A TIME OF CHANGE: RECENT DEVELOPMENTS IN CANADIAN COMPETITION LAW

*Kent E. Thomson**

This survey reviews the leading developments in the law concerning competition in Canada, concentrating on the recent case law in this area. The first half of the paper is a review of the recent constitutional challenges to the previous provisions of the Competition Act *and to the Competition Tribunal. The latter half of the paper canvasses recent proceedings before the Tribunal with respect to the refusal to deal, tied selling, exclusive dealing, abuse of dominant position and merger provisions. It is clear from the analysis of the cases that this is a time of change in Canadian competition law. In light of the number of these cases which are currently under appeal, it remains to be seen what direction the law will take in the future.*

Cette étude examine les changements importants survenus dans le domaine du droit de la concurrence au Canada, en traitant principalement de la jurisprudence récente dans ce domaine. L'auteur passe d'abord en revue les affaires récentes dans lesquelles on a contesté la constitutionnalité des anciennes dispositions de la Loi sur la concurrence *ainsi que celle du Tribunal de la concurrence. Il examine ensuite de manière approfondie des procédures engagées récemment devant le Tribunal et qui portaient sur le refus de vendre, les ventes liées, l'exclusivité, l'abus de position dominante et les fusionnements. L'analyse de ces affaires démontre clairement que le droit canadien de la concurrence est en pleine évolution. Étant donné le nombre d'affaires qui ont été portées en appel, on ne sait pas encore quelle direction prendra cette évolution du droit.*

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* Tory Tory DesLauriers & Binnington, Toronto. The author wishes to acknowledge the assistance of Susan Valencia, Student-at-Law, in the preparation of this survey.

The *Combines Investigation Act*[1] was substantially amended in June, 1986 and renamed the *Competition Act*.[2] The central purpose underlying many of the amendments which were effected in 1986 was the reduction or elimination of obstacles which historically had rendered the legislation difficult, and sometimes impossible, to enforce.

The most significant legislative initiatives which were made at the time of the 1986 amendments involved the decriminalization of the mergers and monopolies provisions, the creation of a complex scheme of pre-notification obligations in respect of mergers surpassing certain size thresholds, the abolition of the Restrictive Trade Practices Commission in respect of new inquiries, and the creation of a quasi-judicial tribunal known as the Competition Tribunal. It seems apparent that while these initiatives have effectively remedied several of the matters which gave rise to enforcement difficulties under the *Combines Investigation Act*, fresh problems have arisen. This is so, in large part, because several of the amendments proclaimed in 1986, and at least one of the pre-existing statutory provisions, may be inconsistent with some rights and freedoms guaranteed by the *Canadian Charter of Rights and Freedoms*.[3]

This is, indeed, a time of rapid change in Canadian competition law. The Bureau of Competition Policy has issued draft enforcement guidelines in respect of the predatory pricing and price discrimination provisions of the *Competition Act*, as well as merger enforcement guidelines. There have been a number of recent decisions of the Competition Tribunal pertaining to the refusal to deal, tied selling, exclusive dealing, abuse of dominant position and merger provisions. Constitutional challenges have been brought in several provinces pertaining to the conspiracy, merger and refusal to deal provisions as well as to the investigative powers conferred upon the Director of Investigation and Research. The constitutional validity of the Competition Tribunal has been brought into question in judicial proceedings in Quebec and in proceedings before the Tribunal. Virtually all of the significant decisions which have been rendered in this area currently are under appeal.

It is beyond the scope of this paper to analyze in detail all of the recent developments in Canadian competition law. I have not, for instance, attempted to deal with the Bureau's draft enforcement guidelines pertaining to the predatory pricing and price discrimination provisions. I have endeavoured to highlight the more significant developments emanating from recent judicial determinations and from proceedings before the Tribunal.

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[1] R.S.C. 1985, c. C-34 [hereinafter the *Combines Investigation Act*].

[2] R.S.C. 1985 (2nd Supp.), c. 19, Part II. ss 19-45 [hereinafter the *Competition Act*].

[3] Part I of the *Constitution Act, 1982*, being Schedule B of the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter the *Charter*].

I. CONSTITUTIONAL CHALLENGES

A. *Conspiracy Provisions*

The conspiracy provisions of the *Competition Act*,[4] like the predecessor provisions in the *Combines Investigation Act*,[5] are viewed by many to be the "heart" of the legislation and the primary criminal weapon in the arsenal available to those responsible for suppressing or eliminating collusive conduct which restrains trade. Michael Bliss, in his paper *The Yolk of the Trusts: A Comparison of Canada's Competitive Environment in 1889 and 1989*,[6] notes that concerns of collusive activity among horizontal competitors precipitated the enactment of Canada's first anti-combines legislation. In the Toronto mayoralty election of 1887 a local Member of Parliament, N. Clarke Wallace, complained that one of the candidates for election was the leader of a coal ring that was fixing prices to the detriment of Torontonians. In 1888 Wallace was appointed as the Chairperson of a House of Commons Select Committee with a mandate to investigate the extent and operations of combinations in the Canadian marketplace. Bliss notes that in its Report, the Committee stated that "the evils produced by combinations....have not by any means been fully developed as yet in this country....Sufficient evidence of their injurious tendencies and effects is given to justify legislative action for suppressing the evils arising from these and similar combinations and monopolies".[7] The following year, in 1889, Parliament enacted *An Act for the Prevention and Suppression of Combinations formed in restraint of Trade*[8] in which it was made illegal to conspire unlawfully to unduly prevent or lessen competition.

Various iterations of Canada's anti-combines legislation have been enacted since 1889. Significant amendments were effected in 1899,[9] 1910,[10] 1919 and 1923,[11] 1935,[12] 1952[13] and 1960.[14] Further changes were

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[4] *Competition Act*, *supra*, note 2, ss 30-31.

[5] *Combines Investigation Act*, *supra*, note 1, s. 45.

[6] (National Conference on the Centenary of Competition Law and Policy in Canada, October 1989).

[7] *Ibid.* at 3.

[8] (1889), 52 Vict., c. 41.

[9] *An Act to Amend the Criminal Code, 1892, with respect to Combinations in Restraint of Trade*, S.C. 1899 (4th Sess.), 62 & 63 Vict., c. 46.

[10] *The Combines Investigation Act*, S.C. 1910 (2d Sess.), 9 & 10 Edw. VII, c. 9.

[11] *The Combines and Fair Price Act*, S.C. 1919 (2d Sess.), 9 & 10 Geo. V, c. 45, as rep. *The Combines Investigation Act*, S.C. 1923 (2d Sess.), 13 & 14 Geo. V, c. 9.

[12] *The Combines Investigation Act Amendment Act*, S.C. 1935 (6th Sess.), 25 & 26 Geo. V, c. 54.

[13] *An Act to amend the Combines Investigation Act and the Criminal Code*, S.C. 1952 (6th Sess.), 1 Eliz. II, c. 39.

[14] *An Act to amend the Combines Investigation Act and the Criminal Code*, S.C. 1960 (3d Sess.), 8 & 9 Eliz. II, c. 45.

made to the legislation in 1976[15] and again in 1986.[16] The basic conspiracy prohibition, however, has remained substantially unaltered for more than 100 years.

During that 100-year period, Canadian combines enforcement has been characterized, to a considerable extent, by prosecutions commenced under the conspiracy provisions. The legislation did not prohibit any other form of anti-competitive activity until 1910. As William Stanbury observes in his paper *Legislation to Control Agreements in Restraint of Trade in Canada*,[17] between 1889 and 1951 conspiracy cases accounted for approximately 80% of all combines prosecutions in Canada. There have been more than 140 conspiracy prosecutions in Canada from the time these provisions were first enacted.[18] Not surprisingly, Howard Wetston, the current Director of Investigation and Research under the *Competition Act*, has recently described the conspiracy provisions as "the central nervous system of any competition legislation".[19]

The conspiracy provisions traditionally have been difficult to enforce because they require the Crown to prove, beyond a reasonable doubt, that the agreement of the accused, if carried into effect, would lessen competition "unduly". Stanbury has characterized the use of the term unduly as the "fatal flaw" of the legislation,[20] and observed in his recent essay that the Crown's failure to discharge its burden in respect of this issue has resulted in at least one-half of the acquittals under the conspiracy provisions in the last 100 years.[21]

Stanbury's remarks concerning the fatal flaw of the legislation were directed towards the evidentiary burden which rests with the Crown throughout a conspiracy case, rather than to the constitutional validity of the legislation itself. Recent decisions in the Nova Scotia and Quebec superior courts,[22] however, render these remarks somewhat prescient. In both cases, the courts have held at the trial level that the use of the term

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[15] *An Act to amend the Combines Investigation Act and the Bank Act and to repeal an Act to amend an Act to amend the Combines Investigation Act and the Criminal Code*, S.C. 1974-75-76, c. 76.

[16] *An Act to establish the Competition Tribunal and to amend the Combines Investigation Act and the Bank Act and other Acts in consequence thereof*, R.S.C. 1985 (2d Supp.), c. 19.

[17] (National Conference on the Centenary of Competition Law and Policy in Canada, October 1989) [hereinafter Stanbury].

[18] *Ibid.* at 6.

[19] "N.S. Court Ruling Backs Competition Act" *The [Toronto] Globe and Mail* (25 April 1991) B1.

[20] Stanbury, *supra*, note 17 at 2.

[21] *Ibid.* at 3.

[22] *See R.* v. *Nova Scotia Pharmaceutical Society* (1990), 73 D.L.R. (4th) 500, (*sub nom. R.* v. *Nova Scotia Pharmaceutical Society* (No. 2)) 98 N.S.R. (2d) 296 (T.D.) [hereinafter *Nova Scotia Pharmaceutical Society* cited to D.L.R.], *rev'd* (1991), 80 D.L.R. (4th) 206; 102 N.S.R. (2d) 222, (C.A.) [hereinafter *Nova Scotia Pharmaceutical Society* cited to D.L.R.], *heard on appeal* (4 December 1991) No. 22473 (S.C.C.); *L'Association québécoise des pharmaciens propriétaires* c. *Le Procureur général du Québec*, [1991] R.J.Q. 205 (Sup. Ct) [hereinafter *Quebec Pharmacists*].

"unduly" in the conspiracy provisions of the *Competition Act* renders those provisions impermissibly vague. Accordingly, for this reason and others, they have held that the conspiracy provisions are constitutionally invalid and of no force or effect. As described hereafter, the Nova Scotia Court of Appeal recently has upheld the conspiracy provisions. The issue has been argued before, but not yet decided by, the Quebec Court of Appeal. It seems inevitable that this issue ultimately will be determined by the Supreme Court of Canada.

1. Nova Scotia Pharmaceutical Society *v.* The Queen[23]

On September 5, 1990, Madame Justice Elizabeth Roscoe of the Trial Division of the Supreme Court of Nova Scotia rendered judgment in the *Nova Scotia Pharmaceutical Society* case. Twelve defendants had been charged with conspiring to unduly lessen competition in the pharmaceutical business in Nova Scotia. The indictment was in respect of a 12-year period between 1974 and 1986.

The accused proceeded with a pre-trial motion for a declaration that the conspiracy provisions of the *Competition Act* were constitutionally invalid because they infringed the rights of accused persons under the *Charter*. They sought this declaration on two bases. First, they argued that the conspiracy provisions were invalid because they enable the Crown to secure a conviction without requiring the Crown to establish that the accused had a guilty intent (or *mens rea*) to limit competition, either unduly or at all. Second, they argued that the conspiracy provisions were excessively vague in that the term "unduly" is not defined in the *Act*, and is subject to different interpretations by lay people and economists.

Madame Justice Roscoe accepted both arguments. She agreed with the Crown, relying upon the Supreme Court of Canada's decision in *Container Materials, Ltd* v. *The King*,[24] that the Crown, in order to succeed in a conspiracy prosecution, need only establish that the accused intended to enter into an agreement, the effect of which, if carried out, would be to lessen competition unduly. There is no need for the Crown to establish a so-called "double intent", as has been maintained by several practitioners and theorists in this area, by proving not only that the accused intended to enter into the agreement, but also that the accused intended to lessen competition unduly.

The issue as to the intent required of an accused before a conviction can be entered was clarified to some extent in the 1986 amendments to the conspiracy provisions which expressly state that the Crown need not prove, in a conspiracy prosecution, that "it was the object of any or all of the parties thereto to eliminate, completely or virtually, competition in that market". Pursuant to subsection 45(2.2) of the *Act*, which was added in 1986,[25] the Crown need not prove that the parties to the

[23] *Nova Scotia Pharmaceutical Society, ibid.*, note 14 (T.D.).
[24] [1942] S.C.R. 147, [1942] 1 D.L.R. 529.
[25] *As am.* by R.S.C. 1985 (2nd Supp.), c. 19, s. 30(3).

agreement in question intended that the agreement have the effect of preventing, limiting or lessening competition unduly. The 1986 amendments did not apply, however, in the *Nova Scotia Pharmaceutical Society* case because the amendments were proclaimed after the period covered by the indictment.

