REGULATORY AND POLICY DEVELOPMENTS

THE SUPREME COURT OF CANADA RULES ON CRTC TELECOMMUNICATIONS JURISDICTION

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Most telecommunications carriers in Canada construct, own, operate and maintain facilities in one province. In general, Regulation of these carriers is carried out by provincial boards and commissions, not by the federal Canadian Radio-television and Telecommunications Commission. Notable exceptions to this are Bell Canada, the only interprovincial telephone company, two CN subsidiaries and British Columbia Telephone Company, a company declared by statute to be an undertaking for the general advantage of Canada.

Undertakings with facilities within one province have nevertheless been able to provide telecommunications users within the province with access to integrated telecommunications services, not only intraprovincially but also interprovincially and internationally. Through their participation in Telecom Canada, an unincorporated organization comprised of all major Canadian telecommunications carriers except CNCP, provincial telephone companies have entered into contractual agreements with the owners of telecommunications systems outside a province, and indeed outside Canada, permitting the connection of a provincial network with extraprovincial networks. Such telephone companies have nevertheless continued to be regulated provincially, leaving some doubt as to any one regulator's real ability to control the terms and conditions for the provision of services reaching beyond the territory served by the carrier it oversees. The division among carriers of revenues accruing from interprovincial and international services and the terms and conditions of connection between their respective systems to provide services requiring the interchange of traffic between telecommunications networks have been perceived as the major areas where, in many cases, regulatory control is likely to be no more than *pro forma*.

In 1979 and 1981 respectively, the CRTC required Bell and BC Tel, federally-regulated telephone companies, to permit CNCP, another federally-regulated carrier providing telex and other telecommunications services across Canada, to interconnect with their facilities in order to allow CNCP to provide certain interconnected private line and data transmission services.

In 1982, CNCP tried and failed to negotiate an agreement with Alberta Government Telephones, an undertaking owned by the Government of Alberta, for CNCP interconnection with the network operated by AGT. CNCP then filed an application with the CRTC under the provisions of the *Railway Act* for certain orders requiring AGT to permit interconnection with CNCP. CNCP relied in doing so on its long-held belief that provincial telephone companies constitute undertakings connecting provinces and extending beyond the limits of a province and are as such subject to federal rather than provincial jurisdiction.

The jurisdiction of the CRTC was debated in the Federal Court. In the Trial Division, Madame Justice Barbara Reed found AGT's system to constitute a non-local undertaking subject to federal regulatory authority from a constitutional perspective. However, she also found that, as AGT was created by provincial statute as an agent of the Crown in right of Alberta, according to principles governing Crown immunity, AGT was not bound by the *Railway Act* and was therefore not subject to CRTC jurisdiction. The inescapable result of her judgment was that privately-owned telecommunications carriers such as New Brunswick Telephone Co. and Maritime Telephone and Telegraph Company Limited which operate in substantially the same manner as AGT are most likely subject to CRTC jurisdiction.

Not surprisingly, an appeal was launched. In December 1985, the Federal Court of Appeal upheld the Trial Division on the constitutional issue but reversed the Judgment on the Crown immunity issue. The Court concluded that AGT could not invoke its status as a Crown agent to avoid the laws applicable to federal undertakings when it exercises its powers in a manner inconsistent with or outside the scope of the provincial purposes for which it was created as a Crown agent. In other words, the Court found that when AGT operates a federal telecommunications undertaking, thus exceeding its provincial authority, it becomes subject to the *Railway Act*.

The Supreme Court of Canada will review this Fall in *CNCP Telecommunications v. AGT and CRTC* the respective legislative and regulatory competence of Parliament and of the provincial Legislatures in an area of increasing national importance: The provision on an integrated and to a large extent a monopolistic basis, of local, interprovincial and international telecommunications services. The implications of the Supreme Court upholding the Judgment of the Federal Court of Appeal are far-reaching on many fronts, constitutional, regulatory, political and practical:

- The right to regulate telecommunications within a province has been jealously guarded by most provincial legislators as an instrument of provincial policy-making. In fact, in many cases, the provincial government owns the telephone company serving the province.

