Officials of the accused held two meetings in hotels in connection with tenders for the supply and installation of reinforcing steel which had been called by the Montreal Urban Community for a sewage treatment plant. At the first meeting, it was decided by cutting playing cards that Acier d'Armature and Gendron jointly would be the low bidder. At the second meeting, officials of the latter two companies advised the others what price they intended to bid. Their bid, which amounted to $11.2 millions, proved to be the lowest. However, the tender calling authority became aware of the scheme and called new tenders, thereby saving over $2 millions.

OUTSIDE THE COURTS

OTTAWA'S PLANS FOR TRANSPORT POLICY REFORM HERALD MORE COMPETITION AND LESS REGULATION

Transport Minister Don Mazankowski's position paper Freedom to Move, which was released on July 15, calls for a major shift from detailed regulation to more dependence upon competition in Canadian air, rail, highway and multi-modal transport as well as some pro-competitive changes in marine shipping policy. He plans to introduce implementing legislation by the end of this year after further consultations. The changes respecting highway transport also require provincial legislative changes, and these have been agreed upon although the legislative priorities of the new government of Ontario are unclear.

The changes proposed for air transport are summarized in a press release as follows:

> "Entry to any class of domestic commercial air service in Canada will be open to carriers meeting a 'fit, willing and able' requirement. It will no longer be necessary for the carrier to establish that its service is required by 'public convenience and necessity'. Any operator submitting evidence of adequate liability insurance, and in possession of a Department of Transport operating certificate attesting to the adequacy of its equipment and its ability to conduct a safe operation, shall be granted a licence.
>
> "The new policy is expected to have particular impact on the encouragement of new local regional fixed-wing and rotating-wing carriers, in both charter and scheduled services.
>
> "Discontinuance of services will require minimal notice - perhaps 60 days on monopoly routes, 30 days on others.

"Determination of routes and schedules of domestic air carriers will be exempted from regulation, permitting airlines to offer routes and schedules to meet perceived public demand.

"There will be no ongoing regulation of domestic tariffs, except a review procedure on fare increases, with the power to overturn or reduce excessive increases.

"Services which are deemed necessary in the public interest, but not provided for under normal market conditions, will be considered eligible for direct public support.

"Consistent with Canada's obligations under bilateral air agreements, there will be continued regulatory control of market entry to international scheduled services and of international tariffs. However, the Government will pursue reduction of regulations on international routes through bilateral negotiations, such as those ongoing with the United States."

The changes proposed for railways include the following:

- S. 279 of the Railway Act, which exempts the railways from prosecution under the conspiracy section of the Combines Investigation Act for collective rate-making, will be repealed. That proposal reverses a recommendation made by the Canadian Transport Commission in its report of June, 1985 on "Inquiry Into Effects In Canada Of U.S. Rail Deregulation". (The Commission did, however, recognize in that report the need for a considerable measure of deregulation in order for the Canadian railways to compete effectively with the deregulated U.S. railways).

- The Railway Act will be amended to permit railways to enter into confidential contracts with shippers for domestic, overseas and transborder traffic. Rebates will be permitted, competing railways will not have access to the contracts and there will be no appeal to the proposed new regulatory agency (see below).

- S. 276 of the Railway Act, which requires that rates be compensatory, will be repealed in five years, thus eliminating any regulatory floor under rates. The position paper notes, however, that the railways are subject to the provisions of the Combines Investigation Act as it applies to pedatory pricing.

- S. 278 of the Railway Act, which provides for the fixing of maximum rates for "captive shippers" without access to competing transport services will be replaced by a more

effective appeal procedure. In addition, the position paper states:

> "Despite the additional appeal mechanisms, captive shippers may well continue to be at risk in a rail transportation environment characterized by only two main railways. Wishing to encourage competition in all segments of the transportation system, the Government proposes to allow shippers captive to one rail line to have access to the lines of competing rail carriers, through provision in legislation for a joint-line rate from the traffic's origin to its destination."

- Abandonment procedures for "non-protected" (i.e. not protected by Order-in-Council) branch lines will be expedited. In addition, provision will be made to empower the government to permit a third party to acquire and operate a non-protected branch line which the owner wishes to abandon. In the U.S., independent short line operators have contributed to competition and efficiency.

With regard to trucking, interprovincial and international movements fall constitutionally under federal jurisdiction while intraprovincial trucking is under provincial jurisdiction. However, by the Motor Vehicle Transport Act (MVTA) of 1954, federal economic regulatory responsibilities, which could be exercised under the National Transportation Act (NTA), are delegated to the provinces. The position paper states:

> "Significant progress towards economic regulatory reform was made on February 27, 1985, when the federal/provincial Council of Transport Ministers agreed upon a number of specific steps to implement the first phase of regulatory reform of the extraprovincial trucking industry. These steps involve shifting the burden of proof on entry from the applicant to the respondent; eliminating rate approval; creating a list of commodities and services exempt from control; streamlining operating licences and licence categories; and streamlining the licence application process. The MVTA will be modified to reflect these reforms.
>
> "Federal and provincial ministers have also agreed upon a second stage of reform which will assess the socio-econmic effects of eliminating the test of public convenience and necessity in favour of a fitness test and eliminating rate filing.
>
> "Part III of the NTA is the instrument by which the government could exercise its responsibility, both to users and operators, for the extraprovincial trucking industry. If retained in its present form, this provision would remain outdated with respect

to truck transportation and would not enable the Government to show leadership in regulatory reform.

