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I. Canadian Telecom Regulator Issues – First Annual Report

On September 28, 2001, the Canadian Radio-Television and Telecommunications Commission (CRTC) issued its inaugural report on the status of competition in Canadian telecommunications markets and on the deployment and accessibility of advanced telecommunications infrastructure and services.[1] The report offers information, facts, and data on the Canadian telecommunications industry. The report includes an overview of the industry, general data on Canadian telecommunications industry players, information on the status

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1. *See* Report to the Governor in Council: Status of Competition in Canadian Telecommunications Markets and Deployment/Accessibility of Advanced Telecommunications Infrastructure and Services (Sept. 2001) (Can.), *available at* www.crtc.gc.ca (last visited July 5, 2002).

of telecommunications competition in Canada, a description of the impact of competition on customers, and an overview of the current status of the roll-out of broadband infrastructure across Canada.

Among the report's principal findings:

- Telecommunications services have played an increasingly important role in the Canadian economy, with industry gross revenues of approximately $28.7 billion in the year 2000 and an average growth rate of 9 percent per year since 1996.
- The Canadian telecommunications industry has undergone a profound transformation characterized by increasing competition, corporate consolidations, price wars, and the introduction, growth and bundling of products and services.
- The industry has recently been affected by the downturn in financial markets, with numerous companies having entered and exited the market and competitors, as a whole, reporting net losses.
- In 2000, competitors captured 49 percent of business long distance minutes (46 percent of revenues); international minutes were split approximately 50/50 between incumbent telephone companies and competitors; competitors accounted for 30 percent of data revenues; and non-incumbent carriers (41 percent, incumbent telephone companies (32 percent), large cable companies (19 percent) and others (8 percent) served Internet subscribers.
- Also in 2000, telecom incumbents had over 80 percent of residential long distance minutes (73 percent of revenues). In the local services market, the incumbents had 96 percent of total local lines in 2000. This market was opened to competition in 1997 and, to date, competition has primarily been in the urban business market.
- Competition in the marketplace has led to greater choice of products, services and suppliers in both the business and residential markets. Customers, both business and residential, have seen significant price decreases for most services, including long distance, Internet, data, mobile and international. On the other hand, local residential rates have increased.
- Canadian cable and telecommunications companies have made considerable investments in broadband infrastructure over the last several years. Approximately three-quarters of Canadians live in communities where such companies provide high-speed services.
- On a per capita basis, Canada is ahead of all other G-8 countries in terms of subscription to high-speed services.

The Commission's report is the first of five annual reports to be made to the Governor in Council with respect to the status of competition in Canadian telecommunications markets and on the deployment and accessibility of advanced telecommunications infrastructure and services.

II. Canadian Transportation and Customs Regulations

A. Canadian Air Transportation Regulation

Three years ago, with Canadian Airlines International Limited (CAIL) on its deathbed, a hostile takeover bid was mounted against Air Canada as part of a plan designed to save CAIL by combining it with Air Canada. The bid was struck down in court because it was premised upon a consortium acquiring a controlling interests Air Canada at a time when the Air Canada Public Participation Act restricted the interest of a single shareholder, or a consortium of share holders to not more than 15 percent.[2]

2. *See* Air Canada Public Participation Act, R.S.C. c. 35 (1985).

As the transaction played out, Air Canada acquired CAIL and its regional air services, but at the same time gathered up an enormous debt obligation that, taken together with a basket full of costly and relatively inflexible labour contracts (not to mention September 11), has driven Air Canada to a loss of over a billion dollars in 2001.

In a legislative move designed to enhance Air Canada's ability to attract fresh capital, the Canadian government removed the shareholder/shareholder consortium restriction. The queue of new well-heeled investors has yet to materialize.

One Air Transportation Regulation likely to continue into the foreseeable future is the requirement that a license permitting air service, whether for passengers, goods, or both, between points in Canada must be controlled by Canadians and must, at the same time, have at least 75 percent of the voting interests of such a license holding company owned and controlled by Canadians.[3] Air Canada has invited the Canadian government to open the door and permit wide-open foreign competition within Canada so long as the foreign carriers come from a jurisdiction (read—United States) that will permit Canadian Air Carriers a similar open skies privilege within that country. The idea has not yet taken flight.

B. Rail Regulation

In June 2001, the Canadian Transportation Act Review Panel issued its comprehensive report on the operation of the Act, an omnibus piece of legislation that is the cornerstone of the federal government's regulation of the Canadian transportation industries including air, marine, rail and road.[4] The report dealt in particular with the rail industry, an industry much studied through a series of relatively recent federal commissions and reports, all of which had focused on the movement of western Canadian grain generally, and competition within the rail industry specifically.

Following a series of cross-Canada public hearings, and after poring through of a multitude of written and oral presentations, the Review Panel Report introduced a number of positive, albeit restrained, recommendations to enhance rail competition. Those recommendations included:

- A requirement that a railway publish in its tariff the level of service attached to its rates in the tariff.
- That the Agency have authority to determine whether a railway has met the level of service commitments in a tariff, and be able to order the railway to take specific steps to meet those commitments.
- Transform the competitive line rates provisions of the Canadian Transportation Act (CTA) into competitive connection rate provisions by, inter-alia, removing the requirement that shippers obtain an agreement with the connecting carrier before requesting the rate from the Agency, repealing the substantial commercial harm test, an onus now placed upon a shipper seeking competitive relief, and focusing more closely on the conduct of the behaviour of the carrier by retaining the "commercially fair and reasonable to all parties" test.

The Review Panel's report, now in the hands of the federal Ministry of Transport will undergo thorough bureaucratic analysis before it finally resurfaces in the form of a proposal for legislative change. Open access is not in the cards.

3. *See id.*
4. *See* Canada Transportation Act Review Panel, Final Report (2001), *available at* http://www.reviewcta-examenltc.gc.ca/english/pages/final/tablee.htm (last visited July 5, 2002).

C. The Customs Act and Cross-Border Security

In 2001, Canada Customs moved forward with its Customs Action Plan generally and it's Customs Self-Assessment Program (Program) in particular. The Program is designed to significantly speed up the movement of low-value, high-volume goods moving from the United States into Canada by effectively eliminating, save for random inspections, customs clearance at the border, and moving clearance into the facility of the receiving Canadian importer.[5] By application, a Canadian-based importer can receive certification, which will allow goods to move from the United States across the border into Canada, with the customs clearance occurring after delivery to the importer. To take advantage of the Program the transportation services must be provided by a Canada Customs' certified carrier and the vehicle must be operated by a Canada Customs/Canada Immigration certified driver.[6]

A renewed and aggressive approach towards border security has significantly impeded efforts to speed up the movement of cross-border traffic by significantly increasing border clearance requirements, after the attacks in New York and Washington on September 11. In as much as the United States is Canada's dominant trading partner, with cross-border trade approaching two billion dollars daily the Canadian government and Canadian industry, at years-end, are moving forward aggressively to meet United States border security concerns while at the same time, trying to ensure the smooth movement of commerce between the two countries.

III. Principal Tax Developments in Canada in 2001

Relative to previous years, 2001 was not particularly eventful from a Canadian income tax perspective, as Parliament focused its energies on implementing changes announced in 2000. For this reason, the more significant tax events for 2001 occurred in the judicial arena where Canadian courts rendered five income tax decisions that may be of interest to non-resident readers.

In 2001, the Department of Finance introduced another "version" of its proposed amendments to the "non-resident trust" and "foreign investment entity" rules. Over the past several years, the Department of Finance has been attempting to develop legislation designed to make interests held by Canadian residents in non-resident trusts and offshore investment entities subject to taxation. In this draft legislation, the Department of Finance tried to balance its desire to prevent overly aggressive tax planning with its goal of having an administratively feasible system of foreign taxation. However, in December 2001, the Department of Finance announced that it would be delaying the implementation of these amendments until 2003. In the past, this course of events has been followed by the Department of Finance issuing significant revisions to these rules. Accordingly, it is anticipated that the proposed non-resident trust and foreign investment entity rules will be changed materially in the months ahead.

In the decisions of *Backman v. The Queen*[7] and *Spire Freezers Limited v. The Queen*,[8] the Supreme Court of Canada considered whether Canadian residents could acquire U.S. part-

5. *See* Customs Self Assessment Program (Canada Customs 2001), *available at* http://www.ccra-adrc.gc.ca/customs/business/importing/csa/assessment-e.html (last visited July 5, 2002).

6. *See id.*

7. *See* Backman v. The Queen, [2001] S.C.R. 367.

8. *See* Spire Freezers, Ltd. v. The Queen, [2001] S.C.R. 391.

nership interests, enabling them to "import" losses into Canada. In each of these cases, the Supreme Court considered the issue of whether a partnership had been created for Canadian income tax purposes. Although the facts of these two cases were similar, the Court arrived at a different conclusion to this question in each case. Besides addressing the issue of the legal requirements for establishing the existence of a partnership, these cases illustrate the Supreme Court's approach for evaluating business entities and transactions according to their "legal substance" as determined by Canadian law.

In *Singleton v. The Queen*[9] and *Ludco Enterprises Ltd. v. The Queen,*[10] the Supreme Court of Canada addressed the issue of interest deductibility. In these cases, the Court reaffirmed its approach for interpreting the Income Tax Act that it had articulated in its 1999 decision in *Shell Canada Ltd. v. The Queen.*[11] In so doing, the Supreme Court made it clear that *bona fide* legal transactions should not be re-characterized according to their economic substance. The Court also reiterated its position that it is not the function of the judiciary to inquire into the policy underpinnings of tax legislation when the words of the statute are clear and unambiguous. These cases also serve to strengthen the Supreme Court of Canada's "non-interventionist" reputation in income tax matters.

Despite being part of Canadian income tax law since 1988, 2001 marked the first opportunity for a senior tax court to consider the application of the general anti-avoidance rule (GAAR) in section 245 of the Income Tax Act. In *OSFC Holdings Ltd. v. The Queen,*[12] the Federal Court of Appeal considered whether a *bona fide* arm's length transfer of an interest in a partnership with significant accrued operating losses offended GAAR. Although its analysis of the rules was thorough and well reasoned, the Federal Court of Appeal apparently decided to give full force and effect to the rather broadly worded GAAR provisions. In fact, if the Federal Court of Appeal's approach becomes the standard by which section 245 of the Income Tax Act[13] is applied, GAAR may truly become the weapon that tax commentators thought it would be when it was first enacted. The Federal Court of Appeal's application of GAAR may also provide Canadian revenue authorities with an effective counterbalance to the recent trend in Canadian tax jurisprudence towards legal form as opposed to economic substance. Finally, given the apparent philosophical differences between Canada's two most senior tax courts, it will be interesting to see how *OSFC Holdings Ltd.* is ultimately decided should the taxpayer be successful in seeking leave to appeal to the Supreme Court of Canada.

IV. Competition Law and Mergers

A. Mergers

Without doubt the most significant merger development of 2001 was the case of *Superior Propane v. Canada.*[14] On April 4, 2001, the Federal Court of Appeal allowed the Commissioner of Competition's appeal of the Competition Tribunal's earlier decision to permit Superior Propane's acquisition of ICG Propane.[15] The Tribunal found that the merger led

9. *See* Singleton v. Canada, [2001] S.C.C. 61.
10. *See* Ludco Enters., Ltd. v. Canada, [2001] 204 D.L.R. (4th) 590.
11. *See* Shell Canada, Ltd. v. The Queen, [1999] S.C.R. 622.
12. *See* OSFC Holdings, Ltd. v. The Queen, [2001] 4 C.T.C. 82.
13. *See* Income Tax Act, R.S.C., ch. 1, 5th Supp. (1985) (Can.).
14. *See* Comm'r of Competition v. Superior Propane, Inc., [2001] 7 C.P.R. (4th) 385.
15. *See* Comm'r of Competition v. Superior Propane, Inc., [2001] 11 C.P.R. (4th) 289.

to monopoly or near-monopoly in sixty-five local markets as well as in a "national account coordination services" market, but was saved under the Competition Act's efficiencies defense provision. The appellate court held that the Tribunal incorrectly applied the "total welfare" approach to the measurement of merger-related efficiencies. The court said this approach put the Act's efficiency provision at odds with its stated purpose of maintaining and encouraging competition. The court gave no guidance regarding the correct standard for the measurement of claimed efficiencies ought to be and remanded the matter back to the Tribunal for reconsideration on this point.

In addition, 2001 saw a number of consent orders entered with the Competition Tribunal in connection with mergers. One example, *Blue Circle/Lafarge*,[16] resulted in the largest ever divestiture under Canadian competition law (approximately C$1 billion). Following an investigation involving extensive co-operation between the Competition Bureau and the U.S. Federal Trade Commission, the parties agreed to divest assets in both Canada and the United States, including all of Blue Circle's aggregate business and reserves in Ontario, with the exception of certain of its operations and reserves, as well as certain construction industry assets. Another significant consent order involved major book retailer Chapters/Indigo pursuant to which Chapters/Indigo agreed to divest twenty-three stores across Canada. The Commissioner required the Order as a remedy to the take-over of Chapters Inc. by Trilogy Retail Enterprises L.P., an affiliate of Chapters' rival book retailer Indigo Books and Music Inc. The order required that the merged company divest nine Chapters superstores, four Indigo superstores and ten smaller stores operating under the Smithbooks and Coles' banners. If the company was unable to divest the stores within a set period of time the Order provided that a trustee be appointed to complete the sales. However, the Order proved to be a failure, no buyers could be found by either the Company or the trustee. The Order has now expired and Chapters/Indigo is expected to close the stores in question.

The year 2001 also saw the use of undertakings (backed-up by agreements to file consent orders if necessary to enforce them) in a high-profile case, *Diageo/Pernod Ricard/Vivendi*.[17] Under the undertakings, Diageo agreed to divest the "Gibson's Finest" brand to resolve concerns about competition in provincial markets for premium Canadian whisky. Diageo and Pernod Ricard's joint acquisition of the Seagram spirits and wine business from Vivendi S.A. in the previous year necessitated the divestiture.

D. Abuse of Dominance

On March 5 the Commissioner sought an order prohibiting Canada's dominant air-carrier, Air Canada, from operating flights on routes in eastern Canada at fares that did not cover its "avoidable cost" of providing the service. The application followed more than a year of procedural and constitutional wrangling between Air Canada and the Commissioner over the scope of the Tribunal's jurisdiction. On October 26, the Tribunal made a scheduling order for the recommencement of hearings on the Commissioner's application. Hearings are presently scheduled for the first several months of 2002.

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16. *See* Comm'r of Competition v. Lafarge S.A., [2001] Comp. Trib. 31 [unreported], *at* http://www.ct-tc.gc.ca/english/cases/ct-2001-004/0012a.pdf (last visited July 5, 2002).

17. *See* Competition Bureau, News Release: Competition Bureau Requires Divestitures to Address Competition Concerns in Diageo plc Acquisition of Seagram Spirits and Wine Business (Oct. 23, 2001), *at* http://strategis.ic.gc.ca/SSG/ct02286e.html (last visited July 5, 2002).

E. INTERNATIONAL CARTELS

The Competition Bureau continued its attack on international cartels affecting Canadian markets in 2001, with four convictions:

- Pfizer Inc. was convicted and fined C$1.5 million in the Federal Court Trial Division for its involvement in a conspiracy to fix prices in the supply of sodium erythorbate from July 1992 to December 1994.[18]
- Ueno Fine Chemicals Industry, Ltd. of Japan was convicted and fined in Quebec Superior Court C$1.25 million for its role in the international sorbates conspiracy. Additionally, one of Ueno's former senior executives was fined C$150,000.[19]
- Carbone of America Industries Corporation was convicted in the Federal Court Trial Division and was fined $300,000 for its part in the international isostatic graphite conspiracy;[20] and
- Tokai Carbon Co., Ltd. was convicted in the Federal Court Trial Division and fined $250,000 for its participation in the international graphite electrodes conspiracy.[21]

These cases demonstrate that the Bureau continues to focus on the fine chemicals/food additives and the graphite products sectors with success.

D. OTHER SIGNIFICANT DEVELOPMENTS

1. *Legislative Amendments*

Bill C-23, An Act to Amend the Competition Act and the Competition Tribunal Act (the "Bill")[22] was passed by the House of Commons on December 10. The Bill would create for the first time certain limited rights of access to the Competition Tribunal for litigants other than the Commissioner. Under the proposed new regime, private litigants will be able to sue for the enforcement of the Competition Act's (Act) refusal to deal and exclusive dealing/tied selling provisions. In addition, the Bill would augment the Commissioner's powers in respect to the Canadian airline industry by allowing the Commissioner to apply to the Tribunal for an extension of a time-limited cease and desist order previously issued by him to protect industry players from price predation. Additionally, it would permit the Tribunal to assess an "administrative monetary penalty" of up to C$15 million against an airline when the Tribunal has issued an order under the abuse of dominance section of the Act. The Bill would also set up a broader framework for international cooperation between the Competition Bureau and international competition authorities in relation to civil competition matters. Bill C-23 is now before the Senate, Parliament's upper house, where it is expected to pass shortly and subsequently becomes law later in 2002.

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18. *See* The Queen v. Pfizer, Inc., [2001] Fed. Ct. [unreported], *at* http://strategis.ic.gc.ca/pics/ct/t1559_indict.pdf (last visited July 5, 2002).

19. *See* The Queen v. Ueno Fine Chem. Indus., Ltd., [2001] Super Ct. [unreported], *at* http://strategis.ic.gc.ca/pics/ct/ueno_indictment.pdf (last visited July 5, 2002).

20. *See* The Queen v. Carbone of America Indus. Corp., [2001] Fed. Ct. [unreported], *at* http://strategis.ic.gc.ca/pics/ct/indictment_carbon1.pdf (last visited July 5, 2002).

21. *See* The Queen v. Tokai Carbon Co., [2001] Fed. Ct. [unreported], *at* http://strategis.ic.gc.ca/pics/ct/indictment.pdf (last visited July 5, 2002).

22. *See* An Act to Amend the Competition Act and the Competition Tribunal Act, 1st Sess., 37th Parl. (2001), *at* http://www.parl.gc.ca/PDF/37/1/parlbus/chambus/house/bills/government/C-23_3.pdf (last visited July 5, 2002).

2. *Enforcement Guidelines*

The Competition Bureau also released its "*Enforcement Guidelines on the Abuse of Dominance Provisions of the Competition Act*" (Guidelines)[23] last year. The Guidelines provide an indication of how the Competition Bureau interprets the Competition Act's abuse of dominance provisions, and confirm the Bureau's view that the Act's "market dominance" is the same as "market power," and that the Bureau will employ market-share safe-harbours similar to those for mergers in its *Merger Enforcement Guidelines*. The new Guidelines also confirm that the mere possession of market power does not constitute abuse of dominance. Instead, the Guidelines suggest that abuse of dominance occurs when a dominant firm or group of firms substantially prevents or lessens competition by engaging in acts that aim to eliminate or discipline competitors, or to stop potential competitors from entering the relevant market.

3. *Canada-Mexico Competition Agreement Signed*

On November 14, representatives of Canada and Mexico signed a cooperation agreement on competition law enforcement between their respective governments.[24] The agreement is similar to the 1995 competition agreement between Canada and the United States, which sets out a framework for notification, coordination, and cooperation on enforcement activities, exchange of information, and avoidance of conflict. The new agreement will be effective in 2002.

V. International Trade Disputes – Canada

A. World Trade Organization

In December Canada scored a victory at the World Trade Organization when the Appellate Body rejected a U.S. and New Zealand attack on Canada's dairy supply management system.[25] Reversing a panel decision, the Appellate Body held Canada's dairy system—bifurcated between a domestic, supply-managed system and a de-regulated commercial export market in the wake of earlier WTO attacks—does not constitute an impermissible export subsidy under the WTO Agreement on Agriculture.[26]

Canada faired less well in its own challenge to a U.S. measure. In June 2001, a WTO panel disagreed with Canada that U.S. law or practice oblige U.S. trade authorities to treat export restraints as "subsidies" to other products made using the restricted product. The panel did, however, conclude that an export restraint of the sort alleged could not be a

23. *See* Competition Bureau, Enforcement Guidelines on the Abuse of Dominance Provisions (2001), *available at* http://strategis.ic.gc.ca/pics/ct/aod.pdf (last visited July 5, 2002).

24. *See* Press Release, Government of Canada, Canada and Mexico Sign Cooperation Agreement on Competition Law Enforcement (Nov. 15, 2001), *available at* http://strategis.ic.gc.ca/SSG/ct02307e.html (last visited July 5, 2002)

25. *See* Canada Measures Affecting the Importation of Milk and the Exportation of Dairy Products, Recourse to Article 21.5 of the DSU by New Zealand and the United States (Dec. 3, 2001), WT/DS103/AB/RW, WT/DS113/AB/RW.

26. *See* Canada Measures Affecting the Importation of Milk and the Exportation of Dairy Products, Recourse to Article 21.5 of the DSU by New Zealand and the United States (July 11, 2001), WT/DS103/RW, WT/DS113/RW.

subsidy within the meaning of the WTO Agreement on Subsidies and Countervailing Measures, a decision welcomed by Canada.[27]

Also in 2001, Canada launched two new WTO complaints against the United States. In the first, Canada challenges section 129(c)(1) of the U.S. Uruguay Round Agreements Act (the URAA).[28] Under section 129(c)(1), WTO rulings take effect at a time directed by the United States Trade Representative (USTR). Canada complains that this provision prevents the United States from refunding duty deposits collected from foreign companies prior to the USTR directive, even if the USTR acts past the compliance deadline set by the WTO. In the second challenge, brought in June 2001, Canada and several other countries urge that a new U.S. provision—the Continued Dumping and Subsidy Offset Act of 2000—does not comply with several WTO agreements.[29] The Act, also known as the "Byrd Amendment," requires U.S. customs authorities to distribute annually countervailing and anti-dumping duties collected on imported goods to domestic producers for a series of "qualifying expenses." The United States has now implemented this law and made its first annual duty distribution in late 2001.

B. NAFTA

In the single Chapter 19 arbitral proceeding involving Canada and the United States decided in 2001, a panel rejected the U.S. Department of Commerce's calculation of Canadian steel producer Stelco's cost of production in an anti-dumping case, and remanded the matter to Commerce for re-determination.[30]

There were several new developments in 2001 relating to the investor arbitration provision in Chapter 11 of NAFTA. In February, Canada brought an application for judicial review before the Federal Court of Canada challenging the award issued by a NAFTA Chapter 11 panel against Canada in a claim brought by U.S. company S.D. Myers Inc. The arbitral panel had found in 2000, that Canada's temporary ban on the export of PCB waste between 1995 and 1997 breached two provisions of NAFTA's investment chapter.[31] In its application to the Federal Court, Canada urged that the Tribunal's award exceeded its jurisdiction and was made in conflict with the public policy of Canada. Arguments in the case were heard in December.

In April, Canada had mixed success in defending a second Chapter 11 challenge, brought by another U.S. company, Pope & Talbot, Inc.[32] The company controlled a Canadian subsidiary whose exports of softwood lumber to the United States were curtailed by the Canada-U.S. Softwood Lumber Agreement (Agreement). The arbitral panel held that the

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27. *See* United States Measures Treating Exports Restraints as Subsidies, Report of the Panel (June 29, 2001), WT/DS194/R. GOVERNMENT OF CANADA, NEWS RELEASE: MINISTER PETTIGREW WELCOMES WTO PANEL RULING ON EXPORT RESTRAINTS (June 29, 2001).

28. *See* United States—Section 129(c)(1) of the Uruguay Round Agreements Act—Request for Consultations by Canada, G/ADP/D33/1, G/L/434, G/SCM/D41/1, WT/DS221/1 (Jan. 22, 2001).

29. *See* United States—Continued Dumping and Subsidy Offset Act of 2000—Request for Consultations by Canada and Mexico, G/ADP/D36/1, G/L/452, G/SCM/D43/1, WT/DS234/1 (June 1, 2001).

30. *See* Corrosion-Resistant Carbon Steel Flat Products from Canada, USA-CDA-98-1904-01 (Mar. 20, 2001), *available at* http://www.nafta-sec-alena.org/images/pdf/ua98010e.pdf (last visited July5, 2002).

31. *See* S.D. Myers v. Gov't of Canada, Partial Award, *available at* http://www.dfait-maeci.gc.ca/tna-nac/myersvcanadapartialaward_final_13-11-00.pdf (last visited July 5, 2002).

32. *See* Pope & Talbot, Inc v. Gov't of Canada, Award on the Merits, *available at* http://www.dfait-maeci.gc.ca/tna-nac/Award_Merits-e.pdf (last visited July 5, 2002).

softwood lumber system imposed under the Agreement did not discriminate on the basis of the nationality of the parties, contrary to the assertions of the company. However, it concluded that the procedure employed under the verification part of the Agreement was a denial of "fair" treatment, and thus violated NAFTA.

In May, a lawsuit was brought by a union and a public interest organization in the Ontario Superior Court of Justice, alleging that provisions in Chapter 11 denying public access to arbitral proceedings violated free expression and freedom of the press provisions of the Canadian Charter of Rights and Freedoms.[33] Meanwhile, in July, the NAFTA Free Trade Commission released an interpretation of Chapter 11 indicating that nothing in NAFTA precludes governments from providing public access to documents submitted to, or issued by, a Chapter 11 tribunal.[34]

C. Antidumping, Countervailing Duty, and Safeguard Disputes

A number of high profile antidumping and countervailing duty disputes arose in 2001. Most notably, the Canada-U.S. Softwood Lumber Agreement expired in 2001, sparking yet another round of countervailing and antidumping investigations of Canadian softwood lumber exported to the United States. By the end of the 2001, preliminary determinations in the countervailing and antidumping investigations had resulted in average duties of 19.31 percent and 12.58 percent respectively on Canadian softwood lumber.[35] In August, Canada challenged the preliminary countervailing duty determination at the WTO, arguing that the U.S. duty violated several provisions of the Subsidies and Countervailing Measures Agreement.

Also in 2001, U.S. antidumping investigations were commenced with respect to greenhouse tomatoes and live processed blue mussels from Canada. By the end of the year, preliminary determinations in both cases resulted in the imposition of antidumping duties.[36] The mussels case has since been terminated at the behest of the U.S. complainant.

In December, the International Trade Commission concluded in a global steel safeguards action that steel imports—including those from Canada—contribute to serious injury to the U.S. steel industry and made a series of recommendations on the imposition of tariffs and quotas.[37] In October, countervailing duty and antidumping investigations were initiated

33. *See* Democracy Watch v. The Att'y Gen. of Can., Notice of Application (May 28, 2001), ***available at*** http://www.dfait-maeci.gc.ca/tna-nac/CUPE28.pdf (last visited July 5, 2002).

34. *See* Notes of Interpretation of Certain Chapter 11 Provisions (NAFTA Free Trade Commission, July 31, 2001), ***available at*** http://www.dfait-maeci.gc.ca/tna-nac/NAFTA-Interpr-e.asp (last visited July 5, 2002).

35. *See* Notice of Preliminary Affirmative Countervailing Duty Determination, Preliminary Affirmative Critical Circumstances Determination, and Alignment of Final Countervailing Duty Determination With Final Antidumping Duty Determination: Certain Softwood Lumber Products From Canada, 66 Fed. Reg. 43,186 (Aug. 17, 2001); Notice of Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination: Certain Softwood Lumber Products From Canada, 66 Fed. Reg. 56,062 (Nov. 6, 2001).

36. *See* Notice of Preliminary Determination of Sales at Less Than Fair Value: Greenhouse Tomatoes From Canada, 66 Fed. Reg. 51,010 (Oct. 5, 2001); Notice of Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination: Live Processed Blue Mussels From Canada, 66 Fed. Reg. 52,888 (Oct. 18, 2001).

37. *See* International Trade Commission, Federal Register Notice: Steel Determination, ***available at*** http://www.usitc.gov/steel/ (last visited July 5, 2002).

38. *See* Notice of Initiation of Countervailing Duty Investigations: Carbon and Certain Alloy Steel Wire Rod From Brazil, Canada, Germany, Trinidad and Tobago, and Turkey, 66 Fed. Reg. 49,931 (Oct. 1, 2001); Notice of Initiation of Antidumping Duty Investigations: Carbon and Certain Alloy Steel Wire Rod From

with respect to steel wire rod from Canada.[38] Canada's steel industry received better news in November, when President Bush issued a proclamation declining to impose restrictions on Canadian steel wire rod exports to the United States.[39] The proclamation followed an August finding by the International Trade Commission concluding that imports from Canada were undermining the effectiveness of the wire rod safeguard measure introduced by the Clinton administration in 2000.[40]

Finally, in December, U.S. entertainment industry unions filed a countervailing duty complaint with the U.S. Department of Commerce, alleging that Canadian subsidies for film and television were attracting "runaway" production from the United States, to the detriment of U.S. film and television workers.[41] However, the petition was withdrawn prior to a Commerce decision on whether to launch an investigation into the matter.

VI. Canadian Environmental Law - 2001

There have been five main themes in environmental law across Canada in 2001. Not surprisingly, these have been air emission reductions, drinking water protection, enforcement, contaminated sites, and waste management. The bulk of new regulation, and case law, has been made in Ontario, spurred by the drinking water contamination disaster in Walkerton and a renewed interest by the provincial government in environmental regulation and enforcement.

A. Air Emissions

Ontario has introduced significant new regulations requiring greater monitoring and control of air emissions. The Airborne Contaminant Discharge Monitoring Reporting Regulation[42] puts in place a monitoring and reporting regime for electricity generation facilities and large source emitters. The scheme is to be phased in to include control measures and ultimately emissions trading. The emissions trading scheme will recognize credits relating to reductions in emissions in the Northeast U.S. as affecting the Ontario airshed.

Federally, the national Climate Change Process continues, as Canada has stayed involved in the Kyoto Protocol through the most recent meetings in The Hague. The Prime Minister has pledged federal support for ratification, and a number of federal initiatives have been commenced, relating primarily to funding emissions reduction programs.

Brazil, Canada, Egypt, Germany, Indonesia, Mexico, Moldova, South Africa, Trinidad and Tobago, Ukraine, and Venezuela, 66 Fed. Reg. 50,164 (Oct. 2, 2001).

39. *See* Imports of Steel Wire Rod Proclamation (Nov. 21, 2001), *available at* http://whitehouse.gov/news/releases/2001/11/20011121-6.html (last visited Sept. 3, 2002); Press Release, Department of Foreign Affairs And International Trade (DFAIT), Canada Welcomes Presidential Steel Decision (Nov. 28, 2001), *available at* http://webapps.dfait-maeci.gc.ca/minpub/Publication.asp?FileSpec=/Min_Pub_Docs/104716.htm (last visited Sept. 3, 2002).

40. *See* Certain Steel Wire Rod, 66 Fed. Reg. 45,692 (Aug. 29, 2001), *available at* http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=2001_register&docid=01-21800-filed.pdf (last visited Sept. 3, 2002.

41. Film and Television Productions From Canada, 66 Fed. Reg. 64,057 (Dec. 11, 2001), *available at* http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=2001_register&docid=01-30507-filed.pdf (last visited Sept. 3, 2002).

42. *See* Airborne Environmental Discharge Monitoring and Reporting under the Environmental Protection Act, R.O. 127/01 (2001).

B. WATER

The effects of the Walkerton tragedy, in which seven people were killed as a result of *E. coli* contamination of a town's drinking water supply, have continued. A number of provinces (Quebec, British Columbia, PEI, Saskatchewan (in 2000)) have followed Ontario's lead in passing new drinking water protection regulations and implementing protection strategies. The judicial inquiry into the Walkerton events, while finding fault with the municipal personnel managing the treatment system, also found that government cutbacks in funding of environmental programs provincially, including enforcement and training, shared direct responsibility.

C. ENFORCEMENT

Federally, the new enforcement powers under the Canadian Environmental Protection Act, 1999,[43] (linked to increased funding for enforcement) that began in 2000 are now showing their effect. The first Environmental Protection Alternative Measure (EPAM), a program for diversion of environmental offences outside the courts, has been implemented. The EPAM, put in place with respect to *Sherritt International Corporation*, required publication of an article describing the EPAM in an environmental trade magazine.[44]

In *The Queen v. Inco*,[45] the Ontario Court of Appeal clarified a restriction on enforcement officers' powers of search and seizure where they already have "reasonable and probable grounds" to believe that an offence has been committed. The decision now requires enforcement officers to obtain a search warrant prior to conduct any such search and seizure.

D. CONTAMINATED SITES

The most significant area of activity was in contaminated sites. The Ministry of Municipal Affairs and Housing (*not* the MOE) sponsored legislation (Bill 56)[46] to encourage the clean up and revitalization of abandoned contaminated lands. The legislation establishes rules limiting future environmental liabilities, including providing liability protection from future environmental orders, under the following situations: municipalities taking action for the purpose of a sale; secured creditors while protecting their interest in a property; fiduciaries in their personal capacity; for any person conducting an environmental investigation while acquiring interest in the property; and owners (and subsequent buyers) who follow the prescribed site assessment and cleanup process. The legislation requires mandatory remediation of property where there is a land use change from commercial/industrial to residential or parkland. Quality assurance measures, including certification of environmental professionals, mandatory registration of "certificates of property use," and a compliance-auditing program are also to be implemented.

In *Trident Developments Limited and Ottawa Motor Sales (1987) v. Shell Canada Products Limited and Shell Canada Limited*,[47] the court found that the owner of a neighbouring pe-

43. *See* Canadian Environmental Protection Act, S.C. 1999, c. 33 at Part 10 (1999).

44. *See* Samuel W. Ingram, Q.C., *Legal Brief: Alternative Measures*, Hazardous Materials Management, Dec./Jan. 2002, at 54.

45. *See* The Queen v. Inco, [2001] 54 O.R.3d 495 (Ontario Ct. App.).

46. *See* Brownfields Statute Law Amendment Act, S.O. 2001, ch. 17 (2001).

47. *See* Tridan Dev. Ltd. v. Shell Canada Prods. Ltd., No. C34404 (Ontario Ct. App. Jan. 3, 2002), *available at* http://www.ontariocourts.on.ca/decisions/2002/january/tridanC34404.pdf (last visited July 5, 2002).

troleum station was responsible for cleaning an adjacent contaminated property to a "pristine" condition, not merely to Ministry of Environment contaminated site guideline levels. However, cleaning to a "pristine" condition meant that no damages were awarded for any stigma that might affect property values.

Quebec is also in the process of revising its contaminated sites legislation (under Bill 156, and now Bill 72). The legislation will create a broader scope of liability for contaminated sites, while providing better mechanisms for dealing with sites through risk assessment. The related REVISOL program will continue to provide funding under certain circumstances for the redevelopment of contaminated sites.

The British Columbia Environmental Appeal Board (EAB) also rendered an important decision on contaminated sites, *Beazer East, Inc. v. British Columbia (EAB)*.[48] In this case, the EAB found that Beazer, a U.S. parent company of a subsidiary that owned the contaminated lands, was held liable for the clean up. Liability was not imposed simply because of the legal relationship between parent and subsidiary, but rather based on a finding of control by the parent. That finding was based on a number of *indicia* of direct and indirect control, though the EAB found that actual control of day-to-day operations was not necessary. Extensive financial controls, control over the lease with the landlord, reliance on a parent's environmental staff to deal with environmental problems, and an active involvement in defending charges brought against the subsidiary, all appear to weigh heavily in the findings that Beazer, as a parent, was an "operator" and, therefore, in control of, and liable for, the site. In the same decision, the EAB found that a company that amalgamated with the owner of the site took over responsibilities for the site subsequent to the contamination, even though the company had not been directly responsible for any contamination.

E. Waste Management

A number of changes to the waste management regime in Ontario and Quebec have resulted from a concern regarding the transboundary movement of waste, particularly hazardous waste from the United States into Canada. A new Quebec regulation has banned the disposal by landfilling of contaminated soils. Ontario has implemented a number of changes[49] designed to closely mirror U.S. federal law, including implementation of the "mixture" and "derived from" approvals on hazardous waste, adopting the federal TCLP test for hazardous waste, and a recent proposal to adopt U.S. federal universal pre-treatment standards.

48. *See* EAB decision 98WAS.0IC6, affirmed 36 C.E.L.R. (N.S.) (B.C.S.C.) 195.

49. *See* Ontario Regulation—General—Waste Management, R.R.O. 1990, Reg. 344, as amended.