Competition Tribunal Tribunal de la Concurrence

CT-1-86

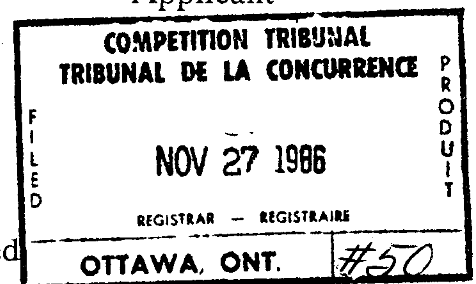
IN THE MATTER OF an application by the Director of Investigation and Research pursuant to Part VII of the Competition Act, R.S.C. 1970, c. C-23 as amended by S.C. 1986, c. 26, part VII;

AND IN THE MATTER OF the proposed acquisition of all of the issued and outstanding shares of Palm Dairies Limited by 340280 Alberta Limited;

B E T W E E N :

The Director of Investigation and Research

Applicant



- and -

Palm Dairies Limited
340280 Alberta Limited
Fraser Valley Milk Producers Cooperative Association
Northern Alberta Dairy Pool Limited
Central Alberta Dairy Pool
Dairy Producers Cooperative Limited
340379 Alberta Ltd.
Union Enterprises Ltd.

Respondents

- and -

Alberta Cheese Company Ltd.
Foothills Creamery Ltd.
Kappler Dairies
Neapolis Dairy Products Ltd.
Stadnick Dairy Farms Ltd.

Applicants for Intervenor Status

- and -

George L. Spetifore
James Verdonk
Warren Oliver Nottingham
Albert Van Esch
Stanley Van Keulen
Gilbert Van Keulen
Hendrick J. Malenstyn

Applicants for Intervenor Status

REASONS AND ORDER

This first application before the Competition Tribunal raises

some fundamental questions about the nature of consent orders which it is appropriate for the Tribunal to grant.

An application for an interim injunction pursuant to section 72(1) of the Competition Act, R.S.C. 1970, c. C-23 as amended by S.C. 1986, c. 26, part VII was scheduled to be heard by the Tribunal on October 20, 1986. At that hearing the Director withdrew his application for an interim injunction and filed an application pursuant to section 64 of the Competition Act[1]. At the same time a motion

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1 Section 64(1) reads as follows:

> 64.(1) Where, on application by the Director, the Tribunal finds that a merger or proposed merger prevents or lessens, or is likely to prevent or lessen, competition substantially
> (a) in a trade, industry or profession,
> (b) among the sources from which a trade, industry or profession obtains a product,
> (c) among the outlets through which a trade, industry or profession disposes of a product, or
> (d) otherwise than as described in paragraphs (a) to (c) the Tribunal may, subject to sections 66 to 68,
> (e) in the case of a completed merger, order any party to the merger or any other person
> (i) to dissolve the merger in such manner as the Tribunal directs,
> (ii) to dispose of assets or shares designated by the Tribunal in such manner as the Tribunal directs, or
> (iii) in addition to or in lieu of the action referred to in subparagraph (i) or (ii), with the consent of the person against whom the order is directed and the Director, to take any other action, or
> (f) in the case of a proposed merger, make an order directed against any party to the proposed merger or any other person
> (i) ordering the person against whom the order is directed not to proceed with the merger,
> (ii) ordering the person against whom the order is directed not to proceed with a part of the merger, or
> (iii) in addition to or in lieu of the order referred to in subparagraph (ii), either or both
> (A) prohibiting the person against whom the order is directed, should the merger or part thereof be completed, from doing any act or thing the prohibition of which the Tribunal determines to be necessary to ensure that the merger or part thereof does not prevent or lessen competition substantially, or
> (B) with the consent of the person against whom the order is directed and the Director, ordering the person to take any other action.

for a consent order disposing of that application was filed. A copy of the consent order being sought was not itself filed; this occurred only later, at the subsequent hearing on October 22.[2]

As a result of the procedure followed any would-be intervenors, who might have felt they had an interest in the proceeding and would be affected by an order which might be given, could not have become aware of the terms of the consent order being sought until the actual hearing of the section 64 application on October 22, 1986. Indeed, it is unlikely they would have been aware that the consent order the Director was seeking had changed from one relating to an interim order to a request for a final order, unless they happened to be in the courtroom on October 20. In any event, judgment was reserved on October 22, 1986 and further argument was subsequently ordered. Gordon Henderson, Q.C. was appointed amicus curiae by the Tribunal for the purpose of that argument (refer: orders dated October 28, 1986).

