REGULATORY AND POLICY DEVELOPMENTS

COMPETITION IN THE TELECOMMUNICATIONS INDUSTRY AND REGULATORY FORBEARANCE UNDER THE RAILWAY ACT

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Regulatory forbearance involves a decision by a regulator not to regulate in an area where it has the statutory mandate to do so. It differs from deregulation effected through legislative amendment in that the power to forbear gives the regulator by statute the option to regulate or not.

As a creature of statute, a regulator must find within the four corners of its constituting act the power to exempt from regulation certain parties or certain areas of activities that it has, but for the exemption, the responsibility to regulate. The power to exempt can be expressly outlined or implied in such act. It can be conferred exercisable only when narrowly delineated circumstances exist or at the regulator's broad discretion. Where the regulator's mandate is economic regulation of a certain area of activity, the existence of competition is usually the reason cited for the appropriateness of forbearance.

On 13 October 1988, in *Telecommunications Workers' Union* v. *The Canadian Radio-television and Telecommunications Commission and CNCP Telecommunications*, the Federal Court of Appeal set aside Telecom Decision CRTC 87-12 issued by the Canadian Radio-television and Telecommunications Commission (CRTC) on 22 September 1987 and referred it back to the Commission for reconsideration. Decision 87-12 approved an application by CNCP Telecommunications for an exemption from the requirement to file tariffs for a number of its previously tariffed service offerings. The court found that the Commission's jurisdiction under the *Railway Act* did not include the authority to relieve a telecommunications carrier under federal jurisdiction from the requirement to file for approval any toll to be charged for its services.

The tolls, terms and conditions of service of telephone companies under federal jurisdiction have been regulated pursuant to the provisions of the *Railway Act* since 1906, and those of telegraph companies under federal jurisdiction since 1908. Telephone and telegraph tariffs were filed for approval with the regulatory agency and, according to the administrative process in place for the filing and approval of railway freight tariffs until 1976, many years after freight tariffs no longer required approval.

In 1976, jurisdiction over the economic regulation of telephone and telegraph companies was transferred from the Canadian Transport Commission (CTC) to the CRTC. This transfer was effected by enacting the *CRTC Act* in which it was declared that the commission already in place for the regulation of broadcasting, the CRTC, would henceforth exercise the powers, duties and functions in relation to telecommunications vested in the CTC by the *Railway Act* or any other act of Parliament. The provisions of the *Railway Act* respecting the filing and approval of telephone and telegraph tolls, virtually unchanged since 1906, were not amended or transferred from the *Railway Act*.

At issue in the *Telecommunications Workers' Union (TWU)* case is the meaning of section 320 of the *Railway Act*. Section 320 declares that tariffs for all telephone and telegraph tolls to be charged by telephone and telegraph companies under federal jurisdiction must be filed with the Commission and that such tolls are subject to the approval of the Commission and may be revised by the Commission. Subsection 320(3) specifies that, except with the approval of the Commission, a telephone or telegraph company may not charge a toll in respect of which there is default in filing

or which is disallowed by the Commission. Section 321 requires that all telephone and telegraph tolls charged be just and reasonable, that they be charged equally to all persons for similar services under similar circumstances and that tariffs not represent unjust discrimination or undue or unreasonable preference or advantage with respect to tolls, services or facilities.

CNCP had applied in September, 1986, for the exemption granted by the CRTC in Decision 87-12, arguing that, with growing competition in the provision of most of the services offered by the company, regulation was no longer necessary to ensure that its tolls were just and reasonable. The level of its tolls, by then, CNCP claimed, was dictated by market forces.

CNCP stressed in 1986 that its share of the total telecommunications market was small and that the company did not enjoy a monopoly power or a dominant position in any part of such market. CNCP emphasized that, in addition, it was experiencing increasing competition, not only from other federally-regulated telephone companies, but also from provincially-regulated companies whose competitive offerings are largely unregulated and from unregulated resellers of services and suppliers of terminal equipment. Moreover, CNCP argued, since the company provides no monopoly services, there is no need for regulation to prevent unfair cross-subsidies from monopoly to competitive services. Exemption from tariff filing for the services it was offering in competition with others was essential, CNCP argued, if the company was to be in a position to compete effectively, free from the regulatory burden, including the delays in marketing and the operational constraints that flow from the need to apply for Commission approval before a toll is charged.

During the hearing of CNCP's application, the Telecommunications Workers' Union and other interveners raised the issue of the scope of the Commission's jurisdiction under subsection 320(3) of the *Railway Act*. The subsection was intended, TWU argued, to allow the Commission to relieve a regulated company from the consequences of a specific default in the statutory obligation to file tariffs before charging tolls, but not from the obligation itself. In other words, although the obligation to file tariffs is ongoing and although the *Railway Act* provides sanctions for a company charging tolls without such filing, subsection 320(3) was intended, in TWU's view, to empower the Commission to allow a company who has not filed a tariff for a toll to continue charging the toll while it prepares and files a tariff for approval as required by the *Railway Act*, not to empower the Commission to dispense a company from the obligation of filing a tariff.

In approving CNCP's application on 22 September 1987, the Commission did not expand on the legal underpinnings of its conclusion that it had jurisdiction to detariff a number of CNCP service offerings. The Commission saw no reason, it stated, to change its previous determination that federally-regulated telecommunications carriers may be permitted by the Commission, pursuant to subsection 320(3) of the *Railway Act*, to charge tolls for which tariffs have not been filed.

Decision 87-12 indeed does not represent the first exemption from tariff filing granted by the Commission to a telecommunications carrier. The Commission considered, as early as 1984, the issue of the appropriate regulatory regime for competitive telecommunications network services offered by regulated telecommunications carriers and the scope of its jurisdiction under the *Railway Act* to forbear from requiring tariff filings from certain companies providing telecommunications services.

In Telecom Decision CRTC 84-18 dated 12 July 1984, the Commission determined the regulatory treatment to be accorded a new range of services generally known as enhanced services whereby, using computer processing technology, ordinary telecommunications services can be combined with the provision of information storage, information processing or information creation services. Such services can be provided either by regulated telecommunications carriers or by other service providers using the underlying basic telecommunications services and facilities of such carriers. In light of the *Railway Act* definition of a company subject to Commission jurisdiction, the Commission faced the prospect of finding within its regulatory purview a host of enhanced service providers and a situation where services provided by telecommunications carriers in competition with other unregulated service providers would be tariffed.

The Commission concluded in Decision 84-18 that it was neither necessary nor desirable that enhanced services provided by parties other than common carriers be regulated. Not only would the diverse and dynamic market for enhanced services render the development of generally applicable criteria for regulation virtually impossible, but, in the Commission's view, its jurisdiction under section 320 of the *Railway Act* was intended to extend only to those companies within federal jurisdiction that may be considered to be operating a telephone or telegraph system. Moreover, the benefits to be derived from competition, especially innovation, market flexibility, competitive pricing and user choice, would be more likely to result from an environment governed, to the maximum extent possible, by market forces rather than by regulation. As for the rates charged by federally-regulated telephone and telegraph companies for enhanced services, the Commission stated its intention to require the filing of aggregate studies for all enhanced services on an annual basis to ensure against cross-subsidies from monopoly services but not to require tariff filings or individual rate evaluation studies when new enhanced services are introduced or the rates for existing enhanced services are modified.

