OUTSIDE THE COURTS

EROLA SUCCEEDS OUELLET AS MINISTER OF CONSUMER AND CORPORATE AFFAIRS

Judy Erola became Minister of Consumer and Corporate Affairs in August, succeeding André Ouellet. Her's is the ninth appointment to that portfolio since Ron Basford introduced the ill-fated Competition Act bill in 1971 (the others were Robert Andras, Herb Gray, Andre Ouellet, Anthony Abbott, Warren Allmand, Bryce Mackasey, Allan Lawrence and André Ouellet for the second time).

Amendments to the Combines Investigation Act were approved in principle by the Cabinet last December and have been discussed with business groups. Mr. Ouellet told the House of Commons Committee on Health, Welfare and Social Affairs on May 24 that amendments would be introduced in the next session of Parliament. At the time of writing, Mrs. Erolla has not given any clear indication of the priority she attaches to the amendments.

PROPOSED DAILY NEWSPAPER ACT FACES UNCERTAIN FUTURE

The then Minister of State for Multiculturism James Fleming released the text of a proposed Daily Newspaper Act on July 6. Its principal features are:

- Future expansion of chains by acquisition or by establishment of new dailies would be prohibited where it would result in control over more than twenty per cent of total Canadian daily circulation. The Southam and Thompson chains, which each control between twenty and thirty per cent of total daily circulation in Canada, would not be required to divest. However, they could not acquire or establish any other dailies, and some divestiture would be required if their ownership changed.

- Acquisition by a non-media corporation of control over a daily newspaper would be subject to public inquiry and report by the Restrictive Trade Practices Commission when the latter believed the newspaper might not maintain its editorial independence. The RTPC's report would include recommendations for remedial measures "within the legislative competence of the Parliament of Canada".

- A Canadian daily newspaper advisory council would be established to investigate complaints in provinces without a satisfactory voluntary press council, to carry out research and to subsidize the establishment by dailies of extra-provincial or foreign news bureaus.

The proposals are in line with what Mr. Fleming outlined as government policy a year ago and in most respects are more moderate than the recommendations made by the Royal Commission on Newspapers (Kent Commission) in August, 1981. In one respect, however, they go further than the Ken Commission recommended. The ownership restrictions recommended by the Royal Commission would have applied only to acquisitions of existing dailies, whereas the draft act applies to establishment of new dailies as well.

The prohibition of control over dailies with combined circulation exceeding twenty per cent of the Canadian total would be applied in the same way as are those in Part V of the Combines Investigation Act. The Director of Investigation and Research under that Act would initiate investigations; as with combines cases, he would have the option of referring a case directly to the Attorney General of Canada to consider prosecution or of submitting a statement of evidence to the Restrictive Trade Practices Commission for consideration and report with recommendations. The latter alternative is rarely chosen now in respect of Part V combines cases because of the delays involved and because the basic issue is guilt or innocence under the law; the same considerations would appear likely to apply in respect of the prohibitions in the draft Daily Newspaper Act, which amount to per se offences. The proposed prohibition of acquisitions is as follows:

> "4(1) Everyone who, alone or jointly or in concert with one or more other persons, acquires control over an existing daily newspaper commits an offence if the average daily circulation of the daily newspaper over such period of six months within the year that immediately precedes the date of establishment of control as is determined pursuant to the regulations, together with the average daily circulation over that period of all other daily newspapers controlled by that person, alone or with his affiliates, exceeds twenty per cent of the average daily circulation over that period of all daily newspapers."

S. 5 of the proposed act would prohibit in quite similar language the establishment of a new daily including the conversion of a newspaper to a daily where the twenty per cent circulation share is exceeded. A striking feature of both prohibitions is the absence of any requirement upon the prosecution to show anti-competitive effects or even to establish the particular market or markets served by the acquired dailies; and there is no defence based upon a showing of pro-competitive effects. Thus, it would become illegal for Southam or Thomson to acquire or establish a daily in New Brunswick where Irving interests control all the English language dailies. Conversely, it would be

perfectly legal for Irving to establish another daily in that province since the Irving papers have less than twenty per cent total Canadian circulation. It was the acquittal of Irving by the Supreme Court of Canada in 1977 that confirmed the ineffectiveness of the present merger prohibition in the Combines Investigation Act.