- The telephone companies have been able to develop and to provide telecommunications services across provincial boundaries without effective regulatory intervention to date. One may question the need for this cooperative arrangement to be scrutinized by a single federal regulator.

- Could a federal regulator be empowered, under Canada's constitutional division of powers, to oversee the provision of local as well as interprovincial and international telecommunications services?

- Could the federal and provincial governments opt for some form of "cooperative federalism" which would allow in large measure continued provincial autonomy and, effectively, through legislative amendments, the preservation of the *status quo* of some eighty years?

- As competition in the provision of telecommunications services increases, could part of the answer be found in a larger measure of regulatory forbearance?

Since Madame Justice Reed's Judgment, federal and provincial officials have devoted increasing energies to a review of telecommunications regulation in Canada. Meetings have been held and a preliminary policy statement has been issued by the federal Minister of Communications. The federal and provincial governments may have an urgent need for a new regulatory scheme when the Supreme Court determines the legal questions raised by the *AGT case*.

At approximately the same time as the Supreme Court of Canada considers an appeal of the *AGT* decision, it will also hear a motion for leave to appeal a July 1987 Judgment of the Federal Court of Appeal in *Bell Canada* v *CRTC*. In a two-to-one decision, the Court found that the CRTC had exceeded its jurisdiction in directing Bell Canada, in October 1986, in Telecom Decision CRTC 86-17, to return to its subscribers of record, on a pro-rated basis, $206 million found by the Commission to be excess revenues earned over 1985 and 1986. Such revenues were the result, in part, of a rate increase granted Bell by the Commission on an interim basis effective January 1, 1985 which the Commission then suspended on September 1, 1985 following an ongoing assessment of Bell's financial performance.

Telecom Decision 86-17 followed a 1986 public review of Bell's economic performance of the previous two years and of its revenue requirement for 1987. The Commission expressed its views in the decision as to what would have been the permissible rate of return on equity for the years 1985 and 1986, and what it should be for 1987. It ruled on a final basis, in the light of such findings, on the level of rates allowed on an interim basis for 1985 and 1986 and it established Bell's rates for 1987. The Commission found the rate approved on an interim basis to have yielded Bell revenues in excess of the permissible ROE range in 1985 and 1986.

At issue is the jurisdiction of the CRTC under the *Railway Act* and the *National Transportation Act* to disallow retroactively rates it has already approved or fixed by interim order and to order the return to subscribers of the revenues earned in excess of a revenue requirement fixed by final order on a date subsequent to the interim order. The majority Judgment characterized the order as "a retroactive decrease of the tolls for 1985 and 1986" and, indirectly, as a finding of just and reasonable tolls required by the provisions of the *Railway Act*. The CRTC described the order as the exercise of an express statutory power to make an interim order regarding rates and to reserve for later a final determination, including the power to correct retroactively what was ordered in the interval. The power relied upon by the Commission is found in subsection 57(2) of the *National Transportation Act* which empowers the Commission:

> ...instead of making an order final in the first instance, [to] make an interim order, and reserve further directions either for an adjourned hearing of the matter, or for further application.

The question raised, stated the majority of the Court, is whether Parliament intended to confer on the Commission a rate-making regulatory role that can be retrospective as well as prospective. The Court concluded that the only rates that the Commission may approve or prescribe, be it in final or interim decision, are those that the Commission considers <u>at that time</u> to be just and reasonable rates to be levied henceforth.

