OUTSIDE THE COURTS

STRAWS IN THE LEGISLATIVE WIND

A number of recent ministerial statements and other events point in the direction of a renewed effort by the Federal Government to strengthen the competition legislation. The Honourable Andre Ouellet, Minister of Consumer and Corporate Affairs, in an appearance before the Standing Committee on Health, Welfare and Social Affairs on June 25 stated:

> "...there is this important Phase II of competition policy that I would like to bring forward in the next session of Parliament, whenever the next session may be, in the fall or in the spring or in the winter of 1981, but indeed I hope that this Department will then be in a position to come forward with a set of proposals dealing with mergers and other aspects of competition that I would like to deal with.
>
> I know and appreciate that in relation to competition policy, this is more controversial and therefore it might be unrealistic to ask that this pass quickly, but I would like if by the time I come back next year for the estimates, I were then in a position to have at least a public document (in) front of Parliament that could be studied and dealt with in due course."

He appeared again on June 26 and stated:

> "As you know, there is a sense of urgency and we indeed have this sense of urgency. The big problem has been the passing of legislation in the House of Commons. The House of Commons is unable to deal with the current, easy, non-controversial piece of legislation. I say it very bluntly and very categorically: I have three pieces of legislation that I consider of a noncontroversial nature and they are not yet passed by Parliament and I do not know if they will be passed by Parliament before we adjourn for the summer.
>
> Before we are able to deal with such an urgent question as phase II of our competition policy we will have to get the cooperation of the Conservative Party and the N.D.P. to speed up the parliamentary process. If the honourable member is very serious

> in the questions he is asking, and he really feels that some urgency ought to be given to these types of legislation, I hope he will cooperate and when the measures coming from my Department are before the House he will make sure that they pass quickly."

On July 9, 1980 he stated as part of a reply to a question:

> "...as soon as possible in one of the next sessions of this Parliament I intend to introduce amendments to the legislation on competition in Canada so that it will have more teeth than the present legislation."

Several developments since the amendments to the Combines Investigation Act early in 1976 and since the demise of Bill C-13, The Competition Act, in 1978 have drawn public attention to difficulties in administering the present Act. The Supreme Court of Canada decision in the K.C. Irving case in 1976 confirmed the ineffectiveness of s. 33 as it relates to mergers. As it happened, that year marked the start of a sharp increase in the numbers of large mergers, some of which proved to be matters of public concern. The acquisition of Simpson's by Hudson's Bay in 1978 brought forth strong criticisms by the Canadian Apparel Manufacturers Institute and others, and these criticisms have continued. Mr. Ouellet's statement in the Commons cited above related, in fact, to recent complaints by the Institute about discounts being sought by Simpson's and the Bay.

Mergers and closures of daily newspapers have also attracted a good deal of public attention. In January, 1980, Thomson acquired control of F.P. Publications along with its eight papers, including the Globe and Mail, the Winnipeg Free Press, the Ottawa Journal, the Times of Victoria, the Colonist of Victoria, the Lethbridge Herald, the Calgary Albertan and, through a half interest in Pacific Press Ltd., the Vancouver Sun. Early in August, Thomson merged the two Victoria papers into the Times-Colonist. On August 26 and 27, a series of closures and transactions between Thomson and Southam brought Southam an English language newspaper monopoly in Vancouver, Montreal and Ottawa while Thomson obtained one in Winnipeg. Thomson's Ottawa Journal and Southam's Winnipeg Tribune were closed and Southam acquired Thomson's interests in Pacific Press Ltd. and the Gazette of Montreal. Some ten years ago the report of the Senate Committee on the Mass Media recommended the creation of a press ownership review board, but no action was taken.

In addition, the Supreme Court of Canada decisions in Aetna Insurance Company in 1977 and in Atlantic Sugar

Refineries Co. Ltd. last July (reported in this issue of the Record) appear to have seriously lessened the effectiveness of s. 32 in dealing with collusive arrangements.

