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## Competition Law and Enforcement in Canada

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# Competition Law and Enforcement in Canada

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**I. General**

Throughout its lengthy,<sup>1</sup> if not altogether illustrious, history, Canadian competition legislation has been characterized by significant difficulties of enforcement. These problems have stemmed largely from constitutional limitations which has meant that, until recently, the law being applied has been exclusively criminal in nature. The situation today is not very different in that enforcement issues in this field continue to preoccupy the legislators and the courts.<sup>2</sup>

During the past several years there have been a number of conflicting constitutional law decisions dealing with the federal government's authority to legislate, and even to enforce, law in this area. While some of the constitutional uncertainties have been resolved by the Supreme Court of

1. The first Canadian competition legislation was enacted in 1884, one year prior to the Sherman Act in the United States.

2. See in this regard the discussion following under the headings "III. Constitutional Law Issues," "IV. Charter of Rights" and "V. Competition Law Reform."

Canada,<sup>3</sup> there continue to be significant undecided issues concerning the federal government's constitutional authority to enact laws which confer civil jurisdictions in regard to competition law matters. These continuing uncertainties have a particular significance for the direction of proposed competition law reform which is generally moving away from the traditional criminal law basis and toward the creation of new civil law jurisdictions. Some of these uncertainties are fairly basic. For example, it is still not clear (there are a number of conflicting judicial decisions on the point) that the private damage action remedy which has been in the Combines Investigation Act (the Act)<sup>4</sup> since 1976, is constitutionally valid.<sup>5</sup>

More recently, constitutional issues have surfaced from another direction. In 1982, the Canadian Constitution was amended to provide for a Charter of Rights<sup>6</sup> which operates as a restraint on the otherwise supreme legislative authority (within its area of legislative competence) of the federal Parliament. Provisions of the Charter relating to unlawful search and seizure in particular have been effectively applied by a number of enterprising would-be accused in potential combines prosecutions to defeat the use by federal combines law enforcement officials of the traditional search and seizure procedures provided in the Act.

A third, perhaps more significant, development in terms of Canadian competition law enforcement is the process of legislative reform. One may be forgiven for thinking that proposals for reform of the law in this area are not a new development. Indeed, debate concerning Canadian competition law reform has been ongoing, more or less continuously, for over fifteen years, with relatively little actual new legislation to show for it. Recently, however, this situation has shown signs of changing. In December 1985, the federal Parliament gave first reading to a Bill (C-91) to amend the Combines Investigation Act.<sup>7</sup> This Bill contained a number of major reforms which

3. For example, the Supreme Court of Canada has upheld the federal government's authority to enact legislation conferring on the federal Attorney-General the power to enforce the provisions of the Combines Investigation Act: *Attorney-General Canada v. CN Transportation Limited* [1983] 2 S.C.R. 206.

4. REV. STAT. OF CAN. 1970 c.23, as amended by c.10 (1st Supp.), c.10 (2nd Supp.) 1974-75-76, c.76 and 1976-77 c.28.

5. The most recent decision, by the Federal Court of Appeal in *Rocois Construction Inc. v. Quebec Ready Mix Inc. et al.* (Judgment rendered 1985, as yet unreported, Federal Court of Appeal docket number A-705-79) upholds the constitutionality of this provision (§ 31.1 of the Combines Investigation Act). See the discussion of this and other cases under the heading "III. Constitutional Law Issues" *infra*. The *Rocois* case is on appeal to the Supreme Court of Canada.

6. The Charter of Rights and Freedoms amendment to the Canadian Constitution (Constitution Act, 1982).

7. Bill C-91: "An Act to establish the Competition Tribunal and to amend the Combines Investigation Act and the Bank Act and other Acts in consequence thereof"—First Reading, Dec. 17, 1985.

address some longstanding enforcement issues or problems. This legislation (which has not yet become law and is not expected to become effective prior to mid-1986 at the earliest) follows relatively closely the earlier legislative reform proposals tabled by the then Liberal government in April 1984 in the form of Bill C-29<sup>8</sup> which was not proceeded with due to a change in government in September 1984. The proposed amendments attempt to deal with major enforcement problems which have been encountered in the core areas of the legislation, namely mergers, monopolies and trade-restraining horizontal agreements. They also purport to resolve the longstanding debate as to whether the civil law-based provisions of the legislation should be adjudicated by the courts or a specialized competition tribunal.

There have been a number of recent decisions in the competition law field which are of interest and which significantly clarify the application of the law in areas which were previously uncertain. There have also been other decisions which, from an enforcement point of view, further emphasize the need to proceed with legislative reforms. Some of the more important recent cases in this regard are discussed below.

Finally, we will be dealing with a somewhat different enforcement issue, namely efforts to nullify the enforcement of foreign (i.e., United States) antitrust laws in Canada, most recently exemplified by the Foreign Extraterritorial Measures Act,<sup>9</sup> which came into force in February 1985. This statute is but the latest in a series of legislative efforts to resist the extension of foreign antitrust laws into the Canadian domestic law area.

While these subjects are obviously too comprehensive to be treated fully in this article, an effort will be made to highlight, in the space available, the more significant developments. By way of general background for readers not familiar with the Act, it may be useful, as a preliminary matter, to attempt to describe briefly its principal subject matter.

## II. The Legislation in General

The first Canadian statute dealing with competition law matters was enacted in 1888, one year before the Sherman Act. Historically, this legislation has been primarily criminal in character (largely due to constitutional law considerations). However, in 1976 the Combines Investigation Act was amended<sup>10</sup> to provide for a number of civil jurisdictions exercisable by the Restrictive Trade Practices Commission (RTPC) and for the recovery of private damages suffered as a consequence of a violation of one of the criminal provisions of the Act or a breach of an order of the RTPC.

8. Bill C-29: "An Act to amend the Combines Investigation Act and the Bank Act and other Acts in consequence thereof"—First Reading, Apr. 2, 1984.

9. STAT. OF CAN. 1984 c.49 (proclaimed in force Feb. 14, 1985).

10. STAT. OF CAN. 1974-75-76, c.76 s.12.

## A. CRIMINAL PROVISIONS

The criminal provisions of the Act cover the following practices or matters: conspiracies to limit competition unduly amongst competitors (price-fixing, etc.); bid-rigging; implementation of international conspiracy; conspiracy relating to professional sport; unlawful merger; unlawful monopoly; price discrimination; promotional allowances; predatory pricing (regional price discrimination and selling at prices unreasonably low); price maintenance; misleading advertising; and other miscellaneous offenses akin to misleading advertising (e.g., double ticketing, pyramid selling, referral selling, bait-and-switch selling, selling at above the advertised price, and promotional contests).

## B. CIVIL PROVISIONS

Civil law jurisdictions under the Act deal with the following: abuse of industrial property rights; refusal to deal; consignment selling; exclusive dealing; market restriction; tied selling; implementation of foreign judgments and orders and foreign laws and directives; and refusal to supply by a foreign supplier. The Act applies to services as well as articles, except in the case of price discrimination. There are also a limited number of exemptions for such things as collective bargaining activities, underwriters, amateur sport and professional associations. In addition, the law has been interpreted as not applying in certain circumstances to government-regulated businesses and conduct.

## C. ADMINISTRATION AND ENFORCEMENT

The Combines Investigation Act is federal legislation. The Minister responsible for its administration and enforcement is the Minister of Consumer and Corporate Affairs. The actual administration and enforcement of the legislation is carried out by the Bureau of Competition Policy whose principal officer is the Director of Investigation and Research (the Director). Investigations under the Act are usually initiated by the Bureau. The Act contains procedures for the compulsory disclosure of documentary evidence and mandatory oral testimony by or on behalf of individuals or corporations, although the recently enacted Charter of Rights has largely invalidated the documentary discovery procedures under the Act. Most criminal prosecutions under the Act are commenced in the ordinary criminal courts, although jurisdiction is also conferred upon the Federal Court of Canada for certain purposes.

The Director has a duty of inquiry into matters that appear to call for action under the legislation. He has access to information through the utilization of any of three investigation procedures: search warrants issued

under the Criminal Code, notices requiring persons to answer questions orally under oath, and notices requiring persons to submit written information on oath. The Director may discontinue an inquiry at any time. He may also obtain by negotiation written undertakings regarding a party's future conduct. If the evidence justifies having recourse to any formal remedial powers, he may recommend prosecution to the Attorney-General or, in the case of certain distribution practices, make application directly to the RTPC for a prohibition order.

The RTPC's functions currently include: authorizing the use by the Director of certain compulsory investigative powers (although not the search and seizure powers under sec. 10 of the Act) and presiding over the taking of oral evidence in the course of investigations by the Director; conducting further hearings to review conduct at the request of the Director in cases where the Director has concluded that criminal offenses have occurred; holding hearings into general matters concerning competition policy; and considering applications for prohibition orders directed to certain distribution practices.

There is also a civil cause of action conferred by sec. 31.1 of the Act authorizing any person who has suffered loss or damage as a result of conduct constituting a criminal offense under the Act to sue for and recover damages as a consequence of such loss or damage. A criminal conviction is not a condition precedent to the civil action; however, prior criminal prosecution resulting in conviction will undoubtedly facilitate a subsequent civil action.

#### D. REVIEWABLE TRADE PRACTICES

The RTPC, upon application by the Director, is required to hold hearings, and may issue prohibition and other orders relating to a variety of distributive and other matters (not in themselves criminal offenses) which are the subject of such hearings: refusals to supply (sec. 31.2); consignment selling (where engaged in to avoid the prohibitions on price discrimination and price maintenance) (sec. 31.3); exclusive dealing (sec. 31.4); tied selling (sec. 31.4); market restriction (limiting a customer to selling only in a defined market) (sec. 31.4); implementing a foreign judgment which adversely affects competition in Canada (sec. 31.5); implementing a foreign law or a directive outside of Canada that adversely affects competition in Canada or which is designed to give effect to a foreign conspiracy or arrangement that, if entered into in Canada, would have been in violation of the Act (sec. 31.6); and refusal to supply a product to a person in Canada by reason of the exertion of buying power outside of Canada by another person (sec. 31.7).

#### E. MERGERS

The Act makes it an offense for one or more persons to acquire, "whether

by purchase or lease of shares or assets or otherwise . . . any control over or interest in the whole or part of the business" of any person, whereby competition is or is likely to be lessened to the detriment or against the interest of the public.<sup>11</sup> There have been relatively few Canadian merger cases, yielding but one conviction which resulted from a plea of guilty.<sup>12</sup> The existing case law suggests that proof of actual or likely detriment requires a showing of almost a complete absence of actual and potential competition.

## F. MONOPOLY

It is a criminal offense under the Act for anyone to be a party or privy to, or to the formation of, a "monopoly."<sup>13</sup> This term is defined as a "situation where one or more persons either substantially or completely control . . . the class or species of business in which they are engaged and have operated such business or are likely to operate it to the detriment or against the interest of the public. . . ."<sup>14</sup> Again, the government has had relatively little success in bringing criminal prosecutions under this provision.

## G. HORIZONTAL AGREEMENTS

The Act prohibits, as a criminal law matter (punishable by fines and imprisonment in appropriate cases), horizontal agreements which unduly restrain or injure competition.<sup>15</sup> The most common type of infringing agreement is the horizontal price-fixing agreement amongst competitors. Generally speaking, the law in this regard has been interpreted as requiring a high degree of market concentration on the part of the participants, such that they may effectively operate without any significant competition. The Act in this regard does not create a *per se* offense (although there is a specific *per se* offense treatment applied to bid-rigging offenses where formal bids are submitted in a competition) but rather operates on a "rule of reason" basis.