As noted above, the *Bell* decision was not a unanimous judgment of the Court. Mr. Justice Hugessen found that an interim rate order can, like all rate orders, have prospective effect, but, unlike final rate orders, is an order in which the Commission has reserved "further directions". Such "further directions", Mr. Justice Hugessen held, may be retroactive to the date the interim order was originally made. The CRTC, therefore, had the power, concluded Hugessen J., in October 1986, to fix just and reasonable rates for Bell with effect from 1 January 1985, the date on which it made its interim order. The minority judgment questioned whether the power to make an interim order can simply be one which is subject to later, prospective revision by the Commission since all orders fixing tariffs and tolls may be so revised, even on the Commission's own motion. Hugessen J. concluded that subsection 57(2) of the *National Transportation Act* indeed adds to the powers which the Commission already has to fix tolls prospectively by empowering it to vary retroactively tolls fixed by interim order.

The Chairman of the CRTC echoed somewhat the minority judgment of the Federal Court of Appeal when the Commission decided to appeal the *Bell* decision. He spoke of the importance of the Commission's power to increase rates on an interim basis in order to grant temporary relief without a full airing of a rate increase request as long as the power is coupled with the capacity to adjust such increased retroactively at a final stage if they are found to have been unjustified on closer scrutiny.

It may well be that the real problem lies in the complex, cumbersome and therefore lengthy process involved in adjusting Bell's rates. It is a process which leads to regulatory lag rather than to a regulatory regime which can respond quickly to the rapidly-changing economic environment in which carriers often operate. Such a process may indeed require the power to make interim rate increase orders without a full review of their need with the attendant power to erase their effect if the orders are later found to have been made in error.

Given that the law on regulatory decisions which have retroactive application is less than settled in Canada and the fact that the Federal Court of Appeal's judgment in *Bell Canada* v *CRTC* was not unanimous, the Supreme Court is likely to grant leave to appeal.

TELECOMMUNICATIONS POLICY FRAMEWORK ANNOUNCED

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On July 22, 1987, the federal Minister of Communications, Flora MacDonald announced a policy for telecommunications in Canada. The policy statement has no immediate legal effect. However, it will provide an analytical starting point for the Department of Communication's consideration of applications for radio transmission facility licences by telecommunication services and Cabinet appeals from CRTC telecommunications decisions. The policy may also guide federal government negotiations with the provinces in its recent efforts to conclude a federal-provincial agreement on telecommunications regulation.

The policy may, therefore, have a signalling effect for telecommunications industry decision-making. It may influence some CRTC decisions, and it may provide a demonstration of the federal government's desire to reach a deal with the provinces on telecommunications jurisdiction and policy.

The policy framework paper released by the Minister is largely devoted to a review of existing telecommunication regulatory legislation and practice as well as recent structural developments which have increased the scope for competitive provision of telecommunication services.

The policy statement covers only two issues, <u>regulation of new entry</u> and <u>foreign investment</u>, and indicates only that the Minister intends to "use current powers", and to seek new legislation <u>where necessary</u> to implement the following policy objectives:

- the designation of a class of telecommunications carrier (Type I) that may own and operate interprovincial and international telecommunications network facilities for the purpose of providing basic telecommunications services to the public (all existing federally-regulated carriers are included in Type I);
- the authority to establish the general terms and conditions for the operation of Type I carriers, especially their obligations to serve and to provide access to their network facilities for other carriers;
- statutory guidelines requiring effective Canadian ownership and control of all Type I carriers operating in Canada that would include provisions prohibiting foreign nationals from holding more than 20% of their voting shares (with appropriate arrangements made to exempt any existing Type I carrier which is currently foreign owned and controlled);
- the designation of a class of telecommunications carrier (Type II) that will be authorized to provide services to the public utilizing in whole or in part the network services of Type I carriers; and

- legislative and regulatory measures necessary to ensure that Type II carriers obtain access to the network facilities of Type I carriers on just and reasonable terms and conditions and in a manner which promotes fair and equitable competition in the provision of new telecommunications services.

The statement indicates that these measures are intended to encourage the rapid growth of innovative and competitive new services that are of interest to the business community and to prevent inefficient over-investment in telecommunications network capacity. In essence, the policy proposes to achieve these objectives by closing new entry into the Type I class "for the time being" and to improve interconnection rights with Type I carriers for the Type II class.

With respect to the question of facilitating actual changes to industry competition, the policy statement has left more questions unanswered than it has answered. Some unanswered questions are:

1. What criteria will be employed to designate a new Type I carrier?

2. Since CNCP and Telesat are included in Type I, does this mean that there will be no legal impediments to their providing switched long distance or local voice services through interconnection?

3. What are "basic" telecommunication services? Does this include all services which can be simultaneously transmitted using fibre optic cable and digital technology or will the term cover only selected services (e.g. voice grade transmissions). If it is the latter, how can the policy impact different services provided by the same facilities differently? Are private line services, for which the CRTC has developed a liberal competitive interconnection policy, basic or not?

4. What will the "reasonable" interconnection terms be? Will the current authority of the CRTC to establish terms and conditions of service provision, including system interconnection conditions, be changed? If so, how and where?

5. Will every firm offering telecommunications services be classed as Type II, or will there also be restrictions on eligibility to this class? If so, what will the restrictions be and what will their effect be?

6. What body or bodies will determine Type I interconnection terms? If provincial regulators will be the court of first instance for inter-provincial interconnection (e.g. private line services, cellular radio systems) what means of appeal, if any, to federal authority will be available to ensure that national standards apply?

7. Will Type I carriers compete in Type II services? If so, what protections against discrimination or cross-subsidization to the detriment of pure Type II carriers are envisaged?

8. Where do carriers owning only intra-provincial facilities fit? What then is an "inter-provincial facility" as opposed to an "intra-provincial facility"?

It is not entirely clear what impact the foreign investment limit can be expected to have. The GTE-controlled companies, BC Tel and Telebec, are grandfathered. There has been no indication of foreign investor interest in acquiring control of BCE which controls Bell Canada and the other traded telecommunications carriers. The remaining carriers are Crown corporations whose owners are not likely to privatize them let alone allow a major foreign shareholding interest. Teleglobe has a statutory foreign investment limit. The *Telesat Act* prevents any shareholding by non-Canadians. Finally, a prospective foreign-controlled Type I could be kept out of the market using the same restrictions that could freeze out a new Canadian-controlled Type I carrier, and, if allowed in, the foreign carrier would be subject to the same operating restrictions as Canadian Type I carriers.

This foreign investment limit would appear to have been introduced to ensure that all industries falling within the purview of the federal Department of Communications (cultural industries, broadcasting, and telecommunications) are treated as a related group and exempted from any general reduction on foreign investment controls flowing from the recently concluded Canada-U.S. trade agreement.

The impact of the Type I/Type II carrier policy is more difficult to assess, largely as noted because it has left so many important questions unanswered. However, some of the statement's premises, which are woven through its lead-up text, suggest an underlying desire to protect incumbent full-service carriers from further competition and to carefully and consciously plan the introduction of new competition in existing services (principally long distance service). These premises, if given life through the elaboration of the control elements of the policy (e.g. carrier classification criteria, terms and conditions of carrier classification and carrier interconnection) might, in fact, restrict the current competitive evolution of the Canadian telecommunications industry.

A key premise of the policy would appear to be that additional regulation is needed in order to prevent Type I carriers as a group from investing in switching and transmission capacity to the point that available economies of scale or scope and other operating efficiencies are lost. This leads to a policy distinction between owners of full service nationally designed networks (Telecom Canada, CNCP, Telesat) and all others (value-added carriers, and presumably Cantel, the national cellular radio service competitor of the telephone companies).

One problem with this premise is that de-monopolization of Canada's telecommunication networks and the erosion of their control over the ownership of network facilities has been occurring for quite some time. Every privately-owned system or local area network represents a loss of control over telecommunications facilities by traditional telecommunications carriers. With this evolution and with increasingly rapid technological change it may be virtually impossible to identify just where and when economies of scale or scope are being given up.

A second problem is that there would appear to be no economic reason to single out networks spanning provincial boundaries as being particularly vulnerable to the perceived dangers of over-investment. A major new intra-provincial network serving, say private systems in the downtown core of Toronto or Montreal through private coaxial or fibre-optic cable, could conceivably pose the same problems for industry efficiency if it handles a large volume of traffic.

The basis of DOC's facility over-investment concern has not been articulated. There is no pressure in Canada or the U.S. for the introduction of duplicatively configured, competitive local networks. There remains pressure for the introduction of long distance competition in Canada, but the American experience to date with long distance competition does not appear to have raised concern that overall efficiency in this sector has been harmed by competition.

Existing CRTC interconnection policies have not explicitly accepted this over-investment thesis as a ground for controlling competition. Furthermore, the CRTC's case-by-case approach to the introduction of competitive services tends to focus discussion on financial and price impact assessment of the specific proposal in issue and away from global questions such as "how much competition is enough" or "when are economies of scale lost"? The CRTC's case-by-case approach has generally resulted in acceptance of specific measures to increase competition where established carriers have been unable to prove they would suffer financial harm. Thus, acceptance of this chronic over-investment premise (in the transport sector it was often termed "destructive competition") could signal greater restraint in the introduction of new network services competition than might occur under the CRTC's approach.

Competitive entry in telecommunications has, starting with private branch exchanges, occurred through the introduction of new networking configurations, using new technology and offering distinctive service attributes. All commercial telecommunications services, whether they are termed "public networks" or "value-added carriers", own facilities and interconnect through contractual arrangements with other carriers in order to make the signals deliverable over their facilities available to the largest possible number of potential customers. In this sense, all telecommunications competition involves competition through facilities investment. A distinction between "facilities providers" and "services providers" as is presented in the policy statement therefore risks being a distinction without a difference.

Seen in this light then, the proposal to freeze membership in a preferred class of full service carrier (Type I) for the time being and to restrict entry through regulation later on may have a chilling impact on current private investment plans which may retard the competitive development of the Canadian telecommunications industry and may lead to restrictions on competitive entry that are tougher than would be applied by the CRTC under its current legislation.

CRTC DENIES BC RAIL/NORTHWESTEL INTERCONNECT

In a precedent-setting decision, the CRTC has denied an application by BC Rail to interconnect with NorthwesTel for the purpose of providing competing private line services (Telecom Decision CRTC 87-9). In this Decision the CRTC has spelled out the criteria it employs in deciding whether to permit competitive entry in the provision of public telecommunication services. The Decision makes it clear that there are limits on the markets in which the CRTC is prepared to allow private line service competition. Prior to the BC Rail/NorthwesTel Decision, the CRTC had approved all applications for limited private line service interconnection that it had received (CNCP/Bell Canada, Telecom Decision CRTC 79-11, CNCP/BC Tel, Telecom Decision CRTC 81-24, BC Rail/BC Tel Telecom Decision CRTC 85-19).

In February 1986, BC Rail applied for an order requiring NorthwesTel to permit BC Rail to interconnect its telecommunication facilities with the facilities of NorthwesTel to enable BC Rail to provide interconnected private line services in the north-east corner of British Columbia. BC Rail requested that interconnection with NorthwesTel be granted on the same terms and conditions as applied to its interconnection with BC Tel. These are the same terms and conditions which govern CNCP private line service interconnection with Bell and BC Tel. They principally entail restrictions to BC Rail subscribers' private communication needs (including off-premises extension, tie-trunk, and foreign exchange type services) and compensation to the common carrier based on the carrier's Information Service Access Line (data trunkline) or Private Branch Exchange trunk rates plus a 25% or 30% surcharge depending on the nature of the interconnection.

BC Rail also requested the Commission to direct NorthwesTel to provide it with local loops to enable BC Rail to provide interexchange private line services that are not connected with NorthwesTel's public switched telephone network. NorthwesTel opposed the BC Rail application arguing that its ability to provide universal and affordable basic telephone service to small and remote communities would be impaired.

Competitive interconnection applications have been judged in the past by the CRTC on the basis of whether the interconnection would be in the public interest. In so doing, the CRTC weighs the potential advantages and disadvantages presented by the application. The Commission has consistently construed its statutory authority to allow system interconnection in section 320 of the *Railway Act* as favouring neither the monopoly nor the competitive supply of telecommunication services.

In assessing whether the BC Rail application was in the public interest, the Commission first estimated the financial impact of the proposed interconnection on NorthwesTel. The CRTC found that NorthwesTel's annual revenue loss resulting from BC Rail competition would be $200,000, that BC Rail would take little time achieving its expected market penetration, that NorthwesTel would have very limited offsetting operating expense savings, and that NorthwesTel's compensation from BC Rail based on the established private line interconnection conditions would amount to $21,000 annually. From these findings, the CRTC calculated that NorthwesTel's net revenue erosion per access line would be $0.50 per month if averaged over all subscribers, but that it would be more appropriate to assess revenue loss averaged only over the number of NorthwesTel subscribers in the area of northern B.C. subject to the BC Rail application. For decision-making purposes the net revenue loss impact therefore was raised to $5.00 per access line per month. This last calculation was taken by the CRTC as the measure of the negative impact of allowing competitive entry as proposed by BC Rail.

The Commission then reasoned that the circumstances of this case made it materially different from the previous applications for private line interconnection all of which it had approved. In this regard, it noted that a higher proportion of NorthwesTel revenue (compared to Bell and BC Tel) was derived from interexchange private line services, that NorthwesTel's base for these services was limited to a few large customers, and, consequently, that NorthwesTel's revenue base was more vulnerable to competition. The Commission also concluded that the cost of providing basic telephone service is comparatively higher for NorthwesTel due to the small number (and low density) of access lines in its serving area.

The CRTC therefore rejected BC Rail's proposed compensation formula. This left the Commission the choice of allowing BC Rail competition based on a richer compensation formula which more closely approximated the net revenue loss to NorthwesTel, or denying the application. The CRTC elected to deny the application for the following reasons:

> The appropriate compensation charge per trunk line would have to be substantially greater, and the Commission considers that such a charge would, in large part or entirely, offset the potential benefit of lower prices to users.

To fortify its view that there would be no net benefit from competition even if an appropriate compensation level were set, the CRTC observed that the potential benefits of BC Rail competition would be limited to a small number of subscribers in one part of NorthwesTel's operating area and that approving the application would not result in any extension of BC Rail services to remote locations or any stimulation of demand. Although the matter was not considered in the CRTC's decision, the Commission may have concluded that a richer compensation formula would result in BC Rail payments to NorthwesTel which exceeded the cost of services acquired by BC Rail plus lost cross subsidies from private line customers to basic service customers.

The approach taken by the CRTC in the BC Rail/NorthwesTel case is consistent with its denial in 1985 of CNCP's application for Bell/BC Tel interconnection to provide switched long distance service (Telecom Decision CRTC 85-19). Both decisions reflect an increasing concern over the impact of new voice service competition on the price of "basic" residential and business services. Both display a willingness on the part of the CRTC to project the effect of granting the application and to make an *a priori* determination whether competitive entry would be successful. In the CNCP long distance service decision, the Commission applied similar hypothetical reasoning:

> If the Commission granted CNCP's application and required it to make contribution payments (from long distance to local service) equal to those made by Bell and BC Tel, CNCP would be financially restricted to offering very limited price discounts and serving a limited number of routes. This would have the effect that a number of the benefits of competition noted earlier would be substantially reduced.

> For example, the Commission considers that the benefits of customer choice and supplier responsiveness would, both in the short term and the long term, accrue only to a small number of primarily high volume toll users and those in the limited number of serving areas selected by CNCP for entry.
>
> Were the Commission to approve CNCP's application without a substantial contribution discount, the Commission foresees, based on the evidence as to CNCP's financial ability, that CNCP would within the near future, seek Commission approval for a substantial contribution discount.

Implicit in such an approach is a reluctance on the part of the Commission to allow new competition with the risk that the new service will either not be introduced or will fail with the result that the CRTC may be blamed for setting the "price of entry" (i.e. interconnection compensation) too high and causing the failure. Also implicit is a recognition of the political fact of life that the regulator becomes a stakeholder in the continued viability of a new regulated competitor, particularly if the regulator's decision to allow new competitive entry is based on a finding that the application is in the "public interest" and the regulator rests its decision, at least in part, on the credibility of prospective evidence of financial performance.

The CRTC's experience in broadcasting regulation provides ample evidence of how difficult it is for the regulator to turn its back on licensees faced with business failure where the licensees are required to live up to licence conditions which both the regulator and they had originally endorsed.

COPYRIGHT ACT AMENDMENTS BEFORE PARLIAMENTARY COMMITTEE

A Parliamentary Committee is scheduled to commence hearings on October 13, 1987, on Bill C-60 amending the *Copyright Act*. That Bill forms Phase I of a planned two-phase revision and modernization of Canada's *Copyright Act*. This *Act* has not been substantially amended in over 60 years.

The Bill proposes an expanded role for the Copyright Appeal Board (to be renamed the Copyright Board) and a modified role for the Director of Investigation and Research (the "Director") with respect to agreements among copyright holders.

The Copyright Appeal Board, established in 1938, is presently a rate-setting tribunal with authority to approve or alter the rates submitted annually by societies which manage performing rights for musical and dramatic-musical works. The new Copyright Board will assume this function and will be given two new responsibilities:

(1) authority to fix the royalty rates, and other terms and conditions of the copyright licensing agreements of "copyright collectives", associations of copyright owners which exercise collectively a particular aspect of copyright of their members, for example the right to reproduce by photocopying. (This is essentially a broadening of the regulatory scheme which currently covers only performing rights societies);

(2) licensing use of copyright works when the copyright owner cannot be located.

Currently a number of copyright collectives exist outside the area of musical performing rights. Examples include:

- l'Union des ecrivains du Québec which distributes royalty payments to its members according to the use made of their works under an agreement with the Québec Ministry of Education respecting photocopying of printed works by educational institutions in the province.
- Vis-Art, a non-profit association of painters, photographers, designers and sculptors established in 1984.
- la Société pour l'avancement des droits en audio-visuel established in Québec in

1979 to manage copyright for firms engaged in producing and distributing audio-visual materials.

The internal arrangements of such collectives are currently subject to the prohibition of section 32 of the *Competition Act* regarding agreements to unduly lessen competition in the supply of a product.

The proposed copyright legislation would give copyright collectives the choice of continuing to be subject to section 32 and retaining bargaining freedom with copyright users in licensing their members' copyright or permitting the Copyright Board to fix the royalties and related terms and conditions of their copyright licensing agreement with users in which case the collective will be exempted in a limited fashion from section 32 of the *Competition Act.*

Bill C-60 would give the Director the right to review all copyright collective licensing agreements submitted to the Copyright Board for regulatory approval and to request that the Board examine agreements which he considered to be contrary to the public interest. The Board would be required to consider the Director's request as soon as practicable and, after giving the Director and the parties concerned an opportunity to present their arguments, could modify the royalties or the agreement's related terms and conditions.

In addition, the Attorney-General for Canada would be given the right to apply to the Federal Court for a remedial order where use has been made of the exclusive rights and privileges conferred by a copyright to unduly lessen competition or otherwise restrain commerce in a manner prohibited by section 32 of the *Competition Act.* This remedy (contained in section 29 of the *Competition Act*) currently applies only to the restrictive exercise of patent or trademark rights.

The option of direct regulation of copyright collective licensing agreements is being advanced by the federal government as an incentive for the establishment of more copyright collectives. The government's backgrounder to the Bill observes: "Certain classes of copyright owners who want to form collectives have been reluctant to do so for fear of prosecution under the *Competition Act.*" However, no copyright collective has to date been prosecuted under section 32.

It is worth noting that the exemption from section 32 which would be available under the proposed direct regulation option would be available with respect only to any royalties or related terms and conditions arising under a copyright licensing agreement filed with the Board. This exemption would not appear to extend to other agreements or arrangements within the copyright collective to restrict the supply of creative material subject to copyright or to control the competitive conduct of participants in a collective.

Copyright collectives would not be exempted by Bill C-60 from the abuse of dominant position provisions of the *Competition Act* and that *Act's* provisions with respect to non-price vertical restraints (e.g. tied selling and exclusive dealing). However, subsection 51(5) of the *Competition Act* provides an exemption from the abuse of dominance provision for an act engaged in pursuant only to the exercise of any right or enjoyment of any interest derived under the *Copyright Act*, which may conceivably cover some acts of copyright collectives.

In addition, where a copyright user or a collective is unable to agree on the terms of a licensing agreement, either party would be able to have the Copyright Board arbitrate the level of royalties or the related licensing terms. The resulting agreement would also be exempt from section 32 of the *Competition Act.*

Consistent with its broader regulatory role, the Board would be restructured along the lines of traditional independent regulatory agencies. Its five members would be appointed to five-year terms by the Governor-in-Council and would be removable only for cause. The Chairman would be a judge and both the Chairman and Vice-Chairman would be full time members. The Board would have the authority to hire its own staff. The Board would be required to issue public notices of its proceedings and to give reasons for its decisions. It would have the rights of a superior court to subpoena witnesses, require production of documents and hear evidence under oath, and its decisions would be subject to review by the Federal Court.

Other important aspects of C-60 include:

1. Computer Programs: Computer programs would be defined as literary works, regardless of the medium of expression, and would become eligible for full copyright protection for the life of the creator plus 50 years. Two exceptions to copyright infringement relating to computer software would be available:

   (a) persons in lawful possession of a computer program would be permitted to alter it to suit their personal needs or to adapt it without infringing copyright, and

   (b) users would be allowed to make a limited number of back-up copies.

2. Penalties for Piracy : Any person who sells, distributes, exhibits or imports for sale an infringing copy of a work would be guilty of an offence and liable on summary conviction to a fine of $25,000 or six months imprisonment or both, or upon indictment to a fine of $1 million or five years imprisonment or both.

3. Industrial Design: Revised definitions are aimed at clarifying whether an article can be protected by copyright, industrial design, or both or neither. Recent court decisions have raised the possibility that utilitarian or functional objects may be eligible for copyright protection. Bill C-60 provides a detailed code for determining whether copying the design of an article that has a utilitarian function constitutes copyright infringement.

4. Moral Rights : An author's right to protect the integrity of his work from distortion or modification or use in association with a product, service or institution would be expanded by removing the current requirements to prove that such modification is prejudicial to the author's honour and reputation.

TRANSPORT REGULATORY REFORM LEGISLATION RECEIVES ROYAL ASSENT

The federal government's transportation regulatory reform legislation, Bills C-18 and C-19, which will significantly liberalize the economic regulation of air transport, railways, and extra-provincial trucking received Royal Assent on August 28, 1987.

The legislation is expected to be proclaimed in force on January 1, 1988. However, complementary provincial legislation will be required to fully implement the extra-provincial trucking reforms and may delay proclamation of C-19.

The government accepted a number of amendments of a technical nature to Bill C-18 made by the Senate Standing Committee on Transport and also accepted substantial amendments to Bill C-19 made by that Committee which will:

(a) require provincial trucking regulators in issuing extra-provincial licenses to have regard to any statement of public transportation policy issued by the Governor-in-Council after consultation by the federal Minister of Transport with his provincial counterparts, and

(b) require the Minister of Transport to make annual reports to Parliament on the progress of trucking deregulation and trucking safety during the planned 1988 to 1993 transition period to full entry deregulation.