Immediately before commencement of further argument on November 13, 1986 the Director filed a revised consent order. Counsel for the Director stressed that there was no difference in substance between the new consent order and that filed earlier on October 22, 1986. The revised order differs only in form from the earlier version, with one exception. The new draft allows the parties to decide not to complete the agreement at all if they so choose. This alternative was not open to them under the earlier draft order.

The order which the Tribunal is asked to grant is certainly unusual. It is important to set out its terms in some detail:

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[2] The hearing of October 20th was adjourned to allow the Tribunal to be appropriately constituted (while only one member is required to hear an application for an interim injunction at least three members are required by operation of subsection 10(1) of the Competition Tribunal Act, S.C. 1986, c. 26, to hear an application pursuant to section 64).

> 1. THIS TRIBUNAL DOES order that the proposed acquisition described in Schedule A hereto shall not be completed with the Co-ops as owners of 100% of the shares of 340280 but shall only be completed with the Co-ops as owners of no more than 50% of the shares of 340280.
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> 2. THIS TRIBUNAL DOES FURTHER order that the proposed acquisition shall only be completed in accordance with the terms of this order as set forth in Schedule B hereto.

Schedule B is 23 pages long; some of its provisions are as follows:

> 1. (a) if the proposed acquisition is completed, it shall be completed within four months of the date of this order;
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> (b) the Co-ops, 340280 and P.M.G. shall enter into an agreement, whereby, prior to or concurrently with the completion of the proposed acquisition of the Palm Shares by 340280, P.M.G. shall acquire a number of shares of 340280 which shall represent 50% of the shares of 340280 and which shall be equal in number to the number of shares held by the Co-ops. The shares aforesaid shall be equal in all respects and include the right to vote at any meeting of shareholders of the corporation, to receive any dividend declared by the corporation and to receive the remaining property of the corporation on dissolution;
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> (c) the interest of the Co-ops in Palm whether held directly or indirectly shall never be greater than 50% and shall at all times be equal in all respects to that of P.M.G. including the right to vote at any meeting of shareholders of the corporation, to receive any dividend declared by the corporation and to receive the remaining property of the corporation in dissolution;
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> ...
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> (e) the business of Palm shall at all times be run independently from and in competition with the business of each and every one of the Co-ops and, in particular, without limiting the generality of the foregoing, with respect to any of the Competitive Issues, listed in paragraph l(o)(vi) hereof, the business of Palm shall be established, maintained or changed solely with reference to the best interests of Palm as a viable competitive enterprise and specifically without reference to the interests of the Co-ops as competitors of Palm or 340280;
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> ...
>
> (i) the Respondents shall direct and require their directors, officers and employees to comply with this order, and, in particular, subparagraph l(e) hereof and, in the case of Palm, the directors, officers and employees of Palm shall maximize the profits of Palm independently of those of the Co-ops and specifically without reference to the interests of the Co-ops as competitors of Palm or 340280;

(j) no Co-op shall at any time take any part in the management or direction of Palm or 340280 other than by voting as a shareholder and all decisions with respect to same shall be made by the management and board of directors of Palm or 340280, respectively and specifically without reference to the interests of the Co-ops as competitors of Palm or 340280;

...