In October, 1984, the Commission considered the regulatory approach it would take in relation to companies licensed by the Government of Canada to provide a new high capacity type of mobile telephone system using radio frequencies as a carrier and known as cellular radio service or cellular telephone service. The telephone company serving each province of Canada or an affiliate thereof was licensed to provide cellular radio service within its operating territory. A national licence was granted to the Cantel Cellular Radio Group Inc. to provide cellular telephone services in competition with each licensed telephone company.

The Commission expressed the opinion, in CRTC Telecom Public Notice 1984-55, that Cantel and any affiliate of a federally-regulated telephone company are companies within the definition found in subsection 320(1) of the *Railway Act* and are therefore subject to its jurisdiction. The Commission considered, however, that as a matter of regulatory policy it was neither necessary nor desirable that such companies be required to file tariffs for the provision of cellular radio service to the public. The Commission based its conclusion on its opinion that the benefits which users may derive from this innovative service were likely to be greater if the terms of its provision were governed, as much as possible, by market forces rather than by regulation. The Commission concluded that, pursuant to subsection 320(3) of the *Railway Act*, Cantel and any arm's-length affiliate of a federally-regulated telephone company may charge tolls to the public for cellular radio service for which tariffs have not been filed.

In March, 1986, in Telecom Decision CRTC 86-5, the Commission determined that the market for multiline and data terminal equipment services was sufficiently competitive that, coupled with regulatory safeguards to prevent cross-subsidization from monopoly services, market forces could be relied upon to ensure that Bell Canada's and British Columbia Telephones' rates for such services were just and reasonable. Both companies were exempted from the obligation to file tariffs for the approval of the tolls charged for the provision of multiline and data terminal equipment.

Also in March, 1986, the Commission approved an application by Telesat Canada for authorization to charge tolls for its commercial earth station services without filing tariffs, provided Telesat established that, on an aggregate basis, the services were compensatory. Telesat had argued that the existence of several competitors in the provision of earth station services rendered economic regulation, a proxy for competition, unnecessary. Telesat had also relied, in its application, on the argument that, where genuine competition exists, regulation is harmful since it hampers one or more of the competitors and deprives them of the flexibility necessary to respond with ease to market forces, thus preventing the development of effective competition with its attendant advantages for the public.

The Commission granted Telesat's application in Telecom Decision CRTC 86-6 stating, at pages 2 and 3 of the decision:

> The Commission is of the view that, where effective competition exists, coupled with regulatory safeguards to prevent cross-subsidization from monopoly services,

federally-regulated carriers may be permitted, pursuant to s.320(3) of the *Railway Act*, to charge tolls for which tariffs have not been filed.

CNCP's response to TWU's appeal of Decision 87-12 was based on the argument that subsection 320(3) of the *Railway Act* admits of an interpretation other than that advanced by TWU. In CNCP's view, read in their ordinary sense, the words "in respect of which there is default in filing" mean "in the absence of filing." They therefore empower the Commission not only to allow a company which has not filed a tariff for a toll charged to continue charging the toll while it prepares and files a tariff for approval but also to grant the exemption from filing sought by CNCP.

In rejecting CNCP's argument, the Federal Court of Appeal reviewed subsection 320(3) of the *Railway Act* in light of the purpose and objects of those parts of the *Act* applicable to telecommunications carriers. Read as a whole, the court concluded, such parts put in place a regulatory scheme which confides in a regulatory agency rather than in the carriers, whatever the market conditions, the task of ensuring that the tolls charged are just and reasonable. That responsibility must be discharged by the Commission for all tolls charged, decided the court. The applicable provisions of the *Railway Act*, dating back to 1906, may no longer be in tune with changed circumstances, but Parliament alone, the court stated, through legislative amendment, could authorize the Commission to decide which telecommunications rates require tariff filings and prior Commission approval and which service offerings can be priced through the operation of the marketplace. It is not open to the Commission, concluded the court, under the provisions of the *Railway Act* now governing telecommunications carriers, to cease to discharge its obligations under the *Act* on the grounds that the rationale underlying them have ceased to exist. The very scheme of the *Act* was at stake and, the court stated, "reconsideration of that scheme must come from Parliament, not from [the] Court or the Commission's own conception of how the statute should be rewritten in light of changed circumstances."

With recent advances in technology, in particular the convergence of telecommunications and computer processing technologies, a new range of communications services with a potential for competition between them and for competition with the telecommunications services provided by telephone and telegraph companies have reached Canadian markets. Increasing pressures for innovative regulatory approaches with respect to telephone and telegraph companies have been generated as a result. With little change in the federal legislative framework underlying the regulation of telecommunications, the CRTC has had to try new avenues, but under old guideposts, in order to ensure that service development is not inhibited and that industry participants have the ability to respond with flexibility to innovation and to market demand. In the *TWU* case, the Federal Court of Appeal reminded the CRTC that the technology and the marketplace may have changed but that the law has not. CNCP is seeking leave to appeal the *TWU* judgment to the Supreme Court of Canada.

The Government has explored some new legislative avenues in recent years with respect to the ability to forbear regulating certain aspects of the telecommunications industry. A proposed measure specifically related to Teleglobe Canada, the Canadian international telecommunications carrier, was enacted in 1987, a proposed omnibus measure that would have affected the regulation of all telecommunications carriers has yet to become law.

In 1984, Bill C-20 was introduced in Parliament to amend, *inter alia*, the *CRTC Act* by providing that where the Governor in Council is of the opinion that a telecommunications service provided by a federally-regulated telecommunications carrier is, or will be, subject to a degree of competition sufficient to ensure just and reasonable rates, the Governor in Council may order the Commission to refrain from regulating such service. Bill C-20 died on the Order Paper.

In 1987, the statute governing the privatization of Teleglobe Canada, the *Teleglobe Canada Reorganization and Divestiture Act*, provided that the CRTC could, if it was satisfied that any activity of Teleglobe Canada was subject to a degree of competition sufficient to ensure just and reasonable tolls and to ensure against unjust discrimination or undue or unreasonable preference, advantage, prejudice or disadvantage,

permit Teleglobe to charge tolls for that activity without having first filed a tariff with the Commission for approval.

Both the federal government and some provincial legislatures are actively pursuing legislative projects aimed at ensuring that regulators are armed with the discretionary flexibility required to subject monopoly activities of telecommunications carriers to the degree of economic regulation necessary to protect the public interest while leaving to the forces of the marketplace the pricing of their competitive activities. These projects can only be given higher priority if CNCP is not granted leave to appeal the judgment of the Federal Court of Appeal in the *TWU* case or if the Supreme Court of Canada hears an appeal and confirms the judgment.

ONE-STOP SHOPPING FOR FINANCIAL SERVICES

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The Laurentian Group pioneered the supermarket approach to the provision of financial services in Canada. It brought together its securities, insurance and deposit-taking arms under a single roof in Montréal.

