

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That O.E.C.D. Recommendation was superseded by a more refined one in 1979.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

In 1969 Consumer and Corporate Affairs Minister Basford and U.S. Attorney General Mitchell reached an understanding which confirmed the Fulton-Rogers Understanding and related it to the 1967 O.E.C.D. Recommendation. The press release stated in part:

"In addition, therefore, to continuing the Notification and Consultation Procedure in accordance with the 1959 Understanding, the two cabinet members agreed that the O.E.C.D. Recommendation of 1967 should be actively implemented as between Canada and the United States in relation to restrictive business practices in international trade. Notification and consultation will continue under both arrangements. Each country will, insofar as its national laws and legitimate interests permit, provide the other with information in its possession of activities or situations, affecting international trade, that the other requires in order to consider whether there has been a breach of its restrictive business practices laws.

"A primary concern would be cartels and other restrictive agreements and restrictive business practices of multi-national corporations affecting international trade. The enforcement agencies of the two countries, each within its own jurisdiction, will where possible coordinate the enforcement of their respective laws against such restrictive business practices."

A number of U.S. antitrust actions in the 1970's, including attempts to obtain information in Canada relating to Saskatchewan potash international marketing arrangements and the uranium cartel, created new strains. These actions were seen in some Canadian quarters as a challenge to the roles of the federal and provincial governments in Canadian industrial and resource development strategies. In June, 1977 U.S. Attorney General Griffin Bell met in Ottawa with Canadian ministers. Certain unpublished "principles of guidance to officials" were agreed upon, and negotiations at the official level looking to a new agreement were begun. The negotiations had reached an advanced stage when the Canadian general election of 1979 brought a change of government. Negotiations were eventually resumed, culminating in the Memorandum of Understanding which has just been announced.

The Understanding as it relates to notification requirements is in much more detail than previously and is an interesting reflection of the relative openness of the border. Thus, while Section 2 spells out the circumstances under which one country must notify the other of investigations of activities in the territory of the other, it also reflects a recognition by both countries that restrictive business practices are not confined by national borders. Notification is required, for example, before the initial visit of an agent of one country to the other country to seek information, but subsequent requests for information relating to the same case need not be notified unless they raise new issues of national interest.

Section 5 of the Understanding, relating to situations where one country blocks the other's attempt to obtain information or documents from a firm located in the first country, is new. Both countries agree "not normally" to block; if a country finds that permitting the transfer of information is contrary to a "significant national interest" it will "normally" block only after notification and consultation. Canada is the country more prone to block because of the more aggressive application by the U.S. of its antitrust laws. Ontario and Quebec have business records protection acts, and the federal government resorted to its uranium security regulations to prevent the transfer of uranium-related documents. Also, on July 11, 1980 the government introduced blocking legislation by Bill C-41, the Foreign Proceedings and Judgments Act; while the bill died on the order paper it is understood still to be on the government's legislative agenda.

Sections 4, 6 and 7 relating to consultation requires each country to give careful consideration to the "significant national interest" of the other at all stages of antitrust investigations and proceedings affecting the other country. The position of the U.S. Government and the courts on issues of extraterritoriality has at times been that a company in another country which acted contrary to U.S. antitrust laws was only protected if its actions were mandated or were the result of a prohibition under the laws of the country where it was located. The U.S. courts have begun to pay more regard to the broader concept of international comity, and the position of the U.S. government seems to have shifted in the same direction. Thus, Section 6 of the Understanding provides in part:

"While a significant national interest may exist even in the absence of any governmental connection with the activity in question, it is recognized that such interests would normally be reflected in antecedent laws, decisions or statements of policy by the competent authorities."

The emphasis on having regard to the other's "significant national interest" permeates the whole document, and it is clearly intended that the concept should be observed by officials at all levels in dealing with all phases of transborder investigations and proceedings. The enforcement of its antitrust laws is of course, in many cases itself a "significant national interest" of the U.S., and Section 7(3) of the Understanding as it relates to consultation provides:

"If each Party asserts that its own national interest is predominant and it is unable to defer to the expressed national interest of the other, they will nonetheless seek to reduce, by accommodation and compromise, the scope and intensity of the conflict and its effects."

Section 11 relating to private antitrust suits is entirely new and will provide some comfort for Canada. The majority of antitrust suits in the U.S. are launched by injured parties rather than by a government agency.