The Citizen of Ottawa, in a blistering editorial on August 12, attacked the Government for not proceeding with the reform of competition policy and contended that the results of the seven-year investigation of the petroleum industry had been placed in jeopardy by the sugar judgment. On June 21, prior to the sugar judgment, The Citizen had reported a disagreement between the Departments of Justice and Consumer and Corporate Affairs over how to proceed with the evidence which the Bureau of Competition Policy had collected in the petroleum inquiry. Justice, acting in an advisory capacity, has apparently had access to evidence for over a year. The article states:

> "Senior officials in the Department of Consumer and Corporate Affairs have concluded that there is overwhelming evidence of joint pricing arrangements by the oil companies, and they are urging strongly that it be made public.
>
> "But they are encountering resistance from the Justice Department, where some officials are arguing that the evidence requires further study.
>
> . . .
>
> "Sources told The Citizen an impasse has now been reached.
>
> "The Department of Consumer and Corporate Affairs is expected to break the impasse soon by acting on its own initiative to make the evidence public..."

Justice Minister Chretien stated in reply to a question on the matter in the House of Commons on June 25:

> "...it is true that the director of investigations, Mr. Bertrand, has asked the Minister of Justice in April of last year to appoint attorneys to study the file. Unfortunately, there have been delays and the attorneys were appointed only on November 13. Since then one of them was able to make his report; the other one should be completed before the end of the month and if not, the director concerned will continue his investigation with the means at his disposal."

Hon. Mr. Ouellet followed with the statement:

> "...I can confirm that the director of investigations is taking steps to hasten the completion of the investigation and I think that we will be obtaining his report during the next few weeks."

The Director's options after completing an investigation are limited. He can formally discontinue the inquiry, which seems unlikely in the case of petroleum. He can refer the matter to the Attorney General of Canada for such legal action as the Attorney General may wish to take. That is the option normally taken by the Director if he considers a prosecution is warranted by the evidence. His only other option is to transmit a statement of evidence, often called the "green book", to the Restrictive Trade Practices Commission for consideration and report. The "green book" may be distributed under the authority of the Commission to interested parties preparatory to hearings. It is not normally made public, however, unless the Commission decides to hold the hearings in public or an interested party makes its contents known.

There are no means under the present legislation whereby the Director himself can publish the results of his formal inquiries. Moreover, in view of the judicial functions with which it was endowed by the 1976 amendments, the appropriateness of the existing provisions for references to the Commission has been questioned. Under Bill C-13, those provisions would have been repealed and the Director, subject to certain safeguards for the parties, would have been able to publish the results of his own general inquiries.

BILL TO COUNTER U.S. EXTRA-TERRITORIALITY INTRODUCED IN CANADIAN PARLIAMENT

Bill C-41, The Foreign Proceedings and Judgments Act, was introduced in the Canadian House of Commons on July 11, 1980 on behalf of the Minister of Justice. According to an accompanying press release, the Bill would "protect Canadian citizens and corporations from penalties and judgments imposed by foreign tribunals for actions taken outside their jurisdiction in accordance with legitimate Canadian commercial policies and laws". Referring specifically to the uranium litigation including the private treble damages suit brought by Westinghouse and others against uranium producers, Justice Minister Chrétien stated:

> "In our view, it is objectionable that actions of the Canadian uranium industry, taken outside the United States in accordance with Canadian law in response to a declared national policy, should be the subject of legal proceedings in the United States."

The bill would prevent the recognition or enforcement in Canada of foreign antitrust judgments where, in the opinion of the Attorney General of Canada, such action would harm Canadian international trade and commerce. In such cases the bill provides a mechanism whereby a defendant could recover that portion of the judgment declared unenforceable in Canada, if the defendant has substantial links to Canada. The bill would also enable the Canadian Government to prevent the removal from Canada of documents and information where a foreign court attempts to exercise extraterritorial jurisdiction in a way that would adversely affect significant business or trading interests in Canada. The Uranium Information Security Regulations, which were introduced to prevent the production of Canadian uranium documents in United States courts, would be repealed. The part of the bill relating to removal of documents and information from Canada is not limited only to foreign antitrust actions.

