CANADIAN COMPETITION LAW DEVELOPMENTS

Articles in this section were written by Lawson A. W. Hunter (Fraser and Beatty), John F. Blakney (Fraser and Beatty), and Eric A. Milligan (Milligan and Company).

CONSTITUTIONAL CHALLENGE IN MERGER CASE SUMMARIZED

A hearing of the constitutional challenges to the validity of the *Competition Act* raised by the parties to the Québec Meat Rendering Industry Merger (see the *CCPR* for June and September 1987) is not expected to be heard until March 1988.

The principal constitutional arguments raised by the meat rendering companies are:

- The *Competition Act* constitutes an encroachment on the exclusive jurisdiction of the provinces over property and civil rights in the province and more generally over all matters of merely local nature in the province. The *Competition Act* purports to regulate commercial agreements and transactions between private parties without restriction to such arrangements pertaining to inter-provincial or international commerce. Accordingly, the Competition Tribunal lacks jurisdiction to decide the Director's application;
- Under the terms of the *Agricultural Products, Marine Products and Food Act*, the activities and the meat rendering are strictly regulated and controlled by Québec authorities and are therefore not subject to the *Competition Act*;
- The merger provisions of the *Competition Act* are vague and consequently are void at common law. Further, they do not constitute a reasonable limit on *Charter* freedoms which can be demonstratively justified in a free and democratic society;
- The vagueness of the merger provisions also results in the deprivation of rights without due process of law.

These grounds have been disputed by the Attorney General for Canada. The Attorney General's defence emphasizes that the authority of the Parliament of Canada in relation to trade and commerce is not limited to international and interprovincial commerce "but also includes the general regulation of commerce affecting the country as a whole, including the preservation and maintenance of such competition as Parliament may deem appropriate."

The Attorney General has also emphasized that the *Competition Act* is not designed to regulate local industry and should therefore not be read down with the Québec legislation under which meat rendering operations are licenced:

> The provisions of the *Agricultural Products, Marine Products and Food Act* are not incompatible with the provisions of the *Competition Act*, which does not deal with the same subject matter and does not have the same objects, and so the said *Competition Act* is constitutionally applicable to the business activities engaged in by the plaintiffs, even if they are activities that are validly regulated by the provincial legislature in relation to aspects of those activities that fall within the competence assigned to a province under section 92 of the *Constitution Act 1867*.

As a result, the decision on the merits of the meat rendering companies' application can be expected to shed considerable light on:

- The applicability of the merger provisions of the *Act* with respect to purely intraprovincial markets. It is worth keeping in mind that the Director's application has, primarily due to perceived regulatory barriers to interprovincial trade in the industry, defined the geographic market as the Province of Québec;

- The availability of the so-called "regulated industries exemption" with respect to the new merger law. The *Combines Act* merger provision was founded upon the federal criminal law power while the *Competition Act* merger provisions have been founded upon the federal "trade and commerce" power. *J.F.B.*

SCC RULES ON DIRECTOR'S INTERVENTION CAPACITY

In two related judgments rendered on November 19, 1987, the Supreme Court of Canada upheld decisions of the Newfoundland and New Brunswick Courts of Appeal which had concluded that, under the former *Combines Investigation Act*, the Director of Investigation and Research lacked the capacity to intervene in proceedings of provincial regulatory agencies. (*Director of Investigation and Research under the Combines Investigation Act v. Newfoundland Telephone Company Limited and Newfoundland Board of Commissioners of Public Utilities*, and the *New Brunswick Telephone Company Limited v. Lawson A.W. Hunter and Board of Commissioners of Public Utilities for the Province of New Brunswick*, judgments rendered November 19, 1987, unreported.)

Both cases arose from interventions by the Director in board hearings to establish policy with respect to the attachment of customer-owned and customer-maintained telecommunications terminal equipment to the networks of Newfoundland Telephone and New Brunswick Telephone. Both interventions had been permitted by the provincial regulatory boards but were challenged by the telephone companies.

Speaking for the Supreme Court in both cases, the Honourable Mr. Justice LeDain concluded that a public officer requires statutory authority, expressed or implied, to intervene in his official capacity in proceedings before an administrative tribunal if he intends to make representations as well as to introduce evidence with respect to the public policy for which he is responsible. Mr. Justice LeDain observed that:

> Such action although it does not have regulatory effects, may have consequences for the rights, obligations, or interests of others. It is an assertion, in an adjudicative context of the authority and expertise of a public official. In such a case a public officer puts the weight of his opinion and knowledge, acquired in the exercise of his official duties, on the adjudicative scales. He extends, on his own initiative, the effective reach and influence of his office and authority with potential direct legal effect. Whether he should have the power or right to do so is a matter of legislative policy and thus of statutory authority.

The court also concluded that the general power of the tribunals to supervise public utilities and to make all necessary examinations and inquiries includes the power to permit interventions in their proceedings. However, this power could not be extended to give a board the authority to permit the intervention by a public officer in his official capacity if the officer had been denied the necessary authority to intervene by his governing statute.