(n) neither Palm nor 340280 shall disclose to any of the Co-ops nor shall any of the Co-ops request any information regarding financial or other matters other than such financial information to which the Co-ops would be entitled as shareholders under the Business Corporations Act of Alberta as amended from time to time, or such financial information as is necessary for the Co-ops to properly assess their investment but information in this latter category shall not be provided to the Co-ops if the President of Palm is of the view that the information is confidential to Palm and that its disclosure may adversely affect Palm's competitive position;

(o) the Co-ops and P.M.G. shall enter into an agreement which shall provide, *inter alia*, that:

> (i) the directors and officers of Palm shall be identical to those of 340280 and subject to the terms of this order;
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> (ii) the board of directors of Palm shall appoint the chief executive officer of Palm who shall be the President and General manager ("President") and who shall be responsible for the day to day operations of Palm and the first President shall be Jack James, the current President of Palm;
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> ...
>
> (vii) all decisions of the board of directors of Palm or 340280 shall be made with reference to the best interests of Palm as a viable competitive enterprise and specifically without reference to the interests of the Co-ops as competitors of Palm or 340280;

2. For a period of 5 years from the closing date of the proposed acquisition, P.M.G. shall have no investments or assets other than its shares of Palm or 340280. P.M.G. shall not sell less than its entire interest in Palm or 340280 and shall give the Director 60 days notice of the sale of its shares of Palm or 340280. The Director shall review any proposed sale and may apply to the Tribunal under section 78 or section 64 of the Competition Act if he has reason to believe that the proposed purchaser will not operate Palm without regard to the interests of the Co-ops as competitors or if the transaction will result in effective control of Palm passing to the Co-ops.

3. Subject to paragraph 4 hereof, P.M.G.'s shareholders may sell their shares but with the intention of encouraging managers of Palm to become or continue as shareholders of P.M.G., no shares of P.M.G. shall be sold by P.M.G. from treasury or by a

> holder thereof (including subsequent transferees) without first offering to the shareholders of P.M.G. who may be members of the management of Palm and to other members of the management of Palm (who may acquire such shares individually or collectively) a bona fide right of first refusal with usual terms and conditions to acquire such shares ("Offered Shares") intended to be sold at their offered price ("Offered Price"). The Offered shares shall not be offered for sale to any person other than a member of the management of Palm at a price lower than the Offered Price or on more favourable terms without first being offered to one or more members of the management of Palm at the lower price or on the more favourable terms.
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> ...
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> 5. If P.M.G. shall sell or dispose of its entire interest in Palm or 340280 or if P.M.G. shall cease to be controlled directly or indirectly by persons employed or formerly employed in the management of Palm on a full time basis then the Co-ops may apply to the Competition Tribunal under section 78 of the Competition Act requesting a variation of this order to eliminate the sections which provide for a casting vote. In the event that a competitor of any one of the Co-ops proposes to acquire P.M.G.'s entire 50% interest in Palm or 340280, or a controlling interest in P.M.G., directly or indirectly, the acquisition shall not be completed until the availability of the casting vote provisions in this order to the competitor has been considered by the Competition Tribunal on application by any party under section 78 of the Competition Act and the casting vote provisions shall only be available to the competitor if the Competition Tribunal so orders.
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> ...
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> 10. This order shall be applicable to and be binding upon any successor corporation, organization, partnership, association or other entity of any of the Co-ops, P.M.G., 340280 or Palm howsoever such successor is legally structured and their respective directors, officers, employees or other persons in a position to control any of such entities and shall be binding upon any corporation or organization, partnership, association or other entity which acquires all or part of the interest of any of the Co-ops, P.M.G., or 340280.
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> (underlining added)

The original agreement, that set out in schedule A, contemplated that 340280 Alberta Limited (a company owned by the four dairy co-operatives named as respondents in this action - Fraser Valley Milk Producers Cooperative Association, Northern Alberta Dairy Pool Limited, Central Alberta Dairy Pool and Dairy Producers Cooperative Limited) would purchase Palm Dairies from Union Enterprises Limited. That agreement was signed on June 17, 1986 and

it gave rise to the Director's aborted original application before the Tribunal for an interim injunction to prevent its completion.

