REGULATORY AND POLICY DEVELOPMENTS

THE NEW PORTFOLIO INVESTMENT POWERS OF FINANCIAL INSTITUTIONS

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Some of the most significant changes that have marked the new regulatory climate for financial institutions relate to the rules that govern investments. It is a well known fact that banks, loan and trust companies, and insurers have been, or will be, given the authority to acquire a controlling interest in securities dealers. By comparison, the thrust of the new portfolio investment rules has received much less publicity and attention.

Portfolio investments are passive; they do not involve control of a business. Together with loan receivables, they represent the bulk of the assets that stand behind the obligations incurred through financial service activities.

The investments made by financial institutions other than banks have traditionally had to fit one or other of a number of technical moulds. They have had to satisfy certain tests that were apparently meant to provide some assurance of the quality of the investment. For example, shares have had to carry a certain minimum dividend or earnings record, measured against paid-in capital, for four or five years.

Investments that do not pass muster are not absolutely precluded. However, the institution must treat "ineligible investments" as falling into a "basket clause" in their governing legislation at any one time by "basket investments."

Therefore, an investment that is eligible without regard to this residual category, a so-called "legal-for-life investment," will be particularly attractive to a financial institution. Those who issue or underwrite securities are often dependent on financial institutions to make a market for their securities - hence the importance of "legal-for-life" considerations.

Lawyers for issuers and underwriters are frequently asked to give opinions, for inclusion in a prospectus or other offering document, indicating that the securities described in that document are indeed "legal-for-life." For that opinion to be given, the issuing vehicle will often be a corporation with the requisite track record of earnings or dividends that has been acquired for the very purpose of making the issue. The business in which the public has been asked to invest will have been transferred into, or amalgamated with, the then inactive "legal-for-life" corporation.

The latest round of legislative reforms promises the abolition of most of the mechanical investment rules. The substitute is the prudent investor test - would a reasonable and prudent person make the particular investment?

The province of Québec was the forerunner of this trend, opting in 1984 for the prudent investor approach in its insurance legislation. The 1987 *Trust Companies Act* of the province follows suit.

The proposed federal initiatives in this area are evidenced by the terms of the discussion draft of a new Trust and Loan Companies act, released in December of last year. The investment standards that would be established by such an act, and presumably by the promised federal insurance act, are essentially those of the prudent man.

The prudent investor rule will replace the qualitative investment test. Some quantitative requirements will remain, such as:

- restricting the proportion of assets placed in certain categories of investments, say real estate, or
- establishing a minimum proportion of assets that must be in the form of certain gilt-edged (mainly government) securities.

Although Ontario's new *Loan and Trust Companies Act* does not go the full route to the

prudent investor approach, it does incorporate such a test. But it then recites some additional eligibility criteria for particular types of investments that are reminiscent of the predecessor statute. In the case of debt instruments and shares issued by a corporation the criterion is deceptively simple by comparison to the previous rules. The securities must be those of a corporation that has been in *bona fide* existence for at least five years. However, no definition of "*bona fide* existence" is provided.

Does this provision exclude a corporation that was acquired for the purpose of making a public issue of securities? Or does it simply mean that the securities of a corporation so acquired that has been a "shelf company," with no active business, will not be a qualified investment? If a corporation has been involved in an acquisition, merger, or change in business activity during the five year period, how will this affect the eligibility of its securities for investment? The new Ontario standard for qualifying corporate securities as investments certainly raises more questions than it answers.

The implications of the uncertainty are not limited to Ontario incorporated loan and trust corporations. The investment rules of the new Ontario legislation apply to all loan and trust corporations carrying on business in the province and registered there.

The prudent investor approach will simplify the making of portfolio investments by Canadian financial institutions. However, Ontario's peculiar amalgam of the old and the new has raised some serious roadblocks to the potential success of this approach on a national basis.

CRTC DECIDES ONE CALL-NET APPLICATION; RECEIVES ANOTHER

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On August 16, 1988, the Canadian Radio-television and Telecommunications Commission (CRTC) issued a decision which indicated that the Commission was not prepared to open up its criteria for distinguishing between the prohibited resale of Message Toll Service (MTS) and WATS and the permitted resale of enhanced telecommunication services (Telecom Decision CRTC 88-11). The application by Call-Net Telecommunications Ltd for such a review and for guidance respecting whether certain service features amounted to a basic or an enhanced service was reviewed in the June, 1988, *Canadian Competition Policy Record.*

In the Decision, the CRTC concluded that two of the four service modifications on which Call-Net sought the Commission's guidance, incoming call identification and voice recording, storage and retrieval, are enhanced telecommunication services. Nevertheless, the Commission concluded that all of the proposed modifications were intended to operate in conjunction with a basic voice transmission service and that the basic service could operate independently of the modification. The Commission therefore elected to follow its previous Decision (87-5) in which it concluded that the nature of a service was unchanged even though it may be offered in conjunction with an enhanced service. The result is that resale of interexchange private lines or WATS to provide Call-Net's basic voice transmission service remains prohibited with or without Call-Net's proposed modifications being included.

With respect to the issue of whether clarifications were required to the CRTC's present rules for identifying basic and enhanced services, the Commission concluded that its original rules established in Telecom Decision 87-2 still provide a "clear technical approach to determining which forms of resale should in the public interest be permitted." The Commission rejected the approach favoured by Call-Net and a number of intervenors which would provide for determination, on a case-by-case basis, of whether it would be in the public interest to permit specific exemptions from the Commission's prohibition against direct competition in the provision of MTS and WATS. The Commission felt that this alternative approach would be extremely difficult to administer and would lead to confusion and uncertainty in the industry. As well the Commission considered that adopting such a procedure would, in essence, involve a review of the prohibitions on resale, which the Commission

had emphasized in its Public Notice in this proceeding, were not open for review. In order to clarify its rules, the Commission has required all resellers (whether basic or enhanced) who provide interexchange voice services with access to the public switch telephone network to comply with the type of facilities based restrictions established originally in Decision 87-2. The Commission hopes that this clarification

> ...will make it abundantly and absolutely clear that the resale of interexchange of private lines and WATS to provide direct competition with MTS/WATS, whether or not the competing service is enhanced, is currently not permitted.

Call-Net's application for a review of the enhanced services criteria was supported by a large number of small business representatives and users who cannot benefit from WATS or private line services to reduce their long distance costs. It is uncertain whether the Commission's most recent reiteration of an absolute prohibition against any form of MTS or WATS resale can be sustained over the long term in light of the apparent substantial business interest which Call-Net's creative use of its private branch exchanges on behalf of small and medium size business customers has generated.

