REGULATORY AND POLICY DEVELOPMENTS

THE REGULATION OF FINANCIAL PLANNERS

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Financial planning is a growing industry. It is responsive to a consumer demand for personalized guidance through the myriad of financial products that are now on the market. The consumer who is on his or her own is apt to be confused not only by the variety of products but the uncertainty of their sources. It is no longer clear that one should go to a bank for a savings vehicle, to an insurance company for an annuity or to a securities dealer for an equity investment.

Some of those who act as financial planners or consultants are subject to government regulation in related capacities, say as insurance agents or securities dealers; others such as lawyers and accountants belong to professional organizations that govern their client-related activities; but some simply hang out their shingles without having to acquire any special qualification or to follow any particular code of conduct.

It is against this background that the governments of Québec and Alberta have begun to move towards the regulation of financial planners.

The Québec initiative is much more advanced. On May 11, 1989, Pierre Fortier, the Minister of Finance and Privatization, introduced Bill 134, *An Act respecting Market Intermediaries*, into the Québec National Assembly. Among other things, the bill would control the activities of financial planners as a class of market intermediary.

Anyone using the designation "financial planner" or an equivalent would have to hold an approved diploma. If that person were a member of a professional association, the authorization of that association would be an additional prerequisite to adopting the title.

While the provincial government would have the power to establish standards for the conduct of financial planning activities, some requirements and general disciplinary authority over those in the business would be left to the appropriate insurance councils, professional associations or other self-governing organizations. But someone who proposed to operate exclusively as a financial planner, and was not under the jurisdiction of any such body, would have to hold a certificate issued by the Inspector General of Financial Institutions and would be subject to the supervision of that official. The holders of certificates would also be obliged to contribute to a fund for the purpose of affording compensation to those who might suffer loss through the fraud or dishonesty of any one of their number.

The bill also emphasizes the importance of adequate disclosure by financial planners of any relationships that might colour the advice they provide. Commission sharing arrangements and corporate connections with other market intermediaries and financial institutions would have to be revealed to clients.

These consumer information concerns are the principal focus of the Alberta proposal to regulate financial planners. That proposal was put forward in a report of a Ministerial Advisory Committee released in January of this year, entitled "A Blueprint for Fairness." The Committee recommends full and clear disclosure in advance of all non-salary compensation to be received by a financial planner if a consumer purchases any of the products recommended by the planner. A delegated regulatory organization is suggested as the vehicle for ultimately governing the activities of financial planners, the hope being expressed that the Canadian Association of Financial Planners would form the nucleus of such an organization.

In an independent development, that association has recently announced that it is making errors and omissions coverage available, through an insurer, to its 1,200 members in a move that it hopes will enhance their professionalism and credibility. On the qualification side, the Canadian Institute of Financial Planning provides a training program leading to accreditation as a Chartered Financial Planner (C.F.P.).

These government policy and industry developments are evidence of a general re-ordering of the system for distributing financial products in Canada.

CRTC ORDERS TERMINAL COMPETITION FOR DATAROUTE SERVICE

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On May 1, 1989 (Telecom Decision CRTC 89-5) the CRTC granted an application launched by Paradyne Canada for an order directing Bell Canada to unbundle the rates for Dataroute Access Arrangements in order to permit the attachment of customer-provided terminal equipment to Bell's Dataroute network service.

Paradyne's application was based on provisions of the *Railway Act* which prevent federally-regulated telecommunication carriers from unduly discriminating against other parties or granting an unreasonable preference in favour of other parties or themselves. Paradyne had contended that Bell Canada's Dataroute tariff, which required all Dataroute customers to obtain digital channel terminating equipment (DCTE's) through Bell Canada, discriminated against Paradyne and other suppliers and manufacturers of DCTE's and put them at a competitive disadvantage to Bell and Bell's supplier, Amdahl Communications Inc.

Dataroute service has been offered by the Telecom Canada companies since 1973. It is a private-line point-to-point digital data service that provides for a variety of data transmission speeds. Dataroute customer premises equipment consists of two components: a Data Service Unit which codes and decodes the customer's data and a Channel Service Unit which terminates the transmission channel and interacts with telephone company equipment to perform diagnostic tests concerning network performance. Generally, these two components are combined in one piece of equipment which is commonly referred to as digital channel terminating equipment (DCTE). Customer provisioning of DCTE's has been permitted for several years in the United States. Although the CRTC established general rules for customer provisioning of terminal equipment in 1984, at that time competition in Dataroute DCTE's was not allowed because the Commission accepted telephone company submissions that DCTE's were integral to the operation of the Dataroute network.

