

CANADIAN COMPETITION LAW DEVELOPMENTS

The articles in this section were written by Lawson A. W. Hunter, John F. Blakney, Nick J. Schultz and Brenda Swick-Martin of Fraser & Beatty, Ottawa.

DIRECTOR SEEKS CONTEMPT CITATION AGAINST CHRYSLER CANADA

On February 19, 1990, Counsel for the Director of Investigation and Research submitted a motion to the Competition Tribunal alleging that Chrysler Canada Limited, Chrysler Motors Incorporation, and Chrysler's executive, should be found in contempt of the Tribunal. This is the first case in which the Director has commenced contempt proceedings against parties involved in a remedial order of the Tribunal.

The Director's Notice of Motion alleges that the respondents interfered with the orderly administration of justice in that they caused pressure to be brought upon Richard Brunet (person to which the Order to restore supplies relates) compromised his rights under the Order and influenced the bringing of the Appeals from the Order (Brunet and the Director had cross-appealed against Chrysler's appeal to the Federal Court from the original Order) by refusing to supply him with automotive parts unless the Tribunal's Order and the Appeals noted above were discontinued or compromised. The Notice of Motion also alleges that Chrysler Canada failed to abide by the terms of the Competition Tribunal's Order in that it is not treating Brunet on trade terms ordinary to his relationship with Chrysler Canada prior to the refusal to supply.

Chrysler Canada objected to the Director's motion arguing that the Tribunal does not have jurisdiction to entertain a contempt motion because it does not have jurisdiction to punish contempt which occurs "out of the face of the Court" (i.e. contempt *ex facie curiae*). Absent express statutory provisions, inferior courts or regulatory tribunals do not have power to punish contempt except with

respect to contempt committed in their presence (contempt *in facie curie*).

The Competition Tribunal concluded that it does have the authority to entertain the contempt proceeding proposed by the Director. The Tribunal specifically referred to section 8 of its *Act* which provides, among other things, that with respect to enforcement of its Orders and other matters necessary or proper for the due exercise of its jurisdiction the Tribunal has all the powers, rights and privileges as are vested in a superior court of record. Section 8 also contemplates contempt proceedings by providing that no person shall be punished for contempt of the Tribunal unless a judicial member is of the opinion that the finding of contempt and the punishment are appropriate in the circumstances. Section 9 of the Tribunal's *Act* provides that it is a court of record.

The Tribunal concluded that this scheme indicates that the Tribunal was intended to have the power to punish for contempt, both in the face of and out of the face of the court:

... this falls not only from the text of the statutory provisions themselves but also from the nature of the Decisions and Orders which the Tribunal was established to render. The Tribunal's powers and functions are not limited to evidence gathering. The Tribunal is not in "pith and substance" an administrative body as was said of the Ontario Municipal Board (*In Re: Diamond and the Ontario Municipal Board*, [1962] O.R. 328 (C.A.)). The Tribunal is not an investigative agency; the Director conducts the investigation. The Tribunal adjudicates. Orders which the Tribunal renders under Part A are made upon application by the Director after adjudication. The adjudicative procedure followed and the type of Orders issued are comparable to those followed in and issued by courts.

CANADIAN COMPETITION POLICY RECORD

Chrysler Canada has applied to the Federal Court for Leave to Intervene against this decision. In granting leave, however, the Court declined to stay the Tribunal's hearing of the Director's motion.

J.F.B.

FLOUR MILLS CHARGED WITH BID-RIGGING AND CONSPIRACY UNDER THE COMPETITION ACT

Eight Canadian flour mills have been charged under the *Competition Act* with bid-rigging and conspiring to lessen competition in the sale of approximately \$500-million worth of wheat flour to the federal government over a 12 year period. The wheat flour was food aid destined to third world countries. The companies charged are Maple Leaf Mills Limited, Robin Hood Multifoods Inc., Dover Industries Limited, B.P. Kent Flour Mills Limited, Ogilvie Mills Ltd., Parrish & Heimbecker Limited, Soo Line Mills Limited and Rogers Foods Limited.

More specifically, the eight companies were charged under section 45(1)(c) of the *Act* with conspiring to prevent or lessen unduly, competition in the production, sale or supply of wheat flour to the Canadian Commercial Corporation, until April 1, 1978, and thereafter to its successor, the Department of Supply and Services, in response to requests for tenders for the supply of wheat flour on behalf of the Canadian International Development Agency.

