

## OUTSIDE THE COURTS

### THRONE SPEECH PROMISES NEW COMPETITION POLICY

The Governor General stated in the speech from the throne on December 7:

"Following extensive and continuing consultations with the private sector and the Provinces, the government will introduce a new competition policy to bring market forces to bear in the continuing fight against inflation. The legislation will modernize conspiracy, monopoly and merger provisions, and promote the interests of consumers and small business through a freer marketplace. Amendments will also facilitate consortia to compete abroad for export sales and development projects."

The speech contained no reference to the proposed Daily Newspaper Act, a draft of which the then Minister of Multiculturalism James Fleming released last July. The abandonment of that proposal, along with the loss of the combines case against the newspaper chains, will add to the arguments for proceeding with a competition bill. On the other hand, the session will be crowded one and will probably be cut short by an election.

### EXCESSIVE RETAIL MARGINS ALLEGED UNDER PROVINCIAL DRUG PLANS

The Ottawa Citizen of October 21 reports a Southam News investigation which has found that all provincial governments except British Columbia and Saskatchewan have for years been paying excessive prices to pharmacists for drugs supplied to aged and welfare recipients.

Ontario, which was found to have been paying the highest prices, pays according to prices in its "formulary" book. Those prices are the suggested retail prices as established by the manufacturers, and are often higher than actual retail prices as determined by the market. According to Southam News, manufacturers keep their suggested retail prices high in relation to wholesale prices in order to entice pharmacists to stock their brands. The latter tend not to stock brands with smaller suggested markups.

Following the report, Ontario Health Minister Tom Wells announced an investigation into the matter. Information about the problem has in fact been publicly available for some time. For example, it was discussed in Economic Council of Canada Technical Report No. 8 by Paul K. Gorecki entitled Regulating the Price of Prescription Drugs in Canada: Compulsory Licensing, Product Selection and Government Reimbursement Programmes, dated May, 1981. Dr. Gorecki stated:

"In Ontario and Quebec the prices currently listed in the provincial formularies allow substantial intra-marginal rents to be

captured by pharmacists instead of being passed on to the consumer or the government as the provider of drugs at reduced cost to various classes of consumers...In both provinces use of more appropriate (i.e. lower) prices should be made in the formulary. Numerous sources of price information exist in which to monitor the presence and magnitude of intra-marginal rents...

"In Ontario, in the (Ontario Drug Benefit) sector of the market, the drug cost of a prescription is derived by mandatory price selection of the lowest priced interchangeable pharmaceutical product in the formulary. In the non-ODB section of the market the relevant rule is set out in section 158(3) of the Health Disciplines Act, which reads,

'No person shall knowingly supply an interchangeable product ... at a price in excess of the cost of the lowest priced interchangeable pharmaceutical product in his inventory..' (emphasis supplied)

"These differences between the two markets lead to the following practice: the pharmacist will stock brands of a particular drug which have medium to high formulary prices and low real prices so he can profit from the spread, especially to non-ODB consumers."

Attention also continues to be drawn to the drug industry because of its efforts to persuade Ottawa to repeal or modify the 1969 amendment to the Patent Act which provides for compulsory licensing of drug patents. Last May the then Minister of Consumer and Corporate Affairs André Ouellet made a number of proposals which would meet some of the industry's concerns (see the departmental discussion paper Compulsory Licensing of Pharmaceuticals: A review of Section 41 of the Patent Act, Supply and Services Canada, Cat. No. RG 15-2-1983). Recent press reports indicate that the new Minister, Judy Erola, is having the proposals reviewed following protests from consumer groups and provincial governments. Any price increases which resulted from changes in the legislation would be borne in large part by consumers and provincial health and welfare plans. The Globe and Mail of November 12, after interviewing Mr. George Post, Deputy Minister of Consumer Affairs, stated:

"One option for Ottawa has always been to leave the act as it is. But that, said Mr. Post, would leave unresolved the 'sense of irritation the multinational drug companies feel towards Canada' and might eliminate the country from competition for drug research."

#### **ONTARIO LAW SOCIETY REJECTS LIMITED FEE ADVERTISING**

The Law Society of Upper Canada recently rejected a recommendation by a special committee of the Society that fee advertising be permitted on cards and signs in a lawyers's premises (Globe and Mail, October 5). Laura Legge, Treasurer of the Society is reported to have said that the

public is well served now by lawyers informing clients individually about prices. Some lawyers are reported to have pointed to the danger of fee cards being taken outside a lawyer's office and distributed to prospective clients.

Fee advertising is permitted in varying degrees in many parts of the United States as well as in Manitoba, Alberta and British Columbia. However, the Supreme Court of Canada in Jabour v. Law Society of British Columbia et al. (1982) 137 D.L.R. (3d)1), upheld the authority of the Law Society of British Columbia to restrict advertising by lawyers and found that the Combines Investigation Act does not apply to that body.