The consent order now sought from the Tribunal would prohibit the original agreement, unless the four co-operatives reduce their proposed shareholdings in the purchaser company (340280) from 100% to 50%. But, it would also require that the purchaser of the other 50% be 340379 Alberta (P.M.G.). P.M.G. is to be owned, at least in its inception by the present management of Palm. The original request for an order for an interim injunction did not list 340379 (P.M.G.) as a party. Nor does the Wolinsky affidavit which is the evidence by reference to which the Tribunal is asked to make a finding that the June 17 agreement if consummated would likely lead to a substantial lessening of competition. Indeed it is not apparent that 340379 (P.M.G.) existed when the original agreement was challenged by the Director. The decision to involve P.M.G. as a party in the transaction arose as a result of the Director's negotiations with the respondents.

In any event, the fact that the Tribunal is being asked by order to require that it must be P.M.G. which purchases 50% of 340280, if the acquisition is to go ahead, is odd. It is not immediately obvious why the Tribunal should be concerned as to whether the purchaser of the 50% of the shares of 340280 not owned by the dairy co-operatives be 340379 (P.M.G.) rather than some other entity.

Had the Director been satisfied that the new (revised) agreement, which provides for the involvement of P.M.G., was not likely to lead to a substantial lessening of competition, his course of action would have been to discontinue his challenge to the June 17 agreement, withdraw from the Tribunal any attack related thereto; and, allow the revised agreement to proceed, with or without an additional approbation by way of a certificate issued under subsection

74(1) of the Competition Act[3]. As the Director did not follow this procedure, it is clear that he has some concerns. Indeed his counsel so indicated in the course of argument. Thus, the Director is only satisfied with the operational and shareholding restrictions contained in the new agreement if they are imposed by Tribunal order.

Under the Act the Director has wide discretion to determine what acquisitions or mergers should be challenged. He has authority under section 74 to approve acquisitions and mergers without involvement of the Tribunal. But once the Director has invoked the adjudicative powers of the Tribunal, the Tribunal has a duty to determine the nature of the anti-competitive conduct and to fashion an order which in its judgment serves the purposes of the Act. Or, at the very least when the Tribunal is asked to issue a consent order it is incumbent on it to satisfy itself that that order will be effective to accomplish, with due regard to the circumstances of the case, the objectives of the Act.

Section 1.1 of the Competition Act provides that:

> The purpose of this Act is to maintain and encourage competition in Canada in order to promote the efficiency and adaptability of the Canadian economy,... and in order to provide consumers with competitive prices and product choices.

The purpose of the consent order is to maintain Palm Dairies as an independent entity in the marketplace. A key question is the extent to which the order sought meets this test. It is incumbent on the Tribunal to satisfy itself that the order sought meets a critical threshold of effectiveness, namely that of eliminating the likely prevention or lessening substantially of competition that gave rise to the application for the order. Palm currently is an

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3 Subsection 74(1) reads as follows:

> Where the Director is satisfied by a party or parties to a proposed transaction that he would not have sufficient grounds on which to apply to the Tribunal under section 64, he may issue a certificate to the effect that he is so satisfied.

independent competitive entity. If the effect of the consent order is to place this status in jeopardy, there is a danger that this threshold will not be met.

To turn then to the specific provisions of the order sought. In addition to ordering that it be 340379 (P.M.G.) which is to purchase the 50% of the shares of 340280 not owned by the co-operatives, the order would impose specific terms on the management of the four co-operatives, Palm, 340280 and 340379. For example, the four co-operatives and Palm would be directed to deal at arms length at all times and neither indirectly nor directly exchange assets, employees or information such as customer lists or trade secrets; the four co-operatives would be directed never to take part in the management of Palm or 340280; the composition of the Board of Directors of Palm and 340280 would be dictated by the Tribunal order, as would the voting rights of its members. The Tribunal order would direct the management of Palm Dairies and 340280 and the four co-operatives to conduct themselves in certain competitive ways. It would also order that the Director should have certain rights of inspection and advance notice with respect to certain intended actions by the respondents. The complexities of the order obviously flow from the fragile situation created by the 50-50 ownership split in numbered company 340280 between the dairy co-operatives on the one side and the management team of Palm on the other.

