CANADIAN COMPETITION RECORD

CANADIAN COMPETITION LAW AND POLICY DEVELOPMENTS

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ADDRESS BY DIRECTOR OF INVESTIGATION AND RESEARCH TO THE CBA COMPETITION LAW SECTION

The following are the notes from a speech made by George N. Addy, Director of Investigation and Research, Bureau of Competition Policy, to the CBA Competition Law Section at the 3rd Annual Competition Law Conference held in Aylmer, Quebec on September 29, 1995, and is reproduced with permission.

Introduction

Today I would like to highlight some of the significant case and policy developments that have occurred since I last addressed you. I am also going to talk about changes that have taken place in the Bureau as a result of the government's program review. I will also outline some initiatives that I intend to pursue in the next year. Finally, I will update you on the amendments process.

The Year in Review

When I spoke to you last September I identified some ongoing case matters that I hoped to see resolved as well as some initiatives I intended to pursue. One of my commitments was to work on revitalizing the Consent Order process. My application under the abuse of dominance provisions concerning certain business practices of Yellow Page Publishers was the first opportunity we had to act on this commitment. The application was filed on September 20, 1994, and the Consent Order was issued on November 18, 1994.[1] This was significant in two respects. First, obtaining a Consent Order in approximately two months from filing should signal that this process can be both quick and effective. This together with the Competition Tribunal's decision to revise the rules of the Consent Order process, will go a long way towards its revitalization. Second, this was both the first Consent Order sought under a non-merger provision of the Act and the first joint dominance application to be dealt with by the Tribunal.

Another major development in the non-criminal area is the recent decision of the Tribunal in the Nielsen case.[2] In April 1994, I filed an application under the abuse of dominant position provisions alleging that Nielsen had engaged in a practice of anti-competitive acts relating to the purchase of scanner data from major retail chains, and that these acts had the effect of preventing or lessening competition substantially. The hearings commenced on October 17, 1994. A stay of proceedings was granted pending a Motion for leave to appeal to

the Supreme Court of Canada by Nielsen of a Federal Court of Canada decision concerning certain privilege claims I made in relation to some documents. The leave to appeal was denied and the hearings recommenced on April 3, 1995, and were completed on April 28, 1995.

In its August 30, 1995, decision the Tribunal found that Nielsen controlled a class or species of business and that it had engaged in a practice of anti-competitive acts, the result of which was to substantially lessen or prevent competition. The Tribunal made an order in this matter that, among other things, prevents Nielsen from entering into a contract which precludes or restricts a supplier of retail scanner data from providing data to another supplier or potential supplier of a scanner based market tracking service.

Apart from the importance of the decision to those directly involved in the market in question, the decision is significant for a number of other reasons. First, it reemphasizes the importance of the abuse of dominance provisions and their application to situations where companies try to prevent the possibility of competitive entry into a market through the use of exclusionary tactics such as exclusive contracts and inducements. Second, the decision is a significant addition to the jurisprudence in the non-criminal area and re-affirms many of the previous Tribunal findings concerning the interpretation of the wording of the abuse of dominance provisions. I was pleased to see that the Tribunal accepted our interpretation of the meaning of "a class or species of business" and its breakdown into product and geographic market components. Finally, the implications of this decision are not limited to the use of marketing data used by the grocery products industry and drug stores, but relate to the use of data in any context. For example, participants in high tech industries cannot control data for strategic and anti-competitive purposes.

Another priority matter that I mentioned last year was to seek to increase the level of fines in *Competition Act* offences in appropriate cases and to actively pursue charges against individuals. I am pleased to report that in the last year we obtained the largest single fine under the misleading advertising and deceptive marketing practices provisions of the Act, in the Wolverine Tube matter.[3] We also obtained substantial fines under the ordinary selling price provisions in Color Your World[4] and Suzy Shier.[5] In 1994-95, the average fine for offences under the misleading advertising provisions was $61,000 - a threefold increase over the previous year. As to individual charges, in the Calgary Real Estate matter, on October 28, 1994, Royal Lepage Real Estate Services Ltd. and a former vice-president and regional manager were convicted[6] on three counts of horizontal price maintenance. In addition, a former branch manager was convicted on one count.

The Bureau continues to ensure that the provisions of the Act are applied to the activities of professional associations where these activities are not expressly authorized by a regulatory agency. A prime example of this is the guilty plea which was entered by the A.Q.P.P.[7] for contravening the conspiracy provisions of the Act. The matter involved the cash sale of birth control pills and prescription narcotics, including dispensing fees, in the province of Quebec. A fine of 2 million dollars was imposed under section 45 of the Act.

As you may be aware, on Wednesday [September 27, 1995] I announced that a record fine of 2.5 million dollars had been levied against Canada Pipe

Company Ltd.[8] Canada Pipe pleaded guilty to one count of conspiracy to have a major American competitor, U.S. Pipe and Foundry Company, exit the Canadian market. The decision is significant in that a portion of the fine was designated as the company's contribution to the cost of the Crown's investigation and legal services. As well, this matter proceeded with extensive cooperation from the U.S. Department of Justice. The open discussion and exchange of information between the two agencies was important to the resolution of this matter. I would also like to make specific note of the assistance provided by Barbara Brown and Bill Oberdick of the Cleveland Office of the U.S. DOJ. This is a clear example of how cooperation between antitrust agencies can clearly benefit the Canadian economy.

There was a significant development in the merger area as well. On August 8, 1995, the Federal Court of Appeal issued its decision on the appeals filed against the Tribunal's decisions in the Southam matter.[9] The decision, on our appeal of the Tribunal's dismissal of the applications with respect to print retail advertising markets served by the North Shore News and the Vancouver Courier and the print real estate advertising market in the Lower Mainland of British Columbia, is very important for the Bureau in many respects. In overturning the Tribunal, the Federal Court of Appeal re-affirmed the relevant market tests which are used by the Bureau and set out in the Merger Enforcement Guidelines. The Court of Appeal concluded, as we had argued, that the Pacific Press dailies and the community newspapers were in the same relevant market. The Court of Appeal also found that the Tribunal had focused too much on one indicator of the lack of competition, namely the lack of evidence of price sensitivity, and had ignored other types of evidence which revealed the existence of competition.

In a second decision, the Federal Court of Appeal dismissed Southam's appeal of the Tribunal's remedies decision ordering the divestiture of either the North Shore News or the Real Estate Weekly. The Court of Appeal rejected Southam's arguments, finding that the Tribunal was required to assess the effectiveness of the alternative remedies proposed, and held that notions of economic harm or inconvenience were irrelevant to the decision making process.

Another significant development on the merger front was the first use by the Bureau of the Interim Consent Order provisions of sections 100 and 105 of the Act. On December 23, 1994, Quebecor Printing Inc., notified me of its intent to purchase certain assets from Rogers Communications Ltd. On January 16, 1995, the Competition Tribunal issued an Interim Consent Order in response to my application.[10] The Order allowed Quebecor to make the acquisitions but required that the acquired businesses be maintained separate by Quebecor from its other operations for a period of 21 days. The application was intended so to allow completion of my assessment of the competitive impacts of the transaction. After a detailed examination, I announced on February 7, 1995, that I would not challenge the transaction.[11] This was the first time these provisions were used, and it brought to light some deficiencies in the provision. There is also some question about the use of this provision as a hold separate mechanism. While the provisions adequately dealt with the circumstances in this case, where the parties to the proposed transaction did not wish to provide adequate time for the Bureau to review the proposal, it does not provide a mechanism for me to compel production of the information that was required from the parties. In the future I will

be inclined to use other tools at my disposal should similar circumstances arise.

Still in the merger area, a matter that has received considerable press in recent weeks is that of the proposed AMOCO/Home Oil transactions.[12] On August 3, 1995, I issued an Advanced Ruling Certificate in respect of the proposed transaction under section 102 of the Act. Shortly thereafter, I received new information which raised some concerns as to the competitive impact of the proposed transaction and we pursued an examination of these issues. This is indeed what the Act allows for. Section 103 prohibits me from applying to the Tribunal under section 92, in respect of a transaction for which an ARC was issued and that is substantially completed within one year, solely on the basis of information that is the same or substantially the same as the information on which the certificate was based. This was clearly not the situation in this case. Since the Act was passed in 1986 there have been over 700 ARCs issued and this is the first time that the Bureau has received new information that has raised a concern with a transaction in which an ARC had already been issued. I do not think that this signals the demise of ARCs.

In another merger matter the ability and appropriateness of dealing with competition concerns through the use of undertakings was severely tested. On September 24, 1990, Ultramar Canada Inc. provided undertakings concerning the continued operation of the Eastern Passage Refinery that it acquired as part of the divestiture of assets required in the Imperial/Texaco merger.[13] One of the provisions of the undertaking required that Ultramar continue to operate the refinery for a period of at least seven years from the date of purchase, "barring a material adverse change". In May 1994, Ultramar provided notice there had been a material adverse change and that the operation of the refinery would be discontinued. On July 18, 1995, my preliminary views, that there had been a material adverse change, were provided to interested parties for comment before I made a final decision on the issue. Legal actions were initiated by the Atlantic Oil Workers (AOW), the union representing workers at the refinery and by the province of Nova Scotia, as represented by the Attorney General of Nova Scotia.

The AOW filed a motion with the Competition Tribunal requesting that the Tribunal take jurisdiction over the undertakings as part of the original Imperial/Texaco matter. The Tribunal, in denying the motion, concluded that it had dealt with the competition concerns raised in the Atlantic market with its order to divest the assets and that the order gave the Director the role of approving the purchaser of those assets.[14] Furthermore, the decision of the Tribunal recognized that I could deal with competition concerns in a number of ways, including the acceptance of undertakings. As for the motions of the Attorney General of Nova Scotia, the Federal Court of Canada dismissed both applications.[15] In dismissing the application for prohibition on the issue of bias, the Court concluded that the Director was executing an administrative function, as opposed to a judicial or quasi-judicial function, and was not subject to the reasonable apprehension of bias standard. It held in any event that there was no bias and further that while there was no such duty owed given the nature of the function, there was no violation of any duty of fairness. In the second application for mandamus, the Federal Court concluded that there is general public duty on the Director by virtue of the Act to consider Ultramar's submission that a material

adverse change has occurred in light of the available evidence, including that provided by interested parties. The Court also stated that whether legal action is taken by me to enforce undertakings is within my discretion and that it is not for the Court to order if or how that discretion should be exercised.

While these challenges to my ability to resolve concerns by way of undertakings have not been successful, the use of undertakings is still seen by many as an inappropriate manner to deal with competition issues arising from mergers. While undertakings are normally made public, the evidence supporting the conclusions of the Director and the positions of the parties, of necessity, remains largely confidential. This leaves the correctness of the decision open to question by those not privy to all the information. Thus, as I have stated in the past, I continue to prefer the use of consent orders which allows for greater openness to the public.

The most active business sector for the Bureau in the year since I last addressed this group is that of telecommunications and broadcasting. At that time the Canadian Radio-Television and Telecommunications Commission had just rendered its decision (CRTC 94-19) on a new telecommunications regulatory framework.[16] Since then the Bureau has participated in several other matters before the CRTC, the most significant being the public hearing on Information Highway issues. On May 19, 1995, the Commission issued its report to the government, adopting a pro-competitive framework for convergence and the development of Canada's Information Highway. Perhaps most significantly, the CRTC's report accepted that the public interest would best be served by the development of competition in the distribution of broadcast services, which has been provided by the cable industry on a monopoly basis. In particular, the Commission accepted my recommendation that there should be no mandated period of transition to protect the cable monopolies. The Commission indicated that it is prepared to grant broadcast distribution licenses to the telephone companies, conditional upon the completion of regulatory reforms necessary to allow for competition in the provision of local telephone service. I concur with the CRTC's course of action, provided that it can complete the process of regulatory reform within the 12-18 month time set out in its report.

In addition, Government policy for Direct-to-Home (DTH) satellite distribution, as reflected in its directions to the CRTC concerning DTH licensing, strongly endorses the principle that there should be competition in the distribution of broadcast services. I appeared as a witness before both the Senate and House Committees on DTH and was particularly gratified that the Senate report adopted a number of the positions which I had put forth at the hearings.[17] Many of these points appeared in the Government's subsequent directives aimed at promoting a dynamically competitive market for DTH services. For example, the directives provide that the impact of new entry on other market participants is not to be a criterion in the awarding of DTH licences. This is significant support for the principle of relying on market forces to determine participation in the provision of broadcast services.[18]

Another industry in transition is that of power generation. This year, I intervened in an Electricity Market Structure Review conducted by the B.C. Utilities Commission.[19] The purpose of this review is to provide policy advice to the B.C. Government regarding the benefits of, as well as options for, further opening the province's electrical network. My submission examined various technological and other

developments that support movement toward a more open and competitive market structure in the B.C. electricity industry. The final argument, submitted on June 14, 1995, reviewed various structural requirements for effective competition in electricity markets and stressed the role that competition policy can play in facilitating the transition to a competitive market. This intervention followed a similar intervention in proceedings in Ontario considering the future of Ontario Hydro.[20]

A commitment that I made last year in the international area was to update the existing relationships with other antitrust agencies to make them more in tune with the globalization of trade that has and is continuing to develop. A key development in this area occurred when the Minister of Industry, the Honourable John Manley, signed a new Agreement, on August 3, 1995, between the Government of Canada and the Government of the United States of America Regarding the Application of their Competition and Deceptive Marketing Practices Laws. The new Agreement replaces the non-binding Canada/U.S. Memorandum of Understanding which was concluded in 1984. The Agreement builds on the 1984 MOU by improving the notification, consultation and dispute avoidance provisions. It also contains several new provisions committing the two governments to more extensive cooperation in the enforcement of their competition and deceptive marketing practices laws. I would refer you to my remarks delivered at the joint session of the CBA and the ABA in Chicago for more detail on the new agreement.[21]

The final topic I would like to discuss in my review of the Bureau's activities is the new Bulletin on Strategic Alliances. Given the increasing number of types of business organization in today's economy, I was concerned that uncertainty about the application of the law to various business arrangements not impede beneficial forms of cooperation. So, it was important to me that a clear statement on strategic alliances and the Act be released. I also wanted to make sure that its intended audience find the document useful. I am therefore extremely pleased with the process that was followed in this instance. The comments I received on the drafts illustrated the effectiveness and value of informed consultation. Most of them supported the need for such a bulletin and have been quite positive regarding the changes incorporated into the second draft. I appreciated receiving the many useful comments which made the second draft more helpful to its audience without losing the essential message I wanted to communicate. The document is at the printers at this time and so you will receive it soon.

The Changing Bureau

Last year at this time, the Government was in the process of completing its program review, a ground up examination of federal government programs to determine their continued relevance, to identify operational and legislative efficiencies and to reduce overall fiscal burden on the economy. This review had specific consequences for the Bureau, not only as a result of the overall departmental review, but also as it examined its own operations.

