OUTSIDE THE COURTS

COMBINES ACT REFORMS TO BE INTRODUCED THIS YEAR

Press reports indicate that Consumer and Corporate Affairs Minister Michel Cote is working on a package of competition law reforms which he will introduce as soon as possible. According to Diane Francis in the Toronto Star of January 2, he hoped to get a bill introduced in April or May. The Ottawa Citizen of January 29 reported a subsequent interview during which Mr. Cote spoke of a date "within six months". He told the Citizen reporter that several aspects of his reforms would resemble those proposed by the previous government in former Bill C-29 of April 2, 1984 including:

- Combines investigators should be notified of large mergers ahead of time, giving them time to decide whether to fight the deal in court.
- Uncompetitive practices in mergers should be taken from the criminal courts and dealt with through civil law.
- Banks and Crown corporations should be subject to competition laws (the 1976 amendments brought banks in except for mergers and inter-bank agreements; Crown corporations that are agents of Her Majesty are not subject to the Act unless otherwise specified).
- A new civil law section should be included to deal with powerful firms that abuse their dominant position.
- Fines for convictions should be increased from the current maximum of $1 million.

Giles Gherson, reporting in the Financial Post of March 16 on an interview with the Minister, mentioned late May or early June as the time when a bill was likely to be introduced and he wrote:

> "Cote has absolutely no plans to challenge the main structure of the Liberal Bill, which would decriminalize mergers and abuse-of-dominant position offenses and move to clarify and strengthen the restraint-of-trade criminal conspiracy section."

Another subject reported as likely to be included relates to the search and seizure provisions which were recently struck down by the courts as unconstitutional.

CTC RECOMMENDS MORE COMPETITION ON TRANSBORDER RAIL ROUTES: DOMESTIC RAIL COMPETITION COULD FOLLOW

The Railway Transport Committee of the Canadian Transport Commission, in a report released of January 3, 1985, recommended less regulation of transborder rail shipments in order to enable the Canadian railways to compete more effectively with the largely deregulated U.S. lines. It also recommended a study to consider the "general advisability of introducing more intra-rail competiton in Canada" for purely domestic traffic.

The recommendations, which would require some amendments to the Railway Act, include the following regulatory charges:

- "Insofar as circumstances in the U.S. dictate, confidential contracts should be permitted on the Canadian portions of the movement of rail freight traffic between Canada and the United States". Canadian railways would not be permitted to disclose such contracts to one another but the CTC would publish summaries of them.

- Rate regulation on shipments from one U.S. point to another U.S. point via Canada would be terminated.

- Canadian railways would continue to be allowed to cancel tariff routings for international traffic and, in addition, would be allowed to impose surcharges on such routines.

- Appeals pursuant to s. 23 of the National Transportation Act from rates and route cancellations (except from unregulated U.S. to U.S. via Canada rates) would continue to be available. Special provisions would be required to provide for appeals from confidential contract rates.

The Report followed public hearings into the effects in Canada of the Staggers Act of 1980 which largely deregulated the U.S. railways. The U.S. lines are now subject to the antitrust laws and can no longer agree on rates. They may and frequently do offer secret rebates to shippers, thereby undercutting the CTC-approved and published rates offered by Canadian railways. The U.S. lines are also free to cancel routes or impose surcharges for the use of their lines on international shipments. This enables them to offer better rates on their long hauls than are available to shippers using only portions of their lines as "bridges" to connect with competing lines. The net effect has been to encourage shippers on international routes to make more use of U.S. lines and less of Canadian lines, thus adversely affecting the revenues of the Canadian railways.

The CTC's recommendations, while meeting the essential requirements of the railways, also take account of broader interests. The railways had sought permission to exchange information on confidential contracts, some protection from liability to attack under the U.S. antitrust laws, and no appeals from international traffic route cancellations or surcharges. The Director of Investigation and Research under the Combines Investigation Act opposed any exchange of information by the railways on confidential contracts and took the position that they should not continue to be permitted to agree on rates on transborder movements.