The proposed provision relating to the acquisition of dailies by non-media corporations does not constitute a prohibition. It simply requires such acquisitions to be reported to the RTPC, which must launch an inquiry if it believes the acquired daily may not maintain its editorial independence. The Commission's report shall include recommendations "for such measures within the legislative authority of the Parliament of Canada as it considers appropriate". There is not much that the government could do to prevent such an acquisition under existing laws, and a new law enacted to meet a specific acquisition would have to be of fairly general application if it was to have any prospect of being found to be constitutional by the courts. A strengthened merger law of general application might resolve some such cases where anti-competitive effects could be established.

Reactions to the draft act have come largely from the press, which has been hostile. Perhaps the sharpest criticisms have been directed at the proposed press council, a matter which does not relate to competition but which has been attacked as infringing press freedom. The proposals to restrict ownership of dailies have also been attacked vigorously but not always in a way to criticize the principles of competition law. The Globe and Mail editorialized on July 7:

> "But the most striking thing about the act is that most the what it wants to do could be accomplished without a Daily Newspaper Act.
>
> "For instance: Parliament could revise the Combines Investigation Act, if necessary, to control the concentration of ownership in the newspaper business. For instance: Parliament could amend the Restrictive Trade Practices Act (sic) to require the Restrictive Trade Practices Commission to control the purchase of newspapers by non-media corporations."
>
> Editor's note: There is no Restrictive Trade Practices Act: the Commission's activities are legislated largely in the Combines Investigation Act.

Another prominent feature of the press reactions has been widespread skepticism that the government intends to make a serious effort to get the measure through Parliament. One reason advanced for this skepticism is that the constitutionality of the proposed act is by no means certain. Another is that, with a general election likely to be held next year, the Official Opposition would no doubt be delighted to align itself with the newspapers as a defender of press freedom.

Mr. Fleming's ouster from the Cabinet on August 14 created additional questions about the future of the proposed act. The Prime Minister indicated in the Commons on September 16 that he planned "eventually" to assign responsibility for the proposed act to the new Minister of Consumer and Corporate Affairs, Judy Erola.

The trial of the Thomson and Southam newspaper chains on conspiracy, merger and monopoly counts opened in the Ontario Supreme Court on September 19. The charges relate to the emergence of English language daily newspaper monopolies in Montreal, Ottawa, Winnipeg and Vancouver. The trial is expected to be lengthy and, allowing for appeals, the final verdict is unlikely to be rendered for a long time.

PRIVATE BILL INTRODUCED TO AMEND COMBINES ACT

A private bill to strengthen the Combines Investigation Act as it applies to professional sports franchises was introduced in the House of Commons by Hon. Ray Hnatyshyn on June 29. The bill, C-690, was in reaction to the decision of the National Hockey League board of governors not to approve transfer of the St. Louis Blues to Saskatoon. Mr. Hnatyshyn stated in the Commons:

> "I have had some concerns about the strength of the Combines Investigation Act and its application to the granting, transfer and operation of sport franchises. These subjects have been specifically excluded from the freedom of trade section in the Act. This Bill would correct that problem and thus would hopefully ensure that a professional sports league could not unreasonably restrict the transfer of a franchise, particularly when it is contrary to our national interests."

The amendment specifies that s. 32 (conspiracy that unduly lessens competition) applies to "the grant, transfer and operation of franchises by and in professional sport leagues". At the same time, ss. 32.3(3) is amended to remove such activities from the application of s. 32.3 (conspiracy relating to professional sport).