As part of our portion of the program review exercise, we reviewed our enforcement operations. When we looked at the decentralized structure of the Marketing Practices Branch, we realized that a centralized Branch, like the other enforcement Branches, would contribute most to the focusing of the Branch's enforcement activities on those matters of the highest priority. As a result, the Bureau has closed its regional operations. We are now in the process of staffing the new positions in the

Headquarters operations of the Branch. The restructuring of the Marketing Practices Branch operations will allow for better priority setting in the Branch and will also position the Branch to be integrated more fully with the rest of the organization.

The closing of the Bureau's regional operations also meant we had to look at complaint handling. The regional offices were an entry point for complaints the Bureau would receive. Now, however, a centralized complaints and information unit, the Complaints and Public Enquiries Centre, has been created to receive all public complaints and information requests. While previously only an estimated 38 percent of Canadians had toll free access to the Bureau, the new 1-800 number will provide all Canadians free and easy access to the Bureau. I expect that the Centre will be functioning at complete capacity in the next few weeks. It is currently receiving close to 900 complaints and information requests per week and the volume of requests is on the increase. At the present rate of growth, we expect to receive over 50,000 requests for service over the next year, an increase of almost 20 percent over last year. To reach the Centre, just call 1-800-348-5358.

The departmental program review exercise also resulted in responsibility for Industry Canada's Consumer Products Directorate being transferred from the former Bureau of Consumer Affairs to the Director of Investigation and Research. The Consumer Products Directorate enforces and administers legislation that protects and assists consumers by promoting fairness in the marketplace: the *Consumer Packaging and Labelling Act,* the *Textiles Labelling Act,* and the *Precious Metals Marking Act.*

Legislative changes will be required before we can proceed with any potential integration of our activities. For now, and until we have given the matter more thought, the two organizations are being held separate. Although it reports to me, the Consumer Products Directorate is not part of the Bureau. There will be no co-mingling of my responsibilities under the Act and those with respect to the labelling legislation. This separation is necessary to avoid any real or potential conflict that might arise due to the overlap in the respective mandates of the Act and the consumer protection legislation. In addition, the stringent confidentiality provisions of the Act require it.

While the cut to our budget for the current year was ultimately lower than was initially indicated, the effect of the reductions from the program review exercise is only one part of the equation straining our enforcement capabilities. In recent years, major sections of the economy, which were previously regulated, have become open to competition and therefore fully subject to its provisions. In order to make the most effective use of our resources, we implemented case screening criteria to identify priority cases. These measures were implemented at that time because we realized that our resources were not sufficient to pursue all the cases of merit.

I mentioned earlier that the Bureau has devoted considerable time and effort in the last year in the area of telecommunications policy. There are a number of industrial sectors including telecommunications, broadcasting, transportation and agriculture where major changes in the marketplace have or may take place. We have, for example, devoted time to the review of initiatives that the Government is currently undertaking of the *National Transportation Act* (NTA). Bill C-101 is

currently before the House of Commons and provides for the further deregulation of the transportation sector.[22] The proposals will result in some areas where responsibility is currently shared between the NTA and the Act, such as merger review, becoming the exclusive domain of the Bureau.

Yet another example of an industry in transition that may soon be absorbing more Bureau resources is the financial sector. The Standing Senate Committee on Banking Trade and Commerce released an Interim Report in August 1995 on the federal financial institutions legislation. The legislation studied comprised the *Bank Act,* the *Trust and Loan Companies Act,* the *Insurance Companies Act* and the *Cooperative Credit Associations Act.* Each of these four statutes was adopted in 1992 and contains a sunset clause which will come into effect in 1997. While this is only one level of the examination of the structure of financial institutions in Canada, the Senate Committee report, while not including specific recommendations, is strongly supportive of competition policy goals. It seems likely that as these sunset dates approach we will not only be involved in the examination of the various regulatory regimes, but may also find that more and more activities of financial institutions are removed from regulation and become fully subject to the provisions of the Act. As these industries continue the move towards competition, the demands on the Bureau will continue to increase.

Without sufficient resources to meet these new demands, the Bureau's ability to continue to pursue all the cases that we believe are significant will be compromised. If this situation persists it can only result in the Bureau pursuing fewer cases. This resource squeeze may be mitigated to some extent should the proposed amendments concerning the opening up of the Tribunal to private actions be made law, but private access alone will not solve the problem.

I want to spend the next few minutes speaking about the philosophy behind our enforcement policies and practices. Our enforcement of the reviewable matters provisions, and most particularly the merger provisions, has been characterized by an approach of voluntary cooperation. This has included the voluntary disclosure of proposed mergers that are not required to be notified, and the voluntary provision of information relating to both notifiable and non-notifiable transactions. We have also witnessed cooperative information disclosure in relation to practices arising under the other reviewable provisions of the Act.

In the case of merger review during the past few years, the voluntary process has worked for the majority of cases, typically the ones that do not raise any concern or where concerns were quickly alleviated after obtaining additional information from parties or from third parties. These represent more than 90 percent of all transactions examined in the Mergers Branch. However, when transactions raise *prima facie* competitive concerns, or when additional information fails to alleviate those concerns and my staff ask for more specific and strategic information, we have seen cooperation fade and fade fast.

For example, I am aware that some counsel advise their clients to take a very narrow view of the voluntary information requests that we send out in the course of our examinations. And in every merger case that we have brought before the Tribunal we have obtained, during the discovery process, documentary information that we believe should have been made available during the course of our preliminary examination of the matter.

Accordingly, to ensure the effectiveness of our review process we have recently felt it necessary to use the provisions of section 11 in the course of some merger examinations.[23] Previously we found, by requesting parties to respond to information requests as though they were made under section 11, an improvement in the quality of information provided to us. Counsel not only provide their usual competition brief, but counsel will also provide corporate documents and more factual information. In one case, orders under paragraphs 11(1)(a) and (b) were used to obtain information that parties to transactions had refused to provide. These provisions have also been used in a civil abuse examination and most recently we have conducted the first section 15 searches in respect of a noncriminal provision of the Act.

In the absence of open, voluntary cooperation by the parties it will always be necessary to occasionally use formal powers to maintain the effective enforcement of the Act. However, these instances in no way spell an end to our traditional, compliance oriented approach. Each situation will be examined on its own merits to determine whether formal powers are necessary. If, as experts in this field of law, you believe, as I do, that voluntary cooperation is an important feature of the Canadian model then you must also reflect that in your actions and your advice to your clients. As important as voluntary cooperation is, I will not let a question of process, no matter how attractive, put the fulfillment of my oath of office at risk.

The Year Ahead

In looking at the year ahead I believe that the most important single activity for the Bureau and for Canadian competition policy will be the amendments process that we are presently undertaking. However, before dealing with amendments, I would like to touch on some important initiatives that the Bureau will be undertaking in the year to come.

In the fall I will again be consulting on the subject of cost recovery. With the enactment of the *Industry Canada Act,* we now have the authority to proceed with cost recovery for Bureau services. As part of this process we recently undertook an examination of the Program of Advisory Opinions. I will be sharing with you the changes I propose to make to this program but today I would simply say that Advisory Opinions will be included in the cost recovery initiative.

I will continue to issue statements and papers to explain my policies and position on matters of importance to competition law enforcement. For example, I will be issuing a statement this fall to provide the legal and business communities with my views on Corporate Compliance Programs.

Another subject I intend to address in the coming months is the area of private actions. With the increase in the number of private actions in recent years, I believe that it is important for me to articulate the role and responsibilities of the Director in respect of section 36 civil actions. Cases such as the decision in the A.Q.P.P. matter in Quebec have raised the profile of the provisions of section 36 of the Act.[24] It is important, therefore, that counsel and the business community understand what I believe my obligations are in respect of these matters and what assistance the Bureau can provide.

I intend to continue to devote significant resources to our information and communications activities. In the year ahead, in an effort to further increase the transparency of and accountability for the

decisions taken, I will launch a quarterly publication. This report will build on the Annual Report in that it will provide more timely information to you and your clients on such matters as recent case decisions, interventions that the Bureau made and forthcoming initiatives. As well, this new report will include highlights from recent speeches that members of the Bureau have given.

I mentioned earlier the use of section 11 examinations in merger matters. Their use in the Canmar/Cast examination has resulted in a considerable number of interesting decisions surrounding this procedure, both from the presiding hearings officer and Mr. Justice Farley of the Ontario Court (Commercial Division).[25] These decisions provide valuable guidance on many issues such as the sealing of application materials, the various claims of privilege and their use, the rights of counsel for a competitor to attend examinations conducted under section 11, and access to the transcripts of testimony during the conduct of an examination. In the next few months we will be examining these decisions in detail and will review our policy and procedures in relation to such examinations accordingly.

In the area of international agreements work is currently underway to forge closer links with our other major trading partners. In this regard, negotiations towards a formal bilateral agreement between Canada and the European Union are at an advanced stage and I hope to have a Canada/EC MOU in place soon. Those of you who follow world antitrust developments will already know that the need for better cooperation amongst competition agencies is receiving increasing attention globally.

The Bureau will also be continuing its evolution in the area of technology. We will continue to examine our procedures to identify areas that can benefit from the use of new technology. For example, we will be continuing to develop our expertise in the area of electronic searching. In that regard, I note that you are examining the issues surrounding the process of electronic searches in Bureau investigations. In fact, I would like to suggest that the dialogue between us could be extended in this area. The Bureau would be pleased to participate directly in your examination of this matter such that all parties benefit from this process. I believe this type of working together on issues is an obvious next step for our relationship.

Proposed Amendments

As most of you know, I issued a discussion paper on amendments to the Act on June 28, 1995. The paper proposed amendments in eight separate areas that, overall, will promote quicker and more effective resolution of competition issues, better equip Canada to deal with anti-competitive and deceptive practices that originate outside the country, and address the problem of deceptive telemarketing.[26]

I look forward to receiving the CBA Competition Law Section's comments in the very near future. I want to commend you for the hard work I know the subcommittees have done so far. Some of you, in your personal capacities, have already provided useful feedback during focus groups which were held in July and August on the subjects of prenotification and confidentiality and international cooperation.

As you know, I extended the period for comment from stakeholders from the original deadline of September 15 to October 6, 1995 to accommodate those parties who wanted to comment but indicated they required more time to do so. To assist me in developing recommendations to the Minister, I am setting up a Consultative Panel,

chaired by Ed Ratushny, Q.C., which will include representatives of stakeholders affected by the operation of the Act. The Panel will review possible solutions to issues arising from the discussion paper and advise on the suitability and feasibility of the proposals and alternatives.

I remain committed to a process which would see introduction of a bill in Parliament next spring. I should also note that the Minister of Industry has asked the House of Commons' Industry Committee to consider the problem of deceptive telemarketing by holding hearings this fall on the subject.

Prenotification

Some of the comments we have received on the subject of prenotification have been to the effect that our proposal represents too significant a change to a process that, fundamentally, works well through a practice of voluntary cooperation. While I agree that the current system works reasonably well in many cases, there are problems that, from our perspective, need to be addressed. The most pressing of these relates to the type and quality of information that is available to us in respect of proposed transactions.

It is common knowledge that the information currently required by the prenotification provisions is inadequate to allow us to determine the impact of what is proposed, particularly in cases where competition issues appear to exist. In addition, we are concerned that the existing waiting periods do not provide sufficient time for us to conduct our analysis in such cases. While voluntarily supplied information has been used in the past to bridge the information gap, we have reluctantly come to the conclusion that reliance on such informal measures is not always adequate or efficient for the reasons outlined.

Our goal in the amendments exercise is to improve the prenotification process -- shorten review times within the Bureau, reduce the provision of irrelevant information and provide greater certainty. We assume this objective is in the interest of the parties to the merger as well. While the same level of detail may not be necessary for every filing, at the end of the day, the availability of relevant, reliable and accurate information early in the process is critical to our ability to make wellfounded and timely decisions where issues do arise. This concern is fundamental to an understanding of our prenotification proposal. This means of course that the time spent before filing will be more focused than in the past.

Mutual Assistance and Confidentiality

As business activity transcends national borders, it is essential that Canada not become a haven for foreign-based anti-competitive offences by permitting parties to hide behind our borders when it comes to law enforcement. By all means, businesses should take advantage of the economic benefits of competing in foreign jurisdictions. However, they shouldn't then be insulated from the consequences of their actions in the event they run afoul of reasonably-based foreign competition laws.

The evidence clearly supports the fact that there is a need for this increased cooperation. For example, in 1994-95 my office has received almost twice as many formal notifications under the provisions of bilateral agreements, than it did in the previous year. There has also been a noticeable increase in the number of notifications that we have sent to foreign jurisdictions.

As you know, comments on the 1994 draft Information Bulletin on the treatment of confidential information under the Act reflected a broad range of views on the question of statutory confidentiality limits and policy options on information sharing with foreign counterparts. Given the importance of effective transborder competition law enforcement and the questions that were raised as to my ability to cooperate with foreign competition law agencies, I recommended to the Minister that legislative amendments be considered to clearly establish a framework for gathering and communicating information in appropriate circumstances, including in the international context.

Mutual legal assistance with foreign competition law agencies is a key component of the amendments package. A consistent theme in my public remarks since becoming Director has been that economic and enforcement realities are such that we must strive to find ways to combat anti-competitive acts which transcend borders, harming Canadians. Information sharing is one means of achieving this end.

I have found one position expressed by many legal commentators during our consultations to be particularly noteworthy. These relate to concerns about the potential scope of information exchanges, focusing on how to limit the Director's discretion to communicate information to foreign competition law agencies.

These comments were made from the point of view of counsel for potential targets of investigations under the Act. This is curious since I know that at least some counsel also represent complainants alleging they have been harmed by the practices of their competitors. One presumes that, if one were to ask complainants whether the ensuing investigation should be stopped at the border, one would get a resounding "no -- do your job and don't let multinational companies hide behind international frontiers". Yet some counsel, who admittedly also represent potential targets in other matters, appear to be arguing against this from a public policy standpoint.

In a speech to the Canadian Manufacturers' Association on March 7, 1995, I urged members in their role of providing input on public policy to have regard not merely to domestic issues but also the broader global environment, which was key to their members' and this country's economic success. I would simply reiterate the same broad vision to you.

Misleading Ordinary Selling Price Claims

Section 52(1)(d) seeks to ensure that representations as to savings off ordinary selling prices are genuine. Sales in which fictitious savings are being claimed are prohibited. As you know the Bureau has, in the past, made a concerted effort to bring its views of the requirements of the law to the attention of the bar and the advertising community[27] and recent cases have not signaled a change in how the Bureau should interpret them or enforce them.

To the extent that representations regarding ordinary selling prices lose their legitimacy in the eyes of the consuming public through abuse, there is a danger that the effectiveness of this powerful form of marketing will be diminished. We have already seen some evidence to this effect.

