OUTSIDE THE COURTS

RTPC'S PETROLEUM INDUSTRY INQUIRY EXTENDED AGAIN

Consumer and Corporate Affairs Minister Michel Cote wrote to Restrictive Trade Practices Commission Chairman O.G. Stoner on January 13 asking him to "consider in your forthcoming report on the petroleum industry, the balance of supply and demand in the market for gasoline and other refined petroleum products which confronts Quebec-based refineries". He said it was his understanding that the Chairman hoped to submit his report "within the next three months". In his reply, Mr. Stoner pointed out that the timing of the report was contingent upon a number of factors including decisions by parties to the inquiry whether or not to make submissions respecting the Quebec situation.

Mr. Cote's action followed criticisms of the announcement on December 27, 1985 of the Cabinet's approval under the Investment Canada Act of Ultramar's acquisition of Gulf Canada's assets in Quebec, the terms of which involved the closing of the Gulf refinery in Montreal. The approval was an embarassment to Cabinet Ministers from Quebec because of the loss of employment in Montreal. Mr. Cote revealed some of the findings made in a confidential report on the closing which he had asked Mr. M.P. O'Farrell, Director of Investigation and Research, to prepare. Some of the findings were in apparent conflict with the position taken by Energy Minister Pat Carney that there was a surplus of refining capacity in Quebec.

The RTPC received submissions on the subject in February by the Director of Investigation and Research and by the Department of Energy, Mines and Resources; submissions by some of the oil companies were expected shortly. The two documents each take a somewhat different approach to the question of supply and demand in Quebec. EMR finds supply after the closure to be roughly in balance, while the Director finds demand to exceed supply. The Director notes the high level of concentration in Quebec refining and the high proportion of production that is committed by long term reciprocal supply agreements among the major oil companies. He concludes that there will be less competitive pressure, that prices will be higher than if the refinery had not been closed, and that availability of locally refined products to independent distributors will be reduced. Coincidentally, the public debate over the closing coincided with sharp declines in world oil prices, and there were widespread complaints that retail gasoline prices in Canada did not respond as quickly or as sharply as in the United States.

Another source of delay in completion of the petroleum inquiry was the Commission's convening of new hearings last October to consider new issues that had arisen. These included Petro-Canada's purchase of Gulf's refining and marketing facilities west of Quebec, Petro-Canada's new profit-oriented mandate as reported in its last Annual Report, and the adoption by Imperial Oil of so-called rack pricing as distinct from price contracts and consignment selling to retailers. Under rack pricing, retailers buy at a variable posted price and then seek to resell at a profit.

N.E.B. WRESTLES WITH RESTRICTIONS ON COMPETITION IN NATURAL GAS MARKETING

The National Energy Board opened public hearings on January 13 on a number of issues which must be resolved if a competitive market in natural gas as proclaimed in last year's intergovernmental agreement on natural gas deregulation is to be realized. The current downward pressures on prices will not make the Board's deliberations any easier.

The Agreement on Natural Gas Markets and Prices (the Deregulation Agreement) was signed on October 31, 1985 by the federal government, British Columbia, Alberta and Saskatchewan. The Agreement calls for a "more flexible and market-oriented pricing regime...for the domestic pricing of natural gas". To that end, it states the principles that (1) "The prices of all natural gas in interprovincial trade will be determined by negotiation between buyers and sellers", (2) "access will be immediately enhanced for Canadian buyers to natural gas supplies", and (3) "a competitive market for natural gas in Canada" will be fostered. The Agreement provides for a period of transition, and requests the NEB to review certain matters. The parties recognized that some legislative change might be required for full implementation of the Agreement.

The only way that competing sources of western gas can be brought east is via the facilities of Trans Canada Pipelines Ltd. The issues before the Board concern access to the pipeline and the terms thereof. TCPL is not at present simply the owner and operator of the gas pipeline running from Alberta to Quebec. It is, in addition, the principal buyer of gas from the Alberta producers and the seller of that gas to consumer utilities and industrial users in the east. Moreover, it has accumulated long-term commitments to buy substantially more gas than the market can currently absorb and for which it must nevertheless pay. In the 1970's TCPL apparently overestimated future demands and entered into so-called area contracts with a number of producers. Those contracts committed TCPL to taking or paying (TOP) for increasing volumes of gas as more wells were drilled in the producers' areas.

These commitments had become onerous by the late 1970's, and financing arrangements were made with two bank consortia. Under the arrangements, TOP Gas Holdings Inc. and TOP Gas Two Inc. were created. These companies took over TCPL's TOP obligations, which now amount to some $2.6 billions. They borrow from the bank consortia in order to meet TCPL's obligations to the producers under contract as payments become due. Interest charges are of the order of $300 millions annually. By an arrangement with the Alberta Petroleum Marketing Commission, carrying charges are in effect paid out of the revenues which the producers under contract receive from TCPL for gas which they deliver. There are, in addition, certain federal and Alberta subsidy arrangements which contribute something.

The arrangement is workable as long as most of the gas in the pipeline is that which producers under long term contracts have sold to TCPL. Now, however, with deregulation, producers without such contracts want to begin marketing their heretofore locked-in gas to industrial users in the east and

eventually to consumer gas distributors as well. Moreover, with deregulation, they should be at liberty to seek such business by negotiating prices that are attractive to potential customers. However, if TCPL is required to carry this gas in its pipelines, problems will arise for the TOP Gas arrangement. The reason is that the gas of the new entrants would tend to displace TOP Gas and would presumably not be subject to the TOP Gas surcharge. Since the surcharge amounts to about a third of the Alberta price of the gas, producers not under contract to TCPL would be in a very strong position to compete and could even endanger the viability of the TOP Gas arrangement.

The position taken before the Board by TCPL and many Alberta natural gas interests including the Alberta Petroleum Marketing Commission is that all who have access to the pipeline should share in the TOP Gas costs, some of them arguing that TOP Gas was a part of the developmental cost of bringing gas to the east. That position is disputed by gas users, producers not under contract to TCPL and the Director of Investigation and Research under the Combines Investigation Act. They hold that the TOP Gas arrangements became necesary because of overly optimistic market forecasts by TCPL and that the problem is one to be worked out by TCPL, the banks and those producers who have enjoyed lucrative contracts with TCPL. In his written submission dated December 18, 1985, the Director stated in part:

> "The Director has previously conveyed to the National Energy Board (RH-2-85) his concern with the conflict of interest TransCanada has in its function of both marketing and transporting natural gas to central Canadian markets. The same concerns were expressed by the Economic Council of Canada in its February, 1985 report "Connections" in which it recommended the divestiture of TransCanada's marketing operations from the transportation services..."
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> "...the take-or-pay obligations, the TOP Gas agreements, and the carrying charges thereof are matters related to the non-regulated activities of TransCanada, namely its marketing functions as a buyer of natural gas. These matters cannot be considered by the Board for tariff purposes since the Board's jurisdiction under Part IV of the National Energy Board Act (The Act) only encompasses matters related to the transportation activities of the regulated utility...
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> "Deregulation contemplates the introduction of independent sources of supply and independent purchases by natural gas consumers. This is inherent in the concept of a competitive market, contrasted with TransCanada's historic and current near-monopoly position in control of Canadian gas markets. TransCanada itself recognizes that a portion of its traditional market will be lost to these new entrants. This may well affect TransCanada's

> ability to market volumes that represent current take or pay obligations under TOP Gas and TOP Gas II and may well jeopardize their ability to avoid increases in their take or pay obligations. The Director takes the position that these obligation arise from contractual relations of supply between TransCanada and contracted producers and should not be incorporated into tariff availability conditions approved for TransCanada Pipelines Limited. Further, there are benefits accruing to TOP Gas recipients of take-or-pay advances and there will be inequities experienced by new entrants should the sharing of these take-or-pay obligations be instituted."