"The Government proposes to change the entry criterion in Part III of the NTA from a test of 'public convenience and necessity' to a 'fit, willing and able' requirement. The control of rates and fares will be removed."

At their meeting of February 27 referred to above, the federal and provincial transport ministers agreed that all provinces would make their trucking legislation compatible with a proposed new Ontario Public Vehicles Act. That Act was introduced but had not yet been enacted when the Conservative government of Ontario was defeated last May and replaced by a Liberal minority government with New Democratic Party support. The NDP has been hostile to deregulation, fearing an adverse effect upon employment.

With regard to marine transportation, the position paper proposes amendments to the Shipping Conferences Exemption Act that are substantially more pro-competitive and more in line with U.S. legislation than those which were introduced on March 27, 1984 in the Senate as Bill S-12 but never enacted (see S.D. Khosla and R.D. Anderson, New Canadian and U.S. Legislation To Govern Shipping Conferences, Canadian Competition Policy Record, June, 1984). In particular, it is now proposed to prohibit conference carriers from requiring shippers to transport 100 per cent of their cargo under loyalty contracts, to permit shippers to negotiate confidential contracts with individual conference members and to provide a right of independent action by conference members on rates or levels of service. Also, while conferences will be allowed to quote multi-modal rates, only individual conference members will be allowed to negotiate with individual non-ocean carriers. The proposed legislation will clearly prohibit predatory conduct.

Certain changes in the laws and regulations affecting coastal, Great Lakes and northern shipping are also proposed; the monopoly accorded Canadian ships in those areas will be preserved and extended.

In addition, Transport Minister Mazankowski has elsewhere expressed agreement with the report of the Task Force on Deep-Sea Shipping which was released in June. It recommended against the government taking steps towards establishment of a Canadian flag deep-sea merchant fleet. It found that such a fleet could only compete if it were subsidized and guaranteed a certain share of cargoes.

With regard to commodity pipelines, it is proposed to "greatly relax the regulatory process for licensing commodity pipelines". There will be a "fit, willing and able" entry requirement, but no rate regulation.

Other regulatory changes proposed include replacement of the Canadian Transport Commission by a new regulatory agency which will reflect

"a reduced role due to lessened economic regulation... and a new emphasis on promoting multimodalism and equitable regulation of all the modes". At present, the CTC takes its direction from its interpretation of the legislation, but the position paper states:

> "The revised legislation will confer upon the Minister, with the approval of the Governor-in-Council, the power to issue policy directions to the Regulatory Agency on matters falling within the jurisdiction of the Agency and will make such policy directions binding on the Agency in its consideration of matters before it."

Unlike the CTC, the new agency will not be empowered to review proposed mergers of transportation companies. Instead, the Governor-in-Council will be empowered to disallow such mergers where acquisitions of $20 millions or more are involved. The Combines Investigation Act will also apply to the extent that it now does.

By and large, the proposed policies, if implemented, will go a long way towards meeting the concerns of the Bureau of Competition Policy in regard to transport. In an address before the Canadian Transportation Research Forum on May 29, combines Director Lawson Hunter set out his own proposals for changes in transportation policy, excluding changes which are needed in the Combines Investigation Act. He stated:

"(a) Railways

The critical issues I see here are:

- removal of the right of railways to participate in collective ratemaking exempt from the conspiracy provisions of section 32 of the Combines Investigation Act.

- provision for the allowance of confidential contracts between shippers and carriers so that shipper costs can be reduced.

- the expansion of interswitching and running rights to promote intramodal competition by allowing access to the roadbed.

(b) Air

- replacement of the PCN entry test in section 16 of the Aeronautics Act with a fitness test designed to protect the public's interest in safety and compensation in the event of accidents or property loss.

- removal of price and product design controls so that

carriers are able to freely make marketing decisions.

(These two actions would eliminate problems in both passenger and cargo traffic caused by current regulations such as the inability to enter into confidential contracts, single-entity charters for cargo traffic and restrictions on aircraft size.)

- a clear indication that Air Canada will not benefit from Crown ownership in a deregulated environment.

- elimination of the policy preventing foreign ownership of scheduled carriers.

(c) Trucking

- the critical starting point is the speedy implementation of the federal and provincial Ministers of Transport Memorandum of Understanding to liberalize entry and remove rate approval for extraprovincial trucking. these reforms should be extended to intraprovincial trucking, and a second stage should see the early adoption of a fitness test for entry and the complete elimination of pricing control.

(d) Marine

- at a minimum, modify the Shipping Conferences Exemption Act to provide for freer independent action by conference members, confidential contracts and less stringent patronage contracts.

- prevent conferences from setting multi-modal rates."

