REGULATORY AND POLICY DEVELOPMENTS

COPYRIGHT BOARD SETS CABLE RETRANSMISSION FEES

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In a decision released October 2, 1990, the Copyright Board established for the first time in Canada copyright royalties for the retransmission of distant radio and television signals. Copyright protection was first extended to retransmission by cable and satellite in the *Free Trade Agreement Implementation Legislation* of 1988. At the same time, a compulsory licensing regime for its copyright was established. The Copyright Board is within its jurisdiction in determining the appropriate royalty to be paid under this compulsory licence. The *Copyright Act Regulations* effectively establish royalty liability for retransmission for any location more than 32 kilometers from every point on the Grade B contour of a T.V. station.

In the present case, proposed royalty tariffs were submitted by 11 collecting bodies or collectives representing four separate interests: program suppliers, broadcasters, sports leagues and music copyright owners. The Canadian Cable Television Association and CANCOM objected to the tariffs at the Board's hearing. The public hearing itself was preceded by an extensive exchange of written interrogatories. The hearing commenced on November 27, 1989 and occupied 57 hearing days, terminating on May 10, 1990.

The approach of the Copyright Board was to determine the global or overall value for retransmitted distant signals, calculate the manner in which royalties were to be paid by retransmitters to achieve this global royalty target, and finally allocate fares of the global royalty among collectives.

The guiding principles applied by the Board were that royalty should:

- be fair and equitable;
- reflect Canadian circumstances;
- given a choice of approaches that equally compensate copyright owners, implement the one that results in the least possible disruption to the cable services available to subscribers;
- be based on a set of statistics for a test year;
- reflect the actual retransmission of programs and recognize that some programs may be more valuable than others;
- be simple to administer, transparent and comprehensible.

With respect to the determination of the value of distant signals, the Board elected to base its determination on the estimated value of comparable services. The comparable service value, in the Board's view, should be established through a market interaction between a large number of willing sellers and buyers without market power effects and adjusted, if appropriate, for cost differences. The Board rejected several alternative approaches. Estimates based on the value of programming displaced by distant signals were rejected because the Board was not persuaded that such displacement would have occurred and felt that the economic value of such displaced production would be very difficult and arbitrary to estimate. The Board rejected an estimate based on the value of lost licence fees based on its arbitrary and unsupportable assumptions. Finally, the Board rejected a comparison with the U.S. copyright licensing regime due to significant differences in the Canadian and U.S. cable markets. These include a higher Canadian cable penetration; the greater number of distant signals being carried on Canadian systems, less duplication among Canadian distance signals, and the greater distant signal viewership by Canadians.

The Board selected the wholesale price of the Arts & Entertainment Network (A&E) as the starting point for comparable service value.

However, estimates made to this price take into account qualitative differences between the A&E signal and the structure of distant signals now subject to compulsory copyright licensing in Canada. The Board concluded that the substitution among signals merited a 20 percent discount to the A&E price, that the A&E price would have to have been lower to achieve the higher penetration achieved by distant signals now in Canada, and that A&E price may well be too high for one of the many distant signals comprising the normal package of such signals retransmitted by cable services. As a result, the Board concluded that an appropriate estimate of the value of a comparable service would be 15 cents.

The royalties to be paid by retransmitters, the Board found, should not be a direct function of the number of distant signals carried, but should take into account the overall number of distant signals carried (i.e., involve an upper unit royalty with increased distant signal carriage), the number of subscribers and a discount for hotel and hospital rooms served. Given that the tariff's life would be approximately 15 months, the Board concluded that there should be no inflation adjustment.

The Board concluded that the cable industry and CANCOM, given its current financial health, demonstrated an ability to pay the overall royalty without regulatory pass-through permission. The Board concluded that few retransmitters would try to avoid copyright royalty liability at the levels being set regularly, taking into account that the CRTC had already allowed cable systems with fewer than 2,000 subscribers to pass through the entire cost of the royalty.

Finally, the Board elected to allocate the royalty among collectives based upon the extent to which the programming was watched by cable subscribers (i.e., actual consumption patterns), rather than in accordance with the proportion of total programs supplied over distant signals (i.e., a measure of program availability). In doing so, the Board determined that royalty allocations should be based on the value of programming subject to compulsory licence to the ultimate viewer rather than the value of programming to the retransmitter in terms of its capacity to attract subscribers and set top maximizing price within this particular franchise. The Board did however leave open the possibility that royalty share could reflect relatively high costs of producing certain kinds of programming. However, in this case Board found that there was not enough evidence to make such a cost adjustment to royalty allocation.

At the time of writing, submission had been made to the federal Cabinet by both retransmitters and collectives requesting variation of the Board's decision. The federal Cabinet may vary its decision within ninety days after the Board has certified relevant statements of royalties.

RAFFERTY-ALAMEDA DAM PROJECT CONTINUES TO BREAK NEW GROUND

By: N.J. Schultz
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In the spring of 1989, the Federal Court put the first teeth into the Environmental Assessment and Review Process (EARP) Guidelines Order. The Court ruled that the EARP Guidelines Order applied to the Minister of the Environment in the exercise of the Minister's authority under the *International River Improvements Act* (*IRIA*), that the Minister had failed to comply with the EARP Guidelines, and that the licence issued by the Minister under the *IRIA* for the Rafferty-Alameda Dam project should be set aside. The Minister then conducted an initial environmental evaluation under the EARP Guidelines Order and, without reasons, issued a new licence for the project. An initial environmental assessment does not involve a public hearing. The EARP Guidelines permit a project to proceed after initial assessment if the potential environment effects of the project are insignificant or are mitigable with known technology. In December 1989, the Federal Court (Trial Division) set aside the new licence. The Court was unable to find that the material before the Minister supported the decision to issue the licence. The Court ordered the Minister of the Environment to refer the project to a full public review by an Environmental Assessment and Review Panel. The fallout from this decision

has led to further judicial ground-breaking and, in the end result, to further ground-breaking at the project site.

The December 1989 judgment of the Federal Court provided that the second licence issued by the Minister would be set aside unless the Minister, within a specified time period, appointed an Environmental Assessment and Review Panel. The Minister appointed the Panel within the specified period with the result that the licence remains in force.

In the course of establishing the Environmental Assessment and Review Panel, the Minister entered into an agreement with the Saskatchewan Water Corporation. The agreement required the Corporation not to proceed with certain construction in respect to the project and to agree to such amendments to the second licence as the Minister deemed desirable based on the Environmental Assessment and Review Panel's recommendations falling within the area of federal jurisdiction. In addition, the Corporation agreed to give favourable consideration to further amendments deemed desirable by the Minister based on the Panel's recommendations in areas with provincial jurisdiction. The Minister agreed to pay $10 million to the Corporation and to appoint the Panel. The Minister established the terms of reference for the Panel, which included language dealing with the construction restrictions.