Now the regulatory groundwork has been laid for securities dealers to conduct their retail businesses out of the branches of banks and trust companies to which they are related. On November, 1988, the Canadian Securities Administrators announced the uniform provincial principles on which such dual operations will be permitted.

The need for separate corporate entities to conduct securities and deposit-taking activities arises from two related factors that have influenced the process of reregulation of the Canadian financial services industry. First, the federal government opted, in its December, 1986, White Paper, "New Directions in the Financial Sector," for what is essentially a one-function/one-institution approach to regulation. Each financial institution will be limited to a single major function within an entity that will be governed in a manner suitable for the protection of those for whom that function is performed. The regulatory regime will differ, therefore, depending on whether the central function is, for example, banking, insurance or the performance of corporate trust functions. Second, the accord between the federal and Ontario governments of April, 1987, recognized that, with limited exceptions, financial institutions will have to carry out their securities-related activities through subsidiaries or affiliates which will be regulated provincially. In other words, the one-function/one-institution approach at the federal level was taken to its logical extension across jurisdictional lines, the provinces having constitutional authority over securities trading.

As a result of changes to the *Bank Act* in July of 1987, chartered banks have been allowed to acquire control of securities dealers. A number of banks have taken advantage of that new authority. Federally incorporated trust and insurance companies were promised a similar extension of their investment powers in the White Paper but await delivery on that promise. Nonetheless, some trust companies already have securities dealers "in the family." This is usually the result of a parent holding company which is not limited in its investment powers, having acquired a securities dealer so as to make the dealer a sister or other relative of the trust company.

Given the new relationships between banks and trust companies on the one hand, and securities dealers on the other hand, there has been increased pressure within the financial community for a closer integration of functions. The principles of regulation that have been recently released represent a significant response to that pressure.

Those principles reflect the agreement of all the provincial securities regulators that brokerage business, of the full service or discount variety, may be carried on within the branches of a bank or trust company that is associated with the broker. Permission to operate in this fashion will, however, be subject to a number of requirements that attempt to ensure some separation of roles and the avoidance of potential conflicts of interest. The requirements include:

- prior approval by the relevant securities commission;
- the creation within the branch of separately identifiable premises bearing the name of the dealer;
- the restriction of dealer activities to those premises and bank or trust company activities to the balance of the branch facility;
- distribution of a disclosure document to all customers, before securities are traded on their behalf, indicating the relationship between the two financial institutions and the fact that investments in securities do not have the benefit of deposit insurance and are to be otherwise be guaranteed;
- the provision of remuneration by way of salary rather than commission to those employees who are qualified to provide both securities and other branch services, where such dual qualification is permitted; and
- restriction of securities activities to advertising, information clearance and administrative functions when a dealer has no employees in a particular branch who are qualified by personal registration under the securities legislation.

Coincident with the release of these principles, Marathon Brown, a discount broker that belongs to the Central Capital Group, opened a storefront office in a Toronto branch of Guaranty Trust, which is a member of the same group. Four of the major chartered banks also disclosed their intention to follow suit by bringing subsidiary-run brokerage operations into some of their branches.

There is no doubt that the service areas of some banks and trust companies will take on very different appearances and functions in the future. The supermarket analogy may not be entirely apt in the initial stages because of the need for "identifiably separate premises" for the securities operation. But over time it may be expected that the distinction between the two roles will be blurred and one-stop shopping may take place at a single counter or, heaven forbid, at a single electronic terminal.

NTA CRITICIZES VIA RAIL DISCOUNTING

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In a report to the Governor in Council dated December 19, 1988, the National Transportation Agency concluded, following an investigation under section 281 under the *Railway Act*, that the fares in two 1988 Via Rail discount tariffs were prejudicial to the public interest.

The proceeding arose from applications by Voyageur Colonial Ltd. in May, 1988, for leave to appeal to Via Rail Discount Passenger Fare Tariffs. These Via tariffs implemented a 40% reduction in one way fares between points on Via's Montréal to Ottawa route for travel on off-peak days in June, July, and August, 1988, and a $29.00 one way fare for travel on Via's Montréal to Toronto route on off-peak days in June, 1988, subject to a two-day advance purchase restriction (a reduction of up to 43% from the regular one-way fare). Following a public hearing in late May, the Agency granted Voyageur leave to appeal, and, at the same time as interim relief, suspended the two tariffs until it had an opportunity to investigate and rule on Voyageur's appeal.

In this case, the Agency considered that the appropriate investigation into the complaint would be in the form of a public hearing. The hearing commenced in late June but, because of procedural appeal by Voyageur to the Federal Court, the hearing did not conclude until late November, 1988.

Voyageur alleged that Via tariffs were prejudicial to the public interest on the grounds that they would result in a reduction in Via revenues because the revenue from additional passenger traffic stimulated by the lower fares would not offset the revenue from a significant portion of existing passenger traffic taking advantage of lower fares (thus creating a greater federal subsidy burden for Via), and that the tariffs would reduce these fares to a level below many of the Voyageur fares on the same route (thus reducing Voyageur's profitability).

In this regard the Agency concluded that:

> ...it is imperative that stimulation of demand must not be at the expense of reduced revenues. The appropriate means of ensuring that there

is no cannibalization of Via's revenues would have been through the erection of fences around the discount fares. In essence the more restrictive the fences erected around a particular structure, the lower the risk of revenue diminution.

The Agency then concluded that the fences which Via put around the lower fares were not sufficient to provide reasonable assurance the revenues would decrease as the result of implementing the discount fares. In fact, the Agency regarded that the fare's fences were almost non-existent. A two-day advance purchase requirement in the circumstances was viewed by the Agency as misleading since a ticket purchased Monday could be used Wednesday and in any event the advance purchase time was extremely short considering the magnitude of the discount:

> The ease of changing tickets, once again on a minimum of two days notice and a total absence of penalties for cancellation are further evidence of Via's lack of concern for the effect of the discount fares on its revenues. Perhaps most important of all is the absence of a fence that Via chose not to implement at all - inventory control. Theoretically, it is possible that on off-peak days virtually every seat, both in Coach and in Via on the Montréal/Ottawa route and in Coach on the Montréal/Toronto route, could be occupied by a passenger travelling on a discount fare.

The Agency also rejected Via's contention that passengers travelling on peak days will not change travel plans to take advantage of the off-peak discount fares proposed, i.e. that any diversion from a peak day to an off-peak day would be replaced by people travelling at full fare. The Agency noted that, using 1988 statistics provided by Via, 84% of peak period Friday and Sunday trains were not sold out and that in most cases the diversion of peak to off-peak travel would result in a loss of revenue to Via. The Agency concluded:

> Where 84% of such trains are routinely departing with space available, discount fares are not an appropriate service response. Rather the more suitable response ought to be to adjust the consist on those few occasions when surge demand is evident. In this respect, therefore, Via's proposed discount fares appear to be a fare reduction rather than a special tariff designed to encourage a particular travelling pattern amongst the travelling public.

As a result, the Agency concluded that there was a significant probability that the promotional fares would not leave Via revenue neutral but would require a bigger federal subsidy of Via and that on this basis the tariffs were prejudicial to the public interest.

