REGULATORY AND POLICY DEVELOPMENTS

JUDICIAL APPOINTMENTS ARE MADE TO THE COMPETITION TRIBUNAL

On July 8, 1986, the Honourable Ray Hnatyshyn, the Minister of Justice and the Attorney General of Canada, announced the appointment of four members of the Trial Division of the Federal Court to the Competition Tribunal. The Competition Tribunal is composed of up to four judicial members drawn from the Federal Court and up to eight lay members. The appointment of the four judges by Mr. Hnatyshyn indicates the government has decided to appoint the maximum number of judicial members to the Tribunal immediately.

Appointed as Chairman was the Honourable Madam Justice Barbara J. Reed. Madam Justice Reed received her LL.B in 1968 and her Master of Laws in 1970 from Dalhousie University. Prior to that she spent several years as a homemaker. After being called to the Law Society of Upper Canada in 1971, Madam Justice Reed obtained a position as Assistant Professor at the University of Ottawa Faculty of Law in the Common Law Section. Subsequently she joined the Federal Department of Justice where she worked for several years, primarily in the constitutional and administrative law area. She was also legal counsel to the Privy Council Office and Federal-Provincial Relations Office during her time as a federal public servant. She was extensively involved with the federal government during the negotiations leading to the new constitution, and she was also involved in many leading constitutional law cases.

The Honourable Mr. Justice Barry L. Strayer was appointed a member of the Tribunal. Mr. Justice Strayer graduated from the University of Saskatchewan in 1955 and received his Bachelor of Civil Law from Oxford in 1957. He subsequently obtained his Doctor of Juridical Science from University of Oxford in 1966. He worked with the Attorney General's Department in Saskatchewan for some time, and in 1968 he joined the Privy Council Office in Ottawa, where he was involved in constitutional law matters.

In the mid 1970's, Mr. Justice Strayer became Assistant Deputy Minister of the Department of Justice in Ottawa. In that position he was responsible for all public law matters. As such, he was heavily involved in constitutional matters, including the negotiations leading to the new constitution. He also was involved in legislation relating to human rights and access to information. He has lectured at Carleton University, the University of Ottawa, and the Centre for International Affairs at Harvard University. He is the author of several learned articles and a well-known book relating to judicial review in Canada.

The third judicial member appointed by Mr. Hnatyshyn was the Honourable Mr. Justice Max M. Teitelbaum. Mr. Justice Teitelbaum was born in 1932. He obtained his law degree from McGill University in 1957 and was called to the Quebec Bar in 1958. Prior to being appointed a judge of the Federal Court in 1985, Mr. Teitelbaum was a partner in the firm of Shenker & Teitelbaum. He is a member and Director of the Lord Reading

Law Society and a Past Director of the Beth Ora Synagogue.

The fourth judicial member appointed by the government was the Honourable Mr. Justice Leonard A. Martin. Mr. Justice Martin received his law degree from Dalhousie University and was appointed a Queen's Counsel in 1972. In his career in private practice, he was lead counsel for the Attorney General of Newfoundland in the Upper Churchill Falls Water Rights Reversion Act and also served as Commission Counsel for the Joint Federal-Provincial Royal Commission on the Ocean Ranger Marine Disaster. While in private practice in Newfoundland, he also served as a member of the committee to redraft the Judicature Act for the Province of Newfoundland.

The provisions of the Competition Act require that the judicial members appointed to the Tribunal are done so on the recommendation of the Minister of Justice by the Governor in Council. In his announcement, Mr. Hnatyshyn noted that the appointments were the result of consultations with various groups and the Honourable Michel Côté, who at the time was the Minister of Consumer and Corporate Affairs and responsible for Bill C-91, the legislation which enacted the Competition Tribunal. The appointments were effective on June 30, 1986.

LAY MEMBER APPOINTED TO COMPETITION TRIBUNAL

On August 22, 1986, the Minister of Consumer and Corporate Affairs, the Honourable Harvie Andre, announced on behalf of the Prime Minister the appointment of Dr. Frank Roseman as a lay member of the Competition Tribunal. The *Competition Tribunal Act* provides that up to eight lay members may be appointed, Dr. Roseman being the first. In his announcement, Mr. Andre stated:

> This appointment will serve to make the Tribunal operational until the government establishes an Advisory Council, as provided for in the *Act*, to advise it on non-judicial appointments.

By this statement the Minister appears to be indicating that it is the government's intention to appoint an Advisory Council to assist it in the appointment of lay members. To date no such Council has been appointed.

An important aspect of Dr. Roseman's appointment was the necessity to have a lay member appointed before the Tribunal could be fully operational. The *Competition Tribunal Act* states that hearings before the Tribunal will be heard in panels of not less than three and not more than five. It further states that each panel must have at least one judicial and one lay member. Dr. Roseman's appointment obviously allows the Chairman, Madam Justice Reed, to constitute panels as required by the legislation.

Dr. Roseman has a Doctorate in Economics from Northwestern University. Subsequently he taught economics at the University of Alberta. His area of specialty is industrial organization and competition policy. He co-authored the *Reuber-Roseman Study on "The Take-Over of Canadian Firms, 1945-61"* published by the Economic Council of Canada in 1969.

Dr. Roseman has been a member of the Restrictive Trade Practices Commission since May 1974. In that capacity he has participated in the work of the Commission, including sitting as a member of the Commission in its considerations of the inquiry dealing with vertical integration in the tele-communications industry as well as

the recently concluded petroleum inquiry.

Mr. Andre announced that the appointment of Dr. Roseman was effective immediately.

COMPETITION TRIBUNAL RULES IMMINENT

The new Competition Tribunal is taking shape. With the appointment of the Tribunal's members, work is now underway on developing the Rules of Procedure which will be promulgated as regulations under the *Competition Tribunal Act*. The Competition Policy Record has learned that the draft Rules of Procedure are in their final stages of drafting with prepublication in the Canada Gazette expected about mid-October. The Record will distribute the draft Rules to subscribers as soon as they are available. A 60 -day notice and comment period applies to the Rules under the provisions of the *Competition Tribunal Act.*

GOLDMAN STRESSES COMPLIANCE IN AN ADDRESS TO THE CANADIAN BAR ASSOCIATION

Calvin S. Goldman, Director of Investigation and Research under the Competition Act, in a major speech to the annual meeting of the Canadian Bar Association in Edmonton on August 18, 1986, discussed a major new initiative of the Bureau of Competition Policy relating to compliance with the provisions of the new Competition Act. Mr. Goldman stated that:

> At the present time, members of my staff are actively involved in studying ways of increasing the methods of dissemination of Bureau policy to the general public.

Mr. Goldman further stated that:

> First, consideration is being given to the initiation of procedures whereby Bureau policy and enforcement guidelines, and interpretative comment on recent jurisprudence will be disseminated to the public on a more consistent and formalized basis. In addition to the scheduling of speaking engagements, of the kind being given here today, we are studying the feasibility of improving the flow of information to the public through the preparation and circulation of such items as:
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> 1) newsletters;
> 2) information pamphlets;
> 3) industry guidelines; and
> 4) interpretation bulletins.
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> It should be emphasized here that, the bulletins and guidelines prepared by the Bureau would not be binding on the Bureau, but rather, would be designed to assist the legal profession's and business communities' appreciation of the analytical tools and approach the Bureau is using with respect to the Competition Act.

In addition to the initiative of providing increased information to affected private sector parties, Mr. Goldman also elaborated on other enforcement and compliance techniques available to the Director and how he wishes to consider enhancing the use of those techniques. He stated:

> The thrust behind enhancing compliance initiatives is to attempt to make use of a broader spectrum of available techniques - where circumstances deem them to be a more appropriate course of action. We are now examining the use of a more proactive approach to enforcement, such as the increased use of negotiated settlements. I will be elaborating on this shortly, but for now you should be aware that we view negotiated settlements as falling within at least two distinct categories undertakings and consent orders.

Mr. Goldman indicated that recent developments have persuaded him that an expanded program of compliance is both desirable and possible. In particular, he noted a change in the new Competition Act from a predominantly criminal law

basis to an expanded civil law basis. He also commented on the new statutory provisions in the civil part of the Act to allow for negotiated settlements. In particular, he noted the provisions relating to consent orders in section 77, and the advance clearance certificate provisions under section 74, whereby the Director can provide an exemption from the merger provisions of the Act.

Mr. Goldman also noted the recommendations in the 1985 Nielsen Task Force Report on regulatory programs where it commented that the Bureau of Competition Policy should develop a comprehensive and proactive public education program on the benefits of the maintenance of competition, develop a proactive compliance program, and increase the use of negotiated settlements, such as prohibition orders and inquiry suspension agreements.

Mr. Goldman indicated that he believed the use of negotiated settlements would allow him to ensure "the most efficient use of available financial and human resources." He stated:

> In summary, the focus of our deliberations in developing an enhanced program of compliance would be to bring about corrective action in a timely, effective and economical manner, and to foster continuing compliance on the part of members of the business community whose activities have been or may be called into question.

In providing more specific details on his initiative with respect to negotiated settlements, he stated:

> The process of reaching a negotiated settlement is a difficult one, and definitive criteria would need to be established as a guide to this kind of endeavour. Because of the lack of an impartial arbiter, this process is a delicate one. It would therefore be incumbent upon me, as Director, to ensure that this conflict resolution technique is applied in an equitable fashion, on a consistent basis.
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> ...
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> With respect to the undertakings side of negotiated settlements, while the negotiation and acceptance of an undertaking in a civil matter flows readily from the nature of these proceedings, it is a much more difficult task to determine under what circumstances such a course of action would be appropriate in a criminal case. In that regard, we will be studying the feasibility and desirability of using undertakings for pre-referral criminal matters. However, the preferable route which I tentatively intend to pursue more frequently is to negotiate the acceptance of a prohibition order under s. 30(2) - as opposed to suspending an inquiry on the basis of undertakings - but we are studying the appropriateness of using the latter approach in some cases.

Mr. Goldman cited the Bay-Simpson case as a precedent for the Director discontinuing an inquiry upon receipt of undertakings. He indicated that the legal foundation for the Director agreeing to suspend an inquiry in exchange for undertakings flows, in his view, from subsection 20(1) of the Act which gives the Director discretion to discontinue an inquiry if he decides the matter does not justify further inquiry.

It was not clear from Mr. Goldman's remarks whether he believed that section of the Act permitted him to discontinue inquiries because he believed the resources of his Bureau could be more effectively used in investigating other matters. The undertakings and actions by the Director in the Bay-Simpson case did not appear to directly rely on section 20 for their foundation. The Director's decision in that case to discontinue the inquiry was based, at least in part, on the fact that he believed the undertakings given by the Bay effectively meant that he no longer had reason to believe that an offence was about to be committed. That is a different legal basis, of course, from the general power created in subsection 20(1) to discontinue an inquiry when the Director believes no further inquiry is necessary.

Mr. Goldman added a cautionary note with respect to the policy initiative he was discussing for the first time. He said:

> I would like to emphasize that we are still in the process of developing our policy framework for negotiated settlements. Therefore, I would caution you that the ideas which I put forth to you today represent concepts that we are considering and do not carry the mantle of established Bureau policy. On the other hand, I would be very interested in hearing your views on any of the subjects under discussion.

Mr. Goldman also announced in his speech that he is considering the creation of a special advisory group to the Director as a means of facilitating and implementing the Bureau's mandate. He said such a body might be comprised of experts in the fields of law, economics, business and academia. He said that:

> A group such as this could be useful as a means of conveying to us how the new Act is being perceived by members of the business community and among the public at large.

Mr. Goldman has stressed an enhanced reliance on negotiated settlements in subsequent speeches he has given since the CBA speech. In particular he commented on an enhanced program of compliance in a speech that he gave to the Law Society of British Columbia as part of its continuing legal education series. He also commented on enhanced compliance in an address he gave to the International Bar Association.

WETSTON APPOINTED DEPUTY DIRECTOR OF INVESTIGATION AND RESEARCH

Mr. Calvin S. Goldman, Director of Investigation and Research under the *Competition Act*, has announced the appointment of Mr. Howard I. Wetston as a Deputy Director of Investigation and Research. Mr. Wetston commenced his new responsibilities on October 6, 1986.

The *Competition Act* authorizes the Public Service Commission to appoint Deputy Directors from time to time. Deputy Directors have the general authority to act in the absence of the Director and may be delegated specific authority by the Director to function with respect to particular inquiries. With Mr. Wetston's appointment, there will be two Deputy Directors under the *Act*, the second being Mr. Michael P. O'Farrell. Mr. O'Farrell was Director from September 1, 1985, until Mr. Goldman's appointment in May of this year. Mr. Melvin S. Cappe, who had been a Deputy Director under the *Act,* since 1982 and was extensively involved in the consultations leading to the new *Competition Act*, has left the Bureau of Competition Policy to become the Assistant Deputy Minister of Policy Coordination in the Department of Consumer and Corporate Affairs.

Mr. Wetston obtained his law degree from Dalhousie University and is a native of Nova Scotia. Subsequent to obtaining his law degree, he joined the federal public service as an officer in the Department of Justice. In that capacity he served as counsel to the Department of Consumer and Corporate Affairs and also was coordinator of all criminal competition matters in the Criminal Law Section of the Federal Department of Justice. In that latter capacity he also acted as prosecutor for the Federal Attorney General in the *Albany Felts* case, the last contested section 32 conspiracy case since 1976 where the Crown has been successful.

In 1981 Mr. Wetston left the Justice Department to become General Counsel to the Consumers' Association of Canada's regulated industry program. In that capacity he represented the Consumers' Association before many

federal boards and tribunals such as the the Canadian Transport Commission, the CRTC, and the NEB.

On leaving the Consumers' Association, Mr. Wetston became Assistant General Counsel to the National Energy Board. After a short term in that position, he was promoted to the position of General Counsel to the Canadian Transport Commission. He remained in that position until 1985, when he joined the Ottawa office of Burnet, Duckworth & Palmer. He leaves private practice to re-join the government in his new position. Mr. Wetston has extensive government experience in all areas of competition policy as well as extensive experience in economic regulatory matters, an area of increasing activity for the Director of Investigation and Research in the last few years.

MCDOUGALL GETS PRIVATIZATION AND REGULATORY AFFAIRS

In the general cabinet shuffle that took place in August, Barbara McDougall was appointed Minister of State for Privatization, Regulatory Affairs, and the Status of Women. Responsibility for the government's new Regulatory Reform program, announced last Spring, had previous been assigned to the President of the Privy Council.

Observers view the shift of Regulatory Affairs to Ms. McDougall as confirmation of the government's seriousness about regulatory reform. Don Mazankowski, the new President of the Privy Council, could not possibly have given the area the attention it requires because of his substantial additional responsibilities as Deputy Prime Minister. Ms. McDougall, it is thought, will have both the time and the inclination to do the job.

McDougall should have some powerful, and knowledgeable allies at the Cabinet table. Mazankowski is known to be strongly committed to the transport economic regulatory reform principles of the "Freedom to Move" legislation he introduced last June. Ray Hnatyshyn, the new Minister of Justice, was the architect of the government's new *Citizen's Code of Regulatory Fairness*, and the federal Regulatory Reform Strategy and Workplan when he was President of the Privy Council. He now inherits the Department of Justice Decriminalization and Compliance Enhancement Project which has been an important source of ideas and initiatives for federal regulatory reform activities.

The top official in the Ministry of State is Janet Smith, who holds a cross-appointment as Associate Secretary to the Treasury Board. Ms. Smith was formerly Associate Deputy Minister in the Department of Transport. Prior to that, she was Assistant Secretary to the Cabinet (Economic & Regional Development Policy).

The Regulatory Affairs Secretariat, created to oversee the government's new regulatory reform program, has been shifted from the Privy Council Office to the new Ministry of State. Anthony Campbell, who chaired the Nielsen Task Force Study Team on Regulatory Programs, will head up the Secretariat in its new location.

The government's new Regulatory System, which includes Annual Departmental Regulatory Plans, mandatory prepublication of draft regulations, and publication of Regulatory Impact Analyses became effective September 1. These new arrangements represent the culmination of over 5 years of work on reforms to the federal regulatory apparatus. The Rules of Procedure for the new Competition Tribunal and the regulations for Merger

Prenotification will be be among the first federal regulations subject to the new prenotification and analysis requirements, although they are not "regulatory" initiatives in the accepted sense of the word. Publication of the government's first set of Regulatory Plans is targetted for November.

GOVERNMENT INTRODUCES TRANSPORT DEREGULATION LEGISLATION

In the closing days of the the last Session of Parliament, Don Mazankowski, then Minister of Transport, introduced two bills containing legislative provisions for further deregulation of the transport sector in Canada. The bills died on the Order Paper when the Session was prorogued, but in the October 1st Speech from the Throne, the Government confirmed its intention to reintroduce the legislation as a priority in the new session.

One bill (tabled June 26, 1986 as C-126) would establish the *National Transportation Act, 1986*. While some sections of the existing legislation, passed in 1967, would be retained the bill introduces fundamental changes in the regulatory arrangements for rail and air transport. The Canadian Transport Commission is to be replaced by a new "streamlined" National Transportation Agency, which will play a far more limited role in economic regulation of the transport modes, but which will assume a heightened role in dispute resolution between shippers and carriers.

The second piece of legislation, (tabled June 26, 1986 as C-127) would establish the *Motor Vehicle Transport Act, 1986*. This legislation establishes the basis for a phased move to less economic regulatory control over extraprovincial trucking. It is understood that the provinces will be moving in the same direction with respect to intraprovincial trucking.

The entire legislative package represents one of the most fundamental and far-reaching reforms of any area of economic regulation at the federal level. It is a complex and highly detailed piece of legislation with significant federal-provincial and international implications.

The legislation delivers on the government's policy proposals that were contained in its "Freedom to Move" White Paper, published in July, 1985. In that document, the government proposed substantial reform of economic regulation of the transportation sector in Canada. "Freedom to Move" was reviewed by the House of Commons Standing Committee on Transport which, after extensive hearings, issued a report in November, 1985 endorsing the basic policy principles proposed by the government. The Committee did, however, suggest some modifications in the details of the new regulatory arrangements and, to a large extent, these have found their way into the proposed legislation.

New National Transport Policy

The new legislation contains a revised statement of National Transportation Policy, the major features of which are:

- Safety of the transportation system is the top priority.
- The transportation system exists to serve the needs of shippers and travellers.
- Competition and market forces are to be the prime agents in providing economic, efficient and adequate transportation services at the lowest total cost.

- In order to encourage competition both within and among the transportation modes, economic regulation of carriers will be minimized.
- Carriers should, so far as practicable, bear a fair share of the costs of facilities and services provided at public expense and to be compensated for publicly-imposed duties.
- Transportation is a key to regional development.
- Undue obstacles to the mobility of all, including disabled persons, should not be created by carriers.

Additional policy objectives have been added, but perhaps the most fundamental change is the inclusion of intra-modal competition--a significant departure from the orientation set in the existing section 3 statement which focuses on intermodal competition.

Dispute Resolution Mechanism Proposed

At the same time that the federal government is moving to relax economic regulatory controls over the transport sector, it is establishing new procedures for the resolution of private disputes between shippers and carriers. The proposed National Transportation Agency will be given important new functions in this area.

Mediation services will be provided by the Agency at the request of the parties involved. Final-offer arbitration will be available to resolve shipper-carrier disputes which cannot be settled by the parties or through mediation. If a shipper cannot agree with a carrier on rates or conditions, he will be able to submit the matter to the Agency for arbitration. Under the proposed legislation, decisions by the independent arbitrators appointed by the Agency may decide only between the carrier's final offer and the shippers's final offer. The parties must abide by the arbitrator's decision for up to a year. This new system of dispute resolution is considered long overdue and will replace the outmoded and cumbersome arrangements established pursuant to the existing s. 23 of the *National Transportation Act.*

Disputes that affect the public interest will be handled differently, essentially a modification of the existing procedures. The new National Transportation Agency, acting on a complaint from a shipper, carrier, or other interested person,will be able to inquire into any carrier's rate, act or omission where the public interest may be prejudiced. The new statement of National Transportation Policy and other factors spelled out in the legislation will be considered by the Agency in determining whether the public interest has been harmed.

Further Deregulation of Domestic Air Services

The past few years have seen a substantial dose of competition introduced into the air sector, a development that was accomplished by changing the types of decisions and rules affecting entry and rates under regulatory structures established in the existing legislation. It has been recognized for some time, however, that changes in that legislative framework would be necessary to achieve the full measure of economic deregulation and the benefits that were expected to flow therefrom.

The existing legislation provides for controls over entry, exit, levels of service, routes, operating equipment, passenger fares, and cargo tariffs. Of

these, the most significant is the "public convenience and necessity" test which has been used as it was intended--to control entry and restrict competition within the industry.

Clearly, the regulatory objectives have changed and the government's proposed legislation is intended to establish a new framework in which economic controls over the activities of air carriers are kept to a minimum. The new legislation replaces the "public convenience and necessity test" with a "fit, willing and able" test that focuses on the safety of carrier operations and adequate liability insurance.

Carrier operating licences will no longer restrict competition by imposing limitations on the type of service that can be offered (eg. "charter", *vs.* "scheduled" carrier, routes and points to be served, or types of equipment to be used). Carriers wishing to discontinue or significantly reduce service will be allowed to do so by giving the public 60 days advance notice.

Regulatory approval of passenger fares and cargo rates is essentially eliminated. Carriers will be able to establish fare levels and to lower fares without regulatory approval, but they will be prohibited from charging fares in excess of those published and in effect. Increases in regular air passenger fares on "monopoly routes" will be appealable, and the Agency will have the authority to disallow such an increase if it is determined to be unreasonable.

Continued Regulation of Northern and Remote Air Services

Although there has been, over the past few years, *de facto* reduction of economic regulation over air services in southern Canada, strict regulation has been maintained over services in the north and to remote communities. The reason for this has been a concern that the level and quality of service would decline in a freely competitive environment, because the market is so thin. The government's new legislation maintains a legislative base for continued economic regulation of air services in a "designated area" (ie. northern and remote areas) which is defined in the statute. The boundries of this area can, however, be adjusted by regulation.

The basic changes in economic regulation of air transport that apply elsewhere in Canada will also apply in northern and remote areas, supplemented by special provisions. If some party (eg. a community or another carrier) feels that granting a new licence would jeopardize the continuation of essential air services to a community in the designated area, they may object to the licence application. Intervenors will have to satisfy the Agency that the new service would lead to a "significant decrease or instability in the level of domestic service". Operating licence conditions will continue in the north to limit aspects of the carrier's activities such as the type of service (scheduled *vs.* charter), routes, points to be served and schedules. Fare levels (as well as fare increases) on routes serving northern Canada will be appealable to the new Agency and can be disallowed if found unreasonable. As in the south, 60 days notice to the public will be required to discontinue or reduce a service.

If the Minister of Transport determines that an existing domestic air service is essential and cannot be provided on a purely commercial basis, the federal government may provide direct or indirect financial assistance . The Government has said that any subsidies should be provided on a tendered basis, wherever possible.

International Air Services

The provisions, governing international air service will remain essentially unchanged under the new legislation. However, the Minister of Transport is being given the authority to issue binding directions to the new National Transportation Agency concerning licensing or other matters in response to actions by foreign governments or airlines where the actions are considered prejudicial to Canada's interest in international civil aviation.

Changes to Rail Freight Tariff Requirements

The regulatory changes being proposed for rail transport represent a signficant re-orientation in regulatory approach. The practical effect of these revisions is likely to be more significant than those proposed for the air sector, simply because regulatory practices that restrict competition and/or protect positions of market power have been maintained by the CTC to a greater extent in the rail sector.

The new legislation will allow shippers to negotiate confidential contracts with Canadian railways for the first time. This change is intended to give shippers and railways the flexibility to negotiate the services and other conditions and to tailor rates more closely to the competitive situation of the shipper. Existing provisions on agreed charges are to be continued in the new National Transportation Act primarily as a transition measure.

The new legislation retains the essential requirement that all rail rates be compensatory. Modifications will focus the prohibition on rates which are predatory or designed to drive a competitor from the market.

Rail Freight Competitive Access

The new legislation contains competitive access provisions that are intended to give shippers more options for moving their products to market. The interswitching limit will be increased to 30 km (18 miles) of an interchange point. In addition, within 50 km (30 miles) of any interchange point, a railway will be able to seek the right to run trains over the tracks of another railway in order to pick up and deliver goods ("terminal running rights"). Compensation will have to be paid to the other railway, a minimum commitment of 3 years will be required, and the new service must be available to all shippers on the line.

For shippers not close enough to an interchange point to benefit from interswitching or terminal running rights the Agency may, on application, set a competitive line rate to the interchange point, if they can arrange a deal with the second carrier. This provision will enable many currently "captive" shippers to have two competing routes to destination.

Railway Branchlines

The new legislation will allow the National Transportation Agency greater flexibility in deciding what to do with branchlines, and sets definite time limits for decisions on abandonment applications. Among the options open to the Agency are facilitating and approving the sale of the branchline to another operator, recommending that the Minister of Transport provide financial assistance to develop alternate means of transportation, recommending that the Minister of Transport order one branchline interconnection, ordering the line be retained with a subsidy for three years and then be reviewed again, and

allow the branchline to be abandoned, with or without a time delay to allow a smooth transition to an alternative service.

The definition of branchline costs and losses has been changed to ensure that it includes only costs that are directly incurred by the railways in operating the line in an efficient manner.

The government may ease the pain of branch line abandonments through special assistance. Under the new legislation, the Governor in Council may order that the line be retained where the operation of a line affects a large region of Canada and where its abandonment would lead to a significant impact on shippers with no effective alternative means of transportation.

Extra-Provincial Trucking

Regulatory responsibilities over extra-provincial trucking have been delegated by the federal government to the provinces since passage of the *Motor Vehicle Transportation Act* (MVTA) in 1954. Each province has developed a different regime for the regulation of the trucking industries.

The federal and provincial governments are moving toward new regulatory arrangements for the trucking industry which will see simplified procedures for obtaining operating licences and the abolition of tariff approvals and route restrictions. The new MVTA sets the foundation for a uniform nation-wide licence standard based on a "fitness" test (including primarily safety and insurance requirements). This new test is to be effective on January 1, 1988.

During the intervening transition period, licence applications will continue to be subject to a "public interest" test, with the onus on the complainant to prove that public harm will be caused by new entrants. Extra-provincial tariff approval will be eliminated under the new legislation. Numerous other conditions of licences, such as route restrictions, will also be removed at the end of the transition period. A uniform National Safety Code for trucking is being developed and should be in place by the time the new legislation comes into effect.

No changes to the arrangements for regulation of extra-provincial bus services are proposed in the new legislation.

Northern Marine Transportation

The new legislation provides for continued regulation of entry, capacity, and area of service for the transport of resupply goods by water to communities on the Mackenzie River watershed. However, regulation of northern marine freight operations will be simplified and streamlined.

New Controls Over Mergers and Acquisitions

The new legislation proposes signficant changes in the review of mergers and acquisitions of Canadian Transport companies. Under s. 27 of the existing *National Transportation Act*, the CTC may conduct reviews only when the acquiring firm is another transport firm.

The new legislation will establish an up-dated review mechanism that focuses on major acquisitions and mergers using an asset/sales trigger mechanism similar to that found in the *Competition Act*. However, the net is extended more widely. Mergers and acquisitions by foreign and domestic firms, individuals,

the provinces, and (federal and provincial) crown corporations will all be reviewable if a threshold of $20 million (compared with the $35 million threshold of the *Competition Act*) is exceeded.

A special prenotification procedure is required for these large mergers. The National Transportation Agency must be advised of any proposed acquisition of an interest of 10% or more of the voting shares (or of all or substantially all of the assets) of a transportation undertaking that has assets or annual sales in Canada of $20 million or more.

The Agency will give public notice of the proposed acquisition and, if an objection is received, will conduct a review of the matter. If the Agency determines that the acquisition would be against the public interest, as defined by the new national transportation policy, it may disallow the acquisition. The new legislation stipulates that if a decision is not made within 120 days, the Agency is deemed to be of the opinion that the proposed acquisition is not against the public interest. The Governor in Council will have the authority to rescind the Agency's decison (including a deemed decision).

Where a foreign firm is proposing to acquire a Canadian transport company, an initial review may be required under the provisions of the *Investment Canada Act.*

If the threshold requirements of the *Competition Act* are exceeded, prenotification to the Director of Investigation and Research will be required and the transaction may be subject to review before the Competition Tribunal.

Finally, if the threshold requirements of the *National Transportation Act* are exceeded, prenotification to the National Transportation Agency will be necessary and review by that body is possible. As with the *Competition Act*, the *National Transportation Act* contemplates that regulations will prescribe the method of calculating whether the assets/sale threshold has been exceeded.

DEVELOPMENTS IN BROADCASTING AND TELECOMMUNICATIONS REGULATION

By: Andrée Wylie, Smith, Lyons, Torrance, Stevenson & Mayer, Ottawa

Towards a More Competitive Telecommunications Market

One year ago, the Canadian Radio-television and Telecommunications Commission denied an application by CNCP for orders requiring Bell Canada and British Columbia Telephone to allow interconnection of CNCP's system and Bell's and B.C. Tel's networks so that CNCP could provide long distance public telephone service in competition with the telephone companies. The Commission relaxed, however, some of the restrictions against resale and sharing of telecommunications services and facilities leased from a federally regulated carrier. It authorized resale and sharing of services to provide all services other than long distance and wide area telephone service and primary exchange voice service. It also permitted sharing to provide primary exchange voice service and the sharing of long distance service to provide long distance service.

The Commission decided as well to allow the carriers an opportunity to restructure their rates prior to permitting resale and sharing activity. It directed them to file tariffs permitting resale and sharing and revising the rates for certain inter exchange services.

The tariff revisions aimed at implementing the CRTC decision to allow the introduction of a competitive resale and sharing market for the provision of business telecommunications services have been filed by the carriers. The Commission has expressed a concern that the proposed tariffs revisions could result in varying interpretations of the resale and sharing permitted by its 1985 decision and called for further filings by July 3, 1986. The deadline for submissions by interested parties was August 18.

A number of parties have argued that the facilities-based restrictions contained in the tariff revisions filed by Bell and B.C. Tel, when combined with the rate restructuring proposed, would, if approved, seriously undermine in practice the promise of an emerging competitive resale and sharing market. It has been submitted that approval of the tariff revisions filed would all but eliminate any new resale and sharing opportunities and the potential benefits to be derived from them by Canadian business users. It would effectively change, it is alleged, at the carriers' instance, the Commission's 1985 decision approving certain resale and sharing activity.

An example of the technical restrictions proposed by Bell and B.C. Tel is a prohibition against most switching of shared and resold facilities. Since the restriction would preclude the sharing of inter exchange circuits among various users at various times, it is argued, no effective sharing or resale operation could exist.

The Commission has been urged by many parties not to approve the restrictive provisions contained in the tariff revisions filed. Canadian business users and telecommunications suppliers such as those represented by the Canadian Business Telecommunications Alliance, the Canada Systems Group, the Association of Competitive Telecommunications Suppliers argue that the Commission's decision will represent a test of whether it intends to ensure that the Chairman's promise to Canadian entrepreneurs that new competitive services will be allowed to develop without delay is fulfilled.

CRTC Reduces Canadian Programming Requirements for Pay-TV Licensees

At a public hearing held on June 10, 1986, the Canadian Radio-television and Telecommunications Commission heard applications filed by the general interest PAY-TV licensees to reduce the time requirements for the exhibition of Canadian programming, overall and during prime time viewing hours, from 50% to 15% in the case of First Choice and Allarcom and from 50% to 20% in the case of Premier Choix: TVEC. The licensees also requested that their conditions of licence respecting the funding of Canadian programming be reduced.

French and English-language general interest PAY-TV services were originally licensed in 1982. Since then, a significant restructuring of the industry has resulted from financial failure and corporate and market consolidation and reorganization approved by the Commission. Each application to the Commission was made largely on grounds of poor financial results due to high satellite and programming costs, competition from a number of unregulated sources, the onerous Canadian content requirements of the original licensing decisions and difficulties in achieving adequate market penetration. Lack of subscriber interest was attributed in part to the high repeat factor necessitated by the number of hours of Canadian programming to be

exhibited when weighed against the paucity of suitable Canadian programming material currently available.

The restructuring approved by the CRTC since 1982 has seen an originally competitive system in all parts of the country reduced to general interest PAY-TV being provided by two English-language and one French-language services on a monopoly basis in different parts of the country.

When the Commission heard an application in 1984 to reorganize English-language PAY-TV so that the national and regional licensees would be restructured into two licensees each serving half of Canada, the Director of Investigation and Research under the *Combines Act* made strong representations in favour of retaining the existing competitive PAY-TV structure. He argued that a reorganization such as that applied for should be a solution of last resort because of its impact on the level of competition in the industry. He argued that it should not be considered until all other avenues, including the temporary lowering of Canadian content exhibition and funding requirements had been explored.

The Director also predicted that the reorganization would not forestall applications for relief from such requirements after competition had been eliminated. In his view, what was called for was a fundamental reassessment by the Commission of the availability of and prospects for the development of Canadian product, so that the alleged overexposure of Canadian programs and the failure of licensees to make expected contributions to new Canadian productions could be addressed.

In a decision issued on September 2, 1986 the Commission established new exhibition and funding requirements for First Choice, Allarcom and Premier Choix: TVEC. Amended conditions of licence require that as of 1 September, 1986 the licensees broadcast not less than 30% Canadian programming during prime time and not less than 20% Canadian programming during the remainder of the broadcast day, calculated on a semi-annual basis. New funding requirements for domestic product require licensees to expend not less than 20% of the annual gross revenues derived from their operations on investment in or acquisition of Canadian programming in each year rather than 45% of their total revenues and 60% of their total expenditures on programming.

Both at the reorganization hearing and in the recent decision amending the PAY-TV licensees' conditions of licence, the Commission emphasized that, as a regulatory tribunal, its role was limited to examining the applications brought before it. In the September 2 decision, it stated that the June hearing marked the first time the public and the Commission have had an opportunity since the PAY-TV undertakings were originally licensed, to assess the conditions of licence with respect to the exhibition and funding of Canadian programming which were included in the original licensing decisions.

Some parties such as the Alliance of Canadian Cinema, Radio and Television Artists who opposed any amendment to the PAY-TV licensees' conditions of licence and urged the Commission, at the recent hearing, to undertake a major review of the industry, would agree with the Director that a major review of the direction of the PAY-TV industry should have been undertaken by the Commission long ago, with a view to determining what steps, if any, were required to ensure that PAY-TV's original mandate to contribute to Canadian program production was fulfilled. Instead of exhibiting such leadership, the

Commission examined and approved the applications brought before it on an ad hoc basis by the licensees themselves.

CRTC Adopts "Significant and Unequivocal Benefits" Test for Media Cross-Ownership and Concentration of Ownership

On April 18, 1986, the Canadian Radio-television and Telecommunications Commission denied an application for the transfer of effective control of Tele-Metropole, licensee of CFTM-TV Montreal and of other television stations in the province of Quebec, to Power Corporation, publisher of the Montreal daily *La Presse*. The Commission found that the applicant had failed to demonstrate that the proposed transfer would yield "significant and unequivocal benefits to the communities served, or to the Canadian broadcasting system as a whole". Power Corporation having failed that threshold test, the Commission found it unnecessary to deal with the specific concerns raised by the application with respect to media cross-ownership or to assess the adequacy of any safeguards that may have been proposed to alleviate them.

In three CRTC decisions issued since April 18, 1986 the Commission has reaffirmed the significant and unequivocal benefits test as the standard to be used henceforth to determine whether a proposed transaction involving ownership concentration considerations is in the public interest. The decisions suggest that if the Commission concludes that the test is met by a prospective transferee, issues of increased concentration or of media cross-ownership are unlikely to affect its decision to approve a transfer of control.

On June 19, 1986, the Commission approved the purchase of Multilingual Television, licensee of CFMT-TV, an ethnic Toronto station technically in receivership, by one of the group of companies controlled by Ted Rogers. Rogers owns radio stations in Toronto and in other Ontario cities. The Rogers cable franchises in Ontario and in western Canada provide cable services to the greatest number of subscribers served by one cable licensee in Canada.

On July 4, 1986, the Commission approved applications by Baton Broadcasting, licensee of CFTO-TV in Toronto, for the purchase of a number of television stations in Saskatchewan. The transactions resulted in the ownership by Baton of all existing private television stations in Saskatchewan except CJFB-TV in Swift Current.

On August 26, 1986, the Commission approved the acquisition of QCTV Limited, Alberta's second largest cable company, by the second largest cable company in Canada, Videotron Limitee of Montreal.

In all three cases, the Commission examined the commitments made by the prospective transferee and concluded that, since significant and unequivocal benefits would accrue from the transactions to the specific communities served by the undertakings and to the Canadian broadcasting system generally, the transactions were in the public interest and should be approved. The criteria used to identify such benefits included, in addition to whether the transferee was prepared to assume the transferor's obligations, such factors as restoration of financial stability, technical improvements, increased Canadian programming initiatives and expenditures, contributions to the development of Canadian talent and related production industries, access to

superior financial resources and enhanced expertise, management, marketing and leadership capabilities.

The Commission did reiterate its concern that an effective degree of diversity of ownership of broadcasting outlets and of programming and information sources be maintained. It reviewed as well the measures proposed by the transferees to attenuate any negative impact on such diversity that may result from approval of the applications. However, those concerns were clearly secondary to the transferee satisfying the significant and unequivocal benefits test.

The Commission, in fact, concluded that approval of the applications was in the public interest because significant and unequivocal benefits, in large measure directly dependent on corporate size and therefore on concentration of ownership, were likely to flow from the transactions. In the Baton decision, the Commission emphasized that, in its view, the common ownership of the Saskatchewan stations by a well-financed, experienced and committed broadcaster clearly outweighed any concerns raised by the applications with regard to concentration of ownership.

Historically, the Commission has assessed each application involving cross-ownership and concentration of ownership on its own individual merits. Its review has taken into account in each case the extent to which the commitments made by the transferee were commensurate with the size and nature of the transaction and reflected the importance of the responsibilities to be assumed. Never before, however, has the Commission been as deliberate in establishing a yardstick against which to measure such proposals. Its recent decisions indicate the priorities it intends to place on one aspect of the public interest over any other. They suggest that the Commission is far more interested in the financial capacity of a purchaser and in his willingness to use it to contribute to the broadcasting system than it is concerned with issues of concentration and media cross-ownership resulting from transfers of control.

With these decisions it is possible that the broadcasting system will continue to become concentrated in the next few years. By casting the significant and unequivocal benefits test as the threshold test to be met, the CRTC can allow such concentration to increase and, at the same time, avoid the difficult exercise of refusing to authorize a transfer on the ground that the decreased competition in the market place that will result from it, is unacceptable. The Commission need only find that the benefits proposed are not significant or unequivocal.

Interestingly, Videotron Limitee has recently made public its bid for effective control of Tele-Metropole. The transaction will involve some $29 million more than the agreement reached between Tele-Metropole and Power Corporation. The commitments made by Videotron will undoubtedly come under close scrutiny.

The Commission has also heard this month applications by New Brunswick Broadcasting, a company owned by K.C. Irving and his sons, for new independent stations, one located in Halifax and one located in Saint John, with rebroadcasters in Moncton and Fredericton, as well as an application for a new FM radio station in Saint John. The Irving family already owns a television station in Saint John, with repeaters throughout the province, and the four English-language newspapers serving the province. A decision is expected in the next few months.