As it turned out, the members of the Panel and Environment Canada officials on the one hand and the Corporation on the other could not agree on the interpretation of the construction restrictions in the January agreement. It was the position of the Panel and Environment Canada officials that the Corporation and the Souris Basin Development Authority were in breach of the January agreement. It was the position of the Corporation and the Authority that the work which was being done was consistent with the January agreement. That work included construction of a channel downstream of the Rafferty Dam but not in the river itself. Tension between federal and provincial authorities increased during the course of the summer of 1990 as the Corporation and the Authority expressed concern at the slow progress of the Panel.

This concern led to a letter from the Premier of Saskatchewan to the Minister dated August 10, 1990. This was followed by a meeting between the Premier and the Minister together with their officials on September 5, 1990. Subsequent to that meeting, the Authority continued construction of a channel downstream of the Rafferty Dam and the channelization work entered the river itself. This was a matter of great concern to the Panel. The Panel advised the Minister by letter dated October 4, 1990 that they were suspending operations until the matter was clarified. The suspension of the work of the Panel was of concern both to the Minister and the Premier, who communicated first by telephone and then by way of a letter from the Premier to the Minister dated October 10, 1990. The Premier's letter set out the position of the government of Saskatchewan and requested confirmation of that position from the Minister by 4:00 p.m. on that same day. No such confirmation was forthcoming and as a consequence, on October 11, 1990, the Premier publicly announced that construction would resume on all aspects of the project. The Corporation and the Authority then proceeded to acquire the land for the Alameda Dam and commenced the initial stages of construction. Also on October 11, 1990, the Panel publicly announced that it had suspended operations. On the following day, the Panel members wrote to the Minister and tendered their resignations, which the Minister accepted that same day.

The situation now was that the necessary licence under the *IRIA* for the project was still in force, but the EARP review contemplated by the Federal Court had terminated without producing a report. Construction on all aspects of the project, which had been halted to permit the EARP review to take place, had resumed. The federal government, which had defended the issuance of both the first and second licences in the Federal Court, was content with the December 1989 Order of the Federal Court which left the licence in place. The terms of the December 1989 Federal Court Order had permitted the Minister to negotiate an agreement with the Corporation to suspend much of the work on the project and to agree to amendments to the licence. The federal government's interest was to enforce that agreement. As a result, an action was brought by

the Attorney General of Canada in the Saskatchewan Court of Queen's Bench for an interlocutory and permanent injunction enjoining the Corporation and the Authority from proceeding with the Alameda Dam land acquisition and construction and from continuing work on the Rafferty Dam beyond that required to ensure the safety of the public and of the dam itself until the Minister had received and acted upon the report of the Environment Assessment and Review Panel. The application for the interlocutory injunction was supported by an affidavit from the Minister and affidavits from nine other senior officials including the Prime Minister's Chief of Staff and the Minister's Chief of Staff. The position of the Corporation and the Authority was supported by an affidavit from the Premier as well as affidavits from senior officers of the Corporation and the Authority. The Saskatchewan position was that the work which had been ongoing prior to October 11, 1990, was permitted by the agreement and that the actions taken after that were unobjectionable in that the federal side was in breach of the agreement.

The case attracted a significant amount of media attention which focused on an unseemly dispute between federal and provincial officials as to what took place at the September 5, 1990 meeting. The case is, however, more interesting as an illustration of the problem of enforcing federal policies and objectives in provincial courts against provincial agencies. The application for the interlocutory injunction failed for a variety of reasons.

The principal reason for dismissing the application was that subsection 17(2) of the *Proceedings against the Crown Act* of Saskatchewan bars relief by way of injunction against the Crown. The Court held that agents of the Crown enjoy the same protection. Both the Corporation and the Authority are agents of the Crown.

The Corporation and the Authority had referred in argument to an October 6, 1989 agreement between the government of Canada and the government of the United States which requires the government of Canada to expeditiously construct the Rafferty and Alameda Dams, and provides for the payment to Canada of U.S. $51 million. By a further agreement dated October 23, 1989 between the government of Canada and the government of Saskatchewan, Saskatchewan is designated by Canada to carry out Canada's responsibilities under the Canada/U.S. agreement. Saskatchewan is bound to honour all the terms of the Canada/U.S. agreement and must indemnify Canada in respect of any liability of Canada to the United States under that agreement. The Corporation and the Authority argued that, as Crown agents, they were doing no more than simply performing for Saskatchewan what Saskatchewan must perform under these agreements. The Court did not decide this issue although it indicated that there was considerable substance to the argument. The Court considered that there was sufficient weight to this argument that it weakened the claim for the injunction.

The Court also observed that the Minister had not re-appointed a panel or appointed a new Panel to conduct the environmental review. The obligation to appoint a panel for this purpose was viewed by the Court as fundamental to the January agreement between the Minister and the Corporation. The Court did not accept the evidence advanced by the Attorney General of Canada that it would be "virtually impossible" to find appropriate candidates for such a panel without a halt in construction. The Court determined that the Minister's failure to carry out his obligation under the January agreement further militated against the issuing of the interlocutory injunction.

The Court appeared to take the view that the work which was being done during the summer of 1990, was not in breach of the January agreement. In addition, the Court took the view that, while commencement of construction of the Alameda Dam was in breach of the January agreement, there was a serious question as to whether the January agreement had been frustrated by the resignation of the Environmental Assessment and Review Panel. The doubt in the Court's mind as to whether the Corporation and the Authority were in breach of the January agreement prior to the resignation of the Panel, and the doubt as to whether the January agreement could be enforced in the face of the resignation of the Panel, further militated against the granting of an injunction.

The conflict in the evidence as to what took place at the September 5, 1990 meeting was not adjudicated by the Court. Rather, the Court

simply noted the conflict and observed that the conflict in the evidence did not provide a sound evidentiary basis for granting an interlocutory injunction.

The Court concluded that the January agreement required the approval of the Governor in Council pursuant to section 7 of the *Department of the Environment Act.* That section authorizes the Minister, with the approval of the Governor in Council, to enter into agreements with the government of any province or any agency thereof respecting the carrying out of programs for which the Minister is responsible. The Court found that the term "program" meant "a definite plan of intended proceeding" and that the January agreement was a plan for continued development of the project. Since the January agreement had not been approved by the Governor in Council, the Court concluded that it was unenforceable.