Other issues before the Board include access to space on the pipeline for producers not under contract with TCPL and the question described as double demand charges. Both relate to the long terms of TCPL's contracts with producers, some conditions of which create barriers in the short run to pipeline access by other suppliers. There is at present a regulation in force to the effect that TCPL does not have to accept shipments which represent displacement of its own sales rather than increased volume - and most sales by new competitors are likely to be of that kind for some time. Moreover, TCPL's contracts with producers are in line with that regulation. Consumer interests, potential new competitors and the Director of Investigation all want that regulation to be changed.

The issue of double demand charge relates to that portion - about 75 percent - of TCPL's transportation toll which is levied to cover the fixed costs of the pipleline. Consumers, all of whom are also under long term contracts, pay that charge in advance. The question now arises whether consumers who shift to competing suppliers will be required to pay that portion of the toll again.

CANADIAN IMPORT TRIBUNAL DISMISSES FIRST PUBLIC INTEREST APPEAL UNDER SPECIAL IMPORT MEASURES ACT

The Canadian Import Tribunal released a decision on February 13 rejecting representations that it would not be in the public interest to impose anti-dumping duty on imports of certain surgical tapes which the Tribunal had found to constitute dumping.

The representations were the first to be made under a new provision in the Special Import Measures Act of 1984. S. 45 of that Act provides that, even where the Tribunal has made a finding of material injury or likelihood of material injury to production in Canada, the Tribunal can recommend that dumping duties not be imposed if they would not be in the public interest. The Tribunal can also recommend that only part of the permissible level of dumping duty be imposed in those circumstances.

The case concerned imports by Gainor Medical Canada Ltd. of surgical tapes from Japan. The Tribunal had decided on December 4, 1985 that the tapes were being dumped and that, while they were not causing material injury, certain kinds of them were likely to do so. Prior to Gainor's entry in 1983, the market had been supplied largely by one Canadian producer, Johnson and Johnson Inc., and one importer, 3M Canada Ltd. Gainor expressed a desire to make public interest representations and a notice was issued by the Tribunal. Johnson and Johnson and the Director of Investigation and Research under the Combines Investigation Act responded by written submissions.

The Director of Investigation and Research emphasized the apparent lack of competition in the market prior to Gainor's entry, the high prices charged by Johnson and Johnson in Canada compared with its prices in the United States, and the minimal amount of value added in Canada by Johnson and Johnson. For its part, Johnson and Johnson took the position that competition concerns should not be taken into account under s. 45, and pointed out that no member of the public had come forward with representations. In its decision, the Tribunal stated that it was "not persuaded that there are present in this case such exceptional circumstances as would, in the public interest, outweigh the necessity of protecting Canadian production from injurious dumping".

The case has not been of much assistance in clarifying the circumstances under which resort to s. 45 might be successful or the weight which the Tribunal might attach to competition concerns. A better test might be provided by a case having greater economic impact and about which an important sector of the public demonstrated concern.

GOVERNMENT RESPONDS TO REPORT OF COMMONS SUBCOMMITTEE ON REVISION OF COPYRIGHT

Consumer and Corporate Affairs Minister Michel Côté and Communications Minister Marcel Masse tabled the Government Response to the Report of the Subcommittee on Revision of Copyright in Parliament, in February, 1986. (For analysis of the Subcommittee's recommendations as they relate to competition issues, see Canadian Competition Policy Record, December 1985). The Government response indicates general agreement with the majority of the Subcommittee's recommendations for increased copyright protection for creators. However, it notes a need for further study of some recommendations and states that the new copyright legislation "must recognize the balance between the legitimate interests of creators... and the needs of users to have access to (their) works."

Regarding copyright societies, the government accepts the Subcommittee's recommendations that the collective exercise of copyright be encouraged and that creators be allowed to grant exclusive licences to collective societies. However, the government proposed to examine further the Subcommittee's recommendations respecting the Copyright Appeal Board which is to regulate such societies. The Board's jurisdiction is an important issue. In a

submission to the Subcommittee in June 1985, the Director of Investigation and Research, Combines Investigation Act, suggested that the Board's jurisdiction be limited to reviewing the rates charged for various licensing arrangements for copyrighted works. In this way, the licensing arrangements could remain subject to the Combines Investigation Act.