The same companies were also charged as parties to bid-rigging under section 47(2) of the *Act* in that they agreed among themselves that one or more of them would not submit bids in response to some of the requests for tenders for the supply of wheat flour, and that, in response to some requests for tender, they did submit bids arrived at by agreement.

B.S.M.

SHELL CANADA FINE INCREASED

The Manitoba Court of Appeal, in a two-to-one decision, increased the fine imposed against Shell Canada Product Limited (Shell) for violation of the resale price maintenance section of the *Competition Act*. The fine was increased from \$100,000 to \$200,000. The Court also refused to dismiss the conviction entered against Shell Canada. With respect to the latter decision, the Court was unanimous.

On the issue of Shell's application to have the conviction overturned, the Court found there was no justification for the appeal. They found that the verdict was supported by the evidence and was reasonable. Shell's main argument was that the Shell employee who had communicated with the complainant, Jet Car Wash, was too low in the hierarchy of Shell to constitute the company's directing mind. The Court in rejecting this argument stated:

That submission might have had merit in other circumstances, but in the circumstances of this case the conviction does not rest on Lettner's conduct alone. It was open to the trial judge to find, as I think he did, that Lettner's conduct followed direction from above. There was no direct evidence of that, it is true, but it is to me a compelling inference from the fact that the telephone calls to Jet came quickly after Benson called his office and from the fact that Lettner himself was called back from holiday to deal with the situation.

The Court then referred to the Supreme Court of Canada judgment in *Canadian Dredge & Dock Co. v. The Queen*, [1985] 1 S.C.R. 662, at p. 681. The Court found, relying on that judgment, that although the Shell employee Lettner was relatively low in the hierarchy, based on the Supreme Court of Canada decision, his supervisor Benson was well within it. The Court found that Benson

...was clearly the directing mind of Shell with regard to gasoline prices in Manitoba. It was open to the learned trial judge to find that Shell, through the instrumentality of Lettner and Benson combined, was guilty of the offence with which it was charged.

In summary, the Court found that the learned trial judge had reached a reasonable conclusion and one that was supported by the evidence. They, therefore, refused to overturn the conviction.

CANADIAN COMPETITION POLICY RECORD

With respect to the appeals on sentence, Shell argued that the trial judge's decision not to impose a prohibition order against continuing offences should be used as a mitigating factor against a substantial fine. The learned trial judge had found that Shell had no corporate policy of engaging in resale price maintenance.

Although the Court did not disagree with the non-imposition of a prohibition order by the trial judge, it did find that "the absence of an illegal corporate policy, officially approved, is not, in my view, a mitigating circumstance in this case." The Court also stated:

There is no doubt that, officially, Shell obeyed the law. Despite its official policy, however, it committed the crime of which it has been convicted. To say that the absence of a policy of resale price maintenance is a mitigating circumstance is like saying that the absence of a previous declaration by a burglar that he will break and enter homes at night is a mitigating circumstance when he does so.

The Court then turned to the appropriate level of fine. The Attorney General of Canada had suggested that a formula should be used whereby the fine would be a percentage of the company's earnings. The Court stated that although there is support in the case law that the wealth of the corporation should be taken into account in imposing fines, there is no support for the notion of a formula. The Court then reviewed the findings of the Ontario Court of Appeal in *R. v. Browning Arms Co. of Canada Ltd.* (1974), 18 C.C.C. (2d) 298. The Court concluded after reviewing the appropriateness of considering the earnings of the corporation with the following statement:

It is an admitted fact that in each of the years 1986, 1987 and 1988 Shell earned in excess of \$100,000,000.00 from its business as an oil producer. In the context of those earnings, a fine of \$100,000.00 is but a slap on the wrist: it is inordinately low. Having regard to the circumstances of the offence and the significance of the penalty to the offender, I would increase the fine to one of \$200,000.00.

This fine is by far the largest fine ever received for a single count of resale price maintenance charge under the *Competition Act*. However, it is in line with the increasingly stiff penalties which the Crown has been receiving in recent years for violations of the criminal provisions of the *Competition Act*.

L.A.W.H.

THE SHEETS ARE FINALLY HUNG OUT IN THE IMPERIAL/TEXACO MERGER

February 6, 1990, marked the end of the public review of Imperial Oil's acquisition of Texaco Canada as the Competition Tribunal issued the consent order laying to rest all outstanding competition issues arising from the merger. The review of this merger before the Competition Tribunal on a Consent Order Application by the Director of Investigation and Research, reveals the significant impact which can be made by well-focused and well-supported interventions, the power of the Tribunal in re-shaping the proposed consent order, and the concern of the Tribunal that the proposed order be demonstrated to be effective in addressing the lessening of competition which the merger is presumed to create. The review of this merger also demonstrates that what is seen to be a substantial lessening of competition and what is seen to be effective in preventing a substantial lessening of competition are matters of opinion and that reasonable people can and do hold strongly differing opinions. This decision indicates that more fine tuning of the Director's approach to the consent order process may be required.