In opposing Paradyne's application both Bell and BC Tel (which was added to the proceeding by the Commission) raised a variety of arguments including:

(1) prior approval of a bundled tariff by the Commission;
(2) integrality of DCTE's with network activities;
(3) greater flexibility in utilizing multiple technologies for access arrangements if carrier control over DCTE's were maintained;
(4) availability of unbundled competitive substitutes;
(5) use of a "proprietary signalling scheme" of Amdahl in DCTE's on the Dataroute network which Bell was not at liberty to publish or release without Amdahl's consent;
(6) unnecessary costs of a second public signalling protocol to interface with the proprietary Amdahl protocol in the public network;
(7) additional facilities coordination and network monitoring of repair costs arising from a proliferation of DCTE technologies under competition;
(8) no additional consumer benefits from DCTE competition; and
(9) minimal impact on the development of competition in new services from retaining an end-to-end monopoly in Dataroute.

Paradyne's submissions were built upon the approach taken by the CRTC to terminal competition and tariff unbundling in two CRTC decisions from the late 1970s: *Collins* v. *Bell*

Canada (Telecom Decision CRTC 79-12) and *Challenge Communications and Bell Canada* (Telecom Decision CRTC 77-16). In both cases the Commission had rejected prior approval of tariffs as a ground not to exercise its general jurisdiction to prevent undue preference of advantage under the *Railway Act*.

Paradyne's basic position was that "bundling" the provision of DCTE's and Dataroute network services confirmed an obvious preference to Bell Canada and Amdahl, given the competitive nature of the market for DCTE's, and that it was the carrier's responsibility to prove that discrimination was not unjust or that the preference was not undue or unreasonable.

Paradyne contended that the only relevant issue was whether competitive provisioning of Dataroute DCTE's was feasible and whether a carrier monopoly in provisioning creates an undue advantage for the carrier.

The Commission's decision adopted the approach it had previously taken in the *Collins* and *Challenge* cases and focussed on whether the carriers have established that the preference and advantage that they had conferred upon themselves was not undue or unreasonable. In doing so, the Commission adopted a public interest test involving an assessment of whether the benefits arising from competition in the supply of DCTE's would outweigh the costs. The Commission adopted the submissions of Paradyne and others that benefits from competition in the DCTE market would arise including increased choices of suppliers and equipment, technological innovation and lower costs. The Commission rejected that competition would result in increased provisioning time, increased costs to the carriers, or difficulties in identifying network problems.

The Commission concluded that any potential for loss of network integrality would be removed if competitively supplied DCTE's were to operate on the same signalling standard as telephone company equipment. Paradyne had provided a number of reasons for concluding that the Dataroute DCTE is no more functionally integral to network operations than are other types of customer premises equipment in which competition is now permitted. Paradyne indicated that if there was an integrality test it should hinge on whether competitive terminal equipment can be supplied according to standards that would preclude network harm and would provide appropriate terminal to terminal, and terminal to network intercommunication. In this regard Paradyne referred to the fact that other Canadian telecommunication regulators and the U.S. Federal Communications Commission have concluded the technical standards to protect the network and to provide for intercommunication have been sufficient to permit competitive terminal attachment.

With respect to the development of interconnection standards, Paradyne had noted that the variety of Dataroute access arrangements presented no material barrier in as much as 95% of such arrangements used digital facilities equipped with one of two standard types of Amdahl DCTE. Under competitive provisioning of DCTE's, Paradyne had contended that Bell Canada would not be prevented from using multiple technology access arrangements. Customers could merely be informed of the access arrangement available to them and structure their equipment purchasing around the relevant network configuration. Additional equipment would be required only in the event that the Commission required a separate standard from that embodied in the Amdahl equipment to be used by other customer-owned DCTE equipment. This could only occur if the Commission concluded that Amdahl's claims for protection of its "proprietary" signalling scheme were found to justify the discrimination inherent in the Dataroute bundled tariff.

