Community, and McKenzie Fuels absorbed .3 cents so as to bring the discount back to 2.5 cents. After one week, McKenzie Fuels was advised by an official of Imperial that there were to be no more deliveries either to Community or to Xandu Farms.

OUTSIDE THE COURTS

COMPETITION LAW REFORM BILL INTRODUCED

The long-awaited package of amendments to the Combines Investigation Act was introduced for first reading in the House of Commons as Bill C-29 by Consumer and Corporate Affairs Minister Judy Erola on April 2. its principal features are:

- S.32 on conspiracies is amended to remedy defects exposed by recent court decisions and to broaden the export exemption.
- The criminal law prohibition relating to mergers and monopolies is replaced by civil law provisions relating to mergers and abuse of dominant positions.
- A civil law provision relating to delivered pricing is introduced.
- Applications may be made to the Restrictive Trade Practices Commission for exemption of specialization agreements from the provisions dealing with conspiracies and exclusive dealing.
- Crown corporations engaged in most competitive activities are brough under the Act.
- Banks are brought more fully under the Act.
- Adjudication of mergers, dominant positions, delivered pricing and all presently existing reviewable practices is assigned to the courts rather than to the Restrictive Trade Practices Commission.
- Amendments are made to some of the provisions governing the investigatory procedures of the Director of Investigation and Research.

The package is more moderate than any of the others which have been brought forward by the government since the passage of the first stage of reforms in 1976. It was hammered out in close consultation with business interests and has at least their general support. This latter fact adds to the practical significance of the proposals even if, as appears likely, they are not enacted into law before a general election which is expected later this year. The Bill is to be studied by the House of Commons Committee on Finance, Trade and Economic Affairs after it has passed second reading.

Initial reactions to the Bill in the press and by a wide spectrum of interest groups have been favourable. Supportive comments have been made by the Canadian Manufacturers' Association, the Business Council on National Issues, the Canadian Chamber of Commerce, the Canadian Federation of Independent Petroleum Marketers, the Canadian Federation of Independent Business and the Canadian Daily Newspaper Publishers Association. The Canadian Bankers Association expressed opposition to the proposed inclusion of banks under the Act. The Consumers Association of Canada was supportive although its spokesman would clearly have like a somewhat tougher bill. Mr. Andrew Roman of the Public Interest Advocacy Centre expressed reservations about the assignment of reviewable practices cases to the courts rather than to the Restrictive Trade Practices Commission. Professor W.T. Stanbury of the University of British Columbia was supportive on the basis that "half a loaf is better than none".

First reactions will, of course, be followed by submissions to the parliamentary committee when it is studying the Bill, and serious differences could still emerge. For example, both the Canadian Manufacturers' Association and the Business Council on National Issues have expressed strong reservations about what they consider to be a lack of appropriate exemptions for joint ventures in the merger provisions.

Conspiracies

The principal amendments to s. 32 are designed to increase the maximum fine for violations from one to two million dollars, to remedy serious difficulties in applying the section following recent decisions by the Supreme Court of Canada, and to extend substantially the export exemption. The relevant parts of s. 32 proposed are as follows, new text being underlined:

> "32.(1) Every one who conspires, combines, agrees or arranges with another person
>
> (a) to limit unduly the facilities for transporting, producing, manufacturing, supplying, storing or dealing in any product,

(b) to prevent, limit or lessen, unduly, the manufacture or production of a product, or to enhance unreasonably the price thereof,

(c) to prevent, or lessen, unduly, competition in the production, manufacture, purchase, barter, sale, storage, rental, transportation or supply of a product, or in the price of insurance upon persons or property, or

(d) to otherwise restrain or injure competition unduly,

is guilty of an indictable offence and is liable to imprisonment for five years or a fine of two million dollars or to both.

(1.1) For greater certainty, in establishing that a conspiracy, combination, agreement or arrangement is in violation of subsection (1), it shall not be necessary to prove that the conspiracy, combination, agreement or arrangement, if carried into effect, would or would be likely to eliminate completely or virtually, competition in the market to which it relates or that it was the object of any or all of the parties thereto to eliminate, completely or virtually, competition in that market.

(1.2) In a prosecution under subsection (1), the court may infer the existence of a conspiracy, combination, agreement or arrangement from all the surrounding circumstances, with or without evidence of communication between or among the alleged parties thereto, but, for greater certainty, the conspiracy, combination, agreement or arrangement must be proved beyond a reasonable doubt.