The Agency also concluded that the discounts would result in the transfer of passengers from Voyageur to Via with the result that Voyageur would be less able to cross subsidize unprofitable non-Windsor/Montréal corridor routes, a consequence which in the Agency's view was also prejudicial to the public interest.

Having so found, the Agency was presented with the problem that a remedial order against the tariffs was not possible because the tariffs disputed by Voyageur had expired at the end of August, 1988. Nevertheless, the Agency recognized that these tariffs were only the most recent manifestations of a long standing dispute between the bus industry and Via Rail and that some general guidance to Via with respect to its price setting practices was necessary.

One option considered by the Agency would be issuing a declaratory order to guide Via in the future by signalling what the Agency considers to amount to prejudice to the public interest. Such an order could take one of two forms, either a declaration that the provision of tariffs under appeal were prejudicial or declaring that a particular combination of discounts and fences would be acceptable in the public interest. The Agency rejected the first option because it would merely allow Via to discount just short of the prohibited level and accordingly would likely result in further protracted regulatory litigation between Via and the bus industry. This approach would also provide little certainty to either economic interest. The second alternative was rejected as "less palatable" by the Agency because it would, in essence, require the Agency to establish the segment of the transportation market in general and the service transportation market in particular which Via could attempt to serve. To the Agency this appeared to be a policy matter which falls outside the Agency's tariff and investigation rule under section 281.

The only option remaining to the Agency therefore was a report of its findings to the Governor-in-Council. A number of parties had requested the Agency make such a report in which an inquiry into Via's pricing policy and proposed terms of reference would be recommended.

Consequently, the Agency noted:

> Via's pricing policy is obviously a matter of continuing concern to the intercity bus industry, Via's major competitor. The Agency has concluded that, an Appeal pursuant to section 281 of the *Railway Act* is not the appropriate means of dealing with concerns relating to Via's overall pricing policy and marketing strategy, for a number of reasons. Firstly, Appeal proceedings are lengthy and, as this is shown it may not be possible to hear and dispose of an appeal during the currency of any special tariff. Most importantly, the language of section 281 is such that an Appeal must be made against a specific tariff. The problem is that individual tariffs, particularly short term price promotions represent only a part of Via's pricing policy. Via's overall pricing policy serves to establish the segment of the transportation market in general and the service transportation market which Via attempts to serve. This is clearly a public policy matter which the Agency has no authority to rule upon.
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> Because section 281 of the *Railway Act* is not entirely effective in dealing with the public policy concerns of Via's pricing policy and its impact on the competitive environment for intercity passenger transportation, the Agency recommends that the Governor in Council request the Minister of Transport to direct the Agency to undertake an inquiry pursuant to section 31 of the *National Transportation Act, 1987*, into Via's Rail pricing policy.

The decision concludes a detailed proposed terms of reference for this inquiry. At the time of writing the Minister of Transport was still considering the Agency's report.

The conclusions reached by the Agency raised the question of whether the pricing policies of Via Rail might appropriately be subject to the predatory pricing and price discrimination provisions of the *Competition Act* in as much as the Agency has found that, while it may have jurisdiction to override individual prices established by Via Rail which remained in effect at the time of its decision (an unlikely event), its jurisdiction was ineffective in providing a remedy against a practice of establishing short duration ongoing discount fares which, taken together, established a discounting practice which was injurious to competitors and not in the public interest

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CALL-NET: THE SAGA CONTINUES

The Federal Court has granted Call-Net Communications' application for leave to appeal the CRTC's August, 1988, decision which found that the re-structuring of Call-Net's business as an agency for sharing groups contravened the Commission's rules regarding sharing groups and that therefore Bell Canada could terminate the provision of foreign exchange and WATS services to Call-Net's sharing group. (see September, 1988 *CCPR* pp. 12-13)

The Federal Court denied Call-Net's application for a stay of the Commission's decision because Bell Canada had discontinued FX and WATS service prior to the hearing of the stay application. However, the Cabinet varied the CRTC's decision on October 17, 1988, so that Bell could only curtail these services to Call-Net following the final judicial determination of Call-Net's appeal.

Call-Net's memorandum of points of argument filed with the Federal Court of Appeal on November 8, 1988, raises the following principal arguments. First, Call-Net contends that the CRTC erred in law in electing to assign the onus of proof on Call-Net to establish that it was in compliance with the Commission's rules for permissible resale and sharing. Call-Net contends that it had, in effect, made a complete and discrete application to the Commission to prevent disconnection of FX and WATS service to the sharing group unrelated to its earlier applications to have its Customer Dialed Account Recording (CDAR) feature regarded as an enhanced service. Call-Net also contends that under the Commission's sharing rules which now appear in Bell Canada's General Tariff, the carrier is under an obligation to provide service to a sharing group and that the dispute resolution mechanism embodied in the tariff (which is taken from the Commission's initial sharing decision) places the onus on the carrier to establish that the sharing group is not in compliance with the conditions set up by the Commission for permissible sharing.

Second, Call-Net argues that the Commission's August decision, in effect, establishes two new conditions for permissible sharing which do not form part of the tariffed and sharing rules. These

conditions are that any liability insurance among the sharing group members amounts to an impermissible circumvention of the Commission's joint and several liability rule for sharing groups, and that sharing groups employing commercial agents to arrange for services with the carrier and to establish inter-group commercial arrangements is also impermissible. Call-Net contends that neither liability insurance among group members nor the use of a commercial agent are presently precluded by the Bell Canada tariff.

Call-Net cites the emerging doctrine of "legitimate expectations" in support of its position that the Commission has made an error in law by inserting new sharing group conditions outside a formal public process aimed at doing so. This "doctrine," based on British cases of judicial review of administrative discretion, stipulated that public officials who have established a set of rules which are a proper exercise of their discretion are subject to judicial review if they change the rules without notice in a manner which thwarts the legitimate expectation of persons who have relied on the rules. The doctrine is, therefore, a corollary of the principles of natural justice which has been extended to situations where the decision-maker was not clearly acting in a quasi-judicial capacity. Finally, in this regard Call-Net contends that the implication of the no-agent and no-insurance position of the CRTC is to restrict sharing groups to a few large businesses.

Third, Call-Net contends that the Commission had breached the rules of natural justice in not providing Call-Net an opportunity to comment on its sharing contract, and in particular its co-insurance provision. A copy of this contract was filed by Bell Canada. Subsequent to the Bell filing the CRTC advised Call-Net that Call-Net did not have to file a reply argument in order to assist the Commission in deciding the matter.

(Ed Note: This article was prepared prior to the Federal Court's hearing of Call-Net's appeal. The court dismissed the appeal at the end of the hearing without reasons after finding that no error of law had been disclosed. Call-Net plans to seek leave to appeal to the Supreme Court of Canada on essentially the same grounds advanced before the Federal Court but stressing the doctrine of legitimate expectations.)

J.F.B.

1989 FEDERAL REGULATORY PLAN PUBLISHED

The 1989 Federal Regulatory Plan listing 942 possible regulatory initiatives of 29 federal departments and 6 independent regulatory agencies was published in mid-December.