Subsequent to the Commission's Decision in this case, Call-Net made a further application for an order prohibiting disconnection by Bell Canada on the ground that it had established a "sharing group" among its customers which conforms to the Commission's private line and WATS sharing rules (established in Decision 87-2). Bell opposed Call-Net's application and the Commission subsequently ruled that Call-Net's sharing group agreement did not comply with Decision 87-2. Call-Net subsequently appealed this CRTC decision to the Federal Court and, at the same time, requested an order prohibiting Bell from cutting off Call-Net's private line service. The Federal Court declined to grant Call-Net's stay application and Call-Net's private lines were cut off by Bell on September 7. Call-Net has now appealed the CRTC's sharing group decision to Cabinet.

CRTC ISSUES ADVANCE REGULATORY FORBEARANCE RULING

In a recent decision dealing with Telesat Canada's planned Mobile Satellite Communication Services (MSAT), the Canadian Radio-television and Telecommunications Commission (CRTC) has for the first time issued a ruling permitting forbearance from prior approval of regulated carrier tariffs prior to the services in question being introduced (Telecom Decision CRTC 88-6, June 27, 1988).

In March, 1988, the Commission received an application from Telesat Mobile Inc. (TMI) requesting a ruling that the company not be required to file tariffs in order to charge tolls for the provision of the following MSAT Services: Mobile Radio Service, Mobile Data Service, and Mobile Interconnected Services. The launch of TMI's first satellite is not scheduled to occur until 1992.

In requesting public comment on the application, the CRTC noted that it considered TMI to be "a company" within the meaning of the *Railway Act* and, therefore, subject to the Commission's tariff approval jurisdiction. TMI indicated that it would be operated as a fully separate subsidiary from Telesat Canada and that Telesat's equity interest in TMI once initial financing was arranged would be wound down to 50.1% in the next few months and could ultimately be reduced to as low as 40%. TMI's principal reason for seeking the forbearance ruling prior to starting up operations was to provide potential investors with some certainty as to the type of regulation to which the company would be subject.

In support of its forbearance proposal TMI stated that there are at present no barriers to entry in the provision of mobile telecommunications and that there are many mobile service providers in existence. Consequently, the company anticipated extensive terrestrial and satellite competition. TMI specifically referred to competition from established radio common carriers, some of which operate on an interprovincial basis as would MSAT, but which are not regulated by the CRTC. TMI also contended it would face competition from Cantel, and private mobile systems

established by large corporate users, all of which are unregulated or have been granted regulatory forbearance.

The Commission accepted that TMI would operate in a competitive market but concluded that, in the case of an affiliate of a regulated carrier, the existence of effective competition has not in itself been sufficient to satisfy the Commission that it is in the public interest to dispense with the requirement that tariffs be filed. Rather, the Commission noted that it must also be satisfied that adequate safeguards exist with respect to the possibility of cross-subsidization between a parent and its affiliate.

Accordingly, as a condition of forbearance from tariff approval, the Commission has directed TMI to file semi-annual reports on its relations and dealings with its affiliates providing information on all transactions including those which deal with financing, start-up costs and the provision of personnel and other services together with an explanation for valuing such transactions.

The Commission's decision in this case is significant in that the Commission did not feel it was necessary to wait for the actual service offerings of TMI in order to address the extent to which unregulated substitutes are available. Previous forbearance applications have been based upon evidence of actual head-to-head competition.

J.F.B.

A NEW BROADCASTING ACT: A NEW DIAL OR FINE-TUNING?

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The statute currently providing for the federal supervision and regulation of broadcasting in Canada, the *Broadcasting Act*, dates back to 1968. Students and teachers of broadcasting, those directly involved in the broadcasting industry, and those supervising or providing advice to them, have long been fond of emphasizing the extent to which rapid technological changes and the convergence of the technology used for transmitting radio and television programming and for transmitting voice and data messages have created an environment unheard of when the *Broadcasting Act* was enacted.

Not surprisingly, the jurisdiction of the Canadian Radio-television and Telecommunications Commission (CRTC) over certain modes of program transmission has been challenged in the courts. Many jurisdictional uncertainties remain as technology advances and new forms of transmission are increasingly difficult to fit within the old statutory formulations as interpreted. New federal-provincial jurisdictional conflicts also loom on the horizon as visions of programming and other services being delivered on the same fibre optic conduit come closer to realization. Encoded satellite transmission, direct-to-home delivery of satellite services, pay-per-view services, two-way cable transmissions and the possible delivery of programming services by companies heretofore regulated federally or provincially as common carriers providing telephone and other related services have generated academic debates which increasingly take on an aura of reality.

The cable television industry views with suspicion alleged preparations by the telephone industry to assume a programming delivery role while some consumer advocates welcome the promise of competition for the cable industry in such delivery. Meanwhile, the cultural debate respecting the priority delivery to Canadian homes of more Canadian programming and of a greater number of programming services originating in Canada rages on. It has affected the discussions leading to the *Canada-U.S. Free Trade Agreement*. It continues to inform the debate between those who favour more stringent regulation and those who clamour for its relaxation; without stricter government intervention, cultural nationalists argue, our television screens will be overtaken by American programming. The cultural debate has also ostensibly provided justification for the increased concentration of ownership in the broadcasting industry approved by the CRTC in the last five years; the production of competitive Canadian television programming, it is argued, requires large conglomerates that permit the pooling of financial, creative and other resources.

On June 23, 1988, the Honourable Flora MacDonald, Minister of Communications,

responded by issuing a document entitled "Canadian Voices Canadian Choices" and by introducing in the House of Commons Bill C-136, a bill intended to replace the 1968 *Broadcasting Act* and to make consequential amendments to a number of related federal statutes.

The overall approach and structure of Bill C-136 do not constitute a departure from the currently applicable *Broadcasting Act*, especially when the regulations made by the CRTC pursuant to the *Act* are taken into consideration. In a great many cases, the changes made by the bill to the broadcasting policy enunciated in the original *Act* and the additional powers expressly bestowed on the CRTC to implement the revised policy merely endorse and enshrine in statutory language the policies evolved and the powers exercised by the CRTC on the basis of its interpretation of the currently applicable *Act*. For example, the fact that English- and French-language private broadcasters operate under different conditions and in different markets and may, therefore, have different regulatory requirements; the need for programming reflective of Canada's regions, of its multicultural realities and of its aboriginal cultures and for programming accessible by disabled persons; the requirement that cable undertakings accord carriage priority to Canadian services and deliver programming at affordable rates, are matters that have long been recognized and addressed in regulations made by the CRTC, in CRTC policies and in CRTC licensing decisions. They are now expressly stated goals in Bill C-136.

There are, however, some departures from the *Broadcasting Act* in Bill C-136. This comment will focus on some of the changes affecting the private broadcasting industry.