Madame Justice Roscoe held that the so-called "single intent" required by the conspiracy provisions violates the rights of the accused under section 7 of the *Charter*.[26] This section guarantees to everyone "the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice". She held that the principles of fundamental justice require, as a general rule, that the Crown prove that the accused had the intent to commit each element of the offence in question, so as to avoid punishing the morally innocent. She rejected the Crown's argument that "competition offences are not really crimes and carry no moral stigma upon conviction".[27] Rather, she held that the conspiracy provisions create "a truly criminal offence",[28] and observed that under these provisions an accused could be convicted and sentenced to a period of imprisonment of up to five years "even if the anti-competitive effect of the agreement he entered into was completely unintended and unforeseen and, in fact, even if it were shown that his intention was to increase competition".[29]

With respect to the second argument advanced by the accused pertaining to the vagueness of the term "unduly", Roscoe J. relied upon a recent decision of the Supreme Court of Canada in *Reference re ss. 193 and 195.1(1)(c) of the Criminal Code*,[30] in which Chief Justice Dickson stated that "in the criminal context where a person's liberty is at stake it is imperative that persons be capable of knowing in advance with a high degree of certainty what conduct is prohibited and what is not."[31] In the same case, Lamer J. (as he then was) stated that "[i]t is essential in a free and democratic society that citizens are able, as far as is possible, to foresee the consequences of their conduct, in order that persons be given fair notice of what to avoid, and that the discretion of those entrusted with law enforcement is limited by clear and explicit legislative standards."[32]

Roscoe J. reviewed a number of decisions pertaining to the conspiracy provisions of the *Act*, ranging from the 1905 decision of the Ontario Court of Appeal in *R.* v. *Elliott*[33] to the decisions of the Supreme Court of Canada more than 70 years later in *Aetna Insurance Co.*[34] and

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26 *Nova Scotia Pharmaceutical Society*, *supra*, note 22 at 511-15 (T.D.).
27 *Ibid.* at 513.
28 *Ibid.* at 514.
29 *Ibid.* at 514-15.
30 [1990] 1 S.C.R. 1123, 77 C.R. (2d) 1 [hereinafter *Reference re s. 193* cited to C.R.].
31 *Ibid.* at 17.
32 *Ibid.* at 26.
33 (1905), 9 O.L.R. 648, 9 C.C.C. 505.
34 (1977), 34 C.C.C. (2d) 157, 75 D.L.R. (3d) 21.

Atlantic Sugar Refineries Co. v. *Attorney General of Canada*.[35] Having reviewed these decisions, Roscoe J. held that the conspiracy provisions "do not provide, in advance, with any degree of certainty, information with respect to business conduct that is illegal because of the use of the word "unduly", which is too vague".[36] Relying upon the same reasoning, Madame Justice Roscoe held that it was not sufficient for the Crown to simply repeat in an indictment the wording of the statute, as is frequently done. She held that this too violates the rights of the accused under the *Charter*. She stated the following:

> It is fairly obvious that, if the words in a statute, which create an offence, are void for vagueness that mere repetition of those same words in the indictment does not provide precise information with respect to the essential ingredients of the offence that is charged. I agree with the defence submission that in order to make a full answer and defence and to have a fair trial, pursuant to the *Charter*, the defendants are entitled to notice in the indictment of the exact elements or legal standards of the offence, and, in this case, that has not been done.[37]

Madame Justice Roscoe found that the conspiracy provisions of the *Act* could not be considered demonstrably justifiable in a free and democratic society under section 1 of the *Charter* and accordingly, held that the provisions in issue in this case were constitutionally invalid and of no force or effect.

The Crown appealed Roscoe J.'s quashing of the indictment to the Nova Scotia Court of Appeal which allowed the appeal and held that the conspiracy provisions are constitutionally valid. The reasons of the Court were written by Chief Justice Clarke.

Chief Justice Clarke accepted the Crown's assertion that the trial judge had erred in holding that paragraph 32(1)(c) [now paragraph 45(1)(c)] violated section 7 of the *Charter* because it did not require subjective *mens rea* going to the effect of an agreement on competition. After reviewing the same case law interpreting paragraph 32(1)(c) which Roscoe J. had examined at the trial level, Clarke C.J.N.S. found that:

> ....section 32(1)(c)....puts a *mens rea* requirement on both the entering of the agreement and the effect the agreement would have if implemented. The burden on the Crown is, therefore, to prove the accused had the intention....to unduly lessen competition through the implementation of that agreement or arrangement. Thus, *mens rea* attaches to each essential element of the offence created by section 32(1)(c).[38]

In essence, His Lordship found that paragraph 32(1)(c) requires an essential *mens rea* going to all its elements — including the entering into of the conspiratorial agreement and the intention to lessen competition unduly by entering into the agreement. As a result, these provisions

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[35] (1980), 54 C.C.C. (2d) 373, 115 D.L.R. (3d) 21.

[36] *Nova Scotia Pharmaceutical Society*, *supra*, note 22 at 519 (T.D.).

[37] *Ibid.* at 522.

[38] *Ibid.* at 223 (C.A.).

do not contemplate the punishment of the morally innocent, and paragraph 32(1)(c) was held not to violate section 7 of the *Charter*. Section 32(1.3), which was enacted in 1986 and which amended section 32 so as to remove the onus on the Crown to prove an intention to lessen competition unduly as an element of the offence, was not given retroactive application because of its prejudicial effect on the accused.[39]

The Crown also argued that Roscoe J. erred in holding that section 32(1)(c) and (1.1) violated sections 7, 11(a) and 11(d) of the *Charter* because "unduly" is too vague a term qualifying a criminal offence. Clarke C.J.N.S. accepted the Crown's submission that the term "unduly" is "not so pervasively vague as to permit a standardless sweep".[40] His Lordship first noted that the test for vagueness as set forth in *Reference re s. 193*,[41] is to be applied to the interpretation placed on the provision by the courts and not to the bare words of the statute. Clarke C.J.N.S. then examined subsections 32(2) and (3) which provide examples of subject matter which will or will not trigger the offence in paragraph 32(1)(c). He stated that "[a] plain reading of the statute provides warning and notice to parties entering agreements of the type of conduct that runs the risk of being found illegal".[42] Only those arrangements which lessen competition substantially will be caught by the section. The competitive effect of an arrangement is a question of fact to be determined based on the circumstances in each particular case. Clarke C.J.N.S. concluded that:

> [W]hile the word unduly is not defined by statute and defies precise measurement, it is a word of common usage which denotes to all of us in one way or another a sense of seriousness. Something affected unduly is not affected to a minimal degree but to a significant degree. The type of conduct to which the Act is directed and the goals of the Act are well known and set out in the enactment itself. No one is in a better position to know the likely effect of a particular agreement on competition than the parties to that agreement who know the market in which they deal. Parties who enter an agreement with the intention to lessen competition unduly cannot complain that they are caught by surprise when a trier of fact finds the competitive effect of their agreement is undue. The culpable activity is targeted by the Act and the various considerations that will come into play are enumerated in the case law.[43]

2. L'Association québécoise des pharmaciens propriétaires *c.* Canada (Procureur général)[44]

The *Quebec Pharmacists* case, like the *Nova Scotia Pharmaceutical Society* decision referred to above, arose out of a pre-trial motion brought by a number of accused for a declaration that the conspiracy provisions

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[39] *Ibid.* at 226-27.
[40] *Ibid.* at 227.
[41] *Supra*, note 30.
[42] *Supra*, note 38 at 230.
[43] *Ibid.* at 234-35.
[44] *Supra*, note 22.

of the *Act* are constitutionally invalid because they contravene section 7 and subsection 11(d) of the *Charter*. The accused were charged with conspiracy to unduly lessen competition in the supply of contraceptive pills, prescription drugs and commissions *frais d'honoraires* related thereto.

Mr Justice Forget referred to the conspiracy provisions as the cornerstone of the penal regime under the *Act*, and characterized these provisions as "an omnibus section".[45] Like Madame Justice Roscoe in the *Nova Scotia Pharmaceutical Society* decision, Forget J. held that the term "unduly" is impermissibly vague, and observed that it would be virtually impossible to meaningfully explain the term "unduly" to a jury. He held that this provision would not provide appropriate warning to an accused as to the nature of the prohibition imposed by the section and on this basis held that it violated the rights guaranteed to an accused under the *Charter*.

Forget J. also held that the conspiracy provisions of the *Act* were constitutionally invalid in that they did not require the Crown to establish that the accused intended to limit competition to secure a conviction. He held that the critical problem with the conspiracy provisions was that they applied to all commercial agreements, even if the agreements were entered into in good faith and in the normal course of business. He held that this was the most objectionable consequence of the statutory language.

Mr Justice Forget also rejected the Crown's argument that the conspiracy provisions could be saved under section 1 of the *Charter*. After reviewing extrinsic evidence filed by the parties, he concluded that the conspiracy provisions had not been drafted carefully so as to infringe *Charter* rights as little as possible, and failed to meet the proportionality requirement under section 1 of the *Charter*.

3. *Implications*

The decisions of the Nova Scotia Court of Appeal and Quebec Superior Court currently are under appeal. The issue ultimately will be determined by the Supreme Court of Canada.[46] In the event that the Supreme Court determines that the conspiracy provisions are constitutionally invalid, this could have the effect, at least in the short term, of neutralizing one of the most important criminal provisions in the *Competition Act*. As is noted above, the conspiracy provisions have been central to Canadian combines legislation for more than 100 years. They are extremely important to the Director of Investigation and Research, particularly in cases where other criminal provisions, such as bid-rigging or resale price maintenance, have no application. The effect of such a decision will probably be to hamper somewhat the Bureau's enforcement activities in respect of complaints of horizontal collusion. Any attempt

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[45] *Ibid.* at 226.
[46] *See Nova Scotia Pharmaceutical Society, supra,* note 22 (S.C.C.).

by the Bureau to proceed aggressively with a conspiracy prosecution prior to a resolution of this issue by the appellate courts is almost certain to be met with constitutional challenges similar to those which were considered by the courts in the *Nova Scotia Pharmaceutical Society* and *Quebec Pharmacists* cases.

B. *Competition Tribunal*

One of the most significant legislative initiatives which was effected when the *Combines Investigation Act* was amended in June, 1986 was the abolition of the Restrictive Trade Practices Commission (other than in respect of continuing inquiries commenced before the proclamation of the *Competition Act*) and the creation, in its place, of the Competition Tribunal. The Tribunal is constituted pursuant to the *Competition Tribunal Act*,[47] and is comprised of both lay members and judges of the Trial Division of the Federal Court. The Chairperson of the Tribunal is Madame Justice Barbara Reed. She is assigned the responsibility under subsection 4(2) of the *Act* of supervising and directing the work of the Tribunal ("including, without restricting the generality of the foregoing, the allocation of the work of the members thereof").

Pursuant to section 5 of the *Competition Tribunal Act*, judicial members of the Tribunal are appointed "for a term not exceeding seven years" and hold office as long as they remain judges of the Federal Court. Lay members are also appointed for terms not exceeding seven years. Pursuant to subsection 5(2) of the *Act*, lay members hold office "during good behaviour" but may be removed by the Governor in Council for cause.

The Tribunal is stated to be a "court of record" in section 9 of the *Act*, and is given "all such powers, rights and privileges as are vested in a superior court of record" by section 8 of the *Act* with respect to "the attendance, swearing and examination of witnesses, the production and inspection of documents, the enforcement of its orders and other matters necessary or proper for the due exercise of its jurisdiction." The power of the Tribunal to punish for contempt is dealt with expressly in subsection 8(3) of the *Act*, which provides that persons shall not be punished for contempt "unless a judicial member is of the opinion that the finding of contempt and the punishment are appropriate in the circumstances."

Pursuant to subsection 10(1) of the *Competition Tribunal Act*, hearings of the Tribunal are to be conducted by panels of between three and five members. Each panel must be comprised of at least one lay member and one judicial member. Under section 12 questions of law are to be determined only by judicial members, whereas questions of fact or of mixed fact and law are to be determined by both lay members and judicial members. Decisions of the Tribunal may be appealed to the Federal Court of Appeal pursuant to section 13. Appeals on questions of fact require leave of the Federal Court of Appeal.

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[47] S.C. 1986, c. 26, now R.S.C. 1985, c. 19 (2nd Supp.), Part 1.

The Tribunal is empowered by section 8 of the *Competition Tribunal Act* to hear and determine all applications made under Part VII of the *Competition Act* "and any matters related thereto". This includes the traditional restrictive trade practices, such as refusal to deal, exclusive dealing and tied selling as well as proceedings under the abuse of dominant position and merger provisions of the *Act.*

1. Alex Couture Inc. *v.* Attorney General of Canada[48]

There have been a number of challenges to the constitutional validity of the Competition Tribunal since the proclamation of the *Competition Tribunal Act* in 1986. The first challenge was proceeded with in *Alex Couture Inc.* v. *Attorney General of Canada*, which was decided at the trial level by Mr Justice Philippon of the Quebec Superior Court in April, 1990.