One feature of the bill appears to be a strengthening of the role of the Attorney General of Canada in respect of the international aspects of competition policy and a correspondingly diminished role for the Department of Consumer and Corporate Affairs. The power to apply the measures in the bill are vested in the Attorney General and no mention is made either of the Minister of Consumer and Corporate Affairs or of the Director of Investigation and Research under the Combines Investigation Act. Cases could arise where C.C.A., with its concern for the maintenance of competition, would be more sympathetic to United States anti-trust enforcement efforts than other Departments.

The United Kingdom, Australia and New Zealand have recently enacted laws to counter U.S. extraterritoriality.

C.R.T.C. REQUIRES BELL TO PERMIT INTERCONNECTIONS

The Canadian Radio-Television and Telecommunications Commission, in a landmark decision on August 5, 1980, has ruled that Bell Canada must permit the attachment of subscriber-provided terminal equipment to its telecommunications system pending a final decision on the matter. The equipment must meet certain technical standards, each residential and business subscriber must have one telephone supplied by Bell and, except for the single line telephone subscriber, those wishing attachments must enter a special agreement with Bell.

The decision relates to an application by Bell on November 13, 1979 for approval of an amendment to Rule 9 of the General Regulations of the Company. The effect of Rule 9 has been to prevent inter-connections not approved by Bell. The Company proposed that Rule 9 be modified to permit interconnections provided they met standards specified by Bell and that Bell could charge a fee. According to the C.R.T.C., Bell stated that its application was intended to bring before the Commission the question of whether the liberalization of the rules regarding interconnections was in the public interest and should be allowed. In order to avoid a period of uncertainty, Bell proposed interim attachment requirements for which it sought approval pending a final decision by the Commission.

The C.R.T.C., in a public notice on November 30, 1979 announcing hearings, made a "preliminary finding" that, with certain qualifications, the interim requirements proposed by Bell were reasonable. It welcomed Bell's willingness to enter into a special agreement with subscribers for interconnections except for "reasonable cause", a phrase which had been used in the proposed interim attachment requirements. On January 11, 1980, Bell wrote to the Commission that Bell's interpretation of the proposed interim requirements was that the pending application before the Commission was "reasonable cause for refusing to sign a special agreement for interconnection...save in exceptional circumstances." In the light of that position, the C.R.T.C. concluded that Bell's proposed interim requirements could not be considered reasonable and replaced them by its own.

In reaching its interim decision, the Commission took account of s. 5 of the Bell Canada Special Act, which provides in part:

> "5.(4) For the protection of the subscribers of the Company and of the public, any equipment, apparatus, line, circuit or device not provided by the Company shall only be attached to, connected or interconnected with, or used in connection with the facilities of the Company in conformity with such reasonable requirements as may be prescribed by the Company.
>
> (5) The (Commission) may determine, as questions of fact, whether or not any requirements prescribed by the company under subsection (4) are reasonable and may disallow any such requirements as it considers unreasonable or contrary to the public interest and may require the Company to substitute requirements satisfactory to the (Commission) in lieu thereof or prescribe other requirements in lieu of any requirements so disallowed.*
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> . . .
>
> The decision of the (Commission) is subject to review and appeal pursuant to the Railway Act."

S. 321 of the Railway Act, which applies to telephone companies, prohibits "unjust discrimination" or the granting of "undue preference" in company charges, services or facilities.

The Commission's decision was reached at a time when two recent court judgments had cast doubt upon the legality of Rule 9. In Challenge Communications Ltd. vs Bell Canada, the Supreme Court of Canada on June 19, 1978 dismissed an appeal by Bell against a C.R.T.C. decision that certain tariffs were discriminatory within the meaning of s. 321 of the Railway Act. Challenge, a supplier of an automatic mobile telephone service, had contended that certain tariffs were unjustly discriminatory against them and gave an undue or unreasonable preference to Bell Canada in the supply of mobile telephone equipment. According to Gordon E. Kaiser, s. 321 now means that telephone companies may not grant preferences to themselves over competitors, and the section has become a major behicle for regulatory authorities to determine claims of unfair competition.