The Commission specifically based its recommendations on a finding that "The Staggers Act of 1980 has affected traditional rate relationships concerning international rail freight". The evidence in support of that finding is strong, and in reaching it the Commission has reversed the contrary finding of an earlier staff study. In so doing, the Commission may have opened a Pandora's Box which could eventually bring a finding that Canada's regulatory system as applied to purely domestic rail freight is also incompatible with the Staggers Act. Recognizing the connection, the Commission recommended a study to consider, inter alia "the general advisability of introducing more intra-rail competition in Canada". The Commission stated:

> "There is one consideration that embraces all the recommendations ... inasmuch as they are restricted to international (Canada-U.S.) traffic. Such recommendations would lead to a regulatory regime for U.S. origin or destination rail traffic that would differ from that for rail traffic moving domestically or through a Canadian port as part of an overseas movement. This difference would pose problems of its own. For example, U.S. shippers into a Canadian market would have the opportunity for inter-railway competition and confidential contracts, while Canadian suppliers competing for the same Canadian market would be restricted to published common rates.
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> .....
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> "During the hearing, we noted a general concensus in favour of the general philosophy of the National Transportation Act, tempered with the recognition that Canada must adapt to the changes in the U.S. On this basis we recommend that legislative change be approached from the perspective that: (1) it may, in the future, be decided to put the regulation of domestic traffic onto the same footing as that of international traffic; and (2) after experience with the changes recommended below, and/or should the U.S. pressures change, Canada may wish to adjust again.
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> .....

> "...we suggest that, for the purpose of making recommendations to the Minister, the Canadian Transport Commission, by a panel established by the (Rail Transport Committee), commence an investigation, including public hearings, to determine the advisability of introducing pricing innovations such as convidential contracts for domestic Canadian railway freight traffic and overseas import/export railway freight traffic. Consideration should include, but not be restricted to, known and potential effects of the Staggers Rail Act of 1980 and the general advisability of introducing more intra-rail competition in Canada. This investigation should include consideration of the effects, known and potential, on shippers, receivers, railways, ports or other interests that believe they have been or will be affected."

Coincidentally, in a decision announced on January 21, 1985, the CTC ruled that a secret rebate agreement between Canadian National Railways and Cast Containers S.A. was in violation of the Railway Act. Beginning in 1979 and ending in 1981, CN paid rebates to Cast on west bound containers moved on its rail line from the Port of Montreal to Chicago. The agreement was brought to light by the Government of Nova Scotia which complained about injury to the Port of Halifax. No action will be taken under the Railway Act because the time period within which a charge must be laid had expired before the agreement was uncovered. In its ruling, the CTC stated:

> "The prohibition on the payment of commissions in a manner such as was done in this case may not reflect the realities of the marketplace in today's business environment.
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> "Nonetheless, while legislation exists to prohibit such a practice, railways must follow the letter of the law."

Hearings are to begin in April on a broader CTC inquiry into the effects of railway ownership in the container business in Halifax.

OSC REPORT WOULD EASE RESTRICTIONS ON SECURITIES INDUSTRY'S ACCESS TO FOREIGN AND OTHER OUTSIDE CAPITAL

The Ontario Securities Commission, in a report released on February 18, has recommended that restrictions on foreign and other non-industry capital participation in the Ontario securities industry be relaxed but that unregistered dealers should be brought under regulation and that the separateness of the functions of the securities dealers, the banks and the insurance and trust companies should be maintained (A Regulatory Framework For Entry Into And Ownership Of The Ontario Securities Industry). The recommendations, if fully implemented could raise the capital base of the industry from its present level of about $1 billion to 1.5 billions.

The government of Ontario must decide whether to act on the report, and that is expected to take several months. Its decision could be influenced by a federal discussion paper on Canada's financial institutions, which is expected to be released within a few months. Also, a task force which was established by Ontario to study the operation and organization of financial institutions in the Province has still to report.

The OSC report calls for relaxing entry restrictions in the following ways:

- One or more than one foreigner could acquire up to 30 percent of a registered Ontario securities firm; if one foreigner acquired the whole 30 percent, there would have to be a single block of 51 percent held by Canadians. At present, foreigners may not hold more than 25 percent or a single foreigner more than 10 percent.

- A limited number of wholly foreign-owned subsidiaries would be permitted entry on a selective basis. Each could invest up to 1.5 percent of total industry investment, or about $15 millions each, up to a total of about $240 millions. That would be in addition to the three foreign-owned dealers now in Ontario.