The Court noted the April 12, 1990 Judgment of the Federal Court (Trial Division) in *Naskapi-Montagnais Innu Association v. Minister of National Defence.* In that case, the Innu sought an order prohibiting the Minister of Defence from consenting to the use of the land in question by NATO countries pending the final report of an environmental assessment review panel. The panel had been appointed and the work was progressing. The Federal Court declined to issue the order requested. It observed that there were no time limits for the work of a panel and that granting the order requested could permanently stop the proposal through mere inaction by a panel. It was the view of the Federal Court that if the EARP Guidelines Order had been intended to have the effect sought by the Innu, some further provisions respecting time limits and the consequences of delay would have been included. The Saskatchewan Court of Queen's Bench agreed with these observations and found that an interlocutory injunction would have the same effect as the order which the Federal Court declined to issue in the case of the Innu.

An interlocutory injunction also requires evidence of irreparable harm should the injunction not be granted. The Court reviewed the extensive consultation which had taken place in the development of the project and the statements which had been made by both federal and provincial officials, including the Minister, with respect to the environmental acceptability of the project. The Court was not persuaded that there would be any irreparable harm. On the contrary, the Court observed that granting the interlocutory injunction would mean that the benefit of the completed project would be delayed for at least a year.

In assessing the significance of this case, it must be recalled that it was the view of the federal government in the first *Rafferty-Alameda* case before the Federal Court that the EARP Guidelines Order was not intended to have binding effect on federal departments and agencies. On that view, failure to comply with the EARP Guidelines would not vitiate federal action. That view was rejected by the Federal Court. Nevertheless, it is evident that the EARP Guidelines Order was not written with the same rigour and to the same standards as would be expected of legislation of general application. The reason for that is obvious. The drafters of the Guidelines did not contemplate that they were drafting something which would have binding effect. This deficiency in the Guidelines was recognized by the Federal Court in the case of the Innu and the Court declined to grant the order requested by the Innu. While the form of action in the Saskatchewan Court of Queen's Bench was an action to enforce an agreement, in substance the Attorney General of Canada was seeking relief which would permit the EARP Guidelines to be applied in a meaningful way to the Rafferty-Alameda project. The paradox between the position of the government of Canada in the Federal Court and in the Saskatchewan Court was not lost on the latter.

In a related development, the December 1989 judgment of the Federal Court was considered by the Federal Court of Appeal. The appeal was inititated by the Tetzlaff brothers, who own land at Alameda, Saskatchewan, against the Minister of the Environment. Saskatchewan Power Corporation was a cross-appellant. The Tetzlaffs wanted the December 1989 judgment changed to quash the licence issued by the Minister until the environmental review process had been completed. Saskatchewan Power wanted the December 1989 judgment set aside. The Federal Court of Appeal, in a December 21, 1990, judgment, dismissed

both the appeal and the cross-appeal and upheld the December 1989 judgment of the Trial Division. The Court of Appeal held that the EARP Guidelines Order required only that the environmental review process be followed but did not preclude a decision on a project at the federal level prior to the completion of the environmental review. That is, a decision on a project could be made before the environmental review process was complete so long as the process had been initiated. The only consequences of failing to wait for the process to be completed before approving a project were political. The Court of Appeal referred to and agreed with the judgement of the Trial Division in the Innu case.

In the final analysis, it would seem that, to a significant extent, adherence to the concept of environmental review is voluntary. It was the position of the federal government at the outset that this was a voluntary process governed only by guidelines. The Federal Court has taken things only a short distance from where they started.

MORE DAMMING EVIDENCE LEADS TO IMPOSITION OF ENVIRONMENTAL CONDITION BY NEB

By: N.J. Schultz
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In the hearing held earlier this year on Québec Hydro's application to export electricity to Vermont and New York, the NEB heard evidence on the development of the hydro-electric facilities required to produce the electricity needed for these exports. Some of those hydro-electric facilities were within the area covered by the *James Bay Agreement*. Other facilities would be outside the territory covered by that *Agreement*. The evidence of the damming which would be involved indicated that, in some measure, activities within areas of federal jurisdiction such as navigable waters and/or fisheries could be affected.

In light, among other things, of the Envrionmental Assessment and Review Process (EARP) Guidelines Order and the Federal Court decisions putting teeth into the Guidelines Order, the NEB conditioned the export licence to require that a summary of the environmental assessment of the necessary projects, a report on the conclusions and recommendations of the Environmental Assessment and Review Panel, as well as the environmental authorizations in respect of the facilities be submitted to the NEB following the environmental review of each of the projects.

The NEB, in its August 1990 decision, refers to correspondence between the government of Canada, the government of Québec, the Federal Environmental Assessment Review Office and Hydro-Québec. This correspondence related to arrangements to conduct a joint assessment and review process in accordance with the provisions of the EARP Guidelines Order and the extensive provisions respecting environmental matters contained in the *James Bay Agreement*. The NEB determined that, if an agreement on a joint review did not materialize, then an environmental review under the EARP Guidelines Order would be undertaken by the federal government.

The Grand Council of the Crees (of Québec) had actively participated in the hearing out of concern that a comprehensive environmental review would not be undertaken by Hydro-Québec. These exports would require Hydro-Québec to advance the time for construction and operation of the facilities in question and, in the view of the Grand Council, sufficient time did not exist to conduct a comprehensive environmental review. Hydro-Québec provided no evidence on the environmental impacts of the various projects. It argued that only the early construction and operation of facilities was involved, with the result that no significant environmental impacts were caused by the exports. The NEB was satisfied that there was sufficient evidence to indicate that major hydro-electric facilities such as those required to meet the proposed exports do have environmental effects and was not persuaded that the issue of environmental impact hinged on whether or not the NEB should consider the impact of the construction and operation of facilities or only the impact of their advancement.

The NEB determined that, having the authority to authorize the exports, it was an initiating department for the purposes of the EARP Guidelines Order and was, therefore, required to apply the Guidelines Order. In addition, effective June 1, 1990 the NEB *Act* had been amended to require the NEB to take into account the impact of such exports on the environment.

In conducting an environmental assessment of electricity exports, the NEB examines the potential environmental and corresponding social effects in and outside Canada of the production, transmission and end use of the electricity proposed to be exported. Interestingly, the comparable regulatory agency in the State of Vermont has also determined that it must consider the environmental effects of the purchase of the electricity and that environmental assessment must take into account extra-territorial environmental effects.

At present, the issue of a joint environmental review by the federal and Québec governments has yet to be resolved. The NEB-imposed condition on the export licence prevents the export from taking place in the absence of an environmental review.

SUPREME COURT OF CANADA APPLIES REASONABLENESS TEST TO COUNTERVAILING DECISION

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In a November 8, 1990 judgment in *American Farm Bureau Federation* v. *The Canadian Import Tribunal et al.*, the Supreme Court of Canada dismissed an appeal against a decision of the Canadian Import Tribunal that the importation of grain corn originating in or exported from the U.S. was subsidized and that the subsidized importations had caused, were causing or were likely to cause material injury to the production in Canada of like goods. While the Court was unanimous as to the result, it was split four-three as to the appropriate test to be applied in judging the decision of an administrative body such as the Tribunal.