This case arose out of contested merger proceedings which were initiated before the Competition Tribunal by the Director of Investigation and Research in 1987. Murray Couture Sr and his children had effected a merger in January, 1987 with Pierre Verville in respect of Sanimal Industries Inc., the subsidiary of which was Alex Couture Inc. Two days after the merger was consummated, a representative of the Director advised the parties that the Director was investigating the transaction. The parties undertook to limit the integration of the operations involved pending the Director's investigation. Approximately five months later the Director commenced proceedings before the Tribunal for an order compelling the dissolution of the merger and the divestiture of the assets involved. The Director took the position in proceedings before the Tribunal that the merger would prevent or lessen substantially competition in the rendering industry in Quebec and in the outlets through which the meat industry disposes of animal waste.

The parties to the merger responded by commencing an action in the Quebec Superior Court for a declaration, *inter alia*, that the Competition Tribunal is constitutionally invalid. Significantly, the parties obtained an interlocutory order from the Quebec Superior Court staying the application before the Tribunal pending the resolution of the constitutional challenge. That order was upheld by the Quebec Court of Appeal.

Mr Justice Philippon rejected the plaintiffs' initial argument that the *Competition Act* is not a valid exercise of Parliament's jurisdiction under the *Constitution Act, 1867*. Relying upon extensive expert evidence of Canadian and American economists and lawyers, and after having considered a number of Supreme Court of Canada decisions pertaining to the constitutionality of specific provisions of the *Combines Investigation Act*, Philippon J. held that "....with respect to the distribution of powers, the federal authority can validly establish a system for regulating competition using means of a penal nature, as have always

[48] (1990), 69 D.L.R. (4th) 635, 30 C.P.R. (3d) 486 (Que. Sup. Ct) [hereinafter *Couture* cited to C.P.R.], *rev'd* (1991), 83 D.L.R. (4th) 577 (C.A.).

existed, but also using other means such as those concerned with verifying mergers as in the present case".[49]

His Lordship also rejected the plaintiffs' argument that the merger provisions of the *Competition Act* could not apply to the animal dismembering industry because of the so-called "regulated industries" defence. He held that although this industry was extensively regulated, provincial regulation concerned the quality of services and products in the industry rather than competition. As a result, he concluded that there was no incompatibility between federal and provincial regulation of this industry, and no reason why existing provincial regulations should render federal regulation of mergers and competition in this industry inapplicable.

Mr Justice Philippon did, however, accept the plaintiffs' argument that the provisions of the *Competition Tribunal Act* which establish the Tribunal are constitutionally invalid.

He held that the combination of subsection 5(2) of the *Act* which permits lay members to be removed from the Tribunal "for cause" and the orders appointing Dr Frank Roseman and Marie-Hélène Sarrazin to the Tribunal "during good behaviour" for fixed terms "renders security of tenure ambiguous".[50] His Lordship found fault with the fact that although the *Competition Tribunal Act* provides for the removal of lay members for cause, "the causes are not mentioned and the process does not provide that the interested party has the right to be heard".[51]

His Lordship also found fault with Dr Roseman's continuing role as a member of the Restrictive Trade Practices Commission (R.T.P.C.) in respect of inquiries commenced prior to the June, 1986 amendments to the *Combines Investigation Act*. Dr Roseman had been a member of the R.T.P.C. prior to the amendments and continues in that role at this time. After referring to the decision of the Supreme Court of Canada in *Hunter* v. *Southam Inc.*[52] in which the Court found that the R.T.P.C. was not sufficiently independent to act as a neutral and detached arbiter in issuing search warrants under the *Combines Investigation Act*, Mr Justice Philippon held that Dr Roseman's continuing role as a member of the R.T.P.C. gave rise to a perception that the Competition Tribunal was not impressed with the essential element of judicial independence which, on an institutional plane, required "the preservation of the separateness and integrity of the judicial branch and a guarantee of its freedom from unwarranted intrusions by, or even intertwining with, the legislative and executive branches".[53]

Mr Justice Philippon also found fault with Ms Sarrazin's appointment to the Tribunal on a part-time basis. The evidence established that notwithstanding Ms Sarrazin's appointment to the Tribunal, she

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[49] *Ibid.* at 517.

[50] *Ibid.* at 524.

[51] *Ibid.*

[52] [1984] 2 S.C.R. 145, 11 D.L.R. (4th) 641 [hereinafter *Hunter*].

[53] *Supra*, note 48 at 527 (Sup. Ct) (Phillippon J. quoting from *Beauregard* v. *Canada*, [1986] 2 S.C.R. 56 at 77, 30 D.L.R. (4th) 481 at 497).

continued to act as a consultant to private firms and public institutions in the finance area in strategic planning. His Lordship cited with approval the following statement of Hannan J. of the Quebec Superior Court in *R.* v. *Bracconier*:

> With respect for the contrary opinion, a part-time judge, who devotes his time outside of court to the pursuit of the interests of clients whose identity is not always known, runs the serious risk of not appearing to be impartial in the eyes of an informed man viewing the matter realistically and practically and having thought the matter through. In addition, it would seem that this doubt may exist through the mere fact that the judge is a part-time judge, as was noted by the author Shetreet and the Honourable Mr. Justice Deschênes.[54] [translation]

Mr Justice Philippon rejected the argument of the Attorney General of Canada that the Tribunal was not a court of law within the meaning of sections 96 to 101 of the *Constitution Act, 1867* nor a tribunal within the meaning of section 11(d) of the *Canadian Charter of Rights and Freedoms* or section 2 of the *Canadian Bill of Rights*.[55] He held that although the Competition Tribunal has certain attributes of an administrative tribunal (such as its designation as a tribunal, the presence of lay members and the power to deal with proceedings informally and expeditiously), the powers granted to the Tribunal "exceed in large measure a purely administrative role and place the body into the category of courts which have broad powers".[56] He stated:

> In our view, Parliament does not have competence to assign the powers that the Act assigns to the Competition Tribunal, [equating] it to a superior court of record with all the powers of a true court, without assigning to this tribunal the essential attributes of independence.
>
> This insufficiency manifests itself in the structure of the Tribunal in the selection of the lay members, their role, the removal procedure, the links which, by means of a transitional provision in the Act, persist with the executive branch of our system, without forgetting the possible perception of partiality by a reasonable person because of this ongoing link and the part-time nature of the function of one of the members.[57]

For these reasons, Mr Justice Philippon held that the constitutional right of the plaintiffs to an independent and impartial tribunal was infringed by the presence of lay members in the institutional structure of the *Competition Tribunal Act*. His Lordship issued a declaration that the Competition Tribunal is constitutionally invalid.

It is interesting that Mr Justice Philippon found that the right of the plaintiffs to a hearing by an independent and impartial tribunal had been infringed without identifying the source of that right. This appears to be the central weakness of the decision. It does not appear that His

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[54] [1988] R.J.Q. 981 at 989 (C.S.).
[55] S.C. 1960, c. 44 *now* R.S.C. 1985, Appendix III.
[56] *Supra*, note 48 at 531 (Sup. Ct).
[57] *Ibid.*

Lordship proceeded on a division of powers basis. There is no finding in the decision that such a right is conferred under the *Charter*. The only portion of His Lordship's reasons which deals with this issue in a direct sense is contained in the following passage:

> The question then arises as to the right of the plaintiffs to impartial treatment by an independent tribunal. If the right advanced by the plaintiffs does not come within s. 11 or 7 of the *Canadian Charter of Rights and Freedoms*, s. 2(e) of the *Canadian Bill of Rights* applies, at least with respect to the execution of orders, as the Competition Tribunal has the power to punish for contempt pursuant to s. 8(3).[58]

Section 2(e) of the *Canadian Bill of Rights* requires that no law of Canada shall "be construed or applied" so as to deprive a person of the "right to a fair hearing in accordance with the principles of fundamental justice for the determination of his rights and obligations". This provision does not have true constitutional status, however, and does not give rise to a constitutional requirement of independence. Furthermore, there was no issue of contempt in the proceedings before His Lordship. Also, subsequent to the release of Mr Justice Philippon's reasons the Federal Court of Appeal held, in *Chrysler Canada Ltd* v. *Canada (Competition Tribunal)*,[59] that as an inferior court the Tribunal does not have the power to punish persons for failing or refusing to abide by its orders outside the presence of the Court. Assuming that Philippon J. meant to find that the *Competition Tribunal Act* is inconsistent with the *Bill of Rights* (he made no such explicit finding in his reasons) the question remains as to whether His Lordship had a proper legal basis to issue a declaration that the Competition Tribunal is constitutionally invalid.

The Crown appealed to the Quebec Court of Appeal. The Court of Appeal allowed the appeal and rejected virtually all of the arguments which had been accepted by the trial judge. The reasons of the Court, delivered on September 9, 1991, were written by Madame Justice Rousseau-Houle.[60]

Rousseau-Houle J.A. agreed with the lower court's determination that the power to legislate with respect to competition falls within the federal government's trade and commerce power (subsection 91(2) of the *Constitution Act, 1867*). The Court relied on the Supreme Court of Canada's decision in *General Motors* v. *City National Leasing*,[61] which held that in order to fall within the trade and commerce power:

> (1) the legislation must be part of a general regulatory scheme; (2) the scheme must be monitored by the continuing oversight of a regulatory agency; (3) the legislation must be concerned with trade as a whole rather than with a particular industry; (4) the legislation should be of a nature that the provinces jointly or severally would be constitutionally

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58 *Ibid.* at 528.

59 *See infra*, note 106 and accompanying text.

60 *See supra*, note 48 (C.A.).

61 [1989] 1 S.C.R. 641, 58 D.L.R. (4th) 255 [hereinafter *GM* cited to S.C.R.].

> incapable of enacting; and (5) the failure to include one or more provinces or localities in a legislative scheme would jeopardize the successful operation of the scheme in other parts of the country.[62]

Rousseau-Houle J.A. found that in the present case all of these "hallmarks" were present.[63] She held that the regulation of competition must be at the national level in order to be effective. Rousseau-Houle J.A. agreed with Philippon J.'s ruling that despite the fact that the industry in question is regulated by the provincial government, no inconsistency is to be found between the federal competition law and the provincial law governing the industry.

The Court disagreed with the trial judge's ruling that the Competition Tribunal does not possess all the attributes of a fair and impartial tribunal. Rousseau-Houle J.A. relied on the decision of Mr Justice Le Dain in *Valente* v. *R.*,[64] which stated that judicial independence has three essential conditions:

> (1) the members of the Tribunal must have security of tenure;
> (2) they must enjoy financial security; and
> (3) the tribunal must have institutional independence with respect to matters of adminstration bearing directly on the exercise of its judicial function.

Rousseau-Houle J.A. found that the Competition Tribunal satisfied all three conditions. Section 5 of the *Competition Tribunal Act* provides that judicial members of the Tribunal are appointed for a term of seven years to hold office so long as they are Federal Court judges. Lay members of the Tribunal are appointed for a term of seven years and hold office during good behaviour but may be removed by the Governor in Council for cause. The remuneration of Tribunal members is fixed by the Governor in Council.

Finally, Rousseau-Houle J.A. held that the Tribunal does, in fact, possess institutional independence. Under the 1986 *Act*, the Director has the power of enquiry while the Tribunal only exercises an administrative function.

Based on the foregoing, Rousseau-Houle J.A. held that the Competition Tribunal had satisfied the test outlined by de Grandpré J. in *The Committee for Justice and Liberty* v. *National Energy Board*:[65] an informed person, viewing the matter realistically and practically, and having thought the matter through, would conclude that the Tribunal is impartial. She added that the *Competition Tribunal Act* contained adequate safeguards to ensure the impartiality of the Tribunal.

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[62] *Ibid.* at 643.
[63] *Supra*, note 48 at 611 (C.A.).
[64] [1985] 2 S.C.R. 673, 24 D.L.R. (4th) 161.
[65] (1976), [1978] 1 S.C.R. 369, 68 D.L.R. (3d) 716 [hereinafter *National Energy Board* cited to S.C.R.].

2. *The* NutraSweet *Case*[66]

On June 1, 1989 the Director of Investigation and Research filed a notice of application with the Competition Tribunal under sections 77 and 79 of the *Competition Act* for an order prohibiting certain business practices of NutraSweet which were alleged to be contrary to the exclusive dealing, tied selling and abuse of dominant position provisions of the *Act*.

NutraSweet produces aspartame, an artificial sweetener which it sells in Canada and elsewhere under the brand name NutraSweet. NutraSweet has use patents in effect in Australia and the United States and accounts for all sales of aspartame in those countries. NutraSweet also markets more than 80% of the aspartame sold in Europe and more than 95% of the aspartame sold in Canada. The only competitor of NutraSweet in Canada is Tosoh Canada Ltd, a wholly owned subsidiary of Tosoh Corporation of Japan. The Director's investigation was initiated by a complaint from Tosoh.

After the Tribunal had heard all the evidence in this case over more than 25 days of hearings, but before final arguments had been presented, Mr Justice Philippon rendered his decision in the *Couture* case. As a result, NutraSweet took the position in the proceedings before the Tribunal that the Tribunal was constitutionally invalid. That issue was argued before the Tribunal in July, 1990.