The Commission then decided that there was nothing to prevent an order requiring Bell Canada and BC Tel to furnish sufficient particulars of the Dataroute signalling scheme to permit the development of standardized competitive DCTE's. Specifically, the Commission rejected the "proprietary information" arguments advanced by Amdahl and the carriers, noting that the record did not establish that this scheme could be referred to as intellectual property, and that Bell and Amdahl have had plenty of time to realize on the research and development costs incurred in developing DCTEs for Dataroute.

Paradyne had argued that acceptance of the claim would establish a dangerous precedent for future telecommunications competition since it would allow federally regulated carriers to

monopolize equipment markets structuring their arrangements with third party suppliers to include third-party signalling schemes and confidentiality for such schemes under a technology licensing provision. Paradyne also noted that to permit competitive provisioning of DCTE's the Commission did not require Bell and BC Tel to provide all specifications concerning the operations of Amdahl's equipment but only those that relate to DCTE what must do to communicate with the Dataroute network.

The CRTC itself expressed concern that acceptance of the proprietary information argument would permit circumvention of mandatory carrier obligations under the *Railway Act.*

Paradyne also submitted that the signalling scheme which Amdahl and Bell sought to protect should not be regarded as intellectual property in the sense of the body of knowledge worth protecting in law of public policy terms. Paradyne noted that the scheme has never been patented and that neither Bell nor BC Tel suggested that it was subject to copyright. Paradyne also submitted that the scheme could not constitute a trade secret because of the potential for reverse engineering of the scheme and that in all likelihood it did not constitute anything materially different than the signalling standard currently employed within the American equivalent to Dataroute.

The supply contract between Amdahl and Bell provides that restrictions on the use of so-called proprietary information would not apply to any information which becomes publicly known through no fault of the carrier. The Commission appeared to consider that an order for the release of the information by a public authority would activate this defence under the agreement.

The Commission has given Bell and BC Tel until July 31, 1989 to propose tariff changes providing for unbundling of rates for Dataroute access arrangements in order to provide for the competitive supply of DCTE's and to information, sufficient to permit the design of competitive Dataroute DCTE's. Once these filings have been made the Commission will indicate what further process if any is required.

At the time of writing the period to launch an appeal to the courts had lapsed and no appeal to the federal Cabinet had been made.

The decision is an important precedent for the development of new data transmission services and services involving decentralized network command capabilities. It re-affirms that competition in supply of "off network" equipment having network control or monitoring functions should be allowed, that public signalling standards for such equipment should be permitted and that particular equipment suppliers should not expect CRTC endorsement of carrier sourcing arrangements that create a preference for them through adoption of a signalling scheme developed by the equipment supplier for use in the carrier's network. The decision brings CRTC policy respecting publication of network signalling specifications close to the position of the U.S. Federal Communications Commission.

THE SALE OF SELKIRK COMMUNICATIONS LIMITED—A TEST FOR THE CRTC'S SIGNIFICANT BENEFITS TEST

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On 29 May 1989, the Canadian Radio-television and Telecommunications Commission heard what is without doubt the largest and most complex package of related applications for approval of the transfer of control of licensed broadcasting undertakings ever brought before it. The applications for approval of the takeover of Selkirk Communications Limited by a wholly-owned subsidiary of Maclean Hunter Limited, and of the subsequent sale of most of the broadcasting undertakings thereby transferred to three companies already licensed to provide broadcasting services in various parts of Canada, raise a number of regulatory and public policy issues. They raise issues of concentration of ownership as well as issues of common ownership of broadcasting undertakings and of media cross-ownership in the same market. They raise issues with respect to the integrity of the licensing process, sometimes referred to as "trafficking" or

trading in licenses. They also raise procedural issues.

Broadcasting licenses are not transferable. Ownership or effective control of licensed broadcasting undertakings cannot be transferred by a broadcasting licensee without prior Commission approval.

More specifically, regulations made under the *Broadcasting Act* require prior CRTC approval with respect to any act, agreement or transaction which results, directly or indirectly, in a change of the ownership or effective control of a licensed broadcasting undertaking. Any act, agreement or transaction which results in a person gaining control of a total of 30% or more of the issued voting securities of a licensed corporation or of a corporation that has, directly or indirectly, effective control of a licensed corporation, is deemed to require prior Commission approval. Beyond that threshold, the Commission has the discretion to conclude that an act, agreement or transaction changes the ownership or effective control of a licensed undertaking and therefore requires prior approval.