What is sought with respect to many of the terms in the order is essentially relief in the nature of a perpetual mandatory injunction. The terms proposed would direct on a <u>perpetual</u> basis the way in which the internal management of Palm Dairies would operate. It would direct as well the operation of certain aspects of the co-operatives' management decisions, as well as those of 340280. It is not immediately obvious that these are appropriate subject matters, in any event, for a <u>perpetual</u> mandatory injunction. One also has to ask whether a statute that is meant to result in an improvement in

market forces should be used to create long-term enforcement of an elaborate arrangement when more obvious and straightforward remedies are available.

An additional observation is that some of the terms of the order sought are clearly vaguer and more imprecise than is usual in mandatory injunctions. This consideration gave rise to considerable argument before the Tribunal, indeed it was a question the Tribunal ordered to be argued by its order of October 26. Thus it will be canvassed at some length. The question can be framed as asking whether the Tribunal should be less demanding in regard to precision, effectiveness and enforceability of its orders than a court would be. Counsel for the Director argues that: (1) courts continually interpret vague concepts, such as "reasonableness" or "substantial lessening of competition" and that therefore the embodiment of imprecise concepts in a Tribunal order should not be seen as inappropriate; (2) that all the respondents agree to the present order sought and therefore it would not lie in their mouths at some later date to challenge the terms as vague; and (3) that it is essential in order to accomplish the purposes of the Competition Act that the Tribunal be amenable to issuing consent orders negotiated by the Director and the respondents. This last point, it is argued, is based on the fact that Parliament's intention was clearly to encourage the negotiation of consent orders. Section 77 which expressly provides for such orders is seen as demonstrative of that fact. Consent orders save the parties the attendant costs of protracted litigation; they are more acceptable to respondents who do not, from a business point of view, find it easy to tolerate the lengthy delays which can be imposed upon them by the Director in pursuing cases before the Tribunal (and through the appeal courts); consent orders save the Tribunal, itself, time and cost.

With respect to counsel's first argument, it is not convincing. Courts and tribunals are often called upon to interpret

vague and imprecise terms either in legislation or in contractual agreements which private individuals have negotiated. That does not mean however, that courts or tribunals are willing to issue orders couched in similar vague terms. As was indicated to counsel in the course of argument the courts are often asked to decide whether an individual has acted as a reasonable or prudent person but that does not mean that courts and tribunals are prepared to give orders ordering an individual to "act as a reasonable person" or "act as a prudent person".

With respect to counsel's second argument, there is absolutely no reason why a respondent to the present proceedings could not at some later date, if charged with an offence or with contempt of court for breach of one of the Tribunal's orders, argue that the provisions of that order were vague and uncertain. If such argument was accepted such provision would be unenforceable. If the wording is vague, it remains so and the consent of any number of parties cannot make that vagueness precise.

This leaves for consideration the third argument: that the nature of the proceedings before the Tribunal and the whole purpose of the consent provisions of the Competition Act indicate that it is appropriate for the Tribunal to issue the order sought. It was thought that some guidance might be obtained in this respect from United States jurisprudence which has had a long history of dealing with anti-trust matters. The closest case from that jurisdiction which counsel for the Director and the respondents could produce, was United States v. Brown Shoe Company Inc. and G.R. Kinney Co., Inc., 1956 Trade Cases 71,109 (U.S. Dist. Ct. - Eastern District of Missouri). It is useful to review the circumstances of that case. The Department of Justice had obtained a temporary restraining order preventing the directors of the two defendant companies (Brown and Kinney) from submitting a stock exchange plan to their respective shareholders. The exchange, if approved, would have led to the

merger of the two companies. The application to which the reported decision relates was one subsequently brought by the Department of Justice to dissolve the original restraining order and replace it with an interlocutory injunction preventing any further action being taken with respect to the proposed merger until the Department of Justice could complete its investigation and assessment of the situation.

