

"Finally it is not every attempt to manipulate (upward or downward) or maintain prices that is prohibited but only those attempts made by 'agreement, threat, promise or any like means'. Such an attempt achieved by threat or promise directed at persons may be, at least in some instances, a tangible concept, but where there is no vertical distribution link, it is difficult to conceive an agreement between horizontal entities which could constitute the attempt prohibited by the section. Indeed, it seems to me that an agreement between horizontal entities must, if it is to constitute an attempt to alter the prices at which other persons supply their product, have some constraining effect on those other persons. It must be of such magnitude as to be capable of affecting prices in such a way as to restrict the freedom of trade of suppliers who are not part of the agreement."

He then concluded:

"The evidence, thoroughly reviewed by my brother La Forest, clearly shows that no landlord felt bound by a majority decision of their association, let alone by any agreement of other landlords. At best, there was an attempt to influence landlords to raise their rents but no agreement of sufficient magnitude to affect prices so as to restrict the freedom of other landlords to fix their own prices."

OUTSIDE THE COURTS

COMBINES CHIEF PROPOSES REMEDIES FOR ALLEGED ANTI-COMPETITIVE PRACTICES IN PETROLEUM INDUSTRY

The final written argument on behalf of the Director of Investigation and Research, Combines Investigation Act, was filed in February with the Restrictive Trade Practices Commission in its Petroleum Inquiry. Some 800 pages in length, it also outlines the Director's remedial proposals. His proposals will be further elaborated at hearings in April and May which are scheduled to permit clarifications of final arguments and to hear evidence of remedial panels of experts. The final written arguments by the petroleum companies were to be submitted on March 20, 1984. Final hearings in June and July will permit final responses and rebuttals, after which the Commission must complete its report.

The Director's remedial proposals cover international crude trading, refining and marketing. With regard to international crude trading he reiterates the allegations in the original Statement of Evidence (Green Book) of 1981 that the oil companies have paid excessive prices to foreign affiliates for

imports. He adds that such excessive prices may be promoted in part by the Petroleum Compensation Program which compensates importers of crude oil to ensure equality of prices across the country. As the Program is administered, he asserts, it may encourage multinational firms to send their most expensive crude to Canada. He calls upon the RTPC to take steps to ensure that crude imports are at a fair market value, and he states:

"One approach the Director will urge the Commission to consider is legislation that disallows crude costs for compensation or tax purposes where the price of the crude exceeds the price at which the Alberta government exports domestic crude....

"In the Director's submission this Commission should also recommend in its report that all regulatory restrictions on product import be eliminated. The evidence before this Commission supports the proposition that the import option has significant pro competitive benefits regardless of whether it is actually utilized or not.

"Finally, the Director will ask the Commission to evaluate the anti-competitive elements of Petroleum Compensation Board procedures. In particular, the Director submits that competition policy goals require either the abolition of the Petroleum Compensation Program or a modification of its procedures to ensure that there is no bias that would cause high cost crude to be diverted to Canada."

With regard to refining, the Director's proposals relate largely to reciprocal exchange agreements whereby refined products which are surplus to a company's marketing requirements in a particular geographic area are traded to another refiner on condition that the exchange partner deliver a like quantity of product in the second market. He estimates that over half of Canadian refinery capacity is now subject to such agreements and he states that they are from ten to fifteen years duration. He asserts that these agreements minimize the supply available for non-integrated companies and that they permit refiners to control total industry output. He makes the following proposals which are revisions of earlier ones:

"That all reciprocal exchange agreements between refiners in excess of 90 days be prohibited.

"That refiners be required to deal with each other by separate and independent purchase and sale agreements obtaining prices for their products sold and purchased for all contracts in excess of ninety days.

"That all purchase and sale agreements exceeding two years duration be reviewed by the Restrictive Trade Practices

Commission or the National Energy Board to determine whether or not they are in the public interest taking into account their effects on competition in the industry.

"That any existing exchange agreements be also subject to a review process of the type discussed."

With regard to marketing, the Green Book, which dealt almost exclusively with the 1958-73 period, alleged that gasoline retailing was very inefficient in part because of extreme excess capacity. The Director's argument notes, however, that after 1973 the major refiners rationalized their distribution networks. Nevertheless, he expresses continuing concern about anti-competitive practices in the earlier period by which the refiners are alleged to have sought to curtail entry of efficient independent retailers. Then, referring to changes in competitive circumstances which have occurred since 1973, he states:

"It is submitted that the policies of majors today are not so much directed to a particular class of competitors, but rather to developing new arrangements that increase the refiners control over price through all retail outlets regardless of who operates them.