The approval of the consent order followed the issuance of lengthy Reasons on January 26, 1990 indicating that the Tribunal was prepared to approve parts of the proposed consent order but would require significant changes in other parts of the order before approval could be given. The necessary changes were made and the order was approved. The January Reasons followed a Partial Decision issued last year. That Partial Decision also led to significant changes in the proposed order. Even before the Partial Decision was issued, a number of changes had been made to the proposed order to take account of objections raised by intervenors. While a merger of the Imperial/Texaco scale is unusual, the pattern of amendments required to take into account intervenors' concerns indicates that the parties to a consent order should not be taken by surprise when intervenors propose changes and should remain open to making changes where warranted.

CANADIAN COMPETITION POLICY RECORD

The Tribunal rejected an argument by the Director that intervenors had the onus to prove that, with the proposed order in place, a substantial lessening of competition would still exist. This was considered to be too stringent a description of the test to be applied by the Tribunal and too stringent a requirement for intervenors. The Tribunal stated that the burden is on the parties, in this case the Director and Imperial, to prove that the proposed order will in all likelihood eliminate the substantial lessening of competition which, it is presumed, will arise from the merger. The issue is not whether the proposed order is the optimum solution. The Tribunal's role is to ensure that the order falls within the range of acceptable solutions. The scope of that range is conditioned by the extent to which the pre-merger situation was itself uncompetitive. Where the pre-merger situation was highly uncompetitive, any solution, short of restoring to the fullest extent possible the pre-merger situation may, in the Tribunal's view, have difficulty falling within the acceptable range. The proposed order proceeds with initial deference, that is, an initial assumption that the proposal will accomplish what the Director asserts it is designed to do. However, a consent order application proceeds on the basis of an evidentiary vacuum with respect to the degree, nature and extent of the substantial lessening of competition which is presumed to occur.

In this situation, intervenors have two options. They may elect to challenge the order by filling the evidentiary vacuum. They may also rely on the presumed lessening of competition which the merger will cause and then challenge the proposed order on the basis that it will not likely accomplish the required objective. It might be argued, for example, that the terms of the proposed order are contradictory or inconsistent or that they are not likely to be effective because they lack enforceability as a result of being imprecise, impossible to monitor or because a breach, as a practical matter, would not be susceptible of proof.

This statement of the role of intervenors indicates that not only may the proposed order be attacked on the grounds of internal consistency, but intervenors may choose to challenge the Director's assessment of the market conditions in

which the consent order must be situated. Pioneer Petroleums successfully used both approaches to attack the supply assurance provisions of the order.

Pioneer was successful in tightening up the supply assurance provision on internal consistency grounds related to enforceability. Pioneer also successfully challenged the evidence of the Director that excess refinery capacity in Ontario and ready access to imports supported the continued acquisition of product by independents. The Tribunal rejected the Director's evidence on the viability of the import option and, in addition, relied heavily on the presumption of the anti-competitive effect of the merger in rejecting the Director's submission that the supply assurance provisions were adequate. As a result of the greater weight given to supply assurance for independents, given the conditions of the market and the presumed lessening of competition arising from the merger, the Tribunal directed a number of changes in the supply assurance provisions to guarantee that a supply of gasoline will be available to independent gas stations.

The proposed order provided for the divestiture or de-branding of a large number of retail outlets and some terminals in the Western Canadian market and the Ontario/Quebec market. The Tribunal examined the trend for rationalization at the terminal and retail levels of the industry and concluded that many of the stations and terminals would have been closed or de-branded by Imperial regardless of the merger. The Tribunal also stated that it would not decline to sign the proposed order merely because these aspects of the order were unnecessary given the conditions in the market.