(1.3) For greater certainty, in establishing that a conspiracy, combination, agreement or arrangement is in contravention of subsection (1), it is necessary to prove that the parties thereto intended to and did enter into the conspiracy, combination, agreement or arrangement, but it is not necessary to prove that the parties intended that the conspiracy, combination, agreement or arrangement have an effect listed in subsection (1).

.....

(4) Subject to subsections (4.1) and (5), in a prosecution under subsection (1) the court shall not convict the accused if the conspiracy, combination, agreement or arrangement relates only to the export of products from Canada.

(4.1) Subsection (4) does not apply if the conspiracy, combination, agreement or arrangement has prevented or lessened

or is likely to prevent or lessen competition unduly in the supply of services facilitating the export of products from Canada.

(5) Subsection (4) does not apply if the conspiracy, combination, agreement or arrangement

(a) has resulted in or is likely to result in a reduction or limitation of the real value of exports of a product;

(b) has restrained or injured or is likely to restrain or injure the export business of any domestic competitor who is not a party ot the conspiracy, combination, agreement or arrangement or

(c) has restricted or is likely to restrict any person from entering into the business of exporting products from Canada."

Existing Para. (5)(d) would be repealed; it provides:

"(d) has lessened or is likely to lessen competition unduly in relation to a product in the domestic market"

Subsection (1.1), which was enacted in 1976 but has yet to be tested in the courts, and proposed subsections (1.2) and 1.3) would be relied upon to steer the courts away from recent court interpretations which have seriously weakened s. 32. The Supreme Court of Canada, in Aetna (1977) 34 C.C.C. (2d) 157 and in Atlantic Sugar (1981) 54 C.C.C. (2d) 373, seemed to favour the view that the undueness test requires the virtual elimination of competition. Subsection (1.1) makes it clear that such is not the case.

The majority in Atlantic Sugar also held that a "tacit agreement", in the absence of communication, did not constitute an agreement within the meaning of s. 32. Subsection (1.2) would make it clear that tacit agreements fall within the scope of the section.

Aetna and Atlantic Sugar have also created uncertainty as to the onus on the Crown to prove intent. The explanatory booklet which was distributed along with the Bill states:

"It has been argued by defence counsel in subsequent conspiracy cases that the majority of the Supreme Court of Canada decided that the Crown must prove beyond a reasonable doubt that the accused entered into the alleged agreement with the intention of lessening competition unduly. Previously, it was readily assumed that the element of mens rea (or intent) was met 'when it was shown that the (accused) intended to enter, and did enter, into the very arrangement found to exist...' Moreover, in his dissenting opinion in

the Atlantic Sugar case, Mr. Justice Estey held that the Crown need not prove the agreement among the accused was arrived at with the intention of lessening compeition unduly. Thus, it is essential to state clearly, in the Act, that intent which it is necessary to prove as part of the conspiracy offence."

Subsection (1.3) would specify the nature of the intent which the Crown must establish.

The export exemption would be broadened substantially by the repeal of existing Para. (5)(d); for example, the charging of agreed-upon export prices in the domestic market would seemingly become acceptable. The significance of the proposed insertion of subsections (4.1) would depend upon its interpretation but is is clearly of minor scope in comparison with Para. (5)(d) which would be deleted. The proposed replacement of volume by real value in (5)(a) enjoys wide support and makes sense if there is to be an export exemption.

Mergers

Civil legislation is proposed whereby a court may prohibit, disolve or modify a merger:

"31.72 Where, on application by the Director, the court finds that a merger or porposed merger prevents or lessens, or is likely to prevent or lessen, competition significantly

(a) in a trade, industry or profession,

(b) among the sources from which a trade, industry or profession obtains a product,

(c) among the outlets through which a trade, industry or profession disposes of a product, or

(d) otherwise than as described in paragraphs (a) to (c)..."

Para 31.73 (c) would provide an exemption where the court finds:

"(c) where it finds that the merger or proposed merger has brought about or is likely to bring about gains in efficiency that will result in a substantial real net saving of resources for the Canadian economy and that the gains in efficiency could not reasonably be expected to be attained if the order were made."

