

REGULATORY AND POLICY DEVELOPMENTS

THAT OLDMAN RIVER ROLLS ON INTO MID-WINTER SLEEP

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The Supreme Court of Canada, in a January 23, 1992 judgment, has confirmed that the federal Environmental Assessment and Review Process (EARP) Guidelines Order is a law of general application which must be applied by federal decision-makers.

The case arose from the construction of the Oldman River Dam in Alberta. The Supreme Court, like the Federal Court of Appeal, was unmoved by the fact that the dam was already substantially completed.

The case is worthy of note because it both settles questions related to the application of the EARP Guidelines Order and raises new questions. Four issues discussed by the Court are of particular interest:

- The circumstances which trigger the EARP;
- The constitutional foundation, and hence the scope, of the EARP;
- The meaning of "environment" for the purposes of the EARP; and
- The nature of the activities which may be amenable to the EARP.

The last issue is of special interest in relation to the discussion of the responsibilities of the Minister of Fisheries and Oceans.

The EARP Guidelines apply to certain proposals, where "proposal" is defined to include any initiative, undertaking or activity for which the Government of Canada has a *decision-making responsibility*. Whereas the Federal Court of Appeal had held that both the Minister of Transport and the Minister of Fisheries and Oceans were required to apply the EARP Guidelines Order, the Supreme Court held that the Minister of Fisheries

and Oceans was not so required. The reason was that the Court concluded that the Minister of Transport had a decision-making responsibility in relation to the project but that the Minister of Fisheries and Oceans did not.

The decision-making responsibility of the Minister of Transport arises from the *Navigable Waters Protection Act*, which requires that the approval of the Minister of Transport be obtained, among other things, for the construction of any work in a navigable water. The Oldman River is a navigable water. The *Fisheries Act*, however, prohibits the carrying on of any work or undertaking that results in the harmful alteration, disruption or destruction of a fish habitat and makes any such activity an offence. The Minister of Fisheries and Oceans is given a discretionary authority to request information in connection with any such activity, and a further discretionary authority, if the Minister is of the opinion that the offence is being or is likely to be committed, to issue orders requiring modifications to the work or undertaking, restricting the operation of the work or undertaking, or closing the work or undertaking. The Supreme Court of Canada held that this was not a decision-making responsibility within the meaning of the EARP Guidelines Order.

The Court held that the Federal Government "must have an affirmative regulatory duty pursuant to an Act of Parliament which relates to the proposed initiative, undertaking or activity" to trigger the Guidelines Order. The Court specifically stated that it "cannot have been intended that the Guidelines Order would be invoked every time there is some potential environmental effect on a matter of federal jurisdiction."

At the same time, the Court rejected a restrictive application of the Guidelines Order. The Court held that the EARP Guidelines Order derived its constitutional validity from the heads of federal legislative responsibility such that where valid federal legislation created a decision-making

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responsibility, then the EARP Guidelines Order would apply. Once the EARP Guidelines Order applies, the decision-maker "must also consider other matters which fall within federal power." The Guidelines Order gives "a mandate to examine matters directly related to the areas of federal responsibility affected" by the proposal. Thus, the Court reasoned, the decision-maker, or an Environmental Assessment and Review Panel established under the Guidelines Order, could not use the Guidelines Order "as a colorable [sic] device to invade areas of provincial jurisdiction which are unconnected to the relevant heads of federal power."

The principle, of course, is easier to state than to apply.

Nowhere is the potential for difficulty more evident than in what is, in fact, one of the most positive aspects of the Court's judgment. The Court could not accept that the concept of environmental quality was confined to the biophysical environment alone. It viewed such an interpretation as "unduly myopic" and contrary to the generally held view that the "environment is a diffuse subject matter." The Court noted with approval the observation that long-term economic growth not only depends on a healthy environment but also affects the environment, in that environmentally sound and sustainable economic development requires the technology and wealth that is generated by continued economic growth. Environmental and economic planning are not separate spheres but must be integrated. The Court stated:

Surely the potential consequences for a community's livelihood, health and other social matters from environmental change are integral to decision-making on matters affecting environmental quality...

The Court warned that there is a danger of falling into the conceptual trap of thinking of the environment as an extraneous matter in making legislative choices or administrative decisions. Clearly, this cannot be the case. Quite simply, the environment is comprised of all that is around us and as such must be part of what actuates many decisions of any moment.

Two questions immediately emerge from the Court's conception of the environment. First, if the environment is diffuse and is all that is

around us—social, health, safety and economic as well as physical factors—where does environmental assessment begin and end? Second, it is fashionable for industry organizations and environmental groups to sit at the same table and emphatically agree on the importance of sustainable development where sustainable development involves the integration of economic and environmental issues in planning. Pleasantries aside, each has a radically different view of what constitutes sustainable development and what priority should be given to environmental concerns as opposed to economic development concerns. Nowhere was that more evident than in the Energy Options Study commissioned by the Minister of Energy, Mines and Resources a few years ago. What then does the *Oldman River* decision tell us about the appropriate balance? The answer is very little but, if anything, the physical environment is seen as simply one piece in a large stew. Applying established principles of judicial deference, one can assume that, when environmental decision-makers serve up environmental hot pot, Canadian courts will view the question as a matter of taste.

