OUTSIDE THE COURTS

CRTC OPTS FOR SOME COMPETITION AND MINIMUM REGULATION IN PAY TV

The Canadian Radio-Television and Telecommunications Commission, in its decision on March 18, 1982 granting six pay TV licenses, chose a system which will ensure some competition, avoid cross-media ownership and keep direct regulation to a minimum.

First Choice Canadian Communications Corp., backed by Royfund (Equity) ltd. and Manufacturer's Life Insurance Co., will provide a national general interest network with an English service and a French service. Lively Arts Market Builders Inc., will provide a national performing arts network. Regional general interest networks will be provided by Allarco Broadcasting Limited in Alberta, by Ontario Independent Pay Television in Ontario and by Star Channel Services Ltd. in the Atlantic Provinces. World View Television Ltd. will provide a multilingual network to meet the needs of the various linguistic groups in British Columbia. Applications for licenses have been invited for a regional French language network in eastern Canada and a regional English language network to serve British Columbia and Yukon. Hamilton Southam, a major shareholder in the Southam newspaper chain and a prominent patron of the arts, will be one of a varied group of directors of Lively Arts. There is an ownership link between Allarco in Alberta and Ontario Independent Pay Television.

The Commission, while favouring competition, also took into account the need for adequate funding of licencees to develop Canadian programming. It feared that licencing more competitors would lead to inadequate funding. The Commission stated:

> "The co-existence of a national, and several regional, general interest services will permit an element of competition in the provision of pay television service and is more likely to enhance diversity and opportunities for consumer choice than a monopoly structure...the Commission was not persuaded that a monopoly scenario would maximize opportunities for Canadian program production".

The Commission plans to issue regulations to prevent licencees other than the multilingual network from producing their own programming or acquiring programming from related companies.

The Commission does not plan to regulate prices. It stated:

"...it would be extremely difficult to prescribe mandatory types of

program financing arrangements for pay television network operators without unduly fettering their managerial judgement and creativity".

Dealing more generally with the subject of regulation, the Commission stated:

> "...the Commission has attempted to design a regulatory framework that is free from all but essential constraints and that will permit pay television networks maximum flexibility to innovate and experiment, consistent with the achievement of the objectives set out in Part 3 of this decision and in the Broadcasting Act".

The system adopted by the CRTC goes some way towards meeting the criteria which the Director of Investigation and Research under the Combines Investigation Act proposed in an appearance before the CRTC last September. He proposed open entry in the provision of pay TV subject only to such requirements as Canadian content. He also proposed policies to promote a lessening of concentration in the cable television sector, and warned of the dangers of cross-media ownership.

RTPC SETS PRIORITIES FOR PETROLEUM INQUIRY

The Restrictive Trade Practices Commission, in a draft paper of March 3, 1982, sets out the questions and topics it wishes to address in the Petroleum Inquiry and the order in which it proposes that topics be dealt with at hearings. The paper, which will be issued in final form after receipt of comments by interested parties, calls for priority consideration of subjects which are of greatest current public concern. It also calls for avoidance of detailed consideration of past events which were dealt with in the Green Book (The State of competition in the Petroleum Industry) of the Director of Investigation and Research unless they have current significance.

A series of regional hearings across the country were concluded in February. They were designed to hear evidence on current issues and concerns as seen in each region, particularly in respect of marketing. In March, the Commission began hearings in respect of international aspects of the industry.

Following those hearings, the Commission proposes to schedule hearings on marketing and then on refining. Hearings on the subjects of primary production and pipelines will follow if they prove to be necessary. The oil companies had argued that production and pipelines should be considered first as was done in the Director's Green Book. However, the Commission's draft paper states:

> "...there remains the need to identify the issues in production and pipelines and to decide how these phases of the Inquiry should be managed.
>
> "It is difficult to see what purpose would be served by trying to resolve some of the questions rasied in the Director's Green Book regarding domestic production and pipelines between 1958 and 1973. There can be no question that conditions in those sectors are very different today from what they were during the period covered by the Green Book. Prices of domestic crude are directly set by governments and there is every indication that this practice will continue for the foreseeable future. Similarly, pipeline access and rates are monitored and regulated by governments".

