# CANADIAN COMPETITION LAW AND POLICY DEVELOPMENTS

*The articles in this section were written by James B. Musgrove, Lang Michener, and staff of the Competition Bureau.*

## WARNER MUSIC CASE

In September 1997 the Director commenced an application (CT-97/3) before the Competition Tribunal, pursuant to section 75 (refusal to supply), against Warner Music Canada Ltd. and two of its U.S. affiliates, Warner Music Group Inc. and WEA International Inc. (collectively "Warner"). The Director sought an order that Warner issue licenses to BMG Direct Ltd. (a mail-order record club) so that it might make CDs from Warner master recordings. The Director alleged that BMG needed such licenses in order to compete in the mail-order record (more properly CD) club business in Canada. The only other participant in the mail-order record club business in Canada is Columbia House, which is an equal partnership of Warner and of Sony Music Entertainment. Warner had granted such licenses to Columbia House.

In response to the application Warner brought a motion under Rule 419 of the Federal Court Rules seeking that the application be struck out as disclosing no cause of action. Warner also moved under Rule 474 on the basis that there was no matter of fact in dispute, and as a pure matter of law the application could be determined at an early stage. In addition, Warner brought a motion alleging that service on the U.S. Warner companies was improper, that the Tribunal had no jurisdiction over them as the *Competition Act* does not have extra-territorial effect, and it brought a motion under sections 18.3 and 28(2) of the *Federal Court Act* for a reference to the Federal Court of Appeal.

In the result the Tribunal struck out the Director's application under Rule 419 of the Federal Court Rules, without having to reach a decision on the other issues.

The basis of the Tribunal's decision was that the word "product" as used in section 75 cannot be read to include copyright licenses. While the word "product" as used in the *Competition Act* generally is broad enough to include a copyright license, within section 75 "products" referred to therein must be in ample supply, and there must be usual trade terms for the supply of such products. The Tribunal noted that there cannot be ample supply of legal rights over intellectual property, which are exclusive by their very nature, and there cannot be usual trade terms when licenses may validly be withheld. The right granted by Parliament to exclude others is fundamental to intellectual property rights and cannot be considered to be anti-competitive. It stated that there is no provision in the *Copyright Act* which limits the copyright's right to license. As a matter of copyright law Warner

had the right to refuse to license if it so chose. The Tribunal further noted that there is nothing in the legislative history of section 75 of the Act which would reveal an intention to have it operate as a compulsory licensing provision for intellectual property.

Warner argued that nowhere in the Act is the Tribunal given the power to override the simple exercise of intellectual property rights. It argued that a grant of such power must be based on clear and unequivocal language. Such clear and unequivocal language is found in section 32 of the Act (vis-à-vis the Federal Court's power), but given that language one should not read such a right into section 75 in the absence of clear language. As well, Warner argued that section 79(5) excludes acts engaged in only pursuant to the exercise of intellectual property rights from being anti-competitive, and therefore one could not reasonably find jurisdiction over such matters in section 75 without a clear statement to that effect. The Tribunal accepted these submissions.

The Tribunal referred to its own decision in the *Tele-Direct* case where it stated, in relation to refusal to license trademarks, that such conduct falls squarely within the prerogative of the intellectual property right holder. It noted that inherent in the very nature of the right to license a trademark is the right to refuse to do so, and that copyright rights and trademark rights are similar in that respect.

Finally, the Director had argued that should the Tribunal conclude that refusal to grant a license is not included within the definition of "product" in section 75, then the result would be that intellectual property rights would be seen to trump competition law, and dire consequences would follow. All such distribution arrangements would be beyond the Director's reach, and businesses would arrange their affairs to maximize such insulation. The Tribunal responded to that "floodgates" argument by noting that the *Competition Act* gives the Tribunal specific jurisdiction to deal with certain competitive issues but not others, and that that is the statutory framework within which competition law in Canada operates.

In summary, the decision in *Warner Music,* which is expected to be appealed by the Director, continues the line of cases in which the Courts and the Tribunal have shown reluctance to interfere with the "normal" use of intellectual property rights by employing the mechanisms of the *Competition Act.*

J.B.M.

## ELECTRICAL CONTRACTORS PLEAD GUILTY TO BID-RIGGING AND PAY FINES OF $2.55 MILLION

*The following is a News Release issued by the Competition Bureau on December 19, 1997, and is reproduced with permission.*

Konrad von Finckenstein, Q.C., Director of Investigation and Research under the *Competition Act,* announced today that four Toronto electrical contractors, 948099 Ontario Inc. (carrying on business as Plan Electric Co.), Ainsworth Inc., Guild Electric Limited and The State Group Limited, pled guilty in the General Division of the Ontario Court, in Toronto, to bid-rigging, contrary to section 47 of the Act, and must pay fines totaling $2.55 million.

The charges relate to the period from 1988 to 1993 and are the result of an extensive criminal

investigation conducted by the Competition Bureau into a scheme designed to create the illusion of competitive pricing.

Although the majority of the tenders which the companies were convicted of rigging affected electrical contracts for the renovation of commercial space, including certain leasehold improvements at Pearson Airport's Terminal III, some of the companies were also convicted of rigging tenders related to major new construction projects, including the SkyDome Hotel and BCE Place Phase 2.

