

OUTSIDE THE COURTSGOVERNMENT'S PLANS FOR COMPETITION
LAW REVISION BEGIN TO EMERGE

Recent speeches and press interviews by Andre Ouellet, Minister of Consumer and Corporate Affairs and by R.J. Bertrand, Competition Director, have provided fairly clear indications of the Government's thinking in respect of reforms to the Combines Investigation Act. It would appear that a bill is planned for introduction by the spring, that it will be much shorter than Bill C-13 which lapsed in 1978, and that it will include the following features:

- Revision of s. 32 on collusive arrangements in order to repair the damage done by the Aetna and Sugar judgements, along with provision for approval of temporary specialization agreements.
- Replacement of the present criminal merger provision by a system of advance notification of large mergers and civil review.
- Revision of the present criminal monopoly provision, especially in the light of the Irving decision, or introduction of a civil procedure to review certain monopolistic practices when engaged in by one or more firms.

Mr. Ouellet, in an address to the Canadian Federation of Independent Petroleum Marketers in Toronto on November 26, stated:

"...I would hope by the spring to be in a position to introduce a new bill to deal with those areas where there is the most urgent and pressing need for action - that with respect to mergers, monopolistic practices and conspiracies."

S. 32(1)(c) now requires proof of a conspiracy to lessen competition unduly. Mr. Bertrand, in a speech in Toronto on November 19 to the Conference on Marketing and the Law conducted by Oyez Limited, summarized the enforcement difficulties emanating from the Aetna and Sugar judgements as follows:

"Among the findings or apparent findings arising out of these cases which weaken or appear to create uncertainty an interpretation of the conspiracy provision are the following:

1. Appearing to put an onus on the Crown to establish a virtual monopoly in order to convict.
2. Admission of evidence of public benefit in order to determine whether the object of the agreement was to lessen competition unduly.
3. Appearing to hold that in order to convict it must be established that the accused intended to lessen competition unduly.
4. Appearing to hold that the language of the provision does not encompass a tacit agreement and that in order to come within the provision communication among the parties must be shown."

The Minister, in an address to the Federal-Provincial Conference of Consumer and Corporate Affairs Ministers in Saskatoon on October 8-10, stated:

"There is nothing to be said in favour of price-fixing, or collective boycotts, or agreements to divide up the market. I intend to seek legislation which will bring an end to these practices by outlawing them in unequivocal terms. This does not mean however that in appropriate circumstances and with carefully designed controls, we cannot have specialization agreements for limited terms where the need for such exemption from the general prohibition can be demonstrated."

There was a provision in Bill C-13, the Competition Act whereby a Competition Board could exempt a specialization agreement from s. 32 for a period up to ten years. That bill died on the Order Paper in 1978.

With regard to mergers, the Minister has left no doubt about his intention of replacing the present criminal prohibition by a system of advance notification and civil review. He has not yet expanded upon the kind of civil review procedure he has in mind. In his Saskatoon speech he stated:

"During the long debates that followed Bill C-256, a provision requiring mandatory registration of mergers has been dropped. I think this was a mistake. Some recent business operations, particularly the merger of the Bay-Simpsons and the

reciprocal actions of Thomson and Southam involving the transfer of assets and the closures of newspapers, demonstrate that an advance notification procedure is absolutely vital to enable the Government to intervene before it is too late when the public interest is concerned.

"It is obvious that not all mergers and acquisitions will necessitate scrutiny and the advance notification procedure will have to be designed accordingly. However, I think that the principle of an advance notification is of prime importance. Where a merger will create excessive concentration in any industry, or where an industry is already highly concentrated and the acquisition of smaller firms is likely to entrench the position of the dominant firms, we must be in a position to block the consummation of such mergers. In these circumstances it is manifest that the blunt prohibitions of criminal law are inappropriate. What is needed is a careful analysis of the relevant factors and a decision based on a skilful weighing of the several factors involved."

With regard to monopoly, recent official and ministerial statements seem to point towards a revised criminal monopoly provision or the introduction of a civil provision to deal with specified forms of anti-competitive conduct by one or more enterprises. Mr. Bertrand, in his speech of November 19, described how the Irving decision had emasculated the monopoly prohibition as well as that of mergers. Referring to that decision, he stated:

"It also largely neutralized the effect of the monopoly provision. The Court did not agree with earlier decisions of lower courts that 'unduly' and 'detriment to the public' had essentially the same meaning and held that detriment must involve something more than the extent of interference with competition and there must be proof of actual detriment. Furthermore, it was of the view that where complete control here was obtained by the acquisition of all the companies in the business in the market area, this did not in itself raise a presumption of detriment and the evidence must go beyond complete control of the business. It seems reasonably clear from the decision that a structural approach to merger or monopoly is rejected and that the provisions look solely to a conduct approach."

The Minister, in his speech of November 26, stated:

"You may recall that all the previous proposals for reform put forward over the past several years have envisaged that the existing criminal sanctions against certain monopolistic practices would be retained in the competition law. But both the Economic Council and the Advisory Committee I appointed recognized that there were some practices associated with the exercise of monopoly power that might not be in the public interest, depending on particular circumstances. Consequently, they advocated that provision be made for review by a civil tribunal of certain specific monopolistic practices, such as restricting entry by a new competitor into the market, foreclosing outlets for sale or sources of supply, and elimination of a competitor by predatory pricing or other similar means.

"In my judgment, it is very important to broaden the mechanisms available to deal with this matter of monopolistic practices and I would hope to include such a provision in the new legislation that I plan to bring forward next spring."

COMPETITION DIRECTOR DENIES COMBINES
LAW IMPEDES EXPORTS

Mr. R.J. Bertrand, Director of Investigation and Research under the Combines Investigation Act, appeared before the House of Commons Special Committee on a National Trading Corporation on September 22, 1980. The Committee, which is chaired by Mr. Jesse P. Flis, is considering whether a national trading corporation should be created and, if so, in what form.