The question of where environmental assessment begins and ends is rather more difficult. To begin with, there is the problem of when environmental assessment becomes a "Trojan horse" which the Saskatchewan government feared would become a device for invading provincial jurisdiction. One case in the Federal Court of Appeal has already held that the National Energy Board in connection with Hydro-Québec exceeded its jurisdiction by requiring that the Guidelines Order be complied with before an electricity export licence became effective. That judgment may now be in doubt if the NEB is to be seen in the same position as the Minister of Transport in the *Oldman River* case, with a decision-making responsibility which triggers an environmental assessment of all matters affecting federal responsibilities.

A further aspect of the problem is the extent to which an environmental assessment, as distinct from the decision-making process to which it is an adjunct, involves consideration of social, economic, safety or other issues distinct from the physical environment. This has always been a

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difficult question; it is now even more difficult. The problem can be highlighted with a simple question. Will the Minister of the Environment arise, C.D. Howe-like, as the "Minister of Everything"? Surely, if environmental and economic development issues are to be integrated in the planning process, the logical arrow of change points to bringing those with expertise on the physical environment together with those with expertise on the economic, technical and other issues relevant to development.

Nowhere, however, is the careful Aristotelian analysis of the Court more capable of misinterpretation and misuse than in its discussion of the role of the Minister of Fisheries and Oceans.

There would have been no great issue here if the Court had contented itself with contrasting the decision-making authority of the Minister of Transport under the *Navigable Waters Protection Act* with the responsibilities of the Minister of Fisheries and Oceans under the *Fisheries Act*. The Court, however, went on to opine that the extent to which environmental concerns may be taken into account in the exercise of a constitutional head of power may vary from one power to another.

For example, a somewhat different environmental role can be played by Parliament in the exercise of its jurisdiction over fisheries than under its powers concerning railways or navigation since the former involves the management of a resource, the other activities.

The Court then contrasted two cases where the constitutionality of the *Fisheries Act* had been litigated. In one case, a provision of the *Act* was struck down on the basis that it was not sufficiently linked to any actual or potential harm to fisheries. In the other, such a link was found.

The distinction which the Court makes between legislation which applies to "activities" and legislation which involves the "management of a resource" raises tantalizing possibilities.

The Court goes on at some length to talk about the jurisdiction of the National Transportation Agency over railways. The Court appears to accept that the regulation of railways involves not only merely technical issues but also social and economic issues of both national and local dimensions. In this context, the Court states that

"it cannot be seriously questioned that Parliament may deal with biophysical environmental concerns touching upon the operation of railways so long as it is legislation relating to railways." It is observed that a railway line may cut through ecologically sensitive habitats such as wetlands and forests. It is also observed that a derailment may pose a serious hazard to the health and safety of nearby communities. It is suggested that, on the other hand, the railway may bring considerable economic benefit to those communities. The Court concludes that "all of these considerations may validly be taken into account at arriving at a final decision on whether or not to grant the necessary approval."

What does it mean then to suggest that the "management of a resource" involves different considerations? Does it mean that, unlike the regulation of railways, management of a resource does not include consideration of social and economic matters of national or local dimension? Does it imply, at least in the case of fisheries, that the focus is on biophysical environmental concerns? The difficulty is that the Court has contrasted the broad statement of purpose found in the *National Transportation Act* with specific provisions of the *Fisheries Act* dealing with the protection of fish habitat. The Court gave no consideration to the overall scheme of the *Fisheries Act*.

Even an cursory reading of the *Fisheries Act* reveals that in managing fisheries resources, the Minister of Fisheries and Oceans is charged with regulating the *activity* of fishing. The Minister is authorized to issue licences for fisheries and for fishing. In addition, the Minister decides whether or not any particular fishery or any particular area will be opened to fishing by licence holders.

The fisheries represent finite but, with proper management, renewable resources. Hence licensing, for example, in the case of commercial fisheries, involves decisions as to who will have licences and who will not. In addition, with respect to those who have licences, questions will arise as to how many fish may be taken. Therefore, a complex scheme of allocation has been developed by the Department of Fisheries and Oceans for many commercially important fisheries. Socio-economic concerns are evident in the various

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Fisheries Management Plans which the Department has developed.