In The Bell Telephone Company of Canada v. Harding Communications Lt. et al., the Supreme Court of Canada dismissed an appeal by Bell that the exclusive jurisdiction in respect of its obligations, if any, arising out of the dealings between Harding and the Bank of Montreal resided in the C.R.T.C. The issues, as reported in the Annual Report of the Director of Investigation and Research under the Combines Investigation Act for the year ending March 31, 1979, were:

> "The Supreme Court defined the issue in the appeal as to whether or not it was open to the Quebec Superior Court to decide if section 5(4) of Bell's Special Act imposes an obligation upon Bell to prescribe reasonable requirements for the attachment of customer owned equipment. In refusing Bell Canada's appeal the Supreme Court ruled that the regulatory commission did not have sole jurisdiction and that the Quebec Superior Court had jurisdiction to decide whether section 5(4) imposed a legal obligation upon Bell when the question arises in proceedings that are properly taken in that Court. The second aspect of the decision was that rules 7 and 9 of Bell's general rules and regulations which deal with the attachment of equipment are not a defence for a civil action seeking remedy for wrongful interference with a firm's business."

As indicated above, the C.R.T.C. plans hearings in the spring of 1981 before final disposition of the Bell application. The Financial Post, in an editorial on August 16 criticized "decision making in a policy vacuum". It quoted Mr. James Thackray, President of Bell, as saying that the decision did not consider a "number of problems and issues such as jobs, balance of trade and related concerns before deciding what course would be in the public interst". The C.R.T.C. has not interpreted its mandate that broadly. The Restrictive Trade Practices Commission, in connection with its Telecommunications Equipment Inquiry, is scheduled to begin hearing argument on September 23, 1980 on terminal interconnections, and its impact on equipment manufacturers is expected to be a principal concern.

The C.R.T.C. decision reflects a trend which has also appeared in the U.S. and the U.K. In the U.S., A.T.&T. has had to permit interconnections ever since a decision by the Federal Communications Commission in the Carterphone case in the 1960's. A.T. & T. is the subject of a huge antitrust case which was launched in 1974 and in which the Department of Justice is seeking divestiture of Western Electric.

On July 21, Sir Keith Joseph, U.K. Secretary of State for Industry, announced that legislation will be introduced in the next Session to permit private industry to compete in the supply and maintenance of attachments to the public telephone network. The new arrangements will take effect in about three years, after which the present state owned monopoly in attachments will be limited to the first telephone and the maintenance of private branch exchanges.

PROPOSED BANK ACT MAINTAINS EXISTING INTERFACE WITH COMPETITION LAW

Bill C-6, the banking legislation now before Parliament, retains the present division of jurisdication over competition policy between the Bank Act and the Combines Investigation Act. An earlier version of the bill which was introduced in November, 1978, anticipated possible transfer of jurisdiction over inter-bank agreements from the Bank Act to the Combines Investigation Act. All versions of the legislation which have been introduced would permit substantially more competition from foreign owned banks.

S. 309(3) of Bill C-6 carries forward the provision in existing s. 102.1 of the Bank Act whereby s. 32 of the Combines Investigation Act does not apply to inter-bank agreements. S. 309(1) and (2) carry forward existing s. 138 which, with certain exceptions, outlaws inter-bank agreements. S. 246 carries forward the machinery in existing s. 65 for inquiry by the Inspector General of Banks. S. 255(5) maintains the exemption in existing s. 102.1 of bank mergers from the Combines Investigation Act.

Prior to the amendments to the Combines Investigation Act early in 1976 most services including banking were excluded from the scope of the Act. Those amendments brought banks under the Act except for mergers and inter-bank agreements. Concurrent amendments to the Bank Act outlawed most kinds of inter-bank agreements and assigned enforcement to the Inspector General of Banks.

