

## OUTSIDE THE COURTS

### COMPETITION BILL ENACTED

The competition law reform bill passed third reading in the House of Commons on June 5, the Official Opposition voting with the government. The Bill was adopted by the Senate of June 17.

As enacted, the Bill incorporates a number of amendments that were recommended by the House of Commons Committee on Bill C-91 which reported back on May 28. Many of the amendments are of the nature of fine tuning but some have strengthened the Bill significantly. Whereas the original Bill provided for appeals to the Federal Court of Appeal from decisions of the Competition Tribunal on questions of law and fact, leave of the Court is now required for appeals on questions of fact. Another change permits third parties, with leave of the Tribunal, to make representations before it in proceedings which affect their interests. Maximum fines under the conspiracy section are now \$10 million instead of \$5 million in the original Bill.

With respect to the merger provisions, the asset and revenue thresholds above which pre-notification of mergers is required have been reduced to \$400 millions from the \$500 millions in the original Bill. Also, the following two additional factors for which the Tribunal may have regard in determining whether a merger is likely to prevent or lessen competition unduly have been inserted in s. 65(1):

"(f) any likelihood that the merger or proposed merger will or would result in the removal of a vigorous and effective competitor;

(g) the nature and extent of change and innovation in a relevant market; and"

The insertion of s.65(1)(f) will probably modify the inhibiting effect of s. 65(1)(e) of the Bill, which is:

"(e) the extent to which effective competition remains or would remain in a market that is or would be affected by the merger or proposed merger; and"

There are also some quite significant changes in the provisions respecting abuse of dominant position. As drafted in the original Bill, the burden of proof on the Director was such that the effectiveness of the provisions were in doubt. The object clause in s. 51(1) is now as follows with the underlined words deleted:

"51.(1) Where, on application by the Director, the Tribunal finds that:

(a) one or more persons substantially or completely control, throughout Canada or any area thereof, a class or species of business,

(b) that person or persons have engaged in or are engaging in a practice or anti-competitive acts, and the object of the practice is to lessen competition, and

(c) the practice has had, is having or is likely to have the effect of preventing or lessening competition substantially in a market,

the tribunal may make an order prohibiting all or any of these persons from engaging in that practice."

Another of the changes is in respect of s.51(4). That subsection of the Bill required that no order be made by the Tribunal under the abuse provisions where it found that the lessening of competition was the result of superior competitive performance. As amended, the subsection provides:

"(4) In determining, for purposes of subsection (1), whether a practice has had, is having or is likely to have the effect of preventing or lessening competition substantially in a market, the Tribunal shall consider whether the practice is a result of superior competitive performance."

The submissions that were made to the House of Commons Committee were fewer in number and more moderate in tone than was the case with earlier competition law reform bills that reached the stage of reference to a committee. That undoubtedly reflects the consultative process prior to the Bill's introduction. Changes called for by business groups included use of the test in mergers, "no substantial competition remaining," a Cabinet override for mergers, and a broader exemption for joint ventures.

The Consumers' Association of Canada opposed the foregoing proposals and advanced a number of suggestions to strengthen the Bill. Some of their proposals were adopted in part by the Committee, including their proposals to permit third parties to make representations before the Tribunal and to delete the object clause respecting abuse of dominant position. Other proposals by the CAC included a further strengthening of the conspiracy provision, retention of the existing provision for research inquiries and a provision for class actions.

The Canadian Bar Association noted that many of its earlier suggestions had been incorporated in Bill C-91 but they still expressed a number of concerns, some of a technical nature. They still prefer jurisdiction by the courts rather than creation of a tribunal. They favour a Cabinet override for a number of practices including mergers and export agreements. They would

extend the definition of joint ventures to include incorporated ones and extend the definition of specialization agreements to include agreements relating to products not yet in production.

During the debate on second reading, the Liberals took the position that, while the Bill had serious shortcomings, they would seek amendments to improve it; they did so in the Committee, and some of their amendments were adopted. The NDP proposed an amendment to delay second reading for six months in order to permit more consultations with consumer and labour groups and the introduction of a stronger bill.