There is also a suggestion in recent cases decided by the Supreme Court of Canada<sup>16</sup> that it may be necessary to demonstrate that the conspirators actually intended to restrain competition unduly, rather than merely intending to enter into the agreement which in fact has that effect. One of these cases further suggests that consciously parallel conduct which in fact diminishes competition may be beyond the purview of the conspiracy provisions

11. Combines Investigation Act, s.33 and s.2.

12. R. v. Electric Reduction Company of Canada Ltd. (1970) 61 C.P.R. 235.

13. Combines Investigation Act, s.33.

14. Combines Investigation Act, s.2.

15. Combines Investigation Act, s.32.

16. See in this regard the discussion of the decisions of the Supreme Court in the *Aetna Insurance* and *Atlantic Sugar* cases discussed *infra* under the heading "VI. Recent Cases, A. Conspiracy."



of the Act where such conduct lacks the necessary element of overt communication.

#### H. PRICE DISCRIMINATION

The Act makes it an offense<sup>17</sup> for a supplier of articles (the provision does not apply to services) to discriminate in price (or other terms having financial impact) as between those of his customers who compete with one another on any basis other than quantity or quality differences. The Canadian price discrimination provision has no requirement for cost justification in regard to volume price differences. It is sufficient that the lower priced product is supplied in greater quantity to the favored customer than to the customer who pays a higher price provided that both customers were given the same opportunity. While there is no specific "meeting competition in good faith" proviso to the Canadian price discrimination law, the section is only violated where discriminatory discounts, etc., are granted as a part of a *practice* of discriminating on the part of the supplier.

Generally speaking, volume discounts need not be structured on a proportionate basis, but rather, may be established according to a plateau structure and may be offered on either a single delivery or periodic purchase basis. However, incentive discount schemes based on an increase in volume over prior years' sales are ordinarily not structured to comply with the requirements of the section.

#### I. PROMOTIONAL ALLOWANCES

A typical promotional allowance involves the supplier of an article or service offering to defray a portion of the advertising or promotion costs incurred by a retailer in connection with the sale of that product or service. The provision in the Act<sup>18</sup> requires such allowances to be offered on a proportionate basis; i.e., so that each competing purchaser from the supplier is granted an allowance proportionate to his purchases from the supplier. Where any *quid pro quos* are required for the allowance, such as the performance of some advertising service, such *quid pro quos* are similarly required to be in proportion to the purchases from the supplier made by those customers.

#### J. PREDATORY PRICING

There are two provisions dealing with predatory pricing in the Act,<sup>19</sup> one

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17. Combines Investigation Act, s.34(1)(a).

18. Combines Investigation Act, s.35.

19. Combines Investigation Act, s.34(1)(b) and (c).

that deals with regional price discrimination and another which prohibits selling at prices unreasonably low. Both provisions require either a showing of actual detriment to competition or proof of predatory intent. Both require that the activity be part of a "policy." Both involve sales of "products," a term defined to include both articles and services. Both provisions are intended to protect "primary line" competition.

#### K. PRICE MAINTENANCE

With the possible exception of misleading advertising, the price maintenance section <sup>20</sup> is one of the most actively enforced provisions in the Act at the present time.<sup>21</sup> The success rate of the Bureau in obtaining convictions under the provision is also high. The section makes it an offense for a supplier, by agreement, threat, promise, or other like means, to attempt to influence upward or to discourage the price at which another person supplies or offers to supply or advertises a product in Canada. It is also an offense under this section to refuse to supply a product to anyone because of his low pricing policy. There is a deeming provision which effectively stipulates that the suggestion of a price by a supplier to a distributor which does not indicate that the distributor is not bound to accept the suggestion and would not be affected in his business relations with the supplier by failing to act in accordance with the suggestion, constitutes an attempt to influence the person. There is a further deeming provision to the effect that where a supplier, other than a retailer, places an advertisement indicating a resale price for the product and fails to indicate that the product may be sold for less than the suggested price shall be deemed to be guilty of an attempt to influence upward the selling price of the product.

There are also a number of defenses to that portion of the price maintenance provision as it relates to refusals to supply. Generally speaking, if it can be shown that the denied outlet was making a practice of using the product as a loss leader or was engaged in bait-and-switch selling, was engaged in misleading advertising or was not providing the level of servicing that the purchasers of such products might reasonably expect, no inference unfavorable to the accused may be drawn by reason of the accused's refusal to continue to supply products to such outlet.

20. Combines Investigation Act, s.38.

21. See DEP'T. OF CONSUMER AND CORPORATE AFFAIRS, ANNUAL REPORT OF THE DIRECTOR OF INVESTIGATION AND RESEARCH UNDER THE COMBINES INVESTIGATION ACT (for the year ended Mar. 31, 1985) [hereinafter cited as ANNUAL REPORT], at App. II (1985), (indicating a high level of enforcement activity under s. 38).

## L. MISLEADING ADVERTISING

The Act makes it an offense<sup>22</sup> for any person, for the purposes of promoting the supply or use of a product or any business interest by any means, to make a representation to the public that is false or misleading in a material respect. It is also an offense to make representations in the nature of a warranty or a guarantee of performance that are not based on an adequate and proper test.<sup>23</sup> Another prohibited aspect of misleading advertising is the making of a materially misleading representation to the public concerning the prices at which a product or like products ordinarily have been sold.<sup>24</sup> The Act contains a specific provision to the effect that the general impression conveyed by a representation, as well as its literal meaning, shall be taken into account in determining whether or not the representation is false or misleading in a material respect.<sup>25</sup>

The fines exigible under these provisions potentially can be very significant. In one case a retailer was convicted and fined \$1 million in regard to a particular promotion.<sup>26</sup>

## III. Constitutional Law Issues

Prior to 1976, when the Act was amended to provide for the recovery of civil damages by private litigants who are able to demonstrate having sustained loss or damage as a consequence of a violation of its criminal prohibitions and to include a variety of civil law-based "reviewable trade practices," Canadian antitrust or competition law had an exclusively criminal law basis. Although there have been several previous attempts by the federal government to create civil jurisdictions in this field, such as the Board of Commerce Act of 1919 and the Dominion Trade and Industry Commission Act in the 1930s, such efforts consistently have been held to be beyond its constitutional authority. As a consequence, the only constitutionally assured basis for such legislation to date (which was confirmed by the Judicial Committee of the Privy Council in *Proprietary Articles Trade Association v. the Attorney-General for Canada*<sup>27</sup>) has been the federal government's authority to make laws in relation to criminal matters. The 1976 amendments clearly are not yet safe from constitutional challenge and it remains to be seen whether or not they will be sustained.

22. Combines Investigation Act, s.36(1)(a).

23. Combines Investigation Act, s.36(1)(b).

24. Combines Investigation Act, s.36(1)(d).

25. Combines Investigation Act, s.36(4).

26. *R. v. Simpsons Sears Limited* (unreported decision of His Honor Judge Ferguson in the County Court Judge's Criminal Court for the Judicial District of York, Province of Ontario, rendered May 13, 1983).

27. [1931] A.C. 310 (Judicial Committee of the Privy Council).

In addition, the Supreme Court of Canada in *Direct Lumber Co. Ltd. v. Western Plywood Company Limited*<sup>28</sup> held that, at least with respect to the price discrimination provisions of the Act, Parliament did not intend to confer private rights of action. The Court therefore denied relief to a plaintiff seeking damages alleged to have been sustained by the discriminatory pricing activities of the defendant. More recently it has been held by the Supreme Court of Canada,<sup>29</sup> that a plaintiff asserting a common law conspiracy claim based on a violation of the Act (of which the defendants had been convicted under sec. 32 of the Act), could not succeed and recover damages for injuries sustained as a result of the conspiracy in circumstances where it could not be shown that it was the intention of the defendants to injure the plaintiff (their intention was found to be to protect their own interests at the expense of the customers of the plaintiff).

Although the emergence of civil jurisdictions and remedies in the competition law field in Canada is, as mentioned, of relatively recent origin, these matters have been a principal focus of the debate which has raged over competition law reform in Canada since the Economic Council of Canada, following its review of inadequacies in the existing law in the late 1960s, first recommended their inclusion in the legislation.

There is little doubt that the development of Canadian competition law generally and the enforcement of the existing laws have been greatly hampered by the lack of a clear authority on the part of the federal government to legislate in this area on other than a criminal law basis and the need, in terms of enforcing the law which we do have, of demonstrating violations of its provisions according to the criminal law standard of proof beyond a reasonable doubt.

The enforcement problem has been particularly obvious in relation to such matters as mergers and monopoly which the Act presently attempts to regulate on a criminal law basis. As evidence of this, the government has yet to be successful in a contested merger prosecution and its record in relation to monopoly offenses is similarly unimpressive.

The extent to which the Canadian law is successful in expanding beyond its historical limitations will be dependent upon the outcome of a number of cases which are now beginning to probe the more constitutionally sensitive provisions of the 1976 amendments. To date the litigation has focused on three principal constitutional issues relating to: the provision for the recovery of civil damages under sec. 31.1 of the Act;<sup>30</sup> the authority of the federal

28. [1962] S.C.R. 646 (Supreme Court of Canada).

29. B.C. Lightweight Aggregate Ltd. v. Canada Cement LaFarge Ltd. (1983) 145 D.L.R. (3d) 385 (Supreme Court of Canada).

30. E.g., the *Rocois* case, *supra* note 5.

Parliament to create the existing civil law jurisdiction over reviewable trade practices<sup>31</sup> (provided in the 1976 amendments); and the authority (also established by the 1976 amendments) of federal officials to institute and conduct prosecutions and proceedings under the Act.<sup>32</sup> Although the Supreme Court of Canada has yet to rule on the first two of these issues, it has recently confirmed, in *Attorney-General Canada v. CN Transportation Limited*,<sup>33</sup> the authority of federal officials to enforce the legislation and it appears that it will not be very long before the other two issues receive consideration by that Court.

In the *CN Transportation* case the Supreme Court upheld the power of the federal Attorney-General to enforce the provisions of the Act, the majority view being based on the federal government's power to legislate in relation to criminal law. Significantly, however, three judges upheld the legislation under the federal government's trade and commerce power. This is clearly an important development for those cases awaiting consideration by the Supreme Court involving provisions of the Act, such as the reviewable trade practices and private damage action provisions, which most probably cannot be characterized as criminal law.

Indeed, the Federal Court of Appeal in *Re Bureau of Broadcast Measurement v. Director of Investigation and Research*,<sup>34</sup> has already gone further in upholding, in a strongly worded judgment, the civil reviewable trade practices jurisdiction (in this case over tied selling) of the RTPC by following the minority view expressed in the *CN Transportation* case and upholding the validity of this legislation under the federal authority to regulate trade and commerce. The court in this case found the section in question to be part of a complex regulatory scheme not aimed at a particular business or industry but at the general regulation of trade and commerce throughout Canada for the benefit of Canadians. The same can probably be said of the other reviewable trade practice authorities exercised by the RTPC.

Section 31.1 of the Act provides for the recovery by a plaintiff of single damages and a full indemnity for costs where the plaintiff is able to demonstrate loss or damage suffered as a result of conduct which would constitute an offense under the Act or a breach of an order of the RTPC or of any court. There is no requirement that the defendant should have been convicted of such an offense under the Act or indeed that any criminal proceedings should have been undertaken with respect thereto.

