REGULATORY AND TRADE DEVELOPMENTS

CRTC REJECTS BELL RATE INCREASE APPLICATION

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In a Decision released on August 30 (Telecom Decision CRTC 93-12) the CRTC rejected a Bell Canada application for a general rate increase (i.e. an increase in monopoly basic services) made this February that sought an additional $1 billion in revenues for the remainder of 1993 and all of 1994 through higher local rates as well as an increase in Bell's allowed return on equity capital to 13.5%. In addition, the Commission rejected the terms under which Bell had proposed to selectively spin off its billing and data processing function (into Bell Sygma) and its business oriented enhanced services (into WorldLinx, leaving less viable residentially oriented enhanced services such as Halix within the utility company). Finally, the CRTC rejected Bell's so-called Community Calling Plan which would have greatly enlarged the free or flat rate calling areas of Metropolitan Toronto, Ottawa-Hull, and Montreal.

With respect to Bell's request for increases in its authorized total corporate revenue and profit level, the Commission was clearly unimpressed with the quality of demand, revenue and expense estimation that underlay the company's projected 1993 and 1994 Financial Statements. In perhaps the most aggressive and critical evaluation of carrier income statement evidence to date, the CRTC concluded that Bell had simply been unable to discharge the burden of proof that rests on a general rate increase applicant to show that its financial forecasts were reasonable. In fact, based on the record of the case and the intervention of a number of parties, principally Unitel and Call-Net, the CRTC concluded that the overall evidence disclosed that the company had been too pessimistic in its estimates of market share loss and demand growth for the 1993-94 test period. At the same time, the CRTC also determined that Bell had seriously overestimated its cost of doing business, principally by failing to include more realistic estimates of general efficiency gains and by pumping up its sales expense/marketing budgets with activities directed at meeting competition which would be of unclear benefit to the corporation and, in particular, to monopoly service subscribers.

The Commission was unpersuaded that Bell Canada's business risks had changed so much since the last return on equity decision in 1988 that this change would have (for 1993/94) more than offset the substantial decline in the costs of money that has occurred since the late 1980s. Accordingly, the company reduced Bell's allowed return on equity from the previously authorized level of approximately 12.5% to a range of 11 to 12%.

Arguably, Bell was worse off for having made its application since it was left with the same monopoly rates but a lower allowed profit level.

The Commission could find no basis for accepting Bell's Community Calling Plan Proposal noting that it would result in large net rate increases for the majority of subscribers in the areas to be caught by the plan, that there was no material interest in the proposal on the part of subscribers, that it would negatively impact competitors, and that there were numerous optional calling plans for subscribers in these areas who wished to reduce their current long distance charges. The Commission was also concerned that such a large proposed rate increase could result in an unacceptable level of basic service subscriber drop off.

With respect to the proposals to spin-off portions of Bell's business (accounting/data processing and business enhanced services), the Commission, in disallowing the proposals, signaled that it intended to require in the future that Bell provide much better evidence to demonstrate that the transaction was occurring at a fair market value and that any ongoing relations between the spin-off business and Bell Canada would not result in cross-subsidies from the utility business to the invested business. In addition, with respect to the divestiture of network services businesses, as was proposed in the WorldLinx transaction, the Commission noted that any future similar proposals should ensure that all related products should be included in the transfer and that thereafter, Bell Canada should undertake not to develop similar products internally. Following the spin-off, product development related to the divested business should take place only in that structurally separated business.

Notes

* Mr. Blakney was counsel to Call-Net Telecommunications Ltd. in this proceeding.

NEW RULES FOR THE CABLE TELEVISION INDUSTRY: HOW MUCH PROGRAMMING CHOICE ARE CABLE SUBSCRIBERS PREPARED TO UNDERWRITE?

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On June 3, 1993, following a March 1993 public hearing during which the rules governing the distribution, packaging and carriage of television programming services in Canada were reviewed, the Canadian Radio-television and Telecommunications Commission issued Public Notice CRTC 1993-74. On the same day, the Commission also issued Public Notice CRTC 1993-77 calling for applications for new Canadian specialty, pay television and pay-per-view programming services. Such applications were to be filed with the Commission no later than September 15, 1993.

Continued Control by the Cable Industry

It is fair to say that the environment created by Public Notice 93-74 leaves cable television licensees, who operate on a monopoly basis in their respective franchise areas, very much in control of the distribution of discretionary television programming services, at least for a number of years. Public Notice 93-74 also leaves cable operators in a position to pass on to Canadian households in their monthly cable access subscriber fees a large part of the cost of upgrading their cable infrastructures to modern technology standards such as digital video compression capability and universal addressability which are expected to increase channel capacity,

enhance subscriber choice and make service customization and interactive offerings possible.

Fears have been expressed that the package of regulatory reforms unveiled in Public Notice 93-74, characterized by the CRTC as "consumer-driven" in a press release accompanying the Public Notice, may effectively reduce rather than enhance consumer control, at least in the short and medium term, and will likely lead to ever-increasing costs if viewing choice is to be, not only enhanced, but maintained at current levels.

The rules put in place by Public Notice 93-74 give each cable operator the discretion to distribute any pay television, pay-per-view or specialty service licensed by the Commission on his network. Although the industry as a whole has pledged, through the Canadian Cable Television Association (CCTA), fair and equitable access to all services licensed by the CRTC, cable operators will still retain, on the basis of technical capacity and various market considerations, a wide discretion with regard to the services they carry. In particular, the cable operators will have the discretion to control the combination and prices of the services as well as the conditions on which they will be carried.

The New Services to be Licensed

Although no official list of the applications filed in response to Public Notice 93-77 has yet been issued by the CRTC, it is widely believed that one hundred or more applications were deposited with the regulator by the filing deadline. Judging from various press releases issued since March 1993, the applications range from headline news and business news channels to a science fiction or 'star wars' network. They include health channels, women's channels, seniors' channels, regional sports channels, a hockey channel, country music channels, cartoon channels and performing arts channels. The applicants range from the publicly-funded Canadian Broadcasting Corporation and National Arts Centre to seasoned private broadcasters, cable companies, and existing specialty services licensees, on their own account or in sometimes unpredictable alliances. The applicants also include private entrepreneurs who, as new players in the industry, have programming proposals which, they believe, deserve a broadcasting licence and a position on the cable dial. Some applications include the maximum non-Canadian equity participation in broadcasting licensees permitted by law since the proposals they involve constitute an attempt to 'Canadianize' existing American program service formats while benefitting from the programming of such services.

Educated guesses peg the cost of preparing an application and of shepherding it through the regulatory process at a minimum of $100,000 per applicant, even where no costly market or demand survey has been commissioned to support it. The Commission itself is expected to devote significant resources in the next year to the processing and hearing of the applications filed.

Some of the applications filed clearly will be in head-on competition with each other for a licence for a particular programming format, and are therefore mutually exclusive in light of existing channel capacity and market and other financial realities. Other applications allegedly will be competitive, as applicants strive to position themselves in the contest. The Commission has issued rules, guidelines and criteria regarding what will constitute an application which it is prepared to hear. However, its status as a quasi-judicial tribunal may not allow

it to refuse to hear any application, but for the most deficient, in terms of its financial resources, since the lack of earmarked funds available to meet the investment needs proposed by an applicant is probably the only objectively measurable deficiency on the basis of which an application can be refused any regulatory consideration *a priori*.

Interested parties and the press have described the hearing expected to be held in the spring of 1994 as a regulatory nightmare, a mêlée, a frenzy and a regulatory zoo which will test the patience of the Commission and of cable subscribers.

The informed guess of industry participants is that the CRTC is unlikely to license more than eight new channels, probably in late 1994. In predicting that only five applicants will be successful, the CCTA relies on the fact that the brave new world of video compression, unlimited channel capacity and 'pick-and-pay' choice or 'à la carte' cable service delivery are not yet with us. In the CCTA's view, when new licences are issued, even some of the largest cable companies serving heavily populated urban centres will not be able to accommodate more than two or three additional channels on their physical network. Moreover, it is clear that the viewing public will only absorb so many additional new services at any given time since viewing choices will come at a monthly price.

Cable Carriage Status Issues

Not all licensed specialty services enjoy the same cable carriage status under the rules currently applicable, although all such services are carried at the option of each cable operator. For example, CBC Newsworld, the weather channel, the religious channel and the youth channel, are licensed on an optional-to-basic service basis. Effectively, once a cable operator elects to distribute any of these services, they must be carried to every cable household in the operator's licensed area for a regulated monthly fee added to the cable access monthly fee. Other specialty services, such as The Sports Channel (TSN) and MuchMusic, enjoy a 'hybrid' or dual carriage status. That is, once a cable operator elects to distribute them, they are, at the option of their respective licensee, carried to every cable household in the cable operator's licensed area, for a regulated monthly fee added to the cable access monthly fee, or only to those households who are prepared to pay an unregulated monthly fee. A specialty service carried on an optional-to-the-subscriber basis may be carried on a stand-alone basis or in a package or tier of services. In such circumstances, the cable operator and the specialty service licensee negotiate, on a case by case basis, the content of any tier and the wholesale and retail fee to be collected from cable subscribers. Still other specialty services, such as, the third-language services, may only be distributed for an unregulated monthly fee in addition to the basic cable access fee.

The net result of this system has been increasing monthly fees for cable subscribers who have often been paying, as part of their basic cable access fee, for narrowcast services they do not wish to receive. The regime has also led to cable subscribers paying for narrowcast services distributed on a discretionary tier which they do not wish to receive, or which they may even find objectionable, because such a discretionary tier contains a service they do wish to receive, and which is not available on a stand-alone basis, or is available on a stand-alone basis at a monthly fee which exceeds the monthly fee for the discretionary tier in which it is found. For example, many subscribers who received TSN on a stand-alone

basis at one time, have found that they must suddenly also receive and pay for a number of American and Canadian services with which TSN is tiered, services which they would not otherwise have purchased, if they wish to continue receiving TSN at a reasonable price. The subscriber's next programming choice may be found similarly in a second tier, paired with a number of other specialty services the subscriber does not want.

In Public Notice 93-74, the Commission decided to authorize a dual or hybrid carriage status for all existing and future specialty licensees. Notably, there are a few exceptions: the three existing third-language services and any single or limited point-of-view religious service that may be licensed. Pending technological upgrades, the packaging or tiering of services, and the pricing system now in place, will therefore probably be expanded as new services are licensed. The system probably will continue to irritate consumers who may increasingly find themselves paying for new channels in which they have little interest, if only to keep the channels they have become accustomed to. Given the expected cross-ownership between cable operators and specialty licensees, and the single ownership of more than one specialty service, the 'horse-trading' that will inevitably occur in deciding on the carriage status of individual services may well be conducted with little regard for more vulnerable specialty service providers or for individual cable subscribers. It may indeed be driven, it is feared, by consumer advocates, largely by 'as-much-as-the-market-will-bear' principles.

Some industry participants predict that the package of services delivered for a basic cable access monthly fee may itself soon be reduced to the must-carry Canadian over-the-air services, and that even the basic American network signals now received by all cable subscribers as part of basic cable service may eventually migrate to discretionary tiers. However, migration is prohibited for the moment by Public Notice 93-74.

The Commission has placed much faith, in Public Notice 93-74, in the cable industry's "general willingness to distribute all licensed Canadian services" and in the access guidelines of the CCTA administered by the Cable Television Standards Council. Nevertheless, it has still announced its intention to develop by regulation a mediation procedure to deal with any unresolved dispute between specialty service licensees and cable operators.

Canadian Content Rules

In Public Notice 93-74, the Commission reduced from a 2:1 to a 1:1 ratio the number of authorized non-Canadian specialty channels that may be linked in a tier with Canadian specialty channels, effective no later than January 1, 1995. The eligibility of non-Canadian specialty services for carriage on Canadian cable systems will continue to be determined largely by reference to the extent of their competitiveness with licensed Canadian services. The Commission has expressed the hope that Canadian specialty services with more limited appeal, specifically the third-language services, may be given enhanced exposure as linkage partners for popular non-Canadian services through the reduction in the ratio of non-Canadian to Canadian services permitted in a tier.

Who Will Underwrite Cable Network Upgrades?

During the proceeding that led to Public Notice 93-74, the CCTA argued that, with the regulatory regime governing capital expenditures recoupment now in place, cable operators would not be able to attract the funds necessary to finance the modernization of their cable networks.

Under the regulatory regime currently governing cable fees, cable operators may pass on to their subscribers, in the form of increases in the monthly cable access fees, 50% of certain capital expenditures, at 10% per year for five years, up to a prescribed annual upper limit in the level of increases. Capital expenditures eligible for pass-through are those related to cable headend improvements for the provision of the basic service, community programming equipment and direct costs associated with the upgrading and rebuilding of the distribution plant and existing subscriber drops. A 'sunset' provision requires that each capital expenditure fee increase be removed from the basic monthly fee after five years.

The cable industry specifically proposed, in the proceeding leading to Public Notice 93-74, the inclusion of addressability-related capital expenditures as eligible capital expenditures for fee increases, the removal of the five-year 'sunset' provision for capital expenditures, the removal of the upper limit or cap on annual increases based on capital expenditures and the inclusion of addressability-related capital expenditures in the basic service asset base used to assess profitability or a rate of return on fixed assets when rate increase applications based on economic need are filed.

The Commission considered it reasonable and appropriate in Public Notice 93-74 that basic cable subscribers bear a portion of the capital cost of implementing digital video compression and universal addressability. It announced its intention to amend the *Cable Television Regulations, 1986* to allow the inclusion of 50% of the cost of an addressable digital decoder, to a maximum of $150 per household, as an eligible expenditure for the purpose of calculating automatic fee increases based on capital expenditures. The 'sunset' provision will be maintained, the Commission has decided, except in the circumstances described below. A separate annual upper limit on rate increases for digital decoder devices will be established and addressability-related capital expenditures for the decoder will be included in the basic asset base for the purpose of assessing on a case by case basis rate increase applications based on economic need.

The Funding of Canadian Program Production

A contentious issue at the March hearing was the debate between the broadcasting and cable industries regarding a needed new source of funds to support the production of Canadian television programming. The broadcasters argued for the institution of a fee for carriage of their signals from the cable industry aimed at generating the funds required to produce television programming that Canadians will be willing to watch. The cable operators questioned the Commission's jurisdiction under the *Broadcasting Act* to institute such a direct compensation mechanism for broadcasters and promised to establish, in return for certain regulatory concessions related to the regulation of cable subscriber fees, a Canadian content programming fund to which cable operators would voluntarily contribute and which would generate up to $100 million over eight years.

In Public Notice 93-74, the Commission concluded that it had the statutory discretion to adopt whatever mechanisms it considered appropriate for the purpose of ensuring that each element of the broadcasting system contributes adequately to Canadian programming, as required by the *Broadcasting Act*. However, the Commission discarded an explicit retransmission fee for the cable distribution of local signals as such a mechanism, in part because it raises, in the Commission's view, issues of copyright more appropriately dealt with by copyright bodies. The Commission also concluded that the programming fund proposed by the cable industry would not generate the funds required to provide significant support for Canadian programming production.

In Public Notice 93-74, the CRTC chose to link contributions by cable licensees to a Canadian program production fund, the operational and organizational details of which have yet to be formulated, to the treatment of the capital expenditure component of the cable fee structure. The Commission proposed to suspend the implementation of the reductions required by the 'sunset' provision with regard to fee increases on the basis of capital expenditures for any licensee willing to contribute 50% of the amount by which the basic cable access monthly fee would be reduced if the 'sunset' provision were applied to the Canadian programming fund. The 'sunset' provision is due to take effect in 1995 when rate reductions of up to $85 million are to be implemented, according to current regulatory requirements. The sums expected to be generated over the first five years of the operation of the fund were estimated at approximately $300 million.

In a lengthy dissenting opinion, three CRTC Commissioners opposed the suspension of the 'sunset' provisions for capital expenditures proposed by the majority. Their underlying concern was that if the 'sunset provision' was applied, one-half of the approximately $600 million estimated to be returned to subscribers in fee reductions for the period 1995 to 1999, would remain instead with cable operators, despite the lack of evidence at the hearing of any need for this concession to fund the technical upgrades identified by the cable industry. The other half would flow to Canadian program production from the subscribers of some cable systems and not from the subscribers of other cable systems, depending on the decision of any given cable operator, and in varying amounts, depending on each cable operator's historic level of capital investment. In the words of the dissenting Commissioners: "We cannot accept breaking a commitment made to subscribers that the capital expenditure component of their rates would decrease after five years".

Fee Deregulation for Small Cable Systems

The Commission also decided in Public Notice 93-74 to extend its deregulation of monthly cable access fees for all cable systems serving fewer than 2,000 subscribers to cable systems serving between 2,000 and 6,000 subscribers. In order to provide a mechanism to safeguard the interests of cable subscribers in an environment where such subscribers are served by a cable system operating on a monopoly basis, the Commission proposed to institute by regulation a review process for monthly fee increases, upon receipt of written complaints from 10% or more of the subscriber base in the given licensed area.

One Commissioner wrote a separate dissenting opinion on the deregulation of cable fees for cable

systems with more than 2,000 but fewer than 6,000 subscribers. He argued that, from a subscriber perspective, there is no difference between a system with 5,999 subscribers and one with 6,000 or more subscribers, since both operate in a monopoly-like environment in which subscribers are effectively captive to the local cable operator. In his view, the subscribers of both classes of cable systems should be afforded the same regulatory protection, until such time as the Commission concludes that cable rate deregulation is in the public interest. He also noted that the Federal Communications Commission has recently found it necessary to reregulate the American cable industry in order to protect subscribers.

The Immediate Future

Cable subscribers may indeed balk at the ever-increasing cost of cable service. One dissenting Commissioner noted in Public Notice 93-74 that the single largest category of public complaints and comments received by the CRTC in recent years is that related to cable rates. Yet, since Public Notice 93-74 was issued, some specialty services carried as part of the basic service have been granted fee increases, or in the case of the religious channel, the authority to levy a monthly fee where it has levied none since its license was issued. Although the full deployment of new technologies may eventually lead to a paired-down basic cable service at a more affordable price, Public Notice 93-74 may have the effect of continuing the upward spiralling of the cost of cable service in the shorter term.

Some cable operators have expressed the fear that increases of more than $2 monthly for subscribers receiving all the new channels licensed in the next year could cause Canadians to opt out of cable service altogether. However, in densely populated areas where high rise apartment buildings and signal interference are the norm, and in areas where few signals are received over-the-air, cable service has come close to being considered a necessity.

GENERIC DRUG MANUFACTURER WINS RIGHT TO MARKET HEART DRUG

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On June 16, 1993, Mr. Justice Jean-Eudes Dubé of the Federal Court of Canada (Trial Division) granted Apotex Inc. (Apotex), a Canadian distributor and manufacturer of generic pharmaceutical products, its application requiring the Minister of National Health and Welfare (the Minister) to issue a Notice of Compliance (NOC) under the *Food and Drugs Act* (FDA) in respect of Apo-Enalapril, Apotex's generic formulation of Enalapril, a drug used to reduce hypertension and in the treatment of congestive heart failure. The decision clears the way for Apotex to begin advertising and selling Apo-Enalapril in Canada.

Enalapril has been on the Canadian market under the name Vasotec, the trade mark name under which Merck Frosst Inc. (Merck) markets Enalapril. Merck is the owner and exclusive licensee of Enalapril under a patent valid under the *Patent Act Amendment Act*[1] (PAAA).

The regulations to the PAAA provide that the Minister is prohibited from granting a NOC for a

patented drug until the expiry of all relevant product and use patents pertaining to a drug, which in the case of Vasotec runs until 2007. However, Mr. Justice Dubé found in favour of Apotex as their application for a NOC had "cleared the scientific and regulatory review process" prior to the enactment of the PAAA in spite of the fact that the Minister had not issued the NOC.

The decision has been heralded by Apotex officials as a major victory for consumers as the Apotex version of Enalapril is expected to cost consumers less than Merck's Vasotec, which had estimated sales in 1992 of over $120 million reported in the business press. Vasotec is Merck's most important pharmaceutical product and the "number one selling pharmaceutical brand in the Canadian pharmaceutical market in dollar terms" according to an affidavit filed in the Federal Court of Canada by Merck's Vice-President.

Merck has appealed the decision of Mr. Justice Dubé to the Federal Court of Appeal. The appeal was heard on September 2, 1993, and the decision was reserved.

Notes

1 S.C. 1993, c. 2.

PMPRB REACHES SETTLEMENT WITH GENENTECH

By: Patricia Harrison, Student-at-Law
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The Patented Medicine Prices Review Board's (PMPRB) first formal proceeding, initiated against Genentech Canada Inc. and Genentech Inc. for excessive pricing, has ended in the PMPRB's first formal settlement. In its decision on the termination of proceedings against Genentech and consideration of the Voluntary Compliance Undertaking (VCU), the PMPRB listed the terms of settlement reached with Genentech, and outlined its reasons for resolving the issue in this manner.[1]

On July 3, 1992, the PMPRB issued a Notice of Hearing under section 39.15(3) of the *Patent Act*[2] to consider whether Genentech had sold Activase in Canada at a price that the PMPRB considered excessive. On July 9, 1992, Genentech dedicated its interest in the Activase patents to the public and shortly thereafter filed a notice of motion to terminate the proceedings on the grounds that the PMPRB did not have jurisdiction over the drug as Activase was no longer a "medicine pertaining to a patented invention."

In its 1991 Annual Report, the PMPRB discussed the issue of the dedication of patents. The report indicated that although the *Patent Act* did not deal with the issue of patent dedication, a patentee may at any time relinquish its intellectual property rights by dedicating a patent to the public. Further, this practice has been recognized by the Commissioner of Patents as dedications are recorded in the Patent Record and published.

The PMPRB also addressed the issue of dedication of patents in its response to Genentech's jurisdiction challenge.[3] In its decision, the PMPRB held that it had jurisdiction to inquire into excessive pricing regardless of Genentech's dedication of the Activase patent to the public. In the PMPRB's opinion, the relevant date to determine whether the medicine was a patented medicine and therefore within the PMPRB's jurisdiction, was no later than the date of

the notice of hearing. If, at the date of the notice, the medicine was "one pertaining to a patented invention", the PMPRB had jurisdiction which was not affected by subsequent acts of the patentee. In this respect, the PMPRB stated that Parliament did not intend to allow patented medicine companies to avoid the regulatory consequences of excessive price review by simply dedicating the relevant patents to the public. Further, the PMPRB indicated that a dedication of a patent, although made prior to a notice of hearing, would not terminate the PMPRB's jurisdiction to conduct a hearing and issue a remedial order. This uncertainty, however, has been clarified by recent amendments to the *Patent Act.*[4]

Under subsection 83(3) of the *Patent Act Amendment Act*, the PMPRB's jurisdiction has been expanded to include a former patentee if, while still a patentee, it sold a patented medicine in Canada at a price the PMPRB considers excessive. This new section eliminated the debate over the PMPRB's jurisdiction and resulted in the PMPRB adjourning its proceedings against Genentech under the old *Patent Act* provisions and issuing a new notice of motion in March 1993, under the revised Act. The outcome of this motion was a Voluntary Compliance Undertaking (VCU) agreed to by Genentech and the PMPRB.[5]

There were three elements to the VCU. The central element consisted of a payment of $1.755 million by Genentech to the government of Canada. This figure was said to represent the difference between the revenues earned on the sale of Activase during the period that it was a patented medicine in Canada and the revenue that would have been earned if the medicine had been sold at the lower international median price during that same period.

Genentech further undertook to reduce the Canadian price of Activase to match the current U.S. price and agreed to tie the price of Activase to future U.S. price fluctuations.

The final element of the VCU was an undertaking by Genentech that it would not pursue presently pending patent applications pertaining to Activase. Genentech agreed to register the VCU with the Patent Office in order to confirm this undertaking. This aspect of the agreement provided assurance that Activase would not, at some future date, become a patented medicine once again, thus eliminating some of the uncertainty surrounding the status of the drug and securing the way for its generic development.

The reasoning behind the PMPRB's acceptance of the terms of the VCU is that the agreement represented a reasonable solution of the issue in the public interest. In agreeing to the settlement, the PMPRB took notice of the fact that the payment represented a substantial percentage of revenues from the sale of Activase during the period in question and that the VCU would eliminate the need for a long and expensive hearing (although this factor alone was not considered decisive).

The PMPRB also stated that it had a responsibility to deal with matters as expeditiously and fairly as possible under its policy to seek voluntary compliance and came to the conclusion that the VCU was consistent with the scheme of the *Patent Act* as well as the PMPRB's own guidelines.

Notes

[1] *Decision of the Patented Medicine Prices Review Board on Termination of Proceedings and Consideration*

of Voluntary Compliance Undertaking (June, 1993), No. 93-02 (PMPRB).

2 *Patent Act,* R.S.C. 1985, c. P-4.

3 *Decision of the Patented Medicine Prices Review Board on Jurisdiction* (August, 1992), No. 92-01 (PMPRB).

4 *Patent Act Amendment Act, 1992,* S.C. 1993, c. 2.

5 *Supra,* note 1.

PROVINCIAL TRADE PRACTICES LEGISLATION IS ALIVE AND WELL

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Introduction

In a recent decision of the British Columbia Supreme Court, *Schryvers* v. *Richport,*[1] a couple was awarded damages in the amount of $17,578.47, plus costs, for misrepresentations made to them in the course of negotiations for the lease of two vehicles from a car dealership. Punitive damages in the amount of $6,000 were included in the award as "a disincentive to suppliers in respect of intentionally deceptive sales practices." The action was brought under the British Columbia *Trade Practice Act*[2] (the B.C. Act) which has a counterpart in the Ontario *Business Practices Act*[3] (the Ontario Act). There is also similar legislation in Alberta, Manitoba, Prince Edward Island and Newfoundland.

Scope of Legislation

Provincial trade practices legislation applies to consumer transactions. A consumer is defined as an individual and, accordingly, the legislation does not apply to corporations.

The B.C. Act applies to deceptive acts or practices having the capability, tendency or effect of deceiving or misleading a person. According to section 3, a deceptive act or practice includes an oral, written or visual representation or other conduct. The Ontario Act applies to unfair practices which is defined in section 1 as (i) a false, misleading or deceptive consumer representation; or (ii) an unconscionable consumer representation made in respect of a particular transaction. Deceptive acts or practices and false, misleading or deceptive representations are referred to herein generally as "deceptive acts".

Deceptive Acts

The B.C. Act and the Ontario Act list 19 and 14 examples, respectively, of deceptive acts which include making a representation using exaggeration, innuendo or ambiguity as to a material fact or failing to state a material fact if such use or failure deceives or tends to deceive. In an earlier decision under the B.C. Act,[4] the British Columbia Court of Appeal commented on the wide scope of the legislation and noted that what used to be described in general terms as "puffery" may no longer be immune to legal consequences. The Court stated that the B.C. Act must be taken to require suppliers involved in the types of transactions it covers to refrain from any sort of potentially misleading statement, including an honestly-held opinion given in circumstances in which the supplier knows that giving the opinion without appropriate qualification may mislead.

In the *Schryvers* case, the British Columbia Supreme Court found that the car dealership committed at least two deceptive acts. In that case, the plaintiffs leased, with an option to purchase, two vehicles from the defendant dealership, with whom they had a long-term business relationship. The plaintiffs were

convinced by a salesperson to lease instead of acquire the vehicles. At the time of the transaction, the dealership was holding a contest in which the salesperson who sold the most vehicles through lease transactions would win a sailboat. The amount payable for the vehicles under the leases was not based on the sale prices of the vehicles and was actually greater than the sale prices of the vehicles plus the financing charge, making lease transactions the dealership's preference. Since the plaintiffs had expressed their desire to pay cash for the vehicles, the Court held that the salesperson should have explained the financial differences between a lease and a cash purchase. Therefore, the salesperson failed to state a material fact when he did not tell the plaintiffs that the cost of leasing was greater than the cost of purchasing the vehicles. The Court noted that even if there were benefits to the lease arrangement, the plaintiffs should still have been properly advised. The Court also found that in taking the position that the sale prices of the vehicles were irrelevant once there had been a decision to structure a transaction as a lease and by failing to disclose this position to the plaintiffs to make them aware that the two types of transactions, a purchase and lease, could not be compared, the dealership committed a deceptive act.

Unconscionable Acts

In determining whether a representation is unconscionable, a court may take into account, among other things, whether the supplier knew or ought to have known (i) that the consumer was not reasonably able to protect his or her interests; (ii) that the price grossly exceeded the price at which similar goods or services were readily available to like consumers; or (iii) the consumer was subjected to undue pressure to enter into the transaction.[5]

In the *Schryvers* case, it was the second deceptive act which the Court found to be unconscionable. The Court noted that by structuring the leases without regard to the sale prices that were on the vehicles, the dealership received $28,244 instead of the sale price of $26,080 for the first vehicle and $19,258 instead of $15,222 for the second vehicle.

Remedies

Damages

Under section 22(1) of the B.C. Act, a consumer who has entered into a transaction involving a deceptive act may bring an action for damages, including punitive and exemplary damages. Under section 4 of the Ontario Act, a consumer who has entered into a transaction on the basis of a deceptive act may also bring an action for damages. However, in Ontario, punitive or exemplary damages are available only where the deceptive act is unconscionable.

In awarding punitive damages in the *Schryvers* case, Mr. Justice Tysoe stated that he "consider[ed] the actions of [the defendant] to be sufficiently flagrant and high handed to warrant an award of punitive damages." In this respect, there have been several cases under the Ontario Act where punitive or exemplary damages have been awarded.[6] The principle upon which an award of punitive or exemplary damages is to be made was enunciated in the case of *Bekeros* v. *Metric Lube Equipment Ltd.*[7] That case involved the purchase by the plaintiffs of a used automobile. The salesperson had represented to the plaintiffs that the vehicle they purchased had warranty coverage on the basis of his honest belief that it had such coverage. The Court found that the plaintiffs would not have

purchased the vehicle if they had known that it did not have warranty coverage. Upon discovering that the vehicle was not covered by warranty, the plaintiffs sought rescission of the agreement of purchase and sale, repayment of the purchase price, general, punitive and exemplary damages and costs. Mr. Justice MacDonald found that the statement by the salesperson that a warranty existed on the vehicle was a consumer representation that induced the plaintiffs to enter into the agreement of purchase and sale and an unfair practice entitling the plaintiffs to rescission under section 4(1) of the Ontario Act. In discussing the issue of exemplary damages, Mr. Justice MacDonald stated that:

> Exemplary damages are awarded not to compensate the plaintiff but to punish the defendant. The type of conduct that attracts such an award has been described as 'malicious, high handed, arbitrary, oppressive, deliberate, brutal, grossly fraudulent, evil, outrageous, callous, disgraceful, willful, wanton, in contumelious disregard of the plaintiff's rights or, in disregard of every principle that actuates the conduct of a person': Waddams, S.M. *The Law of Damages* (1983).

Mr. Justice MacDonald found that the representation made by the salesperson as to the existence of a warranty was an innocent one and did not fall into the category of conduct which would justify exemplary damages. He granted rescission and awarded damages in the amount of the purchase price for the car and general damages.

Rescission

Although the B.C. Act specifically provides that an unconscionable practice renders a transaction unenforceable, in order to rescind the transaction, a consumer must successfully bring an action under section 4. In Ontario, a consumer may rescind a contract entered into on the basis of a deceptive act without having to bring an action for rescission by providing notice to the other parties to the agreement. This notice must be provided at any time within six months of entering into the agreement.

On several occasions, Ontario courts have discussed the circumstances in which rescission of a contract will be permitted. The Ontario Act contemplates that rescission may not be possible where restitution to the supplier is not possible. Historically, Ontario courts took a restrictive approach to the availability of the remedy of rescission holding that the defendant seller must be restored to his original position and where, for example, a vehicle purchased on the inducement of a representation constituting an unfair practice was used for two months after the unfair practice was discovered by the plaintiff, rescission was not permitted because the vehicle had depreciated.[8] More recently, Ontario courts have taken a more liberal approach. In the case of *Upwood* v. *Geo. Manuel Industries Ltd.*,[9] McDermid J. stated:

> The modern trend seems to be to permit rescission even where the property transferred under the agreement has deteriorated or depreciated if compensation can be made for the deterioration or depreciation. However, the law does not seem to have advanced to the position where rescission will be granted where the character of the property transferred under the contract has been completely altered or has disappeared.

Intent

Although many of the cases decided under the Ontario Act involved intentionally false, misleading or deceptive representations, the Ontario Act does not require a plaintiff in an action for rescission or general damages to establish that the person making the representation intended to do so, was negligent

in doing so or even knowingly did so. In a decision of the Ontario County Court,[10] it was held that *mens rea* is not required in order to find an unfair trade practice and that the Ontario Act envisages a remedy even where the seller did not intend to engage in the unfair practice. The language of the B.C. Act would support a similar conclusion.

Powers of the Directors under the Acts

The Directors under both the B.C. Act and the Ontario Act have express authority to receive and act on or mediate complaints respecting deceptive acts. In addition, under section 5 of the Ontario Act, the Director may issue an order against the supplier to cease engaging in the unfair practice. In order to stop the occurrence of a deceptive act under the B.C. Act, the Director must apply to a court for an interim or permanent injunction.

Class Actions

Section 18(2) of the B.C. Act also authorizes the Director or any other person to bring an action on behalf of consumers or a class of consumers.

Offence

The Ontario Act makes it an offence to "knowingly" engage in an unfair business practice. Under section 17(2), the penalty on conviction is a maximum fine of $25,000 or imprisonment for a maximum term of one year, or both. The offence has been held to be a strict liability offence which does not require *mens rea* and to which proof of due diligence is a defence.[11]

Comparison with the *Competition Act*

With respect to consumer representations, the scope of the conduct covered by provincial trade practices legislation appears to be broader than that covered under section 52 of the *Competition Act*, the misleading advertising provision. In this respect, the trade practices legislation requires only that a consumer be induced to enter into a transaction as a result of a false, misleading or deceptive representation, while section 52 of the *Competition Act* requires that the general impression of the representation, based on an objective standard, be false, misleading or deceptive.

The remedies available under the trade practices legislation for misleading advertising are broader than those available under the *Competition Act*. Under the *Competition Act*, a person is limited to actual damages suffered as a result of a false or misleading representation and must bring a civil action pursuant to section 36 establishing the commission of an offence.[12] Note that the remedies of rescission and punitive and exemplary damages are not available under section 36 of the *Competition Act*.

In addition, a consumer who wishes to have the broadcast of a misleading advertisement stopped may have greater success under provincial trade practices legislation than under the *Competition Act*. The *Competition Act*, unlike the Ontario Act, does not authorize the Director of Investigation and Research to make an order requiring a person to cease making a false or misleading representation, although in appropriate circumstances such a prohibition may be included in an undertaking or consent prohibition order.

Notes

* Crystal L. Witterick and John D. Bodrug practice in competition and trade law.

1 [1993] B.C.J. No. 1120 (B.C.S.C.).

[2] R.S.B.C. 1979, c. 406.
[3] R.S.O. 1990, c. B. 18.
[4] *Rushak* v. *Henneken* (1991), 84 D.L.R. (4th) 87 (B.C.C.A.).
[5] *Supra*, note 2, s. 4(2).
[6] See for example, *Harding et al.* v. *Chrysler Credit Canada Ltd. et al.* (1985), 35 A.C.W.S. (2d) 482 (Ont. Dist. Ct.); *Hillis v. Ross Wemp Motors et al.* (1984), 47 O.R. (2d) 445 (Dist. Ct.); *Upwood* v. *Geo. Manuel Industries Ltd.*, [1989] O.J. No. 226 (Dist. Ct.).
[7] [1992] O.J. No. 690 (Ont. Court of Justice - General Division, March 30, 1992).
[8] *Hillis* v. *Ross Wemp Motors Ltd., supra*, note 6.
[9] *Supra*, note 6.
[10] *Spoerr et al.* v. *Weinberg*, 22 A.C.W.S. (2d) 334 (Ont. Co. Ct.).
[11] *Regina* v. *F.A.D.S. of Ottawa Ltd. and Kaster* (1979), 49 C.C.C. (2d) 441 (Ont. Co. Ct.).
[12] It does not appear that a successful action has ever been brought for damages suffered as a result of a false or misleading representation contrary to the misleading advertising provision of the *Competition Act*.

THE G7 TOKYO SUMMIT AND ITS IMPACT ON THE URUGUAY ROUND

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During the last seven years, the Uruguay Round negotiations under the General Agreement on Tariffs and Trade (GATT) have attempted to achieve the goal of reducing global trade barriers. The Round has yet to come to a successful conclusion, as it has been consistently stalled due to unresolved issues. Thus, there was much hope for a breakthrough in the world trade talks when the Group of Seven Industrial Democracies (G7) consisting of the U.S., Canada, Japan, Italy, France, U.K. and Germany held their annual economic summit meeting in Tokyo from July 7-9, 1993.

In his pre-summit comments, GATT Secretary-General Peter Sutherland called the summit a "crucial catalyst" for rescuing the stalled trade talks. During each of the last three summit meetings, the G7 had resolved to complete the Uruguay Round. However, general assurances which may have been enough in the past were not sufficient this time. Instead, a detailed agreement showing specific progress was necessary as a basis for negotiations in order for the Round to move forward.

On the opening day of the summit, trade ministers of the Quad countries (U.S., Canada, Japan and the EC) announced a far-reaching market access trade agreement which provided for specific tariff cuts in manufactured products. As a result, the Tokyo summit demonstrated the will of the principal trading partners to take specific action towards concluding the world trade negotiations and not just provide statements of intent as in previous G7 summit meetings. United States Trade Representative Mickey Kantor called the G7 Tokyo Summit "a major breakthrough." However, even though the G7 Agreement contains tariff reductions in certain products, it still does not address some of the most difficult issues which are being left for the remaining Uruguay Round negotiations. Overall, it can still be said that the G7 provided both the basis and momentum for achieving a successful conclusion of the Uruguay Round.

The G7 Agreement pursued tariff cuts through three different methods. First, tariffs were eliminated entirely in eight sectors: pharmaceuticals, medical equipment, construction equipment, farm equipment, steel, beer, furniture and distilled spirits. The elimination of the tariffs on steel, however, is contingent upon the conclusion of a Multilateral Steel Agreement. Additionally, distilled spirits only include brandy and whiskey, not white liquors such

as vodka and gin. Additional tariff eliminations will be sought in future negotiations.

The tariff eliminations in the G7 Agreement were achieved through compromises in zero-to-zero negotiations in which each side offered sectors for zero duties. Throughout the negotiations, there was much pressure on Japan to reduce tariffs on liquor. Finally, at the last minute, Japan announced its willingness to eliminate tariffs on brandy and whiskey. Since Canada benefits from these Japanese concessions on spirits, it in turn agreed to eliminate its tariffs on beer and furniture. The EC had been seeking an end to Canadian tariffs on furniture and thus reciprocated Canada's offer by eliminating tariffs on farm equipment. These compromises by the Quad countries allowed for a much needed breakthrough in achieving an agreement in these sectors.

The second method reached in the trade package was that negotiations would be held in order to cut tariffs by "at least" one-third in five sectors of manufactured goods: scientific equipment, wood, electronics, paper, and non-ferrous metals. However, this is not a specific agreement. Rather, tariffs must be cut by a minimum of 33% which means that countries may still protect certain industries.

Finally, the G7 Agreement calls for 50% tariff reductions for those products with peak tariffs, i.e. products on which tariffs exceed 15%. These areas include ceramics, glass, textiles and apparel. However, this is a problem area in the negotiations because the U.S. is only willing to reduce tariffs by 30% in textiles and apparel while the EC is demanding a 50% reduction.

Therefore, unlike the first category which provides specific tariff reductions, these last two areas of negotiation are merely frameworks for attempting to agree on further tariff cuts. The agreement is seeking to negotiate the maximum achievable package of tariff reductions with the objective of 50% in one category and a minimum of 33% in another. Thus, negotiations failed to resolve some of the most contentious issues in these last two categories with respect to such sectors as textiles, electronics, apparel, wood, and paper.

EC officials hope the agreement on this tariff framework will increase pressure on the U.S. to decrease high textile and apparel tariffs by 50% in order to meet framework objectives. The EC is not willing to agree to an increase in the zero tariff group unless it gets more tariff reductions in other groups. Thus, if the U.S. would decrease textile tariffs, the EC could zero out paper tariffs. Additionally, EC reductions on electronics, semiconductors, paper and scientific equipment are dependent on further U.S. concessions in textiles. In turn, the U.S. and Canada had hopes of tariff cuts in wood, paper, pulp, and scientific equipment which are needed in order to reduce U.S. and Canadian tariffs in other sectors. Unless further cuts are made in wood products, Canada may rescind its concessions on steel and furniture tariff elimination. Japan, however, has consistently refused a zero-to-zero proposal in wood products. Thus, the G7 trade package has left these issues open for further negotiation and compromises.

While the G7 tariff reduction agreement covers a wide range of manufactured goods, it does not specifically apply to several difficult areas which must be included in a full market access deal. Instead, the agreement includes general commitments toward concluding tariff negotiations in these sectors. The G7 trade package failed to

reach an agreement on trade in services. It merely states that it would "continue to work toward satisfactory solutions" to outstanding differences in trade in financial, maritime, and audio-visual services. In financial services areas such as insurance, banking, and securities, the G7 reported "progress" in liberalization. However, U.S. - EC differences on audio-visual services were not resolved. While the U.S. wants to stop an EC directive limiting imports of non-community television programs, the EC is seeking exemptions on "cultural" grounds. Basic telecommunications are moving forward under a "common detailed agenda."

The G7 Agreement also did not address agricultural issues or disputes over GATT rules which involve the settlement of trade disputes, subsidies, anti-dumping, and government procurement. Instead, these areas are being left for negotiations at the GATT in Geneva later this year.

Despite its shortcomings, the G7 Agreement represents an important step towards reviving the Uruguay Round. The G7 has demonstrated a serious commitment to the completion of the Uruguay Round with far-reaching and specific cuts in certain sectors while providing a framework for achieving reductions in other areas where consensus could not be reached in Tokyo. Although the G7 Agreement has left the most difficult issues for the Uruguay Round discussions, the type of agreement reached by the major powers in Tokyo has the ability to draw in the remaining GATT members to negotiate and conclude the Round. In other words, the Tokyo Summit has provided a strong basis upon which wider market access talks may be built. The sectors which achieved specific tariff eliminations in the G7 Agreement are only one part of a broad GATT agreement which must include those areas not addressed in the accord or which only received vague commitments.

To complete the Round, it will now be necessary to move the negotiations from a quadrilateral agreement toward a successful multilateral one. Even though the G7 package resolved several issues among the major trading partners, it will still be necessary for the 100 other members of the GATT to negotiate and ratify the tariff reductions in order for the G7 accord to become a global agreement. In this respect, GATT negotiators in Geneva began working on extending tariff cuts to the remaining GATT signatories immediately after the G7 Tokyo summit.

Developing countries welcomed the GATT breakthrough, but are still concerned because Quad members have not yet resolved differences in sectors of interest to them such as textiles and agriculture. These nations will accept the tariff eliminations reached in the G7 Agreement provided that developed nations put forward improved market access offers in these areas. This is especially true of the textile negotiations. Developing countries need open market opportunities in the U.S. and EC before they will open their markets to services and increase their enforcement of intellectual property protection. Thus, in order for offers to come forth from other countries, the U.S. and EC will need to specifically address these concerns.

Overall, the G7 summit in Tokyo was a significant achievement in that it did not just put forth promises, but rather achieved actions in specific tariff reductions in certain sectors. However, the G7 Agreement among the Quad countries still leaves many difficult issues for GATT negotiators to resolve in the coming months before the latest Uruguay

Round deadline on December 15, 1993. This is the final date on which the U.S. President's fast track authority will expire. Since the G7 Agreement has only provided a framework for negotiations in the contentious areas, it serves as a foundation for a broader agreement. However, despite its shortcomings, the G7 summit in Tokyo revived GATT negotiations by averting a deadlock and identifying specific areas for negotiators to focus on in order to conclude a successful Uruguay Round by the end of 1993.

INTERNATIONAL TRADE LAW UPDATE

The following articles are taken from Update, *a newsletter published by the International Bar Association's Business Law Section (Committee on Antitrust and International Trade Law).*

CANADA

Safeguard Inquiry into Boneless Beef

In April 1992 the Canadian government self-initiated a safeguard inquiry into imports of boneless beef. Triggering the inquiry by the Canadian International Trade Tribunal was an alleged surge in imports of boneless beef from Australian and New Zealand. Of particular note is that the safeguard inquiry has been directed to exclude the effect of boneless beef imports from the U.S. in assessing whether serious inquiry has been caused to Canadian production, in apparent contravention of GATT art. XIX.

Inquiry into Beef Competitiveness

Canada is currently involved in an inquiry into the competitiveness of Canadian cattle and beef industries in North American and world markets. This study by the Canadian International Trade Tribunal is comparable to a s. 332 inquiry by the U.S. ITC. The Canadian inquiry is reviewing conditions and trends in the structure of the cattle and beef industries in Canada, the U.S. and Mexico to identify factors affecting the competitiveness of this industry in North American and world markets. The final report of the Tribunal is to be completed late in 1993.

Royalties and Licence Fees

A recent Canadian International Trade Tribunal decision involving royalties and licence fees in connection with the importation of sound recordings has broad implications in Canada and possibly in other jurisdictions with respect to the dutiability of royalties and licenses generally.

Canadian Customs' view that a royalty payable on the sale of sound recordings in Canada was a fee and a condition of sale for the purposes of Canadian customs legislation was upheld on appeal.

Three criteria were set out: in order to be subject to duty the payment must be (1) a royalty or licence paid directly or indirectly; (2) in respect of the goods; and (3) a condition of the sale of the goods for export to Canada. The appeal court found that these criteria had been met and the amount of that fee was added to the value of the imported goods which was then subject to customs duty.

Patent Act Amendments

Amendments to the *Patent Act* have now come into force, which will eliminate the compulsory licences of patented medicines and will extend patent protection for patented medicines.

EEC

European Economic Area

On March 17, 1993 the protocol allowing the coming into force of the agreement on the European Economic Area between the EC and the EFTA States without Switzerland was signed. The protocol now must be ratified by all countries concerned as well as by the European Parliament. The *EEA Agreement* should enter into force on July 1, 1993 but it is doubtful that this deadline can be kept.

EC/Romania

On February 1, 1993 an *Association Agreement* between the EC and Romania was signed. The Agreement, which is to be ratified by all countries concerned and by the European Parliament facilitates trade and commercial relations between the parties, with full membership of Romania in the EC as a goal for the future. It is expected that the Agreement will come into force at the beginning of next year.

Anti-dumping Developments

Since January 1, 1993 EC Commissioner Sir Leon Brittan, known for taking a more liberal attitude, has taken responsibility for trade matters. This change has not led to any significant changes in the anti-dumping policy of the Commission until now. It is expected, however, that the reasons given in the decisions of the Commission will become more elaborate, and the fact finding may be more thorough in the future.

Anti-dumping cases were initiated with respect to large aluminium electrolytic capacitors from Korea and Taiwan and certain television cameras from Japan. Notice of the initiation of Commission investigations concerning unwrought aluminium from Armenia, Azerbaijan, Belarus, Georgia, Kazakhstan, Krygyzstan, Moldovia, Russia, Tajikistan, Turkmenistan, Ukraine, Uzbekistan, Estonia, Latvia and Lithuania has been given.

Provisional duties were imposed on bicycles from China, low carbon ferro-chrome from Kazakhstan, Russia and Ukraine and on certain magnetic discs (3.5 microdiscs) from Japan, Taiwan and China. Provisional duties were extended with regard to magnesium oxide from China, dead burned magnesium from China and certain seamless pipes and tubes of iron or non-alloy steel from Czechoslovakia, Hungary, Poland and China. Provisional countervailing duties were imposed on ball bearings with a greatest external diameter not exceeding 30mm from Thailand but exported to the Community from another third country.

Definitive duties were imposed on outer rings on tapered roller bearings from Japan, synthetic fibres from India and Korea and on certain electronic scales from Japan. The case on DRAMs from Korea was concluded by undertakings, with a residual for companies which have not offered an undertaking. A review of the regulation on imposing anti-dumping measures on polyester yarn from Turkey has been commenced.

A review proceeding concerning the decision accepting undertakings for the imports of urea from Czechoslovakia and the USSR has been commenced.

GATT

Annual Report

In his annual report to GATT contracting parties on developments in the world trading system (available free from the GATT Secretariat), Arthur Dunkel, the outgoing Director-General, warns that the world economy could be further put at risk if the current trade frictions escalate into a series of retaliations and counter-retaliations and could poison the Uruguay Round negotiations. He stresses that bringing the Round to a successful conclusion in 1993 is the only way to end the uncertainty that has surrounded trade relations since the failure to conclude the negotiations on schedule in December 1990.

The report recounts how GATT membership has undergone significant expansion between January 1992 and April 1993, with 7 new contracting parties (bringing the total to 110), 6 new requests for accession and 11 new observers. Eighteen new regional trade agreements were notified to the GATT during the period under review.

Also documented in the report is the work in GATT's newest area of endeavour, that of the interface between trade and environment. The report as well highlights the sharp increase in the number of anti-dumping and countervailing disputes being brought to the GATT and the continued maintenance of a large number of import quotas and other restraint arrangements.

JAPAN

A Turning Point in Japanese Trade Policy?

On January 29, 1993 the Japanese government levied an anti-dumping customs duty (under the *Japanese Customs Tariff Law*, art. 9) on products from some Chinese corporations on the grounds that they had been dumping ferro-silicon-manganses, steel manufactured materials, in their exports to Japan. The government ordinance came into force on February 3, 1993.

Anti-dumping customs duties are very familiar to Japan since Japanese companies frequently have been the target of such actions. This action is indeed a reversal of standard procedure. Recently the Japanese business world of ferroalloies has found itself in precarious straits, because of high electrical charges in Japan. China and other countries' export offensives resulted in the need to resort to anti-dumping charges.

Another relevant tariff under the *Japanese Customs Tariff Law*, art. 7, has been little used, and no government ordinance has existed to enforce the provision. However, in February of this year, the Ministry of International Trade and Industry (MITI) embarked on a move to intensify the use of this system. MITI will prepare to enact an ordinance which defines the tax base and, after consultation with the Ministry of Finance, shall move to amend the law to adjust the extent of the law's application. It is expected that a bill will be introduced into an ordinary session of the Diet next year. According to the law now in force, the application is limited only to cases where a country discriminates against Japanese products. But, as amended, any act that transgresses the rules of GATT could be covered by

the law, such as import volume restrictions, unilateral sanction measures like the U.S. Trade Act of 1974, Sec. 301, under which GATT's approval need not be obtained, or arbitrary implementation of anti-dumping duties. The possibility should not be overlooked that by adaptation of new rules under the Uruguay Round, new fields, such as services and intellectual property will be covered.

The recent anti-dumping duties against Chinese corporations under art. 9 and the Amendment of Article 7 may be covered by GATT, and MITI is now establishing internal criteria concerning procedures to take against acts that are decided to be "illegal" under GATT.

However, the first anti-dumping action has raised some anxiety that it will be the start of more random suits and a move towards protectionism.

NEW ZEALAND

Anti-Dumping - Final Determinations and Investigations

In late 1992 the Minister of Commerce amended a preliminary determination regarding certain men's footwear from China, Indonesia, Korea, Taiwan and Thailand to include unisex shoes in the categories being given provisional duties. Anti-dumping duty was imposed on some women's footwear imported from China.

In other New Zealand anti-dumping developments:

lead acid batteries from Indonesia, Korea, Malaysia, Singapore and Taiwan: amended anti-dumping duties of up to 40% (August 1992)

- automotive oil filters for internal combustion engines from the U.S.: final determination and imposition of anti-dumping duties (December 1992)

PVC cling film from Korea and Taiwan: final determination and imposition of anti-dumping duties

- home brew kits from U.K. and plaster of paris bandages from Germany: extension of investigation with preliminary determinations with provisional duties imposed on beer (January 1993)

- the Minister of Commerce is reviewing the need for continuing imposition of anti-dumping duty on refined sugar from Germany, Malaysia and Thailand (imposed in November 1988) and from Belgium, Denmark and the Netherlands (imposed in 1989). The Ministry has also initiated an investigation into the possible dumping of reinforceable steel bars from India.

"Country of Origin" Labelling

From July 1993 "country of origin" labelling for clothing and footwear will become mandatory under regulations under *The Fair Trading Act*. The regulations will apply to both imported and domestically produced goods.

Intellectual Property

The *Patent Amendment Act* 1992 implements the 1970 *Patent Co-Operation Treaty* and repeals provisions relating to compulsory licences for patents in respect of foods and medicines. Provisions relating to the *Treaty* came into force in December 1992.

In October 1992 the Ministry of Commerce released a discussion paper recommending the reform of the

Designs Act 1953, accession to a number of intellectual and industrial property treaties, and other related matters.

UNITED STATES

GATT

President Clinton has asked Congress to extend fast-track authority to enter into an agreement under the GATT Uruguay Round to December 15. Fast-track authority removes Congressional ability to amend agreements negotiated by the President and places time limits on the approval process.

Export Controls

On March 27 President Clinton signed legislation reauthorizing and extending the *Export Administration Act* (the EAA) until June 30, 1994. The EAA had lapsed and export controls had been continued under the authority of the *International Emergency Economic Powers Act* (IEEPA). Renewal of the EAA restored administrative and criminal sanctions for violations of export controls to their pre-September 1990 levels. Violations which occurred while IEEPA was in effect were subject to lower civil and criminal penalties. Congress is expected to consider a major overhaul of the EAA.

Eastern Europe and the Former Soviet Union

On March 23 the United States signed bilateral trade agreements with Turkmenistan and Azerbaijan. They are similar to the trade pacts signed with other former Soviet Republics. Among other provisions, the accords extend most favoured nation status to these countries.

The Treasury Department issued regulations implementing U.S. sanctions on Yugoslavia, consisting of the former Yugoslav republics of Serbia and Montenegro. The regulations implement the U.S. embargo, pursuant to the U.N. embargo on Yugoslavia. They prohibit U.S. individuals and corporations from engaging in trade with that country and with persons owned or controlled by Yugoslav government entities.

Trade Disputes

A U.S. challenge to the findings of a binational panel under the U.S.-Canada Free Trade Agreement (FTA) in the live swine countervailing duty investigation was rejected by a binational "extraordinary challenge committee". Under its narrow mandate, the committee rejected the contention that the Panel manifestly exceeded its authority in overruling the Commerce Department's finding of a countervailable duty in the fourth administrative review of the investigation. This was only the second extraordinary challenge initiated under the FTA. The first challenge was also rejected.

On May 6 a binational panel remanded the final determination of the Department of Commerce in the countervailing duty investigation of softwood lumber from Canada. Commerce has 90 days to correct the errors found by the Panel. The Panel ruled that the Department incorrectly applied the "specificity test" for domestic subsidies under U.S. law. The Panel also found that the Department failed to consider whether Canadian stumpage pricing programs created a market distortion. In addition, the Panel found that Canadian log export restrictions can constitute a countervailable subsidy to the lumber industry by reducing the cost of its raw material, but remanded the determination for clarification of the actual effect of the export restraints.