"In the Director's submission, the increase in company owned and operated retail outlets calls for special policy initiatives. In particular, it is important that the remaining trade channels be removed from any price control by the integrated companies."

The Director then makes the following proposals:

- "the Commission, in its final report, should recommend that legislation be enacted to prohibit exclusive dealing in this industry....refiners should be prohibited from contractually requiring any retailer to purchase exclusively from that refiner. In the Director's submission the banning of exclusive dealing provisions should apply to gasoline as well as other petroleum products... Under this proposal, retailers will be free to sell unbranded and branded motor fuels at the same premises. In the case of motor fuels marketed under the trademark of one of the refiners, resellers would be free to obtain their supply from any source, provided that the product met the specifications of the refiner under whose trademark he operated..... In the Director's submission, the evidence before this Commission clearly indicates that 'Gas is Gas'. After all, over 50% of industry gasoline sales are now exchanged between the different refiners. The Director submits that to permit advertising or contractual restrictions that imply otherwise, not only restrains retailers unduly, but misleads consumers."

- "The Director's second submission with respect to marketing remedies is that this Commission recommend in its report that legislation be enacted prohibiting all contracts where refiners or affiliates obtain control over retail pump prices of non-affiliated outlets". (In this connection he referred to a number of practices including consignment selling and temporary allowance schemes).
- "...the Commission should in its report recommend that the Federal government take all necessary steps to remove any barriers on import of product."
- "Finally, the Director submits that special remedies may be necessary to resolve supply difficulties encountered by non integrated firms. It is submitted that the evidence before the Commission shows that the existing procedures cannot be activated on a timely basis. Accordingly, the Director submits that the Combines Investigation Act should be amended to provide for interim supply orders."

BELL CANADA REORGANIZATION ACT TABLED

The Bell Canada Reorganization Act was introduced in the House of Commons for first reading by Communications Minister Francis Fox on February 8. It is included as part of Bill C-20 and would adjust the regulatory powers of the Canadian Radio-Television and Telecommunications Commission to take account of the Bell reorganization which went into effect in April, 1983.

Under the reorganization a new corporation, Bell Canada Enterprises became the parent firm of the Bell group; Bell Canada, a regulated telecommunication carrier, became one of its subsidiaries. One of the CRTC's concerns was that activities which in its view should be regulated would be carried on in one of the unregulated subsidiaries of BCE. In a report on the matter which it released on April 18, 1983, the CRTC recommended that the reorganization as proposed by the company be allowed to proceed but that legislation be enacted to ensure that the CRTC would have the power to regulate Bell's monopoly communications activities effectively. The proposed Act which has now been introduced would largely implement the CRTC's regulatory proposals. Its principal features are:

- Notwithstanding the new corporate structure, the CRTC will be empowered to bring under regulation activities of BCE which are not subject to sufficient competition and to order Bell Canada to divest itself of an activity which is subject to sufficient competition

- The CRTC will be empowered to obtain from the parent concern any information it requires for regulatory purposes
- In cases of conflict, the Bell Canada Special Act will prevail over other legislation including the Canada business Corporations Act. The Bell group utilized the latter Act to achieve its reorganization
- The Bell group will be prohibited from holding a broadcasting licence.
- Bell Canada will be prohibited from controlling the contents of messages it transmits as a common carrier
- BCE will be prohibited from disposing of any of its Bell Canada shares without CRTC approval

The Bill does not include a CRTC recommendation that it be empowered to direct that a minority shareholder interest in Bell Canada be created.

COMBINES ACT CHANGE PROPOSED IN CRIMINAL LAW REFORM BILL

Bill C-19, the Criminal Law Reform Act, 1984, which was introduced in the House of Commons by Justice Minister MacGuigan on February 7, contains an amendment to s. 37.1 of the Combines Investigation Act. It appears as s. 242 of the Bill on pages 254-5.

Existing s. 37.1 of the Act prohibits a sale above advertised price. The proposed amendment adds an exemption which would apply mainly to real estate transactions. It provides that the section does not apply:

"(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."

Thus, the section would no longer apply to an individual who advertises his house for sale or rent directly or through an agent and who receives an offer higher than the advertised price.