The extent to which these proposals will actually be made into law in 1989 remains uncertain. During 1987, a total of 964 regulations were given formal legal and policy review of which only 42 per cent had actually been included in the 1987 Federal Regulatory Plan. There are, however, a significant number of carryover proposals from the 1988 Plan.

The proposed regulatory initiatives range in significance from routine updates to major legislative changes (such as proposed trust and loan and insurance company legislation).

Of particular note, Consumer and Corporate Affairs proposes to publish for comment registration regulations under the recently enacted *Lobbyist Registration Act* in the first quarter, and, anticipating the enactment of the *Postal Services Review Act*, to publish procedural rules for the proposed Postal Services Review Board in the second quarter. Environment Canada proposes to publish regulations specifying information requirements for the premarketing notification of substances new to Canada in the first quarter. Health and Welfare intends to publish regulations under the *Tobacco Products Control Act* (proclaimed in force on January 1, 1989) governing tobacco product reporting, labelling, and monitoring, including increased health messages in the third quarter.

J.F.B.

CANADIAN ENVIRONMENTAL PROTECTION ACT - A REVIEW

The *Canadian Environmental Protection Act (CEPA)* was proclaimed in force on June 30, 1988. The legislation signals the federal government's intention to become more extensively involved in environmental management and regulation. Through the establishment of higher penalties for regulatory violations and acts which damage the environment, *CEPA* is also designed to act as a

direct incentive on businesses to be more sensitive to the environmental and health implications of their activities and the products they sell and consume.

CEPA builds upon a base of existing but underutilized federal environmental law. Generally speaking, the new regulatory measures introduced in *CEPA* are directed at detecting and controlling environmental and health hazards arising from new and man-made chemical substances. To a very large extent, however, the provincial level of government will continue, as it has been to date, as the principal source of environmental regulation (and in particular waste and emission management rules).

CEPA by itself does not invalidate or override any existing provincial environmental law. However, the extensive new regulatory and data gathering powers *CEPA* provides to the federal government, coupled with expanded requirements for federal-provincial negotiation of environmental standards and regulatory enforcement practices may result, over time, in a shift in the political and bureaucratic balance of power in environmental regulation from the provincial to the federal government, and in greater consistency in environmental regulation among provinces.

The federal government has generally elected to move at a deliberate pace and to consult widely in preparing implementing regulations under *CEPA*. Prior to the recent federal election, the federal government had announced no new environmental regulations to be implemented by means of *CEPA*, other than measures to identify and control the operations of PCB waste storage sites. The provinces have generally indicated that these measures add nothing to existing provincial PCB regulations. For the near term, *CEPA* implementation work will likely continue to be aimed at operationalizing the premarketing testing scheme for new substances.

On its surface, *CEPA* appears to be comprehensive, sweeping, and, in many respects novel environmental law. However, in reality *CEPA*, to a very large extent, simply adopts and replaces a number of previously existing federal environmental laws which themselves contained quite broad powers. Those laws absorbed by *CEPA* (together with a brief description of their powers) are:

1. *Clean Air Act:*
   authority to conduct air pollution monitoring and research, to establish air quality objectives, to establish national emission standards and guidelines covering works and undertakings subject to federal jurisdiction, to regulate the composition of fuels, and to negotiate federal/provincial air pollution control agreements.
2. *Environmental Contaminants Act:*
   authority to require the provision of information on "substances" that may be harmful to the environment and to prohibit manufacturing, importing, or release into the environment of substances prescribed by regulation as environmentally dangerous.
3. *Ocean Dumping Control Act:*
   authority to prohibit and to regulate by permit the disposal of wastes by ship, aircraft, or drilling platform at sea by Canadian vessels, and, generally, within Canadian coastal waters and internal waters and waterways subject to federal jurisdiction.
4. *Canada Water Act Part III:*
   authority to regulate the composition and nutrients used in cleaning agents, (eg. detergents) and water cleaners.

Apart from *CEPA*, the federal government will continue to exercise environmental control through the *Canada Water Act* Parts I and II (authority to create water resource management programs through intergovernmental consultations), the *Pest Control Products Act* (regulation of the composition, sale, and use of pesticides and herbicides), the *Fertilizer Act* (regulation of the composition of fertilizers) the *Transportation of Dangerous Goods Act* (regulation of the manner of transport of health and environmental hazards), the *Fisheries Act* (regulation of discharges into fishing grounds), and the *Canada Shipping Act* (regulations to implement the *International Convention of Pollution of the Sea by Oil*).

Toxic Chemicals Regulation

The principal new regulatory activity for which *CEPA* provides is the regulation of "toxic substances" (defined both by potential consequences to humans and the environment) through their full "life cycle," that is, from the time they are

manufactured or imported through the marketing chain to the time of their use and disposal.

In effect, under *CEPA* the federal government is empowered to regulate virtually any aspect of the manufacture, use, or disposal of any "substance" which it concludes is "toxic."

The former *Environmental Contaminants Act* had a narrower focus on substances which could damage the environment and was basically directed at prohibiting the release of specified contaminants into the environment and at prohibiting the use of designated substances outside certain activities.

Major criticisms of the *Environmental Contaminants Act* were that it did not provide federal officials with a sufficient data base to detect and regulate environmental hazards before they caused problems, that there was insufficient attention paid to the human effects of food chain pollution, that effective environmental protection required more than just waste disposal regulation, and that there were too few opportunities for pubic participation in federal environmental regulation.

Some of the key elements of the *CEPA* regime for the "life cycle" regulation of toxic substances are:

(1) a very sweeping definition of the substances potentially subject to *CEPA* regulation covering virtually any matter capable of constituting a short or long term health or environmental hazard;
(2) a detailed procedure for classifying substances as toxic, including establishment of a formal list of substances given priority for environmental assessment; a detailed assessment procedure involving public rights to provoke an assessment and detailed data disclosure requirements for industry, and finally inclusion of a substance on a list of toxic substances coupled with formal appeal rights to a Board of Review from such decisions;
(3) extensive regulatory powers which, however, can only be exercised following federal-provincial consultations;
(4) notification and damage mitigation duties in the event of toxic substance release; and
(5) mandatory premarketing testing and federal government assessment of all new substances introduced into Canada after the end of 1986.

By way of illustration *CEPA* toxic substance regulations can cover the following:

- the quantity or concentration of the substance that can be released into the environment from any source;
- places or areas where the substance may be released;
- the commercial activities which may release the substance;
- conditions under which the substance may be released;
- quantities manufactured, processed or used in Canada;
- permitted purposes of importation, manufacture or use;
- permitted conditions of manufacture;
- quantities or concentration of use or manufacture;
- conditions under which the substance may be contained in any product;
- disposal conditions, including the construction, maintenance and inspection of disposal sites; and
- reports to government.

However, to ensure that federal environmental regulators do not step on the toes of their provincial counterparts the *Act* provides that federal toxic substance regulations will not apply in provinces which have established an equivalent level of environment protection and enforcement to that which would be provided by *CEPA* regulation.