We have not ruled out adopting an equally effective alternative test that adequately reflects marketplace reality, where its effectiveness can be demonstrated to us, although we have concerns about any test

that would permit as the general reference point a price at which no or perhaps very few sales have been generated without some further indicia that it is a bona fide market price. Any such test should be able to support prosecutions similar to those undertaken in recent years, which we see as examples of some of the more egregious abuses.

We are also examining whether this provision need be clarified to ensure better transparency and certainty for the advertising community as well as the efficacy of the additional exemptions to section 52(1)(d) proposed by some commentators. Such exemptions could permit greater flexibility in respect of price-related claims while ensuring they are accurate.

Conclusion

In conclusion let me review the key messages that I wish to leave you with today.

Firstly, after raising last year some concerns that I had surrounding the dialogue between my office and the CBA, I am pleased to note that it has improved greatly in the past year. This is evident in the nature of the comments provided for the Strategic Alliances Bulletin.

Secondly, I hope you will take note of the proactive approach the Bureau has taken in the past year in areas such as proposing amendments, the public information initiatives, and the use of technology. In this regard, I look forward to receiving your comments on the amendment proposals. I have suggested that the dialogue between us could be extended in that the Bureau would be pleased to participate directly in your examination of electronic searches. I believe working together on this type of issue is an obvious next step for our relationship.

Thirdly, I wish you to be aware of and understand that there will always be a need to fine tune, constantly, the balance between vigorous enforcement and the compliance approach. Increased use of formal powers, especially in civil examinations will continue, at least until we are more confident of the adequacy of voluntary disclosure. The recent experience of the Bureau has shown that this is an effective method for obtaining all relevant information necessary to properly assess a matter and the time and resources required to invoke formal powers decreases with each instance.

In closing let me thank you for this opportunity to provide you with some of my thoughts and experiences in this fascinating area of the law.

G.N.A.

Notes

[1] *Canada (Director of Investigation and Research)* v. *AGT Directory Limited* (18 November 1994), No. CT9402/19 (Comp. Trib.).

[2] *Canada (Director of Investigation and Research)* v. *The D & B Companies of Canada Ltd.* (30 August 1995), No. CT94/1 (Comp. Trib.). For additional commentary on the *Nielsen* case, see Bruce M. Graham, "Director Files Application Against Nielsen Under Abuse of Dominance Provisions" (1994) 15:2 Can. Comp. Rec. 6; Bruce M. Graham, "Nielsen Abuse of Dominance Case Developments" (1994) 15:3 Can. Comp. Rec. 1; Iain C. Scott and Bruce M. Graham, "Update on Competition Tribunal Proceedings in *Nielsen* Case" (1994-1995) 15:4 Can. Comp. Rec. 6; and Iain C. Scott and Bruce M. Graham, "Competition Tribunal Hands Down Decision in *Nielsen* Case", *infra*, this issue at 15.

[3] On October 4, 1994, Wolverine Tube (Canada) Inc. pleaded guilty to one charge under section 52(1)(a) of the *Competition Act* and was fined $525,000 in the Supreme Court of British Columbia. For a copy of the News Release issued by the Bureau of Competition Policy regarding this matter, see (1994) 15:3 Can. Comp. Rec. 12.

[4] On December 22, 1994, Color Your World Corp. pleaded guilty to one charge under section 52(1)(d) of the *Competition Act* and was fined $225,000 in Quebec Court

(Criminal Division) in Montreal. For a copy of the News Release issued by the Bureau of Competition Policy regarding this matter, see (1994-1995) 15:4 Can. Comp. Rec. 20.

[5] On July 17, 1995, Suzy Shier Limited pleaded guilty to a charge laid under section 52(1)(d) of the *Competition Act* and was fined $300,000 in the Criminal Division of the Court of Quebec in Montreal. For a copy of the News Release issued by the Bureau of Competition Policy regarding this matter, see (1995) 16:2 Can. Comp. Rec. 21.

[6] *R. (Director of Investigation and Research)* v. *41813 Alberta Ltd.* (previously known as Roberts Real Estate Co. Ltd.) (28 October 1994), No. 9201-1336c6 (Alta. Q.B.).

[7] *R. (Director of Investigation and Research)* v. *Association of Professional Pharmacists of Quebec* (19 May 1995), No. 500-27008234-900 (Que. Sup. Ct.).

[8] For a copy of the News Release issued by the Bureau of Competition Policy regarding this matter, see *infra*, this issue at 44.

[9] *Director of Investigation and Research* v. *Southam Inc. et al.* (8 August 1995), No. A-1093-92 (F.C.C.A.) and *Director of Investigation and Research* v. *Southam Inc. et al.* (8 August 1995), No. A-1668-92 (F.C.C.A.).

[10] *Director of Investigation and Research* v. *Quebecor Printing Inc.* (16 January 1995), No. CT95/01 (Comp. Trib.).

[11] For a copy of the News Release issued by the Bureau of Competition Policy regarding this matter, see (1994-1995) 15:4 Can. Comp. Rec. 23.

[12] On September 9, 1995, it was reported that more than 84 percent of the shares of Home Oil Ltd. had been tendered to Anderson Explorations Ltd.

[13] *Director of Investigation and Research* v. *Imperial Oil Limited et al.* (6 February 1990), No. CT89/3 (Comp. Trib.).

[14] *Director of Investigation and Research* v. *Imperial Oil Limited et al.* (4 November 1994), No. CT89/3 (Comp. Trib.).

[15] *Attorney General of Nova Scotia* v. *Ultramar et al.* (31 August 1995), No. T-2603-94 (F.C.T.D.).

[16] For a discussion of CRTC Decision 94-19, see John F. Blakney, "Split Rate Base and Price Cap Regulation: Utility Regulation and Fostering Competition-Overview" (1994-1995) 15:4 Can. Comp. Rec. 39.

[17] See the Report of the Standing Senate Committee on Transportation and Communications on the Governor in Council Direction orders to the Canadian Radio-television and Telecommunications Commission, First session, 35th Parliament, June 1995.

[18] For a discussion of the Federal Government's DTH Direction to the CRTC, see John F. Blakney and Richard J. Mahoney, "Government Issues DTH Direction to CRTC" (1995) 16:2 Can. Comp. Rec. 49.

[19] The B.C. Utilities Commission announced on September 12, 1995, that it had completed its Report on the British Columbia Electricity Market and that the report had been sent to the Minister of Energy, Mines and Petroleum Resources for B.C.

[20] See *The Report of the Board,* Ontario Energy Board, dated August 31, 1994, H.R. 22, in the Matter of a Reference from the Minister of Environment and Energy respecting Ontario Hydro's Restructuring and Proposed Electricity Rates for 1995.

[21] *Infra*, this issue at 34. For background on this matter, see (1995) 16:2 Can. Comp. Rec. 22 and 23.

[22] Bill C-101 is entitled *"An Act to continue the National Transportation Agency as the Canadian Transport Agency, to consolidate and revise the National Transportation Act, 1987 and the Railway Act and to amend or repeal other Acts as a consequence".*

[23] For a discussion of recent jurisprudence regarding section 11 of the *Competition Act*, see Paul Collins, *"British Columbia Securities Commission* v. *Branch*: Implications for Section 11 of the *Competition Act"* (1995) 16:1 Can. Comp. Rec. 6.

[24] For a discussion of recent jurisprudence regarding section 36 of the *Competition Act*, see Paul Collins, "Injunctive Relief Under Section 36 of the *Competition Act"* (1995) 16:1 Can. Comp. Rec. 18; and Jo'Anne Strekaf, "Interlocutory Injunctive Relief in Recent *Competition Act* Proceedings" (1995) 16:2 Can. Comp. Rec. 13.

[25] See for example *Peter Raimondo* v. *Director of Investigation and Research*, Commercial List No. B55/95 (Ont. Gen. Div.).

[26] Bureau of Competition Policy, *Competition Act Discussion Paper* (Ottawa: Industry Canada, 1995). For analysis of the Discussion Paper, see Peter Glossop, "Major Changes Proposed to *Competition Act"* (1995) 16:2 Can. Comp. Rec. 1.

[27] We have done so through a variety of means: the Director's Annual Report for 1967; the May 1977 issue of the *Misleading Advertising Bulletin;* the 1991 *Misleading Advertising Guidelines;* the *Misleading Advertising Bulletin,* issue 2 of 1994 and, most recently, in vol. 1, issue no. 2 of *Competition Communiqué.*

COMPETITION TRIBUNAL HANDS DOWN DECISION IN *NIELSEN* CASE

On April 5, 1994, the Director of Investigation and Research initiated proceedings before the Competition Tribunal against Nielsen (The D & B Companies of Canada Ltd.) under the abuse of dominance provisions of the *Competition Act*. The Director sought an order to prevent Nielsen from engaging in alleged anti-competitive conduct which prevented Nielsen's competitors from obtaining access to scanner-based sales information generated by large Canadian retailers and to customers for scanner-based market tracking services. IRI (Information Resources Inc.), which made the initial complaint to the Director regarding Nielsen's market conduct, was granted intervenor status in the proceedings before the Tribunal. The Application, related pleadings and subsequent proceedings respecting various procedural matters are described in recent issues of the *Record*.[1] On August 30, 1995, the Tribunal issued its reasons together with an order and on September 26, 1995, it issued an amending order. The Tribunal panel was composed of Mr. Justice William P. McKeown, Dr. Frank Roseman, and Mr. Victor L. Clarke.

The Tribunal found that Nielsen controlled the supply of scanner-based market tracking services throughout Canada and that the contractual practices of Nielsen resulted in a substantial lessening of competition in the Canadian market for the supply of those services. In particular, Nielsen's actions prevented IRI, a company that competes vigorously with Nielsen in the United States, from entering the Canadian market.

The Tribunal prohibited Nielsen from enforcing its existing contracts with Canadian grocery and drug retailers for exclusive access to their scanner data and from entering into future contracts which require or induce such retailers to provide exclusive access to Nielsen. The Tribunal also ordered that all Nielsen's existing customer contracts, and all contracts entered into for 18 months from the date of the order, will be terminable by the customer upon eight months notice. The Tribunal ordered Nielsen to supply historical scanner data to IRI, or other competitors, where the data is unavailable directly from the retailers.

Meaning of "Class or Species of Business"

In its decision the Tribunal dealt first with the proper interpretation of the words "class or species of business" in paragraph 79(1)(a) of the Act. After a review of various authorities, including its decisions in *NutraSweet*[2] and *Laidlaw*,[3] the Tribunal concluded that "class or species of business" is synonymous with the relevant product market, and consequently, that in determining the "class or species of business" in a particular case, the key issue is substitutability. The Tribunal found that the reason this wording was used instead of the word "market" was because "market" has a geographic element to it, and there is already a geographic element in paragraph 79(1)(a), namely, the phrase "throughout Canada or any area thereof". This particular wording was used in order to restrict the application of the abuse of dominance provisions to situations where the dominant firm has "control" in parts of, or all of, Canada.

Definition of the Relevant Product Market

The Tribunal determined that the relevant product market (and thus, the "class or species of business") consisted of scanner-based market tracking services. Market tracking services are used mainly by

manufacturers to follow the progress of their products relative to other products through the chain of distribution, and to measure the success of their pricing and promotion strategies. These services enable manufacturers and retailers to plan more effectively the marketing and merchandising of their products on the basis of past trends. The provision of these services requires collecting data on product movement, as well as on various "causal" factors, such as pricing, promotions and advertising, which may explain observed changes in product movement. This data is then analyzed and presented in useful form to the purchasers of market tracking services.

There are various methods of collecting this type of data, including scanning, store audit, warehouse shipments, and consumer panels. The Tribunal found, however, that only market tracking services based primarily on scanner-generated data were to be included in the relevant product market. Scanner data is generated at the retail check-out counter by scanning the Universal Product Code ("UPC") label attached to most packaged consumer goods. The UPC contains product identifying information, and additional data such as store identification, price and time of purchase are recorded when the product is scanned. Retailers install scanners and collect this data primarily for internal management purposes but this data may also be and is supplied to market tracking service providers such as Nielsen.

Nielsen argued that market tracking services not based on scanner data should also be included in the relevant product market. The Tribunal declined to adopt this broader definition of the relevant product market on the grounds that none of the market tracking services based on the other methods of data collection were close substitutes for services based on scanner-generated data. After reviewing the evidence of industry participants on the functional characteristics of the data collected using the various methods, it concluded that data collected using non-scanner methods were sufficiently inferior to and different from scanner data for purposes of a market tracking service that the products based on these other methods were not in the same market as scanner-based services. The Tribunal justified this approach on the grounds that while direct evidence of buyers switching between products in response to small changes in relative price would provide proof of substitutability, where such evidence is not available, it is necessary to look to the evidence of buyers and suppliers regarding the characteristics, the intended use and the price of the various types of market tracking services.

"Control"

Following its decision in *NutraSweet*, the Tribunal expressly equated "control" in paragraph 79(1)(a) with "market power", meaning the ability to set prices above competitive levels for a considerable period. But it noted that where the evidence does not allow this definition to be applied directly, structural and other variables that can provide relevant information will be used as proxies. In particular, a *prima facie* determination of whether a firm has market power, or control, can be made by considering its market share. It was undisputed that Nielsen was the sole supplier of scanner-based market tracking services in Canada, and thus, the Tribunal was willing to infer, on a *prima facie* basis, that Nielsen had market power or control of the relevant market, absent evidence that there were no barriers to entry. The existence of any barriers to entry could only be properly assessed once the nature and effect of Nielsen's alleged anti-competitive actions had been determined.

The Tribunal rejected Nielsen's argument that the bargaining strength of the retailers as suppliers of the key input for Nielsen's product limited Nielsen's ability to exercise any market power it might hold in the relevant market. The Tribunal agreed with an expert witness for the Director that the sole relevance of the market position of the retailers lay in their ability to command a share of any monopoly returns that Nielsen may have been able to obtain by virtue of its dominance in the market for scanner-based tracking services. Similarly, Nielsen's argument that the bargaining position of the manufacturers, as buyers of Nielsen's product, limited any market power Nielsen might have, was also rejected by the Tribunal. The manufacturers could only have limited Nielsen's market power if there was more than one seller, or only a single buyer, or if the manufacturers were willing to integrate backwards to provide their own scanner-based services. But none of these conditions were found to be present.

Practice of Anti-Competitive Acts

The Tribunal concluded that Nielsen had engaged in three types of anti-competitive acts within the meaning of section 78 of the Act (pre-emption of scarce facilities or resources required by a competitor, requiring or inducing a supplier to refrain from selling to a competitor and pre-emption of access by a competitor to customers). It was not disputed by the parties that these acts constituted a "practice" within the meaning of the section.