The Department of Justice was concerned that the merger not proceed because to allow it to do so would render any success the Department might have at trial meaningless. By that time the two enterprises might have become so entangled that they could not be disentangled. It is clear that the judge hearing that application for an interlocutory injunction was not at all certain that the Department of Justice would in the end succeed in proving that the proposed merger transgressed section 7 of the Clayton Act. While it was considered appropriate that the Department of Justice should be given time to conclude its investigation, the Court was concerned that an interlocutory injunction could render any victory the defendant companies might ultimately win, a hollow one. The Court noted that by the time a final determination of the issue was reached economic circumstances might be such as to make the merger no longer viable. At page 68,244:

> There is no way to determine how long this case will take....The merger depends on economic and stock market factors. They are now favorable to consummation of the merger. On the day of final judgment they may be such as to make the merger impossible....
>
> The weakness of plaintiff's case at this stage moves us to conclude, first, we should not in fairness compel the defendants to hazard a loss even though winning the lawsuit...

A preliminary order was given allowing the shareholders' meetings to proceed and providing that if the merger was thereby approved, then:

> (1) that title to all assets acquired from Kinney by Brown by the merger be vested in a subsidiary corporation of Brown;
> (2) that the subsidiary corporation shall have independent management under the control of a board of directors, none of which members shall be on the

> boards of directors of Brown or any of Brown's other subsidiaries;
> (3) that all assets acquired from Kinney, together with the net earnings of Kinney subsequent to the merger, shall be retained by Kinney, and shall be at all times identifiable as assets of the subsidiary corporation, and none such assets shall be intermingled with Brown's assets;
> (4) that all the stock in the subsidiary corporation shall be held by Brown, other than qualifying shares for the board of directors, and shall not be hypothecated or encumbered in any manner;
> (5) that any leases now held by Kinney if renewed shall be renewed in the name of the subsidiary corporation, and any new leases negotiated for the subsidiary (Kinney) outlets shall be in the name of the subsidiary corporation, and all such leases shall be and remain the property of the subsidiary corporation;
> (6) that no subsidiary (Kinney) retail outlet shall be closed for reasons of competition with any Brown controlled retail outlet;
> (7) that no factory of the subsidiary (Kinney) corporation shall be closed or any of its production taken over by Brown because of competitive reasons with Brown; and
> (8) that on formation of the subsidiary (Kinney) corporation it shall enter its appearance in this cause and make itself subject to the jurisdiction of this Court in this cause.
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> (underlining added)

Thus both the concerns of the respondents and the Department of Justice were met. It must be noted that the terms of that order granted in Brown and Kinney do not contain clauses having the vagueness and imprecision which exist in the one before the Tribunal. Also important is the fact that the injunction granted in Brown and Kinney was of an interlocutory or temporary nature only. It was not a perpetual mandatory injunction. It did not involve a never-ending supervisory jurisdiction. The order was given to allow the parties to complete the proposed merger but at the same time to require that the two acquired enterprises be held "separate and apart" until investigation and any attendant litigation following thereon could be completed. It is clear that the order in Brown and Kinney is not a precedent for the type of order sought in this case.

Counsel for the Fraser Valley Milk Producers' Cooperative Association made reference to three prohibition orders issued pursuant to section 30 of the Combines Investigation Act: that

granted by Mr. Justice Strayer in The Queen v. Pacific Northwest Bus Company Ltd. (dated July 16, 1985); that of Mr. Justice Evans in The Queen v. Allied Van Lines et al. (dated December 14, 1983); and that of Mr. Justice Moore in The Queen v. Canada Safeway Limited, [1974] 1 W.W.R. 210 (Alta. Sup. Ct.). While the orders granted in both the Pacific Northwest case and the Safeway case were consent orders and all three are long and detailed, there are no clauses in them that impose perpetual mandatory injunctions on the parties with the vagueness and imprecision which exists in some clauses of the order now sought from the Tribunal. Nor is there anything which imposes a mandatory injunction on parties to enter into a purchase and sale agreement or to make corporate management decisions by reference to vague directions respecting competitive behaviour. Indeed, those judgments contain prohibitory orders only.

In Morris v. Redland Bricks Ltd., [1970] A.C. 652 at 666 the need for precision was expressed as follows:

> If in the exercise of its discretion the court decides that it is a proper case to grant a mandatory injunction, then the court must be careful to see that the defendant knows exactly in fact what he has to do and this means not as a matter of law but as a matter of fact, so that in carrying out an order he can give his contractors the proper instructions.