The Basis for Federal Jurisdiction Over Broadcasting

In the introduction to "Canadian Voices Canadian Choices," the Minister of Communications emphasized the need to ensure coherent, effective legislative and regulatory control over all aspects of broadcasting. This presumably calls for the continued assertion of federal jurisdiction, not only over the origin of programming and of programming services, but also over their delivery to Canadian homes. In the new legislation, she points out:

> ...broadcasting jurisdiction is defined not so much by the technologies which carry and disseminate signals, as by the content of the signals. The Bill is, therefore, technology-neutral and will be better able to adapt to changing technologies without risking erosion of federal regulatory jurisdiction.

Federal jurisdiction over broadcasting has been anchored in Canada on the fact that radio and television programming was transmitted through the use of radio frequencies or Hertzian waves. The reception or interception of program-carrying Hertzian wave transmissions for further retransmission was the basis on which cable undertakings were characterized by the Supreme Court of Canada in 1978 as undertakings extending beyond a province, pursuant to paragraph 92(10)(a) of the *Constitution Act*, and therefore subject to federal jurisdiction. The underlying assumption was that Hertzian waves or over-the-air transmissions fall within federal jurisdiction since, by their very nature and pervasiveness, they cannot be confined within one province, neither with regard to their receivability nor with regard to their capacity to cause interference. In short, federal jurisdiction over closed-circuit, intra-provincial delivery of television programming was grounded on the character of the carrier of the message, or on the use of the radio spectrum for reception with a view to retransmit, rather than on the content of the message received and retransmitted. The court clearly focussed on radio frequencies as the "connector" between television stations transmitting over-the-air and cable systems receiving and distributing such transmissions intra-provincially to bring the cable industry within the federal regulatory net. The result was an integrated, rationalized regulation by one level of government of both the content and the terms and conditions of the retransmission and distribution of radio and television programming by one level of government.

Bill C-136 redefines broadcasting generally as any transmission of programs, whether or not encrypted or coded, by radio waves or by any other means of telecommunication, for reception by the public by means of broadcasting receivers. Such a definition would capture, for example, a provincially-confined, self-contained hard wire

system, be it coaxial cable or fibre optic strands, distributing programming to Canadian homes that has not originated through the use of the radio spectrum and, if received from another source, received in a prerecorded form or through an intra-provincial hard wire network. It has long been predicted by constitutional experts that the assertion of federal jurisdiction in those circumstances would require a reformulation or an extension of the jurisprudence under which program retransmission or program distribution by cable has been assigned to the federal government.

Bill C-136 hints at the basis for a restatement of federal jurisdiction over provincially-confined program distribution without the use of the radio spectrum. It declares that the broadcasting system makes use of radio frequencies and adds that the system "provides, through its programming, a public service essential to the maintenance and enhancement of national identity and cultural sovereignty." One can recognize in these words the fundamentals for a federal jurisdictional claim based on what is referred to in constitutional law as the national concern doctrine.

The Role of the Cable Television Industry

The cable television industry has long served as the primary delivery system for television programming in Canada. At present, approximately 70% of Canadian homes receive, for a monthly fee, both television services receivable off-air and television services intended for cable distribution, such as pay television and specialty services, from a local cable system licensed by the CRTC. Such a system invariably enjoys an exclusive franchise in the given service area.

Access to cable systems for some licensed Canadian programming services is imposed by regulation made by the Commission. Other licensed Canadian services and non-Canadian services carried by cable systems are carried at the discretion of cable licensees. Services which are discretionary to the cable licensee, once carried by a given licensee, may be mandatory or discretionary to the licensee's subscribers.

Since cable television systems operate essentially on a monopoly basis, cable licensees are cast in the role of gatekeeper of the only distribution system available to programming services licensed by the Commission which are not available off-air. Access to cable systems on fair and reasonable terms has therefore been an increasingly important issue, whether a service has been licensed on a discretionary-to-the-subscriber basis or for distribution, at the discretion of a given cable licensee, as part of the package of services received for a basic access fee. It is fair to say that, where carriage is left to the cable licensee's discretion, the Commission has been reluctant to intervene in the negotiations between programming service licensees and cable companies.

Bill C-136 expressly recognizes the primacy of cable technology for delivering television programming in Canada but also the need for greater supervision to ensure that services licensed by the Commission are given a fair chance to reach their potential audiences on the only distribution highway currently available. It can be argued that the additional powers entrusted to the Commission for the purpose could be exercised by it under the currently applicable *Act*. They include as a policy goal for the regulation and supervision of the broadcasting system the provision of reasonable terms for the carriage, packaging and retailing of programming services supplied to cable undertakings pursuant to contractual arrangements. They expressly empower the Commission to require any licensed cable undertaking to carry a specified service on such terms and conditions as the Commission deems appropriate. They expressly include mediation and arbitration powers for resolving any dispute arising between programming service licensees and cable licensees concerning the carriage of such programming services.

In part, as a result of the cable industry's fundamentally monopolistic status with regard to the distribution of licensed programming services, there has been opposition from other participants in the broadcasting industry to the assumption of any programming role by cable licensees through the vertical integration of the program origination and program distribution functions. This opposition has intensified as regulatory constraints have been relaxed and as such matters as the decision to carry and the terms of carriage, including rates, packaging, promotion and

channel assignment are left, for many services, to the discretion of each cable licensee. Both the recent Caplan-Sauvageau Task Force Report and the recent Report of the Standing Committee on Communications and Culture have recommended that cable operators not be allowed to assume an ownership position in any pay or specialty service so as to avoid any adverse impact on other programming services that could flow from conflict of interest situations, or the appearance thereof, inherent in what would effectively be a situation where access to the only highway available is controlled by one of many competing transportation services.

Although the Commission has heeded and, to a certain extent, shared the concerns expressed, it has recently permitted ownership participation by cable companies not only in over-the-air television undertakings but also in satellite-to-cable programming services. Bill C-136 expressly endorses the Commission's position. It is one of the stated goals of the broadcasting policy set out in the bill that cable undertakings, where appropriate, originate programming, including local programming, on such terms as are conducive to the attainment of the objectives of the bill. In "Canadian Voices Canadian Choices," the Minister of Communications points to the specific regulatory powers of intervention reviewed in this section as sufficient to ensure that cable undertakings act "in a fair and responsible fashion." It is unclear whether it is felt that such fairness will be prompted by the very existence of the Commission's express powers to intervene or whether it will require actual intervention by the Commission.

A Performance Incentive Approach for the Production of Canadian Programming

Increased creation and presentation of Canadian programming remain stated goals of the broadcasting policy outlined in Bill C-136.