The debate was marked by expressions of concern about concentration. Frequent references were made to the number of conglomerate mergers, particularly Imasco's acquisition of Genstar, and to concentration in the petroleum industry. For example, Mr. Turner, the Leader of the Opposition stated:

"I believe, as does my caucus, and I believe the vast membership of the Liberal Party, that the pendulum has swung too far. We believe that there is now a concentration of economic power for the sake of concentration, maybe even for the sake of massaging a few egos, and maybe even for the sake of enjoying paper transactions at the expense of building business and the country. That concentration is benefitting fewer and fewer people at the expense of more and more Canadians.

"I sense that this is a growing concern to the average Canadian. I think that our citizenry is beginning to realize that all these mergers, takeover bids, stock purchases, and buy-outs are not just isolated games being played in corporate board rooms. What is happening will have a real impact on all of our lives. It will impact on the prices that we pay for food, clothes, shelter, movies, books, automobiles, telephones, and transportation, and on the quality and availability of these products."

Both opposition parties contended that reliance upon consultations with business groups during the drafting of the bill had been excessive and that consultations with consumer and other interests had been inadequate.

Several speakers criticized the constitution of the proposed Competition Tribunal, which is to be composed of lay persons and judges of the Federal Court all serving on a part-time basis. Thus, Mr. Ouellet stated:

"I just cannot believe that Canadian judges of the Federal Court are prepared to sit on such a hybrid body. Asking a justice of a Canadian Superior Court, of a Federal Court or of a provincial Supreme Court to sit on the Competition

Tribunal for four, five or six years would be an excellent idea, but I cannot accept that this justice should continue to exercise his responsibility in his own court, to which he has been appointed and with which he is expected to work. I find it absolutely inconceivable that those justices be asked to do double duty as justices of both the Federal Court and the Competition Tribunal. And also that they be asked to lead a panel, not of other judges but of business experts."

The merger and monopoly provisions were criticized as likely to be ineffective. Referring to the merger provisions, Mr. Turner stated:

"Bill C-91 is a watering down of Bill C-29. Under the former Bill, the merger criteria involved what in effect was a 12-point test. Now there are only six criteria involved in the merger provision. For instance, the present Government has eliminated the past anti-competition activity factor. It has eliminated the innovation in market factor. The economic efficiency defence is now based solely on the achievement of the economic efficiency of the company in question, not on the benefit of savings to the consumer as was formerly the case. When one analyzes the present Bill, one realizes that the Government relies primarily on, using the words of the Bill, "the extent to which effective competition remains". I refer to Section 65(1)(e). After the merger there is absolutely no definition of what the word "effective" means. It could be anything; we do not know. Presumably it is being left to interpretation by the Competition Tribunal as that tribunal eventually defines it."

Regarding the provision on abuse of dominant position, Mr. Allmand mentioned with approval some comments which Professor William Stanbury of the University of British Columbia had made about the Bill, and Mr. Allmand stated:

"One again it is a good thing these provisions have been transferred from criminal law jurisdiction into civil law jurisdiction. It may still be very difficult to enforce, because the Crown will have to establish four items of proof. First, the Crown will have to prove that one or more firms substantially or completely control the relevant market. That will not be easy to prove, even with the civil burden of proof. Second, the Crown will have to prove that the firms have engaged in a practice of anti-competitive acts, such as those listed in the section. That may be easier than the first burden, but it is still difficult. Third, the object of the practice is to lessen competition.

It is easy enough sometimes to prove that certain firms are engaging in certain practices, but then to prove that their purpose, their intention, in doing those things is to lessen competition might be extremely difficult. Fourth, the practice of lessening competition has had, is having, or likely to have the effect of lessening competition substantially. Once again, the word "substantially" could cause a lot of problems for the Crown in trying to prove its case where there is abuse of dominant position in the market-place."

Mr. Axworthy raised the issue of foreign control. He contended that the free trade negotiations could lead to more foreign control, especially in technology and services, and that the bill made no allowance for that.

### **THE RTPC'S PETROLEUM REPORT IS RELEASED**

The report by the Restrictive Trade Practices Commission on the results of its Petroleum Inquiry was released by Consumer and Corporate Affairs Minister Michel Cote on June 13 (Competition in the Canadian Petroleum Industry, Ottawa, 1986). The Report largely rejects allegations of consumer exploitation by the oil companies that the Director of Investigation and Research made in his 1981 Green Book and which related to the 1958-1973 period. The Report deals at greater length with the current situation and its conclusions and recommendations call for measures to curb abuses of market power. The Report is signed by Chairman O.G. Stoner and Member Frank Roseman, the only two members who participated throughout the inquiry.