The minority, led by Wilson, J., were of the view that the Court should not interfere with a specialized Tribunal's interpretation of its constitutive legislation where the interpretive exercise was one that was within the Tribunal's area of expertise and where the impugned interpretation was not patently unreasonable. If the Tribunal has not interpreted its statute in a patently unreasonable manner, then the process of judicial review should come to an end. The minority were firmly of the view that the Court should not proceed to consider whether the Tribunal's conclusions were unreasonable.

The majority, led by Gonthier, J., took a different view of the reasonableness test.

The majority stated that a court should only interfere with the findings of a specialized tribunal where it is found that the decision of that tribunal cannot be sustained on any reasonable interpretation of the facts or of the law. The majority indicated that it did not understand how a conclusion can be reached as to the reasonableness of a tribunal's interpretation of its enabling statute without considering the reasoning underlying it. The overall question for determination by a court is whether or not the interpretation ultimately arrived at is patently unreasonable. In answering this question, the majority did not accept that all aspects of the reasoning by which the Tribunal arrived at its interpretation are totally irrelevant to a determination of an application for judicial review. The majority concluded, after a detailed review of the Tribunal's decision, that the Tribunal's reasoning and conclusions were not unreasonable and should not be disturbed.

The majority considered whether the Tribunal should have given consideration to the terms of the *General Agreement on Tariffs and Trade* in interpreting its statute. The Court observed that the Canadian legislation was designed to implement Canada's *GATT* obligations and that it was reasonable for the Tribunal to examine the domestic law in the context of the *GATT* to clarify any uncertainty. Where the text of the domestic law lends itself to it, one should also strive to expound an interpretation which is consonant with the relevant international obligations. Further, it was reasonable to make reference to

an international agreement at the very outset of the inquiry to determine if there was any ambiguity, even latent ambiguity, in the domestic legislation. The use by the Tribunal of the *GATT* was found not to be patently unreasonable.

The Tribunal's decision placed reliance on potential as well as actual imports. The wording of the *GATT* Subsidies Code was helpful in resolving this question and the Court concluded, having regard to the broad wording of the *GATT* Code, it was not unreasonable. It was therefore open to the Tribunal to make a finding of material injury even in the absence of an increase in the amount of imports.

The Court also found that there was evidence before the Tribunal to support the finding of a causal link between the American price of grain corn and injury to the Canadian market. As a result, the Tribunal's conclusion that American subsidization of imports had caused, was causing and was likely to cause material injury was not patently unreasonable.

In analyzing this decision, one might conclude that the Supreme Court of Canada is adopting the American standard of reasonableness for judicial review. That standard of reasonableness supports the substantial evidence requirement imposed on U.S. administrative agencies. In Anglo-Canadian jurisprudence, the evidentiary standard has been a "no-evidence" standard. That is, if there is any evidence upon which a reasonable person properly instructed in the law could reach the decision then the decision will not be set aside. It may be, however, that the Supreme Court of Canada, while using different language, has not moved beyond the no-evidence one. The Court was satisfied once it determined that there was evidence which could support the Tribunal's decision and having found that, concluded that the decision was not patently unreasonable. At the same time, the majority engaged in a detailed scrutiny of the Tribunal's decision which the minority considered constituted an expansion of the scope for judicial review.

This case is also interesting for its reliance on *GATT* to interpret Canadian legislation respecting countervailing and anti-dumping action. The *Canada/U.S. Free Trade Agreement* has been given effect in Canada by legislation. The *FTA* itself incorporates many provisions of the *GATT*. There is, as a result, much scope for injecting Free Trade and *GATT*-related arguments into the federal administrative process including judicial review of federal administrative action.

ONTARIO GOVERNMENT APPROVES TAKEOVER OF CONSUMERS' GAS BY BRITISH GAS

By: Brenda Swick-Martin and E. Lindsay Gorrell, Fraser & Beatty, Ottawa

On October 15, 1990, the Ontario Energy Board (OEB) approved the $1.1 billion takeover of Consumers' Gas Company Ltd. by British Gas plc of London, England. The OEB's decision was subsequently approved by the government of Ontario on November 7, 1990.

In the words of Premier Bob Rae:

> The message is simply this. We're ready to do business in the province, but we want to negotiate. We want to ensure that the consumers of the province get a good deal and we're prepared to bargain hard in a practical and efficient way to ensure that's what happens.

The OEB hearings were initiated by British Gas in March of 1990 when it filed an application with the OEB in accordance with section 26 of the *Ontario Energy Board Act*, seeking government approval with respect to an offer by British Gas to purchase all the common shares of Consumers' Gas at $34 a share, or $1.1 billion. Soon thereafter, the provincial Cabinet issued an Order-in-Council which required the OEB, pursuant to section 36 of the *Act*, to examine and report on a number of matters related to the proposed takeover, namely:

- the probable and potential impact of the proposed acquisition on Consumers' Gas and its customers in particular, and on the province's economy in general;
- the financial strength of the entity that would directly or indirectly control Consumers' Gas;
- the financing of the acquisition and its impact on Consumers' and rates for gas service in Ontario;
- the maintenance of a "public float", that is, the proportion of the issued common shares

of Consumers' Gas actively traded and not held by either the present majority owner or, eventually, British Gas;

- the corporate policies, business and financial plans of the new controlling entity for the business and operations of Consumers' Gas in Ontario; and
- any other impact on the public interest that in the OEB's opinion might result from the granting of the application, including the impact of acquisition of the control of a gas utility by a person or persons not ordinarily resident in Canada.

The parties to the proposed takeover are not small players in the natural gas industry in Canada and the U.K.

Consumers' Gas Company Ltd., with its head office in Toronto, is the largest natural gas distributor in Canada. It has assets of over $2 billion and serves over one million residential, commercial and industrial customers in central and eastern Ontario. The storage, transmission, distribution and sale of natural gas by Consumers' Gas in Ontario are regulated by the OEB.

According to information available at the time of the OEB hearing, there were approximately 3,500 registered holders of Consumers' Gas common shares. The shares are listed on the Toronto and Montreal stock exchanges. Eighty three per cent of the shares were owned by GW-CG Investments Limited, a corporation ultimately controlled by the Reichmann family of Toronto. The remaining 17 per cent of the shares were publicly owned.