"Control" of a broadcasting undertaking is considered to exist, under CRTC regulation, principally through ownership of a majority of the voting shares of a corporation, or through an arrangement, understanding or agreement as to the manner in which such shares are to be voted. Effective control of a broadcasting undertaking can thus be considered to result from factors other than share ownership as such, including shareholders' agreements, voting trusts, voting arrangements, or the holding of substantial debt instruments in a licensee. In establishing where effective control lies, the Commission looks up the corporate chain to the corporation or shareholder ultimately controlling the licensed corporation.

The CRTC has adopted a "significant and unequivocal" benefits test in considering whether approval of an application for authority to transfer ownership or control of a broadcasting undertaking is in the public interest. The Commission requires that the transaction yield significant benefits for the community served by the broadcasting undertaking concerned and for the Canadian broadcasting system as a whole and that it be in the public interest. The public interest presumably involves, in part, concerns over concentration of ownership and over cross-ownership of media outlets in the same market assessed against the means proposed to alleviate them.

The applications heard by the CRTC at the 29 May 1989 hearing included the transfer of all of the shares of Selkirk to Maclean Hunter. The assets represented have been valued at approximately $600 million, of which some $360 million represent the value of regulated broadcasting assets in Canada controlled by Selkirk and some $80 million minority interests in regulated broadcasting assets in Canada.

The regulated broadcasting assets held directly or indirectly by Selkirk include a number of radio stations in British Columbia, Alberta and Ontario, television stations in British Columbia, Alberta and Ontario and cable television operations in Ottawa, Pembroke, Arnprior, Renfrew and smaller communities in the Ottawa Valley. The other assets held by Selkirk include unregulated communications-related operations in Canada and cable television operations in the United States.

Maclean Hunter is already the licensee, directly or indirectly, of television stations in Alberta and of radio stations serving communities in Alberta, Ontario and the Maritimes, and of cable television operations in Ontario. It is the licensee of television and radio stations serving some of the markets already served by television and radio stations controlled by Selkirk. Maclean Hunter is also the owner of daily newspapers distributed in markets served by the broadcasting undertakings purchased from Selkirk.

Equity in Selkirk is held through Class A non-voting shares valued at approximately $600 million. Control of Selkirk is exercised through Class B voting shares worth $10,000. This separation of equity from control has existed since 1983 when a Cabinet Directive was issued to the CRTC pursuant to the *Broadcasting Act* curtailing the Commission's power to issue or renew broadcasting licenses to a person distributing a daily newspaper in the market to be served under the broadcasting license. The Directive caused Selkirk to reorganize its share structure since its largest shareholder, Southam Inc., was the owner of a daily newspaper in a

market served by a broadcasting station licensed to Selkirk. Although the Cabinet Directive was revoked in 1985, 80% of Selkirk's Class B voting shares have been held, since 1983, by Canada Trust Company, through a Voting Trust Agreement, while Southam Inc. has held directly the remaining 20%.

Maclean Hunter bought outright all the Class A shares in Selkirk prior to its appearance before the Commission to seek approval of transfer of control. It bought all the Class B shares in Selkirk subject to CRTC approval. Pending such approval, Selkirk argues, its Board continues to exercise its duties and responsibilities and thereby in effect to exercise control over the broadcasting undertakings now ultimately owned but presumably not controlled by Maclean Hunter.

The transfer by Maclean Hunter to three existing broadcasting companies, Rogers Broadcasting Limited, Western International Communications Limited (WIC) and the Blackburn Group Inc., of all but two of the broadcasting properties it has purchased from Selkirk, was made subject to Commission approval of Maclean Hunter's takeover of Selkirk. Such transfer represents a total value of approximately $310 million and includes both the over-the-air stations which overlap or serve markets already served by Maclean Hunter and those that do not. In fact, Maclean Hunter divested itself of all of the broadcasting assets licensed to Selkirk or in which Selkirk had an interest except for CFNY-FM in Brampton, Ontario and Ottawa Cablevision and Pembroke Cablevision in Ontario. Maclean Hunter is already licensed to provide AM radio services in Toronto and AM and FM radio services in Ottawa. Maclean Hunter also distributes a daily newspaper in Toronto and in Ottawa, as well as a business daily on a national basis.

The applications brought before the Commission by Maclean Hunter raise a number of issues. Some were discussed at the hearing, some were not.