Enforcement Policy, Offences, and Penalties

The scheme for regulating toxic substances, including substance classification and disclosure requirements, is the primary innovation of *CEPA*. However, the enhanced criminal sanctions and broader administrative powers established by *CEPA*, and the new Enforcement and Compliance Policy that flows from these penalties, will also be important to companies whose activities can seriously affect the environment, and to their officers and directors.

In the normal course, the need for possible criminal or administrative action will be identified by inspectors appointed under *CEPA* (likely to be provincial Environment Ministry inspectors

designated as federal inspectors under a federal-provincial enforcement agreement). *CEPA* inspectors will have the following roles:

- to carry out inspections to verify compliance with the law;
- to review options for preventative and corrective action and to explain legal requirements, including providing administrative "warnings";
- to direct corrective action to be taken in emergencies; and
- to conduct investigations to obtain evidence of violations.

Inspectors will have powers to enter and search premises, to seize and detain anything they reasonably believe was used to commit an offence, to issue warnings, to issue "tickets" for procedural and administrative violations as provided for "ticketing" regulations (to be developed), to direct remedial measures, and to recommend prosecution.

The *CEPA* Enforcement and Compliance Policy published with the proclamation of the *Act* outlines a series of graduated enforcement responses which increase in formality and the impact of the sanction in line with the seriousness of the violation. The criteria for applying each response are also presented in this policy.

In ascending order, possible enforcement responses are: written warnings, directions by inspectors, ticketing, orders by the Minister, injunctions, prosecutions and civil suits by the Crown to recover costs. The types of violations to which ticketing, ministerial orders and injunctions may apply are laid out in the *Act*.

CEPA has increased considerably the maximum penalties available if a violator is successfully prosecuted from those available under antecedent federal environmental legislation. The maximum penalty for providing false or misleading information is $1,000,000 or 5 years imprisonment. For lesser offences the maximum penalty is a fine of $200,000, 6 months imprisonment, or both. An offender can be convicted of a separate offence for each day an offence is committed or continued. There is no indication yet, however, whether actual penalties imposed by the courts for breaches of federal environmental law will rise accordingly.

CEPA also establishes a new set of crimes against the environment for which there is no maximum fine, and liability to imprisonment up to 5 years, or both fine and imprisonment. These new crimes include intentionally or recklessly causing a disaster that results in a loss of the use of the environment, or showing wanton or reckless disregard for the lives or safety of other persons, thereby causing a risk of death or harm to another person.

Where a corporation commits an offence under *CEPA*, any officer, director or agent of the corporation who directed, authorized, assented to, acquiesced in, or participated in the commission of the offence may be held criminally liable whether or not the corporation has been prosecuted or convicted.

In addition to fines and/or imprisonment, or in alternative to them, upon conviction of a *CEPA* offence the court may also order the convicted persons or corporation to:

- pay an amount equal to the many monetary benefits that resulted from commission of the offence;
- remedy the harm to the environment prohibiting any act that may result in a continuation or repetition of the offence;
- publish facts relating to the conviction;
- perform community service;
- pay compensation to the Minister for the cost of any remedial or preventative action taken as a result of the offence;
- pay for research into the ecological use and disposal of the substances in question.

Finally, again as part of the enhanced public participation policy, the Minister of the Environment is required to conduct criminal investigation on the application of two adults who believe a *CEPA* offence has been committed.

J.F.B.

REGULATORY REFORM REVIEWED

Don Mazankowski, the federal Minister Responsible for Regulatory Affairs has published a four year report card on the government post-Nielsen Task Force efforts at regulatory reform.

("Regulatory Reform: Making It Work," published by the office of Privatization and Regulatory Affairs.) The current Conservative government has consistently emphasized that regulatory reform is not another term for deregulation, rather it covers in a non-ideological fashion the weeding out of ineffective programs and procedures and introducing improved management and rules into existing programs.

With respect to the federal regulatory process, the report notes that reforms in place since late 1986 have introduced the following innovations: forecasting all anticipated regulatory projects in an annual Federal Regulatory Plan, prepublication of all draft regulations in the *Canada Gazette*, preparation of a Regulatory Impact Analysis Statement for all regulatory proposals, targetting a three-month average turnaround for legal and policy review of proposed regulations, and preparation of a government-wide Regulatory Program Evaluation Plan.

The report also reviews 80 regulatory program reform projects directed to rationalizing federal regulatory activity. Consistent with the "better management" theme of the government's regulatory policy, the projects do not display a leaning either to more or less intervention. On balance the initiatives disclose a conscious effort to strengthen the effectiveness of health safety and environment intervention through, for example, passage of the *Canadian Environmental Protection Act*, greater uniformity in food inspection, procedural improvements in drug and medicine device regulation, and requiring greater disclosure of workplace hazards. At the same time there appears to be a genuine preference to rely less on direct economic regulation, in the transport and energy sectors in particular, and to rely instead to a greater extent on competition law. On the other hand, the government has elected for far more comprehensive regulation of the business decisions of financial institutions.

J.F.B.

WILL THE <u>REAL</u> ONTARIO TRANSPORT BOARD PLEASE STAND UP?

By: Eric A. Milligan
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On January 1, 1988, the first step in deregulation of interprovincial truck and bus transportation in Canada was taken as the federal *Motor Vehicle Transport Act, 1987* (the *MVTA*) came into effect. The "public necessity and convenience" test, which had been used in both federal and provincial regulatory systems to restrict entry, was jettisoned on favour of a "fitness" test under which an applicant would be entitled to receive a licence if it satisfied basic insurance and safety requirements.

In a political compromise between those who favoured immediate removal of all economic controls over entry and those who sought a continuation of restrictions on competition in the trucking and busing industries, a 5-year transition arrangement was incorporated in the *MVTA*. Extra-provincial licences would be granted through a routine administrative process, without public hearings unless the provincial transport board received evidence which satisfied it that (in the absence of evidence to the contrary) granting the licence might be detrimental to the public interest.[1] In such a case, the provincial transport board would convene a public hearing. The *MVTA* effectively "reversed" the onus in licence applications, requiring those opposing an application to prove that public detriment would occur.

With most provinces, transition to the new regulatory regime has proceeded relatively smoothly. In Ontario, however, the trucking industry and the provincial Ministry of Transport are engaged in what appears to be guerilla warfare. The Ministry is committed to moving as quickly as possible toward effective deregulation of intra and interprovincial trucking. The industry, prompted by concern over potential domination of Canadian markets by major U.S. carriers, the lack of reciprocity for Canadian carriers in the U.S., and what is viewed as high-handed behaviour and unfair procedures by the Ministry, is committed to slowing the pace of reform and ensuring

"commercial certainty" for existing licensees. The Ontario Highway Transport Board (OHTB), caught between the two opposing forces, is viewed by both as being more attuned to the industry position and, therefore, likely to maintain a restrictive approach to entry.

The latest skirmish between the Ministry and the industry took the form of a stated case to the Ontario Divisional Court seeking a ruling on who has decision-making authority over truck licensing in the province: is it the Minister of Transport or the OHTB?