The Tribunal's view of the Atlantic market was also different from that of the Director. The Tribunal found that the evidence was clear and unequivocal that the merger would result in a substantial lessening of competition in the Atlantic Region. The Tribunal found the pre-merger market situation to be already highly uncompetitive. This limited the range of acceptable solutions since, in the Tribunal's view, where the pre-merger situation is highly uncompetitive, any solution, short of restoring the fullest extent possible the pre-merger market situation, will

CANADIAN COMPETITION POLICY RECORD

have difficulty falling within the acceptable range. The Tribunal, therefore, required that all assets in the Atlantic Region be divested. It was noted that this would be consistent with U.S. precedents requiring the complete divestiture of assets where a merger would likely produce anti-competitive effects. The Tribunal noted that in the Atlantic Region, Irving Oil Limited has a policy of not selling to independent re-sellers and Newfoundland Processing Limited is subject to a restrictive covenant limiting its sale of refined products to Newfoundland. Barriers to entry in refining are high. There is a lack of independently-operated marine terminal or storage space and the Imperial/Texaco merger would increase the concentration of terminal ownership. Texaco had a reputation as a strong competitor in a region where there are few independent marketers. The direct regulation of both wholesale and retail petroleum distribution facilities in Nova Scotia and P.E.I. presented a barrier both to entry at these levels as well as the forms of competition at those levels. The Tribunal was concerned that, in the absence of the Tribunal's order, five branded retailers would have over 95% of the gasoline sales volume in the Region.

Tribunal Member Roseman dissented from the majority view that the proposed Order should be amended to cover all of Texaco's assets in the Atlantic Region. While sympathetic to that view, Dr. Roseman did not consider this change in the order necessary. The two effects of the merger in the Atlantic would be an increase in concentration, particularly at the refining level, and the elimination of Texaco as a competitor. The changes in concentration are present elsewhere in the country and, in the Atlantic, the effect of the acquisition on concentration, with the terms of the Order as proposed by the Director, would be trivial and would not represent a serious issue. With respect to the elimination of Texaco as a competitor, the issue is whether the purchaser of the divested assets is likely to be a continued source of product at the refinery or wholesale level. Dr. Roseman was of the view that, while the Order as proposed by the Director would result in a situation in which there may be some lessening of competition, the extent of that lessening could not be considered substantial and there was a

reasonable assurance that the assets to be divested by the Order as proposed could support the continued existence of an independent source of wholesale supply. Dr. Roseman noted that, while the future of that source is not assured, the level of uncertainty was unavoidable. Dr. Roseman considered that the long-term future of the Texaco refinery was bleak but that the import option could be viable.

The Chairman of the Tribunal, Reed, J., would have directed that the Tribunal retain jurisdiction over the merger until information respecting the identity, expertise, experience and plans of the purchaser of the Atlantic assets was placed before the Tribunal. This would have allowed the parties to adduce further evidence to persuade the Tribunal that a partial divestiture of the Atlantic assets as proposed would meet the required test. However, in the absence of agreement by the other Members, the Director and Imperial were left with the practical alternative which was taken, namely, agreeing to the divestiture of all of Texaco's assets in the Atlantic Region.

While the Tribunal worked with the geographic and other markets defined by the Director, it is clear that the Tribunal had concerns as to whether Newfoundland could be viewed as a distinct geographic market and whether Quebec should be viewed as part of a larger Ontario/Quebec market. The Attorney General of Quebec withdrew Quebec's opposition to the proposed consent order when the Director and Imperial agreed to increase the number of stations to be divested in Quebec. The Tribunal regretted the withdrawal of the Quebec AG. The Attorney General of Newfoundland and Labrador did not actively participate in the proceedings but later did file a written submission questioning whether Newfoundland should have been treated as a separate market. The Tribunal regretted that the Newfoundland AG did not take a more active role earlier in the proceedings but found that it was too late to open up the issues raised in the written submission of the AG.

The Tribunal noted that intervenors participate in these proceedings to protect their own personal interests and that in some cases the motives may not be directly relevant to competition. Nevertheless, the Tribunal considered that the

CANADIAN COMPETITION POLICY RECORD

information which intervenors bring, regardless of their motives, is often of a type which is directly relevant to the issues. In a number of cases, however, the Tribunal, while sympathetic with the position intervenors found themselves in, particularly the position of station owners, found that it could not insist on what these intervenors requested for the purpose of meeting competition concerns. The question which this leaves is whether, had these intervenors been able to fashion a credible competition hook to hang their concerns on, the Tribunal would have lent assistance.