Dr Roseman sat as a member of the panel which heard the *NutraSweet* case. The constitutional challenge in the case pertained to the fact and manner of Dr Roseman's appointment to the Tribunal, and to the fact that Dr Roseman continued to sit as a member of the R.T.P.C. NutraSweet essentially repeated the arguments which had been accepted by Philippon J. in the *Couture* case and took the position that Dr Roseman was not sufficiently independent to sit as a member of the Tribunal because:

> (a) Dr Roseman has been appointed to the Tribunal for a limited term of seven years but was eligible for re-appointment should the Governor in Council so choose;
> (b) Dr Roseman may be removed from the Tribunal "for cause"; and
> (c) Dr Roseman is still a member of the R.T.P.C. and in that role has functions which are institutionally inconsistent with a duty to act judicially.[67]

Interestingly, when the issue of the constitutional validity of the Tribunal was raised, Dr Roseman stated for the record that he had absolutely nothing to do with the work of the R.T.P.C. since becoming a member of the Tribunal. He apparently offered to provide an affidavit to this effect but none was requested. This, in itself, is most unusual. Had such an affidavit been requested and given, Dr Roseman would have

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[66] *Canada (Dir. of Investigation and Research)* v. *NutraSweet Co.* (1990), 32 C.P.R. (3d) 1 (Competition Trib.) [hereinafter *NutraSweet*].
[67] *Ibid.* at 60-61.

had to appear in the proceedings as a witness and could potentially have been cross-examined. This surely would have prevented him from continuing to sit as a member of the panel which decided the case in that he could not have adjudicated in a case in which he had appeared as a witness. These roles are fundamentally incompatible. Pursuant to subsection 10(1) of the *Competition Tribunal Act*, each panel of the Tribunal must contain at least one lay member. Dr Roseman was the only lay member of the panel who heard the *NutraSweet* case. Had he filed an affidavit, it is strongly arguable that the proceedings would have to have been declared a nullity and the case would have to have recommenced before a differently constituted panel at a later date. Perhaps, given the result of the case (which will be discussed later in this paper) NutraSweet should have accepted Dr Roseman's offer.

During the course of argument, NutraSweet conceded that there was no provision in the *Charter* applicable to this case which expressly required that the Tribunal have a degree of independence akin to that enjoyed by the traditional senior courts. This is so because the only potentially applicable provisions of the *Charter* were sections 7 and 11(d). Section 7 does not apply to corporations[68] and, in any event, the proceedings did not involve potential infringements of life, liberty or the security of the person. Furthermore, section 11(d) of the *Charter*, which guarantees the right to a hearing by an "independent and impartial tribunal", only guarantees that right to a person charged with an offence. NutraSweet had not been charged with an offence. Rather, the proceedings before the Tribunal were civil in nature.

As a result, NutraSweet, relying upon the preamble to the *Constitution Act, 1867*, argued that because the Canadian Constitution is to be "similar in principle" to that which exists in the United Kingdom, there is an implicit constitutional requirement in Canada that anyone who exercises judicial functions must enjoy the kind of independence accorded to judges of senior courts. This argument was criticized by the Tribunal as proceeding on the basis of an "idealized view" of the separation of powers which occurs in the United Kingdom.[69] The Tribunal noted, for instance, that there are more than 25,000 justices of the peace in England and Wales who try criminal cases, and who are mostly part-time lay people with no security of tenure. Furthermore, the Restrictive Practices Court in the United Kingdom, which deals with issues similar to those considered by the Competition Tribunal, is comprised of a combination of superior court judges and lay members. The lay members serve for fixed terms, subject to re-appointment, and may be removed from the Court for inability, misbehavior or conflict of interest.

The Tribunal held that it itself is an inferior court which did not have the implied powers of a superior court and was subject to the supervision of a superior court. Although the Tribunal exercised functions of a judicial nature, its procedural obligation was to respect the

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[68] *Irwin Toy Ltd* v. *Quebec (A.G.)*, [1989] 1 S.C.R. 927, 94 N.R. 167.
[69] *Nutrasweet, supra*, note 66 at 63.

rules of natural justice and fairness in the conduct of its hearings. In this regard, the Tribunal held that the appropriate test to be applied in determining whether the Tribunal was sufficiently independent to be properly constituted was an administrative law test, rather than a constitutional one. That test emanates from the voluminous body of case law pertaining to challenges to the composition (rather than the existence) of administrative tribunals based upon apprehension of bias. The Tribunal, like the Quebec Court of Appeal in the *Couture* case, relied upon the reasons of Grandpré J. of the Supreme Court of Canada in the *National Energy Board* case[70] to hold that the apprehension of bias "must be a reasonable one, held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information."[71] The relevant question is whether such a person, having thought the matter through, would think it more likely than not that the Tribunal member in question, whether consciously or unconsciously, would not decide fairly.

Applying this test to the facts of case, the Tribunal rejected the suggestion that the presence of Dr Roseman on the panel hearing the case would create an apprehension of bias in a reasonable, informed person. The Tribunal stated:

> Using this test, we do not accept that because of the tenure and re-appointment provisions of the *Competition Tribunal Act* and the fact that Dr. Roseman is still a member of the RTPC, the presence of Dr. Roseman would create in a reasonable, informed person an apprehension of bias. This imaginary reasonable, informed person would take into account factors such as the following: that each member of the tribunal, including lay members, must before commencing his duties take an oath that he will "duly and faithfully, and to the best of his skill and knowledge, execute the powers and trusts reposed in him as a member of the tribunal" (*Competition Tribunal Act*, s. 7(1)); that no member can take part in any matter before the tribunal in which he has a direct or indirect financial interest (s. 10(3)); that a lay member must be assigned to a particular case by the chairman who is a judge of the Federal Court and who will, presumably, take into account any valid reason including that of possible bias for not assigning a particular lay member to a particular case; that every panel hearing a case is presided over by a judge of the Federal Court who will also, presumably, be conscious of any apparent bias in a lay member and halt proceedings where he feels such bias to exist (s. 10(2)); that lay members do not participate in the decision of any question of pure law (s. 12(1)(a)); and that there is an appeal from the tribunal to the Federal Court of Appeal as of right on any question of law or mixed law and fact, and with leave on any question of fact alone (s. 13). Surely a reasonable, informed person would see in these arrangements adequate protection against bias on the part of a given lay member.[72]

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[70] *Supra*, note 65.

[71] *Ibid.* at 394.

[72] *Nutrasweet, supra*, note 66 at 66-67.

The Tribunal rejected explicitly NutraSweet's argument that the power conferred upon the Governor in Council under the *Competition Tribunal Act* to remove a lay member for cause would make it appear to a reasonable observer that lay members would decide cases in favour of the Director in order to avoid dismissal or to create favour in hope of re-appointment. The Tribunal cited with approval the decision of the Federal Court of Appeal in *Sethi* v. *Canada (Minister of Employment and Immigration)*[73] in which the Court held that a reasonable, informed observer should not be taken to assume that the government will favour a member of a tribunal who deals unfairly with a party before that tribunal.

NutraSweet also argued that Parliament had conferred upon the Tribunal "superior court functions",[74] and took the position that it was precluded from doing so by sections 96 to 100 of the *Constitution Act, 1867*. The Tribunal rejected this argument and held that Parliament had ample authority to establish the Tribunal under section 101 of the *Constitution Act, 1867*, which gives Parliament the power to establish "additional Courts for the better Administration of the Laws of Canada". The Tribunal concluded, as a result, that the Panel hearing the case had been validly constituted, and dismissed NutraSweet's argument as to the constitutional validity of the Tribunal.

3. Canada (Director of Investigation and Research) *v.* Xerox Canada Inc.[75]

In 1989, the Director commenced proceedings before the Tribunal for an order pursuant to section 75 of the *Competition Act* compelling Xerox Canada Inc. to accept Exdos Corporation as a customer for the supply of certain copier parts. This decision will be considered in more detail later in this paper.

During the course of the proceedings, the parties filed an agreed statement of facts in respect of an argument advanced by Xerox pertaining to the constitutional validity of the Tribunal. Xerox contemplated proceeding with arguments similar to those which had been made in the *Couture* and *NutraSweet* cases. The parties agreed to abide by the result of the Tribunal's decision pertaining to this issue in *NutraSweet*, and as a result, the *NutraSweet* decision was taken as being applicable to the panel which heard the *Xerox* case.

4. *Implications*

As discussed *infra*, the *Couture* case was overturned on appeal. The *NutraSweet* and *Xerox* cases currently are under appeal. This issue will almost certainly be finally determined by the Supreme Court of Canada.

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[73] (1988), 52 D.L.R. (4th) 681, 87 N.R. 389 (F.C.A.D.).

[74] *Nutrasweet, supra*, note 66 at 69.

[75] (1990), 33 C.P.R. (3d) 83 (Competition Trib.) [hereinafter *Xerox*].

In the event that the Federal Court of Appeal or Supreme Court of Canada accepts the analysis employed at the trial level in *Couture* and renders the Competition Tribunal inoperative, which appears unlikely in light of the decision of the Quebec Court of Appeal, the implications would be extremely serious. The abolition of the R.T.P.C. and the creation of the Competition Tribunal were among the most significant legislative initiatives effected when the *Competition Act* and *Competition Tribunal Act* were proclaimed in 1986. The Competition Tribunal is given exclusive original jurisdiction under the *Competition Tribunal Act* to adjudicate over and to issue orders in respect of the reviewable trade practice, abuse of dominant position and merger provisions of the *Act*, among others. Many of the 1986 amendments were enacted for the explicit purpose of making the *Act* more enforceable by, among other things, decriminalizing the merger and monopoly provisions. The civil provisions of the *Act* would be rendered largely unenforceable if the Competition Tribunal was prohibited from sitting, at least until the *Competition Act* and *Competition Tribunal Act* were amended to cure the deficiencies found to exist at the appellate level. If the history of legislative change in this area teaches us anything, it is that amending this legislation is a complex, arduous and time-consuming task.

C. *Investigative Provisions of the* Competition Act

The Director is given broad investigative powers under the *Competition Act*. Pursuant to section 11 of the *Act*, the Director may obtain *ex parte* orders from judges of a superior or county court or of the Federal Court compelling persons who have or are likely to have information that is relevant to an inquiry under the *Act* to attend at a specified place before a presiding officer and be examined under oath by the Director or his or her representative on any matter that is relevant to the inquiry, to produce documents specified in the order or to make and deliver to the Director "a written return under oath or affirmation showing in detail such information as is by the order required". This power is very similar to the power conferred upon the Director under section 17 of the *Combines Investigation Act*. There is a limited protection against self-incrimination provided for in subsection 11(3) of the *Competition Act*. Pursuant to that provision, no oral testimony or written return given by an individual pursuant to an order under this section can be used in any criminal proceedings commenced against the individual, other than a prosecution for perjury. The protection does not extend to corporations or to documents, and does not pertain to so-called "derivative evidence" which may be located by the investigators as a result of information provided by persons named in an order, either orally or in writing.

The Director may also obtain search warrants pursuant to section 15 of the *Competition Act*. The search warrant provisions were substantially amended in 1986 to reflect the decision of the Supreme Court of Canada in the *Hunter*[76] case, which struck down the predecessor provisions of the *Combines Investigation Act* on the basis that they infringed the right to be free from unreasonable search and seizure guaranteed under section 8 of the *Charter.*

1. Thomson Newspapers Ltd *v.* Canada (Director of Investigation and Research, Restrictive Trade Practices Commission)[77]

On August 16, 1985, several senior officers of Thomson Newspapers Limited were served with orders to appear before the Vice-Chairman of the R.T.P.C., or a person named by him, to be examined under oath and to produce documents named in the orders to appear. The orders were issued in connection with an inquiry commenced by the Director for the purpose of determining whether Thomson or its subsidiaries had committed the indictable offence of predatory pricing contrary to paragraph 34(1)(c) of the *Combines Investigation Act.*[78] Thomson and the affected executives responded by commencing an application in the Supreme Court of Ontario for a declaration that the orders to appear, and the statutory provisions pursuant to which they were issued, infringed the rights guaranteed by sections 7 and 8 of the *Charter* and accordingly were of no force or effect.

Section 7 of the *Charter* guarantees to everyone the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice. Section 8 confers the right to be free from unreasonable search or seizure. Thomson argued that section 7 encompassed, as aspects of fundamental justice, a right to remain silent and a right against self-incrimination. Thomson took the position that the compulsory oral examination provision of the 1970 *Act*[79] infringed those rights by compelling the giving of evidence in the context of the investigation of a suspected criminal offence.

Thomson also argued that the compulsory production of documents provided for under section 9, the predecessor to section 11 of the 1985 *Act* amounted to a "seizure" within the meaning of section 8 of the *Charter.* It took the position that because of the absence of any of the traditional safeguards associated with authorizations to search, such as reasonable and probable grounds to believe that an offence has been committed, and that evidence of the offence will be discovered if the order is issued, the compulsory production of documents power was unreasonable and constitutionally invalid.

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76 *Supra*, note 52.

77 (1990), 67 D.L.R. (4th) 161, 76 C.R. (3d) 129 (S.C.C.) [hereinafter *Thomson Newspapers* cited to D.L.R.].

78 R.S.C. 1970, c. C-23 (*now* R.S.C. 1985, c. C-34, para. 45(1)(c)).

79 *Ibid.* s. 17 (*now* R.S.C. 1985, c. C-34, s. 19).