The fact that ownership of Selkirk, and therefore of the broadcasting undertakings licensed to it, had obviously already passed to Maclean Hunter before the hearing did not appear to raise concerns for the Commission, despite the wording of its own regulations which leaves little room for any argument that such a change can be effected without prior regulatory approval.

The hearing was divided into two parts—A and B. In Part A of the hearing, Maclean Hunter only sought Commission approval for the transfer of Selkirk's Class B voting securities. It may be the first time that the Commission examined applications where close to 100% ownership of broadcasting undertakings have been transferred without effective control clearly passing with it. In Part B, approval of the transfers to the three broadcasting companies is addressed.

It is difficult to argue that the public interest would be served by the Commission allowing, for any length of time, more than twenty broadcasting undertakings to remain under the ownership of one party while control resides in another. It has been suggested that the Commission has little choice, from a practical perspective, but to approve the Part A applications before it. Denial of its approval would require Maclean Hunter to find a new purchaser, or, at a minimum, to initiate a new round of applications, all of which would require, at the best of times, at least one year, for a Commission decision. There is, of course, no assurance that such new applications would be acceptable to the Commission.

It may also be difficult to sustain any submission that it would be in the public interest for the Commission to grant approval of Part A of the applications, the Selkirk/Maclean Hunter takeover, and to deny approval of Part B of the applications, the subsequent divestiture of the overwhelming majority of the broadcasting assets purchased by Maclean Hunter. Such a scenario would effectively leave Maclean Hunter, at least until it finds purchasers acceptable to the Commission and/or brings forward new applications to the Commission, with overlapping radio and television stations in some markets, stations that it would own, but has agreed it would not control, and with ownership of a number of broadcasting undertakings in which it has indicated it has no interest on an ongoing basis.

Approval of the applications would also result in the disappearance of one large corporate participant in the broadcasting industry and in further concentration in the hands of existing broadcasting companies in that the undertakings licensed to Selkirk would now be held by existing broadcasters who would add substantially to

their broadcasting assets as a result of the transfer. In the case of Rogers, for example, it would represent the addition of eleven radio stations to its already significant participation in the broadcasting and telecommunications industry in Canada. Moreover, some of the stations transferred would be located in markets where Rogers or related companies are already providing cable service. In the case of WIC, it would result in the addition of television assets in Calgary, where the company is already licensed to provide radio services, and in Kelowna, British Columbia, where the company is already licensed to provide television services.

The applications also raise cross-media ownership issues since Maclean Hunter would be adding to its broadcasting holdings in markets where it distributes a daily newspaper.

Questions were raised at the hearing with regard to the application of the significant benefits test in Part A of the transactions since Maclean Hunter was not in a position to offer specific benefits to the public served by these broadcasting undertakings it was transferring to others in Part B, Maclean Hunter did make a number of substantial commitments with respect to expenditures for the benefit of the Canadian broadcasting system in general, such as a drama fund, funds for a radio project and funds for the development of closed-captioned decoders. Rogers, WIC and the Blackburn Group detailed at some length the list of benefits that would flow from Commission approval of Part B of the applications, including improvements in programming, in facilities and in customer service.

Questions were also raised with regard to whether excessive benefits would accrue to the shareholders of Maclean Hunter through a realization of a profit in the form of assets, in the hands of Maclean Hunter, with a value far in excess of the costs to Maclean Hunter for acquiring them due to the divestiture of the rest of the assets purchased from Selkirk. Historically, the purchase and immediate resale of licensed undertakings has been frowned upon by the Commission as an abuse of its licensing process. This part of the hearing included the filing of conflicting evidence by various parties regarding the valuation of the assets transferred.

It is fair to say that broadcasting licensees and other interested parties followed the Selkirk/Maclean Hunter hearing with great interest. The broadcasting industry in Canada is now relatively mature and appears to be going through an intense period of rationalization. Some parties are already poised to enter into transactions with similar procedural convolutions as those involved in the 29 May hearing. The Commission's position on some of the issues reviewed, and the extent to which the Commission accepts the manner in which the applications were brought before it, may determine the types of applications filed for Commission approval in the future. The question remains whether such procedure represents an unacceptable limitation on the CRTC's power to weigh the public interest in exercising its discretion in the context of transfers of ownership and control. It also remains that some of the problems raised in the Selkirk/Maclean Hunter hearing are inherent to the interaction of a regulator with an industry which may be intensely regulated but is nevertheless largely privately owned.