The Professional Organizations Committee, which was established by the Attorney General of Ontario and chaired by the Deputy Attorney General, recommended in 1980 that the Law Society revise its rules to permit advertising, failing which appropriate legislative amendments should be enacted (The Report of the Professional Organizations Committee, April, 1980, Ontario Government Bookstore, Toronto). That Committee stated:

"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 information as office hours, language 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."

#### **BANKS' INVOLVEMENT IN STOCK BROKERAGE WINS OSC APPROVAL**

The Ontario Securities Commission released a report on October 31 approving the marketing by banks and other financial institutions of stock trading services through discount brokerage houses. The Toronto-Dominion

Bank was expected to be the first entrant with its so-called Green Line Service. Those offering such services will be required to observe the following conditions:

- All orders processed must be executed by a registered broker.
- Investment advice must not be given and customers must be so informed. Investment advice occurs where there is solicitation to buy or sell stocks. However, those offering the service must determine the client's investment objectives and advise on the suitability of the proposed trade
- Tied arrangements between financial institutions and discount brokers are prohibited
- Those offering the service must register with the OSC.

The Commission emphasized its view that the "core function" of the securities industry, which it decided is underwriting, must be protected from encroachment by the other financial sectors (banks, insurance companies and trust companies). However, it concluded that, while full service brokerage is a necessary ancillary function, discount transaction services are not essential to the underwriting function.

Reactions to the report by spokesmen for the securities industry have been negative but most other reactions including those by some brokers have been positive. As reported in Canadian Competition Policy Record in September, federal competition policy officials have expressed some concern that banks might eventually acquire excessive market power in the provision of trading services.

The OSC was faced with a clear trend both in Canada and abroad towards more competitive overlapping of the functions of the various parts of the financial sector. Moreover, services such as the one proposed by the Toronto-dominion Bank appear to be permissible under the Bank Act, and a negative decision by the OSC would probably have been challenged in the courts. Don McGillivray contends in his column in the Ottawa Citizen of November 7 and elsewhere that the stock trading function as practiced by stock brokers on the floors of exchanges has in any case been rendered obsolete and uneconomic by computer technology. "If the past is any guide," he said, "the move towards a fully automated customer-to-customer share-trading system won't start in Canada. But we'll get it after the usual lag."

#### **CORPORATE SHAREHOLDING LIMITATION BILL SHELVED AS SESSION ENDS**

Finance Minister Marc Lalonde revealed on November 23 that the Corporate Shareholding Limitation Act would not be debated in the Commons during the then current session of Parliament which was prorogued on November 30. Consumer and Corporate Affairs Minister Judy Erola, who was

sponsoring the bill, said at the time that the government was still committed to it and it would be re-introduced during the session which began on December 7. However, no mention was made of it in the speech from the Throne at the opening of the new session.

The bill was introduced in the Senate in November 1982. It would prohibit any provincial government from owning more than ten per cent of the shares of any company that is engaged in an interprovincial or international undertaking involving transportation by air, water, rail or product pipelines other than for oil and gas. The bill was a response to concern by Ottawa and by the business community about the activities of the Quebec government's Caisse de Dépôt et Placement du Québec which is permitted to own up to thirty per cent of the shares of a company. The Caisse has an interest exceeding nine per cent in Canadian Pacific Investments Ltd. and there is fear that it might raise that interest to a level where it could obtain representation on the Board.

Mrs. Erola announced some amendments to the bill last month, but they were not of a kind to change its basic thrust, which is to preserve federal power over interprovincial and international transport against provincial encroachment. Opposition by Quebec interests, including that of the Quebec federal Liberal caucus, appears to have been the deciding factor in shelving the bill. Opposition Leader Brian Mulroney also expressed strong opposition to the bill during the question period on November 18.

The Toronto Financial Post editorialized on December 10:

"The proposed bill, S. 31, vanished when Parliament was prorogued last week. And if the Tory leadership has its way, to say nothing of the Quebec Liberal caucus, it will never reappear.

"That would be regrettable. Unless we want a predominantly state-run economy, now is the time to put some limits on how much of the private sector government funds can control. We would have thought the Conservatives, of all people, would appreciate this."

## FOREIGN AND INTERNATIONAL

### **CANADIAN, U.S. OFFICIALS SHARE FORUM ON EXTRATERRITORIALITY ISSUES: NEGOTIATIONS ON NEW BILATERAL AGREEMENT ARE PROGRESSING**

Mr. Lawson Hunter, head of Canada's Bureau of Competition Policy, and Mr. Charles S. Stark, Chief, Foreign Commerce Section of the United States Department of Justice Antitrust Division, both spoke on the subject of extraterritoriality on October 21 at the Annual Conference of the Canadian Council on International Law in Ottawa. Mr. Hunter, after recalling negotiations by the two governments which began in 1977 on a strengthened and more formal notification and consultation procedure, stated: