REGULATORY AND POLICY DEVELOPMENTS

BILL C-22 FINALLY ENACTED

By: John F. Blakney,
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On November 19, 1987, the Liberal members of the Senate withdrew their opposition to Bill C-22. The Bill passed and immediately received Royal Assent.

Most of the amendments being carried out by Bill C-22 will only come into force when the *Act* is proclaimed.

However, two provisions took effect immediately. They are:

(1) Section 41(1) which requires product-by-product claims for most medicines and food has been amended now to apply only to "naturally occurring substances prepared or produced by, or significantly derived from, microbiological processes and intended for food or medicine ...." This amended section ceases to have effect on November 19, 1991; and

(2) Sections 24 and 77, relating to the marking provisions of the *Patent Act* and their related penalty, have been repealed.

The Bill given Royal Assent is essentially similar to that passed by the House of Commons on the basis of the March 5, 1987 Legislative Committee Report. Technical amendments were made relating to the pharmaceutical compulsory licensing provisions with discretion being given to the Government on the proclamation date of the new pharmaceutical patent system.

FIRST PATENTED MEDICINE PRICES REVIEW BOARD APPOINTMENTS

On December 8, 1987, Consumer and Corporate Affairs Minister Harvie Andre announced the appointment of Dr. Harry Eastman as Chairman and Dr. Robert Goyer as Vice-Chairman of the Patented Medicine Prices Review Board. The Board, established under Bill C-22 which extends the scope of patent protection available to medicines and limits the extent of compulsory licensing of patented pharmaceuticals, is structured as an independent regulatory tribunal. The Board will monitor the prices of patented medicines, initiate public hearings in cases where prices are considered to be excessive and report annually on the research and development performance of the pharmaceutical industry.

Dr. Eastman served as Commissioner of the 1983 Commission of Inquiry into the Pharmaceutical Industry. He received his Doctorate from the University of Chicago and was appointed Professor of Economics at the University of Toronto in 1961. Dr. Eastman has also served there as Vice-President of Research and Planning, Registrar, Chairman of the Department of Political Economy and Associate Dean of the School of Graduate Studies.

Dr. Goyer received his Ph.D. from Ecoles de Médecine et de Pharmacie at the Sorbonne in Paris. Dr. Goyer is a professor in the Faculty of Medicine at the University of Montreal and has been involved in pharmaceutical research in Canada and internationally. Dr. Goyer worked on the Commission of Inquiry with Dr. Eastman and has published a wide variety of scientific and medical studies.

(Editors Note: The provisions to Bill C-22 will be reviewed in detail in the March issue of the CCPR, with special emphasis on the functions of the Patented Medicines Prices Review Board.)

J.F.B.

CRTC AND CABINET RULE AGAINST CALL-NET COMPETITION

In late November 1987, the Federal Cabinet announced that it was upholding a CRTC decision (Telecom Decision CRTC 87-5, May 22, 1987) which permitted Bell Canada to refuse to supply to Call-Net Telecommunications Limited certain network transmission services.

In doing so, the Cabinet has supported the approach originally taken by the CRTC in its 1984 Enhanced Services Decision (Telecom Decision CRTC 84-18) that federally-regulated telecommunications carriers should be required to provide network transmission services to new telecommunication service suppliers for the purpose of resale only where those services are to be used in supplying services which are clearly enhanced in nature and are not an attempt to provide "basic" services under the guise of an enhanced service offering.

Pending the CRTC decision and the subsequent Cabinet appeal, Call-Net had obtained WATS, local access services and interconnected private lines from both Bell and CNCP. Call-Net's customers gained access to these facilities through Call-Net's private branch exchanges in Montreal and Toronto in order to route calls to points in Ontario and Quebec. Call-Net's network was also interconnected to the facilities of RCI Corporation, a long-distance services provider located in the United States, in order to route calls to the U.S.

Call-Net contended that it provided three services which constituted legitimate enhancements on basic telephone service and for which it was therefore entitled to obtain the line network services from Bell and CNCP. These three services were:

(1) Customer Dialed Account Recording (CDAR) which provided customers with authorization codes to preclude unauthorized use of the Call-Net network;

(2) Selective Call Forwarding: an optional service permitting a Call-Net customer to redirect incoming calls to another telephone number of the customer's choice; and

(3) Voice Mailbox: a store-and-forward service which is accessible from remote locations and which also provided a pager option.

In its May 1987 decision, the CRTC concluded that Call-Net's network permits its customers to make long-distance calls to other telephones in much the same way as would be done using a telephone company's message toll service, but at lower rates. The Commission took the position that the customer security offered by Call-Net's CDAR core service did not alter the fact that Call-Net provided a basic service similar to Message Toll Service (i.e. customer-dialed long-distance service, a service where, in August 1985, the CRTC had declined to permit competition by CNCP Telecommunications). The Commission noted that there were two precedents for this position. Centrex III, which is equipped with a system similar to CDAR, has been found by the Commission to be a basic service. Similarly, the Commission found that an offering of Morgan G. Holdings Limited, which was also CDAR equipped, was basic as well.

The Commission also found that Call-Net's Selective Call Forwarding Option was "merely a means of routing traffic from point of origin to desired destination," and it was therefore basic as well. However, the Commission concluded that Call-Net's Voice Mailbox Option was an enhanced service.

Call-Net obtained a stay in the Commission's decision permitting Bell and CNCP to cease supplying services and facilities to Call-Net other than for its Voice Mailbox Service, pending a Cabinet appeal.

Call-Net's Cabinet appeal was opposed by both Bell Canada and the Consumers' Association of Canada who argued that a ruling in favour of Call-Net would open the door to unrestricted competition in long-distance telephone services. The appeal was supported by business user representatives and the Director of Investigation and Research.

In upholding the CRTC decision, Cabinet granted Call-Net an additional six months to restructure its operations to conform with the CRTC's enhanced services policy before Bell and CNCP are required to cut off services to Call-Net.

The Cabinet also announced its intention to provide the CRTC with jurisdiction to make advanced rulings with respect to whether opposed service complies with its enhanced services policies in order to reduce the uncertainties and costs of regulatory litigation for enhanced services providers.

The CRTC and Cabinet decisions serve to underline the fact that commercial network services resale, such as has been allowed in the United States for some years, is regarded as the equivalent to head-to-head long-distance services competition even though resellers in the U.S. have traditionally targetted narrower business markets with a lower grade communication service.

The decisions also indicate that it will not likely be possible to establish viable enhanced services business in Canada merely by adding features generally available on advanced private branch exchanges to network transmission services provided by common carriers. Rather, it may be necessary to demonstrate that something is actually being done to store or to transfer information on the part of the enhanced services supplier in order to overcome established carrier challenges that the new service is "basic".

J.F.B.

TELEGLOBE CANADA RATE DECREASE APPROVED

On November 13, 1987, the CRTC approved a general rate decrease application of Teleglobe Canada which will have the effect of reducing Teleglobe's international telephone service rates in 1988 by a weighted average of 13.5% below the rates applicable immediately prior to Teleglobe's privatization at the end of March 1987 and a corresponding weighted average rate decrease of 10% for Teleglobe's international teleprinter services. (Telecom Order CRTC 87-693)

These rate decreases apply only to traffic originating in Canada and not to incoming traffic. The decreases comprise an element of Teleglobe's privatization and were required by the Federal Government in a Direction issued to the CRTC.

Teleglobe's memorandum of support filed with its general rate decrease application on July 31, 1987. outlined the principles followed in revising specific rates for international telephone and teleprinter services to ensure that the weighted average rate reduction complies with the Cabinet Direction. These objectives, as stated by Teleglobe, are:

(1) To encourage efficient use of network facilities: Off-peak calling period discounts were modified to more closely coincide with existing peaks and troughs in Teleglobe's network utilization. The objective of this off-peak pricing policy is to create stronger incentives to callers to spread traffic more evenly in order to reduce capital construction requirements which are typically driven by a desire to avoid congestion of facilities during peak periods;

(2) To align rate levels with major cost elements: Specific rate changes have been designed to more closely reflect the evolution in settlement payments with particular foreign carriers and to encourage lower settlement payments with other carriers. Typically, out of every dollar paid by a customer in Canada for a call to a point overseas, about 53 cents is paid to the foreign administrations, and in excess of 24 cents is paid by Teleglobe to domestic telecommunication carriers as settlement payments. These settlement payments are the major cost component of Teleglobe's international telephone and teleprinter rates.

Although the Commission invited public comment on the application on August 27, 1987, only two parties, the Province of Québec and Carlysle Gilmour, provided comments.

J.F.B.

WILL THE OWNERSHIP STRUCTURE OF THE CTV TELEVISION NETWORK BE ALTERED?

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The CTV Television Network was granted a licence by the Canadian Radio-Television and Telecommunications Commission in 1961 to provide an alternative source of English-language television programming on a national basis. Today, CTV's program schedule is available to 99% of English-speaking television households in Canada.

CTV is obviously a major player in the Canadian broadcasting system. It is a dominant force in bidding for available programming rights, in competing for advertising revenues and in attracting television viewers. Together with its affiliates, CTV accounts for nearly 50% of the television revenues of the entire private sector. Six of its affiliates rank among the 10 most profitable television stations in Canada.

Not surprisingly, CTV has come under increasing pressure from its regulator to improve its performance in the production and airing of Canadian programming and in fostering more systematically the promotion, development and on-air exposure of Canadian talent. Yet, the CRTC has little power other than to refuse to approve applications for ownership changes brought before it and to dictate the corporate and financial relationship between the CTV Network and its affiliates which would, in its view, best ensure the capacity of the Network to discharge the mandate assigned to it as the broadcasting environment changes and regulatory policy develops.

CTV, like the CBC, does not operate any broadcasting station. It reaches viewers solely through local, privately-owned stations affiliated with the Network by contract. CTV affiliates provide viewers with a combination of the CTV Network schedule and a local service. Some CTV affiliates are major broadcasting outlets competing with the CBC and independent television stations in Canada's larger cities. Others provide the Network schedule in smaller markets and, through re-broadcasters, in outlying areas.

The ownership structure of the CTV Network is best described as a cooperative arrangement. The Network is basically the sum total of its affiliates. Ownership percentages vary in importance in accordance with the revenue base of each affiliate. The Network is controlled by an executive committee consisting of the larger affiliates and by a board which allows a voice to each affiliate. CTV's performance is intimately tied to its affiliates' commitments to the Network and to each affiliate's individual performance in its own market.

The Network is bound by contract to provide its affiliates with a portion of their program schedule, currently some 65 hours of programming per week, and they, in turn, are bound to provide the CTV schedule including the national advertising sold on it in their respective coverage areas. The Network not only incurs direct programming production and acquisition expenses but also acts as a buying agency for its affiliates. A cost-sharing arrangement governs the financial relationship between the Network and its affiliates. It is based on the principle that affiliates must share in the costs of supplying the Network schedule while CTV must recognize financially the role played by each affiliate in ensuring national exposure for the Network.

The CRTC has expressed concern in the last decade that CTV's cooperative financial structure and cost-sharing formula may be such as to inhibit the capacity of the Network to respond to regulatory expectations. This is seen, for example, in the 1979 Decision which last renewed the Network licence. The Commission raised questions regarding the methods used for the reimbursement of the Network for expenses incurred and the effectiveness of the ongoing decision-making process between the Network and its affiliates. It has been expected, generally, that for the Network to discharge its mandate, more expenditures may have to be assumed by the affiliates, in particular the more profitable ones. CTV was asked during the renewal process

to proceed with a fundamental review of its cooperative financial structure and of the cost-sharing arrangements in place between the Network and its affiliates and to report in due course.

In November 1986, CTV appeared before the CRTC for a further renewal of its licence. It reported on the results of its review regarding its structure and financing and agreed to submit a copy of a revised affiliation agreement reflective of some changes in cost-sharing arrangements, in the methods used to expense some programming properties and in ensuring the timely assumption by the affiliates of any shortfall in the revenues necessary to meet expected Network expenditures. A more streamlined process for decision-making and consultation between the Network and its affiliates was also announced. However, no fundamental changes in the cooperative structure of the Network were proposed.

In March 1987, the CRTC renewed the CTV licence for the statutory maximum of five years. It requested that CTV file by August 31, 1987, a revised affiliation agreement and by August 3, 1988, a more comprehensive statement of CTV's long-term strategies and objectives than was available at the hearing.

The CTV affiliates themselves were scheduled to appear for renewal of their respective licences in the fall of 1987. Applications were to be filed before July. Each applicant's financial projections had to take into account financial responsibilities extrapolated from the numbers provided by the Network as the level of contribution necessary to meet the conditions of licence imposed by the CRTC on the Network and the expectations expressed by the CRTC in the CTV renewal decision.

On March 2, 1987, before issuing the CTV Network renewal licence and while the press was reporting severe cutbacks at the Network, the CRTC approved an application filed in competition with four other interested parties by Baton Broadcasting Incorporated for a licence to establish an independent television station in Ottawa. Baton is the owner of CFTO-TV Toronto, the largest CTV affiliate, and since July 1986, owner of all CTV-affiliated stations in Saskatchewan. Baton's status as an independent station would have allowed it not only to compete in Ottawa with CJOH-TV, the fourth largest CTV affiliate after Toronto, Vancouver and Montreal, but also to compete with the Network in the purchase of programming.

On April 28,1987, the Cabinet exercised its statutory power under the *Broadcasting Act* to refer back to the CRTC for reconsideration. Hearing its decision, it granted Baton a licence in Ottawa on the grounds that the Commission had failed to consider, or to consider adequately, the impact that the decision could have on the CTV Network and, consequently, on the Canadian broadcasting system. A re-hearing was announced by the CRTC for August 24, 1987. On July 14, Baton surrendered its licence for Ottawa amid reports that it had reached an agreement to acquire control of CJOH-TV subject to CRTC approval. An announcement of a hearing date for considering the Baton application is expected within days.

In September, the Commission announced its decision to delay consideration of the applications for renewal already filed by the CTV affiliates until the fall of 1988 due to the seriousness of discussions concerning the restructuring of the CTV Network and the impact that any revision of the relationship between the Network and its affiliates may have on their strategies, plans and commitments for the next five years. In October, the CRTC postponed to November 30, 1987, the filing of a revised affiliation agreement by CTV since a proposed restructuring of the Network was under discussion.

Despite reports of imminent changes in the ownership structure of CTV itself, what is emerging in the highly competitive world of broadcasting are potential changes in the balance of power in the Network as it is now structured. Such changes have been set afoot as a result of further corporate decisions by the major CTV affiliates. In particular, CKCO-TV, the CTV affiliate in Kitchener, has been reported to have reached an agreement to acquire control of CFRN-TV, the CTV affiliate in Edmonton. A

hearing of the proposal is expected early in 1988. A further increase in the concentration of ownership of CTV affiliates has been rumoured since.

It now appears that the CRTC will be asked to gradually approve what amounts to shifts in power in the corporate arrangement under which CTV operates rather than a change in the underlying cooperative structure of the Network. One may wonder whether those changes by themselves will have the effect of increasing the CRTC's capacity to influence the relationship of the CTV affiliates with the Network and the larger affiliates' commitment to the Network to ensure not only continued performance but also improved capacity to provide quality service to all of Canada and an increasing contribution to Canadian content. Will the proposals brought before the Commission, if approved, achieve the stated goals? Will they render the decisional process between the Network and the affiliates more efficient? Will they result in a better business performance by the Network? Will they enhance the operational efficiency of the Network in an increasingly competitive broadcasting world? Will they ensure that the Network can discharge its national mandate without inhibiting the smaller participating stations' capacity to meet their local service responsibilities? In short, will they ensure that some of the most profitable television stations in the country will guarantee the capacity of the Network, of which they form a part, to play the leadership role expected of it by the CRTC?

THE CRTC SPECIALTY SERVICES DECISION - MORE PROGRAMMING SERVICES: WHOSE CHOICE?

Following a Public Hearing held on July 20, 1987, the Canadian Radio-Television and Telecommunications Commission issued on November 30, 1987, a number of licensing and regulatory decisions in a document entitled *More Canadian Programming Choices*. The document approves eight applications for network licences to provide new Canadian specialty or narrowcast satellite-to-cable television programming services and one application for a network licence to provide a family pay television service. It also amends the network licences of two existing specialty television programming services and denies 10 applications for network licences for new specialty television programming services or for the amendment or renewal of the network licences of existing specialty television programming services. It also modifies the rules concerning the distribution of specialty services by cable television undertakings and the prescribed linkage requirements with regard to the distribution of Canadian and non-Canadian television programming services on cable systems in Canada.

The new licences to be issued will add five Canadian English-language and five Canadian French-language satellite-to-cable network services to the services already available to Canadian cable subscribers. The new English-language services include an all news channel, a religious channel, a youth channel and a family movie channel. The French-language services include a family channel, a sports channel, a music channel and a channel which will offer a mix of Canadian programming and of programming from three European countries and from certain French-speaking African countries. A weather channel available in both official languages was also licensed.

More importantly, the new conditions for the distribution on cable systems of new and of existing specialty services will herald a new era for consumers of cable service.

Pay TV services (the general interest movie services) and all national specialty services licensed before November 30, 1987, (the sports channel or The Sports Network [TSN], MuchMusic, Telelatino, Chinavision and the Life Channel) were originally licensed for distribution on cable on a discretionary basis, that is, for a fee paid by subscribers at their discretion in excess of the amount charged by a cable system licensee for access to cable and for the provision of a basic package of television, radio and other programming services. That basic package of

programming services is usually referred to as basic cable service whereas the services for which a subscriber pays in excess of the basic access fee are called discretionary services.

Until now, the wholesale fee charged by Pay TV or specialty service licensees to cable operators and the retail fee charged by cable operators to subscribers for discretionary services have been unregulated. Cable licensees have also been free to charge a stand-alone fee for each service licensed as a discretionary service or to offer multi-service tiers for a fee which is lower than the sum of stand-alone fees charged for the services contained in the tier. Cable operators have also been free to distribute, as part of such tiers, services from a list of eligible non-Canadian services subject to certain tiering requirements aimed at ensuring a degree of spectrum priority for Canadian services and at avoiding head-on competition between Canadian and non-Canadian specialty services while providing an opportunity for the "lift" effect of combining popular American services with Canadian services in the same tier. Basic service fees have been, and remain, regulated by the CRTC.

One of the important policy issues considered at the July 20, 1987, hearing was whether authorization should be given for cable distribution of new specialty services or of existing specialty services as part of the basic service for a fee levied on all cable subscribers in the form of an increase in the basic access fee.

In the November 30, 1987, CRTC document, the Commission licensed all new services except the English-language family movie channel, for distribution on the basic service in the language markets for which they were primarily intended. Generally, cable operators will be free to choose which service, if any, they are prepared to distribute, but once they elect to distribute a specialty service, that service must be distributed as part of the basic service. The Commission also authorized the distribution, in anglophone markets, of TSN and of MuchMusic either on the basic service or on a discretionary tier at the option of the owner of the service. The new English-language family movie channel was licensed for distribution on a discretionary tier only.

In other words, in anglophone markets, a cable operator will be free to distribute any, some or all specialty services, but any service distributed, with the exception of Telelatino, Chinavision and the Life Channel, must be distributed on basic service. Cable operators must, if they elect to distribute the general interest movie service, the new family movie service, Telelatino, Chinavision or the Life Channel, distribute such services on a discretionary basis. Cable operators may distribute, at the option of their owners, either or both TSN or MuchMusic on basic service or on a discretionary tier. They may also, at their discretion, distribute one, all or some of the French-language family, weather, music, sports or European programming services. Any French-language specialty service they elect to distribute must be distributed as part of the basic service unless the originator of the service consents to having the service distributed on a discretionary basis.

In francophone markets, defined as a market where the French mother-tongue population represents 50 per cent or more of the total population according to Statistics Canada figures, cable licensees, if they elect to distribute any French-language specialty service, must distribute all French-language specialty services on the basic service. Cable licensees in a francophone market, if they elect to distribute the general interest movie service, TSN, MuchMusic, Telelatino, Chinavision or the Life Channel, must distribute the service as a discretionary service. They may also distribute the English-language news, religious, youth or weather specialty services. Such English-language services must be distributed as part of the basic service unless the originator of the service consents in writing to having the service distributed on a discretionary basis.

The practical results of the Commission's decisions are generally as follows:

- A specialty service licensee, whose penetration level could be well below 10% of all cable subscribers in a given cable system if the service is distributed on a discretionary basis, will be able to achieve instantly, under the distribution regime

put in place, a penetration level of 100% of all cabled homes in any cable system;

- The level of the fee required to ensure the viability of a specialty service, when spread across the total subscriber base of the cable systems willing to distribute the service, could drop from as much as $10.00 monthly to a range well below $1.00 monthly;
- A cable subscriber in a market where the cable licensee elects to distribute all specialty services authorized for distribution on basic service will be faced with an immediate increase in the monthly basic cable access fee of well above $4.00. That increase would, of course, be lower if cable operators elected to distribute services only in one official language and in anglophone markets if they elected to distribute only some of the specialty services authorized;
- In francophone markets, the distribution of one authorized French-language specialty service will lead to an immediate increase in the basic cable monthly fee of well above $2.00 when taxes are taken into account;
- A cable subscriber not wishing to receive a certain specialty or narrowcast service such as TSN may receive it nevertheless and be required to pay for it. The only effective recourse available to a subscriber who objects to such reception and to the resultant increase in the basic monthly fee will be to cease to subscribe to cable service altogether;
- Cable operators will be the sole judges of which specialty service(s) will be distributed on their respective system(s), with the exception noted above in francophone markets;
- The originators of the Pay TV services, of the newly-licensed English-language family movie service, of Telelatino, Chinavision and the Life Channel, will not have the advantageous option of packaging their service with TSN and MuchMusic on a discretionary tier in cable systems where TSN and/or MuchMusic are distributed as part of the basic service;
- Since most specialty services are authorized to sell air time to advertisers, broadcasters will, to varying degrees, compete for cable viewing audiences with the licensees of specialty services, especially those carried on basic service. It is inevitable that some audience fragmentation and some erosion of advertising revenues will be experienced by conventional broadcasters;
- For the first time, the wholesale monthly fee charged by a specialty service owner to a cable operator will be regulated when the service is distributed as part of the basic service, as will the level of the monthly retail price charged by the cable operator to the cable subscriber. The fee, wholesale and retail, charged for services distributed on a discretionary basis will remain unregulated.

One of the important issues canvassed at the July 20 hearing was whether to permit ownership of specialty programming services by cable interests. Objections to such ownership were expressed on the grounds that there should be no vertical integration of the program distributor and program provider especially in the prevailing environment where the program distributor or cable operator is licensed on a monopoly basis in a given market. Concerns related to fair and equitable access to cable facilities for all specialty services and the possibility of discriminatory practices in channel positioning, marketing, promotion, pricing and packaging were cited. The Commission nevertheless licensed a youth specialty service whose corporate ownership includes the largest and the fifth largest cable operators in Canada. The regulatory regime put in place, especially the regulation of monthly subscriber fees, alleviates some of the concerns expressed. It leaves the cable licensee, however, exercising a gatekeeper's role in relation to access.

A.W.

REGULATION OF FINANCIAL INSTITUTIONS

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In the June 1987 issue of the *Canadian Competition Policy Record*, John Evans noted that, somewhat later than expected, the legislative process associated with the federal White Paper entitled *New Directions for the financial Sector* had begun. Bills C-42 and C-56, described in that article, were passed by Parliament in June although new ownership requirements originally incorporated in Bill C-56 were withdrawn at the urging of the House of Commons Standing Committee on Finance and Economic Affairs. These ownership requirements were incorporated in a new bill, C-81, which received first reading on June 30, 1987.

Bill C-81, if passed, would preserve the right of the Minister of Finance retroactive to June 26, 1986, to review any purchase of a class of shares of a federally chartered insurance, trust or loan company that exceeded 10 per cent of the issued and outstanding shares of that class, including certain indirect purchases that established control of a corporation itself owning more than 10 per cent of the shares of such an insurance, trust or loan company.

Short of a takeover attempt that the government decided was against the public interest, it is unlikely that Bill C-81 will be taken further. It will be absorbed in the third stage of the Government's plan to implement its financial institutions policy.

The third stage, now considerably delayed, is expected to begin to be released at the end of November in the form of an exposure draft of new trust companies legislation. This will also establish the legal framework to be implemented in new loan company, insurance company and bank legislation. The major policy issue being debated continues to be the proposed ownership constraints and particularly the discrimination against ownership of financial institutions by companies that are commercially linked; i.e., companies that also own or are owned by commercial companies. The governments of Ontario and Québec have both announced that they will not impose ownership constraints on institutions chartered in their jurisdiction beyond constraints related to the character, experience and financial capacity of the owner.

Following the passage of Bill C-56 which allows federally regulated financial institutions to acquire more than 10 per cent of a securities dealer, the Superintendent of Financial Institutions issued on August 20, 1987, guidelines to be followed by firms seeking ministerial approval for such purchases.

These guidelines are meant to facilitate the entry of these institutions into the securities business and will eventually be refined and issued as regulations. They cover such matters as capital, reporting, related party transactions and supervisory requirements.

On October 5, 1987, the federal government released in very general language the principal elements of the agreement with the United States on trade in financial services. Essentially, each government agreed to give the financial institutions of the other national treatment. Canadian institutions operating in the United States have already generally received such treatment and consequently will be little affected. However, should the *Glass-Steagall Act* be removed for U.S. banks, Canadian banks operating in the United States would similarly benefit. U.S. and foreign banks in the United States will also be permitted to underwrite and deal in securities issued by Canada, its provinces and municipalities.

U.S. banks' subsidiaries in Canada will be freed from the 16 per cent total asset constraint over all foreign bank subsidiaries operating here and will no longer need ministerial approval to open new branches. The share ownership constraints of 10 per cent for any foreigner and 25 per cent for all foreigners taken together that are contained in federal trust, loan and insurance company legislation will be removed for U.S. persons. Similarly, the 25 per cent ownership constraint on foreign purchases of the shares of a Canadian bank will be removed for U.S. persons, but the 10 per cent ownership constraint applicable to any person, Canadian or foreign, will remain.

These measures will further enhance competition in the Canadian financial services marketplace and will protect Canadian institutions operating in the United States from future discriminatory and restrictive legislation.

Finally, on October 14, 1987, Mr. Pierre Fortier, Québec Minister of State for Finance and Privatization, released a White Paper entitled *Reform of Financial Institutions in Québec.* The White Paper is an aggressive statement of Québec's intention to confirm and maintain the growth and dynamism of the Québec financial sector, retain its leadership in financial institutions, reform and maintain its jurisdiction.

The action plan set out in the White Paper envisages four major bills covering trust and savings companies, credit unions, insurance companies and securities. They will be introduced into the Legislature before the end of 1988. The bills will broaden the powers of these sectors by permitting the institutions to enter new businesses through subsidiaries thus retaining the four pillars concept for regulatory purposes while providing for the networking of these services in a conglomerate and through unaffiliated companies. The Québec government has no concerns about concentrated ownership and commercial links. It recognizes the advantages of having financial institutions and conglomerates of considerable size to compete in the Canadian and global market places. This is to be achieved without weakening consumer protection and the financial health of the institutions themselves. Self-regulation and tough supervisory systems are stressed as is harmonization of regulation and supervision with the federal and other provincial governments.

The federal and Québec positions clash on the ownership and commercial link policies and this could lead in the future to some interesting and difficult jurisdictional decisions by Canadian financial institutions. But that is for the future assuming the federal government does not yield to the Québec and Ontario arguments against ownership and commercial link constraints. Jurisdictional disputes have already arisen in the securities area where Québec was consulted neither on the Canada-Ontario agreement nor in the development of the federal superintendent's guidelines for entry by federal institutions into the securities business.

On the latter problem, discussions are now taking place and seem to be making progress.

Altogether, reform and plans for further reform are moving quickly ahead. The next step should be the exposure draft of a new federal trust companies bill. All of these measures, except for the federal commercial link policy, will contribute to vigorous and imaginative competition in the Canadian financial services marketplace. The implementation of the commercial link policy will seriously reduce competition from such sources in our marketplace, consolidating further the concentration of business in the hands of the banks and possibly mutual insurance companies. Administrative and drafting problems surrounding the commercial link policy might also further delay into the new year the release of the Government's exposure draft bill referred to earlier.

CNCP TELECOMMUNICATIONS - REGULATORY BURDEN LIFTED

On September 22, 1987, the CRTC issued a decision which substantially reduces the regulatory requirements relating to the provision of competitive services by CNCP Telecommunications. (Telecom Decision CRTC 87-12.)

On September 10, 1986, CNCP had applied to the Commission for orders exempting it from:

- the requirement to file tariffs for its offerings subject to certain procedures described in CNCP's application;
- the requirements established under the CRTC's Cost Inquiry Phase III to file service category, costing manuals and periodic reports.

In its application, CNCP stated that it would provide at least 10-days written notice to the Commission and to registered interested parties of proposed changes affecting any CNCP offering

other than terminal equipment or intraprovincial services provided in competition with non-federally regulated carriers. CNCP's application recognized that the Commission would continue to possess its statutory authority to require CNCP to submit further justification in specific cases and to disallow tolls on an interim or permanent basis if they offend the pricing standards of the *Railway Act*.

CNCP contended that there was no longer any need for its prices to be regulated by the Commission in the traditional manner since CNCP has a small share of the total telecommunications market and no monopoly power in any one submarket. CNCP also noted that it competes with a variety of suppliers which are effectively unregulated, and also that market forces consequently now dictate the level of its prices thereby ensuring that those prices are just and reasonable. Finally, CNCP argued that since it offers no monopoly services and since its services lack the capacity to generate any cross-subsidies, no public interest is served by requiring it to provide a detailed category costing information specified in the Commission's Phase III Cost Inquiry Decision (85-10).

Bell Canada contested the CNCP application and argued that granting the application would be unfair to Bell unless Bell were accorded similar treatment. Bell took the position that CNCP's arguments were really directed at seeking competitive advantages over its regulated competitors through the regulatory process. Bell also contended that the 10 day notification proposal for CNCP changes to its services was too short a period to allow the Commission and interested parties to assess the potential impacts of the proposal.

The application was generally supported by the Consumers' Association of Canada, the Director of Investigation and Research and the Canadian Business Telecommunications Alliance. These parties took the position that competitive market forces were adequate to ensure that CNCP's rates are just and reasonable.

The Commission, consistent with previous decisions concerning tariff filing for cellular radio and multi-line and data terminal equipment and earth station services, concluded that there was no prior approval requirement for tariffs under the *Railway Act*, and a determination that tariffs need not be filed does not affect the applicability of the substantive provisions of the *National Transport Act* and the *Railway Act*. The Commission also accepted the argument that its regulatory treatment of carriers should be tailored to their particular circumstances. With respect to the Cost Inquiry Policy, the Commission concluded that CNCP does not have the ability to engage in any material cross-subsidization among its service offerings, and, accordingly, the Commission exempted CNCP from the requirements of Phase III Cost Inquiry Decision.

With respect to CNCP's de-tariffing proposal, the Commission noted that CNCP faces competition in all areas of its business sufficient to make it unlikely that it can raise prices to any significant degree without losing business. As a result, the Commission exempted all CNCP's services with the exception of the public message service (telegraph service) and interconnected voice services from its existing tariff approval process.

The Commission's decision is significant in that it has, for the first time, exempted the network services of an established telecommunications carrier from its traditional requirement of advanced approval of individual or general toll or service condition changes. The decision's immediate impact will be the provision of greater marketing flexibility for Telex, CNCP's main revenue producer, a service which has in recent years been losing ground to other printed message services which integrate computers and telecommunications networks. The decision will also likely encourage CNCP's competitors in message and data communications to seek equivalent regulatory forbearance from the CRTC.

J.F.B.

THE NEW *NATIONAL TRANSPORTATION ACT* FROM THE SHIPPERS' PERSPECTIVE

Introduction

The new *National Transportation Act* is expected to be proclaimed in force in January 1988. It will considerably liberalize the regulatory framework affecting surface, air and water transport in Canada and will dramatically change the role of the federal transportation regulator (formerly the Canadian Transport Commission to be known in the future as the National Transportation Agency).

While considerable attention has been devoted to measures which reduce or eliminate direct regulation of prices, entry and exit in air transport and extraprovincial trucking, of equal importance are measures aimed at increasing the competitiveness of the transport sector by increasing the commercial clout of individual shippers and shipper organizations. This article reviews these latter measures.

The legislation establishes a new shipper-carrier dispute resolution mechanism which will increase shipper bargaining power. Specific measures are also aimed at improving shipper access to railway services on fair terms and at introducing price competition in rail transport.

Mediation/Arbitration

An objective of the *National Transportation Act* is to make formal mechanisms for dispute resolution between shippers and rail carriers more open and accessible and less costly to shippers. Sections 46 to 57 of the *Act* provide for a process of mediation and arbitration of rate and condition of service disputes between shippers and certain federally regulated transportation companies. Mediation and arbitration is available with respect to domestic air cargo transport and the carriage of goods by railway other than the movement of grain under the *Western Grain Transport Act* or container and trailer carriage unless the shipment arrived at a Canadian port served by only one railway.

Mediation

The National Transportation Agency will provide mediation services upon referral of both parties to a dispute unless the Agency is of the opinion that mediation is not practical. The *Act* requires that all matters relating to a mediation are to be kept confidential unless the parties otherwise agree, and that information supplied by a party can be used only for that mediation unless that party otherwise consents. Unless the parties otherwise agree, Agency mediation must be completed within 30 days of a referral.

However, there is no obligation on the party complained against to participate in the mediation. Nor is there an obligation on that party to provide particular information to the mediator in the event that it agrees to mediation.

The Government has indicated that Agency mediations will be simple and informal, and there will be no requirement for legal representation. As in the case of a labour mediation, the objective is to facilitate the parties reaching an agreement or compromise themselves with the mediator acting only as a facilitator.

Final Offer Arbitration

A shipper may submit any rate or condition of service dispute which cannot be resolved between the shipper and the carrier to final offer arbitration by the Agency. There is no requirement that Agency mediation first be tried unsuccessfully. The arbitration process is more formal than mediation, and the decision of the arbitrator is final and binding on the parties.

The arbitration process is begun by the shipper serving the carrier with a notice of intention to submit the matter to arbitration. This notice must be served at least 15 days before submitting the matter to the Agency. The shipper's submission to the Agency must contain the shipper's final offer and the last offer received

from the carrier, the shipper's undertaking to pay its portion of the arbitration fees as set by the Agency and the name of the arbitrator selected from the Agency's list of arbitrators to which the shipper and carrier have agreed. In the absence of an agreement between the parties about an arbitrator, the Agency may pick one. This arbitrators list is prepared by the Agency in consultation with representatives of shippers and carriers.

The Agency may decline the arbitration if it is of the opinion that the matter raises issues of general public interest, and interests other than those of the shipper and carrier concerned may be materially prejudiced by the matter submitted. The Agency has 10 days from receipt of a shipper's submission to do this.

The carrier can request, within seven days of receiving the shipper's notice, that, as a condition of arbitration, the shipper agree to ship the goods in issue with the carrier in accordance with the decision of the arbitrator. However, the Agency can substitute a bona fide offer to ship from the shipper for such an agreement if it finds that the shipper is not in a position to enter an actual agreement for any reason which is not likely to frustrate the arbitration.

Arbitrations will follow rules of procedure to be established by the Agency. The *Act* specifies that arbitrations shall be conducted as expeditiously as possible.

Within 15 days of the Agency referring the matter to arbitration, the parties are required to exchange the information on which they intend to rely in support of their final offers. Within seven days of receipt of this information, each party may direct interrogatories (written questions for written reply) to the other. These interrogatories must be answered within seven days of their receipt. The arbitrator is entitled to take the withholding of relevant information by a party into account in a decision.

Unless the parties otherwise agree, the arbitrator is obliged to have regard to whether there is an alternative, effective, adequate and competitive means of transporting the goods to which the matter relates, available to the shipper and to all other considerations that appear to the arbitrator to be relevant to the matter.

The legislation initially listed a number of considerations which might be regarded as relevant to an arbitration. These considerations were dropped at the committee stage. However, these factors provide a useful checklist for developing a case to be presented at arbitration and include:

- changes in the costs of providing a service in question;
- efficiencies in providing the services instituted at the shipper's expense or initiative;
- the profitability to the carrier of the movement in question compared to that of its other movements;
- preservation of the economic viability of the shipper or the carrier;
- the quality of service offered;
- the effect of the shipper's shipping practices on the carrier's operations;
- national or international market conditions for the goods in question.

The arbitrator is required to make a decision within 90 days of the initial submission unless the parties otherwise agree. The arbitrator may select either the shipper's or the carrier's offer, not land somewhere in between. This requirement is designed as an incentive to bring the parties' final offers as close as possible at the outset of the arbitration.

Unless the parties otherwise agree, the arbitrator's decision will be effective for a period determined appropriate by the arbitrator of up to one year in duration.

The *Act* requires a carrier to publish the rates or conditions selected by the arbitration unless they relate to a confidential contract.

Agency Investigations

The Agency may elect, in lieu of an arbitration, to conduct a formal "Public Interest Investigation."

An Agency investigation is intended to deal with issues which go beyond the interests of particular shippers and carriers. As was the case under the previous *National Transportation Act*, any person or organization may apply to the

Agency for leave from any act, rate, charge or omission by a carrier which may prejudicially affect the public interest. A shipper cannot request both arbitration and agency investigation.

The Agency may conduct the investigation as it deems appropriate and is not obliged to conduct a formal hearing into the matter involving the parties which complained or the carrier. The Agency must, however, reach a decision on the matter within 120 days of receipt of the complaint. The Agency has the power to order the prejudicial feature complained of to be removed and may order such reparations as in the circumstances it may consider proper.

Conclusion

The mediation, arbitration and public interest investigation provisions of the new *National Transportation Act* provide a prospective remedy for shippers. Although they are not expressly designed to remedy past problems, the scope given to the arbitrator and the Agency in designing a remedy is wide and may well, in appropriate circumstances, enable the arbitrator or the Agency to provide future redress against past problems.

Mediation and arbitration shift the balance of bargaining power in the direction of shippers. They provide a potentially valuable instrument in the negotiation of transportation rates and services for which they are available.

Specific Rail Transport Measures

Expanded Interswitching Rights

Interswitching rights for shippers are aimed at providing captive shippers with access to competing railways serving their urban communities. In order to take into account urban expansion, mandatory interswitching rates will now apply for rail movements from origin or destination to connections with other carriers within a radius of up to 30 km (formerly four miles under the previous legislation) from the point of interchange.

The *Act* requires that a local railway can charge only an Agency-approved rate for moving traffic to a competitive connection within the new interswitching radius. Thus shippers are given greater access on reasonable terms to competing line haul carriers.

Agency-approved interswitching rates are required to reflect the work performed in interswitching activities. It is likely that different rates will apply for movements within different distance zones, and allowances will be made for multi-car movements in line with the relevant efficiency of such movements against single car moves. Upon application, the Agency may also order connections to be adapted as needed for interswitching purposes. Interswitching rates are required to cover carrier costs and are to be adjusted in line with annual carrier cost increases.

Competitive Line Rates (CLR's)

Competitive line rates are designed to benefit shippers not close enough to an exchange point to benefit from interswitching rights. In such cases, shippers will be able to apply to the Agency to set a competitive line rate to the interchange point if they can arrange a deal with a second carrier at that point. A CLR normally applies from the point of captivity from the origin or destination to the nearest point of interchange with the competing carrier. Only one CLR may apply for a given movement.

Where the Agency must establish the CLR, it will likely calculate the rate level by adding a regulated integrated interswitching rate and align a haul component based on rates for competitive traffic applied from the interswitching limit to the competitive connection. It is expected that the line haul carrier will be responsible for car supply and other common carrier obligations and also will be expected to share in interchange maintenance costs.

Confidential Contracts

For the first time, confidential contracts between shippers and rail carriers in Canada are to be permitted. This will encourage private rate negotiations between railroads and shippers and will permit carriers to provide larger discounts to higher volume shippers in some cases. However, it must be kept in mind that the *Act* still requires all railway rates to be compensatory (i.e. rates must exceed the variable cost of the movement as defined by the *Act*).

Repeal of Section 279

A further measure to improve shipper negotiating freedom and bargaining power is the repeal of section 279 of the *Railway Act* which had permitted and, in fact, had encouraged railways to establish rates collectively. Section 279 had the effect of essentially eliminating price competition between Canadian railways.

The repeal of section 279 means that railways will be subject to the general prohibition of the federal *Competition Act* against agreements to unduly lessen competition. As a result, it is expected that Canadian railways will, in the future, avoid joint rate setting.

The combined effect of allowing confidential contracts and disallowing railway collective rate-making will also shift bargaining power from railways to shippers. No longer will railways be able to argue against a rate change on the grounds that it has been agreed to among railways or that other shippers would complain when it was included in the public tariff.

J.F.B.