All provinces except Ontario have vested complete authority over economic regulation for trucking and busing in independent regulatory boards. Ontario operates with a split system under which the licences are issued by the Minister of Transportation in accordance with a certificate issued first by the OHTB. The MVTA, however, delegates regulatory responsibility only to the "provincial transport board" which is defined in subsection 2(1) as being a "board, commission, or other body or person having under the law of a province authority to control or regulate the operation of local bus undertakings or local truck undertakings."

Under the *MVTA*, the provincial transport board determines whether an applicant has met the fitness test, decides whether to hold a public hearing when objections have been filed, and determines whether the public interest would be harmed if a licence were granted. This represents considerable discretionary authority which, due to the relative importance of the Ontario market, could be used to significantly affect the course and pace of trucking deregulation throughout Canada. The industry maintained that the OHTB had the authority. The Ministry, not surprisingly, took the position that the Minister of Transportation was, and always had been, the "provincial transport board." Between January and July, 1988, the Ministry issued approximately 500 extra-provincial trucking licences.

In February, 1988, the *Ontario Gazette* published a routine notice that twenty-three extra-provincial trucking applicants had met the *MVTA* fitness requirements and that the Minister proposed to issue licences if no objection was filed with the OHTB within the specified time limit. Claiming that the provincial access-to-information legislation prevented the government from disclosing information contained in the applications, the transport ministry refused to provide complete copies of the applications to both the OHTB and potential objectors.

In March, the Ontario Trucking Association (OTA) and others filed Notices of Objection to the proposed licences with the OHTB. Later that month, the OTA and 29 transport companies filed an application asking the Board to state a case to the Divisional Court under s. 21 of the *Highway Transport Board Act* seeking clarification concerning "certain questions of law relating to the scheme by which the trucking industry is regulated for movement into, out of, and through the Province of Ontario." A motion on the application was heard on March 25, 1988, and was continued on June 10. Counsel for the Minister opposed the application, arguing that the legal issues were well-settled and that clarification from the Divisional Court was not necessary. The Board granted the application and agreed to state a case.

On May 7, 1988, the Minister of Transportation issued "Guidelines for Public Interest Tests" to the OHTB. The introduction to the Guidelines stated:

> As the Minister of Transportation is responsible for controlling and licensing truck operations within the Province of Ontario, the Minister is for the purposes of the *Motor Vehicle Transport Act, 1987*, (*MVTA*) the Provincial Transport Board as defined in the *MVTA*. Any hearings held by the Ontario Transport Board (OHTB) under the *MVTA* are therefore on behalf of the Minister.

The guideline further specified that respondents should be required to prove that granting a licence would result in "significant detrimental impact" to the public interest.

On May 13, 1988, a majority of the OHTB determined that the Board did not have evidence that satisfied it that, in the absence of evidence to the contrary, the operation of any of the 23 proposed extra-provincial truck undertakings would likely be detrimental to the public interest. The majority noted that the Minister's guideline imposed a stricter test than that prescribed in the federal *MVTA*, but indicated that the Board would apply the new test until the validity of the guideline had been determined by the courts.

The stated case asked for the opinion of the Divisional Court on four questions:

1. Is the Ontario Highway Transport Board the "provincial transport board" for the purposes of the *Motor Vehicle Transport Act, 1987*, S.C. 1987,. c. 35?
2. Is the Minister of Transportation the "provincial transport board" for the purposes of the *Motor Vehicle Transport Act, 1987*, S.C. 1987,. c. 35?
3. If the answer to Question 2 is affirmative, is it lawful for the Ontario Highway Transport Board to consider evidence submitted pursuant to subsection 8(3) and hold a public hearing to determine if the licence sought would likely be detrimental to the public interest?
4. Are the "Guidelines for Public Interest Tests" valid?

On October 20, 1988, in a 2-1 decision, the Divisional Court held that the OHTB was, in fact, the provincial transport board for purposes of the MVTA, that even if the Minister were the board, it would not be lawful for the OHTB to hold the public hearings contemplated by the MVTA, and that the guidelines issued by the Minister to the OHTB were invalid.

After reviewing the past activities and functions of the OHTB and the Minister under both federal and provincial legislation, the court concluded that "with regard to the issuing of licences the Board appears to have been the effective decision-maker whereas the Minister merely carries out the administrative duties of issuing an operating licence according to the Board's advice."

The court went on to state that:

> If the determination of who is the provincial transport board depended on which entity has the most authority to control and regulate, from the foregoing it appears that in the important aspect of entry the Board has the more significant authority to control or regulate, but in almost all other aspects, the Minister has the most authority to control or regulate. (Reasons of Rosenberg J., p. 36)

In reviewing relevant jurisprudence on the point, the court observed that many of the cases, including decisions of the Supreme Court of Canada, decided or assumed that the OHTB was the provincial transport board.

The most important considerations influencing the court's decision, however, appear to have been the somewhat bizarre implications for the regulatory scheme if the Minister had been held to be the board. Writing for the majority, Mr. Justice Rosenberg noted that if the Minister was the provincial transport board, then the Minister would become a federal official:

> This may not be constitutionally possible but even if it is, it is an unlikely and unusual double function for a cabinet minister to perform and might conceivably lead to a conflict in his obligations as an elected member of a provincial government whose policies might be contrary to those expressed in the Federal Act. (Reasons of Rosenberg J., p. 42)

In his concurring opinion, Mr. Justice McKeown expanded considerably on the constitutional problems inherent in delegations from the federal government to provincial ministers.

The majority also concluded that the "plain meaning" of the words, "provincial transport board," did not seem to apply to the Minister. It was noted that there are provisions allowing the Minister to have representations made to the board under some circumstances - a procedure that would very interesting to observe if the minister and the board were the same entity. Perhaps most telling, however, was the fact that the Minister was not authorized under provincial legislation to hold a public hearing. The court concluded that if the Minister were the Board, the 5-year reverse onus procedure and the "public detriment" test would not be applicable in Ontario, with the result that only the "fitness" test would be operative. The court reasoned as follows:

> Sections 8(3) and 8(4) of the MVTA apply only to a province where "the provincial transport board is authorized to hold a public hearing...." Since the Minister is not authorized to hold public hearings, the sections would not apply in Ontario if the Minister is the provincial transport board. If this were so, the legislation would fail to change the criteria in Ontario from the issuing being in accordance with " a certificate of public necessity and convenience" to the test being whether or not the licence which is sought "would likely be detrimental to the public interest" and would mean that the only test that would be applied before the mandatory issue of the licence would be that relating to the fitness of the applicant to hold such licence under section 8(2). This is clearly not the intention of Parliament for the first five-

year period where the changed criteria apply. (Reasons of Rosenberg J., p. 43)

This would have amounted to complete and immediate economic deregulation of entry for extra-provincial truck transport undertakings licensed through the Province of Ontario.

The court went on to hold that the Minister could not delegate to the Board authority to conduct a public hearing, commenting that it is a fundamental principle of the exercise of judicial functions that "he who decides must hear." Sub-delegation of judicial functions is not lawful unless authorized by express statutory authorization or necessary implication.

Finally, the court held that the guidelines were invalid because, by adding the word "significant," they purported to modify the statutory test established by Parliament in the *MVTA*.