"Businesses go to great lengths to ensure they are obtaining the best possible price by using a tendering system," Mr. von Finckenstein stated. "Substantial penalties are necessary to deter those who seek to corrupt the competitive tendering process through illegal agreements."

Plan was convicted on 13 counts and was fined $750,000. Ainsworth was convicted on seven counts and was fined $750,000, Guild was convicted on six counts and was fined $300,000 and State was convicted on 13 counts and was fined $750,000. These parties have received favourable treatment for entering early guilty pleas. Ainsworth and Plan also received additional consideration as a result of having cooperated with the investigation.

The four companies have each taken steps to institute internal compliance programs designed to ensure compliance with the Act.

The Bureau's investigation into allegations of bid-rigging by other electrical contractors, and related conduct by a general contractor, in the Metropolitan Toronto area continues. The Director anticipates making recommendations concerning these other parties to the Attorney General of Canada in the near future.

The Competition Bureau offers an education program to assist companies that utilize the tendering process to detect and prevent bid-rigging, and also to educate bidders to ensure they comply with the Act. In addition, the Bureau has a program by which anyone, including those wishing to remain anonymous, can bring forward information concerning possible violations of the Act.

## ANOTHER ELECTRICAL CONTRACTOR PLEADS GUILTY IN TORONTO BID-RIGGING INVESTIGATION

*The following is a News Release issued by the Competition Bureau on February 27, 1998, and is reproduced with permission.*

The Competition Bureau announced today that the electrical contracting firm Smith And Long Limited pleaded guilty to 10 counts of bid-rigging and was fined $100,000. A form of price-fixing, bid-rigging is an offence under Canada's *Competition Act*.

The Competition Bureau is continuing its investigation of other electrical contractors and one general contractor.

"The Bureau will not cease in its pursuit of all the parties it believes may be involved in bid-rigging schemes across Canada," said Konrad von Finckenstein, Q.C., Director of Investigation and Research. "The integrity of the bidding system in Canada must be maintained so that purchasers can be assured that they are getting the best possible price."

The Toronto-based firm of Smith And Long was sentenced today in the Ontario Court (General Division) in Toronto, on charges relating to the rigging of tenders for electrical contracting work during the period 1990 to 1993. As a result of the early guilty plea, the company received favourable treatment on sentencing.

Bid-rigging is an agreement whereby one or more bidders on a contract refrain from submitting bids or where those who do bid on the contract agree to submit a pre-arranged price. It is only considered an offence if the parties to the agreement fail to make their intentions known to the potential purchaser before submitting their bids.

This conviction is the result of an extensive investigation by the Bureau into the electrical contracting industry in the Toronto area. In December 1997, four major electrical contracting firms were prosecuted by the Attorney General of Canada, and were fined a total of $2.55 million.[1]

**Note**

[1] See "Electrical Contractors Plead Guilty to Bid-Rigging and Pay Fines of $2.55 Million", *supra*, at 2.

## COMPETITION BUREAU STARTS CONSULTATIONS ON DRAFT OF THE MERGER ENFORCEMENT GUIDELINES AS APPLIED TO A BANK MERGER

*The following is a Media Advisory issued by the Competition Bureau on February 27, 1998, and is reproduced with permission.*

The Competition Bureau is announcing in the *Canada Gazette* of February 28, 1998 the launch of a consultation process on the Preliminary Draft of the Merger Enforcement Guidelines as Applied to a Bank Merger. The material to be reviewed is contained in Appendix II of the Bureau's submission to the Task Force on the Future of the Canadian Financial Services Sector (November 1997).

A copy of the notice in the *Canada Gazette* and the documentation under review are available on the Internet at: strategis.ic.gc.ca/competition. Printed copies can be obtained by contacting the Bureau's Complaints and Public Enquiries Centre at 1-800-348-5358, or in the National Capital Region at (819) 997-4282.

## VH$ NETWORK INC. FINED $70,000 UNDER THE MULTI-LEVEL MARKETING PROVISIONS OF THE *COMPETITION ACT*

*The following is a News Release issued by the Competition Bureau on March 20, 1998, and is reproduced with permission.*

The Competition Bureau announced today that VH$ Network Inc. pleaded guilty to two offences contrary to the multi-level marketing provisions of the *Competition Act* and was fined a total of $70,000. A prohibition order was imposed against the company and its shareholders, including Groupmark Canada Limited. The order forbids income claims without disclosure of compensation earned by the majority of participants in the multi-level marketing plan.

VH$ Network, a Mississauga-based multi-level marketing company, sold various products that were advertised in video cassette catalogues. Charges relate to representations made at recruitment meetings, in training manuals, in fax-on-demand

service, and in a pre-recorded telephone message. Income claims were made without disclosure of the compensation earned by the majority of participants.

"People are often misled to believe that they can earn significant amounts of money in multi-level marketing plans," said Konrad von Finckenstein, Director of Investigation and Research. "To comply with the *Competition Act*, any income claims made in connection with these plans must be accompanied by disclosure of the amount typically earned in the plans."

On February 13, 1998, GeoForce Inc. pleaded guilty to two similar offences under the Act. This Edmonton-based multi-level marketing company sold herbal supplements through a network of distributors.

Multi-level marketing is a method of selling products through various levels of distributors. These distributors receive commissions on their own sales as well as the sales of those they recruit. Under the Act, operators of multi-level marketing plans who make income claims to potential distributors must disclose the amount of money typically earned by existing distributors in the network.