The Director's submission dealt at length with the application of the Combines Investigation Act to export activities and also summarized the application of the competition laws of Canada's major trading partners both as to their own export activities and to Canada's. He pointed out that no export association had ever been charged under the Combines Investigation Act, and he stated:

"There are a number of factors which may help to explain the absence of cases. In the first place, large Canadian-owned companies heavily engaged in exporting have the facilities to organize their own foreign marketing, and most apparently prefer to do so. In the second place, foreign-

owned companies which in total are extremely important in the Canadian manufacturing sector, often prefer to rely upon the international marketing facilities of their parent concerns.

"In the third place, such evidence as exists suggests that there are not a great many export associations in Canada or a widespread desire to form them. Under the Program of Compliance of the Bureau of Competition Policy... very few proposals for export agreements have been presented over the years.

"In the fourth place, such export associations as do exist in Canada have apparently been able to operate within the framework of the Combines Investigation Act. A study by K.C. Dhawan and L. Kryzarowski, which was commissioned by the Department of Industry, Trade and Commerce to research the use of export consortia in Canada (1) found just twenty-four Canadian-based limited liability export consortia had been incorporated, twenty-two of them since 1972. The authors asked fifteen consortia participants to rate the seriousness of sixteen specified problems encountered. 'Fear of Combines Investigation Act' was among three problems of least significance to them."

"(1) Export Consortia, a Canadian Study, Deckemco Ltd., Montreal, 1978."

The Director presented standards of conduct for an export association or a national trading corporation in order to comply with the Act. The standards, which are a modified version of the ones he presented on February 15 to the World Trade Committee of the Vancouver Board of Trade (see June issue of the Record) are as follows:

- "(1) An export association should not engage in any action which may serve to reduce the volume of exports from Canada. (to offend this standard undoubtedly would be in direct conflict with paragraphs 32(5)(a) and would mean loss of the exemption)
- (2) If non-member competitors are dependent upon an export association or its members for supplies, such as component parts, the association should not deny supply to Canadian non-members.

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- (3) An export association should not attempt to force Canadian competitors into joining the association.
- (4) An export association should not impede the entry into the market of new producers or potential exporters.
- (5) An export association or its members should not discriminate against any Canadian firm or individual so as to impede their ability to compete for export business.

"Standards (2) through (5) correspond generally to paragraphs 32(5)(b) and (c) which are concerned with restrictions placed upon or injury done to domestic competitors of the association or its members.

- (6) An export association should not extend its arrangements to include suppliers in foreign countries.
- (7) An export association should take no action which serves to limit or impede the import of products into Canada.
- (8) An export association should not engage in any action which serves to affect adversely competition or prices in the domestic market.

"These latter standards provide examples of how paragraph 32(5)(d) might be offended against."

The Canadian Export Association, which was among those making submissions to the Committee, expressed opposition to the creation of a national trading corporation. It called for full implementation of the recommendations of an export promotion review committee which was appointed by the federal Government and which reported in 1979. That committee was chaired by Mr. Roger Hatch, President of Canpotex Ltd. On October 21, The Honourable Edward Lumley, Minister of State for Trade, announced the appointment of Mr. Hatch as first chairman of the Export Trade Development Board, the creation of which was one of the recommendations of the Hatch Committee.

COMPETITION DIRECTOR OPPOSES PROPOSAL
FOR EASTERN CANADIAN POTATO MARKETING
AGENCY

The Director of Investigation and Research, Combines Investigation Act made a submission in August, 1980 to the National Farm Marketing Council on a proposal by the Eastern Canadian Potato Producers' Council for a potato marketing agency.

The Director expressed opposition to the supply management and price setting aspects of the proposal as involving control of regional output, unilateral setting of prices, allocation of supply to different markets and exercise of control over exports. He questioned the ability of a marketing agency to forecast the desirable level of output better than individual farmers and said prices would probably be set at prices to take account of low productivity farms. He foresaw the following adverse consequences:

"A. At the Farm Level

(1) Lower efficiency and provide excessive returns to resources involved in potato production, and reduce the ability of farm firms to achieve size economies (a dynamic process already advanced to a high degree in the Maritime Provinces and Ontario, but less so in Quebec) through their need to purchase quotas from farms who have capitalized economic rents into their production costs;

(2) enforce rigidities within and between provinces in terms of the pattern and composition of potato production

(3) implicitly exacerbate inequities in income distribution within the farm community (most of the resources owned in potato production are in the hands of the relatively few large-scale operators and to these persons will accrue most of whatever gains the scheme will permit);

"B. At the Marketing Level

(4) make more complex decision-making, as well as generating price distortions (as a result of discriminating and other non-competitive pricing practices) as the Agency alternatively grapples with the problems of removing potatoes declared 'surplus' in particular markets while at the same time 'shortages' exist in other markets."

On the other hand, the Director expressed support for parts of the proposal which advocated an agency with powers for use in expanding markets and improving operational and pricing efficiency. However, he noted a greater commonality of interests between Maritime producers and doubted that the inclusion of Ontario and Quebec would be in the interest of growers. Consequently, he recommended a system that would act as a transaction clearing house for transactions between buyers and sellers of Maritime potatoes. His submission stated:

"This system could be a variant of the Dutch Auction System incorporating facilities for telexing market information to growers to provide them with prior knowledge of anticipated prices before potatoes are committed to market. Further, he recognizes the particular circumstances encountered by growers producing potatoes for processing arising from the fact that there are only two Maritime processing companies of any importance. He believes, therefore, that there is merit in establishing a marketing board to conduct negotiations with the processing companies on behalf of the growers."