- Canadian financial institutions would be permitted to own up to 30 percent of a securities firm compared with the present 10 percent. At present, the Bank Act also prohibits a bank from owning more than 10 percent of voting shares.

- Non-industry investors other than foreigners or financial institutions could own up to 49 percent provided no single non-industry investor had more than 30 percent.

The Joint Securities Industry Committee, which represents the stock exchanges and investment dealers, favoured maintenance of existing entry restrictions as well as registration of all firms in financial intermediation. The Director of Investigation and Research under the Combines Investigation Act, on the other hand, favoured removal of all ownership restrictions based upon citizenship or other business interests.

FOREIGN EXTRATERRITORIAL MEASURES BILL ENACTED

The Foreign Extraterritorial Measures Bill (C-14) was passed by the House of Commons on December 14, 1984 and proclaimed into law effective February 14, 1985. It is substantially the same as the measure which was introduced by the Liberal government on May 28, 1984, which was a

strengthened version of a bill introduced on July 11, 1980. The 1980 bill was precipitated by the uranium cartel antitrust suits which had been launched by the U.S. government and by private interests and which involved what the Canadian government regarded as unacceptable challenges to its sovereignty.

A more recent source of irritation concerned the U.S. Export Administration Act. In August, 1982 the Canadian government expressed concern about the application of the Act to control Canadian exports of equipment to the USSR for use in oil and gas pipelines construction. A formal inquiry was launched in November of that year under s. 31.6 of the Combines Investigation Act but was discontinued a few days later when President Reagan announced the removal of the trade sanctions. S.31.6 applies to foreign laws and directives which have specific adverse economic effects in Canada and it does not stress the sovereignty issue as such.

An official fact sheet summarizes the main provisions of the Foreign Territorial Measures Act as follows:

Section 3 Orders prohibiting production of evidence to foreign tribunals

This provision would authorize the Attorney General of Canada to prohibit the submission of documents from Canada to foreign courts, by specific orders, if it were decided that a foreign court exercises jurisdiction with unacceptable extraterritorial scope.

Section 5 Orders prohibiting compliance with foreign measures

This provision would permit the Attorney General of Canada to issue orders, with the concurrence of the Secretary of State for External Affairs, to persons or corporations in Canada prohibiting compliance with extraterritorial measures taken by foreign governments. Similarly, the Attorney General could prohibit foreign-owned Canadian corporations from complying with directives from foreign parent corporations pursuant to such foreign governmental measures.

Section 8 Orders preventing the recognition or enforcement of foreign antitrust judgments

This provision would authorize the Attorney General of Canada to prevent, by specific orders, the recognition or enforcement of foreign antitrust judgments with extraterritorial scope in Canada.

The orders may relate to either the full amount of the foreign monetary judgment or to part thereof; for instance the attorney General might decide to prevent the enforcement of the punitive two-thirds element of a U.S. treble damage award in a private antitrust suit.

Section 9 Recovery in Canada of damages paid abroad pursuant to foreign antitrust judgments

If (and only if) an order has been issued pursuant to section 8, a Canadian party which has satisfied a foreign antitrust judgment abroad by making payment to a foreign party can recover in a Canadian court the amount paid abroad. This action for recovery of damages may be for the full amount if the Attorney General of Canada has issued an order under section 8 relating to the full monetary amount of the judgment. If the Attorney General should decide to prevent the enforcement of only part of a foreign antitrust judgment, then the Canadian party could only recover that same portion in a Canadian court.

The press release states:

"Ministers emphasized that this legislation is intended as a measure of last resort to be used in situations where diplomatic efforts to resolve problems arising from the extraterritorial application of foreign law have been exhausted and where irreconcilable policy differences remain.

Ministers also stated that the Government of Canada remains fully committed to pursuing all diplomatic efforts to resolve any issues that may arise from the extraterritorial application of foreign laws. The Canada/U.S.A. Antitrust Understanding, signed on March 9th, 1984, is a good example of a measure which can assist in working out political problems through notification and consultation."