The Director's principal allegations relating to the 1958-1973 period were that consumers paid billions of dollars too much because of excessive prices paid by oil companies for imported crude oil, because of manipulation by oil companies of the National Oil Policy, because of their maintenance of an inefficient retail distribution system, and because of imports of high cost petroleum products as a result of excessively priced crude oil. Mr. Stoner rejects all these allegations as wrong in some cases and unproven or probably unprovable in others. He does, however, state with regard to imports of crude oil by the major oil companies:

"As indicated in the previous paragraph, there was also testimony to the effect that matters like security of supply and the use of affiliated transportation systems were more attractive than attempting to shop for cheaper crude oil. In the last analysis however, and despite occasional efforts to shop, they did not appear to have the necessary room to manoeuvre towards this objective, or a clear set of workable alternatives open to them.

"Apart from the efforts of National Revenue and a rather superficial survey undertaken by the National Energy Board in 1972, the Canadian Government made no apparent effort to change these practices. This may have reflected the fact that relatively little pressure was exerted by consumers during the 1958-1973 period because of the relatively low price of gasoline and heating oil. Whatever the reason, it is incorrect to allege that the majors were "guilty" of overcharging consumers as a result of their crude oil pricing policies. However, as indicated in the previous paragraph, it is also clear that Canadian subsidiaries were subject to a high degree of control by their parent companies that left them committed to a pattern of supply through affiliated channels. It is useful to think of what lessons this has for the situation today with deregulation in Canada and, at least temporarily, a world glut of crude oil. It is clear that benefits of trade liberalization and world pricing can be undermined by parental control of Canadian subsidiaries in the petroleum industry or indeed in any other Canadian industry exposed to the forces of trade liberalization with the United States, as is now being widely discussed. Certainly for the Canadian petroleum industry and Canadian markets, it is essential that no barriers to free movement of crude oil or product or the prices at which these commodities move, be created by decisions taken by the parent."

Dr. Roseman is slightly less harsh in his criticisms of some of the Director's allegations. He considers that there were excess costs in importing crude and also to the extent that petroleum products were imported as a result of the high costs of crude oil, but he rejects the Director's attempts to measure those costs or the costs to consumers. Both Mr. Stoner and Dr. Roseman found no evidence of collusion.

The Commission's conclusions respecting the post-1973 period are reported below, and they are followed by the Commission's recommendations.

### **The Commission's Post-1973 Conclusions**

#### **Domestic Crude Oil Production and Pipelines**

"The Commission does not see a need for additional public policy action with regard to domestic crude oil production or pipelines"

### **Imported Crude Oil After 1973**

"There is no evidence that companies paid higher than third-party prices for crude oil imported into Canada after 1973 except for certain transactions described in Chapter IX".

### **The Refining Sector**

"The nature and extent of inter-refiner supply agreements, including the extensive degree of reciprocity and the long-term nature of some of the agreements, do not give rise to competition problems that require general prohibitions or advance approvals."

However, the Commission adds:

"The Commission is concerned that there is not adequate provision in Bill C-91 to ensure the opportunity for the Competition Tribunal to review long-term arrangements between refiners involving large volumes, that could reduce supply or the number of suppliers to the point where on balance the arrangement lessened competition to a degree that was contrary to the public interest. Such a provision is recommended below.

"To this end, the Director should be notified of inter-refiner product supply agreements longer than five years in duration, including such agreements currently in force with longer than five years left to run."

### **The Quality of Gasoline**

"The quality of gasoline produced by Canadian refiners is of a uniformly high standard. In fact, refiners frequently sell, under their own brands, gasoline refined by a competing refiner. Similarly, independents receive the same high quality gasoline from Canadian refiners."

### **Mergers**

"A number of mergers in the refining and marketing sectors have increased concentration and removed effective competitors. The merger proposals in Bill C-91 should deal adequately with this subject in the future."