S. 32.3 is directed primarily against agreements or arrangements which impose unreasonable restraints on professional sports players or competitors; the conditions under which it would apply to a league decision to grant or not to grant a franchise are at best unclear. There are, however, also uncertainties about the effects which would flow from bringing sports franchising under s. 32; the courts would have to decide in the circumstances of each case whether competition would be lessened unduly. A successful

prosecution might be just a likely under existing s. 33 which prohibits the operation of a monopoly to the detriment of the public.

The St. Louis Blues affair is being investigated under the Act for a possible violation of s. 33.

CRIMINAL LAW AMENDMENT PROPOSALS INCLUDE COMBINES ACT CHANGE

Justice Minister Mark MacGuigan published a package of criminal law amendment proposals on July 25, including one proposed amendment to the Combines Investigation Act. The principal effect of the amendment would be to exempt most real estate transactions from s. 37.1 which prohibits sale above advertised price.

Ss. 37.1(1) provides the following prohibition:

"37.1(1) No person who advertises a product for sale or rent in a market shall, during the period and in the market to which the advertisement relates, supply the product at a price that is higher than the price advertised."

Ss. 37.1(3) provides the following exemptions:

"(3) This section does not apply

(a) in respect of an advertisement that appears in a catalogue in which it is prominently stated that the prices contained therein are suject to error if the person establishes that the price advertised is in error;

(b) in respect of an advertisement that is immediately followed by another advertisement correcting the price mentioned in the first advertisement; or

(c) in respect of the sale of a security obtained on the open market during a period when the prospectus relating to that security is still current."

The proposed amendment would add the following exemption to ss. 37.1(3):

"(d) in respect of the sale of a product by or on behalf of a person who is not engaged in the business of dealing in that product."

S. 37.1 was enacted as part of the 1976 amendments and it was officially described as being "directed against the situation in which a merchant, having advertised a product at a particular price, exacts a higher price when a customer comes to buy it". As drafted, however, the section applies to an individual who advertises his house for sale or rent directly or though an agent and who receives an offer higher than the advertised price. The proposed amendment would exempt such instances.

CAST ACQUIRES SOFATI: CONTAINER SHIPPING RATE WAR RECEDES

An official of Sofati Ltd. announced on August 4 that the company had agreed to sell Sofati Container Line Ltd. of Montreal to Cast (1983) Ltd. Sofati Container will henceforth charter its vessels from Cast as its existing contracts expire, and this will reduce existing surplus capacity on the North Atlantic route out of Montreal. Cast has announced a rate increase of about one third effective November 1, apparently terminating the rate war in which the two non-conference container shipping lines were engaged.

Sofati Container Line Ltd. was established about a year ago with some former Cast Container Group executives holding a minority interest. Cast (1983), which is indirectly owned by the Royal Bank of Canada, was created to charter ships which the Bank acquired after Eurocanadian Shipholdings Ltd. went into receivership. Eurocanadian had been the parent firm of the Cast Container Group.

An investigation was launched in May into container shipping through the Port of Montreal under s. 34(1)(c) (predatory pricing) of the Combines Investigation Act. Canadian National Railways as well as the container shipping lines are involved. Hearings by the Canadian Transport Commission into the financial interest of CN in the former Cast Container Group were held in September. Nova Scotia had complained that CN's relations with the former Cast Group were having adverse effects upon the Port of Halifax. CN has stated that is has no financial interest in Cast (1983) and the Commission concluded the hearing with a ruling that there was no evidence to support the Nova Scotia complaints.

COMBINES DIRECTOR INTERVENES IN OSC BANKER-BROKER MEETING

Toronto consultant John D. Todd appeared for the Director of Investigation and Research, Combines Investigation Act, in June at public meetings held by the Ontario Securities Commission on the role of financial institutions in the securities brokerage industry. He proposed an administrative networking relationship between the banks and brokers which he said would serve the public interest without incurring the long-term risks for competition which more direct involvement by the banks in securities trading might have.