(a) *Compulsory Oral Examination*

The Court's decision in *Thomson Newspapers* is both complex and confusing. The appeal was heard by a five-person bench. Each judge wrote extensive reasons. Some of the judges accepted some of Thomson's arguments and some rejected others, largely for different reasons. The Court divided 2-2-1 as to whether the compulsory oral examination provisions infringe section 7 of the *Charter*. Mr Justice La Forest and Mme Justice L'Heureux-Dubé both held the relevant statutory provisions not to infringe section 7. Mme Justice Wilson and Mr Justice Sopinka held that the legislative provisions contravened section 7 of the *Charter*. Mr Justice Lamer, *ex proprio motu*, held that the wrong section of the *Act* had been challenged. He held that the applicants should have attacked the statutory provision which conferred a limited protection against self-incrimination, and prohibited witnesses from refusing to testify, rather than the provision which empowered the R.T.P.C. to compel such persons to testify. For this reason, he was not prepared to decide the section 7 issue.

The concerns which Mr. Justice Lamer expressed pertaining to this issue were not raised by any of the judges who heard *Thomson Newspapers*, or the companion case, *Stelco Inc.* v. *Canada (A.G.)*,[80] either at first instance or at the Court of Appeal. These concerns were not raised in the proceedings before the Supreme Court of Canada by any of the respondents or intervenors in either case. None of the parties were invited to address His Lordship's concerns either during the argument of the appeal or in written submissions subsequent to the argument. The result of Mr. Justice Lamer's decision, however, was the dismissal of Thomson's appeal with respect to section 7 of the *Charter*. This issue has yet to be determined by the Supreme Court and presumably can be raised in other proceedings should the Director seek to utilize the oral inquiry powers conferred under the *Competition Act* in respect of another matter.

(b) *Compulsory Production of Documents*

The Court dismissed Thomson's appeal pertaining to the compulsory production of documents by a majority of three to two. Mr. Justice La Forest and Mme Justice L'Heureux-Dubé found that compulsory production of documents constituted a seizure within the meaning of section 8 of the *Charter*. They found, however, that the power provided for under the *Act* was not unreasonable. Mr Justice Sopinka was not prepared to find that the compulsory production of documents constituted a seizure at all. Mme Justice Wilson, with whom Mr Justice Lamer concurred in respect of this issue, held that the compulsory production of documents provided for under the *Act* was an unreasonable seizure,

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[80] (1990), 68 D.L.R. (4th) 518, 55 C.C.C. (3d) 227 (S.C.C.) [hereinafter *Stelco* cited to D.L.R.].

in that there was no requirement that the Director obtain prior authorization on reasonable and probable grounds.

(c) *Significance*

The result of the Supreme Court's decision in *Thomson Newspapers* will be to invite further constitutional challenges to the oral examination provisions when the Director seeks to use this power. The issue as to whether the statutory provisions which confer this power upon the Director are constitutionally valid will not be finally determined for many years.

In the interim, it can reasonably be expected that if a fresh constitutional challenge is brought to the oral inquiry provisions of the Act, persons named in orders issued pursuant to section 11 in respect of other inquiries will seek orders prohibiting the Director from proceeding with their examinations pending the resolution of the constitutional challenge. Applications for stays were brought successfully in several cases involving inquiries under the *Combines Investigation Act* prior to the decision of the Supreme Court in *Thomson Newspapers*, including *YRI-York Ltd* v. *Canada (A.G.)*,[81] and *Ref. re Competition Act*.[82] There appears to be no reason why similar applications could not be brought in respect of inquiries commenced under the *Competition Act* should the Director attempt to compel witnesses to submit to oral examinations under oath.

D. *Merger Provisions*

In *Couture*,[83] the plaintiffs alleged that the merger provisions of the *Competition Act* were constitutionally invalid in that these provisions infringed the plaintiffs' "freedom of association" as guaranteed by subsections 2(d) of the *Charter* and 1(e) of the *Canadian Bill of Rights*. Freedom of association is one of the fundamental freedoms guaranteed to "everyone" in section 2 of the *Charter*, and is described as a human right and fundamental freedom in section 1 of the *Bill of Rights*.

Mr. Justice Philippon held that the proposed merger involving six corporations and an individual was an "association" within the meaning of the *Charter* and *Bill of Rights*. He stated, that "I must assume that I am, at least in the case now in question, in the presence of a union of common industrial objectives included within the notion of association in its broad sense....".[84] His Lordship concluded that the provisions of the *Act* which empower the Tribunal to order the dissolution of a merger, and to order that the parties to a proposed merger not proceed with it, "removes the plaintiffs' right of association" protected by the *Charter* and *Bill of Rights*.[85]

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[81] [1988] 3 F.C. 186, 21 C.P.R. (3d) 161 (A.D.).
[82] (1989), 62 D.L.R. (4th) 565, 27 C.P.R. (3d) 430 (B.C.S.C.).
[83] *Supra*, note 48 (Sup. Ct).
[84] *Ibid.* at 521.
[85] *Ibid.* at 523.

In most *Charter* cases where the constitutional validity of legislation is called into question, those who seek to support the legislation adduce so-called "section 1 evidence". That is, they adduce evidence to demonstrate that even if the legislation in question infringes a right or freedom guaranteed by the *Charter*, it is "demonstrably justified in a free and democratic society" within the meaning of section 1 of the *Charter*, and accordingly, is constitutionally valid. In *Couture*, however, "the Attorney General of Canada did not undertake any proof of justification".[86] Accordingly, Mr. Justice Philippon issued an order declaring *ultra vires* and inapplicable to the merger in issue in this action, subparagraphs 92(1)(e)(i), 92(1)(f)(i) and 92(1)(f)(ii) of the *Act*. These provisions empower the Tribunal to prohibit a pending merger or to compel the dissolution of a completed merger.

As is stated above, the Quebec Court of Appeal rejected virtually all of the arguments which had been accepted by Mr. Justice Philippon, including those pertaining to the constitutional validity of the merger provisions. The Court held that neither the purpose nor the effect of the merger provisions gave rise to a prima facie infringement of the freedom of association guaranteed under the *Charter*. This is so because the merger provisions only prohibit unlawful combinations or activities which are not deserving of constitutional protection. Furthermore, even if it could be established that the merger provisions violate the freedom of association they would be saved under section 1 of the *Charter* in that they "reasonably establish a balance between the private interests of the individuals affected by these measures and the state's interest".[87]

E. *Refusal to Deal*

In the *Xerox* case,[88] Xerox challenged the constitutional jurisdiction of the Parliament of Canada, on a division of powers basis, to enact the refusal to deal provisions contained in section 75 of the *Competition Act*. Pursuant to this section, the Tribunal is empowered to order a supplier to accept a customer on usual trade terms if the Tribunal finds that:

> (a) a person is substantially affected in his business or is precluded from carrying on business due to his inability to obtain adequate supplies of a product anywhere in a market on usual trade terms;
> (b) the person is unable to obtain adequate supplies of the product because of insufficient competition among suppliers of the product in the market;
> (c) the person is willing and able to meet the usual trade terms of the supplier or suppliers of the product; and
> (d) the product is in ample supply.

Pursuant to subsection 75(2) of the *Act*, an article is not to be considered as a separate product for the purposes of this section only

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[86] *Ibid.*
[87] *Supra*, note 48 at 643 (C.A.).
[88] *Supra*, note 75.

because it is differentiated by a trademark or similar mark unless the article occupies such a dominant position as to substantially affect the ability of a person to carry on business in that class of articles in the absence of access to the article in question.

Significantly, there is no requirement in section 75 that the refusal to deal have an impact upon competition or upon the competitive process. Rather, the section requires a careful analysis as to the manner in which the complainant's business has been affected by the refusal.

Xerox argued that because the Tribunal is empowered by section 75 to make an order which governs a supplier's conduct without reference to the impact which that conduct has had upon competition, section 75 is legislation with respect to property and civil rights in the provinces and is not legislation with respect to any of the heads of power conferred upon Parliament under section 91 of the *Constitution Act, 1867*. Xerox also argued that even if section 75 is otherwise valid, it cannot support an order where the order is not founded upon an effect on competition.

The Tribunal rejected both contentions. With respect to the second argument, the Tribunal held that the order sought was directly related to the preservation of competition in the service market for Xerox copiers. With respect to the first argument, the Tribunal held the impact of the refusal to deal provisions is "limited and carefully constrained to redress conduct which is considered to be of competitive prejudice".[89] The Tribunal held that section 75 can be characterized as ancillary to the main purpose of the *Competition Act* and as having an intimate connection to that purpose. The Tribunal held that the objective of this section is "to promote or preserve competition",[90] and accordingly, is within the constitutional jurisdiction of Parliament as defined by the Supreme Court of Canada in *GM*.[91]

II. PROCEEDINGS BEFORE THE COMPETITION TRIBUNAL

There have been a number of important proceedings under the civil and criminal provisions of the *Competition Act* in recent months. Significant fines have been imposed under the bid-rigging and resale price maintenance provisions in *R.* v. *Shell Canada Products Ltd*,[92] as well as in the so-called business forms and flour cases.[93]

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[89] *Ibid.* at 125.

[90] *Ibid.* at 126.

[91] *Supra*, note 61.

[92] (1990), 75 C.R. (3d) 365, 29 C.P.R. (3d) 32 (Man. C.A.).

[93] The "business forms" case refers to simultaneous convictions of the four Canadian business forms companies in Halifax and Saskatoon in June, 1988. The fines were imposed following joint recommendations as to sentence. The only reported endorsement is that of Mr. Justice MacDonald in *Canada* v. *R.L. Crain Inc.* (1988), 22 C.P.R. (3d) 462 (N.S.S.C.).

The fines in the "flour" case also were imposed in the Ontario courts in 1991 following a joint recommendation as to sentence. There is no reported decision or endorsement in respect of the fines imposed in this case.

In addition, a number of proceedings commenced before the Competition Tribunal have resulted in significant decisions pertaining to the exclusive dealing, tied selling, abuse of dominance and merger provisions of the Act. This paper will focus on several recent decisions of the Tribunal.

A. *Refusal to Deal*

The Tribunal has considered the refusal to deal provisions of the Act in the *Xerox* and *Chrysler Canada Ltd* cases. In both cases the Tribunal found in favour of the Director and issued orders pursuant to section 75 of the *Competition Act* directing the respondents to accept the complainants as customers on usual trade terms.

1. Canada (Director of Investigation and Research) *v.* Chrysler Canada Ltd[94]

(a) *The Tribunal's Decision*

On December 14, 1988, the Director filed an application with the Tribunal pursuant to section 75 of the *Competition Act* for an order compelling Chrysler Canada Ltd to accept Richard Brunet as a customer for the supply of certain Chrysler parts, requiring Chrysler to "reverse all steps taken to dissuade any person in Canada from conducting business with Brunet",[95] and "directing that Chrysler take all such ancillary and necessary steps and actions to restore Brunet to the position he enjoyed before the actions herein complained of".[96] The Tribunal had no statutory jurisdiction to make any of these orders, with the exception of the first.

Brunet had operated a business involving the export of automotive parts to markets outside North America since 1977. Brunet dealt with Chrysler as well as two major parts suppliers in the United States and purchased small volumes of auto parts from several suppliers in Canada. Brunet was encouraged by Chrysler to expand the sale of its auto parts in the export market and Chrysler referred potential customers to him. In 1986 Chrysler informed Brunet that it would no longer accept orders from him "since there is no longer any organizational responsibility for handling these orders in Canada".[97] As a result, Brunet attempted to acquire parts through Chrysler dealers. Chrysler responded by advising its dealers that they were not to resell parts for distribution in the export market. Chrysler's dealer agreements were amended to implicitly prohibit such sales. Thereafter, Brunet experienced difficulty in obtaining Chrysler parts in Canada. He was able to obtain identical parts, however,

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[94] (1989), 27 C.P.R. (3d) 1 (Competition Trib.) [hereinafter *Chrysler Canada Ltd*], *aff'd* [1991] 2 F.C. 563, 31 C.P.R. (3d) 510 (A.D.).

[95] *Ibid.* at 2.

[96] *Ibid.* at 3.

[97] *Ibid.* at 6.

from Chrysler U.S., albeit on a modified basis insofar as terms of delivery and price were concerned.

The Tribunal accepted the Director's argument that the product in question in this case was Chrysler auto parts rather than auto parts generally. In doing so, the Tribunal focused upon the customers of Brunet to determine whether potential substitute parts would be acceptable to them. The Tribunal accepted Brunet's evidence that his customers specified in their orders that they wanted genuine Chrysler parts.

Although the issue was not dealt with explicitly in the Tribunal's reasons, the Tribunal appears to have taken from this that Brunet's customers would not accept substitute parts if Chrysler parts were unavailable. Teitelbaum J., who wrote the reasons for the Tribunal, stated the following:

> The evidence shows that Brunet responded to direct orders of customers, that customers specified that they wanted genuine Chrysler parts, and that they used numerical codes specific to Chrysler's parts system when ordering. There was no question of substituting parts of other suppliers for those of Chrysler. The product in question is thus Chrysler auto parts.[98]

The Tribunal also accepted the Director's argument that the relevant market in which Brunet purchased Chrysler auto parts (for the purpose of determining whether Brunet was substantially affected in his business due to his inability to obtain adequate supplies of Chrysler parts "in a market" within the meaning of subsection 75(1)(a) of the *Act*) is Canada, rather than North America. This was an important determination in that the evidence established that Brunet continued to acquire parts from Chrysler U.S. which were physically identical to the parts he had obtained from Chrysler Canada prior to the termination of its sales relationship with him. The Tribunal found that the pricing of Chrysler Canada was premised on, but distinct from, the pricing of Chrysler U.S. and that the "market conditions" in the two countries were different. The Tribunal also found that Brunet was treated differently by Chrysler Canada in that it offered him pricing protection and delivery advantages which were not made available by Chrysler U.S.

