Canadian Law

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U.S. Legal Developments*

A. Trade Disputes

The most prominent trade disputes in 1996 between Canada and the United States involved "cultural trade" issues, involving split-run magazines, country music television, direct-to-home satellite television, book distribution, and blank audio tapes. While Canada sees in U.S. trade policy a refusal to admit that culture deserves to be treated uniquely and is not simply another fungible commodity, the United States sees Canada as engaged in thinly disguised attempts to protect Canadian businesses rather than culture.[1]

1. *Split-Run Magazines*

On December 15, 1995, an eighty percent excise tax on advertising in split-run magazines came into effect in Canada. This tax was aimed at the three-year-old Canadian edition of *Sports Illustrated* and similar U.S.-origin split-run magazines—*i.e.*, magazines that publish separate editions with some editorial material designed for Canadian audiences and with Canada-specific advertising. The legislation exempts Canadian-origin split-run magazines from the tax. The Canadian argument for the legislation is that U.S. publications take Canadian advertising dollars away from Canadian publications while not providing significant Canadian editorial content.

In March 1996, the United States announced that it would invoke WTO dispute settlement procedures to challenge discriminatory practices by Canada that unfairly protect Canada's

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1. *See, generally, A Symposium on Trade and Culture*, ABA Sec. Pub. Can. L. Newsl., at 47, containing: Ronald G. Atkey and R. Alan Young, *Canadian Cultural Policy: Guard Posts Along the "Undefended Border"*; John A. Ragosta, John R. Magnus, and Kimberly L. Shaw, *Having Your Cake and Eating It Too: Are There Limits on Cultural Protectionism?*; and James P. McIlroy, *Canada's Proposed Private Copying Levy on Blank Audio Recording Media: The Case of the Copyright Tortoise Attempting to Keep Pace with the Technological Hare.*

domestic magazine industry.[2] The United States targeted not only the specific excise tax aimed at *Sports Illustrated*, but also other more established Canadian laws and regulations, including: Tariff Code 9958, which since 1965 has banned the importation of split-run magazines into Canada;[3] subsection 19(1) of the Income Tax Act, which disallows an income tax deduction to Canadians who advertise in foreign-owned magazines published in Canada, whether split-run or not;[4] and preferential postage rates for Canadian-owned magazines.[5] Initial consultations took place in Ottawa in April and in Washington in May, and, because no settlement was reached, the United States in June requested that a WTO Panel be established. A final report from that Panel is expected in early 1997.

2. *Country Music Television*

In 1994, after U.S.-owned Country Music Television (CMT) had been on the air in Canada for a decade, the Canadian Radio-Television and Telecommunications Commission (CRTC) decided to block Canadian distribution of CMT in favor of a similar Canadian-owned channel. The U.S. Trade Representative (USTR) initiated a section 301 investigation and, in March 1996, determined that the Canadian access policies leading to CMT's eviction are "unreasonable" and "discriminatory" and "burden or restrict" U.S. commerce. The U.S. Government's threatened retaliation led to a commercial settlement between CMT and New Country Network, the Canadian channel. The agreement essentially merges CMT and New Country Network for purposes of the Canadian programming feed. This entity has sufficient Canadian ownership to qualify as "Canadian" and thereby receive favorable regulatory treatment.

3. *Direct-to-Home Satellite TV*

On December 20, 1995, the CRTC gave "direct-to-home" (DTH) satellite television licenses to two companies—one U.S.-owned (Power DirecTV), the other Canadian-owned (Express-Vu)—but attached a number of conditions, among them that all DTH licensees must purchase feature films solely from Canadian distributors and must guarantee these distributors one-third of the revenues from showing such films. The U.S. Government objected on the grounds

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2. Canada argues that this tax does not violate the national treatment provisions of article III of the General Agreement on Tariffs and Trade 1994 because it does not discriminate with regard to whether a split-run edition is of foreign or domestic origin. The United States contends that the mechanics and method of implementing the legislation reveal Canada's intent to "afford protection to domestic production" of domestic magazines, in violation of Article III:1.

3. The United States argues that Tariff Code 9958 is on its face a violation of GATT article XI, which forbids restrictions other than duties, taxes, or other charges on products imported from another signatory. Canada contends that the Code has not in fact led to large-scale seizure of publications but has simply been used to guide publishers deciding whether to import magazines.

4. Canada maintains that there is no violation of either article III:1 or article III:2 because the deduction permitted by subsection 19(1) of the Income Tax Act is applicable to advertising expenses of a third party, not the publisher of the magazine, and because advertising is a "service" rather than a "good." The U.S. position is that the deduction is prohibited by article III:1 as an internal tax or law that affects the use of Canadian and foreign periodicals in a way that affords protection to a Canadian-owned and controlled publication, and that it indirectly (through advertisers) subjects foreign-produced periodicals to tax in excess of the tax Canadian-produced periodicals are subject to, in violation of article III:2.

5. Canada has attempted to comply with article III:4 by abolishing preferential postage rates and instead giving Canadian-owned publications preferential subsidies as a result of a private agreement between Canada Post, a Crown corporation, and Heritage Canada, a Department of the Canadian government. Canada Post will receive offsetting subsidies to the benefit of Canadian publishers in the order of $55 million in 1996, with the result that the postage per copy for a Canadian-owned magazine (8.6¢ per copy) will have been substantially lower than that payable by a foreign-owned magazine (43.6¢ per copy).

that these requirements give Canadian companies monopoly distribution rights and restrict competition. In April 1996, the USTR placed Canada on a special "watch list" of countries suspected of failure to protect intellectual property rights, specifically mentioning the DTH decisions and warning that the United States is considering action under NAFTA and the WTO.

4. *Softwood Lumber Dispute*

The softwood lumber dispute, traditionally the most prominent trade dispute between Canada and the United States, was settled at least temporarily in the spring of 1996. The bilateral settlement followed a lengthy battle over alleged provincial subsidies to the lumber industry. Canada won the last softwood lumber litigation in 1994, as a result of a binational panel decision under the Canada-U.S. Free Trade Agreement.[6] However, subsequent changes in U.S. law threatened another long legal battle, particularly since Canadian imports were reaching record levels. The two governments entered into talks in 1995 to try to avert further litigation.

The Softwood Lumber Agreement was signed on May 29, 1996, and will remain in force for a five-year period from April 1, 1996.[7] The Agreement committed the United States not to initiate trade actions involving softwood lumber against Canada, in exchange for a Canadian commitment to reduce its lumber exports to the United States. Canada agreed that softwood lumber exports from British Columbia, Quebec, Ontario, and Alberta would be subject to a fee when exports exceeded a specified level; revenues from the fee will be remitted to the four provinces. In connection with the Agreement, Canada implemented a nationwide system to track export volumes. The USTR and other U.S. agencies are monitoring Canada's implementation of the Agreement.[8]

B. Telecommunications

In 1996, the Federal Communications Commission dismissed two applications to provide Direct Broadcast Satellite (DBS) service to the United States from Canadian orbital locations.[9] DBS service is provided from geostationary satellites transmitting broadcast signals direct to small consumer dishes. The International Telecommunication Union has allotted to each country specific orbital locations for use by such satellites. Two of the six slots allotted to Canada are capable of service to the entire continental United States.

In March 1996, two U.S. companies filed applications to provide DBS service to the United States from satellites using these two slots. The applicants were Western Tele-Communications (TCI) and TelQuest Ventures. TCI would provide both satellites; Telesat Canada, the Canadian satellite operator, would pursue licensing for the satellites in Canada and operate them. Several

6. For a review of these developments, see W. George Grandison & Peter Lichtenbaum, *Trade Update: Softwood Lumber Case Ends*, ABA Sec. Pub. Can. L. Newsl., Winter 1995, at 25; W. George Grandison & Peter Lichtenbaum, *U.S.-Canada Trade Relations: Cooperation or Conflict?*, ABA Sec. Pub. Con. L. Newsl., Spring 1994, at 11.

7. See Softwood Lumber Agreement Between the Government of the United States of America and the Government of Canada, May 29, 1996, U.S.-Can., 35 I.L.M. 1197 (1996).

8. See Office of the United States Trade Representative, Notice of Agreement; Monitoring and Enforcement Pursuant to Sections 301 and 306: Canadian Exports of Softwood Lumber, 61 Fed. Reg. 28,626 (1996).

9. Other significant U.S. developments affecting Canada during 1996 include the FCC's proposed use of an "Effective Competitive Opportunities" standard in considering applications for an increasing array of telecommunications services, and the 1996 Telecommunications Act's repeal of prior restrictions on alien officers and directors for certain U.S. telecommunications companies.

U.S. satellite DBS operators requested denial of the applications on the ground that Canada did not afford equivalent competitive opportunities to U.S. providers operating from U.S. orbital locations. These parties pointed to constraints on the distribution of programming from U.S.-licensed satellites as well as content restrictions discriminating against U.S. programmers. The U.S. Executive Branch supported these objections. Two U.S. operators, EchoStar and USSB, alternatively requested dismissal of the applications as premature.

The Commission's International Bureau acknowledged the concerns with reciprocity. However, in July 1996, the Bureau dismissed the applications on the more narrow grounds suggested by EchoStar and USSB.[10] The FCC considers applications to use foreign-licensed satellites only after the foreign satellite operator has received a license from the foreign country. Telesat Canada had not received a license to deploy satellites at either of these slots. The Bureau therefore dismissed the applications without prejudice to refiling after completion of the Canadian licensing process. On reconsideration, the Bureau reaffirmed its conclusion: the applicants did not provide evidence of an existing Canadian license—only vague statements of the Canadian authorities' support "in principle" for Telesat's plans.[11] TCI's and TelQuest's applications for review are now pending.

The *TelQuest* decision clearly signaled U.S. concern with openness of Canada to U.S. DBS companies. At the same time, a U.S.-Canada agreement along the lines of the recently executed U.S.-Mexico DBS protocol does not appear in the immediate horizon. Without such an agreement, the issue of openness is likely to be litigated on the merits in the FCC.[12]

C. Antitrust—Information Sharing and Joint Sovereign Investigations

In 1996, there was a steady development in the area of information sharing between United States and Canadian federal antitrust and consumer protection officials. Under the auspices of the Canada-United States Mutual Legal Assistance Treaty, which allows the criminal antitrust authorities in both countries to exchange information and work together, U.S. and Canadian authorities continued their joint investigation of price fixing in the thermal fax paper market. This investigation, which has already resulted in several individual and corporate guilty pleas and fines totaling over $10 million in recent years, generated three additional indictments in 1996. In April, the U.S. Department of Justice indicted three Japanese fax paper company executives, for alleged violations of § 1 of the Sherman Act.[13]

The United States and Canada also began to formalize their information sharing arrangements in 1996, with the establishment of a joint United States-Canadian Task Force on Cross-Border Deceptive Marketing Practices. This Task Force was established to implement one aspect of the United States-Canadian Agreement on Competition and Deceptive Marketing Practices,

10. Telquest Ventures, L.L.C.; Western Telecommunications, Inc., 11 FCC Rcd. 8151 (rel. July 15, 1996).

11. Telequest; TCI, DA 96-1784, 1996 FCC LEXIS 6017 (rel. Oct. 29, 1996).

12. The TCI/TelQuest proceeding occurred in the context of the FCC's broader consideration during 1996 of an "Effective Competitive Opportunities" standard for applications to serve the United States from any foreign satellite and for any type of satellite service. Amendment of the Commission's Regulatory Policies to Allow Non-U.S. Licensed Space Stations to Provide Domestic and International Satellite Service in the United States, 61 Fed. Reg. 32,399 (1996). Some type of ECO standard, however, is almost certain to affect Canadian satellite ventures. The FCC may have occasion to apply such a standard either in the context of DBS service from Canadian slots, or to satellites in new high frequencies such as the "Ka-band."

13. United States v. Kurachi, Crim. No. 96-CR-40012-NMG (D. Mass. April 24, 1996); United States v. Tano, Crim. No. 96-CR-40011-NMG (D. Mass. Apr. 24, 1996).

signed in August of 1995.[14] The Task Force creates a more formal framework for cooperation and coordination with respect to enforcement of laws prohibiting deceptive marketing practices. The functions of the Task Force will be focused on stopping those perpetrators of fraud who attempt to evade law enforcement by establishing a base of operations in one country and targeting citizens of the other.