NATURAL GAS DEREGULATION – A YEAR OF EVOLUTION

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Introduction

In the fifteen months that have passed since the publication in Volume 9, Number 1, March 1988 *CCPR* of "Natural Gas Deregulation – Recent Regulatory Developments," the deregulated natural gas commodity market in Canada has continued to evolve away from the hangovers of the previously regulated era (for a brief history of natural gas deregulation, see "Deregulation of Domestic Natural Gas Markets," *CCPR* Volume 8, Number 1, March 1987) and toward a functioning competitive market.

The past year has been one of a series of major developments on the gas deregulation front, one which has seen direct purchase, and its sister system gas resale agreements, become the established method of natural gas purchase. This is true not only for larger industrial gas users

(a trend which generally started in 1987), but now in Ontario for virtually all industrial customers, larger public authorities, and even many residential consumers such as groups of apartments and condominiums. In Québec, the ability of non-industrial consumers to purchase market priced natural gas is currently constrained by the policies of the dominant local gas distribution utility, Gaz Métropolitain, inc., and awaits possible change with a forthcoming ruling from the Régie du gaz naturel.

Gas deregulation to date has provided all gas consumers in the consuming provinces of Manitoba, Ontario and Québec with more competitively priced natural gas, and has established a track record of short-term security equivalent to that previously enjoyed when there was essentially only one natural gas supplier to Eastern Canada. Gas consumers such as residential users, which are not themselves direct participants in the direct purchase market, have benefitted from the very substantial reduction in system supply prices which have resulted from the introduction of competition to the local gas distribution utilities' system supply contracting.

Ontario and National Regulatory Developments for the Competitive Market

In November 1988, Ontario Energy Minister Robert Wong released the Ontario Energy Board (OEB) final report on security of gas supply for Ontario, which followed a hearing held in July and an interim report released in August 1988. The report did not find evidence that current direct sale arrangements were proving unreliable and therefore did not accept proposals by gas-producing interests to restrict access to the market. It did recommend, however, that in order to secure access to TransCanada PipeLines Limited transportation capacity, certain consumers be required to contract on a three-year rolling transportation agreement basis. The Board did not give details as to how this requirement would be met, but did indicate in the same set of recommendations that Ontario local distribution companies should be required to make available excess capacity to any direct purchaser which had a need. This decision, if and when accepted by the Ontario government, may not have direct implications for the majority of direct purchasers which now have their local gas distribution utilities arrange for required transportation service with TransCanada in the implementation of their direct purchase.

To enhance security in the event of short-term failure, the Board also recommended that Ontario consider establishing a strategic gas reserve located in or near Ontario "to avoid any problems associated with removal authorizations by producing provinces." (See "Ontario Energy Board Report: Security of Natural Gas Supply," *CCPR* Volume 9, Number 4, December 1988.)

The development of deregulated and competitive natural gas markets followed the signing of the Agreement on Natural Gas Markets and Prices between the governments of Canada, British Columbia, Alberta and Saskatchewan on October 31, 1985 (the "Halloween Agreement"), in which it was agreed that "Effective 1 November 1986 the price of all natural gas in interprovincial trade will be determined by negotiations between buyers and sellers." Until the end of 1988, however, this market determination of price was severely constrained by what came to be known as the "rule against self-displacement."

While various parties had numerous interpretations as to exactly what had been intended by the Halloween Agreement by the signing parties, the operative ruling came out of the National Energy Board decision in June 1986 (docket RH-5-85). This decision interpreted the agreement as permitting individual end-users to enter into direct purchase arrangements and thereby displace an equivalent volume purchase by their local distribution company from TransCanada PipeLines Limited (TransCanada) under existing long-term contracts. The Board's interpretation further held that eastern local distribution companies (LDCs) were prohibited from entering into contracts for the purchase of market priced gas on their own behalf, and thereby displacing a portion of the volumes which they would otherwise have purchased from TransCanada. The existence of this regulatory rule had led to the development of two markets for natural gas operating side by side under which individual end-users could obtain natural gas at approximately one-half of the commodity price being charged by TransCanada to the eastern

utilities under the pre-deregulation era contracts. In January, 1989, the National Energy Board issued its Reasons for Decision in TransCanada's 1988-89 tolls hearing, Phase I, which among other things lifted the prohibition on self-displacement effective November 1, 1989.

That hearing also included issues dealing with the terms of competitive access to the TransCanada pipeline, and the Board's decision is awaited with respect to several issues outstanding.