COMMONS COMMITTEE PONDERS HOW BROADLY TO EXEMPT COPYRIGHT SOCIETIES FROM COMBINES ACT

Combines Director Lawson Hunter, appearing before the Subcommittee on revision of Copyright of the Commons Standing Committee on Communications and Culture on June 18th, criticized some of the proposed amendments to the Copyright Act which are under consideration.

The Subcommittee has been considering the proposals in the 1984 White Paper on copyright, From Gutenberg to Telidon. The existing Act dates back to 1924, and a very extensive overhaul is proposed. Mr. Hunter expressed concern about three of the many proposed changes, one to facilitate the establishment of copyright societies, one to delete a provision for compulsory licensing of copyrighted recordings of works, and one to extend copyright protection to cover rental.

Copyright Societies

Copyright societies are organizations to which copyright owners may assign or license all or part of their rights for the purpose of exploitation and enforcement. Sections 48, 49 and 50 of the existing Copyright Act makes provision for musical and dramatico-musical copyright societies, of which there are two. The Act requires these societies to file their royalty fees with the Minister of Consumer and Corporate Affairs annually and that they be published in the Canada Gazette. Any written objections to the fees are referred to the Copyright Appeal Board; after a hearing, it may alter or approve the fees.

There is nothing in the law to prohibit the formation of copyright societies in fields other than music, but their fee setting activities would be exposed to attack under the Combines Investigation Act because they would not fall under the regulatory authority of the Copyright Appeal Board as the musical societies do. Such societies could also run afoul of other parts of the Combines Investigation Act including s.31.4 dealing with abusive practices such as tied selling and exclusive dealing. Indeed, Mr. Hunter expressed the view that even the musical societies are subject to s.31.4 "because they are not effectively regulated by the Copyright Appeal Board in that type of practice".

The White Paper emphasizes the need for organized exercise of copyright in some fields other than music, and cites the following as major reasons:

"- changing technological circumstances, which have greatly expanded opportunities for unauthorized reproduction and use of copyright-protected material;

- the high costs of transactions, which may be so great as to make it impracticable for copyright owners to negotiate individually with users, such as in the case of photocopying, access to copyright material by educational users, or use of musical works by radio stations."

Other sources have noted that copyright societies could be useful in dealing with recordings made by home audio and video equipment, and cable retransmission of films and radio programs.

The White Paper therefore proposes that a broader range of copyright societies be brought under the Copyright Act. Admission under the Act would be subject to approval by a revamped Copyright Appeal Board. They would be subject to control by the Board with regard to fees and other matters both to protect the public and to meet the concerns of creators about their own relations with the societies. Those concerns relate to the fairness of distribution schemes and the control of the societies' operations. The White Paper states:

> "To ensure that their distribution schemes are fair and efficient, the societies would be required to file their distribution and monitoring schemes with a revised Copyright Appeal Board. The Board would, on the application of a member of a society, have the authority to review the schemes and veto any scheme deemed unfair.
>
> "To meet the concerns of copyright owners that their rights be protected from potential abuse by societies, the new Act would provide that:
>
> - the Governor in Council may establish a standard licensing agreement for the licensing of rights from a copyright owner to a society. This provision will ensure that copyright owners are not forced to enter into contractual commitments of an unnecessarily long duration or to assign rights in bulk to a society. A copyright owner would be allowed to grant one or more rights to a society or retain certain rights.
>
> - a revised Copyright Appeal Borad would ensure that the Boards of Directors of societies be elected democratically by the members of the societies."

The White Paper also states:

> "Once an exercise of rights comes within the jurisdiction of the Board, all negotiations between societies and users about that right would fall under the jurisdiction of the Board. This would be purely permissive legislation, however, and creators or other copyright owners would not be required to join a society. All copyright owners who are not members of a society would be free to negotiate with users individually ...
>
> "Once rates and reporting requirements were approved by the Board, anyone could use the works in the society's repertoire after paying the approved fee and meeting the approved reporting requirements regardless of whether the user had a contractual relationship with the society. This provision is comparable to section 50(10) of the current Act, which covers the performance of musical works."

Mr. Hunter explained to the Subcommittee that his concern was that the proposed legislation should more carefully define the jurisdiction of the Copyright Board and the extent of the exemption from the Combines Investigation Act. He stated:

> "To ensure that the societies do not receive a broader exemption than is intended, it is important that the regulatory jurisdiction of the Appeal Board be carefully defined. This jurisdiction should be confined largely to the review and approval or modification of the

societies' tariffs, the distribution of revenues among members, and the consideration of whether collective societies should be allowed to operate in a designated field. In this way, the societies will be free to carry out their approved functions, while the Combines Investigation Act will continue to apply to any abusive practices."

"The revised Copyright Act should indicate in particular that the societies are not authorized to engage in exclusive licensing arrangements with their members. As noted, such arrangements artifically enhance the market power of collective societies, by restricting individual members from dealing directly with users. The continued application of the Combines Investigation Act to such arrangements is considered important to protect both the societies' users and their members. From the standpoint of users, this could ensure that the societies remain subject to potential competition from their own members. Such competition acts as a check against the danger of monopoly abuse by the societies."