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31. The most recent case in this area is the decision of the Federal Court of Appeal in the *BBM* case, discussed *infra*.

32. Now decided by the Supreme Court in the *CN Transportation* case, *infra*.

33. [1983] 2 S.C.R. 206 (Supreme Court of Canada).

34. (1984) 9 D.L.R. (4th) 600 (Federal Court of Appeal).

The first case in which the constitutionality of this provision was fully considered arose in *Rocois Construction Inc. v. Quebec Ready Mix Inc. et al.*<sup>35</sup> The trial court ruled that the civil damage action remedy was unconstitutional on the basis that it related to matters of property and civil rights and was not supportable under the trade and commerce or peace, order and good government (POGG) authorities of the federal government or as being properly ancillary to the federal government's powers to legislate in respect of criminal law. However, late in 1985, the Federal Court of Appeal reversed the lower court decision,<sup>36</sup> upholding the constitutional validity of the legislation under the federal government's power to enact legislation in relation to trade and commerce.

A trial court decision in an Ontario case, *Seiko Time Canada Ltd. v. Consumers Distributing Co. Ltd.*,<sup>37</sup> had also concluded that the section was unconstitutional. In that case the plaintiff, suing the defendant principally in a passing-off action, also sought to recover damages under sec. 31.1 on the basis that the defendant had violated the misleading advertising provisions of the Combines Investigation Act. While the plaintiff was successful in its common law passing-off action, the court dismissed the claim under sec. 31.1 on the grounds that the provision was *ultra vires* the Canadian Parliament. (Although the decision was affirmed on appeal by the Ontario Court of Appeal, the Court of Appeal expressly stated that, in upholding the lower court decision, it was not to be considered as having agreed with the trial judge that the private damage action provision was invalid.)

A contrary conclusion was reached in an Alberta case, *Henuset Bros. Ltd. v. Syncrude Canada*.<sup>38</sup> In that case, the plaintiff sought damages alleged to have been suffered by it as a result of the rejection by the defendants of its low bids to carry out certain pipeline construction projects. It was further alleged that the reason for such rejection was that the defendants had conspired to restrain competition unduly in the pipeline construction industry. Counsel for the Crown argued that the legislation could be upheld under the federal government's authority to make laws in respect of trade and commerce, criminal law, and POGG. In the result the trial judge held sec. 31.1 to be constitutionally valid under the trade and commerce authority on the basis that it was part of an overall legislative scheme for the general regulation of trade and commerce throughout Canada. Although it affected property and civil rights in the province to some degree, it was nevertheless within the legislative competence of the federal government.

35. [1980], 1 F.C. 184 (Federal Court).

36. *Rocois v. Quebec Ready Mix*, *supra* note 5.

37. (1980), 50 C.P.R. (2d) 147 (Ontario Supreme Court).

38. (1980), 114 D.L.R. (3d) 300 (Alberta Queen's Bench).

Another recent decision on this point was rendered by the Ontario High Court in *City National Leasing Ltd. v. General Motors of Canada Ltd.*<sup>39</sup> in which it was held that since the civil damage action remedy conferred by sec. 31.1 could not be said to be necessarily incidental to the administrative scheme set up by the Act or truly necessary for the effective exercise of Parliament's criminal law jurisdiction, the provision was *ultra vires* the federal Parliament. However, this decision was recently reversed on appeal by the Ontario Court of Appeal in a judgment released January 24, 1986, which apparently follows the decision of the Federal Court of Appeal in *Rocois Construction*.

Although these two appellate court decisions are the most recent, and highest, authority on the point, it seems quite clear that this particular question will not be resolved finally until it receives the attention of the Supreme Court of Canada.

#### IV. Charter of Rights

There is now, since the passage of the Charter of Rights and Freedoms amendment (the Charter) to the Canadian Constitution<sup>40</sup> in 1982, a further basis for constitutional challenge of the provisions of, and procedures under, the Act. The Charter is effectively an entrenched bill of rights having overriding effect on other legislation.

##### A. SEARCH AND SEIZURE

Charter objections in recent cases are now so frequent it is impractical to attempt to summarize here all the issues which potentially may be raised. However, one illustration of its application in relation to the Act is provided by *Southam Inc. v. Director*.<sup>41</sup> On April 13, 1982, in the course of an inquiry relating to the production, distribution and supply of newspapers in Edmonton, Alberta, the Director authorized several Combines officers to exercise his authority under the Act to enter and examine documents on the business premises of the *Edmonton Journal*. On April 16, 1982, a member of the RTPC issued a certificate under subsec. 10(3) of the Act which authorized the exercise of the authority of the Director. The Combines officers specified in the Director's authorization entered the offices of the *Journal* and commenced searching the premises. Shortly thereafter, Southam sought an order restraining these officers from continuing their search. Southam took the position that the provisions of the Act which conferred expansive powers

39. (1984) 47 O.R. (2d) 663 (Ontario High Court).

40. Charter of Rights, *supra* note 6.

41. (1982), 136 D.L.R. (3d) 133 (Alberta Supreme Court); (1983), 147 D.L.R. (3d) 420 (Alberta Court of Appeal); and [1984] 2 S.C.R. 145 (Supreme Court of Canada).

of search and seizure on the Director offended sec. 8 of the Charter, which provides that "everyone has the right to be secure against unreasonable search and seizure."

The trial judge found that while Southam had raised a serious question under sec. 8 of the Charter, the balance of convenience was against granting injunctive relief pending trial of the matter. However, a unanimous five-judge panel of the Alberta Court of Appeal held the provisions to be inconsistent with sec. 8, with the result that they were of no force and effect.

On appeal to the Supreme Court of Canada, Mr. Justice Dickson (now Chief Justice), who rendered the decision on behalf of the Court, began by observing that Canadian courts will have to interpret the Charter generously, so as to avoid "the austerity of tableted legalism," which he considered to be inappropriate to an analysis of constitutional documents. "The task of expounding a constitution is crucially different from that of construing a statute." Observed Mr. Justice Dickson:

A statute defines present rights and obligations. It is easily enacted and easily repealed. A constitution, by contrast, is drafted with an eye to the future. Its function is to provide a continuing framework for the legitimate exercise of governmental power and, when joined by a *Bill* or a *Charter of Rights*, for the unremitting protection of individual rights and liberties. Once enacted, its provisions cannot easily be repealed or amended. It must, therefore, be capable of growth and development over time to meet the new social, political and historical realities often unimagined by its framers.<sup>42</sup>

Mr. Justice Dickson went on to endorse a broad, purposeful analysis of the Charter, and clearly interpreted the specific provision in issue in these proceedings in light of the Charter's larger objects. He held that the purpose of the Charter is "to guarantee and to protect, within the limits of reason, the enjoyment of the rights and freedoms it enshrines,"<sup>43</sup> and to constrain governmental action which is inconsistent with those rights and freedoms. As a result, in analyzing the intended effect of sec. 8 of the Charter he considered that the courts must focus on the unreasonable impact of a search on the individual involved, and not simply on the rationality of a statute which authorizes a search or seizure in furtherance of some valid government objective.

The issue before the Court revolved around a determination of the meaning of the word "unreasonable." Ultimately Mr. Justice Dickson found that this determination could only be made by balancing the respective rights of the individual to security from unwarranted invasions of privacy against those of the state in advancing its goals of law enforcement. This act of balancing has to occur prior to the execution of any powers of

42. [1984] 2 S.C.R. 145 at 165.

43. *Id.*, at 166.



search and seizure. As a result, a requirement of prior authorization has been a consistent prerequisite to the valid exercise of such powers, both at common law and under most statutes:

Such a requirement puts the onus on the state to demonstrate the superiority of its interest to that of the individual. As such it accords with the apparent intention of the Charter to prefer, where feasible, the right of the individual to be free from state interference to the interests of the state in advancing its purposes through such interference.<sup>44</sup>

Having placed much emphasis on this process of balancing, Mr. Justice Dickson went on to conclude that for an authorization of a search and seizure to be meaningful, it is necessary for the person authorizing the search to be entirely neutral and impartial. He held that while the independent arbiter need not be a judge, he must, at the minimum, be capable of acting judicially. The significant investigatory functions vested in the RTPC under the Act, however, had the effect of "vitiating the ability" of one of its members to act in a judicial capacity when authorizing a search and seizure under subsec. 10(3) of the Act.<sup>45</sup>

Mr. Justice Dickson went on to find that the search and seizure provisions of the Act are also flawed in another material respect. Implicitly accepting the finding of the Alberta Court of Appeal that, absent exceptional circumstances, the provisions of sec. 443 of the Criminal Code constitute the minimal prerequisite for reasonable searches and seizures in connection with the investigation of any criminal offense, Mr. Justice Dickson found that sec. 10 of the Combines Investigation Act was woefully inadequate in failing to set out the criteria which should be considered by an arbiter in deciding whether or not to authorize a particular search and seizure:

Section 10 is terse in the extreme on the subject of criteria for issuing an authorization for entry, search and seizure. Section 10(3) merely states that an RTPC member may grant an authorization *ex parte*. The only explicit criteria for granting such an authorization are those mentioned in s. 10(1), namely: (1) that an inquiry under the Act must be in progress; and (2) that the Director must believe that the premises *may* contain relevant evidence.<sup>46</sup>

The most obvious effect of the Supreme Court of Canada's decision in the *Southam* case has been the removal from the Director of Investigation and Research of his powers of search and seizure under the Act. However, the federal Parliament will almost certainly rectify the problem caused by this decision by amending the search and seizure provisions of the Act to answer the concerns articulated by Mr. Justice Dickson in the course of his decision.

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44. *Id.*, at 160.

45. *Id.*, at 164.

46. *Id.*, at 165.

Bill C-91,<sup>47</sup> which was introduced in December 1985, represents the government's latest effort to amend the Combines Investigation Act. As a consequence of the successful challenge, in *Southam* and other cases, of the investigatory powers under the present Act, the Bill establishes an entirely new framework for the exercise of investigatory powers. Under the Bill, only a judge of a superior or country court or the federal court may issue a search and seizure warrant on the application of the Director. In addition, there will be a requirement that the judge have, prior to the issuance of the warrant, reasonable grounds to believe that certain provisions of the Act have been contravened, that an offense under the Act has been or is about to be committed, or that other grounds for the making of an order by the Competition Tribunal in respect of a restrictive trade practice exists, and that there are reasonable grounds to believe that there is evidence on the premises in question relating to such contravention, offense or other grounds. The Bill also requires that any seized materials be taken before the judge who issued the warrant or another judge of the same court in order that he may determine whether or not the seized materials have been retained by the Director for the purposes of conducting an inquiry or proceedings under the Act.<sup>48</sup>

The provisions of the Bill are not yet law and in the meantime Combines officials have been relying upon the investigatory powers contained in the Criminal Code.<sup>49</sup> Subsec. 27(2) of the federal Interpretation Act<sup>50</sup> provides that all of the provisions of the Criminal Code which relate to indictable offenses apply to all other indictable offenses created by a federal enactment, except to the extent that the enactment otherwise provides. Following the decisions of the Alberta Court of Appeal in *Southam*, and of the Federal Court-Trial Division in *Thomson Newspapers Limited et al. v. Lawson A. W. Hunter et al.*,<sup>51</sup> the Combines investigators began utilizing sec. 443 of the Code to obtain authorizations for searches and seizures in respect of offenses allegedly committed against the Act. The Combines investigators took the position that the search and seizure provisions in the Act were of such questionable constitutional validity that they had no choice but to utilize sec. 443 of the Code in order validly to execute searches and seizures.