In late 1988, however, each of the eastern utilities had negotiated new contracts with Western Gas Marketing Limited (Western Gas), which ensure that Western Gas will continue as a major supplier to a greater or lesser extent for each of the eastern utilities for several years into the future. The pricing provisions of the pre-deregulation "long term" contracts had expired as of October 31, 1988, and the contracts did not contain any new pricing mechanisms or binding arbitration provisions.

The OEB released its Reasons for Decision in April 1989 with respect to the inclusion of the gas commodity costs flowing from the 1988 Western Gas Marketing Limited system supply agreements in the rates of the Ontario utilities. Generally, the Board accepted the agreements, however it expressed some concern with the possible anti-competitive effects of system gas resale agreements under which Western Gas, and only Western Gas, is able to stream discounts to end-users and thus obtain effective favoured access to the LDC's systems. The OEB indicated that a further hearing may be held with respect to system gas resale agreements, and specifically the role of Ontario utilities in the implementation of these arrangements.

The new agreements which were approved by the Ontario Energy Board following parallel hearings on the applications of the three major utilities, The Consumers Gas Company Ltd., Union Gas Limited and ICG Utilities (Ontario) Ltd. contain provisions to permit further displacement of purchases by the utilities from Western Gas Marketing Limited as new direct purchases come on stream. The new agreements provide for an undiscounted price of $2.20/GJ, which is down substantially from an effective price being paid by reason of the bundled structure of the previous contracts, which was at one point in 1988 in excess of $2.80/GJ. Thus, while the Western Gas group of suppliers remains the dominant supplier to the eastern gas utilities, the price of gas sold, which remains above the market level for direct sales, has been reduced towards the deregulated market price, and provision is made for future displacement to permit new direct purchase sales.

With respect to the actual gas pricing which was fixed only through October 1990, the OEB noted its assessment of these costs could not assume a fully competitive marketplace but had to be based upon "an assessment of current circumstances..." which woud include the continued upward price influence of the removal permit policy of the government of Alberta and the fact that the NEB ruling on self-displacement was not effective at the time of the gas pricing negotiations.

In April, 1989, the NEB issued its decision with respect to the application by Northridge Petroleum Marketing, Inc. for an order requiring TransCanada to provide transportation service for long term natural gas volumes which Northridge had contracted to sell to Union Gas Limited into southwestern Ontario. Gas under the gas sales contract was to be delivered by way of export from Canada at Emerson, Manitoba and thence through the Great Lakes Transmission Company pipeline for re-importation to Canada through the new facilities of St. Clair Pipelines Ltd. near Sarnia, Ontario. This routing, which provided a competitive alternative to the TransCanada PipeLines system (which itself contracts for space in order to move a portion of its volumes on the GLTC system), was opposed by TransCanada. TransCanada then sought to impose a special toll for gas transported from the inlet point to its system at the Alberta-Saskatchewan border to Emerson equivalent to the full toll via its system from the inlet point to TransCanada's eastern toll zone, which currently includes southwestern Ontario.

Natural Gas Exports

Coincident with the implementation of natural gas deregulation for domestic sales, natural gas producers in Alberta and the other producing provinces have, as the result of the Halloween

Agreement over the course of the past three years, achieved access to new markets in the United States, which under the new limited regulatory regime is not significantly impaired by governmental actions.

While the National Energy Board has, in export license decisions issued this year, imposed certain restrictions on new long-term gas export applications, those applications which have proceeded to hearing have generally ultimately been approved in a form very close to that originally applied for.

One result of the new gas export approvals and additional pending applications for gas export approvals is the application by TransCanada PipeLines Limited for major expansion in its gas transmission facilities.

In December, 1988, TransCanada won approval from the National Energy Board for an approximately $560,000,000 system expansion, approximately 60% of which would be associated with new sales to the United States.

In its recently filed 1991-92 system expansion application, TransCanada has applied for an additional $1,230,000,000 of facilities, approximately 90% of which would be associated with proposed new sales to the U.S.

Under current National Energy Board regulatory policy, the tolls on TransCanada's facilities used for export sales would be rolled in with the tolls for the existing system, which is used for both domestic and export purposes. The very high export component of the new system expansions will therefore achieve a substantial subsidization by reason of the roll-in with the depreciated facilities currently in service. This policy (for which there are a number of supporting arguments), by fostering a bias in favour of export sales over that which would exist with incremental costing of the export tolls, operates to decrease competition in the domestic market.