"From the standpoint of the societies' members, prohibition of exclusive licensing arrangements would provide them with a "right of independent action" to deal directly with users, if they feel unfairly treated by the societies. The distribution of the societies' revenues is a longstanding source of concern to creators.[17] Authors complain that they are under-compensated by socities due to: (a) inadequate monitoring of the use of materials; and (b) perceived unfairness of revenue distribution formulas. To address these problems, the White Paper recommends that (i) the Appeal Board be empowered to review and veto the soccieties' distribution formulas; (ii) the Governor in Council be authorized to prescribe standard form contracts between creators and societies; and (iii) the Appeal Board ensure that the societies' directors are democratically elected by the members. Apparently there is a concern that these recommendations take an unduly rigid and interventionist approach to the regulation of societies' internal affairs. The suggested prohibition of exclusive licensing arrangements, preserving individual members' right of independent action to deal with users, may to some extent be viewed as an alternative to such regulation."

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7. Douglas S. Smith, Collective Agencies for the Administration of Copyright (Consumer and Corporate Affairs, Copyright Revision Studies, 1983) p. 73.

"Two additional restrictions should be placed on the authorized activities of copyright socities. First, the Copyright Act should provide that, once any user has successfully negotiated to obtain specific material from a society at a designated rate, it will be available to similarly situated users at the same rate. This provision might also help to prevent problems arising from refusal to deal, a reviewable practice under Part IV.1 of the Combines Investigation Act. Second, the Copyright Act should provide that the societies must make available genuine alternatives to blanket licences (e.g., "per program" licences or licences for the use of individual works). As noted, blanket licences effectively tie the use of individual copyrighted materials that would otherwise be in competition. While the use of these licences could be challenged under the tying provision of the Combines Investigation Act, a specific requirement under the Copyright Act to make available genuine alternatives would provide greater certainty for the societies and their users."

"Such a framework for the operation of copyright societies in Canada would be similar to the treatment of performing rights societies in the United States. In that country, constraints imposed by an antitrust consent decree in 1950 provide the operative framework for the American Society of Composers, Authors and Publishers (ASCAP) and Broadcast Music Incorporated (BMI), the American counterparts to CAPAC and PRO-CAN. These constraints prohibit the societies from entering into exclusive arrangements with creators for the licensing of music performing rights, thereby requiring the societies to operate on a non-exclusive basis. The societies are also required to make available genuine alternatives to blanket licences (e.g., per program licences) at reasonable rates. Finally, users who believe that they are being overcharged may apply to a District Court for determination of a reasonable fee, with the burden of proof on the society to establish the reasonableness of rates it requests. In this regard, the District Court's role is similar to that of the Copyright Appeal Board in Canada."

"This framework was reviewed by the U.S. Supreme Court in 1979. The Court found that subject to these restrictions, the use of blanket licences and other practices of the performing rights societies do not represent violations of the U.S. antitrust laws. Indeed, the court considered that the societies perform a socially valuable function, in lowering the costs of transaction between users and creators. Subsequent academic analyses of the societies' role have also found that, in the context of the continuing provisions of the antitrust consent decree, the U.S. performing rights societies perform an efficient function. The prohibition of exclusive licensing arrangements is considered important because it ensures that the societies remain subject to potential competition from their own members."

"While the above measures will help to prevent potential abuses by copyright societies, the role of the Copyright Appeal Board will remain critical to balancing the interests of users and creators. The White Paper leaves unclear the precise composition and prerogatives of the Board, and notes the need for further input on this issue. In this regard, it is important to ensure that the composition of the Board reflects the interests of users as well as the creators of copyrighted materials. In addition, it should be made clear in the legislation that the Board's power to review, approve and/or vary the societies' tariffs and related matters may be invoked on its own initiative or on the request of any interested party, including final consumers. Such a provision for invocation of the Board's powers is necessary to ensure that creators and well organized users or consumers."

"One possible model for ensuring adequate recourse by interested parties is suggested by Bill S-12, An Act to Amend the Shipping Conferences Exemption Act, 1979 (SCEA), introduced in the Senate in March, 1984. The SCEA is similar to the Copyright Act, insofar as both provide a form of exemption from the Combines Investigation Act. Bill S-12 contained a provision enabling interested persons to apply to the Canadian Transport Commission for.review of shipping conference practices. The Bill also provided that the Director of Investigation and Research under the Combines Investigation Act should be recognized as an interested person for such purposes. The Subcommittee may wish to consider recommending similar provisions in the revised Copyright Act. With such provisions, the Director could help to balance the interests of less well-organized participants vis-a-vis the established players."

Compulsory Licensing of Recordings

The White Paper proposes the repeal of s. 19 of the Copyright Act. That section establishes a compulsory licensing system for recordings ("mechanical reproduction") of literary, dramatic and musical works. The royalty is fixed by the section at two cents per playing surface. The system is administered on behalf of many copyright holders by the Canadian Musical Reporduction Rights Agency (CMRRA) which collects and distributes the royalties. S. 19 was enacted in 1921, following similar action in the U.K., because the recording industry feared the monopoly exercise of exclusive rights by music publishers. According to the White Paper, most European countries do not have compulsory licensing, and monopoly abuses have apparently been avoided through industry-wide collective agreements negotiated among music composers, publishers and the recording industry. The White Paper states that European-style negotiated agreements would probably develop in Canada, and proposes that the Copyright Appeal Board mediate disputes.