The consent Order contains provisions defining the on-going role of the Director in monitoring the effectiveness of the Order. The circumstances in which the Director may apply for a variation in the Order as a result of a change in circumstances are specified. The Tribunal was concerned as to whether the Director had fettered the Director's statutory authority to seek a variation of a consent order. The Tribunal found that the language of these provisions was both narrower and broader than the statutory authority. The overall effect was to confer on the Director additional authority to that which the Director otherwise would have and, therefore, the Tribunal was prepared to approve these provisions. It remains an open question whether the Director, because the Director can render a merger immune from challenge by issuing an Advance Ruling Certificate or by permitting the 3-year limitation period in the Act to run, should not also be able to limit by the terms of a consent order the Director's discretion to seek variations to Tribunal orders.

N.J.S.

XEROX REFUSAL TO DEAL UPDATE

The Hearing of the Director's application with respect to the refusal to deal by Xerox Canada Inc. (see December, 1989 CCPR) is scheduled to begin on June 7, 1990. By way of illustration the following list of pre-hearing procedures in this application provides a good picture of time frame and preliminary stages which are becoming

conventional in an application before the Competition Tribunal between the close of pleadings and the commencement of the hearing-in-chief:

March 12, 1990	File Affidavits of Documents
March 14, 1990	File Pre-Hearing Conference Memorandum
March 16, 1990	Pre-Hearing Conference
April 12, 1990	Examination for Discovery
April 18, 1990	File Pre-Hearing Conference Memoranda
April 20, 1990	Pre-Hearing Conference
April 23, 1990	Serve and File Expert Affidavits
May 7, 1990	Serve and File Expert Rebuttal Affidavits
May 14, 1990	Serve and File Expert Reply Affidavits
May 22, 1990	File Joint Book of Documents, Agreed Statement of Facts, Memoranda of Law, and Authorities

J.F.B.

NUTRASWEET UPDATE

The Hearing on the Director's application in the NutraSweet case (see December, 1989 CCPR) commenced on January 9, 1990. At the time of writing, the evidence of the Director and NutraSweet as well as Tosoh Canada Inc. (the complainant in the case) had been heard. The Tribunal's Hearing has been adjourned to April 26, 1990 at which point oral argument will be heard. Written argument is to be submitted by April 15th.

The Federal Court of Appeal has dismissed the appeals of NutraSweet which was challenging Tosoh's intervener standing as well as the decision of the Tribunal not to stay proceedings to provide NutraSweet with additional time to prepare its case.

J.F.B.

CANADIAN COMPETITION POLICY RECORD

WETSTON TALKS ABOUT COMPETITION POLICY IN THE 1990'S

Howard I. Wetston, the Director of Investigation and Research, in an address to the Montréal Canadian Club on February 12, 1990, outlined his views of the evolving role of competition policy in the 1990s. He started his address by quoting from Yogi Berra who said: "If you don't know where you are going, you could wind up somewhere else." Mr. Wetston then proceeded to demonstrate that he knew where he was going. In particular, he addressed three priority items which he feels will require attention in the next decade. One was a better approach to price discrimination, predatory pricing and merger review. The second was the merger consent order process and the means of resolving anti-competitive mergers before the Competition Tribunal without full litigation. The third was an increased attention to the state of competition in Canada's regulated industries.

With respect to price discrimination and predatory pricing, Mr. Wetston stated the difficulty in distinguishing between pro-competitive and anti-competitive pricing behaviour. To come to grips with this issue, he stated that the government wants to receive the views of the legal and business communities. In order to obtain that view, the Bureau of Competition Policy is preparing two discussion papers to be circulated this spring. His end objective is "to issue two bulletins which I hope will provide business with the necessary parameters to establish competitive pricing policies that are not in potential contravention of the *Competition Act*."

Mr. Wetston then discussed the development of merger guidelines. He began by stating that since the merger provisions came into force in June 1986 the Bureau has recorded over 3,700 mergers. He stated:

As a result we have accumulated a very large fund of experience in the application of the new merger provisions, in a very short time. And in law, there is no substitute for experience. Each merger review has taught us something new or clarified some issue. Definitions and interpretations have become sharper.

The Bureau is therefore giving high priority to the production of merger guidelines for use by business people and merger counsellors. In

particular, Mr. Wetston stated that the guidelines will give a clearer understanding of the Bureau's approach on matters such as market definition, foreign competition, barriers to entry, failing firms, and the tradeoff between efficiency gains and reduced competition.

Mr. Wetston cautioned, however, that "the guidelines themselves will have to be carefully crafted. To be useful they must be reasonably specific and precise. At the same time they must be flexible enough to allow for differences in individual situations; a simple formula approach is not possible given that competition is a dynamic process and our need for forward looking analysis."