CANADIAN COMPETITION POLICY RECORD

CTC'S OWN AIR FARE HEARINGS PLACE IT UNDER DEREGULATORY PRESSURE

The Canadian Transport Commission has had its cross-Canada public hearings on domestic air fares which opened in Hull on February 13 "stolen from under its nose", wrote Christopher Wadell in the Financial Post of February 18. The CTC had been planning hearings on some rather limited air fare questions, but Transport Minister Lloyd Axworthy directed it to hold hearings on broader issues which have virtually placed the restrictive air fare policies of the Commission on public trial. This comes at a time when air fare deregulation in the United States has made current Canadian policies more and more difficult to sustain.

Air fares have been a live issue in Canada at least since the 1981 report by the Economic Council of Canada on its regulation reference, Reforming Regulation, in which it recommended substantial deregulation of airlines. Shortly thereafter, a study which Prof. William Jordan of York University prepared for the Department of consumer and Corporate Affairs reached broadly similar conclusions (Performance of Regulated Canadian Airlines in Domestic and Transborder Operations).

In August, 1981, however, the Department of Transport issued a policy paper which proposed maintenance and in some respects strengthening of airline regulation. It called for affirming Air Canada and CP Air as the only national carriers, dividing the country in half to establish two operating regions for regional carriers rather than four as now, and for restricting local carriers to the use of non-jet equipment. Hearings on the proposals were held in the spring of 1982 by the House of Commons Standing Committee on Transport, and the Director of Investigation and Researcher under the Combines Investigation Act was among those who appeared before it. The report of the Committee largely rejected the Transport Department proposals and called for more airline competition. That report was followed by nearly a year of official silence until, on March 15, 1983, then Minister of Transport Jean-Luc Pépin appeared before the Committee and announced that the existing system of airline regulation would be maintained without change.

The current set of hearings before the CTC arose in part out of a seat sale which was announced by CP Air last July. Air Canada responded immediately with a similar seat sale. The CTC quickly disallowed the sale even though tickets had already been sold to the public. This led to a public outcry, and the CTC reversed its decision. Following that episode, the CTC planned hearings to consider discount air fares and whether the offer of such fares only between certain cities was discriminatory. In the meantime, Lloyd Axworthy was named Minister of Transport on August 12, and he proved to be a strong proponent of lower air fares. On Sept. 27 he asked the CTC to schedule hearings with broader terms of reference including reasons for disallowing seat sales, comparing airline pricing practices with those in other countries and the impact of the Commission's policies on the public's ability to travel.

The arguments for and against less regulation are well known but the hearings have produced useful documentation on the issues. For example, a 200 page study by the staff of the CTC tends to support existing policies. Two witnesses favouring deregulation have appeared on behalf of the combines Director of Investigation and Research; they were Prof. William Jordan of York University and Mr. Robert McAdoo, a senior official of People Express Airlines, one of the most successful new American entrants to the industry following deregulation.

FOREIGN & INTERNATIONAL

CANADA AND UNITED STATES REACH NEW ANTITRUST UNDERSTANDING

A Canada-U.S. Memorandum of Understanding on notification, consultation and cooperation in antitrust matters was signed in Ottawa on March 9 by Consumer and Corporate Affairs Minister Judy Erola, U.S. Attorney General William French Smith and Federal Trade Commission Chairman James C. Miller. The news was released by Secretary of State for External Affairs Allan MacEachen and Mrs. Erola. The Understanding replaces earlier bilateral understandings and expands upon them in a number of respects. In particular, it commits each country more firmly to take seriously into account the significant national interest of the other at all stages of antitrust investigations and proceedings and provides a means by which government interests may be taken into account in private antitrust suits. The full text of the Understanding is appended hereto.

By way of background, the first Canada-U.S. understanding on antitrust matters was reached in 1959 by Minister of Justice Fulton and U.S. Attorney General Rogers. It followed Canadian irritation over a U.S. antitrust case involving a Canadian patent pool (Canadian Radio Patents Ltd.) which was restricting imports of U.S. radios and television sets. It simply provided for consultations when the interests of one country was likely to be affected by the other country's enforcement of its antitrust laws. In 1967 the Organization for Economic Cooperation and Development adopted a more elaborate antitrust cooperative arrangement in the form of a Recommendation, calling essentially for cooperation in the following respects:

- Notification and consultation on antitrust actions
- Exchange of information on antitrust matters where feasible
- Co-ordination of antitrust enforcement where possible

That O.E.C.D. Recommendation was superceded by a more refined one in 1979. Canada and the United States have been among the stronger adherents to the Recommendations.