Mr. Hunter expressed opposition to the repeal of s. 19, stating:

> "The proposed abolition of compulsory licnesing could affect directly the status of CMRRA in relation to the Combines Investigation Act. At present, the organization functions effectively without statutory authorization and has not come into conflict with provisions of the Act, since: (i) the royalty rate is fixed by statute; and (ii) CMRRA generally acts as a non-exclusive agency, allowing members to deal directly with users. If compulsory licensing is removed, and CMRRA undertakes to negotiate licence rates on behalf of its members, it could come into conflict with provisions of the Combines Investigation Act.
>
> "More generally, the proposed abolition raises anew the concerns about abuse of market power that led to the adoption of the compulsory licensing system in 1921. A recent study examined the impact of abolishing the system and concluded that, 'rights owners, by controlling the entire class of copyrightable material, could secure monopolistic prices and rents far about competitive levels.' The study also found that the existing system has fostered the growth of a competitive recording industry in Canada, by providing low cost, competitive access to original materials. Removal of compulsory licensing would place Canadian record companies at a 'serious disadvantage' vis-a-vis their major foreign competitors, since under their domestic legislation these companies benefit from provisions similar to the system of compulsory licensing in Canada.[23]"

Rental of Protected Works

The White Paper proposes the establishment of a new right of copyright holders to control the public rental by a buyer of a copy of a protected work which he has purchased. Under the existing Act, buyers are at liberty to rent in the absence of an agreement to the contrary with the copyright owner. The White Paper states:

> "Copyright owners who receive revenues from the sale of records and films have found that a growing number of establishments rent copies without authorization, then keep the profits. The copyright owners, as the participants in the creation of these works, argue they should have the right to control the rental of copies. This would ensure compensation for an important new means of exploiting their works.

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23. Mike Berthiaume and Jim Keon, The Mechanical Reproduction of Musical Works in Canada (Consumer and Corporate Affairs Canada, Copyright Revision Studies, 1980, page 18).

> "It is the rental market for both video and sound recordings that is of economic significance. Consequently, the new Act will provide a renting right that is limited to the commercial renting of sound recordings, films, and videotapes. The Act will also contain provisions allowing the Governor in Council to extend this right to other types of works.
>
> "An exclusive right to authorize the rental of particular works would allow copyright owners to negotiate agreements with rental businesses. In return for such authorization, the rental establishment could agree to pay the copyright owner a fee and to keep appropriate records of rental activities."

Mr. Hunter expressed opposition to the proposal, stating:

> "Recent testimony on the impact of such a right before a Subcommittee of the U.S. Senate Committee on the Judiciary disclosed a concern that the establishment of such a right could undermine the viability of independent video rental retailers, and facilitate exclusive dealing and tied selling by the major film makers. Partly as a result of this testimony, it appears unlikely that the U.S. will adopt such a right in its copyright law in respect of pre-recorded video cassettes."

COMBINES HEAD INTENSIFIES WAR AGAINST BID-RIGGING

Bureau of Competition Policy Director Lawson Hunter told the Construction Law Section of the Canadian Bar Association in Calgary on June 13 that a significant portion of the resources available to him is engaged in bid-rigging investigations. He also outlined additional steps which he has taken or which may be taken to assist in prevention, detection and deterrence of bid-rigging.

Prior to the enactment of s. 32.2 of the Combines Investigation Act in 1976, bid-rigging prosecutions were conducted under the conspiracy section., However, the requirement to prove substantial market control frequently could not be met. That difficulty was removed by s.32.2, which outlaws bid-rigging as defined below:

> "32.2 (1) In this section, 'bid-rigging' means
>
> > (a) an agreement or arrangement between two or more persons whereby one or more of such persons agrees or undertakes not to submit a bid in response to a call or request for bids or tenders, and

(b) the submission, in response to a call or request for bids or tenders, of bids or tenders that are arrived at by agreement or arrangement between or among two or more bidders or tenderers,

where the agreement or arrangement is not made known to the person calling for or requesting the bids or tenders at or before the time when any bid or tender is made by any person who is a party to the agreement or arrangement."

The section has stood up well before the courts, with the exception of one difficulty which was brought to light in a decision by the Supreme Court of British Columbia on December 19, 1984 and which is under appeal (Her Majesty The Queen Against Coastal Glass and Aluminum Ltd., Central Glass Products Ltd. and LOF Glass of Canada Ltd. See Canadian Competition Policy Record, March, 1985). The accused glass subcontractors were acquitted of two of the counts against them even though the Court found that they had arranged their prices. The reason was that, as is common in the construction industry, there had been no specific call to the glass sub-trade for tenders; they had simply submitted quotations to the general contractors who were known to be bidding. The Trial Judge took the view that s.32.2 requires the call for tenders to be directed to a sub-trade and that the bids be legally binding. Mr. Hunter urged those calling for tenders to adjust their practices in accordance with that decision until the meaning of the section has been fully clarified by the courts.