And in Sharpe, Injunctions and Specific Performance, (1983) at page 20:

> ...Quite clearly, in formulating injunction orders, the courts should avoid vague or ambiguous language which fails to give the defendant proper guidance or which in effect postpones determination of what actually constitutes a violation of the plaintiff's rights. It is unfair to the defendant to do nothing more than warn him not to do anything wrong, and resolve the important questions of detail on a contempt application.
>
> (...)
>
> Rather more specificity is required for mandatory orders, not only so that the defendant will have a clear idea of what he is required to do, but also so that the court will be able to assess accurately the burden its order imposes. A mandatory order insists upon a positive course of action, the burden of which

> may be difficult to assess unless the details of the obligation are defined.
>
> (underlining added)

Noncompliance with an order of the Tribunal can lead to liability for contempt or subjection to a criminal prosecution pursuant to section 46.1 of the Competition Act:

> Any person who contravenes or fails to comply with an order of the Tribunal under Part VII is guilty of an offence and is liable
>
> (a) on conviction on indictment, to a fine in the discretion of the court or to imprisonment for five years or to both; or
> (b) on summary conviction, to a fine of twenty-five thousand dollars or to imprisonment for one year or to both.
>
> (underlining added)

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 (eg: "the business of Palm shall be established, maintained or changed solely with reference to the best interests of Palm as a viable competitive enterprise...") 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.

By way of summary, then, the Tribunal is asked to issue a consent order which was developed through a process of negotiation between the Director and the respondents. That order would establish a highly detailed, complex and, in parts, vaguely defined arrangement between the respondents. It would require perpetual monitoring by the Director and, probably, frequent reassessment by the Tribunal. There is no evidence before the Tribunal that this complex arrangement, as opposed to a more simple, straightforward

remedy such as allowing another (completely independent) purchaser to acquire Palm Dairies, is necessary to meet the objectives of the Act. Also, there is reason to doubt the effectiveness of the arrangement which it is sought to impose and consequently issuing the order could possibly lead to a substantial reduction in competition. Although the terms of the order are designed to maintain Palm as a separate competitive force in the market there is considerable doubt that they would over the long term have that result.

Counsel for the Director and the respondents take the position that if any part of the consent order is not acceptable to the Tribunal then the whole must be rejected. It is their position that the Tribunal cannot, for example, make an order prohibiting the June 17 agreement but refuse to grant either part or all of what is contained in schedule B. This would clearly seem to be so under section 77 of the Competition Act:

> Where an application is made to the Tribunal under this Part for an order and the Director and the person in respect of whom the order is sought agree on the terms of the order, the Tribunal may make the order on those terms without hearing such evidence as would ordinarily be placed before the Tribunal had the application been contested or further contested.
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> (underlining added)

This is not as clearly the case if the order is seen as one sought pursuant to subsection 64(1)(f). While there is considerable doubt that the order sought is properly categorized as one falling under subsection 64(1)(f), counsel for the Director insists that it does. If this is so then there would seem to be no reason preventing the Tribunal prohibiting the acquisition contemplated by the June 17 agreement but refusing to grant the terms and conditions set out in schedule B to the consent order. Subsection 64(1)(f) provides:

> 64.(1) Where, on application by the Director, the Tribunal finds that a merger or proposed merger prevents or lessens, or is likely to prevent or lessen, competition substantially...the Tribunal may...
>
> (f) in the case of a proposed merger, make an

> order directed against any party to the proposed merger or any other person
> (i) ordering the person against whom the order is directed not to proceed with the merger,
> (ii) ordering the person against whom the order is directed not to proceed with a part of the merger, or
> (iii) in addition to or in lieu of the order referred to in subparagraph (ii)...
> (B) with the consent of the person against whom the order is directed and the Director, ordering the person to take any other action.
>
> (underlining added)

In any event, there are a number of reasons in this case which lead the Tribunal to consider that it should treat the consent order as a whole: the failure of the parties to place before the Tribunal sufficient evidence to satisfy it that the order sought would be effective to meet the objective of the Act; the fact that proceedings under the Act before the Tribunal are new; the parties clearly intended the consent order either to be accepted in its entirety by the Tribunal or rejected in its entirety. This last consideration, the intention of the parties that the order be dealt with in its entirety, should not be taken to always be determinative when the Tribunal is dealing with an order sought pursuant to section 64(1)(f). The Tribunal would not want to be thought to be laying down any general rules in this regard.