The Director argued that the Tribunal, in determining whether Brunet had been "substantially affected" in his business by the refusal of Chrysler Canada to supply him with Chrysler auto parts, should have regard only to "the specific line or product within the overall enterprise affected by the refusal".[99] A majority of the Tribunal rejected this argument and held that the effect of this refusal on Brunet's entire business activity should be assessed. The Tribunal held that a proper assessment of Brunet's business required that the following questions be answered: (a) Does the product in issue account for a large percentage of the overall business? (b) Is the product easily replaced by other

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[98] *Ibid.* at 10.
[99] *Ibid.* at 18.

products sold by the business? (c) Does the sale of the product use up capacity that could be devoted to other activities? (d) Is the product used or sold in conjunction with other products and services so that the effect on the overall results of the business may be much greater than indicated by the volume of the product purchased?[100]

Chrysler Canada relied upon evidence which illustrated that Brunet had larger sales and profit after Chrysler Canada refused to supply parts to him than he did during the period that he had a sales relationship with the company. Chrysler argued that this evidence demonstrated that Brunet had not been "substantially affected in his business" by the termination of the sales relationship. The Tribunal held that this evidence was not conclusive, and stated the following:

> The Tribunal is satisfied, through the evidence of Brunet, that the gross sales and profits earned from the sale of other products is totally unrelated, by way of the utilization of capacity or by way of demand, to the sale of Chrysler parts. The sale of other parts took very little of Brunet's time or that of his assistant and his business could easily have accommodated these additional sales if he had not lost sales of Chrysler parts as a result of his inability to obtain supplies from Chrysler Canada. Similarly, the demand for Chrysler auto parts was independent of the demand for other parts. Accordingly, any changes in the sales of other parts and the gross margins therefrom would have taken place whether or not Brunet's relationship with Chrysler Canada had changed.[101]

The Tribunal accepted Chrysler Canada's submission that the term "substantially affected" should be given its ordinary meaning, and requires the Director to establish that the impact of a refusal to deal upon the complainant's business "means more than something just beyond *de minimis*".[102] The Tribunal applied this definition to the facts of this case and held that Brunet, who had lost sales of approximately $200,000 and gross profits of approximately $30,000 in the two years after the termination of his sales relationship with Chrysler Canada, had been substantially affected within the meaning of the *Act*. The Tribunal held that there was insufficient competition in Canada in respect of the supply of Chrysler parts. Chrysler Canada apparently did not dispute that Brunet was willing and able to meet its usual trade terms and that the product was in ample supply. As a result, the Tribunal held that it had a discretion to compel Chrysler Canada to accept Brunet as a customer and issued the appropriate order. Significantly, the Tribunal held that it does not have jurisdiction to order the payment of costs, as this power has not been specifically conferred upon it by statute.

Chrysler Canada appealed the decision of the Tribunal to the Federal Court of Appeal. For reasons released on September 19, 1991, the Court dismissed the appeal.[103] Chrysler did not seek leave to appeal

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[100] *Ibid.*

[101] *Ibid.* at 19.

[102] *Ibid.* at 23.

[103] *Canada (Director of Investigation and Research)* v. *Chrysler Canada Ltd* (1991), 38 C.P.R. (3d) 25 (F.C.A.D.).

the findings of fact made by the Tribunal pursuant to subsection 13(2) of the *Competition Tribunal Act* and confined its appeal to the Tribunal's findings of law and mixed fact and law. As a result, the Court was bound by the Tribunal's findings of fact. The Court rejected the contention of Chrysler Canada that the Tribunal had erred in failing to find that "the cause of the substantial effect of Brunet's business was his inability to obtain adequate supplies of the product and not other factors".[104] The reasons of the Court were written by Mr Justice Mahoney. He stated the following in respect of this issue:

> The tribunal did not find that, as a matter of fact, other factors had not substantially affected Brunet's business after Chrysler Canada had refused to deal with it. That, in my view, begs the issue. The purpose of the proceeding before the tribunal was to determine whether, as alleged by the director, there had been a refusal to deal which, in a manner otherwise offensive to s. 75(1) had substantially affected Brunet in his business. That the substantial effect on the business during the relevant period was not entirely due to other factors is implicit in the tribunal's decision. It is not a requirement of the provision that the refusal to trade and the resulting inability to obtain adequate supplies be the only factor substantially affecting the business; it is sufficient that it have a substantial effect whatever the impact of other factors.[105]

The Director also cross-appealed the decision of the Tribunal. The Tribunal had refused to order Chrysler Canada to delete from its dealer agreements those terms which prohibited dealers from reselling parts for distribution in export markets. The Tribunal held that it had no jurisdiction under subsection 75(1) of the *Act* to make such an order. The Court dismissed the cross-appeal without calling on Chrysler Canada.

(b) *Contempt Proceedings:* Chrysler Canada Ltd *v.* Canada (Competition Tribunal)[106]

Four months after the Tribunal issued its order compelling Chrysler Canada to accept Brunet as a customer, the Director commenced contempt proceedings before the Tribunal because of Chrysler's alleged failure or refusal to abide by the terms of the Tribunal's order. Chrysler took the position that the Tribunal did not have jurisdiction to punish for contempt committed *ex facie curiae*. The Chairman of the Tribunal, Madame Justice Barbara Reed, dismissed this objection and adjourned the Director's contempt motion to a later date to be determined on its merits.

Chrysler Canada appealed this order to the Federal Court of Appeal, which allowed the appeal and held that the Tribunal does not have the power to punish for contempt committed out of court. The Court held

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104 *Ibid.* at 28.
105 *Ibid.* at 29.
106 [1990] 2 F.C. 565, 31 C.P.R. (3d) 510 (C.A.) [hereinafter *Chrysler Canada (No. 2)* cited to C.P.R.], *leave to appeal granted* (2 May 1991), No. 22151 (S.C.C.).

that the Tribunal is an inferior court and as such, its contempt powers were "limited to contempt committed in the presence of the court"[107] unless broader contempt powers were conferred specifically and clearly by statute. The Court held that the *Competition Tribunal Act* did not contain a clear expression of an intention to confer on the Tribunal the power to punish for contempt those who fail to comply with the Tribunal's orders made under Part VIII of the *Competition Act.*

On May 2, 1991, the Competition Tribunal was granted leave to appeal to the Supreme Court of Canada on the question of whether or not the Federal Court of Appeal erred in its holding that the Tribunal lacked authority to punish for contempt. This matter has yet to be decided.

2. *The* Xerox *Case*[108]

In 1989 the Director commenced proceedings before the Tribunal for an order pursuant to section 75 of the *Act* compelling Xerox to accept Exdos Corporation as a customer for the supply of certain copier parts. Exdos was founded by a former employee of Xerox after he reached an agreement with Xerox whereby he would leave Xerox and create an independent company which would purchase used copier machines from Xerox in an "as is" condition, refurbish them and sell them into the second-hand market. Exdos was also given the right, initially on an experimental basis, to purchase copier parts for various second hand models covered by its contract with Xerox. The parties recognized from the outset that if the sales activities of Exdos conflicted with those of Xerox, the sales contract between the companies could be cancelled.

The contract between Exdos and Xerox was modified and extended on a periodic basis. Exdos purchased second-hand copiers from sources other than Xerox notwithstanding the exclusive nature of its contract with Xerox. Exdos also purchased parts from Xerox to enable it to service the machines which it sold to its customers. After 1983, copier parts were purchased from Xerox by Exdos and other independent service organizations "openly and without restriction".

The Tribunal found that the second-hand copier market and the option for an alternate source of service provided by independent service organizations such as Exdos are beneficial to consumers. Those selling second-hand equipment do so at prices substantially lower than are charged by Xerox for new machines. Furthermore, they provide service "of a quality comparable to that provided by Xerox, and on occasion better and at a lower price".[109]

The Tribunal found that Xerox parts are significantly more expensive than parts for other competing copiers. A study of comparable parts, which was admitted into evidence, demonstrated that prices for Xerox

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[107] *Ibid.* at 514.
[108] *Supra*, note 75.
[109] *Ibid.* at 94.

parts are from 198% to 951% higher than prices for similar parts used in competing copiers. The median differential was 389%. The Tribunal also found that Xerox is the largest supplier of copiers in Canada, having 90% of the copier placements in the high-volume range of the market, almost 50% in the median-volume range and about 33% in the low-volume range.

In 1987 Xerox U.S. implemented a policy whereby it refused to supply independent service organizations with certain copiers and with new product parts for resale. The Tribunal found that this policy was "clearly designed to undercut the viability of the [independent service organizations] and to preserve, if not enhance, the revenue derived by Xerox Corp. from the service aspect of its business".[110] This policy was adopted in Canada by Xerox in June, 1988, and in the Fall of 1988 Xerox ceased selling parts for resale to Exdos.

There was no issue in this case that the parts in question were in adequate supply and that Exdos was willing and able to meet the usual trade terms of Xerox. There was also no serious issue that Exdos was unable to obtain adequate supplies of Xerox parts and was substantially affected in its business as a result. The fundamental issue was whether section 75 of the *Competition Act* encompassed "a situation in which the product is proprietary and derives largely from a single source".[111]

The Tribunal rejected the argument of Xerox that the relevant product market was "the provision of reprographic equipment, parts and service to end use customers"[112] and concluded that the "boundaries of the product market can properly be defined as parts for Xerox copiers."[113] The Tribunal concluded that there was "no compelling reason flowing from either the legislative text of section 75 or from general economic principles which requires that proprietary replacement parts should not be considered to be a relevant product for section 75 purposes."[114]

The Tribunal held that section 75 must be interpreted in light of the express purposes of the *Competition Act* and concluded that the issuance of an order compelling Xerox to accept Exdos as a customer would advance the interests of ensuring that small and medium-sized enterprises have an equitable opportunity of participating in the Canadian economy, and of providing consumers with competitive prices and product choices. Accordingly, the Tribunal issued the order sought by the Director.

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[110] *Ibid.* at 97.
[111] *Ibid.* at 101.
[112] *Ibid.* at 103.
[113] *Ibid.* at 112.
[114] *Ibid.*

B. *Abuse of Dominant Position, Exclusive Dealing and Tied Selling: The* NutraSweet *Case*[115]

The Director's application to the Tribunal regarding NutraSweet, which has been referred to above, pertained to the abuse of dominant position, exclusive dealing and tied selling provisions contained in subsections 77 to 79 of the *Competition Act.*

1. *Abuse of Dominant Position*

NutraSweet controls 95% of the sales of aspartame in Canada. These sales are made primarily to food and beverage manufacturers who use aspartame as a sweetening ingredient in their "sugar free" and "diet" products. Tosoh Canada Ltd accounts for the remainder of the Canadian sales. Tosoh started its marketing efforts in Canada in the summer of 1987 as soon as NutraSweet's Canadian use patent expired.

The Director made two principal allegations in this proceeding. First, he complained of terms in NutraSweet's supply contracts with its customers which, he alleged, create an exclusive supply relationship between NutraSweet and its customers and restrict the expansion of would-be or existing competitors. Second, he alleged that NutraSweet was selling below its "acquisition cost".[116]

The Tribunal began by analyzing the relevant product and geographic markets and then considered the barriers to entry into these markets. The Tribunal then analyzed the various requirements of section 79 of the *Competition Act* pertaining to abuse of dominance.

(a) *Product Market*

The parties agreed that in defining the relevant product market in this case, it was necessary for the Tribunal "to consider the degree to which aspartame is sufficiently distinct from other sweeteners [to determine] whether it should be treated as a separate product or as part of a broader class of sweeteners".[117] Put differently, the Tribunal asked whether, and in what ways, other sweeteners can be utilized as substitutes for aspartame. The Tribunal concluded that there was "no evidence of direct competition between aspartame and caloric sweeteners and very weak evidence of indirect competition between diet and full caloric-products"[118]. Although the Tribunal found some direct competition from other currently approved high intensity sweeteners (such as cyclamates and saccharin) none was considered to be a good substitute in large market segments.[119] This is so because, among other things, aspartame

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[115] Supra, note 66.
[116] *Ibid.* at 9.
[117] *Ibid.* at 10.
[118] *Ibid.* at 19.
[119] *Ibid.* at 20.

is the only high intensity sweetener allowed as a food additive in Canada. As a result, the Tribunal defined the product market as aspartame.

