OUTSIDE THE COURTS

BUSINESS PONDERS PROPOSALS FOR COMBINES LAW REFORMS

Consumer and Corporate Affairs Minister André Ouellet sent to some business and other groups at the end of April a paper outlining and explaining his proposals for revisions to the Combines Investigation Act. He invited comments for June and was expected to meet with various groups. The text of the substantive parts of his proposals are appended hereto. He said in the House of Commons on May 22 that he planned to introduce a bill during the next session of Parliament.

The proposals are not in the detail of a draft bill and it is helpful to examine them with reference to the 1977 Bill C-13, the Competition Act. Features which are new are a strengthening of s. 32 relating to conspiracies in restraint of competition, and a proposal to rely upon the courts rather than the Restrictive Trade Practices Commission for adjudication of the existing and proposed civil provisions with the single exception of a proposed exemption for specialization agreements. As in Bill C-13, criminal provisions are proposed for international cartels and for delivered pricing; in addition, responsibility for competition policy in banking would be transferred to the Combines Investigation Act from the Bank Act. Also, as in Bill C-13, civil provisions are proposed to deal with mergers, monopolization, joint monopolization, patent and other statutory monopolies, export and import restrictions by multinational enterprises, and specialization agreements, The proposals respecting mergers, monopolization and joint monopolization are, however, significantly different from those in Bill C-13. The following are among the provisions in Bill C-13 of which no mention is made in the new proposals:

- Creation of a Competition Board to replace the R.T.P.C. and to have greatly expanded quasi-judicial responsibilites

- S. 4.5 defining the relation between regulatory statutes and competition law. That proposal was strongly opposed by agricultural interests and others.

- S. 31.75 empowering a Competition Board to prohibit interlocking directorates or management.

- S. 31.77 empowering a Competition Board to prohibit so-called price differentiation.

- Ss. 39.1 - 39.21 providing for class actions.

The proposed amendments to s. 32 are, according to the Minister's paper, designed to solve the problems created by the Aetna Insurance and Atlantic Sugar cases "and ensure the continued development of a strong conspiracy law". Those cases appeared to establish that an agreement must be shown to have been intended to lessen competition unduly, that tacit agreements are not covered, and that elimination of virtually all competition must be shown. The proposed replacement of the test of unduly preventing or lessening competition by one of lessening or likely to lessen competition is clearly intended to reduce the burden of proof below what it was before the Aetna and Sugar cases. The burden of proof would still be higher, however, than that proposed in former Bill C-256, the so-called Basford Bill of 1971. That bill would simply have outlawed agreements such as the fixing of prices without any qualification.

The proposal to rely upon the ordinary courts rather than the R.T.P.C. for adjudication of the existing and proposed reviewable practices marks a policy shift. Until recently, official statements reflected the view of the 1969 report of the Economic Council and the 1976 Skeoch report that a specialized tribunal was required to deal with the so-called gray areas of competition policy such as mergers which were regarded as amenable to remedy by inflexible laws only at a cost in terms of efficiency. The paper explains this shift in terms of the uncertainty engendered by the former approach, the extensive powers of such a tribunal and the absence of the same rights of appeal as in ordinary civil cases. The proposed merger and monopoly provisions would leave much less discretion to the courts than was proposed for the Competition Board in Bill C-13. No fundamental redrafting of the other reviewable practices is indicated by the paper.

The merger provision, as outlined, would amount to a per se prohibition where a market control threshold still to be fixed was exceeded. Where only some of the products involved in a merger exceeded the threshold, the merger could proceed after divestiture of the offending products. The position of mergers under the threshold, including large conglomerate mergers, would depend upon the courts' interpretation of a "significant actual or potential lessening of competition". While the ordinary appeal procedures would be available they would be unlikely to succeed where the market threshold had been passed. Bill C-13 offered more limited appeals to the higher courts but provided for a Cabinet override.

The single provision which is proposed to cover both monopolization and joint monopolization would also leave less room for discretion by the adjudicators than in the case of Bill C-13. Also, the kinds of restrictive, exclusionary or predatory conduct to be covered are made more specific than in Bill C-13. Nevertheless, some discretion would still be left to the courts. It must be established that the purpose of the conduct is to create a monopoly or extend a monopoly into other markets. Also, most but not all of the listed

practices are qualified by phrases such as "to eliminate or restrict the growth of a competitor or to prevent entry". Exceptions are freight equalization on the plant of a new competitor, pre-emptive acquisition of scarce facilities or resources, and full-line forcing.

COMBINES DIRECTOR MOVED

Mr. R.J. Bertrand has been moved from the post of Director of Investigation and Research under the Combines Investigation Act and appointed Chairman of the Anti-Dumping Tribunal. At the time of writing, no replacement for Mr. Bertrand had been announced. The news of Mr. Bertrand's shift was apparently leaked and was confirmed by Consumer and Corporate Affairs Minister André Ouellet in a reply to a question in the House of Commons on May 20. He denied assertions that Mr. Bertrand had been dismissed.

The official position is that the move is a normal career progression for Mr. Bertrand. Most commentators, however, consider that he was moved because the Government no longer wanted him in that position, partly because of his bad relations with important business interests. In that connection, references have been made to Mr. Bertrand's "Green Book" on the petroleum industry and the positions he has taken on legslative reform. Reference has also been made to his report on the uranium inquiry which is now in the hands of the Attorney General and which has been an embarrassment for the Government. Comments on Mr. Bertrand have ranged all the way from describing him as a dedicated official who did an excellent job in defending the public interest to assertions that the legislative advice which the Government received from his office was faulty and has contributed to the continuing delays in achieving desirable reforms.

FORMER COMBINES DIRECTOR'S REPORT ON URANIUM SENT TO ATTORNEY GENERAL

Replies by Prime Minister Trudeau and Justice Minister Chretien to questions in the House of Commons on May 26 revealed that the report by the Director of Investigation and Research of his inquiry into uranium marketing had been received by the Attorney General of Canada the previous week.

That indicates that the former Director believes that Canadian law was violated by the cartel because he refers a matter of that kind to the Attorney General only when he considers that legal action is warranted. His