If Parliament's constitutional authority to legislate in respect of extra-provincial railways carries with it the authority to take into account all of the factors which are significant to Canada in the construction and operation of railways, then surely it must follow that the authority of Parliament to legislate in respect of the fisheries carries with it the authority to legislate in respect of all of the matters which are of significance to Canada in the management of fisheries. If so, then fisheries conservation and management may properly be seen as involving a balancing of factors of which the biophysical environment is but one.

Fisheries are not the only area in which management of a resource involves management of activities. The oil and natural gas industries involve a variety of activities requiring a host of permits, licences or other authorizations resting upon a foundation of well-developed resource conservation and management practices and policies.

It may be, however, that the Supreme Court of Canada was simply contrasting two constitutional heads of legislative authority and the potential for such heads of authority to impact to a greater or lesser extent on matters of provincial legislative authority. So the picture of the railway running from Halifax to Vancouver and impacting on all sorts of matters which would otherwise be of provincial or local concern becomes a powerful image in the mind of the Court as contrasted with fisheries which, in the two cases considered, had been examined in a rather more discrete geographic context. In that regard, it is significant that the Court follows on from its distinction between railways and fisheries with a discussion of the provincial jurisdiction in relation to environmental matters. If the Court was simply contrasting federal powers with provincial powers, then not too much should be made of passing comments about resource management.

That more can be made of the distinction between regulating an activity and managing a resource than may be warranted is clear from the Court's discussion of an Australian case.¹ In that case, approval for the export of certain minerals

was required from the relevant federal minister, who decided to take into account an assessment of the environmental impact of the mineral extraction from the area in which the plaintiffs had their mining leases. The mining activity itself was predominantly a State interest. The Court commented favourably on the approach of the Australian court, which was to observe that the decision of the Minister would still be in respect of the exportation and that consideration of these environmental matters would not detract from the character of that decision. It was this case which led to the Court's warning about "the danger of falling into the conceptual trap of thinking of the environment as an extraneous matter in the making of legislative choices or administrative decisions."

It will also be important for all those called upon to apply the EARP Guidelines Order not to fall into the conceptual trap of treating every passing word in the Supreme Court of Canada's judgment as a clear, final and exhaustive statement of the law in this area.

Notes

¹ *Murphyores Incorporated Pty. Ltd. v. Commonwealth of Australia* (1976), 136 C.L.R. 1 (H.C.).

EXEMPTIONS AND MANDATORY ORDERS: THE CRTC IS POISED TO USE ITS NEW BROADCASTING POWERS OF DEREGULATION AND REGULATION

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On June 4, 1991, a completely recast *Broadcasting Act* was proclaimed into force. The new *Act* broadens the forbearance power of the Canadian Radio-television and Telecommunications Commission (CRTC) by authorizing it to exempt from licensing requirements an expanded range of broadcasting undertakings.

The new *Act* also confers upon the Commission a new power to issue mandatory orders,

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enforceable as an order of a court of competent jurisdiction, to require adherence by broadcasting licensees to the conditions attached to their broadcasting licence, or compliance with the provisions of the *Act* or with the generally applicable regulations made under the *Act*. The authority of the Commission to issue binding orders coexists in the new *Act* with the power of the Commission to suspend or revoke a licence for failure by its holder to comply with any of the conditions attached to the licence or for contravention of any regulation or order made pursuant to the *Act*. It also coexists with the power of a court of criminal jurisdiction to find a person guilty of a summary conviction offence for carrying on a broadcasting undertaking without a licence, for contravening any regulation or order made pursuant to the *Act* or for failing to comply with any condition of a broadcasting licence.

The Commission has recently instituted public proceedings involving the exercise of both its expanded power of exemption and its new power to issue mandatory orders. In the circumstances surrounding those proceedings, the proposed exemptions will likely prove far less contentious than the proposed issuance of mandatory orders.

The Power of Exemption

Under the old *Broadcasting Act*, the Commission had the power to exempt from licensing requirements broadcasting receiving undertakings of a prescribed class. The best known use of that power was the Commission's 1977 exemption from licensing, subject to their meeting prescribed criteria, of Master Antenna television (MATV) systems used in lieu of cable television systems to provide cable television services to apartment buildings, condominiums and multiple-unit buildings such as hotels, hospitals, prisons or similar institutions. MATV systems meeting certain prescribed criteria continue to operate without a broadcasting licence. In 1981, the Commission issued a Resource Development Installation Licence Order also exempting from licensing any undertakings providing television distribution services, usually on a temporary basis, in a resource development work camp, construction site or work installation environment.

The new *Broadcasting Act* greatly expands the Commission's exemption powers by authorizing it to exempt from licensing requirements, on such terms and conditions as it deems appropriate, broadcasting undertakings of any class, where the Commission is satisfied that compliance with such licensing requirements will not contribute in a material manner to the implementation of the broadcasting policy set out in the *Act*.

Since the new *Act* came into force, the Commission has used its broader exemption power to exempt from licensing requirements certain shortwave broadcasting undertakings and the provision of the coverage of the proceedings of the House of Commons and of provincial or territorial legislatures to distribution undertakings. In the latter case, it cited as its rationale for the exemption the fact that the service provided raises no question of programming content since no editorial comment is distributed, merely live coverage of legislative debates.

In CRTC Public Notice 1992-5, issued January 17, 1992, the Commission invited comments on a proposal to exempt a number of broadcasting undertakings from licensing requirements. In each case, to be eligible for exemption, the undertakings of the relevant class would be required to meet certain prescribed criteria, including the requirement that their ownership and control be in the hands of Canadians to the extent prescribed by law for broadcasting undertakings in general and, where program origination is involved, that the undertakings not broadcast any programming in contravention of the regulations made under the *Act* which, but for the exemption, would be applicable to them.

The principal grounds cited to support the exemptions proposed in Public Notice 1992-5 are the limited audience reach or the limited duration of operation of the undertakings concerned and the fact that, in many cases, the undertakings will not originate programming themselves but will only redistribute the programming of another undertaking already licensed by the Commission. The Commission is careful to emphasize that, "at this early stage," it considers it prudent to exempt only those types of undertakings that present the clearest and least controversial grounds for exemption and do not pose a threat to conventional broadcasters.

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The undertakings proposed for exemption in Public Notice 1992-5 include:

- Certain low-power AM or FM radio undertakings rebroadcasting the programming of another station on a temporary basis in a work camp or in a construction site situation, and low-power radio undertakings covering special sports, cultural or tourist events or providing commercial messages such as Talking Signs or tourist information;
- Certain temporary networks covering unforeseen events of relatively short duration in Canada such as one-time concerts, festivals, special sports games, non-profit events and public emergencies;
- Closed-circuit video programming undertakings such as hotel pay-per-view services and specialized video services in institutions such as prisons and hospitals; and
- Other classes of broadcasting undertakings involved either in the assemblage of programming services or in the network delivery of such services to cable or other distribution undertakings; for example, undertakings providing still image or alphanumeric services and community programming networks.

The exemptions proposed in Public Notice 1992-5 highlight two major issues. First, exemptions from licensing under the *Broadcasting Act* do not represent total deregulation since broadcasting undertakings retain their status as members of a class eligible for exemption only so long as they adhere to a set of prescribed criteria. These criteria include the eligibility requirements for licensing from an ownership perspective applicable to all broadcasting undertakings, compliance with the program content regulations that would be applicable to the undertakings but for the exemption, DOC certification for the technical facilities used, program content limitations with regard to commercial messages or programming of a religious or political nature, and duration of operation. The exemption mechanism, it can be argued, amounts to indirect regulation in that, presumably, as soon as an undertaking of a prescribed class fails to meet any

one of the criteria established for that class, it loses its exemption and becomes licensable.

Second, it is obvious that some of the exemptions proposed are made necessary by the fact that, under the new *Broadcasting Act*, "broadcasting" is no longer defined, as it was under the old *Act*, by reference to whether radio waves are used for transmission but rather by reference to the content of the transmission, that is, "programs" as defined. The result is the extension of the Commission's broadcasting jurisdiction over undertakings not heretofore encompassed by the definition of "broadcasting", for example, certain closed-circuit programming circuits delivered by wire.

As noted, all proposals to exempt a class of broadcasting undertaking proceed on the basis that the undertakings must, in addition to falling within the class, meet certain criteria to remain eligible for exemption. The result is that certain undertakings such as the closed-circuit delivery of films to hotel rooms, not under Commission jurisdiction in the old *Act*, will now have to meet certain requirements to remain exempt from licensing and regulation. For example, such undertakings must now be owned and controlled by Canadians in the manner prescribed for all broadcasting undertakings, and must not provide programming that is religious or political in nature or any programming that contravenes the television regulations made under the *Act* that would be applicable to them if they were licensed. Despite exemptions, the effect is to regulate indirectly services that were not regulated before.

With technological advances making possible new methods for the delivery of programming services that will likely be captured by the greatly broadened definition of broadcasting, it is expected that there will be increased appeals to the Commission for exemption, coupled in some cases with pressure by existing licensees for the prescription of exemption criteria which they consider necessary for their own protection. One may wonder to what extent adherence to such criteria will be monitored, and how likely it is that any reported violation will be acted upon, considering that the object of the exercise is to rid the regulator and broadcasting undertakings, in some cases, of the burden of licensing and of its

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attendant regulatory requirements.

The Power to Issue Orders

As noted above, the Commission may now issue broadcasting orders requiring or forbidding any person to do any act or thing that the person is or may be required to do, or is or may be forbidden from doing or continuing, by the Act or by any regulation, licence, decision or order made or issued by the Commission under the Act. A person operating a broadcasting undertaking without a licence, or in contravention of a condition of his licence or of a regulation, may therefore find himself vulnerable first, to a Commission order enforceable as an order of the Federal Court or of any superior court of a province or to a summary conviction by a court of criminal jurisdiction, and second, to a Commission order, the suspension or revocation of his licence or a summary conviction.

In November 1991, the Commission called a number of parties to a public hearing in Edmonton set for January 14, 1992 "to inquire into, hear and determine whether a mandatory order should be issued requiring [such parties] to cease and desist operating a broadcasting undertaking... in Canada except in compliance with the Broadcasting Act." At least four of these parties were allegedly rebroadcasting without a licence the programming of an American evangelical television network received by them *via* satellite and retransmitted over the air.

Under the old Act, any attempt to force an unlicensed undertaking out of operation would have required a criminal prosecution, with the onus of proof, procedural manoeuvres, delays and evidentiary requirements and safeguards that are its hallmarks.

Not unexpectedly, the Edmonton hearing, held in a packed meeting hall, pitted the Commission against evangelical associations, supporters of religious broadcasting in particular and of free speech in general, and leaders of local evangelistic churches. Despite its best efforts to cast the hearing as an inquiry into the operation of licensable broadcasting undertakings without the licence required by the *Broadcasting Act*, rather than into the programming content

retransmitted, the Commission was confronted by emotional and passionate pleas by the principals involved, coupled with the charge that the Commission would not license them to offer religious programming even if they applied for a licence. The Commission's long-standing and somewhat controversial policy against licensing AM or FM radio or television stations for the purpose of providing a religious programming service and against aggressive on-air fundraising by religious groups was raised, despite obvious efforts by the hearing panel to keep it out of the discussion.

Should the outcome of the Edmonton hearing be the issuance by the Commission of cease and desist orders and their registration in court for enforcement, one would assume that failure to abide by them will constitute contempt of court which will require further action. Whether or not such action is undertaken, the parties affected may well appeal a Commission order on the ground that, in light of CRTC licensing policies, it represents a denial of a fundamental right or is otherwise contrary to the *Canadian Charter of Rights and Freedoms*. Such parties may also question whether an act of Parliament can make operating without a licence a summary conviction offence and, at the same time, empower a regulatory tribunal, following an administrative hearing, to find someone to be operating without a licence and to issue an order enforceable in court directing that person to cease and desist from such operation.

TELEGLOBE IN THE POST-TRANSITIONAL PERIOD

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The 1987 *Teleglobe Canada Reorganization and Divestiture Act* (the *Teleglobe Act*) provided for the privatization of Teleglobe Canada Inc. It also brought Teleglobe under the jurisdiction of the Canadian Radio-television and Tele-

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communications Commission (CRTC) and made it subject to the regulatory requirements of the *Railway Act*.

The *Teleglobe Act* established a four-year transitional period, from January 1, 1988 to December 31, 1991, during which Teleglobe would be regulated on a rate-of-return basis, with its rate of return on common equity for the period determined by reference to the rate of return established by the Commission for Bell Canada and British Columbia Telephone.

In Telecom Decision CRTC 91-21 issued on December 19, 1991, the CRTC dealt with some outstanding matters related to the regulation of Teleglobe during the transitional period, as well as with a number of issues relating to the regulation of the company after the transitional period. Among the matters dealt with by the Commission were the resale and sharing of Teleglobe's services, forbearance from regulation of some of Teleglobe's services, the type of regulation to be applied to Teleglobe after the transitional period, the treatment of advances by Teleglobe to its parent company, Memotec Data Inc., and Teleglobe's revenue requirement for 1992.

Resale and Sharing

In 1990, the Commission permitted the resale and sharing of Teleglobe's services in accordance with the rules with respect to resale and sharing developed for other carriers under Commission jurisdiction in 1987, but subject to the additional requirement that any resale and sharing arrangements be applicable in any foreign country involved, as well as in Canada.

In Decision 91-21, the Commission considered whether the 1987 rules respecting resale and sharing should be liberalized further, insofar as Teleglobe is concerned, to permit the resale on a joint-use basis of interexchange private line services to provide interconnected voice services. The Commission concluded that such liberalization was in the public interest, subject to the continuing requirement that Teleglobe's tariffs specify that any resale or sharing arrangements permitted between persons in Canada and another country be allowed in both countries.

In order to forestall the diversion of international traffic by domestic facilities-based

carriers to resold private lines, to the significant detriment of Teleglobe, the Commission prohibited such domestic carriers from engaging in liberalized resale of Teleglobe's private lines. It also prohibited the carriers under its jurisdiction from routing their international telephone traffic through a reseller of Teleglobe's private lines. Joint-use resellers of Teleglobe's private lines would also be prohibited by Teleglobe's tariffs from carrying the international telephone traffic of domestic carriers. In addition, to ensure maximum use of Canada's international facilities, Teleglobe was authorized to include in its tariffs a provision prohibiting the routing through a third country of joint-use private line voice traffic when that traffic originates or terminates in Canada, except where alternate routing has been negotiated with the countries involved.