On the other hand, a decision by the Supreme Court of Canada on May 23, 1985 has served to strengthen s.32.2 as well as other prohibitions in the Combines Investigation Act (Canadian Dredge and Dock Company Limited, Marine Industries Limited, The J.P. Porter Company Limited, Richelieu Dredging Corporation Inc. and Her Majesty The Queen). This was an appeal from convictions on charges brought by the Attorney General of Ontario under the Criminal Code that the accused had defrauded the public through bid-rigging. The charges related to events prior to the enactment of s.32.2. Some of the companies appealed to the Supreme Court on grounds that they should not be criminally liable for the actions of their executives and employees. The Supreme Court rejected the appeal because both the employees and the corporations had gained from the conspiracy. The Court found that only when the criminal act is totally in fraud of the corporate employer and where the act is intended to and does result in benefits exclusively to the employee-manager does the corporation avoid liability. The decision is expected to discourage companies from arguing in combines cases that a corporation cannot be held responsible for the actions of its employees.

In his address to the Bar Association, Mr. Hunter described the vigorous efforts of the U.S. Department of Justice to curb bid-rigging in that country, and said that his officials had met with their U.S. counterparts to compare notes. He noted with approval the U.S. practice of seeking jail terms for individuals involved in bid-rigging on behalf of their firms, stating:

> "I believe the time has come to vigourously prosecute individuals as well as firms for bid-rigging offences and to seek jail sentences as well as fines upon conviction."

Mr. Hunter revealed that the Bureau of Competition Policy, in consultation with the Department of Justice in Ottawa, had begun an examination of the possibility of establishing an immunity policy to help deal with bid-rigging. After noting that the Americans apply such a policy, he stated:

> "I have closely examined the American policy of prosecuting individuals whenever possible combined with the granting of immunity from prosecution for key witnesses in certain cases. The Americans have found that this approach to enforcement has resulted in many successful prosecutions because there is great pressure developed to be the first conspirator to come forward and thereby have a chance of obtaining immunity.
>
> "Let me outline for a moment the procedure used in the United States for considering requests for immunity. It is the client's lawyer who usually initates discussions with Department of Justice counsel with a view to seeking immunity from prosecution for his client. The lawyer is advised that the Department of Justice is interested in obtaining information by this means only if the witness intends to be truthful and disclose his entire knowledge of the events at trial, including his participation. The lawyer is then asked to provide an oral 'hypothetical', proffer of the information which is within the knowledge of his client, including references to people, events and places. Before the proffer is requested, the Department of Justic advises the client's lawyer that immunity is not absolute and will apply for immunity only for the evidence about which the witness testifies. Immunity will not be granted for matters not covered by the witness. In addition, the witness may still be prosecuted for false testimony if he has been less than truthful.
>
> "If the information outlined in the hypothetical proffer is thought to be of value, then the witness is asked to make a detailed oral proffer. He is instructed that the information communicated by the witness cannot be directly used against him if immunity is refused, but the Department reserves the right to use the statements for derivative uses.
>
> "The Department of Justice counsel then decides whether to grant immunity or not, or extend a conditional offer upon obtaining approval of his superiors. On occasion, a conditional offer will involve a subsequent personal interview with the witness, in which the witness will be questioned at length by Justice counsel.

"I fully recognize that the law, traditions and institutions are different in the United States and Canada and that an immunity program as far-reaching as the American model may not be suitable here. However, I am hopeful that an immunity program can be developed which would encourage individuals to come forward to reveal bid-rigging offences."

Mr. Hunter emphasized the importance of competitive bidding for purchasing by all levels of government, and suggested that public procurement officials should be encouraged and rewarded when their initiatives lead to detection of bid-rigging. He cited as an example procurement officials of the Department of Supply and Services whose investigations led on May 29 to the laying of bid-rigging charges against six Ottawa area hotels. Skyline, Four Seasons, Delta Ottawa, Holiday Inn on Kent Street, Plaza de la Chaudiere in Hull and Chateau Laurier have all been charged in connection with bids for the rental of rooms to public officials.

Mr. Hunter recalled the 1976 report by the Restrictive Trade Practices Commission on Use of Bid Depositories in the Construction Industry. He described the results of that inquiry as follows:

"Following the report, officials of my department met with other government bodies and the Canadian Construction Association in order to change the Standard Rules of Practice for Bid Depositories used in federal government projects. After extensive consultation and negotiation, changes to the rules were adopted which improved the competitive environment. Two of the more important changes were the following. Firstly, the contract awarding authority was given the freedom to choose whether or not they would use a bid depository. Prior to this change, the federal government often relied upon the local rules of the bid depositories which frequently required the use of bid depositories in tender calls. Secondly, by not allowing disqualification of tenders before the bidding is closed, the contracting authority did not lose out on a low and potentially winning bid which may have been disqualified for unsuitable reaons."

Mr. Hunter noted with interest the U.S. Competition in Contracting Act of 1984, stating:

"The United States has recently made a strong commitment to the competitive process in government procurement with the passage of the Competition in Contracting Act of 1984. The Act makes it clear that all government agencies must use the competitive process in their procurement activity, except in certain limited situations. It requires agencies to develop bid specifications in such a way as to encourage a greater number of bidders, thus avoiding the restrictive bidding that accompanies brand specific specification. The head of each government agency must, by law, refer to the Attorney

General any bid or proposal which he considers evidence of a violation of the antitrust laws. Perhaps most importantly, the Act creates a competition policy advocate in each government agency. The role of the competition advocate is to press for changes in procurement policies that hinder competitive tendering and to examine ways to motivate and reward contracting officers who promote competition in their purchasing activities."