Subsection 31.74(2) provides that for a merger to lessen competition significantly the court must find that the merger has or is likely to have "a major and not insubstantial effect upon compitition."

Ss. 31.74(1) lists a number of factors which a court shall consider in determining whether a merger lessens competition significantly. Broadly speaking, these include the degree to which acceptable substitutes including imports are available, the nature of barriers to entry, the likelihood of the removal of a vigorous competitor, the nature and extent of change and innovation, and whether one of the firms involved has failed or is failing.

S.31.79 provides that the attorney general of a province may make representations before a court in proceedings under the merger sections. S. 31.791 provides for advance rulings by the Director which, in favourable, would be binding.

Finally, sections 31.8 to 31.896 inclusive, which take up fifteen pages of the Bill, provide for advance notification of a merger which would result in a firm with assets or annual revenues exceeding $500 millions. In 1982 there were 144 firms in Canada of that size or larger and about 250 firms which were half that size or larger. It would appear, therefore, that somewhere between 144 and 250 firms would have been subject to the notification requirement if they had been involved in mergers.

The effectiveness of the proposed merger law would depend in part upon how it is interpreted by the courts, and that is particularly difficult to predict where the courts are called upon to make economic judgments.

The Bill removes aspects of the existing merger provisions which have rendered the law entirely unenforceable. The courts have been understandingly reluctant to brand a merger as a crime. Also, they have tended to equate the existing test of lessening competition "to the detriment or against the interest of the public" with the test of "unduly" in s. 32 on conspiracies and, in addition, to demand evidence of specific detriment which has resulted or will result from the lessening of competition.

While those difficulties would be removed, it would be hazardous to predict with any precision how the courts would interpret the standard "prevent or lessen, competition significantly", for which the Bill specifies that the court must find that the merger has or is likely to have "a major and not insubstantial effect upon competition". The Bill stresses behaviour and eschews structural tests. In contrast, the bills of 1977 provided that, to be prohibited, a merger must lessen competition "substantially" and, in the case of a horizontal merger, involve a market share exceeding 20 percent. The proposals which the then Minister of Consumer and Corporate Affairs circulated in April, 1981 envisaged a market share percentage above which a merger would be deemed to lessen competition significantly. In common with the 1977 bills, an efficiency gateway has been provided and, once again, it remains to be seen how the courts will adjudicate that provision.

A factor which could create difficulties in dealing with mergers involving foreign-controlled enterprises is the Foreign Investment Review Act.

The Crown would be in an awkward position if it sought to prevent a merger which had already received Cabinet approval under the Act. Both the 1977 bills and the 1981 proposals called for an arrangement whereby the FIRA process would be delayed if the Director of Investigation and Research was proceeding against a merger.

The notification procedure, which takes up one-fourth of the whole Bill, is of quetionable value. It would only apply to the acquisitions of the largest enterprises, and most such acquisitions quickly become known in any event. The narrow scope of application would also limit the value of the procedure for such purposes as following merger trends and conducting research. In its report on Bill C-42, the Competition Act in 1977, the House of Commons Standing Committee on Finance, Trade and Economic Affairs recommended compulsory notification of all acquisitions of corporations with assets of $500,000 or more by corporations with assets or annual sales of $9 millions or more.

Abuse of Dominant Position

The existing criminal prohibition pertaining to monopoly would be replaced by civil provisions whereby abuse of dominant positions would be reviewable by the courts which could issue prohibition orders or, if necessary, order divestiture. The principal provisions are reproduced below:

> "31.41 (1) Where, on application by the Director, the court finds that one or more persons
>
> (a) substantially or completely control, throughout Canada or any area thereof, a class or species of business, and
>
> (b) have engaged in or are engaging in a practice of anti-competitive acts that has had, is having or is likely to have the effect of preventing or lessening competition substantially in a market,
>
> The court may take an order prohibiting all or any such persons from engaging in such practice."
>
> Subsection (2) deals with divestiture orders, and subsections 31.41(3), (4) and (5) provide:
>
> "(3) For purposes of subsections (1) and (2), without restricting the generality of the expression, "anti-competitive act" includes any of the following acts:
>
> (a) squeezing, by a vertically integrated supplier, of the margin available to an unintegrated customer who competes with the supplier, for the purpose of impeding or preventing the customer's entry into, or expansion in, a market;