### Vertical Integration and Marketing

"(i) The Commission is concerned about the trend over the last decade towards greater centralization in the hands of refiners of the power to set pump prices. Supply arrangements under which refiners obtain partial or complete control over the retail prices of customers with whom they would otherwise compete at the retail level tend to lessen competition." The Commission adds:

"In the Commission's view support programs that relate the amount of support to particular retail prices (as is the case with all margin support programs referred to in the evidence), and that are widespread in the industry, are contrary to the public interest. Similarly, the competitive harm becomes significant when extensive arrangements are entered into between refiners and retailers under branded and unbranded agency agreements."

"(ii) A comparison of the available cost information with the margins earned by major-brand gasoline dealers, and by independents in both heating oil and gasoline distribution, does not support allegations or fears that independents have generally been subjected to a predatory margin squeeze in recent years. However, the margins of the smallest independents in gasoline distribution appear to have been severely compressed throughout most of 1979-1983, the period for which information is available."

"(iii) Regional price differences and swings in prices over time are due largely to variations in competitive conditions caused in part by the number of refineries, the number and types of marketers, the degree of excess refining capacity and the availability of imports. Tax differences and other government interventions also affect prices on a provincial basis."

"(iv) The Commission finds it difficult to envisage a market restriction in this industry that would not in its view, be contrary to the public interest." The commission adds:

"For example, processing or otherwise supplying product to persons for export only, on condition that it not be distributed in Canada, seems impossible to justify. Also, unbranded resellers are occasionally prevented by their suppliers, by contract, from reselling in any way other than through their own

consumer outlets. On balance, however, in view of the scope of existing legislation and the few current instances of markets restriction in evidence, no specific recommendation in this regard is being made."

"(v) All retailers should retain full freedom to offer discounts to customers who pay by cash rather than by credit card. The Commission considers, however, that the existing price maintenance prohibitions in the Act are sufficient to ensure this freedom, and accordingly recommends no change to the law in this respect."

"(vi) Non-Petroleum Use (NPU) covenants obtained by refiners when they sell former retail gasoline sites have no purpose other than to create an entry barrier into gasoline retailing and, therefore, are not in the public interest."

"(vii) Recent changes in wholesale pricing practices, referred to as "rack pricing", adversely affect competition insofar as they involve openly stated policies that confidential discounts will not be granted off published prices." The Commission adds:

"The effect of public announcements by suppliers in a tight oligopoly to the effect that they will not be granted unpublished discounts off published or widely-known supply prices, can produce an effect very much like that of a horizontal agreement. It communicates past and current actual transaction prices to competitors of the supplier and to competing customers, and where the products are as homogeneous as petroleum products it presents a real risk to the intensity of price competition. Such is the case with the emerging so-called "rack-pricing" policies of Imperial Oil and other refiners. The no-discount aspect of those published policies is not necessary to their legitimate purposes. The expectation of the refiners, and the probability, is that retail motor fuel prices will be stabilized by such a policy and raised above levels that would otherwise exist."

"(viii) The characteristics of the heating oil market with respect to the lack of readily available information on prices and the tendency of consumers to settle on a supplier for at least the duration of a heating season requires consumers to shop actively in order to get best value for their money."

"(ix) A viable independent sector operating efficiently in the retailing of gasoline (and heating oil) contributes to the health of markets in Canada by decentralizing pricing decisions and other strategic competitive initiatives. The following three conclusions and the related recommendations support this objective."

"(x) The unavoidably high concentration in petroleum refining, together with pervasive vertical integration and dual distribution, makes it very important to take all reasonable steps to maximize the assurance of supply to unintegrated marketers. One avenue is to clarify the scope of the duty of domestic refiners to supply product to others. Secondly, it makes the import option an extremely important competitive factor in areas of the country open to imports."

"(xi) It is important that there be a legal standard of "predation", which is to say a line beyond which conduct by one firm that has harmful effects on another firm's ability to stay in business or to compete, is unjustifiable and against the public interest." The Commission adds:

"The Commission considers that the existing law, particularly if supplemented as proposed by Bill C-91, is adequately in this regard. In view of the generality of the existing law, however, the Commission's recommendations set out guidelines for its application to pricing in a dual distribution context."