FIRA REPLACEMENT INTRODUCED

Regional Industrial Expansion Minister Sinclair Stevens introduced Bill C-15, the Investment Canada Act, on December 7, 1984. The bill would replace the Foreign Investment Review Act with an act of lesser scope. The principal changes would be:

- Nearly all foreign investments in new businesses as distinct from takeovers would no longer be subject to review. Entry restrictions under other laws such as the Bank Act would, of course continue in effect.
- Nearly all foreign takeovers of Canadian businesses with assets less than $5 million would no longer be subject to review.
- Exceptions to the above would be new investments and takeovers in sectors designated by the government as

culturally sensitive, such as the book and film industries. They would continue to be subject to review

- The Minister of Regional Industrial Expansion rather than the Cabinet would make the review decisions on the basis of "net benefit to Canada". The factors to be taken into account would continue to include effect on competition. As with FIRA, the assessment of the various specified factors in a particular case would be left to the discretion of the government (through the Minister).

It is estimated that only about ten percent of investments now reviewable would be reviewable under the proposed legislation. However, they would be the larger takeovers, which have accounted for about 90 percent of the value of investments screened under FIRA.

IRPP CONFERENCE LINKS PRIVATIZATION WITH COMPETITION AND DEREGULATION

A conference on concentration, deregulation and privatization, which was organized by the Institute for Research on Public Policy in Toronto on February 22-3, 1985, was told that efficiency gains from privatization of crown corporations would require a strong competition policy and removal of competition-inhibiting regulation.

Economists Richard Lipsey and Don McFetridge, lawyer Gordon Kaiser and Thomas E. Kierans, President of McLeod Young Weir all took that position but emphasized that any program of privatization should be highly selective. Kierans, in his article "Commercial Crowns", which appeared in the November, 1984 issue of Policy Options, had stated:

> "...it is the wider range of policy objectives which must be identified and assigned priorities before any privatization programme is essayed. Where competition is a reality and commercial goals and market returns prevail, neither evidence nor theory supports the proposition that privatization *per se* would improve the allocative efficiencies of the commercially oriented Crown corporations. The major savings are to be obtained from exposing the large, consumer oriented Crowns, exhibiting monopolistic behaviour patterns and functioning as policy instruments, to deregulation, to competition and to an enforced and viable competition policy. It would be folly, for example, to abort a deregulation initiative because private sector investors proved reluctant to accept the risks of an uncertain business environment."

Some participants, including James Gillies of York University Faculty of Administrative Studies and Stephen Littlechild of Birmingham University were of the view that in some cases it would be better to press on

with privatization and leave the regulatory and competition problems for later resolution.

Investment analysts and persons in public life stressed that, even after a target for privatization has been carefully selected, the process will be long and complex. The public must be convinced of the wisdom of the move in terms of public interest and that it is not being made on ideological grounds or to benefit some specialized group. It is important to have the cooperation of the labour and management that will be affected. Decisions must be made about any existing political or non-economic functions of the corporation; examples which were cited included locational factors and the policy of bilingualism.

The kinds of buyers to be sought depends upon the circumstances of each case. A number of speakers favoured wide public ownership where large Crown corporations offering services to the public are involved. Support was expressed for encouraging labour and management to become owners of a relatively small regional entity such as Northern Transportation Ltd.

Issues in the valuation of the assets to be sold were discussed. The temptation to obtain the highest price should not be allowed to obscure the central goal of improved economic efficiency. In particular, the buyers should not be artificially protected from competition.

Mr. John Thomson of the Progressive Conservative Task Force on Crown Corporations was among those who emphasized the complexity of the privatization process. Judging from his remarks, it is unlikely that any Crown corporation of the stature of Air Canada or Canadian National Railways will be privatized during the present electoral mandate of the government. Nevertheless, the subject is clearly on the government's agenda, and Treasury Board President Robert de Cotret has general responsibility for it.

FOREIGN AND INTERNATIONAL

EEC HOLDS PULP FIRMS VIOLATED COMPETITION RULES: WEST COAST FIRMS AMONG THOSE FINED

The Commission of the European Communities announced a decision on December 20, 1984 holding that a number of Canadian, U.S., Finnish and Swedish woodpulp producers and three trade associations had violated Article 85(1) of the EEC Treaty. Fines of some four million ECU (roughly equivalent to $Can. 4 millions) were imposed, including the following fines on Canadian firms: