COMPETITION IN TELECOMMUNICATIONS: REFUSAL TO SUPPLY FACILITIES BY REGULATED COMMON CARRIERS

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I. INTRODUCTION

Traditionally, telephone companies have regarded their mandate as rendering a universal or end to end service to all subscribers. This universality presumed carrier ownership of transmission, switching, terminals and local loops. It also implied a lack of access and a refusal to supply facilities to competing forms of transmission and equipment.

New technology has caused regulators to re-evaluate monopoly in both the equipment and service sectors. In the case of equipment, the growth of the computer industry and semi-conductor technology has increased both the demand for customer ownership of terminal equipment and the ability of new firms to develop products not available from the telephone company. In the service sector, new technology, such as microwaves in the 1950s and satellite transmission in the 1960s, has resulted in similar pressures as new firms seek to offer services which compete with the telephone company's local and long distance services.

Over the past decade, regulators have been forced to reconsider the policies of telephone companies to refuse to supply facilities in five principal areas:

1. Pole access to cable television companies;[1]
2. Access to satellite facilities;[2]
3. Access for customer-owned terminal equipment;[3]

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[1] Ottawa Cablevision Ltd. and Bell Canada, [1973] C.T.C. 522 (Telecommunication Committee), *leave to appeal refused* [1974] 1 F.C. 373 (C.A.); Transvision (Magog) Inc. and Bell Canada, [1975] C.T.C. 463 (Telecommunication Committee); Bell Canada, Tariff for Use of Support Structures by Cable Television Licensees, Telecom. Decision CRTC 77-6, 111 CAN. GAZETTE PT. I, 3137, 3 C.R.T. 68 (27 May 1977).

[2] Telesat Canada, Proposed Agreement with Trans-Canada Telephone System, Telecom. Decision CRTC 77-10, 111 CAN. GAZETTE PT. I, 4838, 3 C.R.T. 265 (24 Aug. 1977), *rev'd* P.C. 1977-3152.

[3] Challenge Communications Ltd. v. Bell Canada, Telecom. Decision CRTC 77-16, 112 CAN. GAZETTE PT. I, 61, 3 C.R.T. 489 (23 Dec. 1977), *aff'd* [1979] 1 F.C. 857, 86 D.L.R. (3d) 351 (C.A. 1978).

4. Access to local distribution networks for specialized common carriers;[4]
5. Access to local distribution networks for radio common carriers.[5]

Given the similarities in the structure of the telecommunication industry in Canada and the United States, it is not surprising that these issues closely follow American developments in these same five areas over the past ten years.[6] In all cases, the regulatory commissions have opted for competitive solutions.

II. Regulation and Competition

Just as the substantive issues in competitive telecommunications are the same in Canada and the United States, the procedure for introducing competition also has remarkable parallels. In both countries competition is the creation of regulation. Not only are the basic regulatory decisions in both countries being made by a federal regulatory commission, both commissions are relying on the same basic principle of railway law. This is understandable; the first regulatory commissions in both countries regulated railways and that body of regulation has come to apply to telecommunications.[7] More recently, there have been substantial anti-

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[4] CNCP Telecommunications, Interconnection with Bell Canada, Telecom. Decision CRTC 79-11, 113 Can. Gazette Pt. I, supplement to No. 29, 5 C.R.T. 177 (17 May 1979), *aff'd* P.C. 1979-2036.

[5] Colins Inc. v. Bell Canada, Telecom. Decision CRTC 79-12, 113 Can. Gazette Pt. I, 3895, 5 C.R.T. 115 (Interim Relief 7 Jun. 1979); Telecom. Decision CRTC 79-14, 113 Can. Gazette Pt. I, 4913, 5 C.R.T. 443 (Main Application 26 Jul. 1979); Telecom. Decision CRTC 80-16, 114 Can. Gazette Pt. I, 5630 (Final Rates 29 Aug. 1980).

[6] Access for customer-owned terminal equipment: *see* Carterfone Device in Message Toll Tel. Serv., 13 F.C.C. 2d 420 (1968); Interstate and Foreign Message Toll Tel., First Report and Order, 56 F.C.C. 2d 593 (1975), Second Report and Order, 58 F.C.C. 2d 736 (1976); Economic Implications and Inter-Relationships arising from Policies and Practices Relating to Customer Interconnection, Jurisdictional Separations and Rate Structures, 61 F.C.C. 2d 766 (1976). Access to satellite facilities: *see* Establishment of Domestic Communications-Satellite Facilities by Non-Governmental Entities, 35 F.C.C. 2d 844 (1972). Pole access for cable television companies: *see* Public Notice on Pole Attachment Formula (F.C.C. 10 Nov. 1975). Access to local distribution networks for radio common carriers: *see* Allocation of Frequencies in the 150.8-162 Mc/s Band, 12 F.C.C. 2d 841 (1968) [*reconsideration denied* 14 F.C.C. 2d 269 (1968)], *petition for review denied sub nom.* Radio Relay Corp. v. F.C.C., 409 F. 2d 322 (2d Cir. 1969); Memorandum, Opinion and Order: Interconnection Between Telephone Carriers and Radio Common Carriers (F.C.C. 31 Jan. 1977). Access to local distribution networks for specialized common carriers: *see* Specialized Common Carrier, 29 F.C.C. 2d 870 (1971), *modified* 33 F.C.C. 2d 408 (1972), *aff'd sub nom.* Washington Util. & Transp. Comm'n v. F.C.C., 513 F. 2d 1142 (9th Cir. 1975), *cert. denied* 423 U.S. 836 (1975); Bell Sys. Tariff Offerings of Local Distribution Facilities for Use by Other Common Carriers, 46 F.C.C. 2d 413 (1974), *aff'd sub nom.* Bell Tel. Co. of Pa. v. F.C.C., 503 F. 2d 1250 (3d Cir. 1974), *cert. denied* 422 U.S. 1026 (1975).

[7] Canada's first regulatory commission, the Board of Railway Commissioners, was established in 1903: Railway Act, R.S.C. 1906, c. 37, s. 10. In the United States

trust settlements and judgments in the American courts,[8] but these cases do not establish new principles. They are merely following precedents set by the Federal Communications Commission (FCC) and awarding damages for injury caused.

A recent development in Canadian litigation is the use of section 321 of the Railway Act as a competitor's "Bill of Rights".[9] Section 321, which applies to any telephone company or telephone company activity over which the Canadian Radio-Television and Telecommunications Commission (CRTC) has jurisdiction, currently provides:

> (1) All tolls shall be just and reasonable and shall always, under substantially similar circumstances and conditions with respect to all traffic of the same description carried over the same route, be charged equally to all persons at the same rate.
> (2) A company shall not, in respect of tolls or any services or facilities provided by the company as a telegraph or telephone company,
> (*a*) make any unjust discrimination against any person or company;
> (*b*) make or give any undue or unreasonable preference or advantage to or in favour of any particular person or company or any particular description of traffic, in any respect whatever; or
> (*c*) subject any particular person or company or any particular description of traffic to any undue or unreasonable prejudice or disadvantage, in any respect whatever;
> and where it is shown that the company makes any discrimination or gives any preference or advantage, the burden of proving that the discrimination is not unjust or that the preference is not undue or unreasonable lies upon the company.

Recent jurisprudence demonstrates a number of important features of section 321. First, this section is not limited to customers of the telephone company. The word "company" has been interpreted to include the telephone company itself with the result that a preference granted by the telephone company to itself over its competitors is constrained. Second, this section takes precedence over the telephone company's General Rules and Regulations which may specifically

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the first regulatory agency, the Interstate Commerce Commission, was established in 1887: Interstate Commerce Act, 49 U.S.C. ch. 1 (1970).

[8] The most recent example is the $1.8 billion treble damage award to MCI Communications Corp. resulting from the refusal of system interconnection by American Telephone and Telegraph (AT & T): MCI Communications Corp. v. AT & T (E.D. Ill. 16 Jun. 1980). Another example is the litigation brought by International Telephone and Telegraph (ITT) against AT & T as a result of the latter's requirement that its subsidiary, Bell Telephone Laboratories Inc., purchase equipment only from another AT & T subsidiary. The case was discontinued on 14 Feb. 1980 on the understanding that Bell would purchase $2 billion in equipment from ITT over a 10 year period. This followed two preliminary decisions in the case: ITT v. AT & T, 444 F. Supp. 1148 (S.D.N.Y. 1978); 481 F. Supp. 399 (S.D.N.Y. 1979). *See also* Northeastern Tel. Co. v. AT & T (D. Conn. 11 Jan. 1980): award of $16.5 million in an anti-trust action involving restraint of trade in terminal equipment; Wyly Corp. v. AT & T: anti-trust action concerning refusals to permit system interconnection, settled in Mar. 1980 for $50 million.

[9] Railway Act, R.S.C. 1970, c. R-2, s. 321, *as amended by* R.S.C. 1970 (1st Supp.), c. 35, s. 3.

authorize anti-competitive conduct.[10] Third, this section is not restricted to rates or tariffs but applies also to "facilities" and "practices". Finally, the CRTC under this section may fashion a wide array of appropriate relief including the granting of interim injunctions upon a *prima facie* showing of discrimination against competitors.[11]

The American equivalent of section 321 of the Railway Act is sections 201 and 202 of the Communications Act of 1934.[12] Section 202 provides:

> It shall be unlawful for any common carrier to make any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities or services for or in connection with like communication services, directly or indirectly, by any means or device, or to make or give any undue or unreasonable preference or advantage to any particular person, class of persons, or locality, or to subject any particular person, class of persons, or locality to any undue or unreasonable prejudice or disadvantage.

Section 202 of the 1934 Act can be traced to section 3 of the American railway statute, the Interstate Commerce Act, which prohibits undue preference or advantage to any person, area or particular description of traffic.[13] Both the Canadian and American statutes can be traced in turn to the English railway legislation enacted in 1845.[14] The provisions of the English Act found their way into Canadian and American enactments in the 1850s.

Not surprisingly, most state legislation contains principles similar to section 3 of the Interstate Commerce Act and section 202 of the Communications Act of 1934. Similarly, in Canada most provincial statutes contain provisions that are similar to section 321 of the Railway Act.[15]

Competition is now a fact of life in Canadian telecommunications, and it can be expected to expand with growing user demands for improved services and equipment. Section 321 of the Railway Act has become the major vehicle, directly and indirectly, for resolving claims of unfair competition. The development of this important legal concept can be traced in both equipment and transmission markets.

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[10] *E.g.*, *Challenge Communications* (C.A.), *supra* note 3.

[11] Colins Inc. v. Bell Canada, Telecom. Decision CRTC 79-12, *supra* note 5.

[12] 47 U.S.C.A. (West 1962).

[13] 49 U.S.C.A. (West 1962). The leading application of the section is American Trucking Assoc. v. Atkinson, T. & S.F. Ry., 387 U.S. 397 (1966).

[14] Lands Clauses Consolidation Act 1845, 8 & 9 Vict., c. 20, s. 86. A similar provision was contained in Railway and Canal Act 1854, 17 & 18 Vict., c. 31, s. 2:

> [N]o such company shall make or give any undue or unreasonable Prejudice or Advantage to or in favour of any particular Person or Company, or any particular Description or Traffic, in any respect whatsoever, nor shall any such Company subject any particular Person or Company, or any particular Description or Traffic, to any undue or unreasonable Prejudice or Disadvantage in any respect whatsoever. . . .

[15] *See* The Public Utilities Act, R.S.N. 1970, c. 322, s. 84; Public Utilities Act, R.S.N.S. 1967, c. 258, s. 82; Electric Power and Telephone Act, R.S.P.E.I. 1974, c. E-3, s. 19; Public Utilities Act, R.S.N.B. 1973, c. P-27, s. 6; The Public Utilities Board Act, R.S.A. 1970, c. 302, s. 87(1); Energy Act, R.S.B.C. 1979, c. 108, s. 26.

III. Competition in Terminal Equipment

Section 321 was first developed in proceedings to connect subscriber-owned terminal equipment. The unruly state of early litigation in this area demonstrates the advantages of this provision.

In 1953, both federally regulated telephone companies, Bell Canada and the British Columbia Telephone Company, enacted rules in their General Regulations which prohibited customer ownership of terminal equipment and attachment of that equipment to the public switched network. In 1955, those rules were tested in *United Sterl-A-Fone Corp. v. Bell Canada* when Bell Canada successfully prevented United Sterl-A-Fone from attaching a harmless device to a telephone.[16] The court held that such attachment was contrary to Bell Canada's General Regulations. On essentially similar facts, it was found in the American case *Hush-A-Phone Corp. v. United States* that a tariff prohibiting a harmless telephone attachment was "an unwarranted interference with the telephone subscriber's right reasonably to use his telephone in ways which are privately beneficial without being publicly detrimental".[17]

Continuing controversy regarding interconnection of subscriber-owned equipment caused Parliament to amend the Bell Telephone Company of Canada Act (Bell Canada Act) in 1968[18] to provide that Bell

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[16] [1955]O.R. 1 (H.C. 1954). Bell Canada General Regulations reads:

> Rule 9 The Company's equipment and wiring shall not be re-arranged, disconnected, removed or otherwise interfered with, nor shall any equipment, apparatus, circuit or device which is not provided by the Company be connected with, physically associated with, attached to or used so as to operate in conjunction with the Company's equipment or wiring in any way, whether physically, by induction or otherwise, except where specified in the Tariffs of the Company or by special agreement. . . .

Rule 9 of the B.C. Telephone Co. General Regulations is virtually identical.

Note Rules 4.7(*f*) and 4.13(*a*) of the CNCP Telecommunications Tariff Regulations:

> Rule 4.7(*f*) The characteristics of any subscriber-provided apparatus shall be such that its connection to the Telecommunications Company's channel does not interfere with service over other Telecommunications Company channels. . . .
>
> Rule 4.13(*a*) [O]perating equipment for use in connection with Private Line Service is furnished either by the Telecommunications Company or by the subscriber. Equipment furnished by the Telecommunications Company shall not be used for any purpose other than that for which it is provided. Equipment furnished by the subscriber shall be so constructed, maintained and operated as to work satisfactorily with the facilities of the Telecommunications Company.

[17] 238 F. 2d 266, at 269 (D.C. Cir. 1956).

[18] An Act respecting The Bell Telephone Company of Canada, S.C. 1967-68, c. 48, s. 6 (*amending* S.C. 1948, c. 81, s. 5). Section 5 as amended reads:

> (4) Attachments. — For the protection of the subscribers of the Company and of the public, any equipment, apparatus, line, circuit or device not provided by the company shall only be attached to, connected or interconnected with or used in connection with the facilities of the Company in

Canada may prescribe requirements for the attachment of equipment to its facilities, and any person affected could apply to the CRTC for determination as to the reasonableness of the requirements. In 1975, a Member of the Ontario Legislature, Dr. Morton Shulman, brought an application to permit the attachment of a "Magical Dialler" to his telephone facilities pursuant to section 5 of the Bell Canada Act.[19] Bell Canada responded that as it did not have a tariff for this device, there were no requirements which the Commission could judge to be reasonable or not. The Commission accepted Bell Canada's submissions and held that it had no jurisdiction in the matter, thus rendering the amendments to the Bell Canada Act useless.

A. *Harding Communications Ltd. v. Bell Telephone Co.*

A month after the *Shulman* decision, Harding Communications, a Toronto distributor of telecommunication equipment, brought an identical application to the Commission and received an identical judgment.[20] Rather than appeal, Harding brought another application in the Quebec courts. Harding apparently had entered negotiations with the Bank of Montreal to provide the bank with a telecommunication system which included the attachment of an instrument called "Divert-A-Call". This instrument would permit the telephone calls sent to the bank's Credit Verification Offices in Montreal to be diverted to Toronto after the close of business hours. The bank was prepared to enter into a contract to purchase the Harding equipment, but was prevented from doing so by the actions of Bell Canada, which alleged that the attachment of this equipment would contravene the company's regulations prohibiting the attachment of customer-owned equipment.

Harding instituted an action in the nature of a tort action under the Quebec Civil Code claiming damages for Bell Canada's wrongful

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conformity with such reasonable requirements as may be prescribed by the Company.

(5) Transport Commission to determine if requirements reasonable. — The Canadian Transport Commission may determine, as questions of fact, whether or not any requirements prescribed by the Company under subsection (4) are reasonable and may disallow any such requirements interest and may require the company to substitute requirements satisfactory to the Canadian Transport Commission in lieu thereof or prescribe other requirements in lieu of any requirements so disallowed.

(6) Application to Commission to determine reasonableness of requirements. — Any person who is affected by any requirements prescribed by the Company under subsection (4) of this section may apply to the Canadian Transport Commission to determine the reasonableness of such requirement having regard to the public interest and the effect such attachment, connection or interconnection is likely to have on the cost and value of the service to subscribers.

[19] Dr. Morton Shulman and Bell Canada, [1975] C.T.C. 244.

[20] Harding Communications Ltd. and Bell Canada, C.T.C. Order T-658 (22 May 1975).

interference with its business and wrongful discrimination against the company. In addition, Harding sought an injunction restraining Bell Canada from further interference. Bell Canada's defence throughout the proceeding was essentially that the courts did not have jurisdiction, or alternatively that Bell Canada's General Regulations, prohibiting customer ownership of equipment attached to the network, provided a complete defence to the action. On 2 October 1975 the trial court granted Harding the requested injunction restraining Bell Canada from interfering with its business. The Quebec Court of Appeal upheld the injunction, finding that the court had jurisdiction and that the General Regulations did not provide a defence. A similar finding was made by the Supreme Court of Canada which refused Bell's appeal on 21 November 1978.[21]

The important point, in the context of analysis of section 321 of the Railway Act, is that after five years Harding achieved only a procedural decision with the trial on the merits yet to come. However, two propositions emerge: (1) Rule 7 and 9 of Bell Canada's General Regulations prohibiting attachment of customer-owned equipment is not a defence to a tort action; (2) enforcement of these rules may render Bell Canada liable for damages.

B. *Challenge Communications Ltd. v. Bell Canada*

The first point had in fact been determined by the Supreme Court of Canada a few months earlier in an application by Challenge Communications to the CRTC.[22] This case involved the access of mobile radio equipment to the telephone company's network and was similar to a proceeding lodged ten years earlier in the United States, *Carterfone Device in Message Toll Telephone Service*.[23] Bell Canada had for a number of years permitted ownership of manual mobile radio telephones but when it filed a new tariff in 1977 for automatic mobile radio telephones, that was changed; all equipment had to be leased from Bell Canada. Unlike the manual equipment, automatic mobile radio telephones had direct access to the public telephone system without intervention of an operator.

Challenge Communications, a manufacturer and distributor of mobile telephone equipment in Toronto, alleged that the tariff prohibiting customer ownership of automatic radio telephone equipment was invalid and contrary to section 321 of the Railway Act.

In answer to Commission interrogatories, Bell Canada stated that customer ownership would retard research and harm the integrity of the network. The Director of Investigation and Research, Combines Investigation Act, intervened in the proceedings and called as witnesses

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[21] Harding Communications Ltd. v. Bell Tel. Co., [1975] Que. C.S. 1116, *aff'd* [1979] 1 S.C.R. 395, 92 D.L.R. (3d) 213 (1978), *aff'g* [1977] Que. C.A. 54.

[22] *Supra* note 3.

[23] *Supra* note 6.

the Canadian manufacturers of mobile radio equipment, all of whom testified that customer ownership would neither impair the network nor retard research. They also testified that they would be foreclosed from the Canadian market if the tariff were approved.

The Commission's decision held that the tariff should be suspended, as it constituted unjust discrimination against Challenge Communications, subjecting the company to "undue or unreasonable prejudice or disadvantage".[24] The Commission's decision was upheld by the Federal Court of Appeal and leave to appeal to the Supreme Court of Canada was refused.[25]

Not only is the *Challenge* case important regarding the customer's right to own terminal equipment attached to the public switched network, it also contains some important findings with respect to section 321 of the Railway Act. First, section 321 of the Railway Act was held not to be restricted to discrimination between customers, but also to apply to discrimination against competitors. This finding of law was expressly upheld by the Federal Court of Appeal.[26] As a result, an onus is now cast on the carrier to justify any preference which it accords against a competitor, through the application of its tariff restrictions.

Equally important is the finding that Bell Canada's General Regulations prohibiting the attachment of customer-owned equipment to the network constituted subordinate legislation under the Railway Act and accordingly the substantive provisions of the Railway Act took precedence in the case of conflict.[27]

The third point of importance is the wide remedial jurisdiction conferred upon the CRTC. The Federal Court of Appeal held that the Commission was empowered to deal with the matters of ownership or maintenance of telephone service and matters relating to the connection of customer-owned and maintained (COAM) equipment. It was on this basis that the court upheld the Commission's Order that Bell Canada furnish all competitors with the specifications applicable to the mobile telephone equipment which the carrier itself offered for lease.[28]

One difference between *Challenge* and *Carterfone* was that the mobile radio telephones in the first case were located in automobiles in the streets of Toronto while the Carterphone units were located on oil rigs in the Gulf of Mexico. A more important difference was that the Commission in *Carterfone* required all of the American Telephone and Telegraph Company (AT & T) tariffs to be modified to remove the prohibition against subscriber-owned terminal equipment.[29] In *Challenge*

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[24] Railway Act, R.S.C. 1970, c. R-2, s. 321(2)(*c*).

[25] *Supra* note 3.

[26] *Id*. at 869, 86 D.L.R. (3d) at 360.

[27] *Id*. at 366, 86 D.L.R. (3d) at 358. The court relied upon Bélanger v. The King, 54 S.C.R. 265, at 268, 34 D.L.R. 221, at 223 (1916).

[28] *Supra* note 3, at 871-72, 86 D.L.R. (3d) at 361-62. The court also found that the Commission had the necessary jurisdiction under the National Transportation Act, R.S.C. 1970, c. N-17, ss. 45(2) [*repealed and replaced by* S.C. 1977-78, c. 22, s. 18(1)], 46(1), 57(1).

[29] *Supra* note 6, at 582.

a single tariff, the tariff for automatic mobile radio telephones, was reversed.

The implication however from both *Challenge* and *Harding* is clear: Rules 7 and 9 of Bell Canada's General Regulations are unenforceable unless the carrier can justify the preference in each instance. On 13 November 1979 Bell Canada filed an application for general rule-making and amendment of Rule 9 of its General Regulations including a proposal for interim relief. The Commission's Interim Decision of 5 August 1980 permits attachment of any subscriber-owned terminal equipment with the exception of one residential phone and primary business service.[30] The equipment must however fall into one of three categories:

a) the equipment complies with the technical standards published by Bell Canada in the course of the proceedings;
b) the equipment is of a class or kind currently leased by Bell Canada, or
c) the equipment has been registered by the FCC under Part 68 of that Commission's Rules and Procedures.[31]

An attestation that the equipment falls into one of the three categories must be filed by a registered professional Canadian engineer and the subscriber must enter into an agreement with Bell Canada.[32] While this is an interim decision, subject to the Commission's final decision which will be rendered following a hearing in the spring of 1981, it represents a substantial precedent.

IV. Competition in Transmission

Litigation regarding the boundaries between competition and regulation in telecommunication transmission first arose in the cable television industry. In the late 1960s both Bell Canada[33] and AT & T[34] were prohibited from offering cable television services. Disputes then developed in both countries as to the right of cable television companies to attach their cables to telephone company poles.

In Canada, this conflict resulted in the first attempt to employ section 321 of the Railway Act. In 1973, nine cable companies requested that the CRTC disallow Bell Canada requirements prohibiting the attachment of community antenna television system (CATV) cables to the company's facilities.[35] Bell Canada had required the applicants to

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[30] Bell Canada, Interim Requirements Regarding the Attachment of Subscriber Provided Terminal Servs., Telecom. Decision CRTC 80-13, 114 Can. Gazette Pt. I, 4937 (5 Aug. 1980).

[31] *Id.* at 4947-48.

[32] *Id.* at 4948.

[33] An Act respecting The Bell Telephone Company of Canada, S.C. 1967-68, c. 48, s. 6 (*amending* S.C. 1948, c. 81, s. 5).

[34] 47 C.F.R. 63:54-57. This regulation was upheld in General Tel. Co. v. United States, 449 F. 2d 846 (5th Cir. 1971).

[35] Ottawa Cablevision Ltd. and Bell Canada, *supra* note 1.

enter a special agreement whereby the cables would be owned by Bell Canada and the CATV companies would undertake not to use the cables for two-way transmission in the future. The applicants in turn argued that these requirements granted Bell Canada undue preference contrary to section 321 of the Railway Act and the Commission should substitute more appropriate requirements pursuant to section 5 of the Bell Canada Act.[36]

With respect to section 321, the Commission found that the evidence did not support a claim of unjust discrimination or undue preference. The Commission also held that as the facilities were owned by Bell Canada, section 5 of the Bell Canada Act did not apply.[37] However, in a subsequent application by a Quebec cable television company pursuant to section 317 of the Railway Act, the Commission did grant the relief sought on principles similar to those embodied in section 321.[38] The Commission, in ordering Bell Canada to permit the cable operator to attach his cable to Bell Canada poles in its licensed areas, stated:

> It is not disputed that the telephone poles erected by Bell are its property, but as herein noted, the use or enjoyment Bell has of this property is subject to certain limitations imposed by law in the public interest. We believe that when one devotes one's property to a use in which the public has an interest, one, in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good, to the extent of the interest one has thus created. We believe that Bell is in that position with respect to its telephone poles which cease, for this reason to be *juris privati* only.[39]

As a result, the Commission authorized the applicant to place its coaxial cables upon Bell Canada's poles. Bell Canada subsequently filed a tariff for pole access and the CRTC rendered a decision determining the appropriate price and terms for access.[40]

A. *Telesat Canada, Proposed Agreement with TCTS*

The CRTC first carefully examined the implications of section 321 for competition in telecommunication transmission in the *Telesat* case.[41] In *Telesat*, the Commission considered an application by Telesat Canada

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[36] *Id.* at 524-28.

[37] *Id.* at 533.

[38] Transvision (Magog) Inc. and Bell Canada, *supra* note 1.

[39] *Id.* at 485.

[40] Bell Canada, Tariff for the Use of Support Structures by Cable Television Licensees, Telecom. Decision CRTC 77-6, *supra* note 1. The Commission stated:

> Although the two transmission technologies — coaxial cable and copper pair — provide distinct services into the home at present, new services may develop which could be provided by either technology. In such cases, neither technology should be burdened with artificial barriers preventing their development in a fair and reasonable manner.

Id. at 3145, 3 C.R.T. at 75.

[41] *Supra* note 2.

filed in early 1977 for the approval of an agreement whereby Telesat Canada would become a member of Trans-Canada Telephone System (TCTS). The terms of the agreement gave the nine member telephone companies of TCTS control of Canada's sole domestic communications satellite, Telesat Canada.[42]

It was argued by a number of the intervenors that in light of the new 14/12 Ghz technology permitting satellite messages to be transmitted to populated urban areas, satellites for the first time offered a competitive alternative to the telephone company's terrestrial communication network. The agreement, it was alleged, would place a number of satellite users at a competitive disadvantage to TCTS members.[43]

The Commission ruled that the criterion for approval was whether the agreement was in the public interest viewed in a broad sense. The Commission further held that one public interest consideration was the impact of the agreement on the statutory obligation of carriers under section 321(2) of the Railway Act not to make any unjust discrimination or unreasonable preference.[44] In denying the application, the CRTC concluded that approval of the agreement would raise a substantial likelihood of undue preference to TCTS:

> Viewed as Telesat users, the TCTS carriers are given the real advantages of designating earth station sites; of having satellites designed in a manner that is compatible with TCTS economic and performance requirements and service plans. . . .
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> . . . .
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> While the requirement that only complete r.f. channels may be leased from Telesat itself constitutes a limitation of access to the satellite to very large users, the carrier restriction entails a further and more deliberate limitation of direct access by denying it to present customers such as the CBC and potential ones such as northern pipeline concerns and cable television consortia.
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> In addition, by restricting the right to market services based on portions of r.f. channels to the recognized carriers, it explicitly prohibits cable companies and others, individually or in consortia, from leasing whole r.f. channels and marketing services based on portions of such channels.[45]

The Commission concluded that "these specific restrictions give real advantages to those carriers listed in the Memorandum over all other potential Telesat users, in a manner not justified by the evidence in this proceeding".[46] While the Commission did not find that Telesat was a potential competitor to TCTS's monopoly services, telephone toll traffic,

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[42] Under the proposed agreement, the nine telephone companies of TCTS and Telesat each had one representative on the TCTS Board. All Board decisions were required to be unanimous, with the result that each member had a complete veto. The agreement provided that Telesat would lease only complete r.f. channels, and even then only to specified Canadian telecommunications common carriers. *Id.* at 4846-48, 3 C.R.T. at 272-74.

[43] *Id.* at 4856-57, 3 C.R.T. at 281-83.

[44] *Id.* at 4850-51, 3 C.R.T. at 276-77.

[45] *Id.* at 4859, 3 C.R.T. at 284-85.

[46] *Id.* at 4857, 3 C.R.T. at 285.

the potential for satellite competition, in the Commission's view, did exist for non-telephone traffic. Accordingly, the Commission ruled that "a potentially competitive situation in the long haul data, video and other private line services may be restricted by the Agreement in a manner that does not appear to be justified".[47] Both statements demonstrate the application of section 321(2) burden of proof rules notwithstanding statements in the same decision that both the applicant and the intervenors faced a burden of proof.

The Commission's decision was reversed, however, on appeal to the federal Cabinet.[48] The Cabinet, in approving the agreement, did so on the basis that the agreement would not contravene any statute, which in fact was a term of the agreement itself.[49]

The *Telesat* case raises another issue. Section 321 has become the major vehicle by which regulatory authorities determine claims of unfair competition. The same matter may become the subject of court proceedings under the Combines Investigation Act.[50] The possibility of conflicting decisions as to whether the competition is being limited unduly is now greater with the introduction of private actions under the Combines Investigation Act and recent jurisprudence limiting the regulatory exemption from the Act to anti-competitive conduct specifically mandated by the legislature.[51]

This prospect developed during the *Telesat* hearings when one intervenor instituted a private action in the Supreme Court of Ontario alleging that Bell Canada and Telesat Canada had formed a monopoly and an agreement to eliminate competition contrary to the Combines Investigation Act.[52] While this action has now been settled on consent, continued litigation in competitive telecommunications may lead to the development of "primary jurisdiction" concepts, similar to those in the United States.[53]

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[47] *Id.* at 4867, 3 C.R.T. at 292.

[48] P.C. 1977-3152.

[49] The Cabinet also determined that the public interest would be better served by approving the agreement.

[50] R.S.C. 1970, c. C-53, *as amended*.

[51] Jabour v. Law Soc'y of B.C., [1979] 4 W.W.R. 385, 98 D.L.R. (3d) 442 (B.C.S.C.), *rev'd* 115 D.L.R. (3d) 549 (B.C.C.A. 1980). Other cases under the Combines Investigation Act offer wider exemptions for regulated industries: *see, e.g.*, *Reference re* Farm Prods. Marketing Act, [1957] S.C.R. 198, at 205-06, 7 D.L.R. (2d) 257, at 265; Regina v. Canadian Breweries Ltd., [1960] O.R. 601, at 629-30, 126 C.C.C. 133, at 167-68 (H.C.).

[52] Cablesat Ltd. v. Telesat Canada, statement of claim filed in the Supreme Court of Ontario, 21 Apr. 1977.

[53] In the United States, there are three bases for removing regulated conduct from the anti-trust laws. First, an explicit exemption may be granted in the regulatory statute. Second, the court may infer from the statutory language that an implied immunity was intended and the regulatory body has exclusive jurisdiction. Implied exemption applies to both federally and state regulated activity, although the doctrine in Parker v. Brown, 317 U.S. 341 (1943), is limited to state activities. Finally, there is the concept of primary jurisdiction. Where the claim requires the resolution of issues in which the

In choosing the appropriate forum, the advantages of regulatory proceedings in terms of time, expense, burden of proof and available ruling should be borne in mind. The contrast between *Challenge* and *Harding* makes the point: *Challenge* went all the way to the Supreme Court of Canada in less than a year with very broad relief resulting; *Harding* after five years has achieved only a procedural decision upholding an interim injunction restraining Bell from further interference.

B. *CNCP Telecommunications: Interconnection with Bell Canada*

Six months after the *Telesat* decision, the CRTC began another lengthy hearing regarding competition in inter-city transmission.[54] Although not explicitly invoking section 321 of the Railway Act, the Commission did employ similar principles and relied upon the section in reaching its decision.

CNCP, a consortium of the Canadian Pacific Railway Company (CPR) and the Canadian National Railway Company (CNR), constructed a transcontinental microwave system in the early 1960s in response to construction of a similar system by TCTS in 1958. CNCP then entered into competition with Bell Canada in the provision of private line voice, message record and computer communications services.[55] CNCP applied to the CRTC for interconnection to the Bell Canada local distribution network arguing that it could not continue to compete effectively in the fast-growing computer communication market unless customers were allowed access to CNCP's systems through their telephones in the same fashion as users of Bell Canada's services.[56]

While the application was not brought pursuant to section 321, that section was raised as grounds for the appropriate relief by two of the intervenors.[57] The Commission held that it would be improper to treat the application as coming under section 321 as it was not framed in that fashion by the parties in their initial pleadings, but did state:

> [T]he statutory tests under [sections 265 and 320 of the Railway Act under which the application was brought], to the extent that they raise the question

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regulator has special expertise, the court will refer the matter to the agency first. This is to be distinguished from exclusive jurisdiction or implied immunity, in which cases the court would dismiss the claim.

[54] CNCP Telecommunications, Interconnection with Bell Canada, Telecom. Decision CRTC 79-11, *supra* note 4.

[55] In 1976, CNCP revenues in private line voice service amounted to $8.5 million, compared to $83.6 million for Bell Canada. In message record service (Telex), CNCP revenues of $139.3 million compared with $9.4 million for Bell Canada's competitive offering. CNCP's computer communication services (Infodat and Infoswitch) produced revenue of $16.7 million, compared with Bell Canada's revenues of $79.6 million for competitive offerings (Dataroute and Datapack). *Id.* at 18, 5 C.R.T. at 195.

[56] *Id.* at 65, 5 C.R.T. at 232.

[57] *Id.* at 85, 5 C.R.T. at 248.

> of the general public interest, inevitably require the Commission to have regard to the regulatory principles set out in section 321, including the requirement that rates be just and reasonable and the prohibition against unjust discrimination or undue preference or advantage.[58]

In rejecting the Bell Canada estimates of revenues loss[59] and granting the application, the Commission endorsed a principle consistent with section 321:

> Based on this and other more recent authorities, the Director asserted that the principle had been established "that regulated companies with control of essential facilities may not refuse to supply such facilities or create an unfair advantage through discriminatory tariffs to undermine competitors." The Commission agrees with this approach.[60]

The FCC reached a similar conclusion in the *Specialized Common Carrier* decision.[61]

One of the authorities considered by the Commission in the *CNCP* decision and the Federal Court of Appeal in the *Challenge* case was the decision of the Board of Railway Commissioners in *Western Associated Press v. C.P.R.*[62] Western Associated Press was competing with the CPR in the production and distribution of news services to various newspapers across Canada. Western Associated Press alleged that the rates charged by CPR for the delivery of press matter to Western's headquarters in Winnipeg were discriminatory and designed to eliminate Western as a competitor. The Commission held that a regulated company was not entitled to frame its tariff in a fashion to eliminate competitors and stated:

> [I]n a like manner telegraph companies could put out of business every newsgathering agency that dared to enter the field of competition with them, if it were lawful for them to use the public utilities that are entrusted to their operation, viz., the telegraph lines and stations, upon a system of flat rate contract irrespective of cost or rate of transmission.
>
> It seems clear that these flat rate contracts must be based as well upon cost of transmission and delivery as of collection or gathering, and that tariffs of tolls covering all this class of service must be filed; these tariffs must be so

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[58] *Id.* at 86, 5 C.R.T. at 248.

[59] Bell Canada estimated that granting interconnection to competing carriers such as CNCP would adversely affect its 1982 revenues by $235.3 million. The CRTC considered this estimate to be insupportable, finding that Bell Canada's potential revenue loss in 1982 was $45.7 million. *Id.* at 180-81, 5 C.R.T. at 320. On the same basis, the CRTC revised Bell Canada's estimated rate increases of 27% for residential service and 37% for business services to 5.5% and 7.5% respectively. In addition, the CRTC noted that these increased rates need not be recovered from residential service. Instead, any loss could be recovered through CNCP compensation to Bell Canada for the requested interconnection and an increase in business rates, as business users were most likely to benefit from the proposed interconnection. The CRTC cited the accepted differentiation whereby local business line charges were two to three times those of local residential lines. *Id.* at 231-32, 5 C.R.T. at 357-58.

[60] *Id.* at 124, 5 C.R.T. at 274. Similar language was used by the United States Supreme Court in Otter Tail Power Co. v. United States, 410 U.S. 366 (1973).

[61] *Supra* note 6.

[62] 9 C.R.C. 482 (1910).

framed as not to work discrimination against the applicants [Western Associated Press], or any other person, or association, engaged in like work.[63]

The *Western Associated Press* case is one of the first cases interpreting the undue preference prohibitions as applying to competitors as well as to customers.

C. *Radio Common Carriers*

The final development in service competition concerns the application by licensed radio common carriers for the supply of outpulsing or selector level telephone numbers which would permit radio common carriers to offer dial access radio paging.

Since 1968 Bell Canada has offered radio paging services in competition with radio common carriers. Both the telephone company and the radio common carriers obtain frequencies pursuant to licences granted by the Minister of Communications under the Radio Act.[64] In 1978, Bell Canada began to offer and advertise a wide-area dial access radio paging service while denying its competitors facilities necessary to offer similar services.

In December 1978, the radio common carriers applied for a Commission order directing Bell Canada to supply the selector level telephone numbers, alleging that any refusal contravened section 321 of the Railway Act as Bell Canada would be granting itself an undue or unreasonable preference.[65] In the course of subsequent negotiations directed by the Commission, Bell Canada offered to provide the facilities on the condition that its own facilities be used exclusively to link the paging companies' terminals and their transmitters, and to link the transmitters where the paging companies' facilities were located in different local calling areas. This proposal, which was reminiscent of Bell Canada's earlier response in the cable television cases, was unacceptable to the radio common carriers who then applied to the Commission for interim relief pending hearing of the main application.[66]

The Commission held that on the basis of evidence and argument presented at the interim hearing, a *prima facie* case had been made that Bell Canada's refusal to supply outpulsing facilities to licensed radio common carriers was unjustly discriminatory contrary to section 321(2) of the Railway Act.[67]

In granting interim relief, the Commission noted that unlike *Challenge* the present case did not involve a tariff. The Commission, however, rejected this difference stating:

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[63] *Id.* at 492.
[64] R.S.C. 1970, c. R-1.
[65] *Telecom. Decision CRTC 79-14*, *supra* note 5.
[66] *Telecom. Decision CRTC 79-12*, *supra* note 5, at 3898-99, 5 C.R.T. at 117-18.
[67] *Id.* at 3899-3902, 5 C.R.T. at 118-21.

> Subsection 321(2), which prohibits unjust discrimination, preference or advantage, is not limited to a preference arising from the wording of tariffs but applies to any unjust discrimination, preference or advantage made or given by the regulated company in "respect of tolls or any services or facilities provided by the company as a telegraph or telephone company."[68]

The Commision granted an injunction prohibiting Bell Canada from any advertising for the purpose of attracting new customers to its Bell Boy radio paging service until the dispute between the parties was settled. This was the first time the Commission had granted injunctive relief although the injunction did not prevent Bell Canada from increasing services to existing customers.[69]

The CRTC in *Colins* subsequently held another hearing on the question of appropriate rates for outpulsing facilities or selector level telephone numbers. The Commission established interim rates and a timetable for providing services.[70] Permanent rates were subsequently approved by the Commission.[71]

Again the similarity to an American case is marked. In a 1968 decision on essentially the same issue, the FCC, in ordering outpulsing at fair and reasonable rates, stated:

> [W]e are concerned with establishing and maintaining a fair and equitable climate within which the wireline and nonwireline carriers may compete. . . . Again we state, we are not attempting to limit the activity of the wireline company; we are merely requiring that a balance be established so that the wireline company will not be in a position, because of its control over dial access interconnection, to claim or enjoy advantages not available to the MCC [radio common carrier].[72]

V. Relief and Burden of Proof

Section 321 is somewhat unique because of the wide discretion granted to the CRTC regarding appropriate relief. The other point worth considering in detail is the advantage of the specific provisions on burden of proof.

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[68] *Id.* at 3899, 5 C.R.T. at 117-18.

[69] *Id.* at 3902-05, 5 C.R.T. at 121-24. Regulatory commissions have rarely issued injunctions, although courts have been requested to do so on the basis of regulatory proceedings. The results have been mixed, with some courts declining jurisdiction. *See* Relph v. New Brunswick Tel. Co., 28 N.B.R. (2d) 596, 107 D.L.R. (3d) 727 (C.A. 1979); Lambair Ltd. v. Aero Trades (Western) Ltd., [1978] 4 W.W.R. 397, 87 D.L.R. (3d) 500 (Man. C.A.).

[70] *Telecom. Decision CRTC 79-14*, *supra* note 5, at 4916-18, 5 C.R.T. at 445-47.

[71] *Telecom. Decision CRTC 80-16*, *supra* note 5.

[72] Allocation of Frequencies in the 150.8-162 Mc/s Band, *supra* note 6, at 850.

A. *Relief Available*

Both the *Challenge* and *Colins* cases point to the wide discretion the Commission has in fashioning relief under section 321 of the Railway Act.

In *Colins*, the Commission held for the first time that section 321 permitted it to grant interim relief. The interim injunction requested by Colins was an order that Bell Canada cease soliciting new radio paging customers and cease advertising its services pending a decision on the main application. A preliminary question arose as to whether advertising falls within the scope of section 321(5) of the Railway Act which provides that "[i]n all other matters not expressly provided for in this section, the Commission may make orders with respect to all matters relating to traffic, tolls or tariffs or any of them." In granting the interim injunction, the Commission accepted the applicant's argument that advertising was not traffic as such, but that "it was a 'matter of relating to traffic' since it was a solicitation of traffic. . . . "[73] Similar findings by Mr. Justice Heald of the Federal Court of Appeal in the *Challenge* case were the basis for the decision that the Commission had authority under section 321 to require Bell Canada to provide competing manufacturers with interconnection specifications. The interconnection specifications also were held to be matters relating to traffic.[74]

The CRTC did hold however in the *Colins* case that it was not in the public interest to restrain Bell Canada from adding *any* new customers,as some existing customers may wish to obtain supplementary pagers. Accordingly, the Commission ordered Bell Canada to cease any active solicitation of new customers, including any further advertising, provided that this would not preclude it from providing service to new or existing subscribers where the original contact and request for service had been made by a subscriber. In order to permit monitoring of the Order, Bell Canada was also directed to maintain a list of subscribers added from the day of decision and to furnish the list to the Commission upon request.[75]

Colins developed the law regarding section 321 in another respect. The *Challenge* case involved only the revision of a tariff. In *Colins*, the Commission rejected the Bell Canada argument that the complaints of unjust discrimination must relate to a tariff, as this section refers to other circumstances.[76]

In considering relief, it is important to remember that section 321 of the Railway Act applies to any telephone company or telephone company activities over which the CRTC has jurisdiction. Accordingly, this section is not restricted to Bell Canada but would apply also to British

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[73] *Telecom. Decision CRTC 79-12*, *supra* note 5, at 3904-05, 5 C.R.T. at 123.
[74] *Supra* note 3, at 870-72, 86 D.L.R. (3d) at 360-62.
[75] *Telecom. Decision CRTC 79-12*, *supra* note 5, at 3905, 5 C.R.T. at 123.
[76] *Id.* at 3899-3900, 5 C.R.T. at 118-19.

Columbia Telephone, Telesat Canada, CNCP Telecommunications and TCTS.

There is also convincing authority that this section would apply to interprovincial or long distance tariffs of all Canadian telephone companies. Certainly the provisions govern the mobile radio telephone and radio paging services of any Canadian telephone company.[77]

This section will also have bearing in the case of intraprovincial offerings by non-federally regulated telephone companies. Most provincial statutes governing these telephone companies contain provisions very similar in wording to section 321 of the Railway Act.[78] Current proceedings in New Brunswick,[79] Nova Scotia[80] and Alberta[81] involve the provincial counterparts of section 321.

B. *Burden of Proof*

This review of Canadian jurisprudence in competitive telecommunications also reveals the advantage of the burden of proof provisions in section 321(2) of the Railway Act. The section provides that "where it is shown that the company makes any discrimination or gives any preference or advantage, the burden of proving the discrimination is not unjust or that the preference is not undue or unreasonable lies upon the Company".

Confusion with respect to the burden of proof in regulatory applications first arose in the *Telesat* case where the CRTC held that the criterion for approval of the agreement under section 320(1) of the Railway Act was the public interest viewed in a broad sense and that both applicants and intervenors bear an onus to demonstrate where the public interest lies.[82]

In both Canada and the United States, the telephone company's justification for refusing access to its facilities has been essentially economic. Between 1910 and 1920 when Bell Canada was refusing to interconnect competing local telephone companies with its long distance facilities,[83] the company argued successfully that economic harm would

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[77] Public Serv. Bd. v. Dionne, [1978] 2 S.C.R. 191, 83 D.L.R. (3d) 178 (1977); *In re* Regulation and Control of Radio Communication in Canada, [1932] A.C. 304, [1932] 2 D.L.R. 81 (P.C.), *aff'g* [1931] S.C.R. 541, [1931] 4 D.L.R. 865.

[78] *See* note 15 *supra*.

[79] NEW BRUNSWICK TEL. CO., IN THE MATTER OF AN APPLICATION FOR APPROVAL OF RATES AND CHARGES FOR A NEW SERV. KNOWN AS NETWORK EXTENSION TEL. SERV. (Application to Bd. of Comm'rs of Pub. Utils. of N.B. 22 Dec. 1978).

[80] MARITIME TEL. CO., RE AIR PAGE COMMUNICATION LTD. (Application to N.S. Pub. Utils. Comm'n 19 Dec. 1978).

[81] Alberta PUB. UTILS. BD., TELECOMMUNICATIONS INQUIRY INTO THE PROVISION OF LOCAL NON-BROADCASTING TELECOMMUNICATIONS SERV. IN ALTA. (Submissions of Can. Radio Common Carriers Assoc. 10 Jan. 1980).

[82] *Supra* note 2, at 4849-51, 3 C.R.T. at 275-76.

[83] *See* Rural Tel. Cos. v. Bell Tel. Co., 12 C.R.C. 319 (Bd. of Ry. Comm'rs 1911); Independent Tel. Co. v. Bell Tel. Co., 17 C.R.C. 266 (Bd. of Ry. Comm'rs 1914); Port Hope Tel. Co. v. Bell Tel. Co., 17 C.R.C. 343 (Bd. of Ry. Comm'rs 1914).

result as local service was subsidizing unprofitable long distance (toll) service.[84]

Sixty years later, when CNCP brought the reverse application, connection of competitive and long distance facilities to Bell Canada's local distribution network, the economics were reversed: Bell Canada alleged that economic harm would result because the long distance (toll) service subsidized the unprofitable local service.[85] The same argument has been made with respect to the attachment of terminal equipment: economic harm will result because equipment rental is more profitable in local service and therefore local rates will have to increase.[86]

The economic harm argument has also been the foundation of the American cases. As in Canada, the argument rests on the proposition that there are a series of subsidies which will be disturbed by competitive entry. In the result, revenues will decline and local rates will increase. The American authorities have also placed the burden of proof on the monopoly carrier with respect to these allegations and in no case has proof been satisfactory. The FCC in *Carterfone* decided to allow interconnection in the absence of evidence showing adverse affect either on the telephone company's operations or on the utility of the telephone system.[87] Given the inability to judge on the record whether there was economic harm, the FCC, in dealing with the registration of equipment, instituted a procedure whereby a carrier could obtain a waiver from interconnection requirements upon demonstration that it would suffer economic injury.[88]

The onus of proof became a major issue in the CNCP application seeking interconnection with carrier facilities under section 265 or subsection 320(7) of the Railway Act. Bell Canada asserted that CNCP had "the burden of establishing sufficient facts to satisfy the requirements of 320(7), including, above all, the burden of proving that the public interest demands the granting of the Application. . . ."[89] CNCP took the position that if it made out a *prima facie* case, that is, a case which would satisfy the Commission in absence of any evidence from Bell Canada, then the burden of proof shifted to Bell Canada to dislodge the *prima facie* case.[90] The Commission adopted a burden of proof test similar to section 321 of the Railway Act:

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[84] Independent Tel. Co. v. Bell Tel. Co., 17 C.R.C. 266 (Bd. of Ry. Comm'rs 1914).

[85] *Supra* note 4.

[86] RESTRICTIVE TRADE PRACTICES COMM'N, GENERAL INQUIRY UNDER SECTION 47 OF THE COMBINES INVESTIGATION ACT RELATING TO TELECOMMUNICATION SYSTEM AND EQUIPMENT (Reply Argument of the Director of Investigation and Research Combines Investigation Act 16 Oct. 1980).

[87] *Supra* note 6, at 424.

[88] Interstate and Foreign Message Toll Tel., First Report and Order, *supra* note 6, at 600.

[89] CNCP Telecommunications, Interconnection with Bell Canada, Telecom. Decision CRTC 79-11, *supra* note 4, at 105, 5 C.R.T. at 263.

[90] *Id.* at 107, 5 C.R.T. at 264.

> [W]here a prima facie case has been made in support of an application seeking interconnection pursuant to subsection 320(7) and section 265, the onus shifts to the owner of such facilities to justify a denial of access. As noted earlier, section 321 was not specifically invoked by the Applicant and it chose to frame its claim for relief under section 265 and subsection 320(7). As discussed above, however, to the extent that statutory tests under section 265 and subsection 320(7) raise the question of the general public interest, they inevitably require the Commission to have regard to the regulatory principles set out in section 321.[91]

The Commission further stated that "if there is any persuasive evidence to justify denial of access in the context of section 265 and subsection 320(7), this will be peculiarly within the knowledge of the Respondent rather than the Applicant and the statute makes it clear that it is the Respondent who has the responsibility to come forward with such evidence".[92]

Unfortunately, confusion with respect to the appropriate burden of proof continues to exist. In the recent application by the British Columbia Telephone Company to acquire GTE Automatic Electric,[93] the Commission reverted to the *Telesat* formula. As in *Telesat*, the Commission held that it should decide the application on the basis of whether the transaction was in the public interest viewed in the broader sense. The Commission further stated that there was a burden on both applicant and intervenors to demonstrate where the public interest lay.[94]

This ruling led to an incongruous result because the Commission found the evidence of public interest to be inconclusive. Yet the agreement was approved because both the applicant and the intervenor faced the burden of proof.[95] The Commission stated that the regulatory principles enumerated in section 321 were appropriate in determining the public interest, but unlike the *CNCP* case the section 321 burden of proof was not adopted.[96] The Federal Court of Appeal affirmed the Commission's decision.[97]

VI. Future Developments

In future, section 321 undoubtedly will be applied to a number of disputes between competing providers of telecommunications services

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[91] *Id.* at 108, 5 C.R.T. at 265-66.

[92] *Id.* at 109, 5 C.R.T. at 266. In stating this proposition, the Commission relied upon the case of Maritime Tel. & Tel. Co. v. CNCP Telecommunications, [1973] C.T.C. 227, at 246.

[93] British Columbia Tel. Co., Proposed Acquisition of GTE Automatic Elec. (Canada) Ltd. and of Microtel Pac. Research Ltd., Telecom. Decision CRTC 79-17, 113 CAN. GAZETTE PT. I, 6128, 5 C.R.T. 585 (18 Sep. 1979).

[94] *Id.* at 6131-32, 5 C.R.T. at 588-89.

[95] *Id.* at 6146, 5 C.R.T. at 601.

[96] *Id.* at 6132, 5 C.R.T. at 589.

[97] Consumer Ass'n of Canada v. British Columbia Tel. Co. (not yet reported, F.C. App. D., 23 Dec. 1980) (No. A-37-80).

and equipment. Four areas warrant special mention: resale of service, costing and pricing, transborder satellite service and provincial regulation.

A. *Resale of Service*

It is likely that telephone companies' existing prohibitions on resale or line sharing[98] will be considered with respect to the undue preference criterion. Resale is generally defined as a leasing of common carrier facilities to a party who in turn resells the facilities or services to another party. In some applications the reselling party may "add value" to the carrier facilities through additional computer applications.[99]

Resale is permitted in the United States on the ground that it permits greater utilization of existing common carrier facilities, provides alternative services to subscribers at reduced cost and promotes competition in competitive telecommunication services.[100] Value-added computer services and electronic mail or facsimile transmission will

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[98] Rule 18 of the BELL CANADA GENERAL REGULATIONS provides:

> No payment may be exacted, directly or indirectly from any person by any party other than the Company for the use of any of the Company's services, except where otherwise stipulated in the Company's Tariffs or by special agreement.

Rule 18 of the B.C. TELEPHONE CO. GENERAL REGULATIONS is identical. The CNCP TELECOMMUNICATIONS TARIFF REGULATIONS provide in para. 4.7:

> (*a*) Facilities furnished under this tariff may be employed only for the private use of those companies whose offices are connected to the channels, their affiliated and subsidiary companies and their representatives, and each such office shall transmit and receive its particular communications and those of its affiliated and subsidiary companies and their representatives over the equipment installed therein. Further, such facilities shall not be used either directly or indirectly for the handling of communications for the public or any person, firm or corporation other than those whose offices are connected to the channels or their affiliated and subsidiary companies and their representatives, nor shall such facilities be used for any purpose for which a payment or other compensation for such use shall be received by the subscriber, or an authorized user, from any other person, firm or corporation. The restrictions set forth in this paragraph do not apply to facilities furnished to another communications common carrier.
>
> (*b*) In the event of a dispute between the Telecommunications Company and the subscriber as to the use of the facilities, the Telecommunications Company's decision shall be final and binding upon both parties.
>
> (*c*) The subscriber, or an authorized user, shall not create additional channels from the facilities furnished by the Telecommunications Company, except as otherwise provided in this tariff.

[99] American examples are cited in Packet Communications Inc., 43 F.C.C. 2d 922 (1973); Graphnet Sys. Inc., 44 F.C.C. 2d 800 (1974); Telenet Communications Corp., 46 F.C.C. 2d 680 (1974).

[100] Regulatory Policies Concerning Resale & Shared Use of Common Carrier Servs. & Facilities, 60 F.C.C. 2d 261 (1976).

likely be the first applications proposed. While the issue has not yet been considered by the CRTC, resale has been held to be in the public interest by the Alberta Public Utilities Board.[101]

B. *Costing and Pricing*

The second important area is the pricing of competitive telecommunication services by monopoly based carriers.

Where competition is mandated and the monopoly carrier engages in the competitive market, it becomes necessary to adopt procedures to allocate costs to specific services. Cost allocation was unnecessary in the monopoly world where it was accepted that cross-subsidization existed between the various services offered by the monopoly carrier. But competition questions the traditional pricing methodology. In a competitive environment, it is essential that a monopoly carrier's competitive offerings be compensatory and make a contribution of revenue. If a competitive service is offered at a loss, it becomes a burden on the subscriber to monopoly services who is forced to support a service he does not require. At the same time, the ability of a monopoly carrier to offer competitive services at prices less than cost may result in predatory pricing which eliminates competition.

The dimension of the problem became clear in the last Bell Canada rate application.[102] It allows further scope in the application of section 321 of the Railway Act. Bell Canada has adopted the practice of exempting certain competitive services from rate increases. In 1978, there were thirty-eight services exempted and by 1980 this had increased to forty-eight services with a total revenue of $939 million. Most of the exempted services were competitive services. Notwithstanding exemptions of this magnitude, Bell Canada was at the same time requesting a general rate increase of some 35% for its business monopoly services while acknowledging that the cost of competitive services was increasing as fast as monopoly services. On this evidence, two intervenors supplying competitive services which Bell Canada had exempted claimed that Bell Canada was unjustly discriminating against competitors.

The CRTC recognized this difficulty in its 1977 Rate Decision:

> The offering of both non-competitive and competitive services by a carrier raises certain regulatory problems. The combination exists in telecommunications because of overall economies arising from the common use of resources. However, to ensure that competitive services are offered at rates which fully recover their costs and do not create a cost burden on non-competitive services, a knowledge of their costs is required. Although

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[101] ALBERTA PUB. UTILS. BD., TELECOMMUNICATIONS INQUIRY INTO THE PROVISION OF LOCAL NON-BROADCASTING TELECOMMUNICATIONS SERV. IN ALTA. (1 Sep. 1980).

[102] Bell Canada, General Increase in Rates, Telecom. Decision CRTC 80-14, 114 CAN. GAZETTE PT. I, 5105 (12 Aug. 1980).

> rates need not be based solely on costs, the identification of costs is essential to determine whether rates are just and reasonable and not unduly preferential.[103]

While the Commission's decision in the Bell Canada rate application did not grant relief to those intervenors alleging unjust preference arising from rate increase exemptions, the Commission's decision in the *Colins* final rate case dealt with the matter explicitly. The Commission held that the outpulsing services to the radio common carriers should be priced at some 25% above direct cost in order to provide a total contribution to Bell Canada's own radio paging rates, as competitive services must make a contribution to revenue. In order to achieve this end, the Commission ordered Bell Canada to unbundle its rates so as to provide both a paging equipment component and a network component. The rates of the network component are to include the same cost allocation applied for outpulsing services to radio common carriers.[104]

It is again helpful to refer to American proceedings on the same matter. The FCC, in its recent decision on cost allocation procedures, recognized the same policy problem:

> Over the last decade, the FCC has conducted rulemaking proceedings to determine entry policies consistent with the public interest in markets for various telecommunication services. The "*Above 890*" decision, the *Domsat* decision, the *Specialized Common Carrier* decision, the *Resale and Share Use* decision and the *Other Common Carrier Interconnection* decision, point toward a general finding that competitive markets with minimal barriers to entry are in the public interest. In general, competitive market structures promote economic efficiency and encourage the rapid introduction and diffusion of new types and qualities of products and services. . . . Nevertheless, competitive markets for diverse telecommunications services remain in their infancy. Dominant carriers will possess sufficient market power to cross-subsidize among services and users. Such cross-subsidization might nullify or otherwise restrain telecommunications markets. Consequently, the implementation of Commission-approved costing principles for dominant carriers generally, and AT & T in particular, is crucial to the promotion and further development of sustainable, competitive telecommunication markets of the future.[105]

In general, the FCC has been more active than the CRTC in rejecting tariffs on the grounds of unfair burden and anti-competitive pricing. In 1963, Western Union alleged that AT & T was pricing private line services at below cost. The Commission found that the volume discounts had not been shown to cover costs and that rates were therefore unjustly and unreasonably discriminatory and therefore unlawful.[106] Recent

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[103] Bell Canada, Increase in Rates, Telecom. Decision CRTC 77-7, 111 CAN. GAZETTE PT. I, 3158, at 3178, 3 C.R.T. 87, at 106 (1 Jun. 1977).

[104] *Telecom. Decision CRTC 80-16*, *supra* note 5, at 5638-39.

[105] *In the Matter of* AT & T Manual & Procedures for Allocation of Costs, 73 F.C.C. 2d 629, at 629-30 (1979).

[106] *In the Matter of* AT & T & Western Union Private Line Cases, 34 F.C.C. 2d 629 (1979).

decisions by the FCC have rejected AT & T's rate filings for WATTS,[107] Data Phone Digital Private Line Service,[108] Series 7000 Television Transmission Service[109] and Multi-Scheduled Private Line Services[110] on the same basis. Attempts in both countries to develop cost allocation procedures have not been entirely acceptable.[111] Not only is it difficult to develop cost related services, but the appropriate methodology, the use of fully distributed or marginal (incremental) cost, is disputed.

Given the difficulties of allocating costs which are all too evident in the proceedings to date, the only worthwhile solution may be that recently adopted by the FCC in the *Second Computer Inquiry*.[112] There the Commission required monopoly carriers offering competitive services to do so through a separate subsidiary, although this requirement was proposed only for those carriers with very substantial monopoly power. The Commission stated:

> The argument is advanced that a requirement that enhanced services or CPE [Customer Premises Equipment] be provided through a separate corporate entity is not necessary and that reliance on accounting tools is sufficient to satisfy regulatory concerns. While accounting has always been a fundamental regulatory tool utilized by this Commission in the exercise of our statutory responsibilities, its use has by no means been recognized as a substitute for structural separation. When used in conjunction with the separate subsidiary concept accounting serves as a useful regulatory tool for identifying certain abuses. We view separation and accounting as part and parcel of a single regulatory mechanism. At a minimum, a carrier with market power and control over communication facilities essential to the provision of enhanced services could distort the competitive evolution of the enhanced services markets at the expense of the communications ratepayer through cross-subsidization and other anticompetitive behaviour. Where a carrier has the incentive and ability to engage in sustained cross-subsidization, or predatory pricing, accounting may be employed to assist in the identification of such practices, but it cannot prevent the misallocation of joint and common costs associated with the provision of basic and enhanced services if provided by the same entity. On the other hand, the separation requirement serves as a structural check on the proper allocation of cost between basic and enhanced services.[113]

Separate subsidiaries have previously been imposed on American common carriers providing data processing.[114] The Canadian Govern-

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[107] *In the Matter of* AT & T (Long Lines Dep't), 69 F.C.C. 2d 1672 (1978).

[108] *In the Matter of* AT & T, 67 F.C.C. 2d 1195 (1978).

[109] *In the Matter of* AT & T (Long Lines Dep't), 67 F.C.C. 2d 1134 (1978).

[110] *In the Matter of* AT & T, 74 F.C.C. 2d 1 (1979).