Prior to the Supreme Court's decision in *Southam*, at least one lower court

47. *Supra* note 7.

48. For a fuller discussion of the effects of the *Southam* case see: Goldman, *Hunter v. Southam: The Decision and Its Effects*, CAN. COMPET. POL. REC., 1 (Dec. 1984); and Thomson, *Limiting the Search and Seizure Powers of Combines Investigators: The Southam Decision and Its Aftermath*, 1985 CAN. BUS. LAW J. 55.

49. Canadian Criminal Code R.S.C. 1970, c.34, s.443.

50. Interpretation Act (Canada) R.S.C. 1970 c.1-23.

51. (1983), 73 C.P.R. (2d) 67 (Federal Court-Trial Division).

proceeding<sup>52</sup> challenged the propriety of the Combines investigators using the search and seizure provisions of the Code. The applicants claimed that sec. 10 of the Combines Investigation Act constitutes an exhaustive code of procedure governing the execution of searches and seizures of documents on premises in respect of offenses committed against the Act, and is therefore a "provision otherwise" within the meaning of subsec. 27(2) of the Interpretation Act. The court held that the search and seizure provisions of the Act were of no force and effect and that they contravened sec. 8 of the Charter and as a consequence further held that these provisions were not "provisions otherwise," with the result that the Combines investigators could validly make use of sec. 443 of the Code. This decision was subsequently upheld by the Ontario Court of Appeal.

As a consequence, pending the enactment of Bill C-91, all searches and seizures executed by Combines investigators with respect to alleged offenses against the Act are proceeding pursuant to sec. 443 of the Criminal Code. In this regard it should be noted that under sec. 10 of the Act the Director could seek authorization for searches and seizures in connection with any inquiry under the Act. Inquiries under the Act can be commenced both with respect to offenses allegedly committed against the Act, and with respect to the reviewable trade practices set out in Part IV.1 of the Act. Under sec. 443 of the Code, however, the Director is only able to proceed with searches in connection with alleged criminal offenses. The practical effect of *Southam*, then, has been to curtail the powers of search and seizure available to the Director with respect to reviewable trade practices (refusal to deal, exclusive dealing, tied selling, etc.). Also, the evidentiary threshold which must be met in order to obtain a warrant under sec. 443 of the Code is much higher, meaning that fewer warrants will be granted. Any warrants which are granted with respect to Combines offenses will be more vulnerable to attack for failure to comply with the particular requirements under sec. 443.

At present, there is no definitive Canadian judicial determination as to whether sec. 8 of the Charter can be invoked to attack the provisions in the Act which provide for the compulsory production of documents. Subsec. 17(1) of the Act authorizes a member of the RTPC to require any person present in Canada to "make production of books, papers, records or other documents." It is clear that no independent arbiter is required to make a prior assessment of the reasonableness or relevance of the material sought. The member of the Commission who issues the order is authorized, by virtue of subsec. 17(1), to make "such orders as seem to him to be proper"

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52. *Miles Laboratories v. Hunter* (Supreme Court of Ontario, Toronto Motions Court; Mr. Justice Galligan: reasons dated June 1, 1984; appeal dismissed by Ontario Court of Appeal, Oct. 1, 1984).

for securing the production ordered. He is empowered, in so doing, to exercise all of the powers that are exercised by any superior court in Canada for the enforcement of subpoenas, including the power to cite for contempt.

Much of the uncertainty in this area emanates from the difficulty of determining whether compulsory production of documents constitutes a "seizure" within the meaning of sec. 8. In *Re Zeigler and Hunter*,<sup>53</sup> the Federal Court of Appeal clearly adopted the position that sec. 8 of the Charter does not apply to the production of documents. Much of the Court's reasoning was premised on the finding that an order under subsec. 17(1) of the Act does not involve either an uninvited entry or a forcible seizure of documents.

The Alberta Court of Appeal differed from the position adopted by the Federal Court of Appeal in *Zeigler*, in *Re Alberta Human Rights Commission and Alberta Blue Cross Plan*.<sup>54</sup> In that case, the court considered the legitimacy of a request for records belonging to an employer in connection with a preliminary investigation into a sex discrimination complaint. Because the allegations in this case involved only civil sanctions, the court held that the demand for production was reasonable, and therefore valid. Nevertheless, the court clearly indicated that sec. 8 of the Charter could be invoked successfully in an appropriate case to oppose a demand for production of documents.

Thus, no definitive statement can be made as to the state of the law in this area, until the issue is finally decided by the Supreme Court of Canada.

## B. TRIAL BY JURY

It has been held, in *PPG Industries Canada Ltd. and A-G Canada*,<sup>55</sup> that the right to trial by jury conferred by subsec. 11(f) of the Charter<sup>56</sup> is unavailable to a corporate accused in a prosecution under the Act because a corporation is not liable to imprisonment, although an individual accused who committed such an offense would be.

## C. PRESUMPTION OF INNOCENCE

Subsec. 11(d) of the Charter enshrines the "golden rule" cited by the House of Lords in the *Woolmington* case,<sup>57</sup> that a person charged with an

53. (1983), 8 D.L.R. (4th) 648 (Fed. C.A.) (leave to appeal to Supreme Court of Canada refused).

54. (1983), 1 D.L.R. (4th) 301.

55. (1983) 3 C.C.C. (3d) 97 (B.C. Supreme Court).

56. This subsec. applies where the maximum punishment is imprisonment for five years or more.

57. *Woolmington v. D.P.P.* [1935] A.C. 462, 481 (House of Lords).

offense has the right to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal.

Clause 45(2)(c)(ii) of the Combines Investigation Act stipulates that, in any prosecution or proceeding before a court or under the Act, a document proved to be in the possession of a "participant" to the proceedings, or on premises used or occupied by a participant or his agent, is *prima facie* proof that anything recorded in or by the document as having been done, said or agreed upon by the participant, was done, said or agreed upon "as recorded." The accused in *R. v. Metropolitan Toronto Pharmacists Association (No. 1)*<sup>58</sup> unsuccessfully argued that this provision violated the aforementioned presumption of innocence guaranteed by subsec. 11(d) of the Charter.

## V. Competition Law Reform

On December 17, 1985, the Minister of Consumer and Corporate Affairs introduced Bill C-91<sup>59</sup> into the Canadian House of Commons for first reading. In many ways it is very similar in content to its immediate predecessor (Bill C-29)<sup>60</sup> which was introduced in April 1984, but not proceeded with. Like its predecessors, Bill C-91 proposes major reforms in competition legislation.

The introduction of Bill C-91 follows an extensive period of consultation with a number of influential Canadian business organizations. As a consequence it is expected that the legislation will, in due course, secure approval in that its main content is generally regarded as being satisfactory and unlikely to provoke significant opposition. That is not to say that the business community is in agreement with all aspects of the Bill, but it is recognized as being a reasonable compromise document and deserving of support on that basis, particularly after so much time has elapsed since the initial efforts to initiate these reforms began. The business community has expressed particular objections to certain aspects of the merger and monopoly provisions as well as to the decision to transfer the civil jurisdictions to a specialized economic tribunal. Nevertheless, the government, having heard these objections, is determined to proceed on the basis set forth in the Bill and commands a very substantial majority in Parliament.

Space does not permit a very extended description of the provisions of the Bill but some brief mention of the more important provisions may be useful. In addition, it may be helpful to point out certain differences in the present Bill from its predecessor. In this latter regard, mention should be made of

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58. (1984) 3 C.P.R. (3d) 233 (Ontario High Court).

59. See *supra* note 7.

60. See *supra* note 8.

the fact that in yet another reversal of position on this issue, the government has decided in favor of proceeding with a specialized tribunal, rather than the courts, for the exercise of all of the civil jurisdictions provided under the Act. The present Bill also contains extensive provisions establishing a new code of investigative procedures to replace sec. 10 of the Act which was impugned in the *Southam* case.

An important new theme which runs throughout the Bill is the recognition of the overall importance of international trade and competition to the Canadian economy. Under the Bill the export exemption to the conspiracy offense is broadened to enable Canadian firms to compete more effectively in the international marketplace and a new exemption is created to facilitate the formation of specialized agreements enabling Canadian firms to rationalize production in response to foreign competition. Also the new merger test proposed in the Bill takes specific account of the existence of, or potential for, competition from foreign imports in assessing the effect of a proposed merger on competition in Canada.

#### A. CRIMINAL PROVISIONS

Bill C-91 retains the distinction between criminal offenses and competition matters to be reviewed according to a civil standard. While the Bill proposes that the current criminal provisions relating to mergers and monopolies be repealed and replaced with entirely new civil law provisions dealing with mergers and abuse of dominant position, it also provides that agreements in restraint of trade are to continue to be decided according to a criminal law standard.

#### B. CONSPIRACY

The Bill attempts to legislate away certain uncertainties thought to have been created in several recent decisions of the Supreme Court of Canada. In one such instance, in the *Atlantic Sugar*<sup>61</sup> case, the Supreme Court of Canada held that consciously parallel conduct by certain sugar producers which diminished competition was beyond the purview of the conspiracy provisions of the current Act, because this conduct lacked the necessary element of overt communication. To remedy this, the proposed clarifying amendment provides that an agreement or conspiracy may be proved by circumstantial evidence, with or without evidence of communication.

The majority decisions of the Supreme Court of Canada in both the

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61. *Atlantic Sugar Refineries Co. Ltd. v. A-G Can.*, [1980] 2 S.C.R. 644 (Supreme Court of Canada).

*Atlantic Sugar* and *Aetna Insurance*<sup>62</sup> cases are thought by some to suggest that there may be an obligation on the Crown in a conspiracy case to prove that the accused had both the intent to enter into an agreement which has an undue effect on competition, and also the intent that the agreement should have this effect. A further amending provision in the Bill establishes that there is no need to prove the latter intent.

In addition the Bill proposes increasing the limit on fines for violations of sec. 32 from the current maximum of \$1 million to \$5 million.

### C. EXPORT AGREEMENTS

Subsec. 32(4) of the Act provides for an exemption, in certain limited circumstances, from the conspiracy provisions, where the "conspiracy, combination, agreement or arrangement relates only to the export of products from Canada." Many Canadian firms and trade associations have been concerned about relying on this provision since the exemption appears to be conditioned on, among other things, the agreement not having lessened competition unduly in the domestic market. In response to complaints that the exemption is for such reason of limited practical utility, the Bill, by proposing certain amendments, attempts to make the export exemption more useful to Canadian firms which combine efforts in an attempt to expand into foreign markets. Accordingly, the present limitation is to be replaced by a less stringent requirement that the agreement must not have lessened competition unduly in the supply of services facilitating the export of products from Canada. The Bill would also permit parties to an export agreement to reduce the volume of exports of certain products if there is no reduction in the real value of these products, suggesting that product quality may be upgraded as a trade-off for a reduction in unit export sales.

### D. CIVIL PROVISIONS—REVIEWABLE BY TRIBUNAL

Under the Bill, civil adjudication of the majority of significant competition policy issues, such as mergers, abuse of dominant market position, delivered pricing and the present reviewable trade practices, would be governed by the proposed Competition Tribunal (the Tribunal). Following the consultative process described above, the Government decided that a hybrid tribunal composed of both judges and expert laypersons would be the most appropriate adjudicative forum to review competition matters. To this end the Bill provides for the creation of the Tribunal comprised of up to four judicial and up to eight laymembers. The judicial members, to be appointed from among the judges of the Federal Court-Trial Division, will have sole

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62. *Aetna Insurance Co. and 72 Other Companies v. The Queen* [1978] 1 S.C.R. 731 (Supreme Court of Canada).

responsibility with respect to determining questions of law arising before the Tribunal. Laymembers of the panel will be restricted to considering questions of fact or mixed law and fact. With limited exceptions, all applications to the Tribunal are to be heard by a panel of at least three and not more than five persons, including both judicial and laymembers. The Bill provides that appeals from decisions of the Tribunal are to be heard by the Federal Court of Appeal.

#### E. MERGERS

The existing merger provisions of the Act have been widely criticized as being ineffective. It is also argued that by providing for criminal sanctions, these provisions cast an inappropriate stigma on business transactions. Many are of the view that the existing merger provisions are inappropriate in circumstances where courts must often analyze complex economic issues in order to determine the legality of a merger. Furthermore the judiciary, by failing to consider larger issues of public policy, has concentrated on relatively narrow criteria, such as profits and prices, in determining the legality of mergers.

Bill C-91 incorporates an entirely new set of provisions, making mergers a civil matter reviewable by the Tribunal on application by the Director. While at the present time a merger only offends the Act when, as a result of the merger, competition is or is likely to be lessened to the detriment or against the interests of the public, the Bill provides that the courts may review a merger when it prevents or lessens, or is likely to prevent or lessen, competition substantially.

In administering the new statutory test, the Tribunal will not be permitted to find that a merger substantially lessens competition solely on the basis of evidence of market share or concentration levels. This is designed to ensure that the Tribunal's consideration is more than a merely mechanistic process and that it focuses on both the quantitative and qualitative effects of the merger on competition. Factors set forth in the Bill which the Tribunal is directed to consider include: the extent to which foreign products provide competition to the businesses of the parties to the merger; whether the business (in whole or in part) of one of the parties to the merger has failed or is likely to fail; the extent to which acceptable substitutes are likely to be available; the barriers to entry in the relevant market and the impact of the merger on such barriers; the extent to which effective competition will remain in the market; and any other factor thought to be relevant to competition in the market affected by the proposed merger.

The Bill incorporates an "efficiency gains exception," whereby the Tribunal may exempt a merger if a finding is made that the merger or proposed merger has brought about or is likely to bring about gains in efficiency that



will result in a substantial real net saving of resources for the Canadian economy and that such gains could not reasonably be expected to be attained if the exemption order were not made.

The current merger laws have been subject to the criticism that, in the case of extremely large mergers, very little can be done to dissolve such mergers after they have been completed. The Bill responds to this criticism by stipulating that parties to a merger which exceeds certain relatively high thresholds must notify the Director before the merger is completed and must file certain prescribed information with respect to the transaction in question.

#### F. ABUSE OF DOMINANT POSITION

The Bill proposes replacing the criminal provisions of the Act relating to monopolies with provisions which make an "abuse of dominant position" a civil matter reviewable by the Tribunal. Under the Bill, before a court can issue an order prohibiting an abuse of dominant position, it must find that the person or persons against whom the order is sought substantially or completely control, throughout Canada or any area thereof, a class or species of business. The Tribunal must also find that such persons have engaged in or are engaging in a practice of "anti-competitive acts" that has had or is likely to have the effect of preventing or lessening competition substantially in a market. Where the Tribunal finds that there is an abuse of dominant position, it may prohibit all or any of the persons involved from engaging in the practice. Where such an order of prohibition would not restore competition, the Tribunal may, in addition to or in lieu of making a prohibition order, require the taking of such actions, including the divestiture of assets or shares, as it considers reasonable and necessary to overcome the effects of the practice in the market.

Two important exceptions are provided for in the Bill. Where the person against whom the order is sought has achieved its dominant position by virtue of superior economic efficiency, no order may be made. Furthermore, where an act is engaged in pursuant only to the exercise of any right or enjoyment of any interest derived under the Copyright Act, Industrial Design Act, Patent Act, Trade Marks Act, or any other Act of the Parliament of Canada, no order may be made.

#### G. DELIVERED PRICING

The Bill provides for orders of prohibition to be issued in regard to the practice of "delivered pricing." That term is defined as the practice of refusing to deliver to a customer, or a prospective customer, an article at any locality on the same terms and conditions as are made available to other customers of the supplier. Where the practice is engaged in by a major

supplier or where the practice is widespread in a market with the result that a customer is denied an advantage which would otherwise be available to him, the Bill provides that an order of prohibition may be issued.

#### H. SPECIALIZATION AGREEMENTS

Another new function that, under the Bill, would be given over to the Tribunal is that of exempting certain specialization agreements from the purview of the conspiracy and exclusive dealing provisions of the Act.

A "specialization agreement" is defined in the Bill as a mutually reciprocal arrangement among the parties to the agreement whereby each agrees to discontinue the production of one or more articles then being produced by that party. The Bill provides for the Tribunal to order the registration of specialization agreements in appropriate cases. Where it so orders, the Bill provides for the exemption of the agreement from the conspiracy and exclusive dealing provisions of the Act. The Tribunal is to make such an order where, in its view, implementation of the agreement would result in substantial real net savings for the Canadian economy not otherwise available, and where there has been no attempt to coerce participation in the agreement. Where, as a consequence of granting such an exemption, there would not be any substantial remaining competition in the relevant market, the Tribunal would be authorized to make its order conditional upon divestiture of assets, tariff reductions, duty remission orders, wider patent licensing or removal of import quotas or licensing requirements.

#### I. EXTENDED APPLICATION OF THE ACT

The Bill extends the application of the Act by expanding its effect to banks, and by making certain Crown corporations subject to its purview.

##### 1. *Banks*

The Bill proposes the incorporation into the Act of the corresponding horizontal agreement provisions presently found in the Bank Act.<sup>63</sup> This amendment would necessarily involve the transfer of responsibility for the enforcement of such provisions to the Director from the Inspector General of Banks. Many of the provisions, which relate to such matters as agreements among banks with respect to interest rates, service charges and the types of loans or services to be provided to customers, create *per se* offenses. Part of the rationale for this transfer of jurisdiction over the competitive activities of banks is undoubtedly the fact that banks compete with other financial institutions which are already governed by the Act.

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63. S.C. c.40.

## 2. *Crown Corporations*

The Supreme Court of Canada, in *Regina v. Eldorado Nuclear Ltd.*,<sup>64</sup> held that two federal Crown corporations, which were among those charged in 1981 under sec. 32 of the Act in connection with an alleged uranium cartel, were immune from prosecution under the Act because the acts in question were committed by them as Crown agents and were designed to effect Crown purposes.

To redress this situation the Bill imposes limits on the special privilege of Crown immunity accorded to federal or provincial Crown corporations which are also engaged in commercial activities in direct competition with privately owned enterprises.

## VI. Recent Cases

### A. CONSPIRACY

The conspiracy provisions of the Act have traditionally been the most effective enforcement remedy in the legislation. Accordingly, it is somewhat paradoxical that, as a result of a number of recent cases, this law is now claimed to be seriously defective from an enforcement point of view.

Two fairly recent and frequently cited decisions of the Supreme Court of Canada in support of this view are the *Aetna Insurance* and *Atlantic Sugar* cases cited above. In *Aetna*, an association of insurance companies in Nova Scotia established a common price or rate structure for fire insurance premiums in the province during a ten year period, between 1960 and 1970. During that period, the total share of fire insurance policies in Nova Scotia written by members of the association ranged from 63 percent to 81.5 percent. The various defendants admitted the existence of an agreement which restricted competition. As a result, the sole issue to be determined by the Supreme Court of Canada in this case related to the meaning of the word "undue" in para. 32(1)(c) of the Act.

Mr. Justice Ritchie, speaking for the majority, held that the mere intention between the parties to the agreement to eliminate all competition as between themselves, could not be considered a contravention of the Act. He then quoted with approval the statement of Mr. Justice Cartwright in *Howard Smith Paper Mills Ltd. v. The Queen*,<sup>65</sup> to the effect that an agreement to prevent or lessen competition in commercial activities becomes criminal when the prevention or lessening agreed upon reaches the point at which the participants in the agreement become free to carry on those activities virtually unaffected by the influence of competition.

In the *Atlantic Sugar* case, the Supreme Court of Canada considered

64. [1983] 2 S.C.R. 551 (Supreme Court of Canada).

65. [1957] S.C.R. 403, 426 (Supreme Court of Canada).

whether a "tacit agreement" between the three principal refiners of sugar in eastern Canada not to compete beyond the maintenance of historical market shares constituted a violation of sec. 32 of the Act. In 1960, one of these refiners, Redpath, having been severely hurt by a price war which it initiated in 1958, adopted a long-term marketing strategy under which it concentrated on maintaining its historical market share. While Redpath would engage in selective discounting, particularly with respect to its largest customers, it would only attempt to maintain its share of the market in accordance with historical norms. In so doing, Redpath recognized that over the course of time both of its major competitors would appreciate that this was the course of action which Redpath was consciously following. Furthermore Redpath realized that its competitors would probably adopt similar courses of action.

Speaking for the majority, Mr. Justice Pigeon decided that the intention of Redpath to maintain its historical market share and not to compete beyond that level, and the eventual acceptance of this approach by the other two refiners as an overall principle of operating conduct (which he described as a "tacit agreement"), did not constitute a conspiracy or agreement for the purposes of sec. 32 because it lacked the necessary element of overt communication to the other parties. The mere fact that Redpath's policy became known to the others over time was insufficient to constitute an agreement or arrangement even if, as expected, the competitors adopted a similar approach when they became aware of it. Mr. Justice Pigeon concluded by observing that none of the competitors was obliged to compete more strongly than it considered desirable in its own interest provided that this was not accomplished by collusion.

In both the *Aetna Insurance* and *Atlantic Sugar* cases there were statements which may be interpreted as requiring findings of fact not only that the accused intended to do the acts which are forbidden by the statute because of their undue effect on competition, but also that they intended that their acts should have such effect. It should be noted that in the later *Thomson Newspapers* case,<sup>66</sup> the suggestion that either of the *Aetna* or *Atlantic Sugar* cases established a requirement for proving "double intent" (i.e., to commit the act with the intended anti-competitive consequences) was expressly denied by Mr. Justice Anderson.

Two other recent cases of interest relating to sec. 32 may be mentioned. In *Albany Felt Co. of Canada Ltd. v. The Queen*<sup>67</sup> the Quebec appellate court upheld the conviction of accused corporations, all of whom were members of a trade association which supplied in excess of 90 percent of all papermakers wet felts sold in Canada during the indictment period, who conspired to

66. Ontario High Court Dec. 1983 (unreported).

67. (1983), 70 C.P.R. (2d) 36 (Quebec Court of Appeal).

limit competition in their business. The conviction was essentially the result of circumstantial evidence. During the twenty-two year period covered by the charges (1952–1974), all the price lists of all the competitors in this industry were identical or substantially identical. The trial judge clearly considered that the identity of pricing must have come about as a consequence of agreement achieved through the representatives of the accused while attending meetings of the Canadian Felt Association, although there does not appear to have been any direct evidence of this:

The foregoing does not of itself establish beyond a reasonable doubt that collusion among the accused occurred in setting the prices concerned. Mere followership is not an offence. However, in nearly every instance such identity of price structure coupled with the fact that the representatives of the accused were meeting on a regular basis, that in most but not all, of the issuances of new lists they were proclaimed within a short period of time, may not help but raise serious questions in the minds of the Court.<sup>68</sup>

It appears the Judge was influenced by the fact that the customers of the accused corporations had made concerted efforts to procure quantity discounts and to break up lock-step price increases but had met, as he put it, “a solid wall of stone.”<sup>69</sup>

In the second recent case, *Attorney General of Canada v. the Law Society of British Columbia et al.*,<sup>70</sup> a preliminary question arose as to whether the Act applied to the Law Society of British Columbia. The case involved a ruling by the Benchers of the Law Society prohibiting a Vancouver lawyer from informing the public regarding the type and costs of legal services which he provided. In one of the ensuing proceedings the question arose as to whether in so doing the Benchers may have violated sec. 32 of the Act. The Supreme Court concluded that the Law Society was exempt from the application of this section. Under its governing legislation the Benchers of the Law Society were directed to “govern and administer the affairs of the Society . . . (and to take) such action . . . as they may consider necessary for the promotion, protection, interest or welfare of the Society.”<sup>71</sup> The legislation also empowered the Benchers to make such rules concerning the maintenance of the Society standards for the protection and well-being of those engaged in the practice of law in the province. The Court considered the actions of the Benchers to have been within the authority of the enabling legislation and that in the circumstances self-regulation to have been most appropriate.