The CRTC has until now relied on generally applicable regulations and on specific conditions of licence imposed on individual licensees to require a certain level of performance with respect to the amount of time devoted to the exhibition of Canadian programming, the scheduling of Canadian programming and the resources devoted to the production of Canadian programming. Provisions contained in Bill C-136 represent a major departure from this approach. They specifically empower the Commission to establish a program whereby fees would be calculated by reference to the revenues of a licensee and would become payable by the licensee according to the performance of the licensee in relation to objectives established by the Commission for the broadcasting of Canadian programs.

Although the details of this proposed performance incentive approach for the presentation of Canadian programming are yet to be determined, the Minister has outlined how the concept could work in her policy document. At the beginning of each year, an assessment expressed as a fee would be made for each licensee based on that licensee's gross revenues. A target expressed in broadcast hours would be established for that licensee, presumably in excess of the minimum Canadian content requirements established by the Commission by regulation or by condition of licence. Each licensee's Canadian content performance would then be measured yearly against the specific target established. Performance of the target over the year would offset the assessment for the year according to a predetermined formula and would serve to relieve the licensee from part or all of the assessment. The net assessment, if any, remaining at the end of the year, would be remitted by the licensee to the government. The funds so collected could be used to reward licensees meeting or exceeding their Canadian content targets or to increase government subsidies or assistance programs for the financing of independent Canadian program production.

The wisdom of the performance incentive approach to the regulation of Canadian content in broadcast programming has been questioned. There is little doubt that the instrument intended to achieve a somewhat elusive cultural goal is a blunt one. Going from the basic blueprint to fair and effective implementation may prove a daunting task.

The private television broadcasting industry is a highly competitive sector of the economy, although an admittedly profitable one. Historically, it has achieved the majority of its profits from the presentation of American

programming. Many critics have claimed that it has also been adept at satisfying the minimum Canadian content requirements imposed by the Commission, both in terms of the scheduling of such content and in terms of the time devoted to it, as cheaply as the viewing market has allowed and with little regard for quality in certain categories of programming.

The negative incentive tax approach proposed may end up rewarding those broadcasters skilled at producing and exhibiting what has been described as program "tonnage" rather than programming that Canadians want to watch. It is an approach concerned solely with quantity. The yardstick for measuring a licensee's contribution is expressed in hours. It is hours of programming aired that will reduce or eliminate the need to pay the fee assessed. The approach invites re-runs, repetition and imitation of old formulae capable of meeting quotas, without regard to quality, rather than the deployment of resources for innovative, new, risk-taking forays into quality program production. Moreover, there would be room for licensees to make a business decision to forfeit money to the government if they can profit more from airing additional highly remunerative American programming rather than scheduling Canadian programming.

The Relationship between Cabinet and the CRTC

The *Broadcasting Act* currently authorizes the federal Cabinet, by Order in Council, to set aside or refer back for rehearing by the Commission CRTC decisions issuing, amending or renewing licences. The *Act* also authorizes the Cabinet to issue binding directions to the Commission in relation to a limited, circumscribed number of matters.

There has been heated debate for a number of years whether the government should also have the power to direct the Commission on broad policy matters. The debate has pitted those who argue that there is a legitimate role to be played by the government, albeit with necessary procedural safeguards, in instructing the CRTC in its implementation of the policy broadly outlined by Parliament in a statute against those who perceive such intervention as an erosion of the regulatory independence of the Commission. The CRTC is, the latter stress, an agency engaged in the supervision of a highly sensitive area of the economy. A Cabinet power to issue policy directives before licensing action, especially if combined with the power to set aside or refer back CRTC decisions once issued would be unacceptably intrusive. Those in favour of increased directive power for the Cabinet have argued that the government should not be limited to *ex post facto* intervention as broadcasting policy is formulated on an *ad hoc* basis by a non-accountable tribunal. Those who would limit government intervention have posited the need, more particularly in an area such as broadcasting, to champion an arm's length relationship between an appointed tribunal and elected officials.

Bill C-136 retains the Cabinet's power to set aside or refer back CRTC decisions by Order in Council. It also empowers the Cabinet to issue to the Commission, by Order in Council, binding policy directives with respect to any of the broadly stated objectives of the proposed statute for the regulation and supervision of the Canadian broadcasting system. It also empowers the Cabinet, by Order in Council, to exempt persons carrying on broadcasting undertakings of a specific class from the requirements of the proposed statute or of any regulation made under it by the Commission.

Bill C-136 has been referred to a Parliamentary Committee. Witnesses are currently appearing before the Committee amidst rumours that the calling of a federal election will result in the bill never reaching third reading.

CRTC RESTRUCTURES BROADCASTING DIRECTORATE

Canadian Radio-television and Telecommunications Commission (CRTC) has announced a number of organizational and personnel changes effective July 5, 1988, which bring the structure of the Broadcasting Directorate more in line with the current balance of broadcasting responsibilities of the Commission.

The Broadcasting Directorate will now be composed of three sectoral activities in recognition of the importance the Commission places on

programming: T.V., Radio and Cable, and Pay and Speciality services. Each will be directly responsible to the Chairman of the Commission for policy development and operational matters, compliance monitoring and analysis of applications in the respective sectors.

A new Licensing Directorate responsible for the overall throughput of licence and licence renewal applications has been created. As well, a new Corporate Analysis Directorate responsible for all market ownership and financial analysis has been established. Both new Directorates will report to the Secretary General of the Commission.

The Secretary General will also be responsible for strategic planning (including research activities), technical policy planning, secretariat operations (decisions, scheduling, proceedings, public hearings, and regional offices).

J.F.B.

GOVERNMENT INTRODUCES POSTAL REVIEW BOARD ACT

On August 15, 1988, the federal government introduced into Parliament its promised legislation establishing a new framework for the review of postal rates and services and the establishment of a new Postal Services Review Board (Bill C-149).

The Postal Services Review Board (PSRB or Board) is structured along the lines of a traditional regulatory agency. The Board is composed of Governor in Council appointees having fixed terms, statutory authority to engage staff and experts, and statutory authority to establish internal management by-laws and to make procedural rules. However, the Board, notwithstanding its structure, has been given only the power to review and make recommendations on certain proposed actions by Canada Post and has not been given any true statutory decision making powers. The Board's review duties cover all proposed regulations made pursuant to the *Canada Post Corporation Act*, any major Canada Post service proposal to be contained in a forthcoming corporate plan to be submitted pursuant to the *Financial Administration Act*, and any matter pertaining to the operations of Canada Post submitted to the Board by the responsible Minister.