More informal cooperative institutions also began to develop between U.S. and Canadian officials in 1996. Meetings between the Federal Trade Commission (FTC) and the Research, Marketing, Practices Branch, Competition Bureau (RMPB) staff in September and October 1996 resulted in the establishment of a "staff level" task force on information sharing between Canadian and U.S. federal officials. This task force was established to facilitate increased communications between the two consumer protection agencies.

D. Environmental

1. *International Joint Commission*

In July, the International Joint Commission (IJC) released its biennial report dealing with water quality in the Great Lakes. The IJC is a Canada-U.S. body established under the 1909 Boundary Waters Treaty. The IJC report warned against legislative and regulatory proposals that would weaken pollution control, as well as cutbacks on funding for research.[15] In a related development, Environment Canada and the U.S. Environmental Protection Agency have agreed on a list of priority toxic chemicals to be controlled in the Great Lakes, with the final strategy paper expected to be signed before the end of 1996.[16]

In November, the IJC also concluded a five-year review of the 1991 Canada-United States Air Quality Agreement, whose primary objective was to reduce acid rain. The IJC found that the two countries have generally met their obligations with respect to acid rain controls, but that not enough control has been exerted over transboundary air pollution to provide full environmental protection.[17] The IJC review was included in the 1996 Progress Report on the agreement, released by Environment Canada and the U.S. Environmental Protection Agency.[18]

2. *Freeze on Foreign Assets*

In August 1996, the U.S. Justice Department obtained an order in the Supreme Court of British Columbia, freezing $152 million in assets of international mining entrepreneur Robert M. Friedland.[19] The Justice Department sought the freeze in order to force Mr. Friedland to

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14. Agreement Between the Government of the United States of America and the Government of Canada Regarding the Application of Their Competition and Deceptive Marketing Practices Laws, Aug. 1, 1995, U.S.-Can., 69 Antitrust & Trade Reg. Rep. (BNA) No. 1725, at 177 (Aug. 10, 1995).

15. International Joint Commission, Eighth Biennial Report on Great Lakes Water Quality (1996). Copies of the report may be obtained from the International Joint Commission, 1250 23rd Street, N.W., Suite 100, Washington, D.C. 20440.

16. The draft strategy paper may be obtained through the EPA Great Lakes National Program Office Internet homepage. EPA Great Lakes National Program Office (last modified Feb. 12, 1997) <http://www.epa.gov/glnpo>.

17. The Report appears to have been delayed until after the November election because of U.S. reluctance to adopt politically difficult controls on coal-fired electric generating plants in the U.S. Midwest. See Resignation of Canadian ICJ Co-Chair Said Due to Midwest Plant Emission Report, 19 Int'l Env't Rep. (BNA) No. 19, at 818 (Sept. 18, 1996). The Canadian Co-Chair of the IJC reportedly resigned in protest. *Id.* at 818.

18. The 1996 Canada-United States Air Quality Agreement Progress Report is available from Environment Canada's Inquiry Centre at (819) 997-2800.

19. *See* U.S. Department of Justice and U.S. Environmental Protection Agency Press Release, Justice Department Freezes $152 Million in Stock; Friedland Sued to Pay for Cleanup of Summitville Mine (August 23, 1996).

pay for the clean-up of metal and cyanide pollution at a gold mine in Summitville, Colorado, that a Friedland company abandoned in 1992. The action reportedly is the first time the Justice Department has frozen foreign assets in connection with an environmental enforcement action.

E. Foreign Sovereign Immunity Dispute

On August 9, 1996, the U.S. Circuit Court of Appeals for the Ninth Circuit ruled in *Holden v. Canadian Consulate*[20] that the Canadian Consulate in San Francisco was not entitled to sovereign immunity under the Foreign Sovereign Immunities Act, 28 U.S.C. § 1602 (1994) (FSIA), in a wrongful termination action brought by a former "commercial officer" in the Consulate.[21] The court held that employment of diplomatic, civil service, or military personnel is governmental and thus protected by the FSIA, but that the employment of all other personnel is not.[22]

The court recognized that the FSIA is the "sole basis" for obtaining jurisdiction over a foreign state and its agencies and instrumentalities, and that, under the FSIA, foreign states are presumed to be immune from the jurisdiction of U.S. courts unless one of the FSIA's exceptions applies.[23] As the court noted, however, under the "commercial activities" exception to the FSIA, a foreign state is not immune if the plaintiff's cause of action is based upon a commercial activity carried on by the foreign state.[24] The FSIA further defines "commercial activity" as "a regular course of commercial conduct or a particular commercial transaction or act."[25]

Because the court found that the application of the FSIA's definition of "commercial activity" in this employment context was not clear, it turned to the FSIA's legislative history, which indicates that "Activities such as a government's . . . employment or engagement of laborers, clerical staff or public relations or marketing agents . . . would be among those included within the definition [of commercial activity]."[26]

The Ninth Circuit defined the "commercial activity" exception to the FSIA by reference to the *nature* rather than the *purpose* of the plaintiff's employment activities, with particular focus on whether the plaintiff had any "role in the creation of government policy or its administration."[27] The court found that plaintiff Holden had no attributes of civil service and

20. Holden v. Canadian Consulate, 92 F.3d 918 (9th Cir. 1996), *petition for cert. filed*, 65 U.S.L.W. 3381 (U.S. Nov. 7, 1996) (No. 96-746).

21. *Holden*, 92 F.3d at 919. The complainant, who had been a Commercial Officer in the Trade and Investment Section of the Canadian Consulate, sued the Consulate after it closed its San Francisco office in 1993 and opened a small satellite office staffed with one commercial officer. *Id.* at 920. The complainant lost the competition for that job and subsequently alleged wrongful termination and sex and age discrimination. *Id.*

22. *Id.* at 922.

23. *Id.* at 920 (quoting Argentine Republic v. Amerada Hess Shipping Corp., 488 U.S. 428, 434 (1989) and citing 28 U.S.C. § 1604).

24. *Holden*, 92 F.3d at 920 (citing 28 U.S.C. § 1605(a)(2)).

25. 28 U.S.C. § 1603(d). The Supreme Court has explained that a foreign sovereign engages in commercial activity when it exercises "only those powers that can also be exercised by private citizens," as opposed to those "powers peculiar to sovereigns." Saudi Arabia v. Nelson, 507 U.S. 349, 360 (1993); Republic of Argentina v. Weltover, Inc., 504 U.S. 607, 614 (1992). The "commercial activities" exception has traditionally been most important in cases of suit for breach of commercial contracts, where the foreign sovereign is alleged to have acted as any other commercial actor in making the agreement in question.

26. *Holden*, 92 F.3d at 921 (quoting H.R. Rep. No. 94-1487, 94th Cong., 2d Sess. 16, *reprinted in* 1976 U.S.C.C.A.N. 6604, 6615).

27. *Holden*, 92 F.3d at 921. This interpretation is consistent with the Seventh Circuit's decision in Segni v. Commercial Office of Spain, 835 F.2d 160, 165 (7th Cir. 1987).

that her employment was in the nature of marketing rather than diplomacy, so that the Consulate's activity was commercial in nature.[28]

Canadian Legal Developments*

A. Intellectual Property

1. *Trademarks*

The most significant decision in the past year respecting trademarks was that of the Federal Court of Appeal in *Smith & Nephew, Inc. v. Glen Oak Inc.*[29] where the Court effectively determined that a Canadian licensee may not use trademark and passing-off law to prevent grey goods that originate, directly or indirectly, from the same licensor from being imported into Canada and sold. In the case of *Remington Rand Corporation et al. v. Philips Electronics N.V.*,[30] the Federal Court of Appeal also held that a design mark or a distinguishing guise that features a pictorial representation of the functional part of a product is not registrable as a trademark since it would be a "patent or industrial design in the guise of a trade-mark."

2. *Copyright*

On the copyright front, the most significant case was the Federal Court, Trial Division decision in *Tele-Direct (Publications) Inc. v. American Business Information, Inc.*[31] The Court held that a Yellow Pages compilation of information did not embody the sufficient "degree of skill, judgment or labour" to support a claim of originality in the compilation. The Court ruled that when assessing substantial similarity for the purposes of determining copyright infringement, the Court would exclude from consideration the parts of the work in which no copyright existed and would consider whether the two works competed with each other. With respect to legislation, Bill C-32, which contains the long-awaited phase 2 proposed amendments to the *Copyright Act*, has been tabled.[32] Proposals include protection of neighboring rights for sound recordings, a private copying levy on blank audio cassettes and tapes, and a distribution right to protect Canadian book distributors.

3. *Patents*

With respect to patents, the most interesting development was the rejection of the "Harvard Mouse" application by the Canadian Patent Office. The Patent Office refused to broadly interpret the terms "manufacture" or "composition of matter" to include a nonhuman mammal since the inventors could not fully control the reproducibility of the organism.

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28. *Holden*, 92 F.3d at 921. In doing so, it distinguished Broadbent v. Organization of American States, 628 F.2d 27 (D.C. Cir. 1980), and its progeny, which had held that employment of "internal administrative personnel" is never a "commercial activity" under the FSIA. *Id.* at 33. The Ninth Circuit stated that, even under *Broadbent*, a court would have to determine whether the Consulate had employed the plaintiff "as part of its civil service or diplomatic personnel." *Holden*, 92 F.3d at 921 n.1.

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29. Smith & Nephew, Inc. v. Glen Oak Inc., 198 N.R. 302 (1996) (Fed. C.A.).

30. Remington Rand Corporation et al. v. Philips Electronics N.V., 191 N.R. 204 (1995) (Fed. C.A.).

31. Tele-Direct (Publications) Inc. v. American Business Information, Inc. (1996), 113 F.T.R. 123.

32. *Copyright Act*, R.S.C. Ch. C-42 (1985) (Can.).

B. Securities Law: SEDAR—Electronic Filing for Securities Isuers

Commencing January 1997, Canadian securities issuers will be able to file regulatory documents electronically. SEDAR, the System for Electronic Document Analysis and Retrieval, is similar in concept to the American EDGAR system. The system, when fully implemented, will provide for filing (and searching) of both continuous disclosure and offering documents currently filed in paper format with securities regulators.

SEDAR will offer particular advantages in Canada, since under the Canadian federal constitution, no single central regulator has jurisdiction in securities matters. As a result, a nationally qualified securities offering must presently be filed in each of 12 local jurisdictions individually. SEDAR will give Canadian issuers the advantages of one-step multijurisdictional electronic filing and retrieval. Foreign-incorporated issuers will be exempt from the mandatory SEDAR filing requirements, although they will be permitted to file electronically at their option. Fees (both for use of the system, and the more substantial regulatory fees) will be paid electronically using electronic data interchange protocol (EDI). In the near future, it is expected that SEDAR will also provide users with direct links to the Canadian securities exchanges and news wire services. Such links would enable issuers to use SEDAR to satisfy their timely disclosure obligations by, for example, giving notice of a material change. As mandated reports are replaced by continuously updated information available immediately to investors (through the Internet, for instance), regulators may eventually permit more immediate access to the capital markets, rather than delayed access through the filing and review of prospectuses. The introduction of SEDAR is a preliminary step in the changes being wrought in the Canadian securities market by the widespread availability of new information technology.

C. Environmental Regulatory Reform: Deregulation and Voluntary Initiatives

The environment is the subject of federal and provincial regulation in Canada. Many jurisdictions in Canada have undertaken environmental regulatory reform projects this year. For example, Ontario's Ministry of Environment and Energy (MOEE) began a review of the 80 environmental regulations it administers in the fall of 1995, with the goal of reducing barriers to economic renewal and competitiveness, reducing costs to government and third parties, and improving services to MOEE clients. On July 31, 1996, the MOEE released a discussion paper, *Responsive Environmental Protection* (the REP).[33] The REP outlines the MOEE's proposed reforms to eliminate "red tape."

1. *Proposed Reforms*

Reforms are proposed in most every area of environmental regulation, including air quality, water quality, spills, and waste management. Some of these reforms are relatively minor, such as the consolidation of air regulations and the repeal of obsolete regulations. Some of the more innovative proposals include the creation of Local Airshed Management Units (LAMUs), giving communities the power to manage the air quality within that LAMU using both regulatory and other means (potentially including the use of emission reduction trading and other economic instruments). The MOEE also proposes to eliminate Certificate of Approval requirements for environmentally insignificant activities (such as small ventilation systems) and for activities that could be regulated through "standardized approvals" (also known as permit by rule).

33. To obtain a copy of the REP, contact the Ontario Ministry of Environment and Energy's Public Information Centre at 1-416-325-4000 or 1-800-565-4923.

This project represents a shift away from the "command and control" approach to environmental compliance. The public has been invited to comment on the REP, and the MOEE is currently considering the submissions made by the numerous groups and individuals.

2. *Lender Liability*

Due to the broad scope of potential liabilities in environmental legislation, a number of jurisdictions in Canada are moving towards limiting the environmental liability of lenders in situations where they are not in "management or control" of the property. This change is evidenced by amendments to the federal *Bankruptcy and Insolvency Act* (BIA), as well as by policy changes in Ontario with respect to lender liability.

Proposed amendments to the BIA[34] in Bill C-5 will establish guidelines for lenders and trustees when faced with environmental liability issues. The most noteworthy of the proposed environmental amendments are those that extend the protections afforded to trustees in bankruptcy to trustees under a proposal, interim receivers, and court-appointed monitors under the *Companies' Creditors Arrangement Act.*[35]

The proposed amendments strive to reduce the risks of environmental liability for trustees. For example, the standard of care imposed on trustees is lowered such that a trustee will not incur personal liability for environmental damage unless the damage results from the trustee's gross negligence or wilful misconduct. The proposed amendments also provide steps that a trustee can take to either avoid liability under remedial orders, or to assess the economic viability of complying with remedial orders.

Also designed to protect lenders, Ontario has created a "Global" or "Standard Agreement," which is now being entered into by the MOEE and lenders. Through this agreement, the MOEE will allow a lender to enter on the property for the proposes of carrying out an inspection, provided that the lender is prepared to fund proper security on the property during the inspection period. Furthermore the lender will not become a person responsible under Ontario's *Environmental Protection Act*[36] by reason of taking steps to preserve or protect the value of the property, including steps to maintain services, to insure the property, and to collect rents.

D. Broadcasting

1. *Foreign Ownership*

In a long awaited move, the federal government created a new foreign ownership regime for broadcasters, one that mirrored that for telecommunication carriers. The *Direction to the CRTC (Ineligibility of Non-Canadians),*[37] provides that foreigners can own a maximum of 20 percent directly and an additional 33$^1/_3$ percent indirectly of Canadian broadcast licensees' voting shares. The regime is almost, but not quite, identical to that of the *Telecommunications Act.* Key differences include a requirement that the CEO of a broadcast licensee, but not of a Canadian carrier, must be Canadian and that a broadcast licensee must be controlled in fact by Canadians. In the case of Canadian carriers, they must simply prove that they are not

34. Bill C-5, first reading March 4, 1996, second reading May 27, 1996, third reading October 23, 1996, second reading in the Senate and referred to the Senate Banking, Trade and Commerce Committee October 31, 1996.

35. See s.124 Bill C-5, pp. 81-90. We will refer to trustees in bankruptcy, trustees under a proposal, interim receivers and receivers appointed under the BIA, and monitors appointed under the CCAA as "trustees."

36. R.S.O. C.E.19 (1990) (Can.).

37. *Direction to the CRTC (Ineligibility of Non-Canadians),* P.C. 1996-479, April 11, 1996.

controlled in fact by foreigners. Under both regimes there are no restrictions on the amount of nonvoting shares foreigners may hold.

2. *Federal Government and the CRTC*

The year began with an announcement by the Canadian Heritage Minister, the Minister charged with broadcasting affairs, that a review of the Canadian Radio-Television Telecommunications Commission (CRTC), the federal body charged with regulating the communications sector, was being undertaken.[38] On June 27, 1996, the government announced the appointment of Françoise Bertrand as the new chair of the CRTC.[39] After having its 1995 pay audio decision sent back for reconsideration by the federal government,[40] the CRTC withstood its ground and reconfirmed its initial decision.[41] The government approved the decision the second time around on the basis of a promise of additional Canadian programming commitments from one of the licensees.

3. *Television*

The CRTC surprised many observers by licensing 23 new pay and specialty services, with a sink or swim approach.[42] In another unexpected decision, the CRTC gave a new and coveted Alberta conventional TV licence to a regional broadcaster instead of granting Canwest Global Communications the missing link in its aspirations to become the third national English language network.[43] Finally, the CRTC created a new V-chip policy requiring all Canadian television stations and cable systems to encrypt programs with V-chip ratings by next year.[44]

4. *Cable*

Canada has witnessed a number of moves in 1996 that result from the CRTC's 1995 decision to eliminate cable's traditional monopoly and instead create competition within and against the cable industry. First, the CRTC proposed new broadcast distribution undertaking regulations designed to be as technologically neutral as possible. These new regulations will replace the existing *Cable Television Regulations, 1986*.[45] Second, Skycable, the Manitoba Microwave Multipoint Distribution System (MMDS) licensee, began operation offering an alternative licensed service, for the first time, to Manitoba cable subscribers.[46] Third, the CRTC granted Pacific Place Cable Ltd. the first competitive cable licence to serve a part of the City of Vancouver in competition with the incumbent Rogers Cablesystems.[47] Fourth, the government announced that foreign-owned BC TEL and Quebec-Telephone would be exempt from the broadcasting

38. Philip DeMont, *CRTC Welcomes Review*, FIN. POST, Feb. 29, 1996, at 8.
39. Office of the Prime Minister News Release, "Prime Minister Announces CRTC Appointment," June 27, 1996.
40. Canadian Heritage News Release, "Government Responds to Order in Council," P.C. 1996-356.
41. Decision CRTC 96-479 confirming Decisions CRTC 95-11, 95-12, 95-13, and 95-14. "Appeals of CRTC Broadcasting Decisions," Ottawa, March 19, 1996.
42. Public Notice CRTC 1996-120 and accompanying Decisions CRTC 96-595 through to 96-617.
43. Decision CRTC 96-731.
44. Public Notice CRTC 1996-36 revised by Public Notice CRTC 1996-134.
45. Public Notice CRTC 96-69.
46. Skycable was licensed by Decision CRTC 95-910 and confirmed by Order in Council, P.C. 1996-356, March 19, 1996.
47. Decision CRTC 96-224.

direction so that they could apply for broadcast distribution undertaking licences to compete with cable companies in their respective operating territories.[48] Finally, the government introduced legislation to remove Bell Canada's statutory prohibition preventing it from obtaining a broadcast undertaking licence.[49] In another move, the CRTC created new access rules for Canadian pay and specialty services that give existing and some new licensees priority over exempt services such as shopping and real estate channels.[50]

5. *Satellite*

Nineteen ninety-six was a difficult year for Canadian satellite policy. The year began with an announcement that one[51] of the two 1995 Direct Broadcast Service (DBS) licensees[52] was not going to air because of onerous CRTC conditions. As the other licensee continued to delay its launch due to technological problems with its reception equipment, Telesat Canada, the country's sole satellite provider, experienced a partial failure on one of its two broadcast satellites. As a result, capacity for a Canadian DBS provider became an issue. Telesat's proposed solution to this problem was to launch four new DBS satellites into Canadian satellite slots and then sell the majority of transponders on these satellites to American DBS providers (TCI and Telquest). This solution originally received the support of the Canadian Government, which expressed its willingness to give Telesat two of Canada's prime orbital slots providing that Telesat and its American partners received American regulatory approval. However, the plan fell apart after the U.S. Federal Communications Commission (FCC) twice rejected licence applications by TCI and Telquest. In response, the Canadian Government called for "made in Canada" solutions to Canada's satellite capacity shortage.[53] Meanwhile, the CRTC revoked an earlier decision not to licence any new DTH providers[54] and gave a new licence to Star Choice.[55] It also heard or agreed to hear applications from Homestar[56] and Alphastar.[57] Indifferent to (or as a result of) all of these developments, estimates of up to 200,000 Canadians have purchased U.S. satellite dishes and received services with false U.S. addresses. In response to this growing phenomenon, Industry Canada has released a pamphlet informing Canadians that they are on "shaky ground: financially, technologically and legally" if they subscribe to the grey market.[58]

48. Canadian Heritage News Release, "Competition and Culture Set to Gain in Convergence Policy Framework," August 9, 1996, with Information background entitled "Conditions Governing Broadcasting Distribution Undertakings of BC TEL and Québec-Téléphone."

49. Industry Canada News Release, "Government Moves to Amend Bell Canada Act," September 19, 1996. Bill C-57, *An Act to Amend the Bell Canada Act*, First Reading, September 19, 1996.

50. Public Notice CRTC 1996-60.

51. Power DirecTv.

52. ExpressVu.

53. Industry Canada, Call for Applications to Develop and Operate Direct Broadcast Satellite (DBS) Facilities in the 91° West Longitude Orbital Position to Serve Canadian Broadcasting Needs, November 17, 1996, *Radiocommunication Act*, Notice No. DGTP-009-006.

54. Notice of Public Hearing CRTC 1996-6 overturning comments in Public Notice CRTC 1995-217.

55. Star Choice Television Network Incorporated approved by Decision CRTC 95-529.

56. Notice of Public Hearing CRTC 1996-9.

57. Notice of Public Hearing CRTC 1996-12 and 1996-12-1.

58. INDUSTRY CANADA, DIRECT-TO-HOME SATELLITE TV, FACTS YOU SHOULD KNOW, November 1996.

E. Foreign Extraterritorial Measures Act and Blocking Order

In anticipation of the enactment of the *Cuban Liberty and Democratic Solidarity (LIBERTAD) Act* of 1996, the Canadian Government expanded the 1992 Blocking Order[59] issued pursuant to the *Foreign Extraterritorial Measures Act* (FEMA) and on September 16, 1996, tabled in the House of Commons amending legislation expanding the scope and penalties of the FEMA. Both the ABO and the expanded provisions of FEMA are of significance. The ABO went into effect on January 15, 1996, and the FEMA Amendments became effective on January 1, 1997.

1. *Prohibited Canadian Activity*

The ABO requires any person receiving a "directive, instruction, intimation of policy or other communication" (a "Communication") relating to an "extra-territorial measure of the United States" respecting trade or commerce between Canada and Cuba to give notice in writing thereof to the Attorney General of Canada.[60] It prohibits Canadian corporations, their officers and directors, and managers in positions of authority to comply with any "extraterritorial measure of the United States" and with any "Communications" received from persons in a position to direct or influence the policies of such corporations.[61]

2. *"Extraterritorial Measure"*

The 1992 Blocking Order limited "an extraterritorial measure" to the *Cuban Democracy Act*. The ABO's application is broader. It extends to the measures set out in Section 1706(a)(I) of the *National Defense Authorization Act* for Fiscal Year 1993 (*i.e.*, the *Cuban Democracy Act*), as amended from time to time or replaced, and to:

> any law, statute, regulation, by-law, ordinance, order, judgment, ruling, resolution, denial of authorization, directive, guidelines or other enactment, instrument, decision or communication *having a purpose similar to that of the Cuban Assets Control Regulations* . . . whether enacted, passed, made, done, voted, established, issued, rendered, given, taken or executed by any legislative, executive, administrative, regulatory, judicial or quasi-judicial authority or body of the United States, the District of Columbia or any of the member states or territories or possessions of the United States, or any municipality or other authority in the United States or its territories or possessions, . . .[62]

to the extent that such measures "operate[s] or [is] likely to operate so as to prevent, impede or reduce trade or commerce between Canada and Cuba."[63] Thus, not only does the *Cuban Liberty Act* fall within the ambit of the ABO, but also any existing U.S. legislation (*e.g.*, the *Trading with the Enemy Act*) and any future legislation having a similar trade restricting effect (or intent) on trade or commerce between Canada and Cuba.

59. SOR/96-84, 1996 *Canada Gazette*, Part II, Volume 130, No. 2. [hereinafter ABO]. The first order was issued on October 9, 1992, and is referred to as the "1992 Blocking Order"; SOR/92-584, 1992 *Canada Gazette*, Part II, Volume 26. Both Orders were enacted pursuant to the *Foreign Extraterritorial Measures*, R.S.C., ch. F-29 (1990) (Can.) [hereinafter FEMA]. The amendments were included in an Act to Amend the Foreign Extraterritorial Measures Act, 1996 S.C., ch. 28 (Can.) [hereinafter FEMA Amendments].

60. ABO, § 3.

61. *Id.*, § 5(1).

62. *Id.*, § 2.