One last consideration must be addressed. At the hearing on November 13, 1986 counsel appeared for Alberta Cheese Company Ltd., Foothills Creamery Ltd., Kappler Dairies, Neapolis Dairy Products Ltd. and Stadnick Dairy Farms Ltd. Counsel also appeared for George L. Spetifore, James Verdonk, Warren Oliver Nottingham, Albert Van Esch, Stanley Van Keulen, Gilbert Van Keulen, Hendrick J. Malenstyn and the Mainland Dairymen's Association of British Columbia. These sought intervenor status before the Tribunal.

The Tribunal has been operating without the advantage of specific written rules in place. Accordingly, documentation filed by

the would-be intervenors at the November 13, 1986 hearing was treated as constituting applications to intervene. These applications were treated as having two aspects: (1) the seeking of leave to make argument before the Tribunal on the issues being argued that day (issues relating to the jurisdiction of the Tribunal and to the nature of the order sought); (2) the seeking of leave to make argument on the substantive merits of the consent order being sought (intervenor status of a more general nature).

Leave to intervene for the first purpose was denied. It would have been prejudicial to the existing parties, no advance notice having been given, to have allowed argument by intervenors on the issues being argued that day. Also, there was no reason to believe that the interests of those seeking intervenor status, insofar as the issues of jurisdiction and the nature of the order sought were concerned, would not be adequately and effectively canvassed by Gordon Henderson, Q.C. as amicus curiae. A decision with respect to intervenor status of a more general nature was reserved. As noted above the Tribunal has been operating without specific written rules. There is now a draft set of rules published (The Canada Gazette Part I No. 45, Vol. 120). These contemplate that would-be intervenors shall expressly identify their interests in the matters being dealt with

by the Tribunal and that existing parties should have an opportunity to respond[4] to any application made to intervene.

It is clear from what has been said above that the consent order requested by the Director and the respondents will not be granted. That leaves the Director's section 64 application outstanding. Accordingly, if the Director chooses to proceed with that application and the would-be intervenors still wish to seek status in these proceedings they should file with the Tribunal and serve on the other parties a statement setting out with some degree of specificity the facts upon which they base their claim to have an interest in the proceedings and the reasons why they should be granted intervenor status. Within 15 days of service the Director and those respondents which wish to respond should file with the Tribunal and serve on counsel for the would-be intervenors as well as for all other parties whatever (opposing) argument or affidavit material they deem appropriate. The Tribunal, then, will determine on the basis of the written material filed, unless one of the parties seeks an oral hearing, whether or not intervenor status should be granted.

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21.(1) Every request pursuant to subsection 9(3) of the Competition Tribunal Act for leave to intervene in any proceedings before the Tribunal shall be made by filing with the Registrar a request to intervene that is signed and dated by the applicant or by a person on behalf of the applicant.

(2) A request to intervene shall set out

(a) the title of the proceedings in which the person filing the request wishes to intervene;
(b) a concise statement of the matters in the proceedings that affect that person; and
(c) the official language to be used at the hearing for the request.

(3) A request to intervene shall, forthwith after it is filed with the Registrar, be served by the Registrar on each of the parties to the proceedings.

THEREFORE THE TRIBUNAL ORDERS THAT:

(1) the request for issuance of a consent order as filed with the Tribunal on November 13, 1986 is denied;

(2) the applicants seeking intervenor status, if they wish to perfect that application, shall file a statement specifically setting out their interest in the matter before the Tribunal as noted in the reasons for this order; and the existing parties shall have fifteen days within which to file any response thereto which they might wish to make.

DATED at Ottawa, this 27th day of November, 1986.

SIGNED on behalf of the Tribunal by the presiding judicial member.

CHAIRMAN