The authority of the Director to intervene in regulatory proceedings under Section 27.1 of the *Combines Investigation Act* was limited to federal boards, commissions or other tribunals. The court found that the terms of section 27.1 dealt exhaustively with the authority of the Director to intervene in regulatory proceedings either as of right or with the permission of the board, commission or other tribunal. Consequently, the court concluded that the former *Combines Act*, as it stood at the time, denied the Director the necessary authority to intervene before a provincial board even with the permission of the board.

Section 98(1) of the *Competition Act* now provides that the Director, at the request of any provincial board, commission or other tribunal or on his own initiative with the consent of the board, etc., may make representations to and call evidence in respect of competition whenever such representations or evidence are relevant to a matter before the board and to the factors the board is entitled to take into account in determining the matter.

The Supreme Court decisions therefore confirm the necessity of having introduced subsection 98(1) in the 1986 competition law revisions to ensure that the Director may

continue to intervene in provincial regulatory proceedings having significant competition effects. *J.F.B.*

ONTARIO LAW SOCIETY ADOPTS STAND ON COUNTY LAW ASSOCIATION TARIFFS

In a letter dated November 27, 1987, the Treasurer of the Law Society of Upper Canada, Dan Chilcott, Q.C., advised all members of the profession that the Law Society's convocation (its ruling body) now regards certain tariffs of fees established by county and district law associations as unauthorized conduct and grounds for disciplinary action. Tariffs covered by the Law Society's policy, according to the letter, are those that:

- are intended to bind members with respect to fees charged for legal services; or
- are adhered to as a result of direct or indirect pressure brought to bear upon members by other members.

The letter notes that the Law Society has received legal advice that the *Law Society Act* does not authorize the Law Society to fix tariffs of fees for the provision of legal services.

Formal inquiries into the tariff setting activities of the Waterloo Law Association and the Kent Law Association by the Director of Investigation and Research were reported in the March 1987 *CCPR*. The Law Society letter stresses that the conduct being inquired into by the Director followed the publication of a letter from the Treasurer of the Law Society in May 1985 which indicated that:

> The laws of Canada prohibit agreement whether expressed or implied in restraint of trade, or conspiracies to lessen competition and fixed prices for services and goods, including legal services.

The Treasurer's letter also states that these law associations are currently the subject of a discipline investigation by the Law Society and that any convictions of county law associations under the *Competition Act* will be "treated by convocation in the same way as other serious criminal offences."

Attached to the Treasurer's letter is a letter from the Director of Investigation and Research under the Program of Compliance dated June 15, 1987, in which the Director lays out his views with respect to the establishment of "suggested fee schedules" by county law associations. In his letter, the Director observes that a truly genuine suggested fee schedule might not in itself provide grounds for the initiation of an inquiry under section 32 of the *Competition Act*:

> A genuine suggested fee schedule would be one that an association issues without raising any intention or expectation that the association membership adopt the schedule in their practices. However, any agreement among a substantial number of members of a local law association to adhere to a suggested fee schedule would give me grounds to commence an inquiry. Furthermore, any attempt, directly or indirectly, to obtain adherence to a suggested fee schedule, whether or not adherence is voluntarily offered by its members, would raise an issue under the *Act*.

The Director also noted that subsection 32(1.2) would permit the inference of an agreement from circumstantial evidence, with or without direct evidence of communication among the parties. The Director therefore concludes that, in his view, such an inference could be made from evidence that, upon any increase in the fee levels contained in a suggested fee schedule, a substantial number of lawyers were observed to adopt and to adhere to the new levels. Such an inference could also be drawn, the Director notes, if fees were observed to move to the levels contained in a suggested fee schedule when, prior to introduction, fees had varied among lawyers in the area in question. *J.F.B.*

COURT RULES ON DIRECTOR'S RETENTION OF DOCUMENTS

On October 9, 1987, Mr. Justice O'Leary of the Supreme Court of Ontario ruled on a motion by a number of freight forwarding firms whose records had been seized by representatives of the Director of Investigation and Research as part of an inquiry (see June 1987 *CCPR*) for an order

requiring the Director to give them notice of, so they may be heard on, any proceedings or presentation made by the Director to a judge under section 15 of the *Competition Act*. (*Cottrell Transport Inc.* v. *Director of Investigation and Research*, unreported S.C.O. 1483/87, October 9, 1987.)

Section 15 provides that the Director shall, as soon as practicable, bring records seized pursuant to the search and seizure powers of the *Competition Act* before a judge and at the same time make a report to the judge on the seizure. Upon receiving the records and the report of the Director, the judge may, if he is satisfied that the record is required for an inquiry or any other proceedings under the *Competition Act*, authorize the Director to retain the records in question.

Mr. Justice O'Leary noted that the issue in this motion was whether the person whose property has been seized has a right to participate in that protective process. He concluded that there were no words in the relevant sections of the *Competition Act* which gave him that right, and, to the extent protection is provided by these sections, it is left to the judge presiding over the records and the report to provide it.