British Gas plc, headquartered in London, England, serves approximately 18 million customers in Great Britain. Its total assets in March 1990 were the equivalent of $26.5 billion. Although the primary business of British Gas is the purchase, distribution and sale of gas, that business is supported by other major activities. British Gas owns and operates a range of gas storage facilities, including six liquified natural gas installations, seven underground salt caverns, and a depleted gas well in the North Sea. Its other major activities include a major and increasing investment in oil and gas exploration and production, a broad range of services to customers, and the marketing of gas appliances.

British Gas was a state-owned corporation until it was privatized in December 1986 through a public offering conducted in the U.K. and leading international markets, including Canada. The ordinary or common shares of British Gas are traded on stock exchanges in London and Tokyo and, through other instruments, on the Toronto and New York exchanges. No one party owns more than 5 per cent of the outstanding ordinary shares of British Gas.

The agreement between British Gas and Consumers' Gas provides, as stated above, that the offer for common shares of Consumers' will be made in cash at a price of about $34 a share. The offer constitutes a takeover within the meaning of the *Ontario Securities Act* and will be made by a circular bid prepared in compliance with that *Act*, the regulations thereunder and other applicable provincial securities laws. Either the majority shareholder of GW-CG or British Gas may terminate the agreement if the offer is not made on or before the end of December 1990.

The acquisition must be reviewed under the *Investment Canada Act* and the federal Minister of Industry, Science and Technology must be satisfied that the purchase "is likely to be of net benefit to Canada". The decision of the Minister is yet to be made.

British Gas is required, under the provisions of Canada's 1986 *Competition Act*, to give advance notice to the Director of Investigation and Research, Bureau of Competition Policy, of its proposed purchase of the common shares of Consumers' Gas. The requisite notice was filed in June 1990, and the applicable waiting period has now expired. Advance notice of the purchase was also given to U.S. authorities pursuant to the *Hart-Scott-Rodino Anti-Trust Improvement Act*. The waiting period prescribed by this *Act* has also expired.

In its report released October 15, 1990, the Board stated that the proposed acquisition is not contrary to the public interest. Thus, the purchase of the shares of Consumers' Gas by British Gas had passed its first and possibly most serious hurdle.

The Board based its decision on a number of positive findings and conclusions, chief among which were the following:

- British Gas is a financially strong company,

stronger than Consumers' present majority owner;

- the fact that British Gas is foreign-owned will not change the regulatory regime to which Consumers' Gas is subject;
- Consumers' ratepayers will not be adversely affected in any obvious or material way;
- British Gas is prepared to accept undertakings recommended by the Board; and
- there will be an approximate $1.1 billion capital inflow to the domestic economy which will, on balance, be beneficial.

However, the Board did have several concerns about the proposed acquisition:

- the fact that the British Gas offer would be made to all holders of Consumers' common shares at a price above current market price would result in the elimination of the public float;
- it was unable to judge with confidence the expectations of British Gas shareholders and management regarding the financial performance of Consumers' Gas and thus was unable to come to any valid conclusion about the plans of British Gas for the management and operation of Consumers';
- if the acquisition does not proceed the immediate monetary benefits to Consumers' shareholders may be foregone and their rights compromised; and
- the potential disposition of Telesis, the oil and gas division of Consumers' Gas, depending on the Investment Canada review, should the transaction be completed.

To deal with these concerns, the Board conditioned its approval of the acquisition on the acceptance of several undertakings by British Gas. The most notable of the undertakings are:

- a public float of a least 15 per cent shall be re-established by British Gas as soon as possible, but not later than September 30, 1992;
- the majority of the Board of Directors of Consumers' Gas shall be independent of British Gas, Consumers' and their affiliates or associates, and at least one-third of the Directors shall be resident in Consumers' franchise area;
- the entity which directly owns and controls Consumers' Gas shall be incorporated and headquartered in Ontario;
- any action subsequent to the British Gas acquisition whereby a person would acquire more than 20 per cent of the voting shares may not be undertaken without government consent;
- treasury operations of Consumers' Gas shall be conducted by Consumers' personnel and shall be located in Ontario;
- Consumers' shall not include in its base rate, or recover in its cost of service, any of the acquisition or reorganization costs;
- British Gas will ensure that research and technology expenditures in Consumers' Gas are not reduced below current levels, and will encourage and support an increase in the research and technology activities of Consumers'.

Pursuant to the *Ontario Energy Board Act*, the Board's decision was reviewed by Cabinet for final approval, the second hurdle to be overcome by British Gas in its takeover of Consumers' Gas. The decision was announced by Premier Bob Rae, as noted above, on November 7, 1990.

In making the announcement, the Premier stated that the government had determined that further significant undertakings, "over and above" those required by the OEB, were required "to ensure that the purchase and subsequent operation of Consumers' Gas bring the maximum benefit to Ontario – its people, its industry, and its economy".

The further undertakings contained in the Premier's announcement will be of considerable interest to the ratepayers and to business and university communities of Ontario. British Gas has undertaken:

- to spend $30 million in the next ten years on research and development related to the efficient and "environmentally-friendly" use of natural gas (this research and development will apparently be concentrated in Ontario);
- to create a venture capital fund for commercial investment in energy and energy-related technology;
- to make at least $50 million available over the next ten years for equity investment in economically viable cogeneration projects;
- to promote aggressively energy efficiency and conservation;

- to ensure that there will be no reduction in employment levels at Consumers' Gas; and
- in addition to establishing a public float of 15 per cent of issued common shares in Consumers' by September, 1992, to make 50 per cent of additional equity financing of Consumers' Gas over the next ten years available to the public, resulting in a public float estimated to be 25 per cent by the year 2000.

According to some analysts, Mr. Rae's government was under considerable pressure to approve the acquisition because rejecting it could have sent a negative signal to the foreign investors the government is trying to attract. The Premier had gone to New York the week prior to his announcement on November 7, 1990 to try to convince foreign investors that Ontario's first NDP government wants to work with them and will provide a hospitable environment for their investment.

NEB ROLLS OUT DECISION ON ROLLED-IN TOLLS

By: N.J. Schultz
Fraser & Beatty, Ottawa

After fifty days of evidence and nine days of argument, the NEB, on November 6, 1990, confirmed a long-established preference for the rolled-in toll method. Under this method, all costs are rolled into a common pot and then allocated to all services, with the result that all shippers pay some portion of all the costs. This method has the result that where economies of scale exist, a major expansion of a pipeline system may result in the tolls for service for all users of the system being reduced. This is what happened with TransCanada Pipeline's 1988 expansion program. By the same token, where economies of scale do not exist, a major expansion project can result in the tolls for service for all users increasing. This occurred with TransCanada's most recent pipeline expansion projects.