The Board has also been empowered to give direction to Postal Service Customer Councils and their Coordinators and, generally, to oversee the work of these Councils. The *Act* provides that the Governor in Council may establish Customer Councils for the operating regions of Canada Post. Each Council is to consist of a Coordinator and at least seven other members appointed by the Coordinator from among local and municipal authorities, consumer trade, industry, commerce, and professional organizations, and community and volunteer organizations in the particular region. The duties of the Councils include making representations and recommendations on postal services and postal management in the region and reviewing customer complaints which they receive. The *Act* requires a Council inquiry into a complaint unless Canada Post has not been given enough time to deal with the complaint, the complaint is capable of being dealt with under another act of Parliament or under a Canada Post collective agreement, or it is frivolous or vexatious.

Curiously, the legislation establishes a policy directive power exercisable by the Governor in Council with respect to "any matter that comes within (the Board's) jurisdiction." Such policy directive powers are becoming an increasingly popular accountability measure for statutory decision making bodies. However, it is hard to see the reason for such a power in the case of a Board which can only hold hearings and make recommendations.

The *Act* itself establishes a framework for the Board's exercise of its review and recommendation duties. It indicates that the Board shall take into consideration the public interest, including the public interest in the provision of postal services in a manner satisfactory to the users of those services, the operation of an efficient and competitive postal service, fair and reasonable rates, the provision and extension of postal services in a manner that encourages fair competition with other like services, the Corporation fulfilling its objects pursuant to Section 5 of the *Canada Post Corporation Act*, and the operation of the Corporation on a financially self-sustaining basis. The *Act* also requires that the Board take into account the need of the Corporation to generate

revenue from all sources sufficient to defer the costs incurred by the Corporation in the conduct of its operations and to recover from revenue, through depreciation, the book value of its fixed assets and the amounts that are planned to be recovered for future postal rates as recorded in the Corporation's previous financial statements.

The Board is required to hold a public hearing into the merits of any proposed regulation or major service proposal referred to it and any matter referred to it by the Minister if the Minister so requires. Postal rate changes are made effective by way of regulations approved by the Governor in Council. In addition, all proposed regulations classifying mail, establishing conditions for the transmittal of mail, and providing for discounts, among other matters, will have to be referred to the Board for a public hearing.

The large number of postal regulations generated in a given year may well result in a fairly heavy hearing load for the Board.

Although the Board is empowered to establish the procedural parameters surrounding its public hearings, the fact that a public hearing is required by statute probably means that the Board will not likely be able to avoid, in many cases, the general elements of a public hearing including collecting a significant amount of the evidence required to complete an inquiry through oral hearings, pre-hearing exchanges of particulars, representation by counsel, cross-examination-like questioning of witnesses, and a final argument stage.

At the time of writing the legislation had not yet been scheduled for second reading debate.

J.F.B.

FEDERAL COURT ATTACKS CABINET APPEAL PROCESS

In a decision having potentially far-reaching effects on the procedures for appeals to Cabinet from decisions of administrative tribunals and the incentives parties may have to make such appeals, the Federal Court Trial Division has recently ruled that a federal Cabinet decision to vary a Canadian Radio-Television and Telecommunications Commission ruling respecting the appropriate reimbursement to Bell Canada for temporary labour transfers to its affiliates is null and void because the Cabinet had not provided interested parties with fair opportunity to be heard.

In its 1987 Bell Canada Revenue Requirements Decision, the CRTC had refused to accept a proposal by Bell Canada, supported by its auditors, regarding calculation of reimbursement to the company for employees temporarily transferred to Bell Canada International to permit that company to continue the Bell Canada group's long standing contract to develop and maintain the Saudi Arabia telephone system. BCI subsequently petitioned the Cabinet to vary that part of the CRTC's decision. The Cabinet varied the CRTC decision and largely adopted the Bell proposal.

Following the Cabinet decision, the National Anti-Poverty Organization (NAPO), a significant intervenor in the CRTC's hearing, applied to the Federal Court for an order under the *Charter of Rights and Freedoms* to the effect that the Cabinet's Decision was null and void in that Cabinet had not exercised its statutory "vary and rescind" powers in a manner consistent with Section 2 of the *Charter*. Section 2 provides that every law of Canada shall be construed and applied as not to abrogate, abridge or infringe or authorize such abrogation, etc. of any of the Rights and Freedoms recognized in the *Charter*, and, in particular that no law of Canada shall be construed or applied so as to deprive a person of the right to a fair hearing in accordance with the principles of fundamental justice for the determination of this individual's rights and obligations.

Mr. Justice Muldoon of the Trial Division agreed with this basic submission of NAPO. He concluded that the federal Cabinet in such a petition/appeal was exercising a statutory power to which an obligation to provide a fair hearing applied and that the Cabinet had not provided other participants in the original CRTC proceeding (which could be adversely affected by the outcome of the Cabinet's decision) with a hearing in this case. The court based its conclusion primarily on the fact that the submissions of the petitioners (BCI and BCE) were kept confidential, and as a result, parties adverse in interest to the petitioners could not know the case that they had to meet. In addition, the court noted that parties had been

given no indication of the time frame for dealing with the matter and had no clear right or opportunity to make submissions to Cabinet.

The court's decision effectively overrides the conclusion of the Supreme Court of Canada in *Attorney General of Canada* v. *Inuit Tapirisat of Canada*, (1980) 2 SCR 735. In that pre-*Charter* case, the Supreme Court concluded that there were no procedural constraints enforceable by the courts on the exercise by the Cabinet of its review power over CRTC telecommunication decisions. Subsequent to the Inuit Tapirisat Decision, Cabinet petitions have generally been reviewed in a manner that provided some opportunity for opposing parties to present their views to the Department of Communications officials prior to the preparation by that department of a memorandum to Cabinet on the petition. Nevertheless under this procedure, no party to the original CRTC proceeding had really had an opportunity to deal directly with the submissions of the petitioner unless the petitioner provided voluntarily its submissions to those parties. As well, there was no obligation on petitioners to disclose whether additional oral submissions had been made on the matter directly to government officials or Cabinet Ministers. Parties also depended on departmental officials to reflect their submissions accurately in the Cabinet memorandum.

BCE and BCI have applied for leave to appeal Mr. Justice Muldoon's decision to the Federal Court of Appeal. However, if the decision is upheld, parties with relatively low resources to mount an effective lobbying campaign may find that their effectiveness before Cabinet is enhanced by a requirement that they be given a fairer opportunity to review and comment on Cabinet petitions.

J.F.B.

PATENTED MEDICINES PRICES REVIEW BOARD

In July, 1988, the Patented Medicines Prices Review Board (PMPRB) became fully operational and published a detailed Compliance Policy and Guidelines to be applied in determining whether patented medicine prices are excessive. As well, on July 2, 1988, the Board published, for public comment, proposed regulations respecting the reporting of patented medicine sales price and R & D information.

