OUTSIDE THE COURTS

COMBINES CHIEF STATES POSITION ON NON-VOTING SHARES

Mr. L.A.W. Hunter, Director of Investigation and Research under the Combines Investigation Act, wrote to the Ontario Securities Commission on July 13 recommending that it refrain from major policy changes in respect of the issuance of non-voting shares before "an informed decision can be made on the basis of relevant empirical information" which he said is not at present available. He also forwarded to the Commission a copy of a report entitled Restricted Shares and the Efficiency of the Capital Market which was prepared for the Department of Consumer and Corporate Affairs by Economics Professor James E. Pesando of the University of Toronto. Both Mr. Hunter and Professor Pesando pointed with approval to the widely held presumption that financial markets use information efficiently. They suggested that the introduction of new financial instruments such as restricted shares, if acceptable to investors, should improve the allocative efficiency of the capital market. An excerpt from Mr. Hunter's letter is presented in Appendix I herein.

The OSC and others have been concerned about the increasing resort to the issuance of "restricted", or non-voting, shares. In 1981 the OSC and other securities regulatory agencies in Canada placed a moratorium on the issuance of such shares pending the outcome of public hearings. In 1982 a policy was adopted of again permitting the issuance of restricted shares but with the condition of adequate disclosure being made of the rights attaching to the shares. In March, 1984 the OSC issued a position paper along with more stringent regulations governing the issuance of such shares. The new regulations go beyond the requirement for adequate disclosure by requiring that the shares provide purchasers with certain specified rights including the right to participate in any take-over bid. The Commission then invited comments from various interests including the Director of Investigation and Research.

The OSC's position paper expresses concern about a number of aspects of restricted shares including their effects upon the rights of minority shareholders, concentration of shareholder control, and their possible encouragement of take-over bids. It refers, for example, to the 1983 Industry Take-Over Bid Report by the Securities Industry Committee on Take-Over Bids, which stated:

> "9. As of February 18, 1983, there were 283 companies having shares included in the TSE 300 Composite Index. The Stock Price Index staff of the Exchange must monitor the public float of each stock included in the Index in order to determine the shares' eligibility for inclusion in the Index. The staff consider stocks having no holdings of 20 percent or more to be widely held. Share holdings of 20 percent or more, but less than 50 percent, may be deemed to constitute effective control, while share holdings of 50 percent and up constitute legal control. Using these working definitions, the following is a summary of the extent of control in the TSE 300

Composite Index. The number of companies subject to legal control includes 19 companies whose restricted shares -- be they non-voting, subordinate voting or restricted voting -- are included in the Index but whose common shares are not listed on the Exchange and are held by one shareholder or a small group of shareholders.

	Number of Companies	%
Legal Control (50% or more)	137	48.4
Effective Control (20%-49.9%)	85	30.0
Widely Held	61	21.6
TOTAL	283	100.0

For purposes of comparison, the Report cited the following data showing the extent of control in the companies included in the Standard Poor's 500 Index:

	Number of Companies	%
Legal Control (50% or more)	6	1.2
Effective Control (20%-49.9%)	68	13.6
Widely Held	426	85.2
TOTAL	500	100.0

The OSC position paper commented:

"Of the 'widely held' Canadian companies a significant number are regulated companies such as banks and utilities ... With the proliferation of restricted shares we can be assured that although the majority of public companies may one day be widely owned, most will continue to be closely controlled."

PETROLEUM INQUIRY HEARINGS TERMINATE: REPORT AWAITED

The Restrictive Trade Practices Commission completed its hearings on the Petroleum Inquiry in July, and the last of the written submissions were received in August. The Commission is now completing its report, which will be presented to the Minister and then published.

The remedies which the Director of Investigation and Research proposed in his final Remedies Argument in July were similar in thrust to those he had outlined in February, 1983 (See Canadian Competition Policy Record, March, 1984). However, he added a recommendation that "restrictions on advertising tires, batteries, accessories, lubricants, greases and motor oils from any particular source be prohibited". He explained:

> "The contracts of the various oil companies with their lessees and independent branded dealers cited in Appendix I of Volume 5 of the Director's argument contain clauses which restrict the dealers from advertising or promoting the sale of tires, batteries, accessories, motor oils, lubricants and greases that are supplied by competitors of the franchisor. Although most of these contracts permit dealers to carry such products they generally prohibit the dealer from displaying competing products in public view in the stations they own or lease."

The major oil companies maintained to the end their criticisms of the Director's manner of initiation and conduct of the inquiry. Imperial Oil, for example, prefaced their argument on remedies by denying the existence of the competitive problems alleged by the Director. Aside from serious constitutional problems which they said would be involved in his proposed remedies they pointed to the conditions of constant change in the industry, stating:

> "It is submitted that the crucial error in the whole of the Director's approach to remedies flows from the perception that specific practices which are considered to be inappropriate should be prohibited for all time by specific legislation or regulation, without regard to any general and continuing test of the impact of such practices from the perspective of competition theory. This approach entirely ignores the substantive tests which must be met from time to time, in order for a practice to be prohibited under the current legislation."