In *Goldman v. Hoffman-Laroche* (60 O.R. [2d] Part 3 161) the Ontario Court of Appeal, per Finlayson J.A., concluded that:

> The *Competition Act* provides an elaborate protective process for the benefit of the person whose documents have been seized. In addition to the requirement of the issuance of a warrant by a judge under section 13 supra and the authorization of the retention of the documents seized under section 15 supra, there is a requirement for the return of the documents within 60 days unless there is a detention order under section 16(4).

In reaching his conclusion, Mr. Justice O'Leary noted that it must be remembered that section 15 comes into play during the period when the Director is investigating whether or not a charge should be laid. He also noted that giving of notice and the holding of a hearing on a section 15 report "might unduly complicate and delay or indeed defeat the investigation." The court cited with approval the comments of Estey J. in *Irvine v. Restrictive Trade Practices Commission* (1987) 1 S.C.R. 181 at page 235:

> Courts must, in the exercise of this discretion remain alert to the danger of unduly burdening and complicating the law enforcement investigative process. Where that process is in embryonic form engaged in the gathering of the raw material for further consideration the inclination of the courts is away from intervention.

As a result, the court declined to read into section 15 an implied requirement that the Director must give notice of his intention to bring the records and his report before a judge. On the other hand, the court emphasized that section 15 report procedure is not a bar to an application to the court for the return of records which the Director is not entitled to keep:

> It goes without saying that the Director is only entitled to make copies of records that fall within the terms of the warrant. It is my view that where the Director has made a copy of such a document, he need not and cannot ask the Judge for permission to retain such a copy.

J.F.B.

FEDERAL COURT DENIES APPLICATION IN STEEL INQUIRY

Madame Justice Reed of the Trial Division of the Federal Court, in a judgment dated November 13, 1987, denied an Application by Samuel, Son and Co., Limited and W. Grant Brayley to have an order compelling the respondent Restrictive Trade Practices Commission and Director of Investigation and Research to disclose all material filed in support of a section 17 order issued under the *Combines Investigation Act*.

The application arose in the continuation of the so-called flat rolled steel inquiry which has produced a number of procedural and legal challenges including the *Irvine* case which went to the Supreme Court of Canada. That case was reported in the June issue of the *Canadian Competition Policy Record*.

The facts were that after the *Irvine* decision, the Director resumed the conduct of inquiry. The Director was proposing to examine witnesses based on the orders initially issued by a Commission member on February 2, 1981. The applicant filed a Notice of Motion, dated September 21, 1987, starting the proceeding in

the present case. Subsequent to that, the Commission, here presumably meaning a member of the Commission as required in section 17 of the *Act*, vacated the February 2, 1981 Order and issued a new Order effective October 6, 1987.

At that point the applicants amended their initial Notice of Motion to seek material used by the Commission member in the issuance of both the February 2, 1981 Order and the October 6, 1987 Order. In her judgment Madame Justice Reed found the applicants were entitled to proceed only with respect to the October 6, 1987 Order since the previous Order had been vacated and was therefore irrelevant.

The applicants' basic argument was that they needed access to the material in order to determine what legal remedies they could take to challenge the validity of the Order.

Madame Justice Reed reviewed a number of issues arising from the application. First, she reviewed the question whether a section 17 Order afforded the protection against unreasonable search or seizure contained in section 8 of the *Charter of Rights and Freedoms*. She concluded, based on previous decisions in the Ontario courts, as well as the Federal Court of Appeal, that section 17 Orders were not to be considered as searches or seizures and therefore, not subject to the test contained in section 8 of the *Charter*.

She next considered the procedural safeguards which arose from section 7 of the *Charter* or from the common law doctrine of fairness.

The applicants argued that section 7 imposed a requirement of prior authorization, search or seizure situations, and second, required an assessment by an independent decision-maker of whether granting the Order would be reasonable in the circumstances. Based on those arguments the applicants took the position that the material should be produced in order to enable them to contest the validity of any Order issued.

The respondent argued that a section 17 Order is purely administrative and therefore non-reviewable in any sense and second, even if it were reviewable, any such review would not require a prior authorization procedure or disclosure of the material in question absent some evidence of impropriety.

In considering the arguments, Madame Justice Reed concluded that a section 17 Order is not absolutely non-reviewable. She stated:

> In my view the decision to issue a section 17 Order is one that is reviewable for the purpose of ensuring that the rules of fairness, or fundamental justice (under the *Charter*) have been complied with.

With respect to the scope of review Madame Justice Reed found:

> Even if there had been a breach of the rules of fairness in this case, I would not deem it appropriate to exercise my discretion to grant the Order sought. The applicants suffered no prejudice from being unable to review the material in question. They know the nature of the investigation; indeed, it has already commenced. There is not a shred of evidence to suggest that the Chairman's decision was arbitrary or made without addressing his mind to the question of whether or not there was reasonable grounds on which to require that the applicants be ordered to attend. It is simply not a case to exercise the Court's discretion in favour of the applicants.

In coming to this conclusion the Justice appeared to conclude that some evidence of impropriety would be required in order to have the court exercise its discretion. It is also interesting to note that she seemed to imply that the standard to be used by a Commission member in granting the Order would be "whether or not there was reasonable grounds on which to require that the applicants be ordered to attend." Presumably the Justice was reading that test into section 17 of the *Act* since the section contains no explicit reference to any test or evidentiary standard to be required before the issuance of an order under that section.

