Bureau will establish an annual fee forum to review performance, complaints and service levels. The forum, as well as other mechanisms, will provide an opportunity for clients to give feedback on an annual basis. The Bureau will publicly report on its performance in its Annual Report to Parliament and on a quarterly basis to stakeholders.

COMPETITION BUREAU FEE CHARGING POLICY

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

Introduction

The mandate of the Competition Bureau of the Department of Industry is to enforce and administer the *Competition Act* in order to maintain and encourage competition in Canada and to promote an efficient and adaptable Canadian economy.

The Bureau's main goal is to promote conformity with the law. One of the best ways to achieve this is through the provision of more effective services and high quality products.

In pursuing its mandate, the Bureau strives to achieve a number of objectives, including investigating illegal activity and preventing contraventions of the Act through various means including merger review and the provision of advisory opinions pertaining to proposed business conduct. The following are the details pertaining to the introduction of fees for pre-merger notification filings ("PMNs"), advance ruling certificates ("ARCs"), advisory opinions and photocopies.

The fee policy is consistent with the government's overall objective of fairness which seeks to ensure that those who benefit most from a service should pay for it, rather than have all Canadians pay through general taxation.

The Services and Regulatory Processes

Premerger Notification Filings

Under section 114 of the Act, a person or persons who are proposing a merger transaction and meet specific thresholds must, before completing the transaction, notify the Director of Investigation and Research that the transaction is proposed and supply the Bureau with information as specified in the Act. The transaction must not be completed before the expiration of a certain period[1] unless the Director provides prior notification to the person or persons that he does not intend to make an application to the Competition Tribunal.

Advance Ruling Certificates

Under section 102, where the Director is satisfied by a party or parties to a proposed transaction that

he would not have sufficient grounds to apply to the Competition Tribunal for an order under section 92, the Director may issue an ARC in respect of a proposed transaction.

Advisory Opinions

Pursuant to its Program of Compliance, the Bureau undertakes to promote and ensure compliance with the provisions of the Act through a variety of mechanisms including a program of communication and education and the use of specific instruments such as advisory opinions.[2]

The Bureau will institute fees for one type of advisory opinion on the potential application of the *Competition Act* to proposed business conduct. The specific opinion for which fees will be charged will be based on information submitted by the applicant[3] as well as on previous jurisprudence, previous opinions, Bureau knowledge and the stated policies of the Director. The Bureau will not undertake third party contacts or verifications.

Photocopies

The Bureau is periodically approached to make photocopies for various agencies or persons from within or outside the Department of Industry. In these circumstances, the Bureau will charge for photocopies at a rate of 25 cents per page. Such a fee will enable the Bureau to recover these costs. This fee will also apply to parties seeking photocopies of documents seized under section 15 of the Act once these have been returned to the Bureau. Pursuant to section 15, a judge of a superior or county court or of the Federal Court may issue a warrant authorizing the Director or an authorized representative to search premises and to copy or seize records for examination or copying. The Bureau will charge a fee to persons who are the subject of a search (or their counsel) and who request copies of seized documents[4] before these have been returned to the parties under inquiry.

Background

In developing this proposal, consideration has been given to the comments received during the 1993 User Fee Consultation and the 1995 Advisory Opinion Survey. More recently in June 1997, the Competition Bureau's User Fee Policy Development Forums were held in Toronto, Montreal and Vancouver and these were followed with the publication of a consultation paper in Part I of the Canada Gazette and wide distribution of the paper and Business Impact Test in July 1997. Those consulted included members of the legal and business communities, a number of associations as well as the public. These consultations provided very valuable feedback to the Bureau.

1. Turn-around times have been refined to be both challenging and realistic. They are the following:

Service Regulatory Process	**Maximum Turn-around Times**
Premerger Notification:	
non-complex	14 days
complex	10 weeks
very complex	5 months
Advisory Opinions:	
Sections 52 to 60	
non-complex	8 days
complex	30 days

Other provision:

non-complex	4 weeks
complex	8 weeks

There was some concern that the turn-around times for very complex mergers and for complex advisory opinions might negatively impede business transactions. These were subsequently re-visited and refined and represent the maximum time within which one can expect the provision of the stated service.

2. There were suggestions made to make the Advisory Opinion letter more user-friendly and clear, to indicate the reasoning behind the response and to consider Bureau knowledge and policies and any jurisprudence when formulating these opinions.

3. An information document detailing the type of information that is required by the Bureau for merger review and for advisory opinions has been developed, and will be available on the Bureau's web site at http://strategis.ic.gc.ca/competition or by contacting the Complaints and Public Enquiries Centre.[5]

Fee Schedule

1.	Premerger notification filing*	$25,000/each
2.	Advance ruling certificate request	$25,000/each
3.	Advisory opinion request**	
	Sections 52 to 60 of the Act	$500/each
	All other provisions	$4,000/each
4.	Photocopies	$0.25/page

* Premerger notification filings for the class of transactions normally referred to as asset securitizations will be levied a fee of $50/each.