The Commission also noted that the regional hearings had disclosed considerable concern about conditions and practices in the downstream sectors but none about production and pipelines.

The paper sets out in some detail the issues it wants to address in respect of international matters, refining and marketing. In addition, it cites the following general issues:

> "One issue, the degree of coordination or 'harmonization' of policies and practices amongst the petroleum companies runs throughout the Green Book and is a factor that particularly requires an assessment of present circumstances, and evidence on this question will best be dealt with if and when it arises in each sector".
>
> "The broad question of vertical integration is also best examined in the context of the specific areas and questions posed in this paper".
>
> "Another general issue is whether those forces, which include new technology, new techniques or strategies of production or distribution, an ability to offer a lower price, and any other change having the capacity to alter the market, are free to function".
>
> "Finally, the nature and significance of the Canadian petroleum industry is such that a wide variety of public policy goals and government policies affect it. The Commission, while not presuming to evaluate the merits of those policies, or their administration, must assess their market effects".

COMBINES DIRECTOR ATTACKS PROPOSED DOMESTIC AIR CARRIER POLICY

(Note: on April 6, just as this issue was going to press, the report of the House of Commons Standing Committee of Transportation on domestic air carrier policy was released. It recommends against substantial deregulation and for a continuing strong presence of the Canadian Transport Commission but for a less restrictive policy than was proposed by the Minister of Transport last August. The proposal to restrict the number of regional carriers to the existing four and to divide the country into two operating regions would be dropped. Entry of new regional carriers (such as Wardair) would become possible and regional carriers could apply to operate non-stop flights of up to 1,500 miles rather than 800 miles as proposed by the Minister of Transport. Air fares would still be controlled but a zone of flexibility would be provided within which notice to rather than approval by the CTC would be required).

Mr. Lawson Hunter, Director of Investigation and Research, in an appearance before the House of Commons Standing Committee on Transportation in February, 1982, expressed strong opposition to the domestic air policy proposals which were announced by Transport Minister Jean-Luc Pépin last August. The Consumers Association of Canada and Wardair have been among those opposing the proposals, and references have been made to the June, 1981 report of the Economic Council of Canada on Reforming Regulation in which substantial deregulation of Canadian airlines was recommended.

The Transport Department proposals would affirm Air Canada and CP Air as the only national carriers, would divide the country in half to establish two regions for regional carriers rather than into four as at present and would limit the number of regional carriers to the existing four. Local carriers would be restricted to the use of non-jet equipment.

Mr. Hunter noted that the Transport Department proposals were based upon a policy of mandating stability in the market. He contended that optimal performance should be the focus, and he proposed the following policy objectives:

"1. to ensure the provision of safe, reasonably priced, efficient service to Canadian air travellers;

2. to ensure a wide choice of air travel options with respect to price and service characteristics; and

3. to provide a framework of institutional arrangements in which operating decisions are determined to the maximum extent possible by the interplay of market forces".

He said that the adoption of his proposed policy objectives should have the following operational implications:

"1. no decline in air safety regulation

2. lower fares

3. a simpler fare structure

4. more carriers

5. increased productivity"

In opposing the Transport Department proposals, Mr. Hunter emphasized four aspects of the present industry environment. The first was the "tight oligopoly now in place" which would be perpetuated by the proposals. Taking just domestic revenue ton miles into account, the two national carriers accounted for 83.7 per cent of the total in 1978, the regional carriers had 14.6 per cent and the local carriers had just 1.7 per cent. The market position of the two national carriers was even stronger when international traffic was included.

The second aspect was the massive deregulation of the United States airlines which had occurred and which had shown the potentials for lower fares and increased efficiencies. Mr. Hunter warned that, in the absence of an appropriate Canadian response, Canadian domestic air travel could be priced out of reach of many current Canadian users and business would be diverted to American carriers.

The third aspect was that the rationale for continuing economic as distinct from safety regulation had largely disappeared. He stated:

> "The diversity and reliability of modern aircraft allows for almost unlimited diversity of service offerings. And more importantly, it is beyond serious question...that there are no significant economies of scale in this industry beyond a surprisingly low level of operations. Specifically, the concensus among economists is that minimum efficient scale exists when a firm operates six jet aircraft on a viable route structure. It is even lower for local carriers".