(b) acquisition by a supplier of a customer who would otherwise be available to a competitor of the supplier, or acquisition by a customer of a supplier who would otherwise be available to a competitor of the customer, for the purpose of impeding or preventing the competitor's entry into, or eliminating him from, a market;

(c) freight equalization on the plant of a competitor for the purpose of impeding or preventing his entry into, or eliminating him from, a market;

(d) use of fighting brands introduced selectively on a temporary basis to discipline or eliminate a competitor;

(e) pre-emption of scarce facilities or resources required by a competitor for the operation of a business, with the object of withholding the facilities or resources from a market;

(f) buying up of products to prevent the erosion of existing price levels;

(g) adoption of product specifications that are incompatible with products produced by any other person and are designed to prevent his entry into, or to eliminate him from, a market; and

(h) requiring or inducing a supplier to sell only or primarily to certain customers, or to refrain from selling to a competitor, with the object of preventing a competitor's entry into, or expansion in, a market.

(4) No order shall be made under this section where the competition has been, is being, or is likely to be prevented or lessened substantially in a market as a result of the superior economic efficiency of the person or persons against whom the order is sought.

(5) For the purpose of this section, an act engaged in pursuant only to the exercise of any right or enjoyment of any interest derived under the Copyright Act, Industrial Design Act, Patent Act, Trade Mark Act, or any other Act of Parliament is not an anti-competitive act..."

The movement from criminal to civil law will serve to relax the standards of proof required of the Crown. The repeal of the test of detriment to the public and its replacement by "effect of preventing or lessening competition substantially in a market" will also reduce the burden on the Crown. The courts have come to equate the test of detriment with that of "unduly" in s.32 relating to conspiracy and to have demanded proof of specific detriment as well.

The onus on the Crown would, however, still be heavy. As in the existing criminal prohibition, substantial or complete market control must be shown; the only cases brought before the courts in the past have involved virtual monopoly or, in one case, shared monopoly. The courts will also have to decide whether an anti-competitive act lessens competition substantially. The list of examples of anti-competitive acts will be of assistance in that regard, although they all contain object or intent clauses; this underlines the onus on the Crown to prove intent as well as anti-competitive effects.

Another question is the extent to which the phrase "one or more persons" will bring oligopoly or shared monopoly within the scope of the provision. The drafters of the Bill have apparently relied upon the Large Lamps case (Regina v. Canadian General Electric Co. Ltd. et al., (1976) 150 O.R. (2d) 360) which involved several companies engaging in the same anti-competitive practices. The companies were charged both with conspiracy and monopoly counts and were convicted only of the former. The Court found, however, that with three manufacturers of large lamps controlling 95 percent of the market and working together as a unit by similar detailed sales plans and identical price lists, they asserted the necessary control to constitute a shared monopoly. Nevertheless, the Court concluded that detriment must be shown to flow from the operation of the shared monopoly and not from collateral acts such as an agreement to lessen competition. Thus, the jurisdiction is limited on the extent to which either the existing or proposed provision would apply to oligopoly situations, especially where the relations among the firms fell short of a conspiracy.

In addition, by paragraph (4), there would be an onus upon the Crown to counter evidence that the lessening of competition was the result of superior economic efficiency.

Delivered Pricing

> "31.42(1) For the purposes of this section, 'delivered pricing' means the practice of refusing a customer, or a person seeking to become a customer, delivery of an article at any locality at which the supplier makes delivery of the article to any other of his customers on the same terms and conditions that would be available to the first-mentioned customer if his place of business were located in that locality.
>
> (2) Where, on application by the Director, the court finds that delivered pricing is engaged in by a major supplier of an article in a market or is widespread in a market with the result that a customer, or a person seeking to become a customer, is denied an advantage that would otherwise be available to him, the court may make an order prohibiting all or any of such suppliers from engaging in delivering pricing."

The thrust of this section is the same as that of a criminal prohibition which was proposed in the bills of 1977, but it is now framed as a civil law reviewable practice.

The section is not designed to prevent basing point or other systems of partial or full freight absorption, even when on an industry-wide basis. Rather, it is designed to introduce some flexibility into such systems and to prevent them from becoming an essential part of a scheme whereby each supplier knows that he is charging the same total price to each of his customers as his competitors is charging. Such uniformity is much more difficult to achieve when customers have the right to choose the location at which to accept delivery. For example, a customer at Cornwall may note that all suppliers quote the same delivered price at that point, but the nearest supplier is at Kingston and all suppliers quote a lower price for delivery at that point. The Cornwall customer may find it advantageous to deal only with the Kingston supplier, to accept delivery at that supplier's plant and make his own arrangements for transportation to Cornwall. The proposed section would give him the right to do that, and more distant suppliers would have to decide whether or not to depart from their uniform pricing formula in order to retain the Cornwall account.

The section is likely to apply mainly to suppliers of heavy industrial materials such as cement where transportation is a significant cost factor.

Specialization Agreements

Sections 31.95 through 31.991 provide a procedure whereby the Restrictive Trade Practices Commission may exempt specialization agreements from the conspiracy and exclusive dealing provisions of the Act. The Governor in Council is empowered to reverse negative rulings of the Commission. S. 31.195 provides in part:

> "31.95(1) For the purposes of this section and section 31.96, "article"
>
> includes each separate type, size, weight and quality in which an article, within the meaning assigned by section 2, is produced;
>
> 'specialization agreement' means an agreement under which each party thereto agrees to discontinue producing an article that he is engaged in producing at the time the agreement is entered into on the condition that each other party to the agreement agrees to discontinue producing an article that he is engaged in producing at the time the agreement is entered into, and includes any such agreement under which the parties agree to buy exclusively from each other the articles that are the subject of the agreement.
>
> (2) Where, on application by any person, and after affording the Director a reasonable opportunity to be heard, the Commission finds

that an agreement that the person who has made the application has entered into or is about to enter into is a specialization agreement and that

(a) the implementation of the agreement is likely to bring about gains in efficiency that will result in a substantial real net saving of resources for the Canadian economy and the gains in efficiency could not reasonably be expected to be attained if the agreement were not implemented, and

(b) no attempt has been made by the persons who have entered or are about to enter into the agreement to coerce any person to become a party to the agreement,

the Commission may, subject to subsection (4), make an order directing that the agreement be registered in the register maintained pursuant to subsection (7) for the period specified in the order.

(3) In considering whether an agreement is likely to bring about gains in efficiency described in paragraph (2)(a), the Commission shall consider whether such gains will result in

(a) a significant increase in the real value of exports; or

(b) a significant substitution of domestic products for imported products..."

The Commission could attach conditions, including tarifff reductions.

The proposal is much the same as other which have been brought forward by the government since 1977. However, earlier versions included a maximum time period for the duration of a specialization agreement, generally five years. That was strongly opposed by business groups, and the present Bill would leave it to the Commission to set the time period in each case brought before it.

Crown Corporations

S. 2.1 would provide:

"2.1 This Act is binding on an agent of Her Majesty in right of Canada or a province that is a corporation, in respect of commercial activities engaged in by the corporation in competition, whether actual or potential, with other persons, but not in respect of commercial activities engaged in by the corporation that are directly associated with regulatory activities."

The need to clarify the position of crown corporations under the Combines Investigation Act has been underlined by the decision of the Supreme Court of Canada on December 15, 1983 respecting Uranium Canada Ltd. and Eldorado Nuclear Limited. The Court ruled that, unless otherwide specified, Crown corporations that are agents of Her Majesty, even when engaged in commercial activities in direct competition with privately owned firms, are not subject to the Act. S. 2.1 is designed to correct that. It will be for the courts to decide upon the scope of the exception for "commercial activities engaged in by the corporation that are directly associated with its regulatory activities". Agricultural marketing agencies will clearly come under this exception.

Banks

The amendments of 1976 brought banks under the Combines Investigation 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; those prohibitions are now in s. 309 of the Bank Act. It is proposed to repeal s. 309 of the Bank Act and to enact it with minor changes as s.33 of the Combines Investigation Act, as follows:

> "33.(1) Subject to subsection (2), every bank that makes an agreement or arrangement with another bank with respect to
>
> (a) the rate of interest on a deposit,
>
> (b) the rate of interest or charges on a loan,
>
> (c) the amount of any charge for a service provided to a customer,
>
> (d) the amount or kind of loan to a customer, or
>
> (f) the person or classes of persons to whom a loan or other service will be made or provided or from whom a loan or other service will be withheld.
>
> and every director, officer or employee of the bank who knowingly makes such an agreement or arrrangement on behalf of the bank is guilty of an indictable offence and liable to a fine of two million dollars or to imprisonment for five years or to both.
>
> (2) Subsection (1) does not apply to an agreement or arrangement
>
> (a) with respect to a deposit or loan made or payable outside Canada;

(b) applicable only to the dealings of or the services rendered between banks or by two or more banks as regards a customer of each of such banks where the customer has knowledge of the agreement or by a bank as regards a customer thereof, on behalf of that customer's customers;

(c) with respect to a bid for or purchase, sale or underwriting of securities by banks or a group including banks;

(d) with respect to the exchange of statistics and credit information, the development and utilization of systems, forms, methods, procedures and standards, the utilization of common facilities and joint research and development in connection therewith, and the restriction of advertising;

(e) with respect to reasonable terms and conditions of participation in guaranteed or insured loan programs authorized pursuant to an Act of Parliament or of the legislature of a province;

(f) with respect to the amount of any charge for a service or with respect to the kind of service provided to a customer outside Canada, payable or performed outside Canada on behalf of a person who is outside Canada;

(g) with respect to the persons or classes of persons to whom a loan or other service will be made or provided outside Canada; or

(h) in respect of which the Minister of Finance has certified to the Director the names of the parties thereto and that he has requested or approved the agreement or arrangement for the purposes of financial policy.

(3) In this section, 'bank' means a bank as defined in subsection 2(1) of the Bank Act."

With regard to mergers, Ss. 255(5) of the Bank Act would be amended to bring bank amalgamations under the Combines Investigation Act rather than under the Bank Act as now. However, Para. 31.73 (b) of the Combines Investigation Act would provide an exemption for bank amalgamations "in respect of which the Minister of Finance has certified to the Director the names of the parties thereto and that the amalgamation is desirable in the interest of the financial system".

The Commission

The Bill would drastically reduce the functions of the Restrictive Trade Practices Commission. All the presently existing reviewable practices and the proposed ones respecting mergers, dominant positions and delivered

pricing would become reviewable by the ordinary courts rather than by the Commission. The Commission's functions under the Combines Investigation Act would be reduced to hearing applications under the proposed provision for specialization agreements, holding hearings and making reports on statements of evidence and general inquiries under sections 18 and 47 respectively, authorizing searches, written returns and affidavits as requested by the Director, and authorizing and presiding over examinations of witnesses by the Director. The Commission has not been called upon to make a report under s.18 for many years; and general inquiries have been few in recent years with the major exception of the present petroleum inquiry. One reason for moving largely to the ordinary courts seems to be a concern among businessmen that their rights of appeal from decisions of the Commission are more limited.

The Bill proposes to enlarge the membership of the Commission from the present four full time members by the addition of three part time members. However, the present quorum of two full time members is to be changed to one full time member and two part time members; thus, two panels could operate concurrently. If the Bill is enacted, however, it seems doubtful that as many as four full time members will be required.

Investigatory Procedures

The following changes are proposed in respect to procedures in the conduct of investigations by the Director:

- S. 8 would be amended so that, following a written request, the Director shall inform any person subject to inquiry as to the progress of the inquiry.

- S. 10.1 would provide that, when the Director exercises compulsory powers, he must inform the subject person of the nature and scope of the inquiry.

- S. 10.2 would define the procedures to be followed where claims of solicitor-client privilege are made in the course of searches.

- S.27, which now provides that inquiries shall be conducted in private, would be amended so as to define more precisely the privacy safeguards.

AIRLINE DEREGULATION POLICIES ANNOUNCED

Transport Minister Lloyd Axworthy released a paper on May 10 entitled New Canadian Air Policy. The new policy calls for the gradual introduction of substantially more competition in the airline industry by easing entry restrictions and, in about two years, removing controls over fare reductions. Existing policies include recognition of Air Canada and Canadian Pacific Airlines as the only national carriers, division of the country into four operating zones for regional carriers, special rules for charter carriers (notably Wardair) and local carriers, and tight control over entry and fares. These policies have become increasingly difficult to defend and sustain in the face of deregulation in the United States.

The new policy is to be implemented largely by the Canadian Transport Commission under existing legislation; the paper states:

> Existing legislation provides considerable scope for liberalizing the present regulatory regime. For instance, important changes can be accomplished by issuing statements of Government policy which, although not binding, derive considerable practical authority from the over-ride powers available to the Minister of Transport and Governor-in-Council under Sections 25 and 64 of the National Transportation Act, respectively. The latter power is particularly far-reaching, permitting the Cabinet to "vary or rescind" anything done by the CTC, on appeal or of its own motion. In addition, the CTC itself can and does exercise considerable, though not unlimited discretion in interpreting the requirements of "public convenience and necessity". And it has in the past shown considerable responsiveness to all statements of Government policy.

The CTC issued an interim report on its recently concluded hearings respecting air fare policy on May 11, and its final report was expected some time in June. Its interim report, while calling for a relaxation of regulation, does not go nearly as far in that direction as the Minister's paper. The Minister was planning to meet with the CTC to discuss how government's new policy is to be implemented. The pace of change will also depend in part upon the ability and willingness of new and existing airlines to invest in new services and to lower fares.

The new policies, which will apply to all but the northern extremities of the country, are summarized in the Minister's paper as follows:

"(a) Repeal the policies that set aside certain markets for particular carriers, thereby allowing any new or existing carrier to apply for a licence to serve any domestic route;

(b) Remove restrictions on the unit toll (scheduled service) licences of the National and Regional carriers, and on the unit toll licences of Local carriers for services in Southern Canada. (*)

(c) Encourage the airlines to apply to the CTC to consolidate their unit toll licences, so that such changes can take place in a controlled manner;

(d) Reduce the barriers to new entry to scheduled passenger and all-cargo services by calling on the CTC to give much greater weight to the benefits of increased competition in judging the licensing requirements of public convenience and necessity (PCN), in relation to particular licence applications;

(e) Provide much freer entry to charter services by calling on the CTC to exempt applications for such services from the requirements of PCN;

(f) Encourage new entry by calling on the CTC to grant freedom of exit to incumbent carriers faced with new entry, and to conduct an inquiry on whether carriers, having withdrawn their services, should retain the freedom to re-enter at any time;

(g) Promote lower fares and increased competition by announcing the Government's intent, even in advance of the CTC's report on the air fare hearings, to give the scheduled airlines complete downward pricing flexibility and to limit price increases to an objective measure of the rise in the price of the factors of production, not including labour, starting no later than 1986;

(h) Call on the CTC to report in 90 days on the measures it proposes to take to speed up and simplify the regulatory process to the maximum permissible extent and to consider possible evidentiary changes associated with public convenience and necessity, to shift the burden of proof from the applicant to opposing intervenors;

(*) This refers to such existing restrictions as those which limit the frequency of non-stop services and the kinds and sizes of aircraft which may be used.

(i) To allay concerns that Air Canada may compete unfairly, issue directions to the Company re-asserting its obligation to operate in a business-like manner and requiring it to refrain from unfair competitive practices, provide strong justification for any request for new equity capital from the federal government, dispose of Nordair to private interests as quickly as possible, and to set up a broadly based Task Force to establish adequate safeguards against bias in Air Canada's computer reservations system;

(j) Promote better use of the air transport infrastructure by encouraging applications for new services to under-used airports such as Hamilton and Mirabel, and by inviting the CTC to give them favourable consideration;

(k) Grant two important pending appeals (by PWA and Air Ontario) that ask for new opportunities to compete;

(l) Develop demonstration projects to improve local air services with special considerations for DASH-8 aircraft;

(m) Commit Transport Canada to giving new entrants and competitors fair access to congested airports during peak periods; and

(n) Step up Transport Canada's efforts to police and enhance the level of safety.

"In addition, the first phase of the policy includes the intent to improve commercial air services in the North by asking the CTC to institute a more vigorous surveillance program, including regular adequacy of service hearings, to ensure that licensed carriers are serving the public as effectively as possible, and at the lowest possible prices."

COMBINES CHIEF DISSATISFIED WITH RESULTS OF UNDERTAKINGS BY MOVIE DISTRIBUTORS

The Director of Investigation and Research under the Combines Investigation Act, in a Report to the Restrictive Trade Practices Commission On the Operation of the Undertakings Given By Six Major Motion Picture Distributors which was released on April 4, expressed some dissatisfaction with the results achieved since the undertakings went into effect on July 1, 1983. His concerns related to the availability of first run movies to exhibitors other than Famous Players and Odeon. Cineplex, a distant third among the three

largest exhibitors, announced on May 29 that it is acquiring Odeon, the second largest. After the takeover, the two largest exhibitors will have between sixty and seventy per cent of all the cinema seats in the country. Paradoxically, it was complaints by Cineplex that brought the industry before the Commission.