In a very recent decision, in *R. v. Mediacom Industries Inc.*,<sup>72</sup> the accused

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68. (1981) 52 C.P.R. (2d) 190 (Quebec Superior Court, Trial Division) per Mr. Justice Phelan, at 194.

69. *Id.*, at 198.

70. (1982), 66 C.P.R. (2d) 1 (Supreme Court of Canada).

71. *Id.*, at 6.

72. (1985) 3 C.P.R. (3d) 47 (Ontario High Court).

(who pleaded guilty to an unlawful conspiracy charge under sec. 32) received the highest fines ever upheld in a horizontal agreement case, the largest individual fine imposed being \$400 thousand.

## B. MONOPOLY

There have been only two reported decisions since 1980 under the monopoly provisions contained in sec. 33 of the Act and only one of these dealt with substantive issues. The monopoly provisions are infrequently invoked because of the inherent difficulties which have been encountered in establishing, beyond a reasonable doubt, not only that the accused substantially or completely controls throughout an area of Canada the class of business in which it is engaged, but also that such business has been, or is likely to be, operated to the detriment of the public.

In *R. v. Thomson Newspapers*,<sup>73</sup> Mr. Justice Anderson of the Ontario Supreme Court acquitted the Thomson and Southam newspaper chains on a series of charges under the Act. The principal events which precipitated the prosecution began with the closure of the *Montreal Star* by F. P. Publications Ltd. in September 1979. Subsequently, Southam's *Montreal Gazette* acquired and then exercised an option to purchase the printing presses owned by the *Star*. In return, F. P. Publications Ltd. obtained an option to acquire one-third of the shares of the *Gazette*. In January of 1980, Thomson acquired F. P. Publications Ltd. and subsequently exercised the aforementioned option to purchase a one-third interest in the *Gazette*. On August 26, 1980, Thomson closed the *Ottawa Journal*, with the result that the only remaining newspaper in the city of Ottawa was Southam's *Citizen*. The following day, Southam closed the *Winnipeg Tribune*, and sold its physical assets and name to Thomson. The only remaining newspaper in Winnipeg was Thomson's *Free Press*. Thomson also sold its fifty percent interest in Pacific Press Ltd. to Southam, with the result that Southam acquired full ownership of the *Vancouver Sun* and *Province* newspapers. Thomson also sold back F. P. Publications Ltd.'s one-third interest in the *Montreal Gazette* to Southam.

Two of the charges related specifically to the formation of a monopoly in Montreal and Winnipeg. Both of these charges were dismissed. Mr. Justice Anderson rejected the contention of the Crown that the Court should consider the situation which prevailed in the newspaper markets in Montreal and Winnipeg before the formation of the monopolies, in determining whether the monopolists had operated their businesses to the detriment or against the interests of the public. He next proceeded to consider the criteria which must be dealt with in determining whether sufficient "public detri-

73. Ontario High Court, Dec. 1983 (unreported).

ment" exists to merit conviction under the Act:

The framing of the offence of monopoly in the Act tacitly acknowledges that there may be monopoly without detriment. Proof of detriment must therefore, go beyond the consequences which flow purely and simply from the fact of monopoly, to some abuse in its operation. The Crown did not submit that Southam had abused or was abusing the monopoly; in other words, there was no evidence of present detriment . . . It was suggested that there was a likelihood, once this case was over, and its repercussions had, to some extent died away, that that situation might change, was likely to change, and that abuse of monopoly would result. Having regard for the definition of 'likely' which is used in the Act, and an alternative being 'probable,' I am not prepared to accept that submission. I think it equally likely that having gone this way once, Southam may very well be persuaded that it does not wish to come this way a second time. So that there is, at best, a balancing of possibilities and, in my view, no likelihood or probability at all.<sup>74</sup>

### C. PRICE DISCRIMINATION

One anomaly in regard to the Act is the complete absence of jurisprudence on the subject of price discrimination. Although this continues to be the case, the recent conviction of a bedroom furniture manufacturer under para. 34(1)(a) on a plea of guilty is to some degree instructive of the government's enforcement attitude in regard to incentive discounts and volume rebates.<sup>75</sup> These counts of the charge are effectively described in the Agreed Statement of Facts which was filed in the case. Simmons was fined \$15 thousand per count on two counts of price discrimination.

Count 1 related to conditional incentive rebates. It would appear that the Simmons program was a classic example of the sort of incentive discount plan which has generally been regarded as offensive to para. 34(1)(a). In this regard it is to be noted that in the Agreed Statement of Facts it is stated:

This conditional incentive rebate plan resulted in price discrimination because the discounts granted were not directly related to the quantity purchased by a dealer but rather to the increase in purchases during the year as compared to purchases made during the previous year.<sup>76</sup>

The second price discrimination count related to Simmons' volume rebate program which is also described in the Agreed Statement:

The structure of the plan led to multiple instances of discriminatory rebates being granted by Simmons. The structural features of the plan which contributed to discrimination are:

- (a) the initial starting volume brackets varied widely between competitors;
- (b) the range of the volume brackets was inconsistent between competing dealers

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<sup>74</sup>. *Id.*

<sup>75</sup>. *R. v. Simmons Limited* (Provincial Court [Criminal Division] Judicial District of Peel) Agreed Statement of Facts (unreported). The text of the order in this case appears at *ANNUAL REPORT*, *supra* note 21, at 139-141.

<sup>76</sup>. *Id.*

such that the incremental purchases required to reach a higher rebate bracket varied between dealers;

- (c) for other than the first rebate level, a different percentage rebate was applicable to each of the separate categories of Bedding, Upholstered Goods and Case Goods; and
- (d) although generally consistent between competing dealers, the percentage applicable to a category at any given rebate level occasionally varied between competitors.<sup>77</sup>

This case is not really a legal authority since it resulted from a plea of guilty entered on behalf of the accused. However, it would seem to be an indication of the enforcement attitude of the Bureau of Competition Policy in regard to such practices.

#### D. PREDATORY PRICING

Para. 34(1)(c) of the Act prohibits persons engaged in a business from "engaging 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 such effect." In *Regina v. Hoffmann-LaRoche Ltd.*<sup>78</sup> the charges arose out of the policy of the accused in selling its "Librium" and "Valium" products to hospitals in Canada. During the late 1960s, a change in the law respecting the compulsory licensing of drug products opened the way for a potentially significant competitor, Horner, to market a generically equivalent product. The accused's response was to initiate a program of distributing "free goods" to hospitals and government agencies. Hoffmann-LaRoche ultimately offered, over a one year period, to provide to the hospitals all their requirements for Valium free of charge. This action was effective in preventing the competitor from making any significant inroads on sales to hospitals.

The accused contended that it had not violated the Act because it had not made any "sales" of its products to the hospitals. An alternative argument was that even if these products could be said to have been sold at zero price, in the circumstances it was not unreasonable to sell at below cost if such sales gave rise to other economic benefits (such as promoting the prescription of these drugs by doctors on the basis of their acceptance by the hospitals).

The Court had no difficulty in characterizing the free goods distribution as an integral part of Hoffmann-LaRoche's sales policy. The distribution of Valium to hospitals was intended to have the long-term effect of generating future sales after the elimination of a competitor. It was motivated exclusively by the objective of maximizing long-term profits, and "thus there was a selling going on at a zero price." It had been contended that the actions of the accused constituted simply a competitive response. However, the one

77. *Id.*

78. (1982), 125 D.L.R. (3d) 607 (Ontario Court of Appeal).



year giveaway of Valium was not regarded as simply a matter of competitive response or defense of the accused's market share. The accused might have been justified in counter attacking to meet, and perhaps even better, Horner's prices, but to reduce its prices to zero was overdoing it. In the result, Hoffmann-LaRoche was convicted and the conviction was upheld on appeal.

In another case, *R. v. Consumers Glass Co. Ltd.*,<sup>79</sup> Consumers Glass and one of its subsidiaries, Portion Packaging Ltd., were charged with respect to the sales policy of the subsidiary relating to plastic container lids. During the preindictment period, Portion Packaging had been the sole supplier of plastic lids to the Canadian market. Even at that time it had excess capacity. Then some former employees left to form a competitive firm, Amhil. Both Portion and Amhil had virtually identical production machinery, both had the necessary capacity to supply the entire requirements of the Canadian market, and both used virtually identical manufacturing methods. Amhil entered the market offering prices 2 percent to 3 percent below Portion's. Portion responded with a 16 percent discount which was met by Amhil. This brought Portion's selling price well below its total cost of manufacturing.

Ultimately, Portion was forced out of the market in 1979. Ironically, Portion was subsequently charged under para. 34(1)(c) of the Act. It was alleged that the decision to lower the prices to a figure below the Company's production cost was made for the purpose and with the intent of forcing its competitor out of the market.

Mr. Justice O'Leary of the Ontario Supreme Court held that there was no evidence that in pricing its products, the accused was not simply minimizing its losses by maximizing its throughput. The Court accepted the contention of the accused's expert witnesses to the effect that, so long as products are sold at or above their average variable cost, it could not be said that the motive of the accused was necessarily predatory, even though the accused could probably be taken to have recognized that ultimately this could lead to the elimination of its competitor. Mr. Justice O'Leary observed that since both companies maintained plant capacity sufficient to supply the requirements of the entire Canadian market, it was inevitable that one of them would have to drop out if either of them were to make a profit in the business.

#### E. ADVERTISING ALLOWANCES

Although sec. 35 of the Act, dealing with advertising or promotional allowances, has been on the statute books for many years and is difficult to comply with, it has not been extensively enforced and until the recent case of

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79. (1981), 57 C.P.R. (2d) 1 (Ontario High Court).

*Regina v. Koss Ltd.* (Provincial Court, British Columbia)<sup>80</sup> there had never been a conviction under this section in a contested case. Under this section, generally speaking, an advertising allowance is required to be offered by a supplier on proportionate terms to all competing purchasers from that supplier if such benefits are to be conferred upon any of its customers. In this case the accused was convicted of violating the section in connection with the selective application of its cooperative advertising program to particular purchasers when that program was not available to its other competing customers. The violation of the statute appears to have been particularly blatant in that while the evidence showed that the cooperative advertising program had been extended to large stores such as Eaton's, Simpsons and Woodwards, the accused had written to various other smaller retail vendors of its products denying that it had a cooperative advertising program.