Later in 1976, when the White Paper on Canadian Banking Legislation was published, a second stage of revisions to competition law was anticipated soon. The White Paper proposed:

> "In view of the comprehensive revisions of competition legislation and in order to concentrate in a single organization, as far as possible, responsibility for the administration and enforcement of combines legislation, it is proposed that those areas (agreements and mergers now under the Bank Act) also be made applicable to banks under the Combines Investigation Act.
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> ...the Minister of Finance will continue to have authority to approve agreements among banks that are desirable for reasons of monetary or fiscal policy. Secondly, it will be a requirement that the Minister of Finance be consulted in respect of all mergers between banks and that he have the power to authorize such mergers which, in his view, are in the interests of the stability of the financial system." (page 46).

At the time it appeared likely that the Bank Act and the second stage revisions to competition policy would be introduced in the same sessions of Parliament. The proposals in the White Paper were reflected in the second stage revisions to competition policy which were introduced in March, 1977 as Bill C-42, The Competition Act, and re-introduced in November, 1977 as Bill C-13. Both bills proposed repeal of sections 102.1 and 138 of The Bank Act, thus removing the exemption from the competition law of both bank mergers and inter-bank agreements. Exemptions similar to those now in the Bank Act were provided for certain kinds of inter-bank agreements and for bank mergers certified by the Minister of Finance to be desirable in the interest of the stability of the financial system. Other features of both competition bills encountered strong opposition and neither was enacted.

Bill C-15, the first of the three bills to revise banking legislation, was introduced in November, 1978. That bill, while retaining the status quo in respect of bank mergers and agreements, left open the possibility of a transfer of jurisdiction over inter-bank agreements by revision of the competition law if it occurred before the Bank Act received Royal Assent. S. 301(1) and (2) carried forward the prohibition of inter-bank agreements set out in existing s. 138, but s. 301(3) of the bill provided:

> "This section shall not come into force if, prior to the day this Act is assented to, section 138 of the Bank Act...is repealed and if, after this Act is assented to, that section is purported to be repealed by any other Act, this section is repealed."

The banking legislation which was introduced by the Progressive Conservative Government in October, 1979 as Bill C-14 dropped that provision and it has not been re-instated in the present Bill C-6.

All three banking legislation bills have contained proposals to permit substantially more competition from foreign owned banks. Subsidiaries of foreign banks could be allowed entry as banks under the Bank Act. If and when their combined domestic assets exceeded eight per cent of total domestic bank assets, new foreign entrants could no longer be permitted.

ONTARIO COMMITTEE RECOMMENDS MEASURES TO STIMULATE COMPETITION IN PROFESSIONS

The 291 page report of Ontario's Professional Organizations Committee [1] includes recommendations for relaxation of citizenship requirements, greater freedom to advertise and more fee disclosure in a number of self regulating professions.

The Committee, which was established in 1977 by the Attorney General of Ontario, is chaired by H. Allan Leal, Deputy Attorney General, and J. Alex Corry and J. Stefan Dupré are members. Its terms of reference called for a review of The Architects Act, The Law Society Act, The Notaries Act, The Professional Engineers Act and the Public Accountancy Act. R.J. Bertrand, Director of Investigation and Research under the Combines Investigation Act, was among those who submitted briefs to the Committee.

The Committee's recommendations respecting citizenship are:

> "7.1 Canadian citizenship should not be a requirement for membership in any of the self-regulating licensing bodies in accounting, architecture, or engineering, but should be required in order to practice law in Ontario.
>
> 7.2 The statutes establishing each of the self-regulating licensing bodies in accounting, architecture, engineering and law should provide that all (professional and lay) members of the governing councils of these bodies should be Canadian citizens."

The legislation governing architects and lawyers now have citizenship requirements. In commenting upon its recommendation that Canadian citizenship requirements for lawyers be retained, the Committee stated:

> "Believing that the views expressed in the McRuer Report should prevail over those expressed in the Staff Study, we deem it appropriate for members of the legal profession in Ontario to be Canadian citizens. The legal profession has special responsibilities to the community which it serves to uphold its legal institutions. To us, Canadian citizenship connotes a necessary and desirable commitment to our national institutions and traditions."