Although it had done an extensive review in the hearing associated with TransCanada's 1988 expansion program, the NEB was forced to review the question of toll method again, as a result of an Order of the Federal Court in February 1990. The Order was obtained at the instance of the Industrial Gas Users Association who considered that the U.S. Northeast market, which was to be served by TransCanada's 1991/92 expansion program, constituted a new regionally-distinct market which should be responsible for all costs associated with the expansion caused by serving that new market. In its decision, the NEB rejected the argument that the U.S. Northeast market was a distinct market from those presently served by the TransCanada system. Nor did it consider the market to be new since Canadian gas has been flowing to the market since 1984.

Much of the argument in the case by other parties who were opposed to rolled-in tolls turned on the magnitude of the expansion – $2.6 billion over two years – as a distinguishing feature supporting a change in toll method. The NEB determined that to rebuild the existing system at today's costs using current technology would cost approximately $10.3 billion. In that context, a $2.6 billion expansion was not exceptional. The NEB noted that the system has experienced relatively constant growth over its 30-year life and that the proposed capacity expansion was the normal result of the continuing growth of the natural gas industry in Canada. A number of shippers also argued that the magnitude of the toll increase – $0.10 GJ in the Eastern zone as compared with a current toll of $0.73 – justified a change in method. The toll is forecast to be $0.97 GJ in 1993. However, the NEB suggested that the more appropriate comparison was to the historical toll for the Eastern zone of $0.989 GJ in July 1987. The projected 1993 toll resulting from this expansion would actually be somewhat lower than the 1987 toll, even without adjusting for the effects of inflation. The NEB went further and compared tolls in constant dollars from 1975 to 1989 in relation to the projected toll with this expansion. The projected toll with the expansion was seen to be lower in real terms that it was in 1975.

The Canadian Petroleum Association proposed a capital contribution from new shippers, while Consumers' Gas proposed a demand surcharge

for new shippers. The NEB rejected any distinction based on vintages of shippers. It agreed with those who submitted that the payment of tolls conferred no future benefit on toll payers beyond the provision of service. Previous toll payers have no acquired rights to the continuation of tolls at any particular level. In addition, the NEB observed that the requirement of a capital contribution or a demand surcharge would serve as a barrier to entry for new participants in the marketplace, would limit competition and would give existing shippers an undue competitive advantage.

The NEB confirmed its view of the TransCanada system as an integrated system in which facilities for particular services cannot be meaningfully identified. The NEB rejected notional allocations of costs to service for the new shippers which would require the NEB to deny the realities of an integrated pipeline system.

Nor was the Board persuaded that a change in toll method shifting more of the burden on cost to the new shippers was justified on the basis of cost causality. The Board concluded that it was the aggregate demand of all shippers that gives rise to the need for additional pipeline capacity with the result that the responsibility for a pipeline system expansion should be borne equally by existing and new users of the system.

The Board agreed that there was some theoretical support for the idea of charging an incremental toll to the most price-sensitive customers. As a result, in theory, incremental tolls could achieve economic efficiency results superior to those that would be obtained under rolled-in tolls. The NEB determined, however, that in practice it would be very difficult to assign incremental tolls only to the most price-sensitive markets. There are no data available on the relative price sensitivities of demand in the markets served by TransCanada. In addition, shippers who are renewing their contracts and industrial gas users in the domestic market may be equally sensitive to the toll charged on TransCanada as are new shippers. There had been no suggestion in the hearing that an incremental toll be charged to industrial users on short-term contracts nor that an incremental toll be charged to renewals. Finally, there was no empirical evidence which demonstrated that an incremental toll would yield economic efficiency improvements over the rolled-in toll method.

The Board's decision also addressed the criteria for determining the economic feasibility of a pipeline expansion.

Earlier this year, the NEB rejected the use of benefit-cost analysis in the assessment of export licence applications. It had invited parties to address in the TransCanada hearing the question of the appropriate measure of the economic feasibility of a pipeline expansion. A number of parties put forward numeric tests of economic feasibility based on DCF analysis or variations of benefit-cost analysis. The NEB rejected the use of a quantitative test for economic feasibility. Among other things, the NEB observed that there was no consensus about the basic variables entering into quantitative analysis. For example, there was no agreement on matters as fundamental as the appropriate measure of the opportunity value of gas reserves and whether or not price projections could be relied upon with adequate confidence for decision-making purposes. The Board was not confident that it could implement a quantitative test that would yield acceptable results.

The Board also rejected using incremental tolls as a test of economic feasibility. It recognized that using incremental tolls as a test of economic feasibility had some merit in principle. If the rolled-in toll understated the real marginal cost of expansion, then shippers would tend to request more service than would be economically optimal, with the result that economically inefficient expansions of the system could occur. If an incremental toll better reflected the real marginal cost of expansion, then the willingness of shippers to pay the incremental toll would be a demonstration that the shippers' gas sale was more economically efficient to the extent that it could recover the real incremental cost of transportation. In addition, the NEB would not be required to make judgments about the economics of individual gas sales contracts. Instead, knowing that they would be required to pay an incremental toll would permit parties to make their own choices about the type of contract which best satisfied their individual needs. However, while an incremental toll might fulfill the objective of sending appropriate price signals

to new or renewing shippers, the NEB rejected the use of an incremental toll for the various reasons set out earlier in its decision.

The Board concluded that a determination of the economic feasibility of a pipeline expansion was appropriately made through a determination of the likelihood of the facilities being used at a reasonable level over their economic life and of the likelihood of the demand charges being paid. The NEB enumerated a number of factors which would provide a good indication of whether this was likely to occur. These included:

- the existence of a sufficient long-term supply of gas to keep the pipeline fully utilized over its economic life;
- evidence of the long-term outlook for gas demand; evidence of the potential for competition in the market;
- the existence of individual gas sales projects underpinning the expansion based, among other things, on an adequate project-specific gas supply and the existence of necessary upstream and downstream arrangements;
- evidence that the parties have financial integrity;
- provision for the payment of demand charges;
- evidence of the risks associated with the new gas sales; and
- consideration of the likelihood of a toll increase caused by the expansion resulting in reduced demand for service on the system.

TransCanada had taken the position in the hearing that renewals of existing contracts should be for a term of ten years or more during a period of major facilities expansion such as that presently experienced. This would mean a change in the TransCanada tariff which permits a shipper to renew service contracts on a year-to-year basis with six months' notice. The NEB was not persuaded to change the existing short-term contract and renewal rights provisions in the TransCanada tariff. It observed that the appropriateness of continuing the existing tariff provisions related to the risk that shippers with short-term contracts might cease to use the system. This risk is inherent in short-term contracts. However, the NEB was persuaded that the number of short-term transportation transactions, the demonstration that such transactions are serving long-term gas markets and the current demand for pipeline access ensured that the risk of underutilization resulting from shippers ceasing to use the system was minimal. It also considered that the risk of short-term shippers switching to alternative fuels was also minimal. The long-term commitment made by such end users in plant and equipment to use natural gas either as fuel or as feed stock supported the continued use of gas over the long term. Nor did the NEB consider that the risk of short-term shippers switching to U.S. gas as an alternative was significant, since the necessary pipeline capacity is not available.

The NEB noted that the introduction of these flexible tariff provisions has enhanced the development of a more market-oriented and competitive gas environment. In addition, shippers have been given flexibility in choosing the term and form of transportation service which best meets their particular circumstances. The Board had authorized these provisions in the first place to provide producers, marketers and end users with transportation options to access gas markets and gas supplies.

CRTC ORDERS DIRECT ACCESS TO TELEGLOBE CANADA

By: John F. Blakney
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In a decision released September 4, 1990, (Telecom Decision CRTC 90-19), the CRTC granted applications made by two resellers, Fonorola Inc. and ACC Long Distance Limited, to obtain direct access to Teleglobe Canada's overseas network. In ordering Teleglobe to file direct access tariffs, the CRTC also directed Bell, B.C.Tel, Unitel and Telesat to permit private line customers to connect directly to Teleglobe's switches.

Fonorola and ACC had argued that Teleglobe's failure to provide the requested interconnection unjustly discriminated against Canadian resellers wishing to provide overseas service, and that such access would lead to reductions in rates,

increased service choice, and improvement in the responsiveness of suppliers. Bell, B.C.Tel and Teleglobe opposed the applications. Unitel and Telesat, who were also made respondents by the resellers, did not oppose the application. Unitel stated that it would not object to providing private lines terminating at Teleglobe's premises. B.C. Tel and Teleglobe, on procedural grounds, argued that the applications were an attempt to obtain a review of previous CRTC decisions without satisfying the criteria established for such reviews, and that the form of interconnection requested should only be available to regulated telephone companies. B.C. Tel also suggested that reseller access to Teleglobe would reduce funds generated to help keep local rates low.

The Commission concluded that the current arrangements, under which the only way to access Teleglobe's network is by way of Telecom Canada's network, conferred a preference on Telecom Canada member companies. It also found that permitting reseller access to Teleglobe's network would provide benefits similar to those it had concluded would flow from other forms of domestic service resale. Furthermore, it noted that, with reseller access to Teleglobe, the volume of traffic carried by Teleglobe would not decrease but might increase. As a result, Teleglobe's revenues could increase. In addition, the Commission considered that Teleglobe's rates could also increase by recovering some traffic currently routed over a U.S. overseas facilities. It noted that any net revenue impact of direct access to Teleglobe's network on Telecom Canada member companies would not likely be significant.

Teleglobe's tariffs implementing the CRTC's decision were filed on November 15, 1990, and are currently being reviewed. The filing proposes a subscription-based discount service (called DirectConnect) which has a rate structure comparable to that offered by U.S. carriers to large customers for overseas calls. Bell and B.C. Tel proposed in their filings that Teleglobe should be required to collect $0.43 per minute from customers making calls under Teleglobe's tariffs, in order to compensate these carriers for lost access contribution. The Commission has rejected this latter proposal and has directed Bell and B.C.Tel to refile tariffs which involve no greater access contribution charge than what is currently provided with respect to resold private line services.

CONTROL OF CHCH-TV HAMILTON REMAINS WITH MACLEAN HUNTER LIMITED

By: P. Andrée Wylie
Blake, Cassels & Graydon, Ottawa

In 1989, through a share purchase, Maclean Hunter Limited acquired control of Selkirk Communications Limited. Selkirk is the licensee of several broadcasting assets serving various parts of Canada including television, radio and cable undertakings. Maclean Hunter was already, at the time of the transfer, a major player in the Canadian broadcasting industry, with important broadcasting and cable operations in more than one province. The transfer of control of the Selkirk broadcasting properties to Maclean Hunter required the prior approval of the Canadian Radio-television and Telecommunications Commission.

When Maclean Hunter appeared before the Commission in May 1989, it requested regulatory approval in two phases: first, approval of the share transaction and second, authority to divest itself of all the Selkirk broadcasting properties acquired through the share transfer, with the exception of CFNY-FM, an FM radio station serving Brampton, Ontario, and cable systems serving part of Ottawa and Pembroke, Ontario.

Included in the broadcasting assets that Maclean Hunter proposed to sell immediately, and therefore to control indirectly "only for a moment in time", was CHCH-TV, an independent television station serving Hamilton, Ontario and licensed to Niagara Television Limited, a Selkirk subsidiary. Maclean Hunter sought approval to transfer control of the station to the Blackburn Group Inc. of London, Ontario, the long-time owner, indirectly, of the independent television stations CFPL-TV London and CKNX-TV Wingham, Ontario.

Operating in the country's largest and richest market, especially when its over-the-air reach and its distribution by cable are taken into consideration, CHCH-TV had been for a long time

the major independent television station in the country. It had become over the years a leader in Canadian program production and had proved innovative and effective in the acquisition of foreign programming rights in the face of powerful bidding competition from the Canadian television networks. Under Selkirk's direction however,CHCH-TV had failed to achieve its full potential in the late 1980s in terms of audience share and revenues.

In the second phase of the hearing, the Commission examined the merit of the proposed transfer of CHCH-TV to Blackburn in light of the significant benefits test applied in transactions of this nature. The test requires the transferee to satisfy the Commission that the proposed transfer will yield significant and unequivocal benefits for the public served by the undertaking which is the subject of the transaction and, where relevant, for the Canadian system as a whole. The benefits must be commensurate with the size and nature of the transfer and the resources available to the transferee. The applicant must demonstrate to the satisfaction of the Commission that the application represents the best possible proposal in the circumstances.

On September 28, 1989, the Commission approved the sale of Selkirk to Maclean Hunter and the subsequent transfer of the vast majority of the broadcasting undertakings thereby acquired to third parties. However, in Decision CRTC 89-768, it denied Maclean Hunter's application for authority to transfer control of CHCH-TV to Blackburn.

The Commission had found Blackburn's business plan for CHCH-TV wanting. Specifically, it was not convinced that the strategies put forward by the company were dynamic enough to lead to any improvement in CHCH-TV's performance in its market. In fact, the projections filed by Blackburn had forecast no significant improvement in CHCH-TV's revenues, and therefore in its performance as a television licensee, for at least five years.

In light of MacLean Hunter's stated lack of desire to own or operate CHCH-TV, and therefore of the absence of any long term plans for the station by its effective owner, the Commission required Maclean Hunter to submit for Commission approval, within six months, its own proposals for CHCH-TV, including a business plan and an acceptable benefits package or, in the alternative, a new application for authority to transfer control of the station to a third party. In either case, the level of the benefits proposed was expected by the Commission to be at least equal to those put forward by Blackburn.