Consequently, decisions to litigate and to seek information in Canada are frequently not under government control. Section 11 has the effect of including private suits within the scope of intergovernmental consultation procedures. Under it, for example, Canada may request the U.S. Government to inform a court of the outcome of consultations and of how the national interest of Canada would be affected by the action the court is contemplating, and the U.S. may agree to do so.

CONSENT DECREE WOULD TERMINATE U.S. SUIT AGAINST CANADIAN TRUCKERS

The U.S. Department of Justice filed a proposed consent decree on January 19 which, if not challenged within sixty days, will terminate its civil suit against the Niagara Frontier Tariff Bureau Inc. and five Ontario trucking firms (see the September, 1983 issue of Canadian Competition Policy Record).

The defendant truckers were in a collective ratemaking agreement which was approved by the Interstate Commerce Commission and which enjoyed antitrust immunity as long as its terms were strictly observed. In particular, such agreements must reserve to each of its motor carrier members the free and unrestrained right to take rate action independent of the collectively set rates. The complaint, which alleged a violation of s. 1 of the Sherman Act, accused the defendants of holding rate setting meetings outside the framework of the approved agreement and of interfering with the rights of other motor carriers to make rates independently.

Aside from ensuring that the defendants conduct their ratemaking strictly according to law, the consent decree imposes additional requirements to safeguard carriers' rights to price independently. The Justice Department press release states:

"In this regard, the decree would (1) prohibit the motor carrier defendants from discussing with any other carrier or the NFTB any independent rate prior to the rate's publication; (2) prohibit the defendants from discussing an independent rate for 90 days after the issued date, except that it would permit discussions after the issued date concerning lowering the corresponding NFTB rate to an amount not lower than the independent rate; any such discussion could take place only in an authorized rate committee or subcommittee meeting; (3) prohibit the NFTB for 90 days after the issued date of an independent rate from processing rate proposals that could cause collective undercutting of the independent rate; and (4) require the defendant motor carriers to certify that their rate proposals for collective action were not aimed at forcing any other carrier to raise its rates."

The legal problems of the truckers are not, however, at an end. Two private price fixing suits have been filed on behalf of a class of customers (Square D Co. v. Niagara Frontier Tariff Bureau, and Big D Building Supply Corp. v. Niagara Frontier Tariff Bureau). The suits were filed in the District of Columbia but have been transferred to the Western District of New York.

U.S. ANTITRUST CHIEF CHALLENGES BIG STEEL'S RATIONALIZATION PROTECTIONSIM SURVIVAL PLAN

U.S. Assistant Attorney General J. Paul McGrath announced on February 15 that the Antitrust Division would challenge a proposed merger of LTV Corp. and Republic Steel Corp. if it were to be proceeded with. The decision if maintained, was expected to forestall other steel mergers which were in the planning stage. It appears to signal that the Antitrust Division under its new head is not prepared to stand aside while the steel industry seeks its salvation through protectionism and massive concentration. However, the decision encountered strong opposition within the administration including from President Reagan. Also, U.S. Steel and National Steel abandoned their planned merger. On March 21 Mr. McGrath approved a somewhat modified merger plan by LTV and Republic.

LTV, of which Jones & Laughlin is a subsidiary, is the third largest steel producer and Republic is the fourth largest. U.S. Steel Corp. is the largest producer and National Steel Corp. is the seventh largest.

LTV had maintained that a merger with Republic would not violate the guidelines when account was taken of import competition and the efficiency gains which it claimed would flow from the merger. However, various protectionist devices have kept imports down to about 22 per cent of the market, and the Justice Department was unconvinced that the merger as proposed would increase efficiency significantly. Nevertheless, Mr. McGrath recognized the serious problems of the steel industry and invited discussion of other restructuring plans.

The London Economist of February 18 applauded the decision, pointing out that large integrated steel producers have been losing out to unintegrated specialized producers with modern equipment. It stated:

"Instead of trying to beget more of a dying species by promoting mergers of integrated steelmakers...steelmakers should try instead to cut costs by specializing in fewer products in less capital-intensive plants, and buy in semi-finished steel from other companies. Integrated steelmaking, even in Japan, has had its day."

The Wall Street Journal of February 16, while criticizing Mr. McGrath's decision, was equally critical of the industry's attempt to survive by protectionist measures. It stated:

"Foreign steel crept in more slowly, but it crept in anyway... The delay let steel managers put off difficult decisions to reinvest in better plants and newer technology. Their U.S. customers, auto makers in particular, became more vulnerable to products made with cheaper steel abroad. And protection led to unrealistic wage increases that made U.S. companies even less competitive."

