

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

combinations...whose natural tendency is to raise prices, and through evidence of rebates and other price-cutting activities that respondents argue tend to prove a combination to suppress prices. But cutting price in order to increase business often is the very essence of competition. Thus, mistaken inferences in cases such as this one are especially costly, because they chill the very conduct the antitrust laws are designed to protect."

The suit alleged a conspiracy by Japanese television set producers to drive U.S. producers out of business by setting artificially high prices in Japan and using the profits to set artificially low prices in the U.S. Citing several Chicago school lawyers and economists, the Court largely accepted the position of the Japanese petitioners that they had no rational motive to enter such a conspiracy. The Court noted that the share of the U.S. market held by U.S. producers was approximately 40 percent and had not changed appreciably during the 1970's although the Japanese share had risen from about one-fifth to one-half. Mr. Justice Powell stated:

"The alleged conspiracy's failure to achieve its ends in the two decades of its asserted operation is strong evidence that the conspiracy does not in fact exist. Since losses in such a conspiracy accrue before the gains, they must be "repaid" with interest. And because the alleged losses have accrued over the course of two decades, the conspirators could well require a correspondingly long time to recoup. Maintaining supracompetitive prices in turn depends on the continued cooperation of the conspirators, on the inability of other would-be competitors to enter the market, and (not incidentally) on the conspirators' ability to escape antitrust liability for their minimum price-fixing cartel. Each of these factors weighs more heavily as the time needed to recoup losses grows. If the losses have been substantial - as would likely be necessary in order to drive out the competition - petitioners would most likely have to sustain their cartel for years simply to break even."

#### **U.K. LAUNCHES MAJOR REVIEW OF COMPETITION POLICY**

Trade and Industry Secretary Paul Channon announced in Parliament on June 5 that he was establishing a departmental committee chaired by Mr. Hans Liesner to review competition policy. The committee will include members from other departments, and outside experts will serve as consultants. The review will cover the Fair Trading Act and the Restrictive Trade Practices Act. It will not consider the Competition Act, which was only enacted in 1980 and deals with so-called "anti-competitive practices" as defined in that Act. The last study, also chaired by Mr. Liesner, was in the late 1970's.

The U.K. has been experiencing a wave of large mergers, and shortcomings in merger policy have attracted a good deal of public attention. Under present procedures a decision to refer a merger proposal to the Monopolies and Mergers Commission can be enough to forestall the merger because of the time and expense that would be involved in its defence. Moreover, the decisions of the Commission are difficult to predict, in part because the law permits factors other than competition to be considered.

The British system of dealing with restrictive agreements is weak in comparison with those in the U.S. and the European Community. Much depends upon companies complying with the requirements that they register restrictive agreements with the Restrictive Practices Court; the investigatory powers of the Office of Fair Trading are weak and remedies for non-compliance are inadequate. One idea that has been quite widely discussed is to adopt the approach of the European Community, which is already applied in the U.K. when Community trade may be involved. Sir Gordon Borrie, Director General of Fair Trading, is among those who have advanced that suggestion. He stated in a speech on March 11:

"An alternative model which will obviously have to be studied is Article 85 of the Treaty of Rome which prohibits anti-competitive agreements and concerted practices while providing for exemption from that prohibition in specified circumstances. Article 85 is of course also already part of UK law through our membership of the EEC but only insofar as agreements affect inter-State trade. Where it does apply, substantial monetary sanctions are available at the instance of either the EEC Commission or private persons or businesses. Also part of the UK law are the various powers of EEC officials to search out for contraventions of Article 85. If there were in UK law generally a system based on prohibition of certain categories of agreement, then it would be appropriate to introduce wider powers and tougher sanctions than are provided under the Restrictive Trade Practices Act and to provide for greater scope for private rights of action. I am not here advocating the Article 85 model about which there can be as many arguments as about our own statute. What is indisputable is that an effective means of controlling restrictive trading agreements, wherever they are found, is a sine qua non for an effective competition policy and therefore for an efficiently functioning market economy."

## EUROPEAN COURT OF JUSTICE DECIDES AIR FARES COME UNDER COMPETITION RULES

The European Economic Community's highest court held in a decision released on April 30 that member states should not approve or enforce air fares that "were the result of an agreement, a decision by an association of undertakings or a concerted practice contrary to Article 85" of the Treaty of Rome. The case involved a French travel agency, which the Court found to have the right to sell airline tickets at prices lower than those authorized by the French government. A French court had referred the case to the European Court of Justice.

The full effects of the decision are unlikely to emerge for some time. There may well be other clarifying legal actions as some airlines seek to challenge member state authority and as the Commission of the European Communities moves to assert more influence over civil aviation. European air fares are among the highest in the world, and the U.K. and Holland have been campaigning for reductions.

## PUBLICATIONS RECEIVED

James P. Cairns, Economics in Court: The Consumers Glass Case, Canadian Business Law Journal, 1986, Vol. 11, No. 1.

R. Jack Roberts and Christopher Hewat, Pre-Merger Notification in Canada, Canadian Business Law Journal, 1986, Vol. 11, No. 1. This article discusses the merger pre-notification provisions of former Bill C-29, the competition law reform package that was introduced by the previous government in April, 1984. However, many of their comments are germane to the Bill that has just been enacted.

S. Globerman and W.T. Stanbury, Changing the Telephone Pricing Structure: Allocative, Distributional And Political Considerations, Canadian Public Policy, Vol. XXII, No. 1, March, 1986. Considers some of the issues in so called rate rebalancing. Favours the introduction of local measured service as a means of shielding many households from the cost shock.

Walter Block, Ed., Reaction: The New Combines Investigation Act, The Fraser Institute, Vancouver, 1986. This volume consists of an introduction by Walter Block of the Institute and ten papers. The contributors are William A. MacDonald, J. William Rowley, C.J. Michael Flavell, L. Philippe de Grandre, Donald E. Armstrong, Colin Irving, Steven Globerman, Gabrielle and Reuven Brenner, James C.W. Ahlakpor, Donald N. Thompson, Donald J. Lecraw and Edwin G. West. Walter Block's position is essentially that Bill C-91 is better than its predecessors only because it is weaker. While that viewpoint clearly influenced the Institute's selection of contributors, many of the papers are well worth reading. For example, Donald Lecraw's paper on Industry Structure and Competition Policy provides a thoughtful survey of the approaches of the present