Finally, in line with previous Commission decisions on resale, a contribution charge of \$200 for each local or interexchange channel of Telecom Canada members used to gain access to Teleglobe's private lines for the purpose of providing joint-use interconnected voice services was required to be collected and remitted by Teleglobe to Telecom Canada members. In this connection, resellers and sharing groups were required to register with Teleglobe and the CRTC prior to receiving service.

Forbearance from Regulation

Section 16 of the *Teleglobe Act* authorized the Commission to forbear from regulating any activity of Teleglobe, where the Commission determines that such activity is subject to a degree of competition sufficient to ensure just and reasonable rates (as required by the *Railway Act*) and to safeguard against unjust discrimination or undue and unreasonable preference or advantage contrary to the provisions of the *Railway Act*. For any activity which is the subject of forbearance, Teleglobe could therefore charge tolls without first filing them for Commission approval.

Decision 91-21 deals with Teleglobe's proposal that the Commission exercise its power of forbearance with regard to its existing or future services other than international telephone service. The Commission examined the potential for Teleglobe to engage in price discrimination and

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cross-subsidization and to earn monopolistic profits with respect to such services. It identified the following general criteria to assess the degree of competition existing in the various market segments in which Teleglobe offers the services earmarked for detariffing:

- The degree to which direct competition exists for a given service or the extent to which substitutes are available (this includes a consideration of barriers to entry);
- Where comparable services are available from other providers, the extent to which Teleglobe's rates exceed or are below the rates for those comparable services; and
- The extent to which service changes or new technology are implemented relative to other international service providers.

The Commission noted that these criteria are consistent with its decisions detariffing certain of Unitel's services and dealing with the regulation of cellular carriers in which it had emphasized the issues of "effective competition" and the potential for cross-subsidization.

Having enunciated these criteria, the Commission then turned to an examination of the general environment in which Teleglobe operates and the extent to which, in a general sense, the company exercises market power within that environment. While acknowledging that Teleglobe's market power is somewhat mitigated by certain external factors related to its ability to set prices, the Commission nevertheless considered that its monopoly status with regard to earth station licences, cable landings and INTELSAT space segment access enabled it to influence, if not control, the speed of innovation and the introduction of new technology and services. The Commission noted as well that Teleglobe's market power has been enhanced by the introduction of Globedirect and by past CRTC decisions which have reduced the potential for bypass of Teleglobe's facilities. It also found, on a *prima facie* basis, that the majority of Teleglobe's "competitive" services are in effect provided on a monopoly basis. The Commission concluded that, in a general sense, Teleglobe is in a position to exercise market power within the operating environment in which such services are offered.

Turning to a consideration of whether forbearance could be exercised in respect of one

or more specific services, the Commission noted the absence of any analysis of competition filed by Teleglobe on a service-by-service basis rather than using a general market approach, particularly with regard to factors such as relative price levels, substitutes, geographic reach and service availability. The Commission stated that it was impossible for it to find, on the basis of the evidence presented, that the necessary conditions exist for the exercise of its power to forbear from regulating any of Teleglobe's services. Teleglobe's application for forbearance was therefore denied.

The Regulation of Teleglobe in the Post-transitional Period

As early as 1990, the Commission invited comments on the form of regulation that should be applicable to Teleglobe after the transitional period, and sought submissions on possible alternatives to regulation on a rate-base/rate-of-return basis. In the period leading to the proceeding which resulted in Decision 91-21, the Commission set out the broad concerns which required Teleglobe to consider in formulating its position as to the form of regulation to be applied to the company after December 31, 1991. It also forwarded to Teleglobe a series of interrogatories aimed at eliciting the company's position on the matter. The Commission nevertheless directed Teleglobe to file financial evidence for 1992 on a rate-base/rate-of-return basis.

In its evidence, Teleglobe questioned the appropriateness and adequacy in its case of conventional rate-base/rate-of-return regulation, in part due to the complex nature and changing competitive dynamics of the international telecommunications environment. It did not, despite the Commission's invitation to do so, reach any definitive conclusions on a better form of regulation or formulate in its evidence a specific alternative proposal for its future regulation. Teleglobe did, however, propose a modified rate-base/rate-of-return régime for an interim period, with a rate of return on equity averaged over a rolling multi-year period rather than fixed on the basis of a single forward-looking test year. A deferred income reserve account was proposed by Teleglobe to record any revenue excess or shortfall

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incurred in any one year and to allow for the amortization of any balance over a number of years. The company stated that it would develop and file for Commission consideration a concrete proposal for an alternative regulatory régime no later than 1993.

Teleglobe's moving multi-year approach and its proposed deferred income reserve account were rejected by the Commission in Decision 91-21. The Commission concluded that, until an alternative regulatory framework (such as, for example, the price cap regulation recommended by the Director of Investigation and Research, or an incentive rate-of-return régime), is examined and possibly established for Teleglobe, it would regulate the company on the basis of a single forward test year rate-base/rate-of-return régime, with a 200 basis point rate-of-return range.

The Commission stated its willingness to initiate a public proceeding to consider the form of regulation that should apply to Teleglobe in the future. It stressed, however, the need for the company to place a concrete proposal for an alternative before the Commission and to be prepared to substantiate such a proposal with strong empirical evidence that the alternative régime proposed would be more adequate and more appropriate than rate-base/rate-of-return regulation for the post-transitional period. The Commission also stated that it expected that any such proposal should take into account the areas of concern already identified by the Commission, particularly the economic benefits and savings that the proposed approach would achieve and the extent to which it would ensure that the requirements of the *Railway Act*, such as the justness and reasonableness of rates and fairness, continue to be respected. The Commission considered it inappropriate to provide, as requested by Teleglobe, more specific guidance in this regard.

Advances to Memotec

In establishing Teleglobe's revenue requirement in Decision 91-21, the Commission determined the treatment to be accorded intercorporate transactions between Teleglobe and its parent company and unregulated

subsidiaries, affiliates or other related companies. The matter of Teleglobe's advances to Memotec under Memotec's Central Cash Management System, whereby substantial Teleglobe funds are transferred to Memotec at the end of each day, was the most important intercorporate Teleglobe practice addressed.

Teleglobe's advances to Memotec have been a source of serious concern for the Commission since it first assumed jurisdiction over Teleglobe. The Commission first identified problems to be resolved surrounding this issue in 1989. Its concerns have revolved largely around the level of security provided by Memotec for the funds advanced by Teleglobe, the amount of interest (if any) paid by Memotec to Teleglobe on the advances, and the extent to which the funds advanced could be readily available at any time to meet Teleglobe's funding and liquidity needs.

In 1991, Teleglobe was directed to file details of an arrangement with Memotec whereby Memotec would pledge a portion of its shares in Teleglobe to secure the funds advanced. The Commission advised Teleglobe that it was prepared to accept an alternative proposal as long as such alternative would provide for a level of security equivalent to a pledging of shares. The return to Teleglobe on the advances made was also to be commensurate with the risk associated with Memotec's use of the funds.

In Decision 91-21, the Commission examined the adequacy of the proposal filed by Teleglobe in response to the Commission's 1991 direction. As an alternative to pledging shares in Teleglobe, Teleglobe proposed security arrangements embodied in a series of agreements, one of which, an escrow agreement, would be between Memotec, the CRTC and a third party. Such an agreement could eventually require the Commission to order the sale of the shares on a default by Memotec.

The Commission concluded that Teleglobe's proposed arrangements were not acceptable. In the Commission's view, they did not provide for adequate security or liquidity. More particularly, the Commission was not persuaded that, should there be a default by Memotec, Teleglobe would actually receive sufficient proceeds under the proposed security arrangements to cover the advances made. Neither was the Commission

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persuaded that the advances would be liquid under the proposed arrangements. Moreover, it expressed serious concern, as Teleglobe's regulator, with the role required of it under the escrow agreement.

The Commission repeated its view that, in order to discharge its mandate under the *Railway Act* to ensure the provision of international telephone service at just and reasonable rates, it must be assured that Teleglobe is able to recover the funds advanced to Memotec on a timely basis, in the event of a default. Otherwise, the Commission concluded, it may find it necessary to increase Teleglobe's revenue requirement, and therefore the rates charged by Teleglobe, to compensate Teleglobe for uncollectible or overdue advances to Memotec and thus enable Teleglobe to meet its foreign revenue settlement obligations. The Commission was also concerned that Teleglobe's creditworthiness not be impaired and its cost of borrowing not be increased, at the eventual expense of its customers, as a result of such default.

The Commission stated that it would consider Teleglobe's advances to Memotec adequately secured if Memotec were to provide Teleglobe with an irrevocable third-party letter of credit, with any associated covenants acceptable to the Commission, authorizing Teleglobe to draw money up to the total balance of the cash advances to Memotec at the time those advances are due. The Commission emphasized that the provision of such a letter of credit would more appropriately shift the risk of default on the part of Memotec from Teleglobe and its customers to a financial institution. The Commission directed Teleglobe, should it not provide the Commission with an acceptable letter of credit by a specified date, to retrieve all the advances made to Memotec and to make no such further advances.