Alberta Policy

The policy of the Alberta government not to issue removal permits to natural gas producers wishing to sell the natural gas commodity to Ontario and Québec consumers which are either small industries, larger industries which have their production spread across several plants, or larger non-industrial gas users, remains in place as the most significant anticompetitive constraint on the functioning of the domestic gas commodity market.

These consumers, under Alberta's policy, would currently be required to pay the undiscounted system gas price rather than the significantly lower market price for any gas consumed, notwithstanding the lack of contemplation of such a restrictive policy in the Halloween Agreement, or indeed any explicit authorization of this policy in Alberta legislation. The policy was originally justified by Alberta as being necessary at a time of falling gas prices resulting from the large gas inventory overhanging the market and resulting from the previously imposed 25-year reserve requirements under the pre-deregulation policies of the National Energy Board with respect to natural gas exports. The policy, however, continues in place at the time of writing, notwithstanding the recent suggestions from the Alberta Minister of Energy that the previous large surpluses have disappeared, the elimination by the National Energy Board of the rule against self-displacement, and the contractual agreement of the Western Gas Marketing Limited producers to accept the contractually negotiated displacement mechanism in the new Ontario LDC system supply contracts.

Last month, the Western Gas producers, which include over 700 large and small producing companies located across the province of Alberta, were presented with a proposal from Western Gas which would include a coordinated strategy of reducing gas production in order to increase market prices. Western Gas Vice President, William Scotland, was quoted in the *Globe & Mail* as stating "I think such action would begin to firm up prices. The law of supply and demand still holds sway." A removal of the Alberta core market restriction policy at this time would permit some balancing of interests in favour of consumers at a time when prices are subject to upward pressure from producing entities.

From the gas user's viewpoint, the effect of the current restrictive Alberta policy for sales to Ontario and Québec is to require these unfavoured users to pay significantly higher prices either via continued purchases from Western Gas or in the less competitive Saskatchewan market. The

Saskatchewan Ministry of Energy and Mines does not prohibit sales of gas from its comparatively limited asset base by reason of the size of facility or nature of use of the gas commodity. Consequently, many institutional and other similar gas users have been able to access gas commodity purchases at prices below those in the Western Gas agreements, but significantly above the market price prevailing for sales to end-users not constrained by the Alberta policies.

On a positive note, Alberta's removal permit policies appear to be coming under some federal government scrutiny. The new Minister of Energy, Mines and Resources, Jake Epp, in a speech in June, 1989 to the Canadian Gas Association at Jasper renewed his department's commitment to gas deregulation and stated: "Clearly, market based approaches to achieving the goals of supply security and price competition are preferable to any government imposed solutions."

The Unfinished Agenda

In order to complete the agenda of deregulation, and to permit those gas users in the consuming provinces which can economically contract for their own natural gas supply on favourable terms to benefit from deregulation, movement is required by the province of Alberta. The province must dispense with its gas removal permit policy restrictions which seek to impose significantly higher non-market determined prices upon large segments of Eastern Canadian consumers, and thereby permit those parties to contractually protect both their supply security and market determined gas commodity pricing.

If gas deregulation is to proceed to conclusion on a basis of fairness and a market which is not tilted towards producing interests, just as it was at the time of original implementation in 1986-87 tilted towards consuming interests, then the restrictive Alberta policies must be changed so that Canadian consumers may have access to Canadian gas resources on a basis of at least some equality with potential U.S. purchasers. It would appear most likely that all Canadian consumers, including those which are paying premium prices for Alberta sourced gas, will effectively subsidize new exports to the U.S. if there is no reappraisal of the NEB policies with respect to rolled-in tolls.

If, on the other hand, no movement is made in Alberta's restrictive policies with respect to sales to Eastern Canada, any future supplies acquired for these markets following the coming on-stream of the new exports to the U.S. will be undoubtedly influenced by not only any existing new flows of gas, but market perceptions of future market tightness. The late implementation by Alberta at a time of rising prices of domestic deregulation on a basis consistent with Alberta's policy towards gas export sales will, unfortunately in the writer's view, be too little too late.

(Portions of this paper are based upon a presentation by the author at the Canadian Institute conference "Gas Exchange '89", held at Toronto June 15-16, 1989.)