### **Government Programs and Policies**

"There is a need for improved understanding at all levels of government of the effects of government policies on the petroleum industry. There is also a need for improved consultation regarding the purposes and implementation of government policies affecting the industry." The Commission adds:

"The maintenance of open competition and healthy markets is surely a major dimension of Canadian public policy, and yet it is a truism that frequently as much damage, distortion and cost of a serious and long-term nature is inflicted on the operation of markets, and on the public, by government programs or by their implementation or administration, as by any private sector conduct that contravenes the competition laws."

## Petro Canada

"Government ownership of Petro-Canada affords unique opportunities to correct certain market defects."

The Commission considers that, while Petro-Canada's rapid growth by acquisition since 1979 has increased concentration, "it has at the same time consolidated the regional refining and marketing operation of several companies into a potentially stronger competitive force throughout Canada." Significant defers of market power in the downstream sector are unavoidable and "Petro-Canada gives the Government the opportunity to reduce the competitive restraints and associated public cost of that market power, not only without having to pass special laws, but also in an ongoing and pervasive way that probably could not be achieved by laws."

## Refinery Closures and Supply in Quebec

"(i) The relatively large decline in petroleum product demand in Quebec in the early 1980's made the closure of Montreal refineries that occurred in 1983 a virtual necessity."

"(ii) The sale and closure of Gulf's Montreal refinery cannot usefully be evaluated on the basis of whether there was "enough" remaining capacity in Quebec, in view of the ready movement of product regionally and internationally."

Regarding the Gulf closure, the Commission explains that it no doubt diminished competitive pressures, "but the Government of Canada, by approving Petro-Canada's acquisition of Gulf's Texaco processing contract and subsequently Ultramar's acquisition of Gulf assets, determined that on balance those transactions were in the overall public interest."

## The Commission's Recommendations

" "Recommendation No. 1: To deal with several practices in the petroleum industry and those that may from time to time arise in other industries, a section should be added to Bill C-91 that would allow the Tribunal to issue orders requiring the discontinuance or non-repetition of any conduct that would substantially lessen competition." The

Commission points out that such a section "would not suffer many of the limitations" found in the abuse of dominant position section of Bill C-91. While the section would apply to practices in all industries, the Commission cites as examples long-term gasoline exchange agreements and agreements giving a gasoline supplier control over a customer/competitor's prices where such agreements lessened competition substantially.

"Recommendation No. 2: Suppliers who hold high degrees of market power should not be entitled to refuse supply to others except to the extent that they can establish sufficient reason for refusing supply. Market power being a matter of degree, the greater a person's market power is over supply the less should be the need to prove that the refusal injured someone or that it substantially lessened competition, and the more the focus should be on the adequacy of the supplier's reasons for refusing supply."

"Recommendation No. 3: Jurisdiction to grant interim orders, particularly with respect to matters affecting supply, should be conferred by legislation." The Commission notes that Bill C-91 already provides for such orders in connection with the reviewable practices covered by the Bill.

"Recommendation No. 4: Any person who has been refused supply should be entitled to apply directly to the Competition Tribunal for relief."

"Recommendation No. 5: The Government should be empowered to exempt particular mergers from review by the proposed Competition Tribunal."

"Recommendation No. 6: Refiners should not impose non-petroleum use covenants on land they sell, and should declare publicly that they will not enforce the covenants they hold on properties they have already sold."

"Recommendation No. 7: Further to the conclusion regarding the standard for identifying predation, suppliers and the Director should apply the following guidelines in determining the limits of appropriate pricing in the dual distribution context of the petroleum industry:

1. Independents should not be required to pay more, at any time, than the lowest retail price charged in the independents' market area by the supplier (i.e. at outlets where the supplier sets the pump price), less reasonable product transportation cost.
2. A refiners' net return from retail sales should be no less than the net return on its sales to either branded dealers or independents in any market area. The calculation of net returns for the purposes of this test would necessarily depend upon the time frame involved and on whether the industry is depressed, static or expanding."

"Recommendation No. 8: Refiners who have stated that they will not grant unpublished discounts off published prices should abandon this aspect of their "rack pricing" policies."