Exclusive Retailer Contracts

It was found that Nielsen's long-term contracts (the standard term was five years) with all major grocery retailers and several drug retailers for exclusive access to their scanner data had the unquestionable effect of excluding all potential competitors from obtaining the retailer scanner data. While it was not strictly necessary for the Director to prove a subjective intent to restrict competition, there was evidence that Nielsen had entered into and maintained the contracts with the express goal of excluding would-be competitors, particularly IRI. The fact that Nielsen had engaged in a strategy of staggering the renewal times of the various contracts was also cited in support of this conclusion.

Nielsen was not able to satisfy the Tribunal that there was a valid "business justification" or efficiency rationale for the exclusive contracts. Nielsen had argued that the present exclusive arrangements were only a competitive response to an earlier initiative of IRI, and thus, could not be anti-competitive. In 1984 or 1985, the Retail Council of Canada ("RCC"), a retailer trade association, approached IRI to discuss a project to develop and use retailer scanner data. Nielsen and another company, SAMI, were also approached by the RCC. IRI proposed, and the RCC agreed to endorse, a joint-venture proposal under which retailers would provide data free of charge to IRI on an exclusive basis, and IRI would contribute the technology and financing. IRI would recover its operating costs, and any revenues from sales of the data would be shared equally with the retailers. When Nielsen learned of the initiative, it signed one of the most important retailers in Western Canada to an exclusive agreement for the supply of scanner data. IRI abandoned its efforts and Nielsen went on to sign exclusive agreements with all the major grocery retailers in the country.

In the view of the Tribunal, retaining or obtaining a dominant position in order to defend against another firm potentially becoming dominant was not

an acceptable business justification. The Tribunal noted that if IRI had succeeded, it might have been in Nielsen's position as a respondent in an application by the Director. In addition, Nielsen had not shown why it was necessary to obtain exclusives with all retailers if its objective was simply to prevent IRI from obtaining a dominant position in the market. Neither did Nielsen show that exclusives were justified because of the time, energy, and resources that had to be expended to exploit a new technology, nor on the basis of retailer concern respecting the protection of their scanner data.

Inducements to Exclusivity

The Tribunal found that Nielsen had offered significantly higher payments to retailers in exchange for exclusive access to their scanner data and that this constituted an unmistakable inducement to exclusivity within the meaning of section 78. The evidence indicated that when Nielsen first entered into exclusive contracts for scanner data in 1986 there was an increase of 500 percent in the amount of payments to retailers. In a more recent contract negotiation, Nielsen had apparently offered a retailer twice as much for an exclusive agreement as for a non-exclusive one.

Manufacturer Contracts

The Tribunal found that Nielsen had engaged in a practice of trying to "lock up" as much business as possible by signing many of its customers to long-term contracts (three years or more) in the face of possible entry by IRI. There was also evidence that Nielsen had made special efforts to sign companies that were customers of IRI in the U.S. While these practices did not fall within any of the enumerated categories of anti-competitive acts in section 78, in keeping with its prior decisions and the wording of the section, the Tribunal held that this list was not exhaustive. In evaluating allegedly anti-competitive acts falling outside those specified in the list under section 78, the Tribunal held that it must determine the "nature and purpose of the acts which are alleged to be anti-competitive and the effect that they have or may have on the relevant market" in the context of all known factors, especially any other allegedly anti-competitive actions. In particular, it must be determined whether the purpose of those acts is to withhold scarce resources from the market, to prevent a competitor's entry into the market or to achieve some other exclusionary purpose.

Substantial Lessening or Prevention of Competition

The Tribunal held that Nielsen's exclusive contracts with suppliers of scanner data, and the inducements that led to them, resulted in the prevention or lessening of competition substantially in the Canadian market for scanner-based market tracking services. Given that scanner data, including both current data and one year of historical data for comparison purposes, was a critical input in market tracking services, the lack of access to this data constituted a *prima facie* barrier to entry. This lack of access, the Tribunal found, was the principal deterrent to IRI providing a market tracking service in Canada. Nielsen's long-term contracts with its customers were also held to have prevented competition by significantly reducing the volume of business available to a would-be entrant such as IRI.

Nielsen advanced several arguments as to why exclusivity had not resulted in a substantial lessening of competition, none of which were accepted by the Tribunal. Nielsen argued that the exclusives had

not resulted in a substantial lessening of competition because it was open to IRI to compete with Nielsen each time the exclusive agreements came up for renewal, and that such entry would have been profitable for IRI. In 1986 and in 1991, in particular, IRI could have outbid Nielsen and secured for itself exclusive access to the scanner data. The Tribunal rejected this argument on the grounds that this type of "competition for the market"—where the winner becomes the sole supplier in the market—in contrast to competition within the market, likely only resulted in higher prices being paid to retailers for their data, and consequently, higher prices being charged for market tracking services. An expert witness for Nielsen suggested that this type of competition might benefit consumers in that the payment received by the retailers would get passed on to their customers in the form of lower prices. The Tribunal rejected this contention as there was no reason to believe that retailers would be actually prompted to pass these profits on to their customers.

The Tribunal also determined that it would not have been possible for IRI to enter the Canadian market for scanner-based market tracking services on a gradual, piecemeal basis by bidding for individual retailers' data as the Nielsen exclusive contracts expired. In support of this argument, Nielsen referred to the operation of the market in Australia as a model of how the market in Canada could operate if IRI chose to enter the market on a piecemeal basis. The Tribunal found that the Australian experience only provided additional support for the conclusion that where two or more market tracking services firms are bidding for exclusive access to data, the likely end-result is the emergence of a single supplier in the market. Given this tendency toward a single supplier, the Tribunal found that it was highly unlikely that IRI could have entered the Canadian market profitably by bidding for exclusives from individual retailers because Nielsen, as the dominant supplier, could always afford to outbid it. The U.S. market, on the other hand, where IRI and Nielsen presently acquire data from retailers on a non-exclusive basis and compete vigorously in the provision of scanner-based market tracking services, was cited as an example of how competition could work in the Canadian market in the absence of exclusive agreements.

Remedies

The Tribunal prohibited Nielsen from entering into any future contracts that would restrict or preclude a retailer from supplying to someone other than Nielsen scanner data and causal data necessary for the provision of a scanner-based market tracking service and from offering a retailer direct or indirect inducements to restrict or preclude access in that way. The Tribunal also prohibited Nielsen from entering into contracts containing a most favoured nation clause (where the retailer agrees not to provide its data to a third party on terms more favourable than those it has granted to Nielsen) for a period of 24 months from the date of the order. The scope of the order was restricted to causal data and scanner data, and to suppliers of this data in the grocery and drug channels of distribution.

The Tribunal also prohibited Nielsen from enforcing the provisions in existing retailer contracts that restrict or preclude a retailer from supplying to someone other than Nielsen the scanner and causal data necessary for the provision of a scanner-based market tracking service. The Tribunal noted that it is not clear what the legal status of the payment terms and of the remainder of the contracts will be once the order makes the exclusivity clauses

unenforceable, but that this was an issue to be decided in other forums.

With respect to Nielsen's contracts with its customers, the Tribunal determined that it was necessary to go beyond simply prohibiting the conduct which it had found to be anti-competitive in order to restore competition in the market. Thus, instead of just dealing with Nielsen's contracts of three years or more, the Tribunal, under subsection 79(2), ordered that all existing customers of Nielsen would have the option of discontinuing their purchases of scanner-based market tracking services on eight months notice and that such notice shall not result in the loss of any discounts. This provision was also extended to future manufacturer contracts entered into by Nielsen during the 18 months following the order. This extension to future contracts went beyond the remedies that had been requested by the Director, but the Tribunal felt that this measure was necessary in order to overcome the effects of the anti-competitive practices of Nielsen.

Finally, the Tribunal ordered (for a nine month period from the date of the order) Nielsen to supply fifteen months of historical data upon request to IRI, or other competitors, when a retailer, who has not stored the data for the relevant period, asks Nielsen to do so. The historical data is required in order to account for seasonal fluctuations in the sales of products. Nielsen is to be compensated for various costs incurred to comply with the order in this regard.

I.C.S. and B.M.G.

Notes

[1] For additional commentary on the *Nielsen* case, see Bruce M. Graham, "Director Files Application Against Nielsen Under Abuse of Dominance Provisions" (1994) 15:2 Can. Comp. Rec. 6; Bruce M. Graham, "Nielsen Abuse of Dominance Case Developments" (1994) 15:3 Can. Comp. Rec. 1; and Iain C. Scott and Bruce M. Graham, "Update on Competition Tribunal Proceedings in Nielsen Case" (1994-1995) 15:4 Can. Comp. Rec. 6.

[2] *Director of Investigation and Research* v. *The NutraSweet Company* (1990), 32 C.P.R. (3d) 1, [1990] C.C.T.D. No. 17 (QL).

[3] *Director of Investigation and Research* v. *Laidlaw Waste Systems Ltd.* (1992), 40 C.P.R. (3d) 289, [1992] C.C.T.D. No.1 (QL).

FREIGHT FORWARDERS DECISION RELEASED

On November 9, 1995, the Ontario Court (General Division) released its decision rejecting Crown allegations that five Toronto-based pool car operators: Clarke Transport Canada Inc., Consolidated Fastfrate Transport Inc., Cottrell Transport Inc., Northern Pool Express Ltd. and TNT Canada Inc., had conspired over an eleven year period to unduly lessen competition in the supply of freight forwarding services in contravention of section 45(1)(c) of the *Competition Act*.

In his decision, Mr. Justice Michael Moldaver said that the central issue was whether the Crown had proven beyond a reasonable doubt that the effect of the agreement among the accused was the "substantial lessening of competition." While it was apparent that the five accused had reached an agreement with respect to prices for the delivery of freight by rail from Toronto to various destinations in Western Canada, this, alone, did not constitute an offence under the Act. Further, notwithstanding the existence of an agreement, the Court accepted evidence that a number of the accused companies had encountered serious financial difficulties during the time the conspiracy was alleged to have occurred. Therefore, given the fact that the Crown had not

produced any evidence regarding the accused freight forwarders' market share, Mr. Justice Moldaver concluded that the accuseds' collective marketing power was negligible. As such, there had not been any undue lessening of competition in the freight forwarding industry which included trucking and intermodal rail operations during the period in question as a result of the agreement among the accused.

The Crown has indicated that similar charges remaining outstanding against five individuals will be dropped if there is no appeal of Mr. Justice Moldaver's decision.

A more detailed analysis of this decision will be prepared for the next issue of the *Record*.

Staff

STOP THE PRESSES!!!!: *SOUTHAM* REVERSED ON APPEAL

Introduction

On August 8, 1995, the Federal Court of Appeal rendered its much anticipated decision (the "FCA Decision") in *Director of Investigation and Research* v. *Southam Inc. et al.*,[1] reversing the decision of the Competition Tribunal[2] (the "Tribunal Decision"). The FCA Decision is significant from both a competition law and administrative law perspective. With respect to the former, it represents the first contested merger case under section 92 of the *Competition Act*[3] to reach the Federal Court of Appeal and provides the most extensive discussion regarding market definition to date in Canadian jurisprudence. This is significant as the definition of a market represents the fundamental basis of every competitive impact analysis required by virtually all reviewable matters under Part VIII of the Act. From an administrative law perspective, the FCA Decision addresses the appropriate standard of appellate review from a decision of the Competition Tribunal (the "Tribunal") a decision which is not protected by a privative clause and which is subject to a statutory right of appeal.

The Facts

Overview

This case involves the alleged prevention or lessening of competition in the supply of print *retail* and print *real estate*[4] advertising services in the Lower Mainland and North Shore areas, respectively, of British Columbia, resulting from certain acquisitions undertaken by Southam Inc. ("Southam"). Specifically, Southam, a diversified Canadian communication company whose principal business is newspaper publishing, had been the owner of the two Vancouver area daily newspapers, the *Vancouver Sun* and the *Province* (collectively, the "Pacific Dailies") when, during a period between 1989 and 1990, it acquired a direct or indirect controlling interest in thirteen community newspapers in the Lower Mainland, including the *North Shore News* and the *Vancouver Courier* (the "Acquisition"). In addition, Southam acquired three distribution businesses, two printing businesses and the *Real Estate Weekly*, a real estate advertising publication, which prior to the Acquisition competed with the *Homes* supplement to the *North Shore News* and the North Shore edition of the *Real Estate Weekly*.

The Supply of Print Retail Advertising in the Lower Mainland

The sale of advertising to retailers represents an important source of revenue for both the Pacific Dailies and the two key community newspapers in issue, the *North Shore News* and the *Vancouver Courier* (collectively, the "Community Papers"). In recent years, however, the fortunes of the Pacific Dailies and Community Papers had been moving in opposite directions. That is, while the Pacific Dailies had experienced declines in household penetration, the Community Papers had prospered. The Court attributed this phenomenon primarily to the growing trend among retail advertisers for achieving better targeted marketing, for which community newspapers appear to possess, in many respects, a comparative advantage.

The Pacific Dailies made attempts, albeit unsuccessful, to address the changing demands of advertisers. For example, Southam introduced "Flyer Force", a flyer distribution business to compete with the flyer services provided by community newspapers. However, Flyer Force incurred substantial losses until it was ultimately terminated in 1991, shortly after Southam acquired three distribution businesses as part of the Acquisition.

In addition, fundamental to Southam's decision to construct a new plant in Surrey, B.C., was its intention to publish and distribute zoned supplements, i.e. a section of a daily newspaper containing advertising and editorial content of specific interest to a geographic community within a newspaper's circulation area. The one such example was the short-lived *North Shore Extra*, a supplement to the *Vancouver Sun* on the North Shore. This venture also lost money and was discontinued in less than two years. Following the Acquisition, Southam did not publish any other zoned supplements for other parts of the Lower Mainland.

As an apparent response to these forays by the Pacific Dailies, a number of community newspapers formed collectives, i.e. selling groups, which enabled them to offer advertisers the opportunity to purchase multiple advertising at a discount in one or more of the community newspapers within the group. The first successful effort in this regard was MetroVan, which was formed in 1988, and included the Community Papers. MetroVan subsequently participated in the formation of MetroGroup, along with ten community newspapers owned by Trinity Holdings Inc. As noted by Mr. Justice Robertson, in writing for the Court,

> The purpose of "MetroGroup" was to challenge the Pacific Dailies for national and major retail advertising revenues in the Lower Mainland.[5]

The Community Papers remained members of MetroGroup until the Acquisition, at which time Southam formed its own community newspaper group VanNet Group, consisting of all but one of the community newspapers acquired by Southam, as well as other publications.

The Tribunal Decision

An amended application was filed by the Director on July 8, 1991, requiring, among other things, the divestiture of the Community Papers on the basis that the Acquisition would result in a prevention or lessening of competition in the market for newspaper retail advertising services in the North Shore and in the City of Vancouver, respectively. In response, Southam argued that the Pacific Dailies and Community Papers were not in the same market.