In December, 1982 the Director applied to the RTPC for an order compelling the major distributors to supply Cineplex's chain of movie houses under s. 31.2 of the Act. In June, 1983, following undertakings made to him by the distributors, the Director obtained the RTPC's permission for a one-year postponment of the hearings on the application. The Commission stipulated that the Director was to report on the operation of the undertakings in six months. The distributors had undertaken to make the best deal on an individual theatre-by-theatre basis with respect both to first and subsequent runs of each motion picture. They had also undertaken not to be a party to any agreement or arrangement with any exhibitor to determine the pattern of release for each of their motion pictures nor to grant any exhibitor the right of first refusal on films.

In his report to the RTPC, the Director found that there had been a marked improvement in opportunities for Cineplex and other independent exhibitors to obtain second runs of movies more quickly but found little improvement in respect of first run movies. "It appears that Famouns Players and Odeon continue to receive the right of first refusal for first runs in many cases", he stated. He planned to meet with the exhibitors and was to make a further assessment on June 30, at which time he would reactivate his application to the Commission for hearing unless there had been a significant improvement.

BILL TO COUNTER EXTRATERRITORIALITY INTRODUCED IN CANADIAN PARLIAMENT

Justice Minister Mark MacGuigan introduced the Foreign Extraterritoriality Measures Bill in the House of Commons on May 28. It is a strengthened version of former Bill C-41, the Foreign Proceedings and Judgments Act, which was introduced on July 11, 1980 but died on the order paper when the last session of Parliament ended. The present Bill may well meet the same end in view of crowded legislative calendar and the likelihood of a general election this year.

Like its predecessor, the Bill would empower the Attorney General of Canada to issue orders to prevent recognition or enforcement in Canada of foreign antitrust judgments with extraterritorial scope, or to prevent the removal from Canada of documents to a foreign court asserting extraterritorial jurisdiction. Unlike its predecessor, the Bill would also empower the Attorney General of Canada to order persons or corporations in Canada not to comply

with extraterritorial measures taken by foreign governments. I would also empower the Attorney General to prohibit Canadian foreign-owned corporations from complying with directives for foreign parent corporations pursuant to such foreign governmental measures.

Australia, France, New Zealand and the United Kingdom have all enacted similar measures over the past few years following jurisdictional disputes with the United States.

OTTAWA SHELVES PLANS TO RESTRICT COMPULSORY DRUG PATENT LICENSING

Consumer and Corporate Affairs Minister Judy Erola announced on April 18 the formation of a Commission of Inquiry into the pharmaceutical industry in Canada. The announcement means deferment or cancellation of plans announced on May 27, 1983 by her predecessor, André Ouellet, to "rebalance" the 1969 compulsory drug patent licensing legislation. S. 41.4 of the Patent Act provides for the compulsory granting of licenses for the manufacture or importation of patented prescription drugs. The inquiry, which is to be headed by Professor Harry Eastman of the University of Toronto, is to:

> "...make recommendations directed toward the development of a policy framework for the pharmaceutical industry in Canada, including, where he considers it appropriate, proposals for patent protection, tax and tariff changes, incentives, availability of capital, modification of the Health Care delivery system and clearance procedures, and other policies and programs under provincial and federal contro."

The government has been under pressure to modify the 1969 legislation on the ground that if has discouraged pharmaceutical research and development in Canada. However, Mr. Ouellet's announcement last year led to protests by consumer groups and some provincial governments who were concerned that his plans would result in higher drug costs. The government has so far been unable to devise a formula which would be acceptable to the opposing factions and, according to Mrs. Erola's press release, it has concluded that:

> "...further exploration and analysis is needed in order to identify the best ways to encourage expansion of the pharmaceutical industry in Canada, while at the same time ensuring that drugs are available at acceptable cost levels to Canadians."

In an unrelated development, Ontario Health Minister Keith Norton announced on March 22 the appointment of Professor John Gordon of Queen's