"Recommendation No. 9: With respect to Petro-Canada:

- (a) It would be in the public interest to require the recommendation of the Minister of Consumer and Corporate Affairs, in addition to the ministerial recommendations that are required under existing law, as a precondition for the approval of Petro-Canada's capital budgets, corporate plans and any amendments thereto, and for Government directives to Petro-Canada.
- (b) Even though it may not be required by law to do so:
  - i) Petro-Canada should not provide to others any assurances that it will not grant confidential discounts off its published prices to resellers or other large volume customers.
  - ii) Petro-Canada should abandon its practice of obtaining and enforcing non-petroleum use covenants.
  - iii) Petro-Canada should continue to pursue a policy of open and non-discriminatory supply from its refineries to unintegrated marketers to the best of its ability to do so.
- (c) Petro-Canada and its employees should be made fully subject to the provisions of the Combines Investigation Act, except to the extent that acts are

done pursuant to specific directive or approval of the Governor in Council.

- (d) As long as the company is publicly owned, a Committee of Parliament should review the Petro-Canada Act and the purposes and operations of Petro-Canada every five years. Such a review would be facilitated by a special report from Petro-Canada, and by a report from the Minister of Consumer and Corporate Affairs as to Petro-Canada's effect on those aspects of the public interest for which he is responsible."

"Recommendation No. 10: With respect to federal, provincial or municipal government interventions into any aspect of the petroleum industry:

- (a) The Commission commends to the federal, provincial and municipal governments alike, in regard to any regulation or contemplated regulation of entry, pricing or output, the basic principles embodied in the Federal Government's policy proposals entitled Freedom to Move: A Framework for Transportation Reform (1985). In particular, the Commission's examination of provincial and municipal regulation of gasoline retailing persuades it that the public would be better served if any government licensing decisions regarding new entry and proposed new offerings were guided by a test of "fit, willing and able" instead of "public convenience and necessity".
- (b) The experience and knowledge of the office of the Director of Investigation and Research should continue to be made fully and openly available, through both private consultations and public hearings, to assist agencies, departments and officials of all governments in regard to such regulation of specific industries as may be thought necessary in the public interest.
- (c) Aspects of the organization and performance of the downstream petroleum sector are of such general public interest and importance, that it would be desirable for federal and provincial governments to consult more systematically at senior levels in order to review industry performance and to coordinate their objectives and policies to the extent possible."

Recommendation No. 11: Restrictions on the importation of petroleum products into Canada should be avoided in order to promote competitive markets in Canada. To the extent that the Government supports continuation of a policy of open access it is important to let the industry know."

Recommendation No. 12: Consumers should seek to strengthen their market position by drawing on their collective bargaining (or buying) power."

### **CALVIN GOLDMAN BECOMES DIRECTOR OF INVESTIGATION AND RESEARCH**

Calvin S. Goldman has been appointed Director of Investigation and Research under the Combines Investigation Act and Assistant Deputy Minister of the Bureau of Competition Policy, effective May 12, 1986. Following Lawson Hunter's resignation from those positions on August 31, 1985, Mr. M.S. Cappe became acting Assistant Deputy Minister of the Bureau and Mr. M.P. O'Farrell became Director of Investigation and Research. Mr. Cappe now leaves the Bureau to become Assistant Deputy Minister of Policy Coordination, Department of Consumer and Corporate Affairs. Mr. O'Farrell becomes Deputy Director of Investigation and Research (Operations) in the Bureau.

A press release by the Department states in part:

"Mr. Goldman received his LL.B. from Osgoode Hall Law School of York University in 1973 and was the recipient of the Gold Medal as well as various other prizes and scholarships.

His awards included the MacKenzie King Travelling Scholarship for post-graduate studies at Harvard Law School from which he obtained his LL.M. in 1974.

Before being called to the Bar of Ontario in 1976, Mr. Goldman clerked for Mr. Justice Spence of the Supreme Court of Canada.

That same year he joined Blake, Cassels and Graydon, Barristers and Solicitors, in litigation practice, and is at present a partner in the firm.

Mr. Goldman has extensive experience in the competition law field having acted as defence counsel and as prosecutor in a number of significant cases under the Combines Investigation Act, including having served as assistant counsel to the Director of Investigation and Research and as assistant special prosecutor for the Attorney General of Canada in the uranium cartel proceedings."

Mr. Goldman's publications include a paper entitled "Hunter v. Southam: The Decision and Its Effect", which appeared in the December, 1984 issue of Canadian Competition Policy Record.