63. *Id.*

3. *Notification Required*

Every corporation registered or incorporated under Canadian law that carries on business in whole or in part in Canada, and every director and officer of such corporation must forthwith give notice to the Attorney General of Canada of any directive, instruction, intimation of policy, or other communication relating to an extraterritorial measure of the United States if received from a person who is in a position to direct or influence the policies of the Canadian corporation in Canada.[64] Notice may also be given by an agent (*e.g.*, legal counsel).[65]

4. *Compliance Prohibited*

Compliance by the Canadian corporation (including senior management) with any direction, intimation of policy, and the like is prohibited. Further, even if no communication is received, compliance by a Canadian corporation (including senior management) on its own initiative with an "extraterritorial measure" (*i.e.*, *Cuban Democracy Act, Cuban Liberty Act*) is prohibited.[66]

5. *Personal Liability for Senior Management, Officers, and Directors*

The ABO imposes personal liability on officers, directors, and senior management for breaches of the Blocking Order and the Helms-Burton legislation and exposes Canadian business to the potential of private lawsuits (with possible treble damages) and denial of entry to the United States for senior management and controlling shareholders and their immediate families.

Previously in Canada, liability and fines could only be imposed on the corporate entity. Now this potential liability extends to those involved in the management, control, and operation of the Canadian business. Directors, officers, and senior management are also exposed to possible prosecution if the Attorney General is not notified of any "Communication" received or if a "Communication" is given effect to.

6. *Penalties*

A contravention of the ABO or FEMA will render a person liable to conviction of an indictable offense and a fine up to Can$1.5 million in the case of a corporation and Can$150,000 in the case of an individual, or to imprisonment for a term not exceeding five years, or both; or to conviction of an offense punishable on summary conviction and a fine up to Can$150,000 in the case of a corporation and up to Can$15,000 in the case of an individual, or to imprisonment for a term not exceeding two years, or both.[67]

7. *Amendments to FEMA*

The amendments to FEMA, in addition to increasing the penalties applicable for a breach of the blocking order, have also significantly expanded the scope of the enabling legislation pursuant to which the blocking orders were initially enacted. The FEMA Amendments extend

64. *Id.*, § 3(1). The notification to the Attorney General of Canada must include the name(s) and capacity of the person(s) giving notice or on whose behalf the notice is given; the full text of the communication, or if the communication is not in writing, the purport of the communication; the date(s) when the communication was received; and the period during which the communication was intended to be in effect. *Id.*, § 4.

65. *Id.*, § 3(2).

66. *Id.*, § 5. The ABO provides that the prohibition applies in respect of any "act or omission constituting compliance, . . . whether or not compliance with that measure or communication is the only purpose of the act or omission." *Id.*, § 6.

67. FEMA, § 7.

the previous provisions that enable the clawbacks with respect to treble damage awards issued in antitrust judgments, to awards of foreign tribunals instituted under a foreign trade law identified in the Schedule to the Act. The Helms-Burton legislation is so identified.[68]

Where the Attorney General of Canada determines that the recognition or enforcement of a foreign judgment pursuant to legislation identified in the Schedule has or is likely to adversely affect significant Canadian interests, he or she may, by order, declare that the judgment will not be recognized or enforced in any manner in Canada and, further, that in the event of a judgment for a specified amount of money, declare that for the purposes of the recognition or enforcement of the judgment in Canada, the amount of the judgment shall be reduced to an amount specified in the Order.[69] Consequently, the clawback provisions are not limited solely to treble damage awards, such as the treble damage provisions of Helms-Burton, but to any award or judgment rendered as a consequence of the Helms-Burton legislation (or any other legislation subsequently scheduled in the Act). Even where no final foreign judgment has been awarded, a person may, with the consent of the Attorney General of Canada, institute an action and recover from the person all expenses incurred by the party defending those proceedings and instituting proceedings under the Act, including costs on a solicitor and client basis as well as judicial and extra-judicial costs.[70]

In addition to any other means of enforcing a judgment, a court may order the seizure and sale of any property in which the person against whom the judgment is rendered has an interest or against any person who controls in law or in fact the person that has a direct or indirect beneficial interest. Consequently, a subsidiary or affiliate of a corporate entity that initiated a Helms-Burton suit could be the subject of a clawback action in Canada. The property that may be seized and sold includes the shares of any corporation incorporated under Canadian law, irrespective of where the share certificates are located.[71]

F. Developments in the Field of Telecommunications Law

1. *Foreign Ownership*

The CRTC ruled that Unitel, the country's largest alternative long distance supplier, was not controlled in fact by AT&T. Under the *Telecommunications Act*, non-Canadians are permitted to own, directly and indirectly, 46⅔ percent of the voting shares of a Canadian carrier providing that the carrier is not controlled in fact by non-Canadians. In the *Unitel* decision,[72] the CRTC articulated, for the first time, its criteria for determining what constitutes control of a Canadian carrier. In another 1996 foreign ownership development, the government proposed new regulations for the *Radiocommunication Act*[73] that included, for the first time, foreign ownership restrictions that are identical to those under the *Telecommunications Act*.

68. FEMA Amendment, § 8 and Schedule.

69. *Id.*, § 7.

70. *Id.*

71. FEMA, § 9(2).

72. Letter from Allan Darling, CRTC, to Janet Yale, AT&T Canada Long Distance Services Company (October, 16 1996).

73. "Regulation Respecting Radiocommunication, Radio Authorizations, Exemptions from Authorizations and the Operation of Radio Apparatus, Radio-Sensitive Equipment and Interference-Causing Equipment," *Canada Gazette*, Part I, July 27, 1996.

2. *Industry Canada*

There were two significant developments. First, Industry Canada granted two companies licences to provide Local Multipoint Communications Systems (LMCS), a new high-powered wireless distribution in the 26-28 GHz range that can be used to offer both broadcasting and interactive telecommunication services to subscribers.[74] Second, the government, in a joint statement from Industry Canada and Canadian Heritage, announced its long-awaited Convergence Policy.[75]

3. *CRTC*

Key telecom proceedings that are presently underway include examinations into creating the rules for local competition[76] and a proceeding to determine whether the CRTC should follow the FCC route and permit switched hubbing.[77] Following its landmark ruling last year, which forbore all nondominant long distance providers from rate and term regulation,[78] the CRTC is considering extending such a forbearance order to cover all the incumbent former telephone monopolies called the Stentor companies.[79] Finally, in a letter decision issued to one Canadian carrier, the CRTC exerted its jurisdiction over voice telephony over the Internet by stating that such a service provider must still pay contribution.[80]