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(1) The Report of the Professional Organizations Committee, April, 1980, Ontario Government Bookstore, 880 Bay Street, Toronto M7A 1N8

With regard to advertising, the Committee concentrated its attention largely on lawyers, partly because of the large household market for legal services. The Committee recommends:

"10.1 The Law Society of Upper Canada should bring forward to the Attorney General, in the form of regulations subject to Lieutenant Governor in Council approval, revised Rules of Professional Conduct providing that:

(a) every member of the Law Society be entitled to advertise such informaton as office hours, languages spoken, educational qualifications, professional affiliations, preferred areas of practice, representative clients (with consent), references, publications, and fees charged for initial consultations, hourly rates or fixed fees for services;

(b) members advertising a service, where such advertising is misleading or deceptive, be subject to the professional misconduct provisions of The Law Society Act and be subject to disciplinary proceedings; and

(c) price and non-price advertising by members be confined to the print media.

10.2 In the event that such revised rules are not forthcoming in a timely fashion, The Law Society Act should be amended to implement Recommendations 10.1

10.3 The Business Practices Act should be amended to include professional services."

The Committee expressed the view that lack of information on prices has "significantly impaired the competitive health of some segments of the legal services market by weakening the usual market restraints on pricing behaviour." It cited a recent finding that commonly observed prices for conveyancing service of standard difficulty on a $70,000 home in Toronto ranged from $200 to $700, the full range having been from $150 to $1600.(1)

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(1) Housing Transactions Costs in Canada, Barry J. Reiter and J. Robert S. Pritchard (forthcoming study for the federal Department of Consumer and Corporate Affairs).

The Committee also recommends that the self regulating professional bodies under review be empowered to conduct and publish fee surveys. It states:

> "We believe that both practitioners (especially new entrants) and clients would find it to their advantage to have some systematic body of pricing information to which they could turn for guidance in professional dealings. We consider that the interests of all parties would be well served by encouraging the undertaking of purely descriptive fee surveys and the wide dissemination both within a profession and to the public of the results therefrom. We emphasize that the results from such fee surveys should be purely descriptive, and that the information should be assembled by systematic and scientific survey procedures."

> "11.2 The Attorney General should advise the professional bodies under review of the desirability of adopting a rule of professional conduct requiring disclosure by a professional to a client of the basis on which fees will be determined before an engagement is undertaken."

STUDY MEASURES IMPACT OF SELF-REGULATION ON PROFESSIONAL INCOMES

Two Queen's University economists have concluded that fee setting, restrictions on advertising and restrictions on interjurisdictional mobility enhanced the earnings of professions imposing all three restrictions by 26.9 per cent in the census year 1970. Their 250 page study (1) was released on May 28 by the Federal Department of Consumer and Corporate Affairs.

According to the study fee setting, where practiced, enhanced incomes by 11.8 per cent, restrictions on advertizing by 10.8 per cent and restrictions on interjurisdictional mobility by 4.3 per cent. Total cost to consumers in 1970 amounted to $347 millions, of which almost half stemmed from fee setting. The largest aggregate amount of earnings from the three types of restrictions accrued to physicians and surgeons, followed by lawyers, dentists, pharmacists,

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(1) Timothy R. Muzondo and Bohumir Pazderka, Professional Licensing and Competition Policy: Effects of Licensing on Earnings and Rates of Return Differentials, Research Monograph No. 5, Research Branch, Bureau of Competition Policy.

industrial and mechanical engineers, architects, optometrists, veterinarians, chemical engineers, osteopaths, chiropractors and land surveyors.

The authors emphasize that their results relate to the year 1970 and take no account of later events including the 1976 amendments which brought services under the Combines Investigation Act. They call for further research including on the impact of licensing on the quality of professional services.