In the alternative, Southam argued that if the market were defined to include both the Pacific Dailies and the Community Papers, then the market should also include other modes of advertising (eg. radio, television, etc.).

The key issue before the Tribunal was the definition of the relevant product market. In this regard, the Tribunal considered the similarities and differences between dailies and community newspapers and drew several conclusions. First, it determined that despite the differences between dailies and community newspapers, a number of retailers were willing to advertise in either the Pacific Dailies or the Community Papers. However, the Tribunal concluded that there was also a relatively large segment of retailers, as high as 50 percent, whose trade was local and therefore too small to use the Pacific Dailies profitably. The Tribunal excluded this local group from its definition of the market.

The Tribunal also considered the views and behaviour of Southam as well as the dynamics between the Pacific Dailies and the Community Papers. In this regard, the Tribunal reviewed a key consulting report, the marketing of the Pacific Dailies, Southam's entry into the flyer distribution business, Southam's concern with respect to price sensitivity, the rationale behind the Acquisition, etc. Yet despite these considerations, many of which suggested the existence of a relatively strong link between the activities of the Pacific Dailies and the Community Papers, the Court summarized the decision of the Tribunal as follows:

> In the final analysis, the Tribunal found that there was no *direct* evidence that display advertisers would switch between the Pacific Dailies and the community newspapers in response to a change in relative prices. With respect to *indirect* evidence of substitutability, the Tribunal held that the similar purposes achieved by advertising in the Pacific Dailies and community newspapers should not be adopted when evaluating substitutability (emphasis added).[6]

Issues Before the Federal Court of Appeal

The Director launched his appeal of the Tribunal Decision on the basis that the Tribunal had erred in concluding that the Pacific Dailies and Community Papers were not in the same product market for, *inter alia,* the following reasons: (1) the Tribunal failed to properly apply its own stated approach by *requiring* direct evidence of high price sensitivity; and (2) the Tribunal ignored certain relevant *indirect* evidence of substitutability.

Not surprisingly, Southam supported the Tribunal's definition of the market. However, in the alternative, Southam argued that the Director had not raised before the Tribunal, the arguments it was advancing in favour of its appeal. Furthermore, Southam argued that the Federal Court of Appeal lacked the requisite jurisdiction to address the issue of market definition since market definition is a question of fact, thereby requiring that leave to appeal be obtained. Finally, Southam argued that the issue of market definition was within the Tribunal's area of expertise and that the Tribunal Decision should therefore be assessed on a standard of curial deference rather than a standard of correctness.

The Federal Court of Appeal Decision

The Jurisdictional Issue: Is Market Definition a Question of Fact or Law?

Before addressing the substantive aspects of market definition, the Court turned to the question of whether it had jurisdiction to even consider the

appeal. This, in turn, required a determination of whether the issue of market definition was a question of fact, as a result of subsection 13(2) of the *Competition Tribunal Act*[7] (the "CTA"). Specifically, this provision states that an appeal on a question of fact requires leave from the Federal Court of Appeal.

The Court concluded that the adoption of the appropriate framework for defining a product market and its proper application are, collectively, a question of law whereas the issue of whether the facts in a particular case satisfy the requirements of the framework is a question of mixed law and fact. As a result, the Court concluded that leave was not required and that it therefore had the requisite jurisdiction to consider the appeal.

The Administrative Law Issue: What is the Standard of Appellate Review?

It is well established that the concept of specialization of duties requires that deference be given to decisions of tribunals on matters that fall squarely within their expertise.[8] In the context of the FCA Decision, the question was whether the issue of "product market definition" fell squarely within the expertise of the Tribunal. This is a significant issue since the definition of the relevant market represents the fundamental question for every competitive impact analysis undertaken in accordance with the reviewable matters under the Act. To exclude market definition *entirely* from the scope of the Tribunal's expertise could therefore subject all future decisions of the Tribunal to judicial intervention on appeal based on a standard of correctness.

In order to determine the appropriate standard of appellate review in *Southam*, the Court relied upon the so-called "pragmatic or functional approach" espoused in *Pezim* by Iacobucci J., which the Court concluded required an analysis on three levels: (1) the purpose of the Act and the reasons for the Tribunal's existence; (2) the statutory provisions conferring jurisdiction on the Tribunal and, in particular, the composition of the Tribunal and the decision-making power of its constituent members; and (3) the nature of the problem before the Tribunal.

Turning to the first criterion, Mr. Justice Robertson concluded that, "[t]he broad powers of the Tribunal to act in the public interest suggest that curial deference is owed those decisions squarely within its expertise."[9] However, when addressing the second criterion, Robertson J.A. noted that the Tribunal is the only federal tribunal composed of both judicial and lay members, and that this was indicative of "...a clear intent on the part of Parliament to divest the Tribunal's lay members of the jurisdiction to decide questions of law."[10] This conclusion was based on subsection 12(1) of the CTA which states as follows:

> In any proceedings before the Tribunal,
>
> (a) questions of law shall be determined only by the judicial members sitting in those proceedings, and
>
> (b) questions of fact and mixed law and fact shall be determined by all members sitting in those proceedings.

Based on this "statutory imperative", the Court held that (i) the issue of market definition does not fall squarely, i.e. entirely, within the expertise of the Tribunal; (ii) curial deference was therefore not owed to this decision of the Tribunal; and (iii) the appropriate standard of appellate review was one of correctness.

Finally, when considering the third factor, i.e. the nature of the problem, the Court concluded that the absence of a definition for the term "relevant market" under the Act was, contrary to one possible view,

> ...not an oversight on the part of Parliament but an implied recognition of the fact that the term is and always has been a judicial construct informed by economic principles and now guided by the practical experience of those familiar with the operation of markets lay members of the Tribunal...[11]

As a result, it is evident that the Court maintained that an important role is to be played by the lay members of the Tribunal in the context of defining a market.

The determination by the Court of whether the issue of market definition is a question of law or fact constitutes, potentially, the most problematic aspect of the FCA Decision. That is, the interpretation of this specific aspect of the decision will determine the likelihood of judicial intervention in future appeals from Tribunal decisions. Specifically, if the FCA Decision is interpreted as standing for the proposition that the *entire* undertaking of defining a market is a question of law, then the likelihood of judicial intervention on future appeals from Tribunal decisions will be significant. However, if the FCA Decision is viewed as having delineated the exercise of defining a market between (i) establishing and properly applying an analytical framework, as a question of law; and (ii) assessing and weighing relevant indicia, as a question of mixed law and fact, then the likelihood of judicial intervention will diminish markedly. It is submitted that the FCA Decision is consistent with the latter interpretation and that the former interpretation would result in a level of judicial intervention that was unintended and unwarranted by the decision.

The Competition Law Issue: Market Definition

With the jurisdictional question resolved and the standard of appellate review established, the Court turned its attention to determining whether the Tribunal had correctly defined the relevant product market on a substantive basis. The Court set out the three basic parameters of market definition: product, geographic and temporal, and immediately confined its analysis to one of product market definition, as the other parameters were not in dispute.

The alleged error committed by the Tribunal was that despite its statement of an analytical framework from which the product market would be defined, and despite the fact that this framework was reflected in certain practical indicia outlined by the Tribunal in its decision, the Tribunal failed to weigh the evidence relating to each of the indicia identified and rather based its decision solely on the Director's failure to adduce statistical or anecdotal evidence of cross elasticity between retailers advertising in daily and community newspapers. In other words, the Tribunal allegedly applied an inappropriate analytical framework to the facts.

In advancing his grounds of appeal, the Director relied significantly on the following passage from the Tribunal Decision:

> There are obvious differences and similarities between the dailies and the community newspapers. There is no reason to review them. In light of the differences, *it is incumbent on the Director to show that buyers regard the two products as highly similar and that small changes in relative price would cause a significant shift in advertising volume between the two vehicles.* Evidence showing that advertisers use one or the other vehicle mainly because of the characteristics of the particular vehicle suggests the opposite.

> *There is in fact no evidence before the Tribunal that advertisers are highly sensitive to the relative prices of the dailies and the community newspapers* (emphasis added).[12]

In order to determine whether the alleged error occurred, the Court reviewed existing theoretical and legal frameworks of market definition and addressed the following topics: (i) market power paradigms; (ii) American jurisprudence; (iii) Canadian jurisprudence; and (iv) merger enforcement guidelines in both the United States and Canada.

At its core, merger review is concerned about whether a merger will lead to an anti-competitive level of market power being held by a merged entity in a relevant market. In accordance with economic theory, it is well established that market power is defined as the ability to profitably maintain prices above competitive levels. Market power, in turn, is a function of market share. However, since market power can rarely be measured directly, estimates of market share or market concentration are used as proxies for market power. The FCA Decision cites two market power paradigms: the hypothetical monopolist and cross-elasticity. However, there are other derivations. For example, in the United States, the Herfindhal-Hirschman Index (defined as the sum of the squares of the market shares of each firm in a market) is commonly used as a key measure of market concentration. In essence, each of these and other paradigms are theoretical constructs which attempt to forecast the post-merger level of market power that will be held by a merged entity. The statistical inputs of these formulae, however, are rarely, if ever, available. As a result, it is common for antitrust authorities to consider any number of practical indicia to determine market power. Moreover, the relative importance of such indicia vary significantly between mergers.

Based on this theoretical background, the Court then turned to the jurisprudence in the United States and Canada for guidance regarding its practical application. In regard to U.S. jurisprudence, the Court traced the evolution of various approaches to market definition by reviewing three landmark American decisions: *United States* v. *E.I. du Pont de Nemours & Co.*,[13] *Brown Shoe Co., Inc.* v. *United States*[14] and *United States* v. *Continental Can Co. et al.*[15] Based on this review, Robertson J.A. concluded that reasonable interchangeability of use, i.e. functional interchangeability, with its emphasis on a product's use and its physical characteristics, is critical to determining whether two products are in the same market. The following summarizes the Court's position in this context:

> The American jurisprudence with respect to the proper application of the interchangeability of use test reveals that where the intended use of the product is the same, products have been placed in the same market notwithstanding the following factors: different price levels, different physical characteristics in composition, appearance or quality, different customer classes or customer preferences and dissimilar production facilities or marketing and distribution methods...[16]

Therefore, the American jurisprudence confirmed the importance of functional substitutability in any attempt to define a product market.

Turning to the sparse Canadian jurisprudence in this context, the Court initially referred to several criminal cases, under predecessor competition legislation, each of which focused on "...the central concept of product market definition - substitutability."[17] Unfortunately, none of these cases provided a definitive framework for assessing substitutability. The Court then considered the two key decisions to date on market definition under the Act: *Canada (Director of Investigation and Research)*

v. *Hillsdown Holdings (Canada) Ltd.*[18] and *Canada (Director of Investigation and Research)* v. *Chrysler Canada Ltd.*[19] Following this review, the Court concluded that there existed a void in the Canadian jurisprudence in connection with the first step toward ascertaining the product dimensions of a market (i.e. determining whether the products of two merging firms are in the same product market). As a result, the Court then focused on the *Merger Enforcement Guidelines*[20] (the "MEGs") in Canada. While acknowledging that they are non-binding, the Court endorsed the MEGs' discussion regarding the use of practical indicia to assist one in defining a market.

The Alleged Error

The Court described the alleged error of the Tribunal as follows:

> [t]he Director has framed the principal issue in terms of whether the Tribunal erred in its application of the stated approach to product market definition by requiring statistical or anecdotal evidence of price sensitivity on the part of advertisers to the exclusion of other evidence of substitutability.[21]

In essence, the position of the Director was that the Tribunal did not incorporate indirect evidence of substitutability into its definition of the product market. Interestingly, one can infer from the FCA Decision that both the Director and Southam agreed that such evidence should form part of this and every attempt to define a market. Where the parties diverged in their positions, however, was in their respective assessments of whether the Tribunal actually carried out this task. In ultimately concluding that the Tribunal misapplied its stated approach to defining a market, and that this error should be assessed on a standard of correctness, the Court concluded that the Pacific Dailies and the Community Papers were in the same product market. As a result, the Court referred the matter back to the Tribunal to determine whether, based on the Court's definition of the product market, the merger will result in a prevention or lessening of competition in that product market.

The Legacy of *Southam*

The Implication For Future Appeals From Tribunal Decisions

From an administrative law perspective, the importance of *Southam* arises from its implications for appeals from future decisions of the Tribunal. That is, if one reads *Southam* as standing for the proposition that the issue of market definition lies *entirely* beyond the expertise of the Tribunal, then virtually every future Tribunal decision will be subject to judicial intervention on a standard of correctness since the issue of product market definition is fundamental to *all* competitive impact analyses. It is submitted, however, that this is not the proper interpretation of the FCA Decision.

In this regard, the crux of the FCA Decision arises from the determination by the Court of whether the issue of product market definition is one of law or fact. In its assessment of the jurisdictional issue, i.e. whether leave was required as a result of the error being one of fact, the Court reconciled the decisions in *Regina* v. *Hoffman La Roche Ltd. (Nos. 1 & 2)*[22] and *R.* v. *J.W. Mills & Son Ltd. et al.*[23] with its conclusion that the issue of market definition is not a mere question of fact. Specifically, the Court drew a distinction between the adoption of a framework or parameters for defining a market (being a question of law) and the application of this

framework to the facts (being a question of mixed fact and law). In arriving at this conclusion, the Court relied on the decision of the Supreme Court of Canada in *R.* v. *Nova Scotia Pharmaceutical Society* and, in particular, on the following passage therefrom:

> In the context of s. 32(1)(c) [s. 45(1)(c)], *the process followed and the criteria used to arrive at a determination of "undueness" are questions of law and as such are reviewable by an appellate court. The application of these criteria, that is the full inquiry, often involving complicated economic issues, into whether the impugned agreement was an undue restriction on competition, remains a question of fact.* The general rule that appellate courts should be reluctant to venture into a re-examination of the factual conclusions of the trial judge applies with special force in a complex matter such as here (emphasis added).[24]

After referring to this passage, Mr. Justice Robertson states that "...the application of that legal meaning to a particular case (i.e. "full inquiry") is a question of fact, or, more precisely, a question of mixed law and fact."[25]

A further indication of Robertson J. A.'s assessment of the market definition issue arises from his reference to a passage in the text, *Mergers and the Competition Act*[26] which states as follows:

> It would appear from the context of the remarks in these cases that the learned judges meant that the question "what constitutes the relevant market *in a given case" is a question of fact.* The distinction is important, because the meaning of the notion "relevant market" does not change from one fact situation to another (emphasis added).[27]

This passage was reformulated by Robertson J.A. to read "... what constitutes a relevant market in the given case is a question of mixed law and fact."[28]

Therefore, rather than standing for the proposition that the *entire* inquiry into the definition of a market is not within the area of expertise of the Tribunal, it is submitted that the more appropriate reading of the FCA Decision is that, in the context of defining a market, the analytical framework and its proper application (i.e. ensuring that each is given due consideration) is a question of law. However, within the scope of this analysis, the respective weight accorded to a specific parameter, in a particular instance, would be a question of mixed fact and law, which in accordance with section 12 of the CTA should be determined by *all* members of the Tribunal. Under this interpretation of the FCA Decision, the role of lay members of the Tribunal is preserved.