On October 19, 1990, the Commission ruled on a second application related to the transfer of control of CHCH-TV. The proposed transferee, this time, was Kenwal Communications, a partnership of Maclean Hunter and Blackburn in a 65/35 ratio. Kenwal applied to the Commission for authority to acquire the assets and for licences to continue the operation of not only CHCH-TV, but also CFPL-TV and CKNX-TV. The applications were denied in Decision CRTC 90-1072.

At the hearing of the Kenwal applications, the Commission assessed the merits of the proposal and the acceptability of the benefits put forward as flowing from the transaction in light not only of the benefits which formed part of the earlier Blackburn proposal but also of the conditions of licence, past commitments and expectations pertaining to all three television stations in previous Commission decisions, notably at the last renewal of the licences pertaining to these stations. The Commission found the benefits proposed to be significant and unequivocal, but not commensurate with the nature and size of the transaction, given the viability of the undertakings concerned and the resources of the partnership. It found them wanting especially when weighed against the concerns raised by the transfers.

Decision 90-1072 discusses a number of failings in Kenwal's proposal:

- the short-term approach taken by the partnership;
- the tentative nature and lack of vision of the business plan put forward;
- the fact that it was predicated on a significant decrease in the operating costs of all three stations, substantially through a reduction in expenditures for the Canadian and non-Canadian programming of all three stations involved;
- Maclean Hunter's apparent unfamiliarity with the independent television industry; and
- a lack of confidence in the accuracy of the revenues and expenses projections field, since

they were based on a program strategy which was revised substantially only days prior to the hearing.

Of particular concern to the Commission was the fact that, despite the resources available to Maclean Hunter and the nature of the markets served by the stations involved, the applicant's plans as filed would have resulted in a net reduction in expenditures on Canadian programming for the stations concerned, as compared to commitments previously made with respect to them. Such a reduction, the Commission ruled, added to the general inadequacy of Kenwal's business plan and made it impossible to conclude that the applications represented the best possible proposal in the circumstances and that their approval would be in the public interest.

For the second time, the Commission directed Maclean Hunter to come forward within six months of the Decision with another application for the transfer of CHCH-TV to a third party, complete with an acceptable business plan and a benefits package equal in size to that put forward by Blackburn in the 1989 application or, should Maclean Hunter wish to retain effective control of the Hamilton television station, its own proposals meeting these tests.

Control of CHCH-TV thus continues to be held by Maclean Hunter. More than two years will have elapsed since Maclean Hunter's acquisition of Selkirk, by the time it files a third application dealing with the long term future of one of the most important television stations in the country. In the meantime, the long term ownership of CHCH-TV remains unsettled as rumours abound of its possible divestiture to a new third party. It is hard to believe that any benefits can accrue to the public, or to the Canadian broadcasting system as a whole, from this prolonged state of uncertainty.

The seeds of the problems surrounding the sale of CHCH-TV Hamilton can be found in the fact that Maclean Hunter was authorized by the Commission in the first phase to acquire control of all the assets represented by Selkirk's shares when Maclean Hunter really wished to retain only three of the nearly thirty broadcasting properties the shares represented, without regard to whether the proposed transfers to third parties, in the second phase, were all acceptable to the Commission. The difficulties also flow from the fact that, due to the Commission's interpretation of its own ownership rules, Maclean Hunter had already acquired unconditionally all of Selkirk's non-voting shares, representing the overwhelming majority of Selkirk's assets, before it filed with the Commission an application requesting approval of the acquisition of Selkirk's voting shares. The regulatory procedure used, coupled with the imperatives of the marketplace, left the Commission little discretion. This unfortunately resulted in a blanket approval of the transfer of Selkirk to Maclean Hunter but a piecemeal approval of the subsequent transfers of the majority of the assets involved to third parties, leaving Maclean Hunter in control of licensed broadcasting undertakings it never wished to own.

BUSINESS LEADERS LAUNCH MAJOR STUDY ON COMPETITIVENESS

(The following is an excerpt of a Business Council on National Issues Press Release dated November 5, 1990 and is reprinted with permission.)

Thomas d'Aquino, President and Chief Executive Officer of the Business Council on National Issue, announced in on November 5, 1990, that the Council has commissioned a major study on Canadian competitiveness. The study will be carried out by Professor Michael Porter of Harvard University, the Toronto-based Monitor Company and a multinational team of consultants under the overall direction of Professor Porter.

Professor Porter, who teaches at the Harvard Business School, is regarded as a world authority on competitive advantage. A distinguished author, his recent book, *The Competitive Advantage of Nations*, is widely acclaimed as a seminal work on the subject of competitiveness. It is based on extensive research in ten countries where Professor Porter studied the patterns of industry success as well as the company strategies and national policies that achieved it.

CANADIAN COMPETITION POLICY RECORD

In the conduct of the Canadian study, the project team, under Professor Porter's supervision, will apply similar methodologies of research as were used in the ten nation research project, thus enabling direct comparisons with the original study. The study analysis and recommendations will be submitted to the Business Council on National Issues in May 1991.

The Chairman of the Business Council, J. Edward Newall, welcomed the initiative stating that "now, more than ever it is vital that Canadians understand the determinants of competitiveness – competitive industries and a competitive work force are essential for national prosperity."

The federal departments of Consumer and Corporate Affairs, External Affairs and International Trade, Employment and Immigration, Finance, and Industry, Science and Technology will cooperate in the undertaking through the auspices of a Government Advisory Board working with the Business Council on National Issues. Industry, Science and Technology Canada will be coordinating the government's participation.

Mr. d'Aquino also announced the composition of an Economic Advisory Board consisting of nine distinguished Canadian economic authorities who will advise the Business Council on its oversight of the study. They are Thomas Courchene, Director, School of Policy Studies, Queen's University; James Downey, special Advisor to the Premier of New Brunswick on Human Resource Development, University of New Brunswick; Pierre Fortin, Professor of Econonics and Director, Centre for Economic Policy Research, University of Québec in Montreal; James Frank, Chief Economist, The Conference Board of Canada; Lawson Hunter, Barrister and Solicitor, Fraser & Beatty; Thomas Kierans, President, C.D. Howe Institute; Harvey Lazar, Deputy Chairman, Economic Council of Canada; Richard Lipsey, Alcan Fellow and Director, Simon Fraser University; and Michael Walker, Executive Director, Fraser Institute.

The Policy Committee of the Business Council and the Advisory Boards will receive regular updates on the progress of the study. Professor Porter and Roger Martin, Monitor Company Managing Director, will report to Mr. d'Aquino, who will act on behalf of the Council's Executive Committee.