

OUTSIDE THE COURTS

CTC HEARINGS PLANNED ON INTERESTS OF CN IN CAST SHIPPING GROUP

The Canadian Transport Commission has scheduled hearings in February, 1983 into two proposed acquisitions by Canadian National Railways of further financial interests in companies of the Cast Group which is controlled by Eurocanadian Shipholdings Limited. Nova Scotia has for some time been concerned that the relations between Cast and CN have been detrimental to the Port of Halifax and, in addition to complaining to the CTC, it has requested an investigation under the Combines Investigation Act. The Director of Investigation and Research under that Act plans to intervene at the CTC hearings because of a concern about anti-competitive effects of intermodal transport integration. In the United States, the North Atlantic Ports Association has been seeking a formal inquiry by the Interstate Commerce Commission on the basis that CN violated ICC rules by not seeking approval of what the Association believes to be de facto control of Cast by CN.

Cast is a Canadian owned but Swiss based group which was formed in 1969 by Mr. Frank Narby and Mr. Donald Webster. Canadian National acquired an 18 percent interest in the group on 1976. Cast became a significant factor in North Atlantic shipping and the principal non-conference line serving Montreal. The recession, together with rapid expansion created financial problems for the group. It is reported to have agreed to join the North Atlantic conferences.

The present extent of CN's financial interest in Cast is not entirely clear. The CTC hearing will relate to announcements in the Canada Gazette of January 9 and October 23 of proposed acquisitions by CN of additional interests in the group.

The concern of Halifax, as well as of American east coast ports, is that CN's interest in Cast benefits CN and the Port of Montreal by diverting traffic from east coast ports. Moreover, according to the Glove and Mail of November 3, 1982, the Halifax-Dartmouth Port Commission has alleged that CN for several years paid rebates to Cast on containers moving westbound to the United States through the Port of Montreal, contrary to s.380 of the Railway Act. CN has reportedly said that the payments were commissions and were not in contravention of the Railway Act.

The Director of Investigation and Research under the Combines Investigation Act, in a letter of November 8, 1982 to the CTC, stated that his purpose in planning to intervene at the hearing was "to explore the costs and benefits of the proposed acquisitions particularly as to their effect on intra-and intermodal competition, shippers' interests and the most economic use of Canadian transportation modes." Citing the dominance of rail in inter-provincial freight and the substantial interests of the railways in trucking as

well, he stated in part:

"It is essential that integration not impair the ability of any mode of transport to compete freely with any other modes of transport nor lead to a lessening of competition within a particular mode of transport.

"The recent reports of commissions paid by CN to members of the Cast Group are but one example of how market power gained through inter-modal integration may be used to the detriment of competing carriers in various transportation modes. The effect of such rebates on competitive rail companies and shipping lines is an issue which I intend to explore before the Commission.

"I am also concerned with the potential adverse impact that integration may have on customers who require more than one mode of transport to ship their goods from one location to another. It is possible for firms operating in several transportation modes to use discrimination and coercion in their dealings with customers and, in particular, to tie the use of a mode in which market dominance is assured (such as rail) to the use of other modes in which greater competition is faced (such as trucking and water)."

BELL CANADA REORGANIZATION DELAYED BY FEDERAL APPEAL

Communications Minister Francis Fox announced on October 22 that the federal government is appealing the decision of September 24 by the Quebec Superior Court which rejected a federal attempt to block the proposed Bell Canada reorganization (See Canadian Competition Policy Record, September, 1982). He announced at the same time that he has directed the Canadian Radio-Television and Telecommunications Commission to inquire into the Bell plan and report by March 31, 1983.

The appeal, whatever its outcome and whether or not it is proceeded with, will delay implementation of the reorganization plan beyond Bell's original target date of December 31, 1982. The CRTC will have time to complete its report. Thereafter, much will depend upon the recommendations in its report and the reactions of Bell and the government to them. Communications Minister Francis Fox has made it clear that the government is prepared to introduce legislation if it is considered necessary.

Bell's original target date of December 31, 1982 was apparently set partly because of a change in the tax treatment of capital gains which was to take effect at the beginning of 1983. However, in his recent economic statement, Finance Minister Marc Lalonde announced that the change was to be deferred.