The last issue dealt by the court was whether section 7 of the *Charter* required a procedure of prior authorization. It is not clear from the judgment by whom the prior authorization would be required. By implication it appears to mean the prior authorization by a court since clearly the member of the Restrictive Trade Practices Commission in issuing an Order under section 17 performs the function of prior authorization for the issuance of compulsory process by the Director.

On the question of prior authorization, Madame Justice Reed relied on the decision of the Federal Court of Appeal and the Trial Division of the Federal Court in *Stelco Inc. et al* v. *The Attorney General of Canada et al* wherein both

courts had indicated that the procedures prescribed in section 17 of the *Combines Investigation Act* did not offend the *Charter* principles of fundamental justice. (The Court of Appeal decision in the *Stelco* case is reported elsewhere in this issue of the *Canadian Competition Policy Record.*)

For all these reasons Madame Justice Reed dismissed the application. *L.A.W.H.*

FEDERAL COURT OF APPEAL UPHOLDS EXAMINATION PROVISIONS

The Federal Court of Appeal in a judgment rendered from the Bench on October 22, 1987, upheld the judgment of the Trial Division of the Federal Court in the *Stelco* case. The Court of Appeal held that the examination provisions contained in section 17 of the *Combines Investigation Act* were not inconsistent with the *Charter of Rights and Freedoms.*

The court did not find it necessary to hear from the Crown's counsel in the case. Mr. Justice Urie, in speaking for the court, stated:

> However, since we are substantially in agreement with the reasons of the Associate Chief Justice, no useful purpose would be served, in the circumstances, for us to express our views on the issues in our own words.

The court also relied on the Ontario Court of Appeal Decision in the *Thomson Newspapers* case. The judgment of the Court of Appeal was relied on by Madame Justice Barbara Reed in a decision concerning the same matter arising from the Flat Rolled Steel inquiry which is reported elsewhere in this issue of the *Canadian Competition Policy Record.* *L.A.W.H.*

PYRAMID SELLING PROVISIONS WITHSTAND CHARTER SCRUTINY

In a judgment delivered June 25, 1987, by Mr. Justice Krindle of the Queens Bench of the province of Manitoba, the court dismissed an application to have the pyramid selling provisions of the *Competition Act* declared contrary to section 15(1) of the *Charter of Rights and Freedoms.*

Section 15(1) of the *Charter* contains the equality rights provisions. The argument made by CLP Canmarket Lifestyle Products Corporation and R. Hugh Thorsten was that since the application of the pyramid selling provisions of the *Competition Act* depends on the existence of provincial legislation, the result could be an unequal application of the federal provisions.

The specific provision of the *Competition Act* in question is subsection 36.3(4) which states:

> This section does not apply in respect of a scheme of pyramid selling that is licensed or otherwise permitted by or pursuant to an act of the legislature of a province.

At the present time the three most western provinces have passed legislation which licenses or allows certain schemes of pyramid selling. All other provinces, including Manitoba where the case was brought, have no pyramid selling legislation. The consequence which could arise is that a person could be permitted to engage in pyramid selling activities in Alberta yet be prohibited from engaging in the same activity in Manitoba.

Mr. Justice Krindle found:

> I am not satisfied that that state of affairs in any way offends the Constitution of this country or the rights of the individuals in this country. Rather, I am satisfied that those diverse liabilities of individuals depending on where they are situated, flow as a direct result of the constitutional division of powers.

Mr. Justice Krindle then went on to consider the constitutional basis for the federal enactment of the pyramid selling provisions of the *Competition Act.* In particular he considered the decision of the Ontario Court of Appeal in *R. v. Hoffman-LaRoche Limited*, 62 CCC (2d) 118 and the decision of the Supreme Court of Canada in *Attorney General of Canada v. Canadian National Transportation Limited et. al*, 7 CCC (3d) 449.

In both those decisions the question had been whether the *Competition Act* could be sustained as being legislation with respect to trade and commerce and particularly, legislation with respect to the general regulation of trade and commerce. The Ontario Court of Appeal had upheld the legislation in the *Canadian National* case, and the then Mr. Justice Dickson found competition legislation as falling within the general trade and commerce power of the federal

government. Because these judgments were based on the general trade and commerce power, it has usually been thought the legislation would apply to purely local matters. However, Mr. Justice Krindle, in the present case, appears to interpret those decisions as not authorizing the application of federal competition legislation to purely local issues. He stated:

> It is questionable whether the federal government would have jurisdiction to regulate schemes of pyramid sales which are purely local in nature. The legislation by its very wording recognizes that possible provincial autonomy in the area of such economic regulation.

What is not clear is whether Mr. Justice Krindle's view is that the federal government's power with respect to the trade and commerce power must be confined to matters of interprovincial or international commerce. The judgments he cited clearly found that the legislation did not fall under the international and interprovincial head of the trade and commerce power, but rather the general trade and commerce power. As stated above, it has usually been presumed that if federal legislation falls within the general trade and commerce power, then it could apply to purely intraprovincial and, presumably, local matters.