Unfortunately, certain statements in the FCA Decision may lend credence to other interpretations of the judgment. There are instances, for example, where the use of certain unqualified statements may suggest that *all* aspects of the market definition analysis are matters of law rather than fact. For example, during his assessment of the jurisdictional question, Robertson J.A. states as follows:

> In conclusion, I am of the view that the question of market definition is one of law and not fact and, therefore, this Court possesses the requisite jurisdiction to hear this appeal.[29]

However, when the FCA Decision is read in its entirety, it is submitted that the Court intended to delineate the exercise of defining a market between the establishment and proper application of the analytical framework (a question of law) and the weighing of practical indicia in a given industry (a question of fact). The misapplication by the Tribunal of its stated approach to defining a market was tantamount to misstating its approach from the

outset, and therefore constituted an error of law and should be assessed on a standard of correctness. However, in the alternative, if the error is to be characterized as being one of fact, it is submitted that based on the Tribunal's *requirement* for direct evidence of price sensitivity (i.e. negative cross elasticity), a compelling argument would exist for describing the Tribunal Decision as being unreasonable.

The Advancement of Market Analysis Under the Competition Act

As noted above, application for leave to appeal to the Supreme Court of Canada from the FCA Decision has been filed by Southam. Assuming that leave is granted, it is likely that the primary focus of the appeal will be on the administrative law aspects of the decision, i.e. the standard of appellate review. Little, if any, attention will likely be paid to the appropriate analytical framework for defining a product market since it was not the stated approach, *per se*, that was at issue between the parties before the Federal Court of Appeal but rather the question of whether it was properly applied to the facts by the Tribunal. Therefore, even if Southam were to successfully appeal from the FCA Decision, the substantive discussion in the decision regarding market definition the most extensive and thorough in Canadian jurisprudence to date should prevail. As such, at the very least, the FCA Decision will significantly advance market analysis under the Act.

Conclusion

The Tribunal is a uniquely constituted, specialized administrative body which has the task of adjudicating reviewable matters under the Act. There is no doubt that decisions regarding issues which fall squarely within the Tribunal's area of expertise should be accorded curial deference. If the FCA Decision removed the exercise of market definition *entirely* from the Tribunal's scope of expertise, it would subject any appeal from a Tribunal decision on the issue of market definition to a standard of correctness. However, it is submitted that this would undermine the *specialized* nature of the Tribunal. It is further submitted that this was not the intention of the Court. Rather, as aptly described by the Court, the term "relevant market" "...is and always has been a *judicial construct* informed by economic principles and now guided by the practical experience of those familiar with the operation of markets - lay members of the Tribunal" (emphasis added).[30]

Assuming the FCA Decision prevails, the difficult question that will be faced by both the Tribunal and appellate courts in the future will be to distinguish between the "judicial construct" for defining a relevant market and what represents the "guidance" provided by lay members in this process. At the margin, the distinction between these two issues is far less clear and both the Tribunal and appellate courts will face the challenge of articulating this distinction.[31]

P.C.

Notes

1 (8 August 1995), No. A-1093-92 (F.C.C.A.). Application for leave to appeal to the Supreme Court of Canada has been filed by Southam Inc. Please note that in a recent decision of the Federal Court of Appeal in *Upper Lakes Group Inc.* v. *Canada (National Transportation Agency)*, [1995] F.C.J. No. 672 (F.C.C.A.), the majority in *obiter* adopts the opinion that the question of market definition is a question of fact. For a case comment on the *Upper Lakes Group Inc.* decision, see *infra*, this issue at 30.

2 *Canada (Director of Investigation and Research)* v. *Southam Inc.* (1992), 43 C.P.R. (3d) 161 (Comp. Trib).

3 R.S.C. 1985, c. C-34.

4 The FCA Decision and the focus of this comment

refer only to that part of the Tribunal Decision dealing with the supply of print *retail* advertising services. The supply of print *real estate* advertising services was dealt with in a separate appeal decision (see *Director of Investigation and Research* v. *Southam Inc. et al.* (8 August 1995), No. A-1668-92 (F.C.C.A.).

[5] *Supra*, note 1 at 10.

[6] *Ibid.* at 25.

[7] R.S.C. 1985, C-36.4.

[8] See, e.g., *Bell Canada* v. *Canada (Canadian Radio and Telecommunication Commission)*, [1989] 1 S.C.R. 1722; *United Brotherhood of Carpenters and Joiners of America, Local 579* v. *Bradco Construction Ltd.*, [1993] 2 S.C.R. 316; and *Pezim* v. *B.C. (Superintendent of Brokers)*, [1994] 25 S.C.R. 557.

[9] *Supra*, note 1 at 46.

[10] *Ibid.* at 48.

[11] *Ibid.* at 50.

[12] *Ibid.* at 80.

[13] 351 U.S. 377 (1956).

[14] 370 U.S. 294 (1962).

[15] 378 U.S. 441 (1964).

[16] *Supra*, note 1 at 66-67.

[17] *Ibid.* at 67. Specifically, the Court considered the decisions in *Regina* v. *Hoffman La Roche Ltd.* (1981), 125 D.L.R. (3d) 607 (Ont. C.A.); *The Queen* v. *Canadian Court and Apron Supply Ltd. et al.*, [1967] 2 Ex. C.R. 53; *R.* v. *Canadian General Electric Company Ltd. et al.* (1976), 15 O.R. (2d) 360 (H.C.); and *R* v. *J.W. Mills & Sons Ltd.*, [1968] 2 Ex. C.R. 275, aff'd (1970), 14 D.L.R. (3d) 464 (S.C.C.).

[18] (1992), 41 C.P.R. (3d) 289.

[19] (1989), 27 C.P.R. (3d) 1 (Comp. Trib.).

[20] Director of Investigation and Research, 1991.

[21] *Supra*, note 1 at 78-79.

[22] *Hoffman-LaRoche*, *supra*, note 17.

[23] *J.W. Mills & Sons*, *supra*, note 17.

[24] *Supra*, note 1 at 40.

[25] *Ibid.*

[26] P. Crampton, (Toronto: Carswell, 1990).

[27] *Supra*, note 1 at 41.

[28] *Ibid.*

[29] *Ibid.*

[30] *Ibid.* at 50.

[31] For example, the "evaluative criteria" listed under section 93 of the Act, are very similar to practical indicia that would be considered in defining a market. Subsection 93(h) includes the catch-all phrase "any other factor that is relevant to competition in a market that is or would be affected by the merger or the proposed merger". Based on the FCA Decision, query whether a lay member of the Tribunal will have the requisite jurisdiction to propose the consideration of a particular factor to define a market or whether this will fall under the auspices of the "judicial construct" for defining a market.

CASE COMMENT: *UPPER LAKES GROUP INC.* v. *CANADA (NATIONAL TRANSPORTATION AGENCY)*

This Federal Court of Appeal decision[1] is a product of both the increasing deregulation of certain industries in Canada, as well as the growth of importance of competition in free markets in both government policy and judicial law making. One can read this decision as striking a blow for competition policy in the previously unlikely setting of a dispute between a shipping company operating on the St. Lawrence Seaway and a railroad owned by the Federal Government.

Facts

The Canada Salt Company ("CSC"), in Windsor, Ontario, sold fine grain salt to ICI Forest Products ("ICI"), in Becancour, Quebec. CSC arranged for transportation of the salt. It was shipped by lake freighter in the summer and by rail in the winter. The complainant in this case, Upper Lakes Shipping, provided the transportation services by water.

The Canadian National Railway Company ("CN") concluded a contract with ICI, the customer for salt in Quebec, whereby all of ICI's fine grain salt purchased from CSC was to be transported by rail, year round, at ICI's expense. The rate given by CN to ICI was very attractive.

Upper Lakes Shipping, as well as trade unions and various associations interested in the shipping industry, made a complaint under the *National Transportation Act, 1987*[2] (the "NTA") with respect to CN's deal with ICI.

The Relevant Statute

Pursuant to section 112(2) of the NTA, "every rate shall be compensatory". A rate is deemed by the statute to be "compensatory" when it "exceeds the variable cost, as determined by the National Transportation Agency (the "Agency"), of the movement of the traffic concerned".

Under section 113 of the NTA, "any person" may complain to the Agency that a particular rate is not "compensatory" and the Agency shall investigate as it feels is warranted. Within 90 days of receiving the complaint it must determine whether the rate in respect of which the complaint was made is compensatory. Where it is determined that the rate is not compensatory the Agency shall make an order disallowing that rate and requiring the company to substitute for that rate a rate that is compensatory, unless the company establishes that the rate does not have the effect or tendency of substantially lessening competition or significantly harming a competitor and was not designed to have that effect.

The National Transportation Agency's Ruling

The National Transportation Agency found that the rate in question was not "compensatory" within the meaning of the NTA. No leave to appeal was sought in respect of that finding. Though finding the rate not be "compensatory", the Agency found that CN satisfied the 'defence' provision.

The Agency found that CN and Upper Lake were competitors. The Agency stated that the question "is whether one of these companies designed a rate that was so low as to force the other from the market". There was evidence presented that CN now had 100 percent of the ICI fine crushed salt market and that Upper Lakes had lost 30 percent of its total salt traffic; but the salt the subject of the complaint comprised only 1 percent of all Upper Lakes' shipping traffic. Because of this final figure, the Agency found that CN had established that the rate charged by CN did not significantly harm Upper Lakes. An argument by Upper Lakes that its "backhaul" traffic (in this particular case, the "backhaul" traffic was carrying iron ore from ports in the general vicinity of the destination of the salt) should be considered as part of the harm suffered by it, was rejected by the Agency as not relevant and was not taken into consideration in the analysis of harm to Upper Lakes.

The Agency determined that CN did not design its rates in question with a view to driving Upper Lakes from the market and thereafter attempting to recoup any losses incurred thereby, by charging supracompetitive prices. Upper Lakes continued to provide shipping services to CSC for the bulk of its coarse crushed salt shipments. Further, the fact that Upper Lakes continued to be a presence in the transportation market in question was the basis for a finding that competition had not been lessened. Upper Lakes, the Agency stated, would be able to recapture the traffic lost to it should CN raise its prices above competitive levels.

Substantial Lessening of Competition

The appellants/complainants argued the Agency determined whether the rate had the effect or tendency of substantially lessening competition using a too high threshold, in that the rate was required to have the effect or tendency of driving a competitor from the market. Mr. Justice Hugessen, for the majority, points out that the governing legislation prior to 1987 contained no references to anything related to competition policy. The revised legislation contains, in its purpose section, a specific reference

to "competition and market forces" being the "prime agents in providing viable and effective transportation services." Hugessen JA compares section 113(5)(b) of the NTA to section 50(1)(c) of the *Competition Act*, which forbids predatory pricing. The Agency interpreted the NTA provision making such a comparison. Hugessen JA notes that price cutting is a symptom of vigorous competition rather than otherwise. "It is only when low prices form part of a monopolistic strategy that they become anti-competitive."[3]

Chief Justice Isaac, in dissent, found a very different purpose to guide the interpretation of the relevant legislation. Isaac CJ acknowledges that the primary legislative goal here was deregulation. He then quotes from numerous Parliamentary sources for support for the position that the amendment was narrower than found by the Agency—that is, that it is confined to allowing non-compensatory rates only where no competitor is harmed and there is no significant lessening of competition.

Section 113(5)(c) of the NTA provides:

> Where the Agency determines that the rate is not compensatory, unless the company establishes to the satisfaction of the Agency that the rate does not have the effect or tendency of substantially lessening competition or significantly harming a competitor and was not designed to have that effect, the Agency shall make an order disallowing that rate and requiring the company to substitute for that rate a rate that is compensatory.

Section 50(1)(c) of the *Competition Act* states:

> Every one engaged in a business who ...
>
> (c) engages in a policy of selling products at prices unreasonably low; having the effect or tendency of substantially lessening competition or eliminating a competitor, or designed to have that effect,
>
> is guilty of an indictable offence... .

The argument that since the two wordings are different they should not be interpreted to mean essentially the same thing is a powerful argument, from a traditional statutory interpretation viewpoint.

The Chief Justice's reliance on Parliamentary statements for legislative purpose is as dubious as such analyses always are. His reading of the statutory language is, I submit, more rigorous and more compelling. However, there does not seem to be any support for the position that competition was substantially lessened (no player was knocked out of the market), and the loss of 1 percent of its business is difficult to see as a "significant" harm to Upper Lakes Shipping.

Relevant Market

Hugessen JA states that the question of market definition is a question of fact and so is not subject to appellate review. However, he goes on to deal with the complainant/appellants' submission that the market is properly defined as the transportation of fine crushed salt between Windsor and Becancour. He finds that market is to be defined for the purpose of determining whether competition has been substantially lessened. He deferred to the industry expertise of the Agency on this point.

Isaac CJ, in his dissent, forcefully states that the determination of the appropriate market is a question of law, as it feeds into the defining of the statutory interpretation of "competition" and "competitor". Without any real explanation, Isaac CJ asserts that the market in this case was "a discrete market, namely, the movement of traffic in fine crushed salt from Windsor to Becancour".[4] He then dismisses all

other information about the complainant's other traffic and with respect to the carriage of salt generally, as irrelevant.

Chief Justice Isaac's definition of "market", I submit, is far too narrow. Almost every individual transaction will be its own "market" if we apply the Chief Justice's logic. To do so would be to effectively eliminate from the Act the purpose of relying on market forces and competition as "prime agents" in providing transportation services. This narrow definition of market is similar to that adopted by the Competition Tribunal in refusal to deal applications under section 75 of the *Competition Act*. Perhaps this ties in well with the Chief Justice's emphasis on harm to a competitor. It should be noted that, even though Hugessen JA cites the evidence that the complainant lost only 1 percent of its business, the clear emphasis in his analysis is on the harm to the market generally. This might be desirable from a policy standpoint, but the statute states clearly that the respondent (rate setter) must satisfy the Agency that there is no harm to a competitor and there is no substantial lessening of competition.

Significant Harm

Hugessen JA's analysis of this criterion seems well-founded. He states that the private, individual interest being protected here relates to the actual party and its total business, rather than that segment of its business effected by the rate in question. His acceptance of the Agency's refusal to include in its analysis of the harm caused to "backhaul" traffic is not explained other than by deference to the Agency's expertise. Hugessen JA rejects that harm to others, such as port authorities and unions, should be considered in the analysis. This seems correct, given that the statutory words read "harm to a competitor". For any "non-compensatory" rate, one could undoubtedly find some group or individual that suffered significantly because of a change in where a customer purchased its transportation services. This would remove the effect of the 1987 amendments and return us to the previous situation of a fully regulated market.

Isaac CJ found that it was open to the Agency to find that the unions and other interested associations might be "competitors" of CN and thus eligible to have their "significant harm" measured under section 113(5) of the NTA. He found that the Agency erred by refusing to take account of lost backhaul traffic in determining the harm to Upper Lakes Shipping. It is difficult to assess this point without more information than is provided in the judgment.

Isaac CJ's Conclusion

Chief Justice Isaac focused on the fact that the statutory language in section 113(5) is not identical to the predatory pricing prohibition found in section 50(1)(c) of the *Competition Act*. Section 113(5) of the NTA does not speak of the need for a "practice", uses "unreasonably low" rather than "uncompensatory" and, most importantly, speaks of "elimination" of a competitor, rather than "significant harm" to it. Thus, he concludes that CN has a burden of proof with respect to establishing that no competitor was harmed. He rejects the importation of competition law concepts such as monopolistic strategies.

Isaac CJ's statutory interpretation ignores wider policy developments that promote deregulation and competition in the Canadian economy. Perhaps the Chief Justice's description of the policy of deregulation as being "still

in vogue" sums up his view of the policy, and foreshadows his rejection of the importation of competition law ideas into the analysis of the NTA.

Conclusion

Both the majority and dissent are somewhat unsatisfying. Perhaps this is because section 113(5)(b) of the NTA embodies the basic policy divide that has characterized competition law in Canada. Is the purpose of competition law to protect competition, or to protect competitors? While it seems that the universal consensus is that competition, rather than competitors, is the correct answer, the legislation is not always so clear. Section 75 (refusal to deal) of the *Competition Act* is straightforwardly competitor-focused. This may or may not be appropriate, but at least it is unambiguous.

D.G.E.

Notes

1 [1995] F.C.J. No. 672 (F.C. C.A.).
2 R.S.C. 1985, c. N-20.01.
3 *Supra*, note 1 at para. 84.
4 *Ibid.* at para. 40.

INTERNATIONAL ANTITRUST THE CANADA - U.S. CONTEXT

The following are the notes from a speech made by George N. Addy, Director of Investigation and Research, Bureau of Competition Policy, to the ABA Section of Antitrust Law at its Annual Meeting held in Chicago on August 6, 1995, and is reproduced with permission.

Introduction

I am pleased to have the opportunity to address this joint session of the ABA Antitrust Section and the CBA Competition Law and Policy Section. My topic today is Canada/U.S. relations in antitrust enforcement and the new Competition Policy Agreement between our two countries.

I cannot over-emphasize even to this audience the importance of international considerations for competition policy in today's economic environment. Trade liberalization and globalization of markets have considerably increased the need for competition authorities to address cross-border issues. This has highlighted the further need for closer international cooperation. Transnational mergers requiring competition law review in several jurisdictions are now relatively commonplace. There has also been an increase in parallel investigations of anti-competitive conduct by more than one national competition authority. The Fax Paper cases in Canada and the U.S. and the Microsoft cases in the U.S. and the EU are two prominent recent examples.

With the successful implementation of the NAFTA in 1994, and the WTO in 1995, the time has come to bring international instruments for enforcement cooperation in line with the realities of cross-border trade. This is especially true in the Canada/U.S. context given the extent of our bilateral trade. For us, the ultimate goal of closer enforcement cooperation is to promote competitive markets in Canada and to protect Canadian consumers and businesses from anti-competitive and deceptive marketing practices.

While international cooperation between competition authorities is not new, trade liberalization and globalization have increased the need for cooperation, particularly between Canada and the U.S. I stress, however, that the need for greater cooperation does not mean that antitrust agencies are proceeding without regard for statutory requirements and

safeguards. Moreover, the mere fact that a particular matter has international elements does not necessarily mean that it will lead to extensive cooperation or parallel enforcement of the kind we undertook in Fax Paper. In the vast majority of cases, including those with cross-border elements, Canadian and U.S. competition authorities continue to pursue their own independent investigations without the need for extensive coordination.

Nevertheless, even in the absence of elaborate coordination arrangements, there are ample opportunities for increased cooperation between competition authorities by way of informal contacts to discuss common issues at a more general level — and we do take advantage of those opportunities.

In come cases, however, there is an opportunity for more extensive cooperation and coordination, and that is when we must adhere to formal instruments such as the Canada/U.S. Treaty on Mutual Legal Assistance in Criminal Matters[1] (the "MLAT"). The MLAT, which came into force in 1990, and the 1991 amendments to the Canada/U.S. Extradition Treaty[2] have considerably expanded the potential scope for enforcement cooperation.

While the MLAT and Extradition Treaty have increased the potential scope of enforcement cooperation, they only apply to criminal competition law matters. We do not have the ability to cooperate in a similar manner in civil matters, although the U.S. has recently taken an important step in this direction with the adoption of the *International Antitrust Enforcement Assistance Act* (the "IAEAA").[3] Increased cooperation across a greater range of competition law matters is necessary. In Canada we have initiated a consultation process to examine possible legislative amendments to provide, in unequivocal words, the authority and safeguards that should govern inter-agency cooperation and information sharing. I will return to the amendments consultations and the issue of bilateral enforcement cooperation in a moment.

Although there is clearly further work to be done with respect to specific mechanisms to enhance enforcement cooperation, the rationale for enforcement cooperation is clear. It is in both of our countries' interests to promote the effective enforcement of our competition laws and to assist each other in pursuing this objective. The case for cooperation is even more compelling in relation to conduct or transactions that may have anti-competitive consequences in markets affecting both countries. The rapid internationalization of business activity promises that there will be more cases requiring joint or parallel enforcement. Simply put, as markets become international, so does anti-competitive conduct. Indeed, anti-competitive conduct can itself become an export product. If we stop it in Canada, the parties can always set up shop in the U.S. until they get caught again.

Given the increasing integration of our markets, it is increasingly important that each country keep the other apprised of competition law enforcement activities that may have implications for the other's interests. Although there has been a marked decrease in the frequency of bilateral disputes involving competition law matters in recent years, there remain differences between our two countries in areas such as jurisdiction and comity and we need to be vigilant to ensure that these differences do not undermine our common stake in effective enforcement of our respective laws. In furtherance of this objective, on August 3rd, our governments concluded the new Agreement Between the

Government of Canada and the Government of the United States of America Regarding the Application of Their Competition and Deceptive Marketing Practices Laws.

The New Agreement

As some of you are aware, Canada and the United States have had several bilateral Understandings in relation to competition law dating back to 1959.[4] The most recent of these is the 1984 Memorandum of Understanding, which set out a relatively elaborate regime for notification and consultation in cases where a Party's enforcement activities might affect the national interests of the other Party. Our experience under the 1984 MOU, as well as recent developments such as Chapter 15 of NAFTA and the MLAT, led us to the conclusion that a new framework arrangement was required to bring our formal bilateral relations in line with current practice and priorities. The new Agreement also provides a framework within which other bilateral arrangements, such as those contemplated by the IAEAA, can be pursued following necessary amendments to Canadian law.

Like the 1984 MOU, the 1995 Agreement contemplates a procedure for notification and consultation in cases that implicate the other Party's interests and builds on the procedure envisaged by the MOU. The 1995 Agreement, however, improves the MOU in several respects. In particular, it contains a substantial elaboration of the Parties' commitment to cooperate in the enforcement of their competition laws. In addition, since the Federal Trade Commission and the Bureau of Competition Policy are both responsible for the administration of laws relating to deceptive marketing practices, the 1995 Agreement contains new commitments in this area. During the next few minutes, I will summarize and comment on the main features of the Agreement.

General Matters

The 1984 MOU was essentially an informal political arrangement between our governments. It expressly stated that it was not an international agreement. By contrast, the 1995 Agreement is a binding international agreement under international law. This change of status serves to underscore the Parties' commitments to the avoidance of disputes and closer cooperation in the application of their competition laws. At the same time, Article XI clearly states that neither Party is required to act in a manner that is inconsistent with its existing laws, or to change its laws as a result of the Agreement. The purpose of this "existing laws" override is to ensure that the commitments contained in the Agreement are interpreted in a manner consistent with the Parties' respective laws. Similarly, paragraph X(1) expressly provides that neither Party is required to communicate information to the other where its communication is prohibited by its laws or is otherwise incompatible with its important interests. This further ensures that the Agreement will not indirectly bring about a change in the Parties' confidentiality laws. All of the commitments in the Agreement are to be read in the light of these two important qualifications.

The purpose of the Agreement is set out in Article I. In brief, it is intended to:

- promote cooperation and coordination between the Parties' competition authorities;
- avoid conflicts and minimize the impact of differences on their important interests; and

- establish a framework for cooperation and coordination in the area of deceptive marketing practices.

Notification

The notification procedures are set out in Article II. The general criterion for notification is similar to the 1984 MOU, namely, that each Party will notify the other with respect to its enforcement activities that may affect the important interests of the other Party. Paragraph II (2) sets out a non-exhaustive list of circumstances that ordinarily require notification. This list is considerably broader than the comparable list in the 1984 MOU[5] and includes notification of a Party's enforcement activities:

- where they are relevant to the other Party's enforcement activities;
- where they involve anti-competitive activities, other than mergers or acquisitions, carried out in whole or in part in the territory of the other Party;
- where they involve mergers or acquisitions in which one or more of the parties to the transaction is incorporated or organized under the laws of the other Party;
- where they involve conduct believed to have been required, encouraged or approved by the other Party;
- where they involve remedies that expressly require or prohibit conduct in the territory of the other Party or are otherwise directed at such conduct, and
- where they involve the seeking of information located in the territory of the other Party.

The Agreement also contemplates notification of public interventions by the competition authorities in judicial or regulatory proceedings where the issues addressed may affect the other Party's interests.

As a general rule, notification would be made as soon as a Party's competition authorities become aware that notifiable circumstances are present. However, the timing of notifications in certain circumstances is specified in greater detail elsewhere in Article II.[6]

I would like to comment briefly on notifications involving mergers and acquisitions. First, the Agreement requires notification of merger investigations only where significant competition concerns have been raised by the notifying authority. The triggering events are the issuance of a second request in the U.S., and a request for information under oath or an order under section 11 of the *Competition Act*[7] in Canada. Thus, the vast majority of merger reviews involving companies organized under the laws of the other country would generally not have to be notified. Second, the notification would not indicate whether the parties to the transaction had filed a mandatory merger pre-notification, since that information is confidential under both countries' laws. Rather, the notification would state that the investigation authority is reviewing a particular proposed merger.

With respect to non-merger investigations, the Agreement contemplates that notification will be given as soon as the competition authorities become aware that notifiable circumstances are present, with a further notification at least seven days in advance

of the initiation of proceedings or the settlement of the matter. This will ensure that, in most cases, the other Party will have an adequate opportunity to make representations before enforcement action is taken. However, in recognition of the fact that enforcement authorities must act quickly in urgent situations, the Agreement also provides that where seven days' notice cannot be given, notification would be given as promptly as possible.

Notification with respect to the seeking of information located in the territory of the other Party would be given at least seven days in advance where compliance is mandatory, and at the time that the request is made where compliance is voluntary. Requests for oral testimony from, or personal interviews with, persons located in the territory of the other Party would be notified at the time of the request. Finally, in keeping with the current practice under the 1984 MOU, the Agreement would not require notification of telephone contacts with persons in the territory of the other Party where they are not targets of the investigation, only a voluntary oral response is sought and the other Party's interests are not otherwise implicated.

Consultation and Dispute Avoidance

The Agreement also provides for inter-governmental consultations at the request of either Party. It improves on the 1984 MOU by requiring both Parties to be prepared to explain their positions in light of the principles set out in the Agreement.

An important new feature of the Agreement in this regard is Article VI on avoidance of conflicts. This provision sets out a number of principles that are intended to guide the Parties in the exercise of their enforcement discretion. While several of these principles are drawn from the 1984 MOU, the Agreement builds on the MOU by including a non-exhaustive list of "comity" factors.[8] These are adapted from several sources, including our experience under the MOU, Canadian and U.S. jurisprudence and the 1991 U.S./EU Agreement.[9] This is, in my view, a very significant development in bilateral relations in the area of competition law since it marks, for the first time, a common Canadian and U.S. approach to the factors that are relevant in a comity analysis. While I do not expect that the Agreement will resolve all potential jurisdictional disputes, I do expect that it will facilitate their resolution by focusing the Parties' attention on the agreed factors.

Enforcement Cooperation and Coordination

The 1995 Agreement also builds on the 1984 MOU in the area of enforcement cooperation and coordination. These issues are addressed in Articles III to V with respect to competition law, and Article VII in relation to deceptive marketing practices.

Article III notes the Parties' common interest in cooperation and information exchange to facilitate the detection of anti-competitive activities and the effective application of their competition laws. It also notes their commitment to consider further measures to enhance enforcement cooperation. I will return to this issue in commenting on the recently announced consultations regarding possible amendments to the *Competition Act*.

Article III sets out the different forms of cooperation that the Parties' competition authorities may engage in, subject to applicable laws, enforcement policies and their own national interests. The Agreement

commits the competition authorities to:

- assist each other in locating and securing evidence and witnesses, and in securing voluntary compliance with requests for information;

- inform each other with respect to their own enforcement activities where the conduct in question may also have anti-competitive effects in the territory of the other Party;

- provide relevant information to the other Party's competition authorities upon request; and

- at their own initiative, provide the other Party's competition authorities with significant information concerning anti-competitive activities that may warrant their attention.

As you can see, the enforcement cooperation and assistance contemplated by the Agreement is significant. That being said, however, these commitments are subject to each Party's laws, particularly those relating to confidentiality. At the present time, insofar as Canada is concerned, confidential information would only be communicated in the manner set out in my recent public statement on confidentiality.[10] More precisely, confidential information would only be communicated to the U.S. competition authorities for the purpose of advancing an investigation under the *Competition Act*. Of course, this restriction would not apply to public information, or where the person who provided the information — a complainant for example — were to consent to its communication.

The issue of enforcement coordination with regard to related matters is addressed in Article IV. This provision is aimed at circumstances, such as the Fax Paper case, where the Canadian and U.S. competition authorities are investigating the same or related conduct. Article IV sets out several factors with respect to a decision to coordinate enforcement. Where an affirmative decision to coordinate is made, each Party's competition authorities would aim to conduct their investigations in a manner that is consistent with the other Party's enforcement objectives.

Article IV also contemplates that the Parties' competition authorities may request each other to ascertain whether persons who have provided confidential information will consent to the information-sharing. This provision is intended to facilitate cooperation. It does not, however, override my discretion to communicate information without consent for the purpose of enforcement or administration of the *Competition Act*.

Article V incorporates the notion of "positive comity" whereby a Party may request that the other Party's competition authorities initiate enforcement action with respect to conduct in the territory of the requested Party. Positive comity presumes that the conduct in question constitutes a violation of both Parties' laws. Since, by definition, the conduct in question occurs principally in the territory of the requested Party, the latter is arguably in a better position to investigate and impose adequate relief. Positive comity therefore has the benefit of promoting more effective enforcement while minimizing the likelihood of jurisdictional disputes.

Deceptive Marketing Practices

As you are aware, the U.S. Federal Trade Commission and the Canadian Director of

Investigation and Research are both responsible for the administration of laws relating to deceptive marketing practices. In the case of Canada, those laws are an integral part of the *Competition Act*.[11] The FTC has jurisdiction over deceptive marketing practices pursuant to section 5 of the *Federal Trade Commission Act*.[12]

Developments such as cross-border telemarketing, and the continuing integration of our markets more generally, have led to an increase in deceptive marketing investigations with cross-border dimensions. In view of our common interest in countering deceptive marketing practices, and our experience with informal cooperation in the past, Article VII of the Agreement endorses further cooperation between my office and the FTC. Subject to each Party's laws, enforcement policies and other important interests, this cooperation would extend to assistance in the detection of deceptive marketing practices, informing each other of investigations involving practices occurring in, or that affect consumers or markets in, the territory of the other Party, information-sharing and enforcement coordination.[13] The Article also requires us to jointly study further measures to enhance enforcement cooperation in this area.[14]

Confidentiality

Article X of the Agreement acknowledges the importance of confidentiality in several respects. First, as I noted earlier, it expressly provides that neither Party is required to communicate information to the other where prohibited by its laws.[15] The Agreement is not intended to change the Parties' laws in this regard. Second, the Parties have agreed to maintain the confidentiality of information communicated in confidence to the fullest extent possible.[16] Moreover, either Party may make the communication of specific information conditional upon specific assurances with respect to confidentiality and use.[17] The Parties also agree to oppose, to the fullest extent possible consistent with their laws, any application for disclosure of confidential information by a third party. Thus, the Parties would generally invoke any applicable legal arguments or privileges to prevent disclosure of confidential information. Where appropriate, we would consider seeking protective orders with respect to information that may be introduced in evidence in judicial or administrative proceedings. At the same time, we recognize that the competition authorities are subject to legal — and constitutional — obligations to disclose certain information to defendants in legal proceedings. These obligations would be a factor to consider in the course of a decision to communicate information.

Notifications and consultations between the Parties are deemed to be confidential, and information communicated in those contexts would not be communicated outside a Party's federal government without the consent of the other Party.[18]

Finally, investigatory information communicated between the competition authorities in the course of enforcement cooperation must be kept confidential to the competition authorities themselves and may not be communicated to other agencies of the receiving authorities' government or used for purposes other than enforcement of competition or deceptive marketing practices laws, as the case may be, without consent.

Enforcement Cooperation — Present and Future

The 1995 Agreement is an important development in bilateral relations between our countries. It establishes a framework for cooperation in the enforcement of our competition and deceptive marketing practices laws that is flexible and forward looking. The Agreement contemplates further enhancements in our capacity to cooperate while leaving it to each country to determine the nature and scope of such cooperation in accordance with its interests. It respects each Party's laws and practices and, in my view, sets out workable principles to assist in the resolution of potential conflicts.

As I mentioned at the outset, cooperation between our two countries' competition authorities is not a new phenomenon. We have worked together over the years through regular bilateral meetings and at the OECD Competition Law and Policy Committee to promote a better understanding of our respective laws and enforcement policies. We frequently discuss emerging trends in particular sectors, or enforcement policy with respect to certain types of conduct. We also consult regularly on general policy matters such as cost recovery and compliance policy. These contacts have led to a gradual convergence in our analytical approaches despite the differences in our laws. In a case-specific context, such as mergers which are being reviewed on both sides of the border, our staff will often discuss general issues such as market definition, barriers to entry and theories of the case. Similar discussions take place when the other country's competition authorities have had experience with a particular type of conduct or industry that may be relevant to our investigations. These exchanges do not require the communication of confidential information and allow us to learn from one another.

The scope for enforcement cooperation has, however, increased as a result of the availability of the MLAT and the Extradition Treaty. As you know, the MLAT allows us to use compulsory powers to assist each other in criminal antitrust matters and we have invoked these provisions on several occasions. By way of illustration, there have been 11 MLAT requests in competition law matters to date (5 by Canada and 6 by the U.S.) and one Canadian request under the Extradition Treaty in a matter involving the marketing practices provisions of the *Competition Act*.[19]

I should add that there has been increasing cooperation in the area of deceptive marketing practices. For example, growing concerns on both sides of the border with respect to deceptive telemarketing have led to closer contacts between Canadian and U.S. law enforcement agencies, including the Bureau of Competition Policy and the FTC. An important outcome of this trend is the growing cooperation between the Canadian agencies involved in Project Phonebuster, a cooperative effort involving federal and provincial law enforcement agencies, and U.S. agencies including the FTC. Last September, the Bureau of Competition Policy hosted a multi-agency seminar on telemarketing with the participation of the FTC and Canadian police forces. Similarly, Bureau officials attended the FTC's Workshop Conference on the proposed Telemarketing Rule last May. I fully expect that cooperation in this area will increase in coming years.

Since the trend toward more international cooperation is here to stay, I would like to take this opportunity to set the record straight on the issue of confidential information exchange. We do not exchange confidential information as a routine matter. In fact, there have been very few joint or

parallel investigations using the MLAT to date, including the Fax Paper case, which have involved the exchange of confidential information. There have also been preliminary discussions between our two countries' agencies in several other cases, however, these have not yet led to the extensive cooperation and information-sharing that characterized the Fax Paper investigation. In those cases where confidential information was communicated pursuant to the MLAT, it has taken place following a thorough consideration of the issues involved and in a manner consistent with the applicable laws. In this regard, the new Agreement will not change the manner in which we communicate information between competition authorities. As far as Canada is concerned, we will continue to do so in accordance with the statement on confidentiality that I issued earlier this year. What has changed, however, is the strength of our commitment to make further progress toward closer cooperation.

While we will continue to use the existing tools for cooperation, it is clear to me that further measures are necessary in order to facilitate more effective enforcement cooperation. In this regard, on June 28, 1995, the Minister of Industry, the Honourable John Manley, announced a consultation initiative aimed at fine-tuning the *Competition Act* within the next year. The Minister has asked me to consult with a broad range of stakeholders in order to develop amendments proposals to improve and streamline the administration of the Act. Among the key areas to be addressed are international cooperation in competition law enforcement and the protection of confidential information. The eventual legislative amendments would provide clear and unequivocal authority for specified types of inter-agency cooperation and information-sharing as well as appropriate safeguards.

As a result of the Minister's initiative, I have released a Discussion Paper that addresses several areas where amendments would be desirable. These include:

- mutual assistance with foreign competition law agencies and the protection of confidential information;
- notifiable merger transactions;
- misleading advertising and deceptive marketing practices;
- "regular price" claims and section 52(1)(d);
- price discrimination and promotional allowances;
- access to the Competition Tribunal;
- prohibition orders; and
- deceptive telemarketing solicitations.

With respect to international cooperation, the Discussion Paper proposes amendments that would authorize the Director to assist foreign competition authorities on a reciprocal basis. The new regime would authorize the communication of confidential information and the use of compulsory powers in both civil and criminal competition matters pursuant to mutual assistance agreements negotiated with foreign governments. It would also address information providers' concerns about the extent to which commercially sensitive information may be communicated to foreign authorities by including appropriate safeguards.

I am confident that the consultation process will lead to amendments that will greatly enhance our ability to enforce Canada's competition laws with respect to trans-border conduct. By facilitating international enforcement cooperation, the amendments proposed in the Discussion Paper will also allow us to fulfill the objectives of the new bilateral Agreement more effectively.

Moreover, in view of the fact that the U.S. competition authorities now have the ability to conclude Antitrust Mutual Assistance Agreements pursuant to the *International Antitrust Enforcement Assistance Act*, I would expect that the negotiation of such an agreement would be a priority for both governments once the Canadian amendments process has been concluded. In my view, it is these kinds of arrangements, providing for tangible, case-specific cooperation within a framework of obligations and safeguards, that will characterize international competition law developments in the foreseeable future.

As business activity globalizes, there is increasing interest in greater convergence between national and regional competition policy regimes. Ongoing work within the OECD, the NAFTA 1504 Working Group and elsewhere will no doubt lead to an intensified examination of multilateral competition policy norms in the context of trade and investment liberalization. However, it is becoming increasingly clear that greater competition policy convergence on its own will be insufficient to ensure competitive international markets. Despite the significant advances made in the NAFTA and the WTO, restrictive government measures continue to limit effective competition in many sectors and may in fact facilitate private anti-competitive conduct. Competition authorities are therefore being increasingly drawn into participating in international trade and investment initiatives. There is much work to be done in this area in the longer term. As this work proceeds, however, cooperation arrangements within trade areas and between trading partners will likely continue for some time to be the most relevant to international competition policy.

Conclusion

There is increasing recognition in both the public and private sectors that the current international economic environment calls for closer relations among competition authorities. Thus far, Canada and the United States have been at the forefront in promoting closer cooperation and our experience to date has demonstrated the mutual benefits of such cooperation. The Agreement concluded by our two governments last week is an important step in this direction. It represents a firm commitment to closer relations in the enforcement of our competition and deceptive marketing laws and to mutual respect for national sovereignty. The new notification provisions will ensure that each country is adequately informed with respect to the other country's enforcement efforts so that our respective interests can properly be taken into account. Ultimately, the Agreement will increase my ability to protect Canadian consumers and businesses from anti-competitive and deceptive marketing practices wherever they originate. This new Agreement is one of the key tools needed for proper antitrust enforcement. I am confident that it will be followed by further advances during the coming year.

G.N.A.

Notes

[1] Treaty Between the Government of Canada and the Government of the United States of America on Mutual Legal Assistance in Criminal Matters, dated March 18, 1985, in force January 14, 1990, 1990 Can. T.S. No. 19.

[2] Extradition Treaty between Canada and the United States of America, 1976 Can. T.S. No. 3, as amended by a Protocol dated January 11, 1988, in force November 22, 1991, 1991 Can. T.S. No. 37.

[3] Pub. L. No. 103-438, 108 Stat. 4597 (1994).

[4] Fulton-Rogers Understanding of 1959; Basford-Mitchell Understanding of 1969; Memorandum of Understanding Between the Government of Canada and the Government of the United States of America as to Notification, Consultation and Cooperation with respect to the Application of National Antitrust Laws, March 9, 1984.

[5] Paragraph 2(2).

[6] Paragraphs II(4) to (7).

[7] R.S.C. 1985, c. C-34, as amended.

[8] (i) the relative significance to the anti-competitive activities involved conduct occurring within one Party's territory as compared to conduct occurring within that of the other;

(ii) the relative significance and foreseeability of the effects of the anti-competitive activities on one Party's important interests as compared to the effects on the other Party's important interests;

(iii) the presence or absence of a purpose on the part of those engaged in the anti-competitive activities to affect consumers, suppliers or competitors within the enforcing Party's territory;

(iv) the degree of conflict or consistency between the first Party's enforcement activities (including remedies) and the other Party's laws or other important interests;

(v) whether private persons, either natural or legal, will be placed under conflicting requirements by both Parties;

(vi) the existence or absence of reasonable expectations that would be furthered or defeated by the enforcement activities;

(vii) the location of relevant assets;

(viii) the degree to which a remedy, in order to be effective, must be carried out within the other Party's territory; and

(ix) the extent to which enforcement activities of the other Party with respect to the same persons, including judgments or undertakings resulting from such activities, would be affected.

[9] Agreement Between the Commission of the European Communities and the Government of the United States of America Regarding the Application of their Competition Laws, dated September 23, 1991.

[10] *Communication of Confidential Information Under the Competition Act*, Industry Canada, May 1995.

[11] Sections 52 60.

[12] 15 U.S.C. 41-58.

[13] Paragraph VII(3).

[14] Paragraph VII(4).

[15] Paragraph X(1).

[16] Paragraph X(2).

[17] Paragraph X(3). See also 1984 MOU, paragraph 10(1).

[18] Paragraph X(4).

[19] In May 1993, a U.S. company, Thomas Liquidation Inc., and an individual resident in the U.S. were charged under section 52 of the *Competition Act* with respect to misleading representations in connection with a liquidation sale of the inventory of Pascal's Furniture in Toronto. The company and individual failed to appear in court to answer the charges. In consequence, the Attorney General of Canada formally requested the extradition of the individual concerned and a warrant for his arrest was issued in the U.S. The individual agreed to waive extradition hearings and came to Canada voluntarily, where the matter was resolved by way of a guilty plea by the company and payment of a fine of $130,000.

CANADA PIPE COMPANY LTD. PLEADS GUILTY AND PAYS RECORD $2.5 MILLION FINE FOR CONSPIRACY OFFENCE UNDER THE *COMPETITION ACT*

The following is a News Release issued by the Bureau of Competition Policy on September 27, 1995, and is reproduced with permission.

OTTAWA, September 27, 1995 — The Director of Investigation and Research under the *Competition Act*, George N. Addy, announced today that a record $2.5 million fine has been levied against Canada Pipe Company Ltd. (CPC) for one count of conspiracy. This conspiracy involved an arrangement, between the then President of CPC (who was also President of its American parent, McWane Inc.) and the

President of U.S. Pipe and Foundry Company, to cut off supplies of ductile iron pipe to CPC's Canadian competitor. The decision was rendered by Mr. Justice McKeown in the Federal Court of Canada (Trial Division) in Toronto, Ontario.

The company pleaded guilty to have arranged with U.S. Pipe to lessen competition in Canada unduly in the supply and sale of ductile iron pipe in the period of January 1990 to September 1990. If implemented, this arrangement would have effectively given CPC the entire Canadian market. Ductile iron pipe is used in the filtration, transportation and distribution of drinkable water in high pressure water mains. CPC's customers include municipalities, distributors of pipe, fittings, and valves, and construction contractors.

The decision is significant because, in addition to the deterrent value of the record fine, the costs of the Crown's investigation and legal services were an important factor in deciding on the amount of the fine. A Prohibition Order was also imposed.

"Our prosecution of this case in Canada clearly benefited from the cooperation provided by the U.S. Department of Justice, Antitrust Division," Mr. Addy stated. Investigative cooperation among law enforcement agencies to fight transborder anti-competitive activities is increasing and those who break competition laws will not find protection in another jurisdiction. Cooperation allows us to attack foreign based anti-competitive conduct directed at the Canadian market.

"An Agreement on enforcement cooperation between Canada and the United States regarding the Canadian *Competition Act* and American antitrust legislation was signed on August 3, 1995. With these new mechanisms in place, further cooperation between the two agencies can be expected to grow in the future," Mr. Addy added.