** A fee of $50.00 will be levied for requests for interpretations of or compliance with prohibition orders and judgements and requests made by non-profit community-based organizations.

Refund Policy

1. The fee for a premerger notification filing will be refunded upon request if the parties abandon the transaction within 2 days from the time of the filing.

2. The fee for an Advance Ruling Certificate request will be refunded upon request if the proposal is withdrawn within 2 days from the time that the request for the certificate is made and a certificate has not been issued.

3. The fee for an advisory opinion request will be refunded upon request if this request is made within 2 days from the time that the request for an opinion is made. This does not apply to opinions involving sections 52 to 60 of the Act due to the short turn-around times.

Method of Payment

Payments may be made by VISA, Mastercard or by cheque made payable to the Receiver General for Canada.

Notes

[1] Seven or twenty-one days pursuant to sections 121 and 122 respectively.

[2] Additional information is available in the Competition Bureau's Program of Compliance publication.

[3] *Ibid.*

[4] With the exception of copies of essential working documents.

[5] The Complaints and Public Enquiries Centre can be reached at (819) 997-4282 in the National Capital Region or toll free at 1-800-348-5358.

COMPETITION BUREAU RELEASES STUDY ON WHISTLEBLOWING

The following is an Information Bulletin issued by the Competition Bureau on November 18, 1997, and is reproduced with permission.

The Competition Bureau released today the findings of an independent study with an Addendum by the Honourable Charles L. Dubin, Q.C., on whistleblowing and protection of whistleblowers, employees who speak out about possible violations of the *Competition Act* by their employers.

In May 1997, Mr. Dubin was asked by the Bureau to consider the protections currently available to whistleblowers in the competition law context, to provide examples of whistleblowing legislation in Canada and elsewhere and to recommend measures to encourage whistleblowers to assist the Competition Bureau in promoting conformity with competition legislation and in prosecuting offenders.

In his report Mr. Dubin concluded that there is no need to amend the *Competition Act* to protect whistleblowers as other processes are in place to provide protection.

The Bureau will be initiating further consultations on important competition issues, including the study and its Addendum, in 1998. These consultations will form the basis for consideration of subsequent amendments to the Act.

TELEMARKETING SCAMS TARGETED BY *COMPETITION ACT* AMENDMENTS

The following is a News Release issued by the Competition Bureau on November 20, 1997, and is reproduced with permission.

Canadian consumers and businesses will be better protected from telemarketing frauds by new measures contained in proposed amendments to the *Competition Act* which were tabled in the House today by Industry Minister John Manley.

"Vulnerable people, particularly elderly Canadians, have been ripped off by unscrupulous telemarketing scam artists," said Mr. Manley. "The tools provided by these amendments will go a long way towards shutting down these notorious operations."

The proposed amendments have been strengthened since the proposals introduced in the previous Parliament, and would:

- provide for a new criminal offence for deceptive telemarketing;
- provide for stricter disclosure requirements to help potential victims make informed decisions and distinguish between legitimate telemarketers and scams;
- provide quicker and more effective resolution of misleading advertising and deceptive marketing practices through the use of civil, rather than criminal law provisions;
- revise and clarify the law regarding ordinary price claims by retailers;
- allow judicially authorized interception, without consent, of private communications as an investigative tool, to tackle the most

serious cases involving price fixing, bid rigging and deceptive telemarketing provisions of the *Competition Act* (sections 45, 47 and 52.1);

- improve the administration of the merger prenotification process, while reducing the regulatory burden on business; and
- expand the tools available to the courts to address criminal conduct through consent resolutions and directive orders following conviction.

"By providing more effective tools for competition law enforcement, this initiative will help to foster a healthier marketplace, ensuring both fair competition and consumer protection," said Mr. Manley.

According to Konrad von Finckenstein, Director of Investigation and Research, "these amendments will provide the Competition Bureau with modern tools to deal with emerging business trends and to promote conformity with the law."

The amendments will also help address the concerns of Canada and the United States about the growing problem of cross-border telemarketing frauds. A bi-national Working Group set up to examine this problem transmitted today its report to the Prime Minister and the U.S. President. It examined a number of areas in which legislative changes or administrative arrangements could be used to control the problem in both countries. Some of the concerns expressed included the need for effective powers of investigation, the need for federal coordination when an offence involves many provinces or states and the need for powers to deprive fraudulent telemarketers of the tools they need to commit the offence.