EROSION OF MONOPOLY POSITIONS IN U.K. CONTINUES ON SEVERAL FRONTS

Mr. Alex Fletcher, Minister of Consumer and Corporate Affairs in the Department of Trade and Industry, told the House of Commons on December 23 that he has authorized the Office of Fair Trading to institute remedial measures in respect to monopoly conditions in movie distribution and exhibition. A report by the Monopolies and Mergers Commission in May, 1983 found that two distributors (Columbia/EMI-Warner Distributors and United International Pictures) held half that market and two exhibitors (EMI Cinemas and Rank Leisure) held 60 percent of that market, and that they constituted a monopoly acting against the public interest. Monopoly practices included the granting of first choice of movies to one or other of the two leading exhibitors and withholding those chosen from competitive exhibitors for excessive periods of time. The OFT plans to apply new rules of distribution in selected cities for a trial period of six months, after which recommendations for rules of general application will be made.

Mr. Fletcher revealed in the House of Commons on December 15 that associations of architects and surveyors had finally changed their rules in accordance with recommendations in reports of the Monopolies and Mergers Commission which were published in 1977. Members of the associations will henceforth be permitted to offer competitive fees; they previously charged fees according to scales set by their respective associations, a practice which was mandatory in the case of architects. While the associations may still publish recommended fee scales it must be made clear that they are for guidance only.

Mr. Fletcher also revealed recently that the Secretary of State for Trade and Industry has received undertakings by a producer of contraceptive sheaths in accordance with recommendations in a 1982 report by the Monopolies and Mergers Commission. The Commission found that a monopoly situation existed in favour of LRC Products Ltd. and that its pricing might be expected to operate against the public interest. The company has undertaken to limit its price increases by relation to an index of its costs.

A government bill was published on December 5 which, in addition to terminating the supply of free spectacles except to children and low income families, would respond to concerns about spectacle retailing which have been expressed by the Director General of Fair Trading. In a 1982 report on Opticians and Competition, the Director General concluded that rules under the Opticians Act which prevent opticians from advertising had led to higher spectacle prices and lower efficiency. He also concluded that the monopoly on the sale of spectacles which the Act confers on doctors and opticians prevented others from entering the market with cheaper spectacles. Under the bill, which is expected to be enacted by early summer, retailers other than opticians will be permitted to sell spectacles to prescription, and retailers including opticians will be free to advertise. Prescriptions will continue to be available free under the national health service; termination of the general supply of free spectacles will take effect in April, 1985.

The government has promised legislation next year to end the monopoly which solicitors have on house conveyancing - part of a monopoly which the London Financial Times of December 12 tartly recalled was granted by William Pitt the Younger in 1804. This development stemmed from a Labour M.P.'s private bill along those lines which was drafted with the assistance of the Consumers Association. The bill received so much support that it received second reading before being withdrawn by the government. The government has decided to commission a study to report on safeguards required to protect the public when the house conveyancing business is opened up, and to introduce legislation in 1985. Strong opposition from the Law Society is, however, anticipated.

Last November the Law Society responded in part to years of pressure by the Office of Fair Trading and others including solicitors to modify its stand against advertising by solicitors. Small advertisements by solicitors will be permitted to appear not more than once a week in local newspapers. Solicitors will be restricted to stating the kind of work they do and will not be permitted to advertise charges.

PUBLICATIONS NOTED

Statistics Canada, Concentration and Foreign Control in Retail and Wholesale Trade in Canada, 1979, Cat. No. 63-539. \$6.35 in Canada; \$7.60 elsewhere. The preface states:

"This study is the first comprehensive examination of enterprise concentration and foreign control in the Canadian wholesale and retail trade sectors. The data were gathered from individual business locations or stores. The study contains tabulations for each of the ten provinces and the two Territories, covering 19 wholesale industries and 28 retail trade kinds of business

for the year 1979. For the retail sector, additional tabulations on four metropolitan areas are also presented.

"The analysis presents both the degree of foreign control and the market share of the top four and eight firms for each industry or trade classification group in each province and in four metropolitan areas. These results will contribute to a better understanding of competitive structure and degree of foreign control in the Canadian wholesale and retail trade sector."

Restrictive Trade Practices Commission, Annual Report for the Year Ended March 31, 1983, Supply and Services Canada, Ottawa, Cat. No. RG 50-1/1983.

Annual Report, Director of Investigation and Research, Combines Investigation Act, For the Year Ended March 31, 1983, Consumer and Corporate Affairs Canada, Ottawa.