Following receipt of the directive to study the matter, the CRTC issued an invitation for submissions. Comments received in response to its earlier invitation of August 12 will also be before it. The Director of Investigation of Research under the Combines Investigation Act was among those who responded to the earlier call. He concluded:

"In summary, the Director's position is as follows:

- (1) The proposed arrangement is subject to the Commission's jurisdiction under Section 18 of the Bell Canada Special Act.
- (2) The continuance of Bell Canada under the Canada Business Corporations Act has not affected the restrictions placed on Bell by its Special Act or the Commission's regulatory jurisdiction over the company under that Act, the Railway Act and the National Transportation Act.
- (3) It is uncertain whether the Company, subsequent to its continuance, may alter its charter pursuant to Section 167 of the CBCA.
- (4) Unless adequate regulatory policies are adopted prior to, and as conditions of, the proposed arrangement, the reorganization will likely have anti-competitive results and will benefit Bell shareholders at the expense of Bell subscribers.
- (5) Suggested regulatory initiatives include:
 - (a) ensuring that the value of the transfer to BCE of the Company's investments in "non-integral" subsidiaries and associated companies does not result in Bell, in the future, bearing an unjustifiable share of the corporate group's overall financial costs.
 - (b) deeming all new competitive telecommunications service subsidiaries of Bell or BCE to be integral to Bell unless:
 - (i) assets transferred from Bell to such subsidiaries are transferred at least net book value and
 - (ii) the subsidiary meets the test of maximum separation.
 - (c) requiring Bell to adopt a program of competitive purchasing practices such as has been proposed by the Director in the Bell Canada/Northern Telecom Price Comparison proceeding.
- (6) Commission action is required before the arrangement and reorganization are complete. Natural regulatory delays in

issue proceedings and the likely lack of a Bell general rate increase application until some time in 1984 mean that, in the absence of Commission action now, irreversible unfair competitive benefits may flow to the competitive members of the Bell family prior to the implementation of necessary regulatory policies.

- (7) If the recommended regulatory policies are adopted, the proposed reorganization can be expected to provide beneficial separation of regulated utility and unregulated competitive elements of the Bell corporate family, to facilitate greater telecommunications competition in Canada and to lead to a more dynamic and efficient industry structure."

CRTC BROADENS INTERCONNECTION RULES AND ALLOWS CARRIERS DIRECT ENTRY TO TERMINAL EQUIPMENT MARKET

The Canadian Radio-Television and Telecommunications Commission, in a Decision on November 23, 1982, confirmed and broadened its Interim Decision of August 5 on attachment of subscriber-provided telecommunications terminal equipment. It also ruled that Bell Canada, B.C. Telephone and CN/CP may sell such equipment directly rather than only through arm's length subsidiaries as was proposed by independent equipment producers and by the Director of Investigation and Research under the Combines Investigation Act. The latter aspect of the Decision is likely to be appealed either to the Minister of Communications on policy grounds or to the Federal Court on legal grounds.

The Decision applies to British Columbia, Ontario, Quebec, Newfoundland and most of the Northwest Territories. Unlike the Interim Decision, it permits subscribers to buy their first telephone from independent suppliers, and the same applies to Telex terminals of the CN/CP system.

The CRTC accepted an argument of the carriers that the costs of setting up separate subsidiaries with marketing capabilities throughout their territories would be too great. However, responding in part to the concerns of the independents that the carriers would subsidize their equipment sales out of revenues from their regulated activities, the CRTC has decided to regulate the prices of equipment sold directly by the carriers. Prices charged by carriers for equipment must not be less than a floor price which must be filed in confidence with the Commission and which must be shown to be not less than costs.

The Commission, referring to the concerns of the independents about cross-subsidization, noted Phase III of the extensive inquiry into carriers' costing and accounting procedures which it has underway, and it stated:

"...the Commission's decision in Phase III of the Cost Inquiry may alleviate some of the concerns raised by parties in this proceeding relating to potential cross-subsidization of terminal offerings of carriers with revenues from their monopoly operations. Moreover, the methodology resulting from Phase III may be relevant for the valuation of any assets to be transferred to a subsidiary. In light of the above, the Commission has concluded that, based on the record of this proceeding, it would not be appropriate to require the carriers to conduct their terminal equipment business through separate subsidiaries. However, the Commission intends to review this matter further following completion of Phase III of the Cost Inquiry."

Any appeal to the Federal Court might be based upon an argument which was advanced by the Director of Investigation and Research that Bell Canada is precluded by the Bell Canada Special Act from engaging in the sale of terminal equipment. The Commission's view is that there is no legal impediment to Bell's participation in that market.

CORPORATE SHAREHOLDING LIMITATION BILL WILL AFFECT QUEBEC'S CAISSE DE DEPOT

The investment plans of the Caisse de Dépôt et Placement du Québec will be among the first to be affected if federal Consumer and Corporate Affairs Minister Andre Ouellet's Corporate Shareholding Limitation bill is enacted as expected.