The Director also commented on the consent order proceedings in the Imperial/Texaco merger. He expressed the view that the Bureau is committed to finding a way to make the process work better and faster while still protecting the interests of Canadian consumers.

As his final priority area, Mr. Wetston commented on the need to ensure competitiveness as far as possible in the regulated sectors of the economy. In particular, he commented on the cable television industry, as well as the state of competition in the airline industry.

Mr. Wetston also commented on the growing harmony between Canadian and U.S. antitrust authorities following the *Canada-U.S. Free Trade Agreement*. He stated that both countries are generally applying their laws on the basis of the same economic principles, even though there are some significant differences in approach. He stated: "Because of this basic commonality of purpose, our relationship in the area of antitrust law has been remarkably harmonious in recent times and has been characterized by contacts and cooperation at many levels between the Canadian and U.S. antitrust agencies involved."

He noted that "we recently held the first of what will become regular meetings with the Chairman of the Federal Trade Commission and the head of the Antitrust Division of the U.S. Department of Justice, and we have already set up working groups to tackle problems of common concern." It will be interesting to see the development and evolution of the relationship between the two agencies: in particular, whether they will move towards joint resolution of

CANADIAN COMPETITION POLICY RECORD

transborder issues and greater sharing of information than has been the case in the past.

Mr. Wetston also signalled that the Bureau may be taking a tougher stance on criminal matters. He noted that the Bureau remains committed to achieving voluntary compliance, but that sometimes it will not be possible, or even desirable, to avoid the courtroom. He stated:

You can expect to see less use of prohibition orders and more prosecutions.

He also stated that the Bureau will ...take a vigorous line on criminal activity such as price-fixing and bid-rigging - and we will be fully prepared to bring charges against individuals.

L.A.W.H.

ONTARIO COURT OF APPEAL STRIKES DOWN MISLEADING ADVERTISING PROVISIONS

The Ontario Court of Appeal in the case of *R. v. The Wholesale Travel Group Inc.*, a judgment released on November 23, 1989 has struck down certain sections of the misleading advertising provisions of the *Competition Act* as being contrary to Sections 7 and 11 (d) of the *Canadian Charter of Rights and Freedoms*.

The case involved five counts alleging misleading and false advertising contrary to para. 36(1) (a) of the *Competition Act* (old section numbers). The accused, at trial, pleaded not guilty. Before the trial commenced the Provincial Court Judge found that Sections 36(1) and 37.3 (2) were inconsistent with Sections 7 and 11 (d) of the *Charter* and of no force and effect. The Provincial Court Judge, therefore, dismissed the charges. Mr. Justice Montgomery, on appeal, found that the impuned sections did not violate the *Charter* and he ordered the case sent to trial. The accused then sought leave to appeal to the Court of Appeal on a question of law.

The sections of the *Competition Act* in issue included the general misleading advertising provision contained in para. 36(1)(a). The more important section challenged however, was the defence contained in ss.37.3(2). The sections

read as follows:

36.(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,

(a) make a representation to the public that is false or misleading in a material respect...

37.3.(2) No person shall be convicted of an offence under section 36 or 36.1, if he establishes that,

(a) the act or omission giving rise to the offence with which he is charged was the result of error;

(b) he took reasonable precautions and exercised due diligence to prevent the occurrence of such error;

(c) he, or another person, took reasonable measures to bring the error to the attention of the class of persons likely to have been reached by the representation or testimonial; and

(d) the measures referred to in paragraph (c), except where the representation or testimonial related to a security, were taken forthwith after the representation was made or the testimonial was published.

Section 37.3 (2) is the defence available to an accused adopted in the *Competition Act* Amendments passed in 1975.

The sections of the *Charter* in issue include Section 7 which states that everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice. The other *Charter* section raised, Section 11, states that any person charged with an offence has the right to be presumed innocent until proven guilty according to law and after a fair and public hearing by an independent and impartial tribunal.

The accused argued that, in combination, Sections 36 (1) (a) and 37.3 (2) (c) and (d) are contrary to Section 7 of the *Charter* because they in essence create an absolute liability offence for which the punishment may be up to five years imprisonment.

The accused also argued that Sections 7 and 11 (d) of the *Charter* are contravened by paragraphs (a) and (b) of Section 37.3 (2) because they require the accused to "establish" a due diligence defence which is contrary to the presumption of innocence.

Mr. Justice Tarnopolsky, in his majority judgment, first dealt with Section 7 of the *Charter*.