The fourth aspect was that the existing regulatory policies had encouraged or forced the only remaining rivalry to take the form of service rather than price competition, "a classic and inefficient result of unnecessary regulation". He said that fare saving innovations had come originally from carriers not under federal regulation in the United States and from charter carriers in Canada.

URANIUM SECURITY REGULATIONS MODIFIED

The Uranium Security Regulations of 1978 were modified by an Order-In-Council on November 19, 1981. The modification was made in the interest of defendants in the case against the uranium companies under the Combines Investigation Act, charges under which were laid on July 8, 1981.

Section 3 of the original Regulations have the effect of prohibiting the communication of the contents of any uranium document relating to the cartel. The amendment provides:

> "5. Section 3 does not apply to anything done in relation to proceedings instituted at the instance of the Government of Canada and conducted by or on behalf of the Government in respect of a violation of the Combines Investigation Act".

B.C. BEER INQUIRY LAUNCHED

B.C. Consumer Affairs Minister Peter Hyndman announced the appointment of Professor Michael Goldberg on February 27 to conduct an independent inquiry into competition among breweries in British Columbia and to recommend ways of improving competition in the industry.

Concern has been expressed about a fifteen cent increase in beer prices and an apparent lack of competition despite a measure of deregulation about a year ago.

(Editor's Note to Messrs. Hyndman and Goldberg: Before spending too many tax dollars on the study, you might try breaking up the provincial liquor stores monopoly on beer retailing; you might be agreeably surprised by the pressure on prices which large and small retailers could exert both in their buying and selling).

LUC-ANDRE COUTURE RETIRES FROM RTPC

Mr. Luc-André Couture, Q.C., has retired from the Vice Chairmanship of the Restrictive Trade Practices Commission, effective December 31, 1981.

Mr. Couture was first appointed to the Commission in 1963 and served as Acting Chairman for extended periods of time. A lawyer by profession, Mr. Couture's distinguished career so far has included service as an army officer, the teaching of law, and senior positions as legal counsel in federal departments and agencies. He is a former Governor of the University

of Ottawa and former Chairman of the Executive Board of the United Nations Association in Canada.

FOREIGN AND INTERNATIONAL

REAGAN ANTITRUST POLICY GAINS CREDIBILITY WITH DISPOSITION OF IBM AND AT&T CASES

The dropping of the IBM case and the settlement of the AT&T case, both of which were announced in Washington on January 8, are landmarks in U.S. antitrust history and have been widely acclaimed.

The IBM case was launched in 1969 and was not going well for the governnent. IBM was accused of monopolizing markets for general purpose computers and peripheral products compatible with IBM equipment. Aside from IBM's size and strong market position, the government's case was weak in terms of specifics of abuse. Also, while it had some kind of divestitute in mind as a remedy, the specifics of that were unclear as well. In addition, in sharp contrast to the AT&T case, some of the difficulties of the case were widely attributed to mismanagement by the presiding judge. Moreover, in the fast moving field of information technology, the case for a smaller and weaker IBM had become somewhat less convincing; European and Japanese rivals were growing in strength, and the rivalry of AT&T's Bell Research and Western Electric had clearly become only a matter of time even before the settlement of the AT&T case.

The theory behind the AT&T litigation, which dates back to 1949, was always clear. It was, as stated in the Competitive Impact Statement issued by the Department of Justice on February 10, 1982:

> "...as a rate base/rate of return regulated monopolist, AT&T has had both the incentive and the ability, through cross-subsidization and discriminatory actions, to leverage the power it enjoys in its regulated monopoly markets to foreclose or impede the development of competition in relation, potentially competitive markets".

The Western Electric case, which was launched in 1949, was settled by a consent decree in 1956. The settlement was based on the view that the anti-competitive effects of AT&T's structure might be minimized by limiting the business activities in which AT&T could engage. AT&T's activities were limited to the provision of common carrier communications services, and Western Electric was restricted to the manufacture of types of equipment sold or leased for use within the Bell system.

Subsequent developments made the terms of the 1956 settlement inadequate and even harmful. Technological advances and, in some instances,