The meetings followed widespread expressions of concern by stock brokers about the Toronto-Dominion Bank's proposed green line brokerage service. Formal hearings on the green line plan are also to be held. According to the plan, an investor would telephone an order to T.-D. using a special toll free number. T.-D. would have the order executed by a discount broker and no investment advice would be offered. The client would pay a lower transaction cost than he would have to pay a full service broker. Such a service has become feasible only since the deregulation of brokerage fees last April. Other financial institutions will undoubtedly follow T.-D.'s lead if the plan clears regulatory hurdles. Canadian chartered banks have for many years been permitted by the Bank Act to arrange with a broker for the sale or purchase of stock upon the request of a client, charging a small fee in addition to the standard fee charged by the broker. Banks are, however, precluded from providing investment research or advice. Also, the OSC rules that they are not to solicit, although one question at issue is the meaning of that term. Heretofore, it has been largely clients in rural areas who have arranged for stock trades through banks; it has been an accommodation service, the cost and quality of which has not been fully competitive with that offered by stock brokers.

The Director's spokesman at the hearing, while generally in favour of free entry into an activity, expressed some concern that the T.-D. proposal could have some anti-competitive consequences in the long run. His fear was that the proposal, which he classified as "product networking", would have effects similar to the direct entry of the chartered banks into stock brokerage and could conceivably have the following consequences:

- the financial institutions might attain a dominant position in discount brokerage, thus increasing concentration in the industry.

- Financial institutions have an interest in distributing their own investment instruments; this might lead to conflicts of interest even though the banks were not formally offering investment advice to stock trading clients.

- Regulatory asymmetries might create unfair advantages for financial institutions where they were permitted to engage in stock trading while stockbrokers were precluded from offering banking services.

In order to avoid any such risks, the Director's spokesman advanced an alternative proposal which he called "administrative networking" and which de described in the following terms:

> "Administrative networking refers to networking relationships in which producers sell only their own services but cooperate in packaging them with others. In this instance, investors would continue to contact their broker rather than their bank in order to place an order for a trade. The bank and broker would have an administrative relationship which would permit an investor to arrange to have his bank account automatically debited or credited, or a loan from the bank to be processed automatically when an order is processed by his broker. Banks would not be permitted to solicit or market securities or brokerage services since orders would be placed directly with their affiliated brokers.
>
> "The development of administrative networking relationships could lead to a package of banking and brokerage services being offered which would allow investors to establish an investment account with a bank that would be administratively linked to a trading account with a broker. Upon placing an order with the broker - not the bank - the investor's bank account would automatically be debited or credited appropriately. The investor could maintain a credit line with the bank to automatically allow funds to be borrowed for stock purchased in a manner like that envisaged with TD's proposed Green Line Investor Service. All brokers and banks could participate in offering this service package despite the large number of brokers relative to banks since each bank could establish an administrative networking relationship with a number of brokers. In fact, there are no obvious obstacles to the creation of a system which would allow investors to deal with any broker and any bank. This could be accomplished by establishing a central clearing house for broker-banker transactions. While the resulting service would not be one-stop shopping, it would provide all the conveniences of one-step shopping."

And he concluded in part:

> "The primary reason for rejecting product networking as a desirable industry structure is that an alternative exists which promises to provide all the benefits of product networking while avoiding the problems, and allowing the financial services sector to develop incrementally.
>
> "Administrative networking promises to serve the public interest and benefit Canadian capital markets by encouraging the introduction of new service packages which will make securities investment more convenient and available at lower transactions

costs for retail investors. By increasing the attractiveness of securities investment for retail investors, overall retail participation may be increased. The problems of direct intermodal competition and production networking should be avoided by administrative networking."

Federal finance officials have not participated actively in the meetings, which are under provincial auspices. The Inspector General of Banks did reply to a letter from the OSC in which he explained the relevant parts of the Bank Act. It appears from his letter that the green line service would come within the terms of that Act. Clearly, the issues before the OSC raise delicate questions in federal-provincial relations.

Spokesman for the Consumers Association of Canada at the OSC meetings expressed support for schemes such as the T.-D. Bank's green line proposal. They contended that more competition and easier access for consumers would result.