Regarding other recommendations of the Subcommittee, the Government accepts in principle that compulsory licensing for the mechanical reproduction of sound recordings should be abolished. It "recognizes the merit" of the Subcommittee's recommendation to establish a separate, new right of copyright holders to control the public rental of their works - even following their sale to independent distributors. It agrees in principle that the present narrow fair dealing exemption under the Copyright Act should not be replaced by the substantially broader U.S. concept of fair use. The latter permits greater scope for home taping than is currently available in Canada.

The government agrees that computer programs should benefit from the full regime of protection under the Copyright Act. It accepts that a right to control the cable retransmission of copyrighted works should be provided in the Copyright Act revisions. It also agrees that copyright holders should retain the right to bar importation of competing foreign versions of their works. Finally, the government agrees with the Subcommittee that the maximum level of fines for infringement of copyright should be raised to one million dollars.

The covering letter from Ministers Coté and Masse to the Subcommittee Chairman indicates that the revisions to the Copyright Act will be prepared for early introduction in the House of Commons.

RTPC PLANS HEARINGS ON ALLEGED TIED SELLING BY BROADCAST NEWS

The Restrictive Trade Practices Commission has tentatively scheduled hearings for April 1, on an application by the Director of Investigation and Research for a remedial Order directed to Broadcast News Inc. The Director alleges that the firm is engaged in tied selling as defined in s. 31.4 of the Combines Investigation Act.

The basis of the case is outlined in the Director's application of October, 1985. Broadcast News (BN) is a "for profit" company wholly owned by Canadian Press, a non-profit company operating on a co-operative basis for the benefit of its members. BN supplies to broadcasters under contract a selection of news packages, rents the telecommunications equipment needed for reception of the packages, and delivers the packages by various means including satellite. The Director maintains that CP, since its acquisition of United Press Canada Ltd. in 1985, is the major supplier of news packages to publishers and broadcasters.

The Director's complaint is that BN refuses to sell its news packages separately from its delivery services. He states that in 1983 members of the electronic media established Electronic News Group Inc. (EN) "for the purpose of

providing a simple, flexible and low cost satellite communication facility to deliver Basic News Packages to the Canadian electronic media". EN's function was not to be the preparation of news packages but only their delivery to its members by satellite. At the time of EN's establishment, BN had not yet developed its own satellite delivery system. The Director states:

> "15. EN entered into negotiations with the Respondent, BN, in January of 1984 in an effort to obtain access to the Basic BN News Packages for the purpose of delivering the Basic BN News Packages to those EN shareholders which, by means of contracts with BN, are entitled to receive such Basic BN News Packages.
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> 16. Despite requests therefore, the Respondent, BN, has refused access to EN of the Basic BN News Packages for delivery by EN to EN's shareholders who are also subscribers to the appropriate Basic BN News Package, thereby impeding the entry and expansion of EN in the market."

The Order which the Director seeks would require BN to price and sell its News Packages separately from its delivery services. BN has not yet replied to the Director's allegations, and a last-minute settlement is always possible in proceedings of this kind.

COMBINES ACT HOCKEY INQUIRY DISCONTINUED BY DIRECTOR

National Hockey League President John Ziegler announced on December 10, 1985 that he had been notified of the discontinuance of the Combines Act inquiry into the League. The Director of Investigation and Research has informed Consumer and Corporate Affairs Michel Côté that the evidence obtained in the inquiry would not support allegations of misconduct, and the latter has agreed to the discontinuance.

The inquiry, which related a suspected monopoly offence, was launched in 1983 following the refusal of the League's Board of Governors to approve the transfer of the St. Louis Blues franchise to Saskatoon.

FOREIGN AND INTERNATIONAL

PRESIDENT REAGAN SENDS ANTITRUST REFORM PROPOSALS TO CONGRESS

Attorney General Edwin Meese and Secretary of Commerce Malcoln Baldrige revealed at a press conference on February 19 the details of the President's antitrust reform package. The proposals, which have been sent to Congress in five separate bills, reflect the administration's view that the antitrust laws have impeded industrial restructuring of the kinds required to meet foreign competition. Merger law would be made more permissive and industries