Mr. Hunter also noted with approval a U.S. government requirement whereby the successful bidder must sign a certificate stating that its price has been determined independently. He said:

> "If the firm is subsequently found to have rigged its bid, this results in the additional criminal offense of filing a false statement with the federal government. I have suggested in recent discussions with government officials that similar measures should be adopted here in Canada. In addition, I have suggested to purchasing managers in the private sector that they also require an independent price certificate as part of their tendering process. This practice would make potential bid-riggers aware that the purchaser is sensitized to bid-rigging activity. Suppliers who are contemplating rigging their bids may not do so in the knowledge that the purchaser will be viligant and will make his tendering records available to the Director if he has suspicions about the bids submitted."

LAWSON HUNTER RESIGNS FROM COMPETITION POLICY BUREAU

Mr. Lawson Hunter has resigned as Assistant Deputy Minister, Competition Policy, and Director of Investigation and Research, Combines Investigation Act, effective August 31, 1985. He has joined the law firm of Fraser and Beatty, and will be located in Ottawa. He will, however, continue to provide advice in connection with the current task of drafting amendments to the Act.

Mr. M.S. Cappe, Deputy Director of Investigation and Research, economics, is now the acting Assistant Deputy Minister, Competition Policy, and will be responsible for the amendment process, other policy matters and research. Mr. M.P. O'Farrell, formerly Director of the Resources Branch in the Bureau of Competition Policy, has been appointed Director of Investigation and Research. As such, he exercises the statutory powers of that office including the commencement of inquiries, and will direct the enforcement activities of the Bureau. His appointment, which could be renewed, is understood to be for the remainder of the present calendar year.

CN/CP's BID TO PROVIDE LONG DISTANCE TELEPHONE SERVICE FOILED BY DOUBTS ABOUT EFFECTS ON LOCAL SERVICE COSTS

The Canadian Radio-Television and Telecommunications Commission, in a report released on August 29, rejected an application by CN/CP Telecommunications for permission to compete with Bell Canada and British Columbia Telephone Company by providing long distance telephone services in their operating areas, which encompass Quebec, Ontario and British Columbia. In announcing the Commission's decision, Chairman Andre Bureau cited rate rebalancing proposals which Bell and B.C. Tel had each introduced and which he said would increase local rates by as much as 100 to 200 percent and reduce long distance rates by two-thirds. He said the Commission would not make decisions which would jeopardize the principle of universal accessibility to telephone service at an affordable price. He empasized, however, that the decision was based upon the Commission's view of the merits of the particular case and should not be interpreted as reflecting the Commission's position on long distance phone service competition.

The decision is appealable to Cabinet, but Communications Minister Marcel Masse has made it clear that he would not countenance major increases in local rates. Consumer groups had expressed strong oppostion to the CN/CP application because of a perceived threat of resultant increases in local rates.

Combines head Lawson Hunter, as he then was, argued strongly in favour of the CN/CP application at hearings last December, stating that industry structure and technological changes have "developed an irresistible momentum towards increased services and facilities competition and that this momentum does not recognize jurisdictional boundaries and industry definitions established in the past". After warning about the futility of trying to insulate the established carriers against competitive developments in the U.S., he said that competition in long distance telephone service would result in the following benefits:

- increased innovation and efficiency in the provision of telecommunications services
- lower long distance rates
- increased demand for long distance services; and
- a positive impact on the economy.

On the crucial question of effects on local rates, Mr. Hunter stated:

> "The evidence indicates that interexchange competition will not cause any significant increase in local rates. Bell Canada and B.C. Tel exhibits forecast only minimal local rate increases flowing from CNCP's entry."

At the hearings, Mr. Hunter's respresentative elicited from Bell a table according to which local rates were forecast only to rise by $4.90 per month by 1995 as a result of entry by CNP/CP even if the latter made no offsetting contribution to Bell as it had offered to do. Mr. Hunter's representative commented:

> "This table clearly illustrates that, in the worst case scenario involving competition, Bell Canada would be as well off as it would be in the status quo situation with only modest increases in local service rates. For example, assuming CNCP were to make a contribution of 29 cents per minute of access, local service rates would rise by 10 cents a month in 1986; 15 cents a month in 1987 and in the year 1995 by 55 cents a month. The table also illustrates that, assuming a contribution rate of 13 cents per minute of access, local service rates would only be $2.95 greater per month in 1995 than they are now."

The wide disparity of views on the matter of costs flows at least in part from differences on how access costs should be assigned as between local and long distance services. Last June and CRTC released a thirteen-year study of telecommunications costs, and it is expected to assist in reducing the area of dispute.

The Commission, despite its rejection of the CN/CP application, has stated its belief that long distance rates are too high. As part of its decision of August 29, it has frozen long distance rates pending hearings on those rates.