The PMPRB was established as part of the recent *Patent Act* revisions which provided an extended period of exclusivity for patented medicines thereby limiting the potential impact of competition from generic medicine suppliers. The PMPRB is designed to offset the reduction in competition in the supply of pharmaceuticals that these amendments entail. The Board is required to report annually to Parliament on the general pricing and R & D performance in the Canadian drug industry. The PMPRB has also been given regulatory powers to remove the period of patent exclusivity for medicines, or, alternatively, to order a roll-back in the price charged by the patentee for a patented medicine in the event that the Board finds this price excessive.

While the Board is empowered to make an excessive price determination only through a public hearing process, the Board's Compliance Policy is designed to obtain maximum industry compliance without resort to formal regulatory procedures. The core of the Board's Compliance Policy will be its price monitoring and case handling procedures.

Price monitoring will be conducted under the Board's regulations which will provide for reporting of actual average sale prices for individual patented medicines from each patentee covering the January through to June and July to December six month periods. Under the regulations, sales and price information will have to be provided according to a medicine's drug identification number with further breakouts for strength, dosage, form and package size. Price and sales information will have to be provided both by the original patentee and its voluntary licensees as well as compulsory licensees (generic producers).

The regulations will also require detailed reporting on product line R & D activities and expenditures. This information is intended to form the base for the Board's annual reports on drug industry investment in Canada and monitoring of the R & D undertakings which have been given by the industry in order to secure the new exclusivity period.

Sales volume information will also have to be provided for each province according to four customer classes (hospital, drug store and pharmacy, wholesaler, and other).

The second major Compliance Policy element is the case handling procedures. The Board has stated that these procedures will consist of the following steps:

(1) Possible excessive price cases will be identified through the Board's price monitoring process and through other sources such as complaints;
(2) Board staff may request that a patentee provide verification of data, and, where necessary, additional information in order to allow an assessment of a price in relation to the Board's Guidelines;
(3) Acting as CEO, the Board Chairman will authorize the initiation of discussions concerning voluntary remedial action by a patentee where it appears that the price of a patented medicine contravenes the Board's Excessive Price Guidelines;
(4) Relying on the Board's Price Guidelines, Board staff will conduct the discussions;
(5) If no satisfactory agreement is reached, staff will recommend to the Board that a hearing be commenced;
(6) If the patentee agrees to take remedial action the agreement will be submitted to the Board for their approval;
(7) If it appears, on the basis of the information available to the Board, that the reduced price of the patented medicine proposed in the agreement would not be excessive, the agreement would be approved and the Board would indicate that a hearing will not be held;
(8) Alternatively, if the Board concludes that the agreement would still result in an excessive price, a Notice of Hearing would be issued and the more formal processes of an excessive price review established in the *Act* would lock in.

The Board's Excessive Price Guidelines provide some indication of the manner in which the Board will apply the factors listed in the *Patent Act* which the Board is obliged to address in deciding whether the price of a patented medicine sold in Canada is excessive. These factors are:

(1) The prices at which the patentee sold the medicine during the five years immediately preceeding the determination;
(2) The prices of other medicines in the same therapeutic class sold in the market during the five years immediately preceeding the determination;
(3) The prices at which the medicines and other medicines in the same therapeutic class have been sold in countries other than Canada during the five years immediately preceeding the determination;
(4) The Consumer Price Index (CPI).

Although these factors must be considered by the Board, the weight the Board attaches to any of them and the extent to which other factors including costs may be considered relevant by the Board has essentially been left to the Board to decide.

The Board's Excessive Price Guidelines require the calculation of three price measures:

(1) A benchmark price from which a "CPI adjusted price" may be calculated. For drugs marketed in Canada prior to December 7. 1987. this benchmark price is the price at December 7, 1987 (i.e. the date on which the amendments to the *Patent Act* were proclaimed in force). For drugs first marketed after that date in Canada, the initial price will be treated as the benchmark price in the event that it is found not to be excessive according to the Board's criteria. The "CPI adjusted price" at any point in time is the benchmark price plus the benchmark price multiplied by the change in CPI from the benchmark date to that point in time.
(2) The median international price of the medicine is the reported ex-patentee price of the medicine using, as the sample, the countries for which equivalent pricing information is required under the Board's Regulations and;
(3) The therapeutically-adjusted price is a constructed price relating the therapeutic value of the drug in question to its actual therapeutic substitutes taking into account matters such as safety, efficacy and dosage regimen.

The Guidelines indicate that, for drugs marketed in Canada prior to December 7, 1987,

current prices will be presumed to be excessive where they exceed the CPI-adjusted price and to be non-excessive if they fall below that price. In either of these cases the Board has, however stated that this presumption can be rebutted by evidence to the contrary derived from the remaining price evaluation factors listed in the *Act*.

With respect to patented medicines first marketed in Canada on or after December 7, 1987, the Board will presume that current prices are not excessive if they do not exceed the lesser of the median international price and the therapeutically-adjusted price. However, the Board has indicated that, where there is no existing therapeutic class for the drug in Canada, primary weight will be placed on the consistency of the price in Canada with the median international price.

The *Patent Act* establishes that, where the Board is unable to make a determination on excessive price after considering the four price factors referred to above, the Board may only then take into consideration production and marketing costs and other relevant factors. In the Guidelines the Board has signalled that, where it finds it must take costs into account, parties wishing to justify a price on the basis of costs should be prepared to provide comprehensive overhead and product line costs and cost allocation standards. Where a party wishes to justify a price by reason of cost increases in imported inputs, the Board has indicated that it expects to be satisfied such cost increases have occurred and are reasonable and unavoidable and reflected to a similar extent in the prices of the medicine in the countries listed in the Patented Medicines Regulations.

The Guidelines also indicate that the prices which the Board will consider to be relevant with the purpose of determining excessive price will be prices of patentees themselves from the first arm's length sale of the medicine within Canada.

With respect to the definition of the relevant market, the Guidelines state, given that patent rights are national in scope, the Board will initially review prices based on the overall Canadian market.

Prices charged to particular classes of customers and prices charged to particular provinces or geographic regions may, however, be reviewed by the Board where specific evidence indicates that it would be appropriate to do so. The relevant prices will be actual retail prices after the reductions for rebates, discounts, refunds etc. referred to in the Board's regulations.

Finally, the Board has indicated that, where actual CPI figures are not available, patentees, in setting prices for future periods based on the expected rate of inflation over those periods, may rely on the CPI forecast produced by the federal Department of Finance.

Following these announcements the Board staff has conducted an extensive series of information sessions on the Guidelines and Compliance Policy with provincial governments and industry and user representatives. Interested parties have been invited to provide written comments on the Guidelines.

J.F.B.