(b) *Geographic Market*

The Tribunal held that the critical question required to be answered in defining geographic markets is "whether an area is sufficiently insulated from price pressures emanating from other areas so that its unique characteristics can result in its prices differing significantly for any period of time from those in other areas."[120] The Director took "the position that the relevant geographic market for assessing the impact of [NutraSweet's] practices on competition in the sale of aspartame is Canada".[121] NutraSweet argued that the relevant market was worldwide on the basis that, among other things, the barriers to entry into the Canadian aspartame market are extremely low. NutraSweet called expert evidence to the effect "that as long as there are existing suppliers outside Canada they would quickly enter, directly or through others", in the event that NutraSweet "attempt[ed] to raise Canadian prices".[122]

The Tribunal rejected this argument and held that market conditions in Canada, including the marketing practices of NutraSweet (such as securing the use of the NutraSweet logo on the packaging of most of the major aspartame buyers) can produce and have produced prices in Canada that differ significantly from those in other regions. As a result, the Tribunal concluded that "it is reasonable to treat Canada as a separate geographic market for the purposes of evaluating the effects of [NutraSweet's] marketing practices".[123]

(c) *Elements of section 79*

Section 79 of the *Act* provides:

(1) Where, on application by the Director, the Tribunal finds that
(a) one or more persons substantially or completely control, throughout Canada or any area thereof, a class or species of business,
(b) that person or those persons have engaged in or are engaging in a practice of anti-competitive acts, and
(c) the practice has had, is having or is likely to have the effect of preventing or lessening competition substantially in a market, the Tribunal may make an order prohibiting all or any of those persons from engaging in that practice.

The Tribunal held that in determining whether NutraSweet "substantially or completely controls" the aspartame market in Canada, it is appropriate to consider whether NutraSweet can exercise "market power" by setting "prices above competitive levels for a considerable

[120] *Ibid.* at 20-21.
[121] *Ibid.* at 20.
[122] *Ibid.* at 21.
[123] *Ibid.* at 22.

period".[124] This, in turn, requires a consideration of factors such as market share and barriers to entry. The Tribunal had little difficulty in concluding that the various elements of section 79 had been satisfied in this case, having regard to the fact that NutraSweet controls more than 95% of the aspartame sales in Canada and that barriers to entry in this market (including patent problems, significant sunk costs associated with the efficient production of aspartame and regulatory approval requirements) are very high. The "class or species of business" involved in this case was held to be the manufacture and supply of aspartame.

The Tribunal then determined whether NutraSweet had engaged in a "practice of anti-competitive acts" within the meaning of section 79. While a list of nine anti-competitive acts is set out in section 78 of the *Act*, that list is non-exhaustive. The parties agreed, and the Tribunal accepted, that each of the enumerated acts (save one) must be performed for the purpose of achieving "an intended negative effect on a competitor that is predatory, exclusionary or disciplinary."[125] As a result, the Director bears the burden of establishing an anti-competitive purpose for each of the acts complained of.

The Tribunal held that a "practice" of anti-competitive acts would be established where "there is more than an isolated act or acts."[126] For this reason, the Tribunal held that different anti-competitive acts, taken together, may constitute a practice.

Several of the Director's allegations concerning the anti-competitive conduct of NutraSweet were accepted, while others were rejected. The Tribunal dismissed the Director's allegation that NutraSweet had engaged in an "abuse of governmental reporting requirements" by not paying Canadian taxes on its Canadian operations (because of accumulated losses), and by not filling out customs declaration forms accurately so as to properly declare the value of aspartame imported from the United States. The Tribunal noted that the Director had not even attempted to demonstrate an anti-competitive purpose associated with these alleged abuses.

The Tribunal also rejected the Director's allegation that NutraSweet had engaged in anti-competitive conduct by entering into an agreement with Ajinomoto (a Japanese supplier to NutraSweet with a high degree of expertise in the manufacture of aspartame) which excludes Ajinomoto from Canada as an independent supplier of aspartame until 1995. Significantly, the Tribunal rejected this allegation even though it concluded that this agreement was anti-competitive in nature in that "the two leading producers, each with formidable, if somewhat different, strengths have in effect agreed not to compete."[127] The Tribunal did so on the basis that in the list of anti-competitive acts enumerated in section 78 of the *Act*, "the competitor of the dominant firm is a target, not a

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[124] *Ibid.* at 28.
[125] *Ibid.* at 34.
[126] *Ibid.* at 35.
[127] *Ibid.* at 37.

fellow actor."[128] This statement appears not to take into account the fact that the complainant in this case was Tosoh, not Ajinomoto. The Tribunal does not appear to have considered the potential impact which an agreement of this nature between the two primary suppliers of aspartame would have upon smaller competitors seeking entry into the Canadian market.

The Tribunal accepted the Director's allegation that several of the contractual terms relied upon by NutraSweet in its supply contracts with major customers constituted the use, by NutraSweet, of a practice of anti-competitive acts. These terms included:

(a) exclusive supply clauses which require that NutraSweet's customers purchase all of their aspartame from NutraSweet;
(b) clauses which provide for a substantial discount from the gross price of aspartame to the customer (approximately 40%) if the customer agrees to display the NutraSweet name and logo on its packaging and in print and television advertising featuring the product containing NutraSweet aspartame; and
(c) "meet or release" clauses which give NutraSweet "the option to meet a lower price offered to its customer[s] or to release the customer[s] to purchase from the other supplier",[129] and "most favoured nation" clauses which ensure that "the price to a particular customer is the lowest price paid by any customer for an equivalent volume of aspartame."[130]

The Tribunal held that the magnitude of the discounts offered by NutraSweet for logo display, and co-operative advertising allowances offered by NutraSweet, left customers little choice but to display the NutraSweet logo on their products. The Tribunal stated the following:

> The logo and advertising discounts create an "all-or- nothing" choice for customers. In the event that customers decide that they would prefer not to use the logo for a particular product line or not to commit themselves to use it on all of that line, they are forced to purchase all their supply from another supplier because it is too expensive to buy from [NutraSweet] without the logo and advertising discounts. This means that new suppliers must become sufficiently established so that potential customers are willing to entrust all of their needs for a product line to the new supplier.... Therefore, it is clear that the logo display and promotion allowances are essentially inducements to exclusivity.[131]

The Tribunal held that the meet or release clauses inserted into NutraSweet's contracts at the behest of Coke and Pepsi, NutraSweet's largest customers, were objectionable in that by making exclusivity more acceptable to customers, these clauses serve as an inducement for customers to enter into exclusive arrangements. Furthermore, such clauses have the practical effect of discouraging competitors from submitting

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[128] *Ibid.*
[129] *Ibid.* at 39.
[130] *Ibid.*
[131] *Ibid.* at 41.

bids since they know that NutraSweet will be given the opportunity of meeting any price they offer. Similarly, the Tribunal accepted the Director's argument that most-favoured nation clauses act as an inducement to exclusivity by assuring customers that they will not be treated worse than their competitors.

The Tribunal also accepted the Director's argument that the anti-competitive practices of NutraSweet have had the effect of preventing or lessening competition substantially in the Canadian aspartame market. The Tribunal held that in drawing its conclusions in respect of this issue it had to determine "whether the anti-competitive acts engaged in by [NutraSweet] preserve or add to [NutraSweet's] market power."[132] The Tribunal concluded that anti-competitive practices referred to above have the effect of increasing the barriers to entry in this market by "imped[ing] "toe-hold entry" into the market and inhibit[ing] the expansion of other firms in the market."[133]

2. *Exclusive Dealing*

Pursuant to section 77 of the *Competition Act*, the Tribunal is empowered to prohibit exclusive dealing, which is defined as any practice whereby a supplier of a product requires or induces a customer to deal only or primarily in products of the supplier or to refrain from dealing in a specified class or kind of product except as provided by the supplier. The Tribunal held that customers of NutraSweet had been induced by the volume rebate and co-operative advertising clauses referred to above to deal only or primarily in the products of NutraSweet, and that this constituted a "practice" within the meaning of section 77. NutraSweet was determined to be a major supplier of aspartame in the market (or one "whose actions are taken to have an appreciable or significant impact on the markets where it sells").[134] The Tribunal applied its conclusions in respect of abuse of dominance to hold that the exclusive dealing engaged in by NutraSweet had given rise to a substantial lessening or prevention of competition within the meaning of section 77.

3. *Tied Selling*

Pursuant to section 77 of the *Competition Act*, tied selling means any practice whereby a supplier of a product requires or induces a customer to acquire any other product from the supplier, or to refrain from using or distributing, in conjunction with the product, another product that is not of a brand or manufacture designated by the supplier or its nominee. The Tribunal rejected the Director's argument that NutraSweet's trademark was the "tying product". The Director had argued that as a condition of supplying its trademark to its customers,

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[132] *Ibid.* at 47.
[133] *Ibid.* at 48.
[134] *Ibid.* at 55.

NutraSweet required its customers to purchase aspartame, and to refrain from using the aspartame of any other producer in conjunction with the NutraSweet trademark.

4. *Remedies*

The Tribunal held that in considering the issue of the appropriate remedy in this case, it was confined to considering the remedies sought by the Director in his original Notice of Application. Significantly, the Tribunal refused to consider the remedies sought by Tosoh, which had intervened in the proceedings, and stated that "although Tosoh suggested various other remedies, it is not a party and cannot define the issues including that of the remedies being sought".[135] As a result, the Tribunal issued an order prohibiting NutraSweet from enforcing, or entering into, the following terms of contracts for the supply of aspartame to Canadian customers:

> (i) terms which require the purchaser to purchase or use only NutraSweet aspartame;
> (ii) terms which provide financial inducements to purchase NutraSweet aspartame through trade market display, advertising or similar allowances;
> (iii) meet or release terms; and
> (iv) most favoured nation clauses, unless included in supply contracts between NutraSweet and any competitor of that customer.

C. *Mergers*

The Director's experience with the Competition Tribunal in respect of the merger provisions of the *Act* has not been a happy one. He has encountered significant difficulties in obtaining consent orders from the Tribunal, and has been sharply criticized by the Tribunal in several cases. Three of the merger decisions rendered by the Tribunal are referred to below.

1. Director of Investigation and Research *v.* Palm Dairies Ltd[136]

In the *Palm Dairies* case, the Director proceeded with his first application to the Tribunal. In effect, the Director sought a consent order from the Tribunal "to obtain the tribunal's approval of an agreement which [had] been already worked out by the director and the respondents".[137] That agreement prohibited the original proposed acquisition of Palm Dairies by 340280 Alberta Limited, but approved a restructured acquisition agreement and imposed a series of terms and conditions upon

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[135] *Ibid.* at 58.

[136] (1986), 12 C.P.R. (3d) 540 (Competition Trib.) [hereinafter *Palm Dairies*].

[137] *See Director of Investigation and Research* v. *Palm Dairies Ltd* (1986), 12 C.P.R. (3d) 425 at 427 (Competition Trib.).

the acquiror. The Tribunal raised questions as to its jurisdiction to make the order sought, and as to the appropriateness of some of the provisions of the order because of their vagueness. The Tribunal indicated that it wished to hear argument with respect to the enforceability and effectiveness of the order and appointed counsel as *amicus curiae* for the purpose of arguing these issues.[138]

The Tribunal ultimately refused to issue the order. The Tribunal characterized the draft order as "unusual" and "odd" and criticized the evidentiary basis upon which the order had been sought. The Tribunal stated:

> In such circumstances, tribunal orders must be framed in as clear and as precise terms as possible. Certainly some of the portions of the order set out above do not meet that test....They are inappropriate as descriptions of the dividing line between criminal and non-criminal conduct. A consent order (or indeed any order) which the tribunal is asked to issue should be expressed in terms sufficiently clear to permit a person governed thereby to know with tolerable certainty the extent to which conduct engaged in is either lawful or unlawful.[139]

The Tribunal dismissed the application on the basis that the consent order sought in this case was excessively vague and imprecise.

2. Canada (Director of Investigation and Research) *v.* Air Canada[140]

On March 3, 1988, the Director filed an application with the Tribunal for an order dissolving a merger of the computer reservation systems Reservec II operated by Air Canada and Pegasus 2000 operated by Canadian Pacific Airlines. The merger had been effected on June 1, 1987. On April 24, 1989 the Director brought an application pursuant to section 105 of the *Competition Act* for a consent order imposing certain behavioural requirements on the merged parties.

The Tribunal ultimately agreed to issue the order sought by the Director. Prior to doing so, however, the Tribunal subjected the parties, and particularly the Director, to scathing criticism. A series of interlocutory motions had been brought in this case pertaining to interventions and the role of intervenors in the proceedings. Orders of the Tribunal were appealed to the Federal Court of Appeal, and ultimately to the Supreme Court of Canada. On February 9, 1989, counsel for the respondents brought a motion before the Tribunal for an order adjourning the hearing of the original application because of a pending appeal to the Supreme Court of Canada pertaining to the role of intervenors in the proceeding. Significantly, the requested adjournment was not opposed by the Director.

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[138] *Ibid.* at 430.

[139] *Palm Dairies, supra,* note 136 at 553.

[140] (1989), 24 C.P.R. (3d) 29, 37 ADMIN. L.R. 95 (Competition Trib.) [hereinafter *Air Canada* cited to C.P.R.].