Mr. Justice Krindle also made an interesting statement with respect to the criminal nature of the pyramid selling provision of the *Competition Act*. He stated:

> In my opinion, and notwithstanding that section 36 of the *Combines Investigation Act* creates a crime, there is no basis for considering that section of the *Act* to be comparable to criminal enactments by the government of Canada under the *Criminal Code*, the proclamation into force of which, in a territory, may be deferred.

It is not clear exactly what Mr. Justice Krindle is referring to in this quotation, but presumably he was not taking the view that federal competition legislation, which has historically been sustained under the criminal law power, is for constitutional reasons and qualitatively any different than any other federal legislation sustainable under the criminal law power. Presumably there is nothing magic about whether a crime is created in the *Criminal Code* or in any other federal legislation.

An additional consideration with respect to subsection 36.3(4) of the pyramid selling sections is that it is close to a codification of the regulated conduct exemption which has arisen under the *Competition Act*, most exemplified by the *Jaboar* decision of the Supreme Court of Canada. That jurisprudence has clearly established that federal competition legislation does not apply in a situation where the conduct is authorized or regulated pursuant to valid provincial legislation. That is, in essence, what subsection 36.3(4) of the pyramid selling provision concerns. *L.A.W.H.*

TRIAL DIVISION OF FEDERAL COURT REFUSES TO STAY CONTINUATION OF INQUIRY

Mr. Justice McNair of the Trial Division of the Federal Court, in a judgment rendered on November 5, 1987, refused an Application under section 18 of the *Federal Court Act* for an Order to Stay Proceedings under section 17 of the *Combines Investigation Act* in the so-called *Flat Rolled Steel Inquiry*.

The applicants, many in number, are the persons subject to Orders under section 17 in the continuation of the *Inquiry* which had led to the Supreme Court of Canada Decision in the *Irvine* case. The Supreme Court's judgment in that case was reviewed in the June 1987 issue of the *CCPR*.

The basis for the applicants' submission was that the question of the constitutional validity of section 17 of the *Combines Act* is subject to an Appeal to the Supreme Court of Canada in the *Thomson Newspapers* case. The question at issue in the *Thomson Newspapers* case as stated by the Supreme Court of Canada is:

> Is section 17 of the *Combines Investigation Act* inconsistent with the provisions of section 7 and 8 of the *Canadian Charter of Rights and Freedoms* and therefore of no force and effect?

Mr. Justice McNair, in his judgment, reviewed extensively the cases relating to the granting of interlocatory stays. In particular, he reviewed the Supreme Court of Canada decision in *A.-G. Manitoba v. Metropolitan Stores Ltd.*, [1987] 1 S.C.R. 110 as well as the Québec Court of Appeal decision in *P.G. du Canada v. Alex Couture Inc.*

This latter judgment was reviewed in the September issue of the *Canadian Competition Policy Record.*

Both of these cases set out the principles to be applied in deciding whether to grant a stay when there is a public interest involved, such as a possible constitutional question. In the end, Mr. Justice McNair felt that the circumstances of the case before him was distinguishable from the *Couture* case.

Mr. Justice McNair also reviewed the previous case decisions on the likely constitutional validity of section 17 under the *Charter*, including the *Irvine* case. In particular, he noted the judgment of Associate Chief Justice Jerome in the *Stelco* case, which was reported in the September issue of the *Canadian Competition Policy Record.*

Mr. Justice McNair stated:

> In the result, I find that the applicants have failed to demonstrate such serious and irreversible consequences resulting from the first stage of an investigative process as would justify granting an interim injunction or stay of proceedings. Rather, I consider that the public interest will be better served by permitting the inquiry to proceed. In reaching this conclusion, I am mindful of the admonition of Mr. Justice Estey in *Irvine v. Canada* to the effect that courts in the exercise of their discretion must "remain alert to the danger of unduly burdening and complicating the law enforcement investigative process".

L.A.W.H.

GOLDMAN ELABORATES ON ENFORCEMENT POLICY

Through frequent public addresses, the Director of Investigation and Research, Cal Goldman, has continued to elaborate on the enforcement policies of the Bureau of Competition Policy, particularly on its stance on mergers.

In a Meredith Memorial Lecture delivered at McGill University on September 19, 1987, Mr. Goldman discussed his approach to the *Competition Act's* "efficiency gains" defence with respect to mergers.

Section 68 of the *Competition Act* provides that the Competition Tribunal will allow a challenged merger to proceed, even though the merger would lessen competition substantially, when the parties to the merger can satisfy the Tribunal that the merger will bring, or is likely to bring, gains in efficiency that will be greater than and will offset the effects of any prevention or lessening of competition resulting from the merger. Such efficiency gains would not likely be attained in other ways if an order prohibiting the merger were to be made.

Mr. Goldman noted that relevant efficiency gains include economies of scale and scope, plant specialization and lower transportation costs. However, he clearly placed the onus for proving such gains on the acquiring firm. He observed that cost savings that result from "a mere redistribution of income as opposed to a real savings in resources" would not be considered to be efficiency gains under the legislation. He also noted that tax savings associated with the merger should probably be viewed as transfers from the general taxpayers to the merged firm and should therefore not be counted as efficiency gains.