OTTAWA ORDER RELIEVES IRVING MEDIA INTERESTS OF DIVESTITURE THREAT

Consumer and Corporate Affairs Minister Michel Cote and Communications Minister Marcel Masse released the text of an Order-In-Council on June 3 which revokes one of 1982 directing the Canadian Radio-Television and Telecommunications Commission to refuse broadcasting licenses for stations owned by newspaper companies. The 1982 directive was made subject to overriding public interest considerations and/or consequences that would create exceptional and unreasonable hardship.

The 1982 order was part of the response of the government of the day to the 1981 report of the Royal Commission on Newspapers chaired by Tom Kent. Since that time, the CRTC has heard six applications involving cross ownership and has granted license renewals in five cases under the escape clause in the directive. In 1983, however, it ruled that the license of CHSJ-TV in Saint John was ineligible for renewal because of cross ownership, and gave the owners until January 1, 1986 "to rearrange their affairs or for other arrangements to be made".

CHSJ-TV is operated by New Brunswick Broadcasting Co. Ltd. The company also operates seven rebroadcasting stations in the Province and, according to the CRTC, it substantially encompasses the whole of New Brunswick. The company is controlled by K.C. Irving and two sons. The family also controls all the English language daily newspapers in the Province. Irving was prosecuted on newspaper merger and monopoly counts under the Combines Investigation Act in the 1970's but won acquittal by the Supreme Court of Canada in 1976. The Irvings have vast non-media holdings in New Brunswick, and this was a matter of particular concern to the Special Senate Committee on Mass Media chaired by Senator Keith Davies, which reported in 1970. The Globe and Mail editorialized on June 12:

> "A free society diffuses power. The Mulroney Government's indulgence of the Irving family's dominance over communications in New Brunswick through this last-minute policy reversal offends the very principle on which a free society stands."

ANOTHER HEARING CALLED IN PETROLEUM INQUIRY BECAUSE OF NEW DEVELOPMENTS

The Restrictive Trade Practices Commission has scheduled a new round of hearings beginning October 15 on its largely completed petroleum inquiry so as to complete its record respecting a number of recent developments in the industry. What was to have been the last of the hearings were completed in July, 1984 and the Commission's report was awaited. The new hearings will probably last about one week, and the Commission's report is expected to appear about the end of the year. The hearing will deal with the following subjects:

- Petrocan's purchase of Gulf Canada' refining and marketing assets west of Quebec, making it the largest gasoline retailer in Canada.

- Petrocan's new mandate as reported in its last Annual Report in the following terms:

  > "In the first nine years, Petro-Canada was directed to work towards Canada's energy security...without overriding concern for profitability. The corporation has now been given a new mandate by its shareholder - to operate in a commercial private sector fashion, with emphasis on profitability and the need to maximze the return on the Government of Canada's investment. In this regard, Petro-Canada is not to be perceived in the future as an instrument in the pursuit of the Government's policy objectives."

- Indications that some of the major oil companies are contemplating a change in their pricing procedures in selling to retailers by the introduction of so-called "rack" pricing as distinct from present price contracts and consignment selling methods. Under rack pricing, the retailer would buy at a variable posted price and then seek to resell at a profit.

FOREIGN AND INTERNATIONAL

CANADA JOINS OTHER TRADING NATIONS IN AMICI BRIEF TO U.S. SUPREME COURT ON EXTRATERRITORIALITY ISSUE

Canada, Australia, France and the U.K. applied on June 15 for leave to file a joint amici curiae brief with the U.S. Supreme Court in support of the Japanese Government in an antitrust case (Matsushita Electric Industrial Co. Ltd. v. Zenith Radio Corp., No. 83-2004, U.S. Sup. Ct., cert. granted 4/1/85).

At issue is a private suit which was launched in the 1970's alleging a conspiracy among Japanese television manufacturers to fix high prices for sales in Japan and low prices for sales in the U.S. The trial court granted summary judgment for the defendants. A higher court reopened the case despite a Japanese Government statement to the trial court that some of the alleged conduct had been directed by MITI. The following are among the issues to be reviewed:

> "May a U.S. court (a) disregard the duly issued statement of a friendly foreign government attesting that certain export controls observed by its nationals were complelled by that government, (b) permit the trier of fact to adjudicate the veracity of such an official government statement, or (c) hold such government-mandated conduct to constitute or be a feature of a conspiracy in violation of the U.S. antitrust laws."

The brief takes the negative stand. In 1978, the Department of State, at the suggestion of the Clerk of the Supreme Court, encouraged foreign governments to present their views directly to U.S. courts. According to the joint brief, the procedure "has failed to prove satisfactory", and it cites the unfriendly reception by the appeal court of foreign government amicus briefs in the uranium litigation, as well as in the present case.

The U.S. courts have generally been reluctant to exempt otherwise illegal conduct unless it has been mandated by law. However, the Supreme Court adopted a more lenient stand in a recent case which is cited in the amici brief (Southern Motor Carriers Rate Conference Inc. v. United States, 105 S. Ct. 1721, 1730 (1985)). In that case, the Supreme Court considered the question whether, in the absence of a Mississippi statute expressly permitting the