NEW FEDERAL ENVIRONMENTAL PROTECTION ACT IN FORCE

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The new *Canadian Enviromental Protection Act (CEPA)* was proclaimed in force on June 30, 1988. The *Act* consolidates and strengthens existing federal environmental protection legislation, introducing regulatory control over the complete "life cycle" of toxic substances from initial development through manufacturing, storage, transportation, use, release into the environment, and disposal. In announcing proclamation of the *Act*, the Hon. Tom McMillan, Minister of the Environment, also released an Enforcement and Compliance Policy which establishes the principles the federal government will follow in administering the legislation.

The main features of *CEPA* are:

- authority to control introduction of new substances into Canada;
- authority to obtain information on new and existing substances (including testing requirements);

- controls over all aspects of the life cycle of toxic substances;
- authority to regulate fuels and components of fuels;
- authority to regulate emissions and effluents (including waste handling and disposal practices of federal bodies);
- authority to create national environmental protection codes, guidelines, and standards;
- authority to control sources of air pollution where violation of an international agreement would result or where the pollution affects another country and reciprocal legislation exists;
- authority to control nutrients such as phosphates in water conditioners and cleaning products; and
- authority to regulate ocean dumping.

Reflecting the strong presence of provincial environmental protection regulation, particularly in the later stages of the life cycle, the legislation also gives the Minister of the Environment authority to sign agreements with provincial and territorial governments regarding administration of the *Act*. In addition, the legislation allows the federal government to recognize provincial requirements as "equivalent" to federal regulations. The federal government will judge equivalency of provincial requirements according to the following factors:

- equal level of control as sanctioned by law;
- comparable compliance measurement techniques;
- comparable penalties;
- enforcement policies and procedures consistent with the federal Enforcement and Compliance Policy; and
- comparable rights of individuals to request investigation of a suspected offence and to receive a report of the findings.

The *CEPA* Enforcement and Compliance Policy is considered to be a "state-of-the-art" example of a compliance policy for federal regulatory legislation. Developed in association with the federal Department of Justice, it is notable, in particular, for the level of detail provided concerning factors that will influence the department's enforcement decisions. The Policy confirms and elaborates on the "get tough" enforcement stance which the Minister has been signalling for some time. While the Policy states that enforcement officials will administer the *Act* with an emphasis on prevention of damage to the environment, it commits the government to examine every suspected violation and to take action in accordance with the policy's requirements.

Measures to promote compliance are also identified and discussed in the Policy. The government sets out commitments for use of education and information, promotion of technology development, technology transfer, consultations on regulation development and review, use of environmental codes of practice and guidelines, and promotion of environmental audits.

The policy concerning the use of environmental audits for enforcement purposes was a significant issue in private sector consultations concerning drafts of the Policy and during parliamentary consideration of the legislation itself. The final version of the Policy strikes a balance between the department's desire to encourage internal audit programs and its need to preserve effective enforcement capability. The Policy states that inspectors will not request a company's internal environmental audit reports during routine inspections. However, access to the reports may be required when enforcement officials have reasonable grounds to believe:

- an offence has been commited;
- the audit's findings will be relevant to the particular violation, necessary to its investigation and required as evidence;
- the information being sought through the audit cannot be obtained from other sources.

These criteria represent a significant voluntary curtailment of the search and seizure powers accorded to inspectors under *CEPA*. The Policy goes on to state that environmental audit reports must not be used to shelter monitoring, compliance, or other information that would otherwise be accessible to enforcement officials. Any demands for access to the audit reports during investigations will be made pursuant to the new search warrant powers set out in the legislation.

The Policy clearly distinguishes between inspection and invesigation activities under the legislation, setting out the purposes and general

procedures that will apply to each. A program of inspections will be complemented by spot-checks. Enforcement officials will determine the inspection schedule by reference to the risk that a substance or activity poses to the environment or human health, and by the compliance record of the individual or firm in question.

The Policy provides a detailed review of the options open to enforcement officials where there has been a violation of the regulatory requirements. Eight forms of response are discussed:

- warnings;
- directions by Inspectors;
- ticketing;
- orders by the Minister;
- injunctions;
- prosecution;
- penalities and court orders upon conviction; and
- civil suit by the Crown to recover costs.

In an attempt to open up the "black-box" which normally characterizes discretionary decision by enforcement authorities, the Policy stipulates that the following factors will be considered when deciding on enforcement responses:

- nature of the violation (including seriousness of the harm or potential harm, intent of the violator, whether it is a repeated occurrence, and whether there have been attempts to conceal information);
- effectiveness in bringing the violator into compliance with the regulatory requirements (including consideration of the violator's compliance history with both federal and equivalent provincial legislation, willingness to cooperate with enforcement authorities, evidence of prior corrective action, and existence of other enforcement actions by federal or provincial authorities concerning the same matter); and
- consistency in enforcement.

Each of the possible 8 responses to violations is reviewed in detail and the Policy outlines when and how the response would be used. For instance, in a potentially significant departure from past practice, warnings are to be generally reserved for cases in which the degree of harm or potential harm to the environment, human life or health appears to be minimal. The Policy stipulates that warnings will always be given in writing and outlines the information which they will contain.

The Policy sets out the criteria that will be used by enforcement officials when developing recommendations to Crown prosecutors on sentencing. Similar criteria are reviewed concerning the types of court orders which may be requested (eg. corrective action, public notice, community service, compensation) upon conviction.

Although the *CEPA* Enforcement and Compliance Policy leaves officials with considerable latitude in their enforcement decisions, it does represent a commendable and very useful effort to open up yet another aspect of the regulatory process and let the private sector know what the rules of engagement will be.

The federal government has pledged to review the Policy and its implementation within two years. That review should address whether publication of the *CEPA* Policy has, in itself, promoted compliance with the legislation. As part of its Compliance and Regulatory Remedies Program, the Department of Justice is currently encouraging federal departments to prepare and publish similar policies. The perceived success or failure of the *CEPA* Policy could have a major influence on the extent to which Justice's ideas are accepted and compliance policies become "standard equipment" for federal regulatory programs.

Reform of enforcement and compliance arrangements in regulatory legislation may prove to be one of the most important and beneficial areas of regulatory reform in the next few years. Recent studies of small business regulatory and paperburden problems disclosed that many firms are more concerned with the <u>way</u> they are treated by enforcement authorities than with the actual content of the regulatory requirements. Internal federal studies have revealed significant regional variations in enforcement behavior under some national programs.