The Director of Investigation and Research has taken positions on other related matters at previous hearings of the OSC. He strongly favoured the termination of stock brokerage rate fixing, a position which was adopted in Quebec and Ontario and which became effective last April. He also opposed undue restrictions on capital movements into or out of investment houses, arguing that the regulatory system would continue to protect the public interest; he stated:

> "If the Commission considers it necessary to restrict institutional ownership, it should not be restricted by an across the board percentage rule. If necessary, institutional ownership restrictions should be implemented either by an across the board dollar limit or on a case by case review of the purchases of a significant share of any securities firm."

Last January, however, the OSC recommended against permitting any investment at all by banks of other financial institutions in investment firms. More recently, the Quebec Securities Commission expressed itself in favour of continuing to permit up to a ten per cent share ownership by any source including financial institutions.

PETROLEUM INQUIRY HEARINGS CONTINUE

The petroleum inquiry hearings before the Restrictive Trade Practices Commission have been continuing except for a break in August, and witnesses are scheduled to be heard well into December. Hearings on remedies and final arguments are expected to be completed in June or July, 1984, after which the Commission must finish work on its report.

Counsel for the Director of Investigation and Research created a surprise early in May by introducing new witnesses (Messrs. Harries McCann and Borns and new proposals respecting refinery products exchange agreements among the oil companies. These are agreements whereby an oil company with refinery capacity surplus to its marketing needs in one area supplies product to another oil company with a deficit in that area and receives in exchange product in another area where it is in deficit. Some of these arrangements are of a long term nature and the Director contends that to varying degrees they do not involve market mechanisms for establishing prices. He contends that they increase interdependence among the oil companies in the following ways:

- They require ongoing information exchanges on the strategies of competing firms such as present and future product requirements and their present and planned refinery capacities.

- They significantly reduce the amount of uncommitted product available, which can create barriers to entry to new competitors.

- They can entrench market shares in distribution.

He also contends that the exchange agreements tend to take the form of bilateral bartering and that this introduces inefficiencies not associated with competitive market pricing, with the following adverse effects:

- It may result in high cost sourcing because of reciprocity constraints.

- It may lead to inefficient investment decisions.

- Transaction costs may be higher than in competitive market transactions.

The Director's submission concludes in part:

> "This review of the issues indicates that given the ownership configuration of refinery capacity and marketing capacity in the Canadian petroleum industry there are clearly 'gains from trade' to be reaped. However, it is also clear that the existing system of supply-exchange, while it might generate some of the available gains, runs a strong risk of both compromising the level of competition in the industry and incurring the inefficiencies associated with barter systems. Moreover, this risk increases as product demand declines and the incidence of supply exchange agreements increases."

The following new remedies are proposed in the submission:

- Prohibit all reciprocal agreements

- All purchases and sales agreements in excess of 90 days must be subject to public tender

- No purchases or sales agreement can exceed two years in duration

- Reduce all barriers to import and export of product.

The Director's Green Book of 1981 also attacks exchange agreements as anti-competitive, but at that time the remedy proposed was:

> "legislation be enacted requiring that all refiners operating in Canada obtain approval of the National Energy Board for all refinery supply agreements affecting inter-provincial and international trade and exchange. Before approving such agreements the Board must consult with the Minister of Consumer and Corporate Affairs as to likely effect the agreements may have on competition."

Several of the oil companies submitted detailed written submissions later in May on the refining sector including the question of exchange agreements. While the submissions had been prepared prior to the Director's new proposals, some oil company withesses did comment on those proposals and more comments may be expected in October when the hearing shifts from marketing to refining again. A witness for Imperial Oil cited the following as reasons for requiring exchange arrangements:

- Imperial strives for national self sufficiency in refining capacity and its undertakings to supply other oil companies are contingent upon being assured of replacement supplies.

- Transaction costs on exchange agreements are considered to be lower and not higher than open market transactions.

- Exchange arrangements provide a better guarantee of supply.

- Exchange arrangements provide a greater expectation of being able to procure emergency supplies.