Mr. Goldman contended that this approach is similar to the treatment of efficiencies currently being taken by the U.S. Department of Justice:

> I understand that it is one of the more difficult tasks they have experienced in their merger analysis since sometimes competition-lessening "apples" have been balanced against efficiency "oranges". Our initial experience over the last fifteen months reflects a similar challenge in undertaking this rather difficult balancing process. While efficiency arguments have been advanced in some mergers the Bureau has reviewed, we have not yet encountered a situation where efficiency gains have resulted in an "even weight" on the scales.

Mr. Goldman noted that efficiency gains were given significant weight in the decision-making processes in three different merger cases relating to tobacco, forest products and confectionery industries. However, Mr. Goldman stressed that while the potential efficiency gains in each of these cases were viewed to be of significance, there were other pro-competitive factors such as actual or potential competition from imports or other firms, that elevated his concerns regarding the lessening of competition arising from the merger.

As a result, it would appear that the Bureau of Competition Policy may, in practice, be treating efficiency gains not as a separate exercise in a merger review to be applied only once it has reached the conclusion that a merger may substantially lessen competition, but as another of the many factors to be taken into account in determining whether competition may be substantially lessened.

Mr. Goldman also provided some insight on the major negotiated merger settlement of 1987: The Canada Safeway/Woodward Food Stores Acquisition. (This settlement was reviewed in the June 1987 *CCPR*.)

Mr. Goldman noted that it is still too early to state exactly what impact the Bureau's action will have on market concentration in the food retail services industry in Western Canada:

> While the acquisition has been allowed to proceed unchallenged under specific terms, and in that sense Canada Safeway will acquire Woodward Stores' market share, certain undertakings have been given by Canada Safeway, one of which requires divestiture of twelve stores in six geographic markets. The divestitures which are to be accomplished in a period of eighteen to twenty-four months or less will facilitate entry of new firms or expansion of other existing firms through those store locations. This is expected to result in little change in concentration in the retail grocery products industry in the geographic markets of primary concern to us. Upon fulfillment of the undertakings, the level of market concentration is not, at present, expected to increase significantly in those areas. However, since we are dealing with prospective analysis in a number of geographic markets, the actual competitive affects on those markets remain to be seen. By allowing the merger to proceed in this fashion, we have attempted to minimize disruption to suppliers and others who would benefit from the on-going operation of those stores, albeit by a new entity in the future. This decision was made having regard, in part, to the distinct possibility that those Woodward Stores might have closed if the Safeway acquisition had been blocked.

More recently, in a November 11, 1987, address to a competition and trade law seminar presented by Fraser & Beatty in Toronto, Mr. Goldman added the following observations on the Bureau's enforcement stance:

- The Bureau is placing special emphasis on civil reviewable matters and will be organizing its operations to deal with civil matters in a more effective manner;
- The Bureau is proceeding with plans to introduce competition law bulletins similar to those which have been published for several years by the marketing practices branch with respect to misleading advertising. The first bulletin, dealing with advance ruling certificates, will be published shortly;
- The Bureau is continuing to develop a practice of using "information visits" to discuss complaints received relating to civil reviewable matters with the firm complained against;
- The Bureau has strongly encouraged parties to a merger which is subject to the pre-notification requirements of the *Competition Act* and one not likely to raise a competition policy issue, to discuss the pre-notification filing and the possibility that the Director may abridge the pre-notification period which is in advance of the last day available for filing prior to closing. Mr. Goldman emphasized that the Bureau is taking a reasonable approach to the filing requirements for both long- and short-form pre-notifications;
- The *Palm Dairies* decision of the Competition Tribunal (see *CCPR* for December and March 1987) may have increased the incentives on merging parties to settle out of court rather than to fight an application to the Tribunal. However, it has not had a chilling effect on the willingness of the Director to make an application to the Tribunal in appropriate cases. Several merger and abuse of dominant position cases are presently at the stage where an application to the Tribunal may be the next step.