### **CRTC OPTS FOR COSTING INSTEAD OF STRUCTURAL SEPARATION TO PROMOTE FAIR COMPETITION AMONG TERMINAL EQUIPMENT SUPPLIERS**

The Canadian Radio-Television and Telecommunications Commission announced in a Decision issued on March 20 that it will rely upon costing rather than structural separation to prevent Bell Canada and British Columbia Telephone Company from competing unfairly with unintegrated producers in the sale of multiline and data terminal equipment.

The issue was how best to ensure that the two companies do not exploit their monopolies as telecommunications carriers by subsidizing their terminal equipment business at the expense of telephone subscribers and to the disadvantage of competing suppliers who are not carriers. CRTC decisions in 1979 and 1980 permitted customers to attach their own equipment to Bell Canada and B.C. Tel. lines, and independent suppliers now have about one-third of the markets in Bell Canada and B.C. Tel. territories. Increasing amounts of the CRTC's regulatory resources have been devoted to the carriers' rates for the equipment; there have been costly delays for the carriers, and the unintegrated producers have alleged continuing cross-subsidization.

Two alternative solutions were under consideration - structural separation or improved methods of costing for regulatory purposes. In its call for submissions on the issue, the Commission indicated that it had decided to initiate the proceedings on structural separation without delay because the completion of its ongoing Cost Inquiry and the adoption of improved costing methods would take a considerable amount of time.

The submissions by the Director under the combines act, the unintegrated suppliers and the Canadian Manufacturers Association favoured structural separation, while those of the carriers and the trade unions did not. The Director argued that structural separation would be least restrictive of management freedom while costing could only approximate true costs while involving expensive and detailed regulatory intervention. Bell denied the existence of any incentive for cross-subsidization, contended that structural separation would result in an efficiency loss and reduce consumer choice, and held that satisfactory costing controls were available.

In its decision, the CRTC concluded that, while either approach could meet its objectives, "a costing approach provides an equally acceptable, more practical and less costly means". The Commission estimates that a costing approach based upon Phase III of the Cost Inquiry will be available in from 18 months to two years. It cites Bell's estimate that two years to 30 months would be required to establish a separate affiliate along with ancillary changes if the

structural separation choice had been chosen. Bell estimated its start-up costs under the structural approach at \$45 million, and the Commission estimated that start-up costs associated with the costing approach would be considerably less. The Commission considers that ongoing costs will also be less under the costing approach.

### **CRTC REJECTS MORE CROSS-OWNERSHIP OF MEDIA BY POWER CORPORATION**

The Canadian Radio-Television and Telecommunications Commission, in a decision released on April 18, rejected a proposal by Power Corp. to acquire Tele-Metropole of Montreal. While its decision was not explicitly based upon concern about media cross-ownership, it appears that in future a very strong public interest case will have to be made if major increases in media cross-ownership are to be approved.

Power Corporation owns four French language daily newspapers including La Presse of Montreal, and eight weekly newspapers. Tele-Metropole owns the only private French language television station in Montreal and has an interest in a company that owns five other television stations in the Province. Power Corp. is primarily a holding company with huge industrial and financial interests.

The decision was awaited with particular interest. Last year the government revoked a 1982 Order-In-Council directing the CRTC to refuse broadcasting licenses for stations owned by newspaper companies. That action came just in time to permit a television station in New Brunswick owned by Irving interests to get its license renewed.

## **FOREIGN AND INTERNATIONAL**

### **U.S. SUPREME COURT SETS HIGH STANDARDS FOR INFERENTIAL PROOF OF PREDATORY PRICING**

The United States Supreme Court, in a five to four decision, overturned an appeals court decision to reinstate a civil suit filed in 1970 alleging predatory pricing, and referred it back to the appeals court to consider whether there is other evidence (Matsushita Electric Industrial Co. Ltd. v. Zenith Radio Corp. No. 83-2004, U.S. Sup. Ct. 3/26/86). Mr. Justice Powell, speaking for the majority, recalled that in Monsanto, 465 U.S. (1984), it was emphasized that the courts should not permit factfinders to infer conspiracies when such inferences are implausible, and he stated:

"Respondents, petitioners' competitors, seek to hold petitioners liable for damages caused by alleged conspiracy to cut prices. Moreover, they seek to establish this conspiracy indirectly, through evidence of other