[111] Inquiry into Telecommunications Carriers' Costing and Accounting Procedures, Phase II: Information Requirements for New Serv. Tariff Filings, Telecom. Decision CRTC 79-16, 113 CAN. GAZETTE PT. I, 5661, 5 C.R.T. 529 (28 Aug. 1979).

[112] *In the Matter of* Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry), Final Decision, 77 F.C.C. 2d 384 (1980).

[113] *Id.* at 464.

[114] 47 C.F.R., s. 64.202. *See* Computer & Communications Serv. & Facilities, 28 F.C.C. 2d 267 (1971), *aff'd in part sub nom.* G.T.E. Serv. Corp. v. F.C.C., 474 F. 2d 724 (2d Cir. 1973). *See also In the Matter of* Establishment of Domestic Communications-Satellite Facilities by Non-Governmental Entities (Memorandum &

ment recommended a similar separation for Canadian federally regulated carriers engaging in data processing.[115]

The separate subsidiary question in Canadian telecommunications has been raised in the Alberta Telecommunications Inquiry regarding the scope of competitive services to be offered by Alberta Government Telephones. The Commission in its Report to the Provincial Cabinet rejected this proposal concluding that cost allocation tests filed in the course of rate cases could provide sufficient protection.[116]

Issues that remain outstanding in the CRTC Interim Terminal Attachment proceeding are the ability of Bell Canada to compete in the sale of equipment, and whether such sales should be channelled through separate subsidiaries.

The potential impact of the future public policy issues in competitive telecommunications indicates that the Commission's approach with respect to section 321 must be a broad rule-making one. Otherwise, the Commission will be faced with the impossible task of adjudicating a series of undue preference issues on a case by case analysis. This would not be within the Commission's ability nor in the public interest.

A broader approach to undue preference proceedings would require the Commission to add all relevant parties wherever possible and to implement in their decisions procedures and guidelines of a self-policing nature. A leading example of this approach is the Commission's recommended procedures in the *CNCP Telecommunications* case with respect to technical harm from the proposed interconnection. There the Commission established general principles which provided for an arbitration procedure in the event of conflict.[117] Another example is the procedure adopted in the Commission's *Interim Terminal Attachment* decision: a certificate of a professional engineer that the equipment meets the set specifications will constitute sufficient protection of the network.[118] This avoids complicated and costly certification procedures and development of meaningless paperwork.

C. *Transborder Satellite Service*

It is increasingly apparent that telecommunication policies can no longer be developed in domestic isolation. In many respects, these problems are really international.

Order), 38 F.C.C. 2d 665 (1973); *In the Matter of* Applications of G.T.E. Corp. to Acquire Control of Telenet Corp. & its Wholly-Owned Subsidiary Telenet Communications Corp., 72 F.C.C. 2d 91 (1979); 72 F.C.C. 2d 516 (1979).

[115] COMPUTER/COMMUNICATIONS POLICY: A POSITION STATEMENT BY THE GOVERNMENT OF CANADA (Dep't of Communications Apr. 1973); TOWARDS AN ELECTRONIC PAYMENTS SYSTEM (Dep't of Finance & Dep't of Communications 1975).

[116] *Supra* note 101.

[117] *Supra* note 4, at 263, 5 C.R.T. at 381.

[118] *Supra* note 30, at 4948.

The most obvious case involves the use of the radio frequency spectrum. The matter arose in the Canadian and American context in terms of a 1972 Exchange of Letters[119] between the two countries prohibiting Telesat Canada from attracting United States traffic on the understanding that American satellite companies would not solicit traffic in Canada. This type of "tariff in the sky" provision may have been appropriate in the infancy of the satellite industry, but as satellite costs fall dramatically both in terms of space and earth station segments, the increased use of satellites has meant that the traditional excess capacity problem has been replaced by one of under-capacity. In such circumstances, it may be appropriate to rationalize satellite capacity internationally.

International implications are also relevant in policies regarding monopoly in telecommunications equipment. Generally, policies with respect to transmission are specific to the particular country. But the use of certain telecommunication policies as a non-tariff barrier to trade in telecommunications equipment is a different matter. While many national carriers have long exercised the direct purchasing policy in an attempt to stimulate domestic manufacturing, the problem arises in a sharper context in the case of terminal attachment policies. Basically, the United States since 1968 has opened its markets completely. There are no restrictions on any company against entering the United States, establishing production facilities and selling terminal equipment directly to the subscribers who may in turn attach the equipment to the telephone company's network. This has undoubtedly created a substantial market opportunity for foreign firms including Canadian companies.

Faced with this United States policy, there is a serious consideration whether Canada can continue to prohibit the attachment of customer-owned equipment and thereby withhold a segment of the Canadian market from the United States suppliers. Nor is it likely that customer ownership of terminal equipment could be permitted on the basis that the only equipment connected would be of Canadian manufacture. This concern lies behind the present Ontario Government Cabinet appeal in the Commission's *Interim Terminal Attachment* decision. The Ontario Government submits that attachment of subscriber-owned equipment should be restricted to equipment manufactured in countries that do not discriminate against the attachment of Canadian equipment.[120] This concern with reciprocity is also evident in the United States where similar legislation has recently been proposed in Congress.[121]

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[119] Exchange of Letters by K.B. Williamson, Minister of the Embassy of Canada at Washington and F.G. Nixon, Adm'r Telecommunications Management Bureau, Dep't of Communications, with Bertram W. Rein, Deputy Assistant Secretary for Transp. and Communications (6, 7, 8 Nov. 1972), 68 DEP'T STATE BULL. 145-47 (1973).

[120] PETITION TO THE GOV. IN COUNCIL UNDER S. 64(1) OF THE NATIONAL TRANSPORTATION ACT CONCERNING TELECOM. DECISION CRTC 80-13, at 4 (18 Aug. 1980).

[121] Such a reciprocity proposal was submitted as an amendment to HR 61-21, the proposed Telecommunications Act of 1980, which failed passage in the 96th Congress.

D. *Jurisdictional Debate*

The most serious future development concerns the present debate regarding regulatory jurisdiction over Canadian telecommunications. This debate which first developed in the Canadian cable television industry[122] is expanding to the telephone industry as competitive entry develops. It is clear that provincial regulatory commissions are more conservative in matters of competitive entry than the federal regulatory commission. All regulation has a political quality. In general the political influence of a telephone company is inversely related to the size of the province served. Provincial ownership of the telephone company appears to heighten the protectionism.

This experience parallels American developments where the competitive scope of telecommunications, as in Canada, resulted from efforts by the federal regulatory agency. And in the United States, as in Canada, state governments attempted to negate FCC decisions granting consumers the right to attach terminal equipment to the telephone company's network[123] and to prohibit specialized common carriers from operating within the state's jurisdiction.[124]

In Canada, four provincial governments opposed the CNCP application for access to the Bell Canada facilities. Since the CNCP application was granted by the CRTC, all provincial governments have refused to grant CNCP access. This continued opposition by provincial governments to CRTC jurisdiction was exhibited in the recent *TCTS* case in which three provincial governments successfully appealed the Commission's decision to the federal Cabinet.[125]

More recently, Manitoba has proposed legislation requiring approval of the regulatory board for terminal attachment and approval of the provincial cabinets for the interconnection of competing carriers.[126] Saskatchewan in turn has passed legislation prohibiting any interconnection, whether equipment or competing carriers, without approval of the provincial telephone company.[127] The third publicly owned carrier,

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The amendment was not sponsored or endorsed by any agency of the United States Government and does not represent official policy of that Government. The amendment was sponsored at the request of the Communications Workers of America, a major labour organization of employees who work for regulated telephone companies.

[122] *See* note 77 *supra*.

[123] *In the Matter of* Telenet Leasing Corp., 45 F.C.C. 2d 204 (1974), *aff'd sub nom.* North Carolina Util. Comm'n v. F.C.C., 537 F. 2d 787 (4th Cir. 1976), *cert denied* 429 U.S. 1027 (1967).

[124] California v. F.C.C., 567 F. 2d 84 (D.C. Cir. 1977), *cert. denied* 434 U.S. 1010 (1978).

[125] *Supra* note 2.

[126] An Act to Amend the Public Utilities Board and the Manitoba Telephone Acts, Bill 107, 31st Leg. Man., 4th sess., 1980 (3d reading & assent 29 Jul. 1980, to be proclaimed).

[127] The Saskatchewan Telecommunications Amendment Act, 1980, S.S. 1979-80, c. 95, s. 6 (*amending* R.S.S. 1965, c. 42):

Alberta Government Telephones, instituted a lengthy inquiry before the provincial regulatory board to study these same issues.[128]

The prospect of different telecommunications policies in different provincial jurisdictions will quickly negate any increased public benefit to be derived from the CRTC decisions permitting increased competition. Nor is there any reason to assume that uniformity will be improved by granting constitutional jurisdiction over these matters to the provincial governments.

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s. 44.2 No person shall attach or connect to, or use in conjunction with, any part of a telecommunications line of the corporation, any attachment, except as permitted by, and subject to the conditions established in, the regulations.

[128] *Supra* note 101.