For its part, Gulf Canada proposed legislation to curb the Director's power to initiate general inquiries on his own, stating:

> "Indeed, if there is to be any lasting bnefit at all from the almost 200 days of hearing and forty some odd thousand pages of testimony, it is to ensure that the office of the Director is not able to perpetrate on the Commission, on the public or indeed on any industry, under the guise of competition policy, a set of unsubstantiated allegations of anti-competitive activity without any analytical support either in its initial premise or in subsequent evidence."

Gulf proposed amendments to s. 47, which now authorizes the Director to carry out general inquiries on his own or the Minister's initiative. The amendment would provide that the Director could only request the Commission to carry out a general inquiry, and the Commission could not decide to conduct it in public:

> "...unless any person against whom allegations have been made in any statement received by the Commission from the Director has been given full opportunity to be heard with respect to whether or

not the inquiry should be conducted in public and the issues to be heard by the Commission in any such inquiry."

COMBINES CHIEF'S FIRST INTERVENTION ACCEPTED BY ANTI DUMPING TRIBUNAL

The Director of Investigation and Research under the Combines Investigation Act made his first intervention before the Anti-Dumping Tribunal in June, 1984. Outside counsel for the Director was admitted to in camera sessions, which related to alleged dumping of refined sugar from the United States. However, a Justice Department lawyer for the Director was refused admission to the in camera sessions and the Department of Justice is appealing that ruling.

The Director's intervention was made pursuant to s. 27.1 of the Combines Investigation Act which authorizes him to make representations before federal tribunals in respect of the maintenance of competition. S. 29(3) of the Anti-Dumping Act provides for in camera proceedings where, as is frequently the case, confidential business information is disclosed. It provides:

> "Where evidence or information that is in its nature confidential relating to the business or affairs of any person, firm or corporation, is given or elicited in the course of any inquiry under section 16, the evidence or information shall not be made public in such manner as to be available for the use of any business competitor or rival of the person, firm or corporation."

The practice of the Anti-Dumping Tribunal has been to permit independent counsel for all interested parties to attend in camera sessions, but in-house counsel have not been admitted. No objection was raised to the admission of Mr. B. Finlay, Q.C., of Weir and Foulds who was acting as counsel for the Director. However, Mr. Finlay was accompanied by a Justice Department lawyer, Mr. M. Jolicoeur; counsel for the major sugar companies objected to his admission to in camera proceedings, contending that Mr. Jolicoeur was an in-house counsel. More generally, counsel for the sugar companies questioned the intervention of representatives of the Director in the sugar inquiry, suggesting that the Director might be on a "fishing expedition".

The Tribunal ruled that the Director had a sufficient interest in the inquiry to permit him to participate in the proceedings. It also ruled that Mr. Jolicoeur could not be admitted to in camera proceedings, stating:

> "The second question relates to the independence of the counsel appointed by the Director. Is that independence such as to permit him to have access to confidential data? We accept Mr. Finlay as independent counsel and will expect him to sign the written undertaking expected of all independent counsel. As to Mr. Jolicoeur, he will not have access to confidential information. Mr. Jolicoeur is an employe of the government, assigned to the

> Director's staff, as we understand it. The Director has intervened in these proceedings in his capacity as Director of Investigation and Research. That is made clear in the appearance he has filed.
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> The interest of the Director in the sugar industry is a matter of public knowledge and is one of long standing. His intervention in the present case is evidence of his continuing interest. That is the appearance of things. He has never before intervened in proceedings before this Tribunal, and obvious questions suggest themselves as to the reason he does so in this case.
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> It is not a question of the narrow application of the words of subsection 29(3) to the problem. It is a question which relates to the ability of this Tribunal, in the eyes of the business community, to carry out its mandate. We must have that continuing confidence. That is the overriding consideration, not the words of subsection 29(3)."

With regard to the substance of the inquiry, the Tribunal's finding, which was issued on July 23, was that the dumping had not caused any material injury. As the Director had pointed out in his submission, imports of refined sugar from the United States accounted for a small percentage of the market and exports of refined sugar from Canada to the United States exceeded the imports by a considerable margin.

SUPPLY MANAGEMENT CONTROLS PLANNED FOR HATCHING EGGS

Minister of Agriculture Eugene Whelan announced on June 7, prior to his resignation, that he had authorized initiation of the processes for setting up a national supply management agency for broiler hatching eggs. The action was in line with the recommendation in a report by the National Farm Products Marketing Council which was released at the same time. There already exist supply management agencies for eggs, turkey and chicken.

The Director of Investigation and Research under the Combines Investigation Act made representations on the subject in November, 1983 at hearings of the Council. He strongly opposed creation of a supply management agency for hatching eggs, contending it would have negative implications for efficiency, performance, prices and equity in the entire broiler production-marketing system. Prices of hatching eggs in 1983 were lower on average than in the two preceding years but were higher than in 1980; imports as a percentage of supply declined from 22 percent of supply in 1978 to 11.5 percent in 1982.