An application by the Minister for leave to appeal to the Ontario Court of Appeal was refused by the Court of Appeal. In reasons released on December 5, 1988, the Court of Appeal held that no appeal lies from an "opinion" of the Divisional Court stated under s. 21 of the *Highway Transport Board Act.*

End Note

1. Although the federal government has regulatory authority over interprovincial transport, it has delegated administrative responsibility for trucking and busing to the provinces.

ONTARIO ENERGY BOARD REPORT: SECURITY OF NATURAL GAS SUPPLY

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The Ontario Energy Board (OEB), following a direction from the Ontario Cabinet, conducted a hearing in July, 1988, with respect to matters pertaining to the supply of natural gas "to meet the current and future needs of gas users in Ontario."

In August, 1988, the Board issued an interim report laying out its general position for the Ontario utilities which were at that time engaged in ongoing contract discussions with Western Gas Marketing Limited. These discussions eventually produced contracts providing for a fundamental remake of the system supply arrangements which had been put in place prior to the implementation of natural gas deregulation (see "Deregulation of Domestic Natural Gas Markets," *CCPR* Vol. 8, No. 1, March, 1987, and "Natural Gas Deregulation - Recent Regulatory Developments," *CCPR* Vol. 9, No. 1, March 1988). The Board's final report to Cabinet was issued in October, 1988.

In addition to the three major Ontario gas utilities, the Consumers' Gas Company Ltd., Union Gas Limited and ICG Utilities (Ontario) Ltd., twenty parties, broken into producing interest and consuming interest camps, actively participated in the hearing. The consuming interest group received significant support from natural gas producers and marketers which were active in the direct sale market created as a result of gas deregulation.

The fundamental issue which divided the parties and characterized the conflicting advice provided to the Board was whether natural gas consumers, other than larger industrial consumers, should be permitted to purchase a natural gas commodity supply for their own account, or should be required to purchase all natural gas through the local gas distribution companies (LDCs). The LDCs', in turn, would purchase gas primarily under long term contracts as in the past.

The removal permit policy of the province of Alberta at the time of the hearing and at the time of writing was, and is, to refuse a permit (required for a direct purchase) if the purchaser intends to use the gas for anything other than industrial purposes in plants which individually consume in excess of 35,000 gigajoules per year. The result of that policy has been to significantly lessen competition in the small industrial, commercial and residential markets (the "captive market"). Captive customers have, in order to reduce gas costs from the price set by Western Gas Marketing Limited (the company which is the system supplier of the great bulk of gas for each of the Ontario utilities) purchased gas in the province of Saskatchewan, which sourcing is characterized by a significantly less competitive market

dominated by four or five large marketing companies.

The producing interest group argued in favour of legislated maintenance of the captive market which would be supplied only by the LDCs, while consuming interests argued in favour of letting the market sort out the contracting requirements for the various market segments.

A major impetus for the calling of the hearing was the signing of the *Canada-United States Free Trade Agreement* (*FTA*). The Board heard evidence from the producing interests suggesting that, in the absence of long term contracts for the captive market, security of supply for those customers would be endangered by the *FTA*. Reference was made in support of this argument to the new procedures of the National Energy Board which have resulted in the elimination of the reserves requirements in support of natural gas export applications. The OEB found, however, that while the NEB may have a diminished role in this respect, the federal Cabinet will continue to have responsibility for ensuring that new natural gas exports do not impair security of supply for Canadians. The Board further found that there is not currently a functioning continental market for natural gas due to significant constraints on transportation systems.

While the Board did not generally accept an alarmist view with respect to the implications of the *FTA*, it did state its concern that pro-rationing of supplies under the proportionality provisions of the energy section of the *FTA* could impact on Ontario customers far more severely than on U.S. users. The Board's reasoning on this point was not stated, however, it presumably relates to the fact that Ontario is almost totally dependent for its gas supplies upon Western Canada, whereas Canadian supplies (with certain exceptions such as Northern California and the northern tip of New York) do not constitute a large proportion of any given U.S. market. The restricted free market proponents cited as their main precedent the core market definition policy of the California Public Utility Commission (CPUC), which policy was generally at variance with other North American public utility authorities and was significantly changed shortly after the conclusion of the hearing in a new proposed rule making issued by the CPUC.

The current version of the long-term form of contract, which the producing interests sought to impose upon the captive Ontario market by way of government fiat did not, at the time of the hearing contain either a pricing agreement or an arbitration mechanism beyond October 31, 1988. Recently renegotiated contracts provide for a fifteen year market for the Western Gas Marketing Limited group of producers. However, the largest purchasing group in the province, the residential and commercial customers of the LDCs, are to be charged (subject to Ontario Energy Board approval in hearings which are expected to be conducted in the first quarter of 1989) a price approximately 50% higher than recently prevailing market prices over the two-year period for which prices are fixed under the new agreements.

The Board found that longer term arrangements should be encouraged to the extent that they could be arranged on a competitive basis. However, it also advised that on the basis of the current availability of natural gas supplies, the Ontario government should take no action to force any Ontario customer or customer groups to buy gas under long term contracts. The OEB noted, (page 31):

> Although a long term contract with dedicated reserves will provide a customer with assurance that supplies will be available, the major advantage currently flows to the producer since not only is the market assured, but the price will reflect the market price throughout the life of the contract.

The Board, during the course of the hearing, heard evidence indicating that direct purchases currently in place for the Ontario market have provided a highly reliable source of supply. While the producing interests could not quarrel with the evidence in that regard, the spectre was continually raised that gas would not be available to deregulated market consumers who were willing to pay market price at some time in the future. The Board found (page 30) no evidence to suggest that price will not be a satisfactory allocator of gas provided the market is allowed to function freely without distortion or artificial restrictions.

While the Board generally found in favour of continuing to permit the free market to operate without governmentally-imposed long term contracting requirements, it did express concern at several points with respect to the issue of

access to firm service transportation on the TransCanada PipeLines Limited system. It recommended, therefore, that direct purchasers, with certain exceptions, must have TransCanada firm service transportation for a three year minimum rolling term.

The TransCanada system (together with its affiliate, Great Lakes Transmission) represents the sole significant delivery system available for the supply of natural gas to Ontario. At the time of the hearing, TransCanada did not have sufficient firm service transportation to Eastern Canada available to meet the demand for such service; larger users requiring incremental deliveries were being placed in a queue. Since release of the OEB decision, the NEB has released its decision in GH-2-87 certificating substantial new facilities additions on the TransCanada system which are to be in service by November 1, 1989. TransCanada has filed a further application for facilities additions to be in service for November 1, 1990, which will further increase firm service transportation capability. Following the OEB decision, the NEB also confirmed the firm service renewal rights of shippers holding short term contracts.

The OEB security of gas supply decision, if accepted by the Ontario Cabinet and embodied in legislation, will, with minor exceptions, only result in a continuation of the *status quo* for gas contracting practices of Ontario direct purchasers and LDCs alike. The longer term effect of the NEB TransCanada RH-1-88 decision with respect to the elimination of the rule against self-displacement will have a far greater and longer lasting effect upon the continued development of the deregulated gas market.