In a rather surprising and strongly worded decision, issued five days later, the Tribunal denied the unopposed request for an adjournment. In its reasons, the Tribunal appears to have proceeded on the somewhat unusual premise that it has an independent interest in the expedition with which proceedings before the Tribunal are conducted. The Tribunal characterized the reasons underlying the request for the adjournment in this case as "simply not credible" and unconvincing, and stated that it was "not receptive" to postponing the scheduled hearing simply because discoveries had not been completed, undertakings had not been answered, expert evidence had not been prepared and there was "much preparatory work still to do".[141] The Tribunal stated that on several occasions it had "expressed to both counsel for the respondents and counsel for the Director its concern and dissatisfaction with the glacial pace at which preparation for the hearing of this application has been proceeding".[142]

The Tribunal noted that on July 27, 1988 it had "expressed its concern" about the delays in this case "in the strongest terms" and indicated that it was ready, and always had been, to deal with this application without delay.[143] The Tribunal complained, however, that "without the co-operation of the parties and counsel, it is extremely difficult for the Tribunal to do so".[144] The Tribunal also complained that "tribunals and courts should not have to be placed in the role of policemen, continually waging a battle to try to get counsel to move cases along expeditiously" and stated that the Director had a particular responsibility to move the proceedings along.[145]

The Tribunal's reasons reflect that counsel for the parties were taken aback by the way in which members of the Tribunal conducted themselves in respect of this proceeding. The Tribunal stated the following:

> In the course of the November 7, 1988, prehearing conference both counsel for the Director and counsel for the respondents took umbrage with the Tribunal's view that this application was not being proceeded with in an expeditious fashion. One counsel expressed the view that some of the Tribunals' comments in this regard were oppressive. The other expressed the view that both counsel were shocked when they discovered that the Tribunal was not prepared to accept automatically requests for adjournment and postponement (when both counsel consented thereto) as was normal in litigation practice. The Tribunal made it clear to counsel at that time that it was not prepared to accept "the normal litigation practice", that the Tribunal expected a schedule to be established for the speedy disposition of this application and that the Tribunal expected counsel to abide by that schedule.[146]

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[141] *Ibid.* at 32-33.
[142] *Ibid.* at 33.
[143] *Ibid.* at 34.
[144] *Ibid.* at 35.
[145] *Ibid.*
[146] *Ibid.* at 37.

The Tribunal went on to observe, that when the speed of proceedings is limited, "it is the adjudicative body and the adjudicative process itself whose credibility is undermined".[147] As a result, the Tribunal stated that it was prepared to take the timetable for litigation out of the hands of counsel if required. The Tribunal noted that it was placed in a "very, very difficult position" because neither party to the proceeding had an interest in proceeding expeditiously, and threatened to refuse to admit evidence, or to strike out applications or defences to enforce its timetables.[148]

The hearing proceeded several months later as an application for a consent order. In considering this application, the Tribunal held that its role, when asked to issue a consent order, is not to ask whether the consent order is the optimum solution to the anti-competitive effects which would result from the merger, but to determine whether the consent order meets a minimum test. "That test is whether the merger, as conditioned by the terms of the consent order, results in a situation where the substantial lessening of competition, which it is presumed will arise from the merger, has, in all likelihood, been eliminated".[149] The Tribunal concluded that even though some of its concerns had not been addressed by the parties, the draft order in question satisfied this minimum requirement. Accordingly, the order was issued.

3. Canada (Director of Investigation and Research) v. Imperial Oil Limited[150]

The largest merger ever considered by the Bureau of Competition Policy (and by the Tribunal) is that of Imperial Oil and Texaco Canada. Once again, this matter involved an application by the Director to the Tribunal for a consent order following extensive negotiations between Imperial and the Director after the Director had expressed concerns that the merger, as originally proposed, would prevent or lessen competition substantially.

(a) *Partial Decision — 10 November, 1989*

In an unusual step, on 10 November, 1989, the Tribunal issued "a partial decision, a provisional decision, an incomplete decision" because of the impact which the Tribunal's decision would have upon the people concerned and because of the unsettling effects of uncertainty upon those people.[151] This partial decision led to significant changes in the consent order which the Director had sought, and resulted from extensive submissions made by a number of intervenors in the proceeding.

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[147] *Ibid.* at 38.

[148] *Ibid.*

[149] *Canada (Director of Investigation & Research)* v. *Air Canada* (1989), 27 C.P.R. (3d) 476 at 514, 44 B.L.R. 154 at 198 (Competition Trib.).

[150] (1989), 45 B.L.R. 1 (Competition Trib.) [hereinafter *Imperial Oil*].

[151] *Ibid.* at 3.

With respect to the effect of the merger on retail markets, the Director and Imperial agreed that in urban areas, if after the merger Imperial's volume of retail sales exceeded 30% of the market share, and the independent retailers had a market share of over 20%, Imperial would have to divest itself of station sites so that its market share would not exceed 30%. In those areas, if the market share of independents was less than 20%, a sliding scale of divestiture was required. If the market share of independents was less than 15%, Imperial would only be permitted to retain 25% of the retail market. In non-urban areas, Imperial was required to identify for divestiture stations so that its market share did not exceed 30%.

In its partial decision, the Tribunal observed that many of the stations which Imperial identified for divestiture would have been divested or closed by Imperial as a normal part of the rationalization of the combined retail network which would result from the merger. Imperial agreed to assure unbranded supply to these dealers for five years after completion of the merger.

The Tribunal held that it was clear that the merger would have a severe anti-competitive effect in the Atlantic region. The only available refineries in that area were owned by Imperial and Texaco. There were very few independent retailers, and in two of the provinces (Nova Scotia and P.E.I.) relatively high barriers to entry existed. As a result, the Director took the position that most of Texaco's Maritime assets would have to be divested by Imperial. Imperial agreed to do so. The Tribunal, however, was critical of the manner in which the Director enforced this position. The Tribunal stated as follows:

> The evidence which was placed before the Tribunal is sufficient to convince it that there is some doubt that the divestiture of the Texaco assets in the Atlantic region is being handled in such a manner as to ensure that an effective competitor will replace Texaco in that region. There is some reason to think that the hiving off of some of the assets plus the potential sale of those remaining (if it were to several purchasers in piecemeal fashion) could so weaken the viability of the assets that the divestiture would not operate so as to prevent the substantial lessening of competition which arises as a result of the merger. The Director has expressed a preference that the assets be sold as a bundle (except of course for those which Imperial will be allowed to retain). But, at the same time, he has not taken control of the sale, has not put it in the hands of a trustee, has not articulated specific criteria which should be required with respect to the identity of a proposed purchaser, so as to assure an observer that the eventual purchaser will more likely than not play a strong competitive role in the Atlantic region.[152]

As a result, in its partial decision the Tribunal concluded that the Director had not met the burden of demonstrating that the proposed order would, in all likelihood, result in a post-merger situation in the Atlantic region such that no substantial lessening of competition would result from the merger.

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[152] *Ibid.* at 7-8.

The Tribunal was also critical of the Director's conclusions concerning supply assurances, and stated that it was clear that in reaching his conclusions pertaining to supply assurances the Director had relied upon data that was somewhat dated. The Tribunal also criticized the Director's conclusions pertaining to efficiency gains which would arise from the merger, stating that "the evidence respecting efficiencies which was put before [the Tribunal] seems extremely over-estimated. It was, at best, incomplete".[153] The Director had proposed requiring Imperial to offer for sale to independents a certain quantity of gasoline for a seven to 10-year period. The Tribunal stated that it wasn't convinced that this would be effective because, among other things, there were no provisions in the order specifying prices. The Tribunal stated that "without some mechanism for establishing a competitive price or some alternate scheme guaranteeing supply, the supply assurance, as was argued, is no assurance at all".[154]

The Tribunal was very critical of some of the experts who testified during the hearings in respect of this matter. The Tribunal stated the following:

> We wish to make some comments with respect to the role of expert witnesses before the Tribunal. We recognize that when experts are employed, as they were in this case, to assist in the preparation of a case, they become part of a team, so to speak. They almost by osmosis seem to take on the role of advocate for the side whose team they are on. To some extent this may be unavoidable but it is very disquieting to a decision-maker.
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> In our view, many of the expert witnesses were not as thorough and objective in their analyses as one would have wished. We were presented, initially, with very, very strongly held conclusions which often turned out, on examination, to be unwarranted. It would be refreshing if expert witnesses would school themselves to act just a bit more as *amicus curiae* than as advocates.[155]

Finally, the Tribunal was very critical of the manner in which the Director enforced a "hold separate" agreement which had been entered into by the parties shortly after the proposed merger was announced. The Tribunal noted that once the Director identified what he perceived to be the solution to the anti-competitive effects of the merger, he allowed most of the merger to be consummated prior to the Tribunal proceedings. Chairman Reed, who wrote the partial decision for the Tribunal, stated that "I have to tell you that one Tribunal member, at least, considers this to be highly presumptuous, if not arrogant. The message that might be taken by some people from that conduct is that the Director has determined to approve the merger regardless of what the Tribunal decides."[156]

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[153] *Ibid.* at 10.
[154] *Ibid.* at 11.
[155] *Ibid.* at 12.
[156] *Ibid.* at 13.

(b) *Reasons and Decisions — 26 January, 1990*

As a result of the Tribunal's comments in its partial decision of 10 November, 1989, the draft order which the Tribunal had been asked to issue was substantially amended. The Tribunal approved most of the revised order in its lengthy (149-page) decision released on 26 January, 1990.[157] The Order of the Tribunal was issued on 6 February, 1990.

The Director, during the Tribunal proceedings, had argued that in order to successfully challenge a consent order, intervenors had to prove that with the order in place, there would still be a substantial lessening of competition. The Tribunal rejected this argument as imposing too stringent a test. The Tribunal noted that a consent application typically proceeds on the basis of an evidentiary vacuum with respect to the degree, nature and extent of the substantial lessening of competition which will occur as a result of a merger. As a result, the Tribunal held that it is sufficient if it can be shown that the consent order is "not likely to accomplish the objectives which the Director claims for it because, for example, the terms of the order are contradictory or inconsistent or the terms of the order are not likely to be effective because they lack enforceability, either as being imprecise, impossible to monitor or because a breach, as a practical matter, would not be susceptible of proof".[158]

In its reasons, the Tribunal adopted the opposite approach to that taken in its earlier reasons in the *Palm Dairies* case (where the draft order in question was criticized as being excessively vague) and criticized the draft order sought as excessively detailed and specific. One of the stated reasons for this concern was that franchisees whose outlets were named in the proposed order "could perceive that the proposed divestitures resulted from a decision by the Tribunal",[159] whereas, in fact, the outlets to be divested were chosen by Imperial as a result of its discussions with the Director.

The Tribunal's reasons were critical of a number of provisions of the revised draft consent order submitted to the Tribunal following the release of the Tribunal's partial decision in November, 1989. In the end, the Tribunal agreed to grant the consent order sought, in part, and adjourned the proceedings in respect of those provisions which troubled it. The Tribunal would not approve the terms of the order pertaining to the Atlantic region until it had received further information concerning the disposition of the assets which Imperial had agreed to divest. Certain changes were also required in respect of the supply assurance provisions of the order, which were designed to guarantee a supply of gasoline to independent stations in Ontario and Quebec. Finally, the Tribunal

[157] *Director of Investigation and Research* v. *Imperial Oil Ltd* (26 January, 1990), Ottawa CT-89-3 (Competition Trib.). The presiding members of the Tribunal were Madame Justice Barbara Reed, Dr Frank Roseman and Marie-Hélène Sarazin.

[158] *Ibid.* at 17.

[159] *Ibid.* at 34.

required that changes be made to a provision of the order which described the circumstances under which the Director could apply for the variation of an order.

III. Conclusion

This is a time of rapid change in Canadian competition law. The substantial legislative amendments which were effected in 1986 have given rise to a number of significant decisions by the judiciary and the newly created Competition Tribunal which may have a dramatic impact upon the way in which the *Competition Act* is administered and enforced. Constitutional challenges have also been brought, in recent months, in respect of statutory provisions which pre-date the 1986 amendments, including the conspiracy and refusal to deal provisions. The validity of one of the more important investigative tools of the *Act* — section 11's power of compulsory oral examination — remains in doubt.

Several recent decisions of the Competition Tribunal have raised concerns as to the manner in which the Director of Investigation and Research is viewed by the Tribunal. He has been criticized severely for the manner in which he has conducted several cases before the Tribunal, including the *Air Canada* and *Imperial Oil* cases. The Tribunal has also been critical of other parties who have been involved in proceedings before it, and of expert witnesses who have testified in such proceedings. This may have implications for the manner in which future cases are dealt with by parties before the Tribunal.

It is difficult to assess the manner in which Canadian competition law will evolve in the near future. Virtually all of the significant decisions in this area which have been rendered by the judiciary and by the Tribunal are under appeal. The Bureau of Competition Policy has made a substantial and worthwhile effort to formulate comprehensive enforcement guidelines in respect of the predatory pricing and price discrimination provisions of the *Act*. Those guidelines have yet to be finalized. The Bureau has also issued guidelines with respect to merger enforcement.

Perhaps the only matter about which there can be absolute certainty is that those who have an interest in this area are well advised to pay close attention to competition law as it evolves in the next few years. The legal landscape which has been familiar terrain to competition lawyers and businesspersons for some time may appear very different in 1992, after appellate decisions have been rendered in respect of a number of the matters addressed in this paper, than it did at the time of the proclamation of the *Competition Act* and the *Competition Tribunal Act* in 1986.