#### F. PRICE MAINTENANCE

Amendments made to the price maintenance provisions contained in sec. 38 of the Act in 1976 have clearly facilitated the obtaining of convictions under the revised section. However, an important limitation on the scope of sec. 38 was established in *R. v. Philips Electronics Ltd.*<sup>81</sup> In that case Philips published an advertisement in Ottawa and Toronto newspapers listing the stores where, and the prices at which, Philips television converters could be purchased. On these facts, the accused was charged with two counts of attempting to influence upward the selling price of the converters, contrary to para. 38(1)(a) of the Act. It was argued that these advertisements contravened the Act since subsec. 38(4) deems the publication of a purchase price to be an attempt to influence upward the selling price of any person into whose hands the product comes for resale unless the advertisement makes it clear that the product may be sold at a lower price (which was not done in this case). It was held by the Ontario Court of Appeal (which holding was subsequently upheld on appeal to the Supreme Court of Canada) that, in order to convict under this section, it is required to prove not only such an attempt but also that the attempt was accompanied by an agreement, threat, promise or other like means. Of this there was no evidence, beyond the publication by the accused of the advertisements showing the prices. The Court rejected the contention of the Crown that this publication constituted "like means," since it was in no way similar to an agreement, threat or promise. Essentially the court pointed out that the particular section had been defectively drafted and went on to observe that it was not open to the courts, by resorting to the remedial intent provisions of

80. (1982), 65 C.P.R. (2d) 95 (Provincial Court, British Columbia).

81. (1981), 30 O.R. (2d) 129 (Ont. C.A.); (1981) 126 D.L.R. (3d) 767 (Supreme Court of Canada).

the Interpretation Act to provide a substitute for the clear meaning of the provision as set forth in the enactment itself.

In *Regina v. Cluett Peabody Canada Inc.*<sup>82</sup> the accused was convicted of two charges, one of attempting, by agreement, threat, promise or other like means, to influence upwards or discourage the reduction of resale prices and the other related to a refusal to supply products to a would-be retailer of those products, because of its low pricing policy. In regard to the first-mentioned offense there was evidence that the accused had obtained the agreement of a retailer, who was engaged in newspaper advertising featuring the accused's products at special sale prices, not to identify the manufacturer of such sale-price product. This the Court held to constitute a discouragement of price reductions in the market area in question. In regard to the refusal to supply charge, the Court obtained a rather unusual insight into the accused's possible motivation in refusing to open up the would-be account, in that a telephone message from the local sales representative was produced in evidence indicating that the sales representative was seeking some reason he could give to the would-be account for refusing to supply it, other than the fact that the account was a known discounter.

There are now two instances in which subsec. 38(6) has been applied to convict persons who induced suppliers not to supply a product to a third person because of that third person's low pricing policy. Ultimately, this may be an important development in the enforcement of the price maintenance laws since it is frequently the case that price maintenance practiced by a supplier is customer-induced.

In *Regina v. S. & E. Furnishings Limited*<sup>83</sup> the accused pleaded guilty to an offense under subsec. 38(6) of the Act which provides that it is an offense for any person by threat, promise or any like means to attempt to induce a supplier, as a condition of that person's doing business with the supplier, to refuse to supply a product to a particular person because of the low pricing policy of that person.

In *Regina v. Cody Food Equipment Ltd.*<sup>84</sup> the accused, a restaurant equipment dealer-installer, was convicted and fined \$9 thousand for threatening a supplier of refrigeration equipment with the discontinuance of their business relationship if the supplier sold a refrigerator to a competitor of the accused who was bidding on the same contract, but at a lower price. The supplier in fact did not supply the unit to the competitor and the accused's bid was successful.

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82. (1982), 64 C.P.R. (2d) (Ontario Supreme Court); (1983) 71 C.P.R. (2d) 208 (Ontario Court of Appeal).

83. (July 8, 1982), Ontario Provincial Court, Sudbury, Ontario (unreported), as discussed in CAN. COMPET. POL. REC., 3-4 (Dec. 1982).

84. (1984), Ontario Provincial Court (unreported), as discussed in CAN. COMPET. POL. REC., 21 (Sept. 1983).

In another case of interest, *Regina v. Schelew*,<sup>85</sup> the accused was charged with an offense of attempting to influence upward the price at which members of a landlords association supplied rental accommodations. The accused held a meeting of members of the association at which less than 20 percent of the membership attended. The membership did not constitute all the landlords in the relevant market area. The meeting voted to recommend an increase in rents for the following year in a specified amount. A letter to this effect was written to the members of the association. The New Brunswick Court of Queen's Bench (affirmed on appeal by the New Brunswick Court of Appeal) held that such action did not violate the section in that it must be shown that the accused possessed some means or power of achieving the desired result. In this case the accused had no such power. Indeed, in the Court of Appeal decision it was doubted whether sec. 38 could ever be applied effectively in a horizontal situation.

## G. REVIEWABLE TRADE PRACTICES

Currently, the RTPC has civil jurisdictions over exclusive dealing, tied selling, market restriction, refusal to deal, consignment selling, foreign judgments, foreign laws and directives and refusals to supply by a foreign supplier. There have been two principal contested cases decided under these provisions, the first one dealing with an alleged exclusive dealing situation, in which the application for relief was denied, and the second, which was a tied selling case, where a prohibition order was issued. There has also been one consent order in a refusal to deal case.

### 1. *Exclusive Dealing*

In *Director of Investigation and Research v. Bombardier Ltd.*<sup>86</sup> an order was sought from the RTPC to restrain Bombardier, a snowmobile manufacturer, from continuing to engage in the practice of exclusive dealing and to require it to resupply those dealers whose franchises it had cancelled as a consequence of the dealer's nonobservance of the exclusive dealing requirement in Bombardier's dealer franchise agreement. Under the relevant provision the RTPC is authorized to make an order requiring the discontinuance of the practice of exclusive dealing in a case where it finds that the practice, because it is engaged in by a major supplier of a product in a market or is widespread in a market, is likely to impede the entry of a firm into or its expansion in a market with the result that competition is or is likely to be lessened substantially.

85. (1982), 63 C.P.R. (2d) 140 (New Brunswick Court of Queen's Bench); (1984) 78 C.P.R. (2d) 102 (New Brunswick Court of Appeal).

86. (1981) 57 C.P.R. 216 (RTPC).

In this case, there was no question that these were exclusive dealerships and that Bombardier had enforced the exclusive dealing clause in the dealer agreements. In addition the Commission found it to be a "major supplier" with approximately 60 percent of all sales by manufacturers in Quebec and the Maritimes and 40 percent in Ontario. However, it was not satisfied that there was evidence of any substantial lessening of competition.

## 2. *Tied Selling*

The second case to receive a full hearing was *Bureau of Broadcast Measurement*<sup>87</sup> which involved a claim of tied selling. It was established in evidence that Bureau of Broadcast Measurement (BBM) held a monopoly position in the provision of radio audience survey data. It was also a supplier of television audience survey data, in which field A. C. Nielsen was also a competitor. The evidence established that BBM's price for the sale of both radio and tv audience survey data was not only considerably less than if the two surveys were purchased separately but also less than what a customer would have to pay to purchase the radio survey data from BBM and the television survey data from A. C. Nielsen.

The RTPC's jurisdiction to make an order against the practice of tied selling is similar to its jurisdiction in respect of exclusive dealing. That is, it may make such an order where the supplier in question is a "major supplier" and where the effect of the practice is to create barriers to entry or expansion in the market in question and thereby cause a substantial lessening of competition. With 100 percent of the relevant national market for radio audience survey data and upwards of 80 percent of the corresponding survey data relating to television broadcasting, BBM was held to be a major supplier of both products. The Commission considered that the technological necessity defense which is available in tied selling cases was not applicable in this case since it is to be confined to cases in which the reputation of the tying product would be destroyed if the other product were not supplied in conjunction with it. The Commission further concluded that there would be, or was, substantial lessening of competition as a consequence of this practice. In this regard it took note of the fact that there had been no new entrants in the radio measurement service business for eighteen years and that there were not any perceived potential entrants at the time of the application. A. C. Nielsen's share of the tv market had fallen substantially in the preceding ten years. The order of the Commission directing BBM to discontinue such tied selling was subsequently upheld on appeal<sup>87a</sup> to the Federal Court of Appeal.

87. RTPC ANNUAL REPORT (for the year ended March 31, 1982), 29.

87a. *BBM Bureau of Broadcast Measurement v. Director of Investigation and Research* (1984) 82 C.P.R. (2d) 60 (Federal Court of Appeal).

### 3. *Refusal to Deal*

In December 1983 the Director applied to the RTPC for an order under the refusal to deal provisions of the Act against seven major motion picture film distributors in Canada. The order sought was to require the distributors to supply commercially valuable motion pictures to an exhibition chain, Cineplex, which operated multi-screened theatres in various communities across Canada. The Director alleged that Cineplex was consistently denied the opportunity of obtaining adequate supplies of first run motion pictures with the result that it had suffered substantial financial detriment. He further alleged that the major distributors of motion picture films in Canada had maintained longstanding arrangements whereby they supplied motion pictures to the two largest exhibition chains to the exclusion of the denied firm and others.

However, in June 1983 the RTPC agreed to a request by the Director for a one-year postponement of hearings on this application made as a consequence of undertakings provided by the distributors whereby they agreed to revise their distribution policies in Canada. The application was made under sec. 31.2 of the Act which empowers the Commission to issue a remedial order where a person is substantially affected in his business by inability to obtain adequate supplies of a product on usual trade terms. Under the terms of the undertakings, the distributors agreed to deal on an individual theatre-by-theatre basis with respect to both first run and subsequent runs of each motion picture. They also agreed to undertake not to be a party to any agreement or arrangement with an exhibitor to determine the pattern of release of each of its motion pictures nor to grant any exhibitor the right of first refusal on its films. Subsequently, in July 1984, the Director discontinued his application, partly as a result of the improved competitive situation resulting from the undertakings but also because Cineplex acquired one of the two other major film exhibitors which had allegedly been given preferred status in the distribution of the films by the major motion picture companies.

## VII. Resistance of Antitrust Extraterritoriality

In February 1985 the federal Parliament enacted the Foreign Extraterritorial Measures Act. A predecessor version of this legislation was first proposed (although not proceeded with) in 1980. Its provisions are similar to so-called "blocking statutes" of other countries, including Australia and the United Kingdom. The enactment of this legislation is the culmination of a number of prior efforts by various Canadian governments to blunt the extraterritorial thrust into Canada of United States antitrust law.

### A. BUSINESS RECORDS PROTECTION

In 1947, a grand jury in the United States investigating the American paper industry, subpoenaed International Paper Company, a New York corporation, to produce documents under the control of certain affiliated companies located in the Province of Quebec. The American court found that one of these affiliates, Canadian International Paper, was doing business in the American jurisdiction through an agent, and therefore ordered the Company to produce documents within its control, even though they were located in Canada. It was American compulsion of this kind which led to the enactment in the 1950s of legislation in both Ontario and Quebec severely restricting the removal of business records from the respective jurisdictions. Statutes in both provinces prohibit the removal of corporate records in compliance with any requirement, order, direction, or subpoena of a legislative, administrative or judicial authority in a jurisdiction outside each province.