4. *Teleglobe Canada*

In the United States, Teleglobe received its long coveted section 214 licence enabling it to operate as an overseas facility-based carrier on almost equal terms with American companies. Meanwhile, in Canada, the CRTC ordered a reseller to stop engaging in bypass (routing calls through U.S. facilities or over international private lines to foreign destinations), which is not permitted, because bypass undermines the Teleglobe state-sanctioned overseas monopoly.[81] In 1995, the government initiated a review of Teleglobe's mandate given that its monopoly as Canada's sole provider of overseas telecommunications facilities is set to expire at the end of March 1997.[82] In reply to the review, Teleglobe took the unusual step of calling for the government to eliminate its monopoly, with some caveats. As of the date of writing, no decision was released by the government, although rumours associated with the Negotiations on Basic Telecommunications of the World Trade Organization suggest that Canada is prepared to eliminate Teleglobe's monopoly. Finally, earlier in the year, the CRTC granted Teleglobe a new regulatory regime based on price caps rather than rates of return.[83]

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74. Industry Canada News Release, "More Communications Choices for Canadians," Ottawa, October 29, 1996, with accompanying List of Service Areas, Backgrounder, and Minister's speech.

75. Government of Canada, *Convergence Policy Statement*, August 1996, <http://STRATEGIS.IC.GC.CA>.

76. Telecom Public Notices CRTC 95-13, 95-36, 95-48, 96-11, and 96-28.

77. Telecom Public Notice CRTC 96-25.

78. Telecom Decision CRTC 95-19.

79. Telecom Public Notice CRTC 96-26.

80. Stuart MacPherson, CRTC, letter to Robert Belliveau, London Telecom Network, April 23, 1996.

81. Letter from Allan Darling, CRTC, to counsel for Hong Kong Telecommunications (Pacific) Ltd., BC TEL, Bell Canada, and Teleglobe Canada Inc. (October 9, 1996).

82. Industry Canada: Review of Canadian Overseas Telecommunications and specifically "Teleglobe Canada's Role," *Canada Gazette*, Part I, 22 July 1995, Notice DGTP-008-95.

83. Telecom Decision CRTC 96-2.

C. Financial Institution Legislation Reform

In June 1996, an act to amend, enact, and repeal certain laws relating to financial institutions was proclaimed (the Omnibus Act).[84] The *Omnibus Act* has established a new supervisory and regulatory framework for federal financial institutions (*e.g.*, Canadian banks, trust companies, and insurance companies). The *Office of the Superintendent of Financial Institutions Act* (Canada) (OSFI) has been provided with an expanded legislative mandate. OSFI's mandate now includes, *inter alia*, a requirement that it act promptly in the event a federal financial institution is not in sound financial condition or is not complying with its governing statute or the supervisory requirements under that law. Through amendments to the *Bank Act* (Canada),[85] the *Trust and Loan Companies Act* (Canada),[86] and the *Insurance Companies Act* (Canada),[87] the Superintendent of Financial Institutions has new authority to intervene at an earlier stage of financial difficulty and to take control of the assets of a financial institution or of the financial institution itself.

The *Omnibus Act* also included the new *Payment Clearing and Settlement Act* (Canada)[88] (the Payments Act). The Payments Act formalizes the role of the Bank of Canada in the oversight of the clearing and settlement systems for controlling systematic risk. The Payments Act also contains provisions that recognize the legal enforceability of netting agreements.

In addition, the *Omnibus Act* has made various changes to the deposit insurance regime applicable to Canadian banks and trust companies. The Canada Deposit Insurance Corporation (CDIC) now has greater freedom to seek out more flexible sources of financing, including authority to borrow from the private capital markets. In addition, the *Omnibus Act* gives the CDIC new authority, under certain circumstances, to act as a receiver and to transfer the deposit liabilities and marketable assets of a member institution to third parties. Further, the CDIC has been given the authority to establish differential premiums for member institutions as a new tool to help reduce losses.

In June 1996, the federal government tabled a White Paper entitled *1997 Review of Financial Sector Legislation: Proposals for Change* (the White Paper).[89] The White Paper announced the creation of a task force on the future of the Canadian financial services sector. The Task Force has been established to provide advice to the federal government on public policy issues relating to an appropriate framework for the financial sector in the 21st century that will promote economic growth and job creation. In addition, the White Paper announced the creation of an advisory committee on the Canadian payments system. The Advisory Committee will contribute to the work of the Task Force and focus on, among other things, access to the payment system by unregulated entities.

Further, the White Paper proposed a number of technical changes to existing financial services legislation. Of significance to the international financial community are changes that will create additional flexibility for foreign commercial banks operating in Canada. In the future, foreign commercial banking groups will be free to carry on financial activities in Canada through trust, insurance, and/or securities subsidiaries, rather than through banking subsidiaries only.

84. Brought into force June 28, 1996, by SI/96-58, *Canada Gazette*, Part II (July 10, 1996).
85. R.S.C., ch. C-46 (1991) (Can.).
86. *Id.*, ch. C-45 (1991) (Can.).
87. *Id.*, ch. C-47 (1991) (Can.).
88. *Id.*, ch. C-6 (1991) (Can.).
89. Department of Finance Canada (June 1996).

H. ANTITRUST

On November 7, 1996, Bill C-67[90] was introduced in the House of Commons to amend the *Competition Act.* The Bill followed an 18-month period of public consultation on amendments initially proposed by the *Competition Act* Director during which period there was considerable debate on the shape of the amendments. For the most part, the amendments will not be controversial, and include:

- Doubling the waiting periods applicable to merger prenotification filings (to fourteen and forty-two days. The relevant period is determined by the type of filing that is made by the parties).
- Decriminalizing all but the most serious misleading advertising offenses and creating a civil regime under which the less serious prohibited practices will be enforced.
- Creating a new criminal scheme aimed at combating deceptive telemarketing practices.

Draft merger prenotification regulations also have been released that will expand the information required to be included in premerger filings.

The government hopes the Bill will become law by late Spring 1997. In part to accomplish this objective, the government put on hold some of the more controversial amendments initially proposed by the *Competition Act* Director such as provisions designed to permit the Director more flexibility to share information with foreign antitrust enforcement agencies, expanded access by private litigants to the Competition Tribunal, and repeal of the criminal prohibition against price discrimination. These issues, however, remain on the table and likely will be included in future proposals for amendment.

90. Bill C-67, *An Act to Amend the Competition Act and Another Act in Consequence,* 35th Parl. 2d Sess., 1996.