An opening statement by Gulf Oil stated in part:

> "In the Green Books and, more recently, in the evidence presented before the Commission last week, the Director has made a serious allegation that product arrangements at the refining level were entered into to acquire information that could be used to inhibit competition. Gulf Canada will establish that supply arrangements were not entered into with any intent to acquire information in order to inhibit competition. These supply arrangements were entered into in order to either sell excess

refining capacity to anyone who was prepared to purchase same or, in other circumstances, to purchase the excess refining capacity of other refiners in the Canadian petroleum industry. We also point out that the Director states that the information 'could be used to inhibit competition', however, he has never established that such information did in fact inhibit competition.

...

"Gulf Canada has noted that the recent statement of Messrs. Harries, McCann and Borns filed on behalf of the Director of Investigation and Research represents a significant change in the case of the Director in the Refining and Supply sector of the Hearings. In Volume V of the Green Books, the Director postulates that supply arrangements, specifically processing agreements and exchanges, are mechanisms employed by the major petroleum companies to share markets, that these arrangements are specifically designed to facilitate the exchange of information, and that the major petroleum companies employed supply arrangements to either discourage potential entrants from entering the refining industry or in order to deter refinery expansions. This is not the position now put forward by the Director through the witnesses Harries, McCann and Borns.

"These witnesses say that because there is a possibility that reciprocity constraints contained in supply agreements result in high cost sourcing, that because there is a possibility that investment decisions were not made on a cost efficiency basis, and because there is a possibility that transaction costs were higher under the supply exchange system than they would have been under the market exchange, then there is a strong risk of compromising the level of competition in the industry and incurring the inefficiencies associated with barter systems. It is to be noted that none of the allegations contained in the Statement of Evidence submitted by these witnesses is based on any analysis or proven fact with respect to the petroleum industry. Nor, for that matter, have the recommendations of these witnesses been based on any proven evidence that the alleged anti-competitive practices in the supply sector of the petroleum industry require remedial action. Gulf Canada will argue, therefore, at the conclusion of these hearings, that the recommendations of the Director's witnesses be rejected.

...

"I would like to re-emphasize that the Company's position is that refinery exchanges, processing agreements and terminaling arrangements are an extremely important and necessary part of the operations of the petroleum industry in Canada. The Company

rejects the allegation in the Green Books that these kind of agreements have had an anti-competitive effect and views with alarm the Director's recommendation in the Green Books and the recommendations of the Director's recent witness panel that these agreements to regulated. In the event of refinery breakdowns, transportation difficulties, and similar emergencies, it is imperative that the industry have the ability to make immediate alternative supply arrangements in order to ensure that the products flow to the consumer without interruption. Government regulation, no matter how efficient, would lead at best to intolerable delays or alternatively, to actual product outages to the customers of individual companies."

FOREIGN AND INTERNATIONAL

CANADIAN TRUCKERS FACE U.S. ANTITRUST CHARGES

The United States Department of Justice filed a civil antitrust suit on June 10 against the Niagara Frontier Tariff Bureau Inc. of Buffalo and the following five Canadian trucking firms:

Bondy Cartage Limited, Windsor
Dominion-Consolidated Truck Lines Limited, Toronto
ICL International Carriers Ltd., Windsor
Inter-City Truck Lines (Canada) Inc., Toronto
TNT Canada Inc., Mississaugua

The Department of Justice issued a press release stating:

"Assistant Attorney General William F. Baxter, in charge of the Antitrust Division, said the complaint alleges that from at least as early as 1966 and continuing to at least 1981, the defendants and co-conspirators engaged in an unlawful combination and conspiracy to fix prices and inhibit or eliminate competition for the transportation of freight by motor carriers between the United States and Ontario.

"The defendants and co-conspirators are parties to the NFTB's collective ratemaking agreement which was approved by the Interstate Commerce Commission and which authorizes them to set rates collectively provided they adhere to the terms of the agreement and ICC regulations.

"Baxter said the suit charges that the defendants engaged in price fixing conduct beyond the scope of the antitrust immunity