The Bill was introduced in the Senate on November 2 in order to facilitate speedy passage. It prohibits any provincial government from owning more than ten percent of the shares of any company that is engaged in an interprovincial or international undertaking involving transportation by air, water, rail, or product pipelines other than for oil or gas. Oil and gas pipelines and electric power transmission are excluded. The bill empowers the government to grant exemptions by order in council. Any investments exceeding the limit which were owned by a province on November 2 will not be affected.

Quebec has its own provincial contributory pension plan whereas residents of other provinces come under the federally operated Canada Pension Plan. The Caisse manages Quebec Pension Plan funds and other provincial funds as well. Its assets amount to nearly \$16 billions, of which over \$2.5 billions are in equity investments. It is permitted to own up to thirty percent of the shares of a company. That compares, for example, with a five percent maximum for the Alberta Heritage Fund and is unusually high for funds of a kind which are generally passive rather than active investors.

Some of the activities of the Caisse have been a source of concern among private sector investors for some time. There have been criticisms about

the Caisse having representatives on the boards of directors of companies in which it has a substantial interest because it is believed that the objectives of such directors may not be the same as those from the private sector, which is usually the maximization of profits.

The Ontario Securities Commission decided in November to ban the Caisse from trading in shares in Ontario. The ban, which is subject to appeal, resulted from the effective takeover of Domtar by the Caisse in a manner which the OSC found to be illegal under Ontario law. Inter alia, the Caisse refused to file insider trading reports as required.

One factor which may have led Ottawa to act when it did was the 9.3 percent interest which the Caisse already had in Canadian Pacific Investments Ltd. and the possibility that it would increase that interest to the point where it would obtain representation on the board. The press release on the bill which was issued by the Department of Consumer and Corporate Affairs stated in part:

" 'Canadians have long recognized that certain sectors of the economy are uniquely national in scope, and that restrictions on the ownership of companies in these sectors are necessary to maintain the fabric of the Canadian economy and the fundamental arrangements of our Constitution', Minister Ouellet noted.

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"Senator Olson pointed out that the new legislation is an extension of legislation which already exists restricting provincial government investment in the satellite communications, banking and broadcasting sectors of the economy, and that it will replace comparable provisions of the Aeronautics Act which currently restrict provincial ownership of airlines."

"Each of these sectors, he explained, is unequivocally within federal jurisdiction and represents an area of financial or cultural importance which warrants special restrictions on provincial ownership."

The Canadian Chamber of Commerce, which was among the national business organizations to issue statements in support of the bill, took the position that the restrictions should have applied to the Federal government as well. Much of the same position was adopted by the Conseil du Patronat du Québec.

COMBINES DIRECTOR OPPOSES SUPPLY MANAGEMENT POWERS FOR PROPOSED MAPLE SYRUP MARKETING BOARD

The Director of Investigation and Research under the Combines Investigation Act, appearing before the Régie Des Marchés Agricoles du Québec in October, expressed opposition to proposals by producers and by a cooperative for a maple syrup and sugar marketing board with supply management powers under the Quebec Farm Products Marketing Act. He argued that giving supply management powers to such a board would have the following adverse effects:

- "(1) lower efficiency and provide excessive returns to resources involved in maple syrup production and reduce the ability of firms to achieve size economies (a dynamic process that is already in motion in the Province of Quebec) through their need to purchase quotas from producers who have capitalized economic rents into their production costs.
- (2) implicitly exacerbate inequities in income distribution between producers because, as experience with other agricultural regulated schemes reveals, whatever gains are achieved under a scheme with supply management powers, such gains accrue chiefly to large-scale operators.

....

- (3) make more complex decision-making, as well as generate price distortions (as a result of discriminating and other non-competitive pricing practices) as the board alternatively grapples with the problems of removing maple syrup declared 'surplus' in particular markets while at the same time 'shortages' exist in other markets."

He noted, however, that four processors account for about 80 percent of purchases and also that there is a potential to increase exports. He saw merit in a producers' marketing board whose purpose would be market development and improving the operational and pricing efficiency of the marketing system.

COMBINES DIRECTOR URGES QUEBEC TO ACT ON PROFESSIONAL DEREGULATION

The Director of Investigation and Research under the Combines Investigation Act, in a paper to a symposium on advertising of professional services in November which was sponsored by l'Office des Professions du Québec, urged the Province to take up the cause of professional deregulation.

He pointed out that the recent decision of the Supreme Court of Canada in the Jabour case precludes application of the Combines Investigation Act to professional self regulation when, as in British Columbia, a province has delegated to a professional group in general terms the regulation of professional ethics. He said that the application of the Combines Investigation Act in Quebec is even more limited by the fact that regulations adopted by professions must be approved by the Lieutenant Governor of the Province.

L'Office was established by the Province to adopt for approval professional rules where none exist, but its activities have been mainly advisory. A report which it published in 1977 on professional fees tended to favour deregulation.