Teleglobe's Revenue Requirement for 1992

During the four-year transitional period, in order to ensure that Teleglobe's rate of return on common equity was kept within the range prescribed by Order in Council, the Commission approved a number of international telephone rate reductions which, taken together, reduced

international telephone service tolls by 35 percent. Teleglobe's allowed rate of return during the transitional period was approximately 12.9 percent to 14.9 percent

In the proceeding leading to Decision 91-21, Teleglobe proposed an allowed rate of return range of 14.5 percent to 16.5 percent, with rates set to achieve the mid-point of that range, 15.5 percent, in 1992. It proposed an allowable rate of return range of 100 basis points if its proposal for a deferred income reserve account were approved, and the continuation of a range of 200 basis points if the framework of a single forward test year were applied by the Commission.

In Decision 91-21, the Commission established an allowable range of 12.75 to 14.75 percent as a fair and reasonable rate of return for Teleglobe in 1992, and set Teleglobe's rates on the basis of the 13.75 percent mid-point of the range.

The Commission found it appropriate to reduce Teleglobe's forecast operating expenses, excluding depreciation, from \$154 million to \$149.3 million, for an annual increase of 5.8 percent over 1991 expenses rather than the 9.1 percent increase forecast by Teleglobe. After certain upward adjustments to the net operating revenues forecast by Teleglobe for 1992, the Commission found that, in order to provide Teleglobe with a regulated rate of return of 13.75 percent, a revenue reduction of approximately \$70 million was necessary. This downward adjustment resulted in rate reductions for 1992 of an average of 6.9 percent for Teleglobe's international telephone, data, private line and broadcast services. The company's Globetel service rates were reduced by an average of 9.7 percent.

BLUE SKY LAWS FOR BLUE FLAME PEDDLERS?

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As the industrial, commercial, institutional and large residential market for direct purchases of natural gas becomes saturated, some direct

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sellers of natural gas have moved into the small residential market. Individual home owners with small individual gas requirements are being approached by door-to-door salesmen offering a way to obtain a natural gas rebate. The rebate is obtained when the residential customer enters into a contract with the direct seller which makes the direct seller responsible for securing the customer's natural gas requirements.

This works through an arrangement whereby the direct seller arranges for a supply of gas with producers. The direct seller then sells the gas to the local distributor under a "buy/sell" arrangement. The local distributor is required to pay average cost for this gas, which is typically higher than the cost at which the direct seller is able to obtain the gas from producers. This is where the direct seller makes his profit in the transaction. The local distributor then delivers gas in the normal fashion to the residential customer who continues to receive a bill from the local distributor for the gas delivered. The direct seller agrees to share a portion of the profit on the transaction with the residential customer. This is the rebate.

Local distributors such as Consumers Gas have expressed concern that residential customers may not fully appreciate the significance of this transaction. Consumers Gas has struck back with information advertising and a 1-800 telephone number which customers may call to obtain more details about the direct purchase of natural gas.

In a direct sale arrangement, the residential customer appoints the direct seller as the customer's agent. Buy/sell transactions with local distribution companies in Ontario involve the customer of the distributor acquiring the natural gas supply and then selling it to the distributor who then redelivers it to the customer. The contract which is entered into between the customer and the distributor is complex and involves many rights and, perhaps more importantly to the customer, obligations as to the delivery of the supply. The potentially onerous consequences of a failure to supply are also spelled out. Thus, when a direct seller comes to a small residential customer with a view to entering into a gas discount or rebate arrangement, the contract entered into will appoint the direct seller

as the customer's agent to enter into the buy/sell arrangement.

The concern is that, to the residential customer, this may appear to be a very simple arrangement between himself and the direct seller which does not appear to alter the contractual relationship with the distributor who, on the face of it, continues to deliver gas in the usual way and to deliver the customary bill for service. Nevertheless, the residential customer becomes bound by the rights and obligations of the buy/sell agreement, which allows the distributor to terminate gas service if the required gas supply is not delivered to the distributor for redelivery to the customer.

In natural gas purchase arrangements entered into between significant commercial interests, the parties will carefully spell out the delivery obligations of the supplying party and the purchase obligations of the buying party. The term of the arrangement will be established, a price fixed for at least an initial period, provision made for changes in price, and provision made also as to the consequences if price changes are not agreed to. These are complex arrangements which parties need to enter with their eyes open. There is concern in the case of small residential customers that they may not possess all the information they need to make an informed choice as to the wisdom of entering into a direct sales arrangement.

The efforts of local distribution companies have gone beyond information advertising. In submissions to the Ontario Minister of Energy, the Ontario local distribution companies have raised security of supply concerns again, including concerns for small residential customers, as a reason for imposing restrictions on the direct sales market restrictions such as minimum term supply agreements. These arguments have been raised in the past and were rejected by the Ontario Energy Board.

The problem of providing consumers with adequate information to make important choices is not new. It arose years ago in the security industry. Across North America, "Blue Sky" laws were enacted to ensure that purchasers of securities had adequate information to make informed choices. If the actions of direct sellers in relations to the small residential market is of concern, there is ample precedent for appropriate consumer protection legislation.