In Ontario, sec. 1 of the Business Records Protection Act<sup>88</sup> prohibits any person in such circumstances from taking or removing from Ontario "material in any way relating to business carried on in Ontario," unless such taking or removal forms part of a regular practice of furnishing such material to a head office or parent company located outside Ontario, or is otherwise provided for by or under the laws of Ontario or Canada. Furthermore, sec. 2 of the Act provides for a procedure whereby the Minister of Justice, the Attorney General or any other person having an interest in a business who has reason to believe that a foreign order will be made requiring the removal from Ontario of business records, may apply to the courts for an order requiring any other person to furnish an undertaking and recognizance for the purpose of ensuring that such person will not contravene the Act. Anyone who, having received notice of such an application or who is required to furnish an undertaking or recognizance, contravenes the Act, is deemed to be in contempt of court and is liable to imprisonment for one year.

### B. ANTI-EXTRATERRITORIAL PROVISIONS OF COMBINES ACT

Prior to the enactment of the Foreign Extraterritorial Measures Act, the Act was amended in 1976 to protect Canadian citizens and corporations from penalties and judgments imposed by foreign tribunals for actions taken outside their jurisdiction. The relevant provisions of the Act are secs. 31.5 and 31.6.

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88. R.S.O. 1980 c. 56, s.1.

Under sec. 31.5, where the RTPC finds that the implementation in Canada of a judgment, decree, order "or other process" issued by a foreign tribunal would adversely affect competition, trade or commerce, foreign trade or the efficiency of trade or industry in Canada, the Commission may direct that no measures may be taken in Canada to implement the foreign judgment, decree or order. Sec. 31.6 of the Act also empowers the Commission to block the implementation of a foreign law, directive or instruction issued to a person in Canada from foreign persons, corporations or governments which would have such an adverse effect.

### C. URANIUM INFORMATION SECURITY REGULATIONS

In the meantime a case arose which resulted in the promulgation of federal regulations specifically aimed at preventing disclosure of documents, the production of which had been called for by a United States court. In the mid-1970s Westinghouse brought an antitrust suit in Chicago against twenty-nine American and foreign producers of uranium wherein it sought treble damages of approximately \$6 billion. Westinghouse alleged that these producers had conspired to establish an artificially high world market price for uranium. It was later ascertained that a five-nation cartel, involving Canada, Australia, France, the United Kingdom and South Africa, was formed during a meeting in Paris in 1972.

In the context of the various American antitrust actions, orders were made for the production of documents located in Canada which were in the possession or under the control of certain Canadian Crown corporations and several Canadian subsidiaries of American parent corporations. In some cases the Canadian subsidiaries were themselves defendants in the American litigation; in other cases they were not. The American corporations and their subsidiaries took the position that these documents were necessary to establish their defenses to the various actions launched against them in the United States which related to the uranium cartel.

Nevertheless, the Canadian government intervened to prevent the disclosure of these documents by passing the Uranium Information Security Regulations under the authority of the Atomic Energy Control Act.<sup>89</sup> The Regulations provided, in part, as follows:

3. No person who has in his possession or under his control any note, document or other written or printed material in any way related to conversations, discussions or meetings that took place between January 1, 1972 and December 31, 1975 involving that person or any other person or any governmental, Crown corporation, agency or other organization in respect of the production, import, export, transportation, refining, possession, ownership, use or sale of uranium or its derivatives or compounds, shall

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89. R.S.C. 1970 c. A-19.



- (a) release any such note, document or material or disclose or communicate the contents thereof to any person, government, Crown corporation, agency or other organization unless
  - (i) he is required to do so by or under a law of Canada, or
  - (ii) he does so with the consent of the Minister of Energy, Mines and Resources. . . .<sup>90</sup>

The obvious effect of these Regulations was to prohibit the disclosure of the very documents which had been ordered produced by the American courts. As a result, although the Canadian subsidiaries would willingly have disclosed these documents in order to assist the American parent corporations in the context of the U.S. litigation, they were prevented from doing so by the Regulations.

In order to avoid sanction orders in the American courts which could have resulted in default judgments, or in the denial of the right to raise certain defenses, Gulf Oil Corporation obtained orders from the United States District Court for the Northern District of Illinois, Eastern Division, and from the United States District Court for the Southern District of California to issue "letters rogatory" addressed to the Canadian courts in an effort to obtain those documents situated in Canada which supported Gulf's defenses in the American proceedings. In March of 1980 in *Gulf Oil Corporation v. Gulf Canada Ltd.*<sup>91</sup> the Supreme Court of Canada considered Gulf's application for an order enforcing the letters rogatory in Canada.

The enforcement of letters rogatory in a recipient common law jurisdiction depends primarily upon considerations of "comity." Rights based upon foreign law will not be given effect if to do so would be "contrary to the settled public policy of the forum . . . or contrary to good morals or natural justice or prejudicial to the state or its citizens." For this reason, Chief Justice Laskin, speaking for the Supreme Court, extensively examined the prevailing Canadian "public policy" relating to the disclosure of the relevant documents in determining whether the Court's discretion should be exercised to enforce the letters rogatory. Chief Justice Laskin concluded that public policy equated with governmental policy, and found that the stated policy of the Canadian government related not so much to a desire to preserve secrecy, as it did to a growing opposition to the extraterritorial application of American antitrust laws.

Chief Justice Laskin went on to cite, with approval, the dicta of Lord Wilberforce of the House of Lords in *Rio Tinto Zinc Corp. et al. v. Westinghouse Electric Corp. et al.*<sup>92</sup>

90. C.R.C. Vol. III c. 366, p. 2347.

91. (1980), 111 D.L.R. (3d) 74 (Supreme Court of Canada).

92. [1978] 1 All E.R. 434 (House of Lords).

It is axiomatic that in antitrust matters the policy of one state may be to defend what it is the policy of another state to attack. The intervention of Her Majesty's Attorney General establishes that quite apart from the present case, over a number of years and in a number of cases, the policy of Her Majesty's Government has been against recognition of United States investigatory jurisdiction against United Kingdom companies. The courts should in such matters speak with the same voice as the executive. . . .<sup>93</sup>

As a result, the Court refused to enforce the various letters rogatory.

#### D. FOREIGN EXTRATERRITORIAL MEASURES ACT

This legislation is designed to prevent the recognition or enforcement in Canada of foreign antitrust judgments, orders or legislation where, in the opinion of the Attorney General of Canada and the Secretary of State for External Affairs, to do so would "adversely [affect] significant Canadian interests in relation to international trade or commerce involving a business carried on in whole or in part in Canada, or that is likely to infringe Canadian sovereignty."<sup>94</sup>

The Attorney General is also empowered, under the legislation, to prohibit or restrict the production, disclosure or identification of records in the possession or control of any person resident in Canada, or of any Canadian citizen. Sec. 4 empowers the court to issue a warrant authorizing the seizure of any such records where it is satisfied that a prohibition or restrictive order may not be complied with. The legislation confers upon the Attorney General the power to order persons or corporations situated in Canada not to comply with extraterritorial measures taken by foreign governments. The Attorney General is also empowered to prohibit Canadian foreign-owned corporations from complying with directives issued by foreign parent corporations pursuant to such foreign governmental measures.

Persons found to have contravened orders made under the legislation are liable to fines of up to \$10 thousand, and to imprisonment for up to five years. Furthermore, sec. 9 provides for the recovery ("clawing back") from a person in whose favor a foreign judgment is given, of any amount which that person has obtained under the foreign judgment. The court ordering such recovery is also empowered under sec. 9, to order the seizure and sale of the shares of any corporation incorporated in Canada in which the person against whom judgment is rendered pursuant to sec. 9 has a direct or indirect beneficial interest.

93. *Id.*, at 448.

94. Foreign Extraterritorial Measures Act, ss. 3 and 4.

## E. CANADA/U.S. ANTITRUST UNDERSTANDINGS

It would appear that the Canadian government, in addition to clothing itself with the power to resist the extraterritorial application of American antitrust laws by enacting the Foreign Extraterritorial Measures Act has also taken steps to encourage a reduction in such extraterritoriality by entering into various Memoranda of Understanding with the United States.

In 1958 the American Justice Department launched a civil action against two United States companies, General Electric Corporation and Westinghouse Electric Corporation, and against N. V. Philips from the Netherlands. All of these companies manufactured radio and television sets. The Justice Department alleged that they had, acting through their Canadian subsidiaries, engaged in an unlawful conspiracy by organizing a Canadian patent pool (Canadian Patents Limited), which prevented the importation into Canada of radio and television sets manufactured in the United States. The Justice Department alleged that the Canadian market had been virtually closed to American manufacturers, and that as a result, American consumers had been deprived of the lower prices which increased volumes in the sales of such articles would have produced had the patent pool not existed. This case caused great concern in Canada and precipitated discussions between the Attorney General of the United States and the Minister of Justice of Canada in 1959. An informal agreement relating to consultative procedures between the two countries was reached, which is known as the Fulton-Rogers Understanding of 1959.

In 1967, the O.E.C.D. Committee of Experts on Restrictive Business Practices issued its Recommendation Respecting Consultation and Notification. This Recommendation provided for notification and consultation by member countries along the lines of the Fulton-Rogers Understanding of 1959. The Recommendation also envisaged active cooperation among participating countries in the control of restrictive business practices affecting international trade.

The O.E.C.D. Recommendation led to further discussions between the Canadian and American governments with respect to extraterritorial anti-trust enforcement. In November 1969, Ron Basford, then Canadian Minister of Justice, and John M. Mitchell, then United States Attorney General, issued a joint communique confirming and extending the Fulton-Rogers Understanding of 1959.

More recently, in March 1984 the two countries entered into a Memorandum of Understanding (the Memorandum)<sup>95</sup> pertaining to notification, consultation and cooperation with respect to the application of national

95. To be found in Appendix IX of the ANNUAL REPORT OF THE DIRECTOR (under the Act for the year ended Mar. 31, 1984), 155-159 (1984).

antitrust laws. The preamble to the Memorandum recognizes the close links between the economies of the two countries, and the important differences between each country on the appropriate level of extraterritorial application of domestic antitrust laws. The stated purpose of the Memorandum is to avoid or moderate conflicts of interests and policies, and to enhance cooperation in the enforcement of each country's antitrust laws.

Under the Memorandum, both countries have agreed to notify each other whenever they become aware that their antitrust investigations or proceedings involve the national interests of the other, or require the seeking of information located in the territory of the other. The Memorandum provides for a consultative process wherein either country may request consultations when it believes that an antitrust investigation, proceeding or action is likely to affect its significant national interests or require the seeking of information from within its territory.

The Memorandum stipulates that neither country will ordinarily discourage the other from seeking information located within its territory. Nevertheless, where one country finds that access to information within its territory is contrary to a significant national interest, the investigating party must notify the other country and must engage in the process of consultation. By way of broad statement of principle, the Memorandum stipulates that each country will give "careful consideration to the significant national interests of the other at all stages of an antitrust investigation, inquiry or prosecution." Each country is also expected to exchange information with the other relating to antitrust enforcement activities.

### VIII. Conclusion

After a slow start (now closing in on one hundred years), it would seem that Canadian competition law is beginning to gain considerable momentum. Recent and pending legislative reforms in this field, supported by constitutional law decisions giving recognition to the federal government's authority to enact civil-law based competition laws, strongly suggest that the area of competition law in Canada is about to become a considerably more significant factor than has previously been the case. In addition, many of the obstacles to enforcement of an effective competition law (such as exclusively criminal law-based legislation) are being removed. While it is unlikely that Canadian competition laws will ever achieve the degree of importance in everyday business life that the antitrust laws have in the United States, it is at least safe to say that this is no longer an area that Canadian business will be able to afford to ignore.