CANADIAN COMPETITION POLICY RECORD

In particular, he dealt with a preliminary issue raised by the Crown as to whether a corporation could avail itself of s.7. He reviewed the decision of the Supreme Court of Canada in *Irwin Toy Ltd. v. A. G. Quebec*, [1989] 1 S.C.R. 927 and the Supreme Court decision in *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295.

Mr. Justice Tarnopolsky stated in conclusion that:

Therefore, it seems clear that *Irwin Toy* and *Big M Drug Mart*, taken together, produced the proposition that, while a corporation cannot rely on s.7 in circumstances such as an application for declaration that a law is invalid, it cannot be convicted under a law that violates s.7. Once charged with an offence, a corporation is entitled to submit that the legislation under which it is charged is unconstitutional because it infringes the right to life, liberty and security of a human being, and thus violates s.7 of the *Charter*.

The effect of this decision is that even though a corporation cannot avail itself directly of s.7, if the statutory scheme is unconstitutional for any reason, the corporation obviously cannot be subject to it. The Court then turned to the question of whether the provisions of the *Competition Act* contravene s.7 by creating an absolute liability offence.

Mr. Justice Tarnopolsky reviewed the decisions of Mr. Justice Lamer of the Supreme Court in re: *B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486 and *R. v. Vaillancourt*, [1987] 2 S.C.R. 636. In particular he quoted from the *B.C. Motor Vehicles* case as follows:

A law that has the potential to convict a person who has not really done anything wrong offends the principles of fundamental justice and, if imprisonment is available as a penalty, such a law then violates a person's right to liberty under s.7 of the *Charter of Rights and Freedoms*. . . In other words, absolute liability and imprisonment cannot be combined.

Mr. Justice Tarnopolsky stated as follows: Therefore, if paras 36 (1) (a) and 37.3 (2) (c) and (d) prevent an accused human being from relying upon the defence of due diligence before he or she is subject to imprisonment, then those provisions contravene *Charters* s. 7. By s-s.36 (5), a human being may be imprisoned for up to five years for the violation of s-s.36 (1)(a). By paragraphs 37.3 (2) (c) and (d) a prompt retraction is required and so may have to be made before

trial. This could deprive the accused of the defence of due diligence. Where failure to make a prompt retraction is not negligent, the accused may be convicted even despite his proving on the balance of probabilities that he acted with due diligence.

Mr. Justice Tarnopolsky therefore found that paragraphs 37.3 (2) (c) and (d) are contrary to Section 7 of the *Charter* and are of no force and effect. He further concluded that the provisions could not be saved by Section 1 of the *Charter*.

It appears that the Crown has lost this case because the Statute does not distinguish between the penalties available against human beings and corporations. If the penalty in the Statute for corporations were confined exclusively to fines and did not mention imprisonment, then it would seem that there would be no violation of Section 7 of the *Charter*.

The next issue dealt with by the Court was whether the provisions of the *Competition Act* violated the presumption of innocence guaranteed by Section 11 (d) of the *Charter*. In particular the Court looked at the provisions in paragraphs 37.3 (2) (a) and (d). The issue here was whether those paragraphs, by the requirement that the accused "establish" the defence violates the presumption of innocence.

Mr. Justice Tarnopolsky reviewed the various Supreme Court of Canada decisions with respect to the meaning of a presumption of innocence. Particularly, he reviewed the question whether any statutory language would violate the *Charter* if it related only to an excuse and did not impose on the accused the obligation to prove a particular excuse or defence. In other words, if the Crown must still establish beyond a reasonable doubt all the material elements of the offence, then does statutory language which provides a defence or exemption for the accused if he proves a particular fact contravene the presumption of innocence protected by the *Charter*? The Supreme Court of Canada decisions clearly adopt two different approaches. One school of thought states that it is not merely a reasonable doubt with respect to material elements of the offence that must be proved by the Crown, but that any aspect of the matter raising reasonable doubt will result in innocence. Mr. Justice Tarnopolsky, in the final analysis, did not feel it necessary to conclude

CANADIAN COMPETITION POLICY RECORD

which principle the Ontario Court of Appeal should follow because he found that:

...the Supreme Court of Canada has held consistently that a statutory provision which makes it possible for an accused to be convicted despite the existence of a reasonable doubt in the mind of the trier as to the guilt of the accused violates the presumption of innocence in s. 11(d) of the *Charter*.