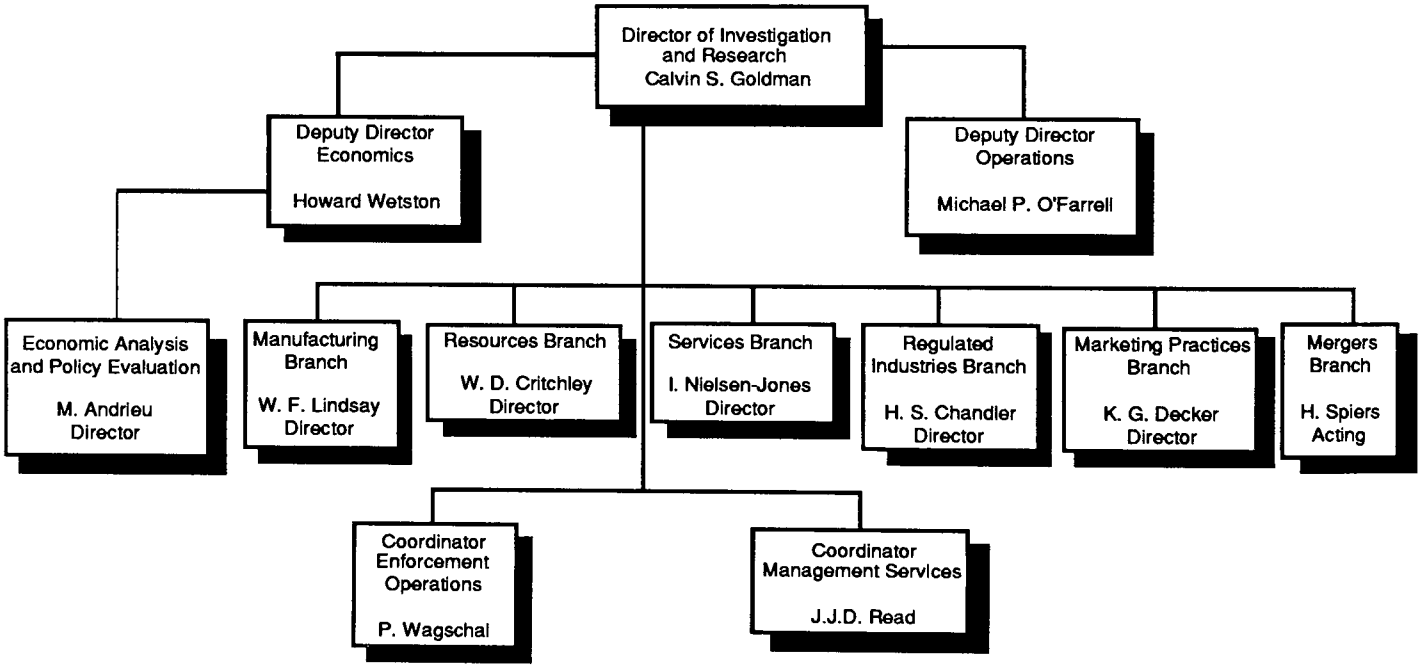
J.F.B.

DIRECTOR ANNOUNCES REORGANIZATION OF BUREAU OF COMPETITION POLICY

At the annual meeting of the Bureau of Competition Policy held on November 19, 1987, Mr. Calvin S. Goldman, Director of Investigation and Research, announced that he was proposing to reorganize the Bureau of Competition Policy subject to Treasury Board approval. It is understood that the Director and the Deputy Minister of Consumer and Corporate Affairs, Ian Clark, have been discussing a possible reorganization and re-allocation of the Bureau's staff for some time.

At the present time, the structure of the Bureau includes two deputy directors, Mr. Howard I. Wetston and Mr. Michael P. O'Farrell. In addition, each of the seven line or sectoral branches of the Bureau has a director. The seven branches are the Manufacturing Branch, the Services Branch, the Resources Branch, the Regulated Industries Branch, the Merger Branch, the Marketing Practices Branch and the Economic Analysis Branch. In addition, there is an administrative unit and an office of enforcement operations.

CURRENT BUREAU ORGANIZATION



Under the Director's proposed reorganization, the hierarchical structure between the deputy directors and the branch directors would be eliminated with each line branch head becoming a deputy director. The *Canadian Competition Policy Record* has learned that Mr. Michael P. O'Farrell, one of the two present deputy directors, will be leaving the Bureau and the Government sometime early in the new year. It is also understood that Mr. Wetston, the other present deputy director, will become a senior deputy director in the reorganized structure with responsibility for the Merger Branch. As senior deputy director, he will be the second most senior official in the Bureau after Mr. Goldman and normally would act in his stead when the Director is absent.