The government's attempt to bring greater transparency and consistency to regulatory enforcement is not without risks, however. As with the government's recent regulatory process reforms, compliance policies are intended to be simple statements of administrative policy. They are not supposed to have legal consequences. This may be wishful thinking. Just as the courts are showing early signs of assigning legal

significance to the federal Regulatory Impact Analyses, (see Formal Regulatory Process Reforms Take on New Legal Significance in June, 1988, *CCPR* and "Further Legal Recognition of Regulatory Impact Analyses" below), it seems inevitable that alleged departures from a compliance policy will be raised either as a defence or as a mitigating factor for sentencing in some future prosecution. The policies will set a standard for judging equality of treatment under the law. The information management systems which must be in place to ensure informed and consistent decision-making by enforcement authorities will provide the evidence (access-to-information willing).

FURTHER LEGAL RECOGNITION OF REGULATORY IMPACT ANALYSES

Do two cases constitute a trend? Is the honeymoon over for regulatory reformers? It is still too early to tell, but some administrative law experts believe that the courts have already begun the (inevitable) process of converting the new "administrative" arrangements for regulation-making in the federal government to legal requirements.

The last issue of the *Canadian Competition Policy Record* (June, 1988) contained a report on a Federal Court (Trial Division) decision which cited a published federal Regulatory Impact Analysis (RIAS) as providing evidence that Cabinet might have been misled concerning the need for, and impact of, a regulation imposing export control restrictions on certain cedar products. The latest development is a decision of the Alberta Court of Queen's Bench in *Reimer Express Lines Ltd.* v *Alberta Motor Transport Board* (Judicial District of Red Deer, June 15, 1988, unreported). In this decision, Mr. Justice Holmes held that the RIAS published in conjunction with regulations under the federal *Motor Vehicle Transport Act* (S.C. 1987, c.35) constituted a statement of public transportation policy within the meaning of s. 8(5)(b) of the *Act*.

Reimer Express had applied to the Court of Queen's Bench for *certiorari* orders quashing nine decisions of the Alberta Motor Transport Board. Acting pursuant to authority delegated under s.8 of the federal *Motor Vehicle Transport Act (MVTA)*, the Alberta Board had granted extensions of extra-provincial trucking licences to certain competitors of Reimer. The Board dismissed objections filed by the company to the effect that the increased competition resulting from the granting of the applications would be detrimental to the public interest. The company argued that costs for truckers would rise, ultimately reducing services and increasing costs for public users. Reimer challenged the Board's decision on a variety of procedural grounds, including the argument that the Board had taken into account irrelevant policy considerations, had failed to establish criteria to assess the public interest tests set out in the legislation under which the Board was acting, and had acted without jurisdiction in the absence of a public transportation policy issued by the federal Governor in Council.

Section 8 of the *MVTA* provides as follows:

> (1) Subject to this section and to any regulations made pursuant to section 9, the provincial transport board in each province may issue a licence to a person to operate an extra-provincial truck undertaking in the province on the like terms and conditions and in the like manner as if the extra-provincial truck undertaking were a local truck undertaking,
>
> (2) The provincial transport board in a province shall in exercising its powers under subsection (1), issue a license to operate an extra-provincial truck undertaking in that province to an applicant therefor who submits to the board prescribed evidence that the applicant meets the prescribed criteria relating to the fitness of the applicant to hold such a licence.
>
> (3) Notwithstanding subsection (2), where under the law of a province the provincial transport board is authorized to hold a public hearing with respect to an application for licence to operate a local truck undertaking, the board shall not hold a public hearing with respect to an application for a licence referred to in subsection (2) unless the interested person who objects to the issue of the licence provides the board with evidence that satisfies the board that, in the absence of evidence to the contrary, the operation of the extra-provincial truck undertaking in respect of which the licence is sought

would likely be detrimental to the public interest.

(4) Notwithstanding subsection (2), where under the law of a province an interested person may object to the issue by the provincial transport board of a licence to operate a local truck undertaking, the provincial transport board is not required to issue a licence referred to in subsection (2) if an interested person objects to the issue of the license and establishes to the satisfaction of the board that the operation of the extra-provincial truck undertaking in respect of which the licence is sought would be detrimental to the public interest.

(5) In applying subsections (3) and (4), a provincial transport board shall:

(a) give primary emphasis to the interests of users of transportation services, whether those services are provided by the undertaking or not; and

(b) have regard to any statement of public transportation policy issued by the Governor in Council after consultation by the Minister with the government of each province affected thereby.

The Alberta Queen's Bench held that s. 8(5)(b) should not be interpreted as implying that there must be a policy statement in the absence of which the *MVTA* would be inoperative. The court went on to state (obiter) that, in any case, the RIAS attached to the *MVTA* regulations "was intended to be a statement of public transportation policy of the kind to which the board is directed to have regard in s. 8(5)(b)."

The court also rejected Reimer's assertion that the Board had relied on irrelevant policy considerations and had failed to establish criteria to assess the public interest tests set out in the legislation. The RIAS clearly influenced the court's conclusions regarding the purpose of the new federal legislation, its review of the Board's actions in granting the trucking licence applications, and its assessment of Reimer's argument that the resulting increased competition would be detrimental to the public interest:

> (The RIAS) is of interest in explaining the purpose and intent of the new legislation which became effective January 1, 1988. Clearly, a new joint federal-provincial scheme was set up with the object of encouraging more competition among carriers. The statement specifically forecasts both more entries as well as exits from the marketplace by carriers and deems such increased competition and the results therefrom as not likely to be detrimental to the public interest.
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> A review of Reimer's objections indicates not so much evidence that the granting of the applications would be detrimental to the public interest, but rather assertions of a different philosophical view on the value and results of increased competition. As I previously mentioned, it is therefore not surprising that the board summarily rejected Reimer's objections, having regard to the board's legislative mandate and the policy statement it has been directed to follow. (Reasons, pp. 6 and 7)

At the very least, the *Reimer* decision confirms that counsel have recognized the significance of regulatory impact analyses for evidentiary purposes and as aids for interpretation of legislation. The RIASs, after all, do constitute the primary documentation that is reviewed by Cabinet when it approves a regulation. Moreover, Cabinet not only approves the regulation, it also approves publication of the accompanying RIAS.

There can be no doubt now that Department of Justice lawyers will be carefully scrutinizing not only the regulations, but also the RIASs. There is a risk that, as a consequence, the documents may become more legalistic and less comprehensible to the lay audience for which they were primarily intended. There is a risk that they will carry less and less information as the government seeks to protect itself against yet-undiscovered uses in judicial review proceedings.

On the other hand, the government may come to recognize the RIASs as a mechanism for communicating not only with the public, but with the judiciary as well. The documents might benefit from a more rigorous approach to preparation and review by the originating departments. The outcome will depend on whether the government's commitment to private sector consultation, informed decision-making, and openness in regulatory process can withstand the equally powerful desire to reduce its political and legal exposure. Keeping regulatory reform on track may prove to be a far more difficult task than implementing it in the first place.

E.A.M.