He concluded that paragraphs 37.3(2)(a) and (b) violated this principle because:

...they require the accused to "establish" that he or she exercised due diligence to prevent the false or misleading representation to the public. This provision cannot be read as simply imposing an evidential burden on the accused. The Supreme Court of Canada held in *R. v. Appleby*, [1972] 2 S.C.R. 303 and again in *Whyte, supra*, that, as a matter of statutory interpretation the word "establishes" imposes a persuasive burden on the accused to prove the necessary fact on the balance of probabilities and cannot be read to impose only an evidential burden on the accused.

He also found that Section 1 of the *Charter* would not alter the result.

As to his disposition of the case, Mr. Justice Tarnopolsky severed paragraphs 37.3(2)(c) and (d) from the rest of the section and held them to be of no force and effect. He also excised the words "he establishes that" from subsection 37.3(2) and held those words to be of no force and effect. The result was as he stated:

...although Section 36 (1) (a) is constitutional, as are the defences set out in paras 37.3(2) (a) and (b), the accused would not have the onus of "establishing" them.

Mr. Justice Lacourcière agreed with Mr. Justice Tarnopolsky. Mr. Justice Zuber agreed with the conclusions of his fellow Justices on the question of paragraphs 37.3 (2) (c) and (d) but he

found that paragraphs 37.3 (2) (a) and (b) of the *Act* were constitutional. He found, after reviewing the Supreme Court of Canada decisions, that the burden of establishing due diligence placed on the accused by provisions of the *Competition Act*, does not contravene the *Charter*. He reached this conclusion since the Crown must still prove, beyond a reasonable doubt, the essential elements of the offence before a conviction can be entered. He also stated that if he were left to his own devices and not subject to the principle of *stare decisis* he would:

...[h]ave had little difficulty in concluding that if an accused seeks to excuse his otherwise criminal conduct, the law may cast the burden of establishing such an excuse (e.g. due diligence) upon the accused. I see nothing unreasonable or unprincipled in this conclusion especially in a case such as the one at hand where the facts upon which due diligence depend are peculiarly within the knowledge of the appellant.

The implications of the Court of Appeal's decision may well be significant for the government in prosecuting misleading advertising cases. The point made by Mr. Justice Zuber about the facts of due diligence being specially within the knowledge of accused is one which the government certainly relied on in 1975 when the provisions were enacted. Previous to that time the government had had difficulty in disproving due diligence by corporations who created paper-based corporate policies strictly prohibiting misleading advertising, etc. Although the language of section 37.3 (2) was ambiguous, in practice it arguably did require the accused to establish a defence of due diligence and relieve the Crown of that obligation. The Crown received leave to appeal the decision to the Supreme Court of Canada.

CANADIAN COMPETITION POLICY RECORD

**MERGER EXAMINATIONS UNDER THE COMPETITION ACT
STATISTICAL SUMMARY**

	1986-87 ¹	1987-88	1988-89	1989-90 ²
MERGER EXAMINATIONS COMMENCED ³	40	146	191	219
EXAMINATIONS CONCLUDED				
Concluded as posing no issue under the Act ⁴	17	120	166	204
Concluded with Monitoring only ⁵	5	7	10	13
Concluded with pre-closing restructuring ⁶		2	1	-
Concluded with post-closing restructuring ⁷	1	2	3	1
Concluded with Consent Order				3
Parties abandoned proposed merger in whole or in part as a result of Director's position	3	2	2	2
TOTAL EXAMINATIONS CONCLUDED	26	133	182	223
EXAMINATIONS ONGOING AT END OF PERIOD	14	25	32	31
INTENT TO FILE APPLICATION ANNOUNCED	-		2	
APPLICATIONS BEFORE TRIBUNAL:				
Concluded ⁸	1	-	2	3
Ongoing		2	2	1

Notes

1. Statistics commenced on June 19, 1986.
2. Statistics to end of Fiscal Year 1989-90 (Mar. 31/90).
3. Two or more days of review. Includes 267 prenotifications since July 15, 1987 of which:
-in short-form (s.121): 1987/88 - 44, 1988/89 - 50; 1989/90 - 89.
-in long-form (s.122): 1987/88 - 21; 1988/89 - 42; 1989/90 - 21.
4. Includes:
159 Advance Ruling Certificates
1986/87 - 2; 1987/88 - 26; 1988/89 - 59; 1989/90 - 72
22 Advisory Opinions -
1986/87 - 3; 1987/88 - 10; 1988/89 - 6; 1989/90 - 23
5. All advisory opinions.
6. All advisory opinions.
7. 1 Advance Ruling Certificate and 6 Advisory Opinions.
8. These matters are counted under examinations concluded.