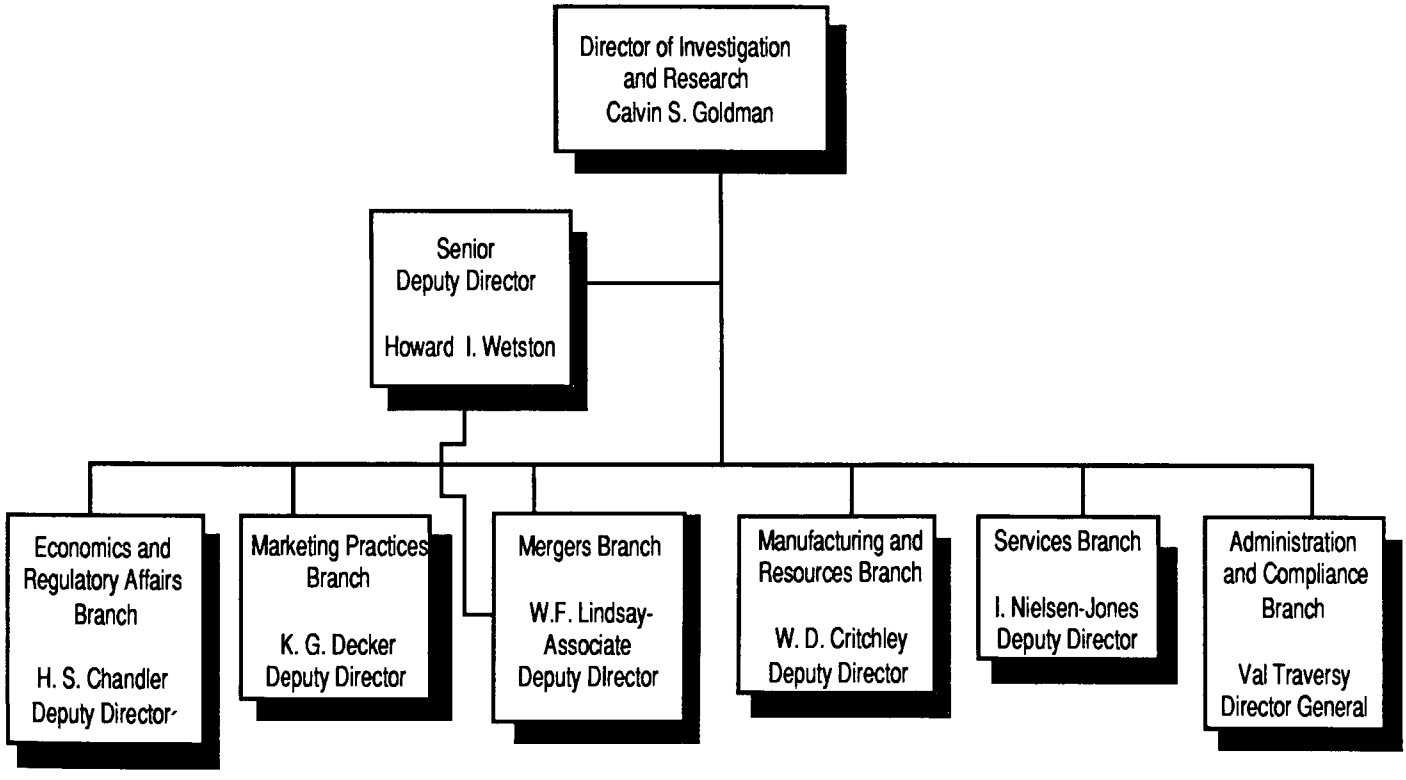
It is also understood that the proposed reorganization would see a merger between the Manufacturing Branch and the Resources Branch. Mr. Wayne Critchley, the present director of the Resources Branch, would become the deputy director responsible for the merged branch. It is also understood that the Regulated

Industries Branch and the Economic Analysis Branch would be merged. Mr. Harry Chandler, who had been assigned as director of the newly created Merger Branch last spring but has been on secondment to the Australian government for the past year, will become the deputy director for the merged Regulated Industries and Economic Analysis Branch when he returns from Australia in the spring. It is understood that this merged branch will have an important economic policy input into the activity of the Bureau and merger analysis in particular.

Mr. Ian Nielsen-Jones, presently the director of the Services Branch, will become deputy director of the Services Branch under the reorganization, and Mr. Klaus Decker, the present director of the Marketing Practices Branch, will become deputy director of the same branch in the reorganization. Mr. William F. Lindsay, the present director of the Manufacturing Branch, will become an associate deputy director in the Merger Branch assisting Mr. Wetston in this important new area of the Bureau's responsibility.

Mr. Val Traversy who has joined the Bureau recently will become director general of the Administration and Compliance Branch. This will make him responsible for all administration matters for the Bureau as well as its information and compliance programs.

PROPOSED BUREAU ORGANIZATION



The significance of the proposed reorganization is that it removes one level in the structure of the Bureau and at the same time elevates the present line directors to deputy director status. It is necessary to obtain Governor-in-Council approval to give delegated authority to deputy directors. That approval presumably is also necessary in addition to Treasury Board approval of the reorganization generally. It may be that part of the intention of the reorganization is to allow the director to delegate responsibilities to the new deputy directors insofar as the *Competition Act* permits. It must be stressed that the reorganization is still subject to central agency approval in the federal government before it can be implemented, but it is expected that approval would be forthcoming fairly early in the new year. *L.A.W.H.*

COMPETITION TRIBUNAL OPENS NEW PREMISES

On November 19, 1987, the Hearing Room of the new Competition Tribunal was officially opened in a reception hosted by members of the Tribunal. The Hearing Room is located on the 6th Floor, 90 Sparks St. Ottawa, adjacent to the offices and Registry of the Trbunal.

Madame Justice Barbara Reed welcomed the invited guests and acknowledged the assistance of numerous individuals who had helped with the complicated task of setting up the Tribunal.

Justice Minister Ray Hnatyshyn and Consumer and Corporate Affairs Minister Harvie Andre both attended the reception and, in brief remarks, indicated that the Government was considering using the model of a hybrid judicial/ lay tribunal in other areas. *E.A.M.*

MERGER STATISTICS

Updated as of December 11, 1987:

- Mergers examined in a significant fashion 133
- Closed - conclusion of no issue under the *Act* 56
- Proceeded under program of Compliance 23
- Proceeded under Advance Ruling Certificate 18
- Parties abandoned merger as a result of Director's position 5
- Examination Ongoing 29
- Applications to Tribunal 2