MONOPOLY LOST? THE LEGAL AND REGULATORY PATH TO CANADIAN TELECOMMUNICATIONS COMPETITION, 1979-2002

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Cet article fait l'historique des changements dans le cadre législatif et réglementaire régissant les télécommunications au Canada durant les vingt-trois dernières années, une période durant laquelle la structure monopolistique préexistante du marché a favorisé la concurrence et le choix des consommateurs dans la plupart des secteurs du marché La discussion porte presque exclusivement sur les services de télécommunications (c'est-à-dire la diffusion de la voix, de données et d'autres messages et renseignements par voie électronique et numérique), mais touche aussi à la « convergence » des télécommunications, à la télédiffusion et à d'autres secteurs. L'article commence par un survol de l'histoire de la libéralisation de la concurrence ainsi que des changements législatifs et réglementaires importants survenus au fil des ans. Divers marchés des télécommunications sont décrits dans le cadre de cette analyse chronologique, y compris l'équipement terminal, les services interurbains, les services internationaux, les services sans fil et locaux. L'article identifie ensuite trois périodes qui s'entrecoupent dans le processus de libéralisation de la concurrence : l'autorisation d'entrée, la mise en place de « mesures de protection de la concurrence » qui limitent l'action des titulaires s'opposant à l'entrée et l'abstention de réglementation. En conclusion, l'article examine les perspectives d'avenir. Divers facteurs sont identifiés qui laissent croire que, malgré la transition en cours vers la concurrence, des résidus de réglementation risquent de persister dans le domaine pour encore un certain temps.

This paper looks back on the historical record of change in the legal and regulatory framework covering telecommunications in Canada in the last 23 years, a period in which the pre-existing monopoly market structure has given way to competition and choice for consumers in most market segments. The discussion focuses almost exclusively on telecommunications services (that is, the distribution of voice, data and other messages and information by electronic and digital means), but touches on the issue of "convergence" of telecommunications, broadcasting and other sectors, as well. The paper begins by setting out in overview the history of liberalized competition and the significant legal and regulatory changes which have characterized this history. A number of telecommunications markets are described in this chronological treatment, including terminal equipment, long distance services, international services, wireless and local service. The paper then identifies three overlapping phases in the process of liberalized competition: permitting entry; putting in place "competitive safeguards" which restrain the reaction of incumbents to entry; and, forbearance from regulation. In conclusion, the paper discusses the prospects for the future. Several factors are identified which suggest that, despite the continuing transition to competition, remnants of regulation are likely to persist in this area for some time to come.

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I. INTRODUCTION

Not long ago, Canadian consumers and businesses had only one supplier of telephone and related services - their local telephone monopoly. In 1979, competitive entry first occurred in private long distance business lines. In 1982, competition came to telephone sets and equipment. In 1984, the first cellular telephone services were offered. In 1992, residential consumers were given their first choice of long distance providers and in 1995, further wireless competitors were permitted. In the last five years, the ground rules for competition in the local telephone services market, and the framework for introducing competition into international telecommunications services, have been established. As a result of these and other developments, in just over two decades, the framework for choice and competition has been introduced into virtually all telecommunications markets and in most regions of the country.

Without advances which have reduced the cost and increased the capacity of computer and telecommunications technology, this transition to competitive markets would not have been possible. However, in this heavily regulated market, technology alone could not have achieved this change. Changes in regulatory thinking and in government policy, consisting principally of the regulatory decisions of the Canadian Radio-television and Telecommunications Commission (the CRTC), the licensing policy of the federal department responsible for communications, and international trade agreements, have been critical to moving telecommunications from a monopoly to a competitive market structure.

Whether the regulatory and policy changes or the changing markets and technology were the primary drivers of this transition, or whether regulation actually retarded market change, are questions open to debate. For example, some have suggested that the CRTC's proper role in the face of market changes should have been to simply "get out of the way and let them happen".[1] It can also be argued, however, that the slower and more invasive approach of "managed competition" adopted by the CRTC has fostered more stable and sustainable competition.

The purpose of this paper is not to enter this debate, but to look back on the historical record and trace the changes to the legal and regulatory framework covering telecommunications services in Canada in the last 20 years, to identify the principal phases in the opening of markets, and to assess to what extent the remaining regulatory structure is likely to endure. As the transition to competitive from fully regulated markets nears its completion, it is a convenient time to take stock.

The discussion below focuses almost exclusively on telecommunications (that is, the distribution of voice, data and other messages and information by electronic and digital means). Such a perspective is becoming less meaningful given the convergence of the media used for the delivery of data, voice communications, broadcasting, newspapers and other information-based services. However, given the historical view taken below, it is relevant to focus on telecommunications services because this reflects the regulatory isolation to which they were, and could be, subjected until recent years. It also reflects the separation of markets which existed until relatively recently between,

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[1] G.B. Doern, "Regulating on the Run: The Transformation of the CRTC as a Regulatory Institution" (1997) 40 Can. Pub. Admin. 516 at 522.

for example, "telephone" and "broadcasting" services. By necessity, the discussion will touch on some of the implications of the "convergence" phenomenon. It is one of the principal challenges facing current regulators and policy makers, as old regulatory structures must be adapted to fit new market realities, to the extent that is possible.

The paper begins with an overview of the history of liberalized competition and the significant legal changes which have characterized this history. Three major phases of regulatory reform are then discussed. Finally, the paper examines the prospects for continuing regulation in the future.

II. THE RECORD OF DEREGULATION AND COMPETITION IN TELECOMMUNICATIONS

A. *The Legal and Technological Context*

The delivery of telecommunications services in Canada was initially regulated by both federal and provincial authorities. Federal regulation became preeminent after constitutional decisions of the Supreme Court of Canada commencing in 1989 gave primary regulatory jurisdiction to Parliament.[2]

Federal authority over telephone companies was initially limited to Bell Canada and BC Tel and certain other smaller telecommunications companies operated in the territories (such as Northwestel) or nationally (such as CNCP telecommunications).[3] The powers given to the federal regulators can be traced to the legislation that first incorporated Bell Telephone in 1880[4] and then introduced a regulatory scheme in 1882.[5] Regulation was entrusted to railway regulators in the *Railway Act,* 1903 which served as the framework for regulation for over eighty years.[6] The Act provided rules requiring "just and reasonable" rates, the imposition of certain terms and conditions on suppliers

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[2] See *Alberta Government Telephones* v. *Canadian Radio-television and Telecommunications Commission*, [1989] 2 S.C.R. 225, 61 D.L.R. (4th) 193 [hereinafter *Alberta Government Telephones* cited to SCR]; *Téléphone Guèvremont Inc.* v. *Quebec (Régie des télécommunications)*, [1994] 1 S.C.R. 878, 112 D.L.R. (4th) 127 [hereinafter *Téléphone Guèvremont* cited to SCR].

[3] See *Toronto (City of)* v. *Bell Telephone Co. of Canada*, [1905] A.C. 52, 13 C.R.A.C. 361 (P.C.), where authority was founded on the federal constitutional power over interprovincial works and undertakings, which covered Bell Canada, *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No. 5 at s. 92(10)(a) [hereinafter *Constitution Act, 1867*]; *An Act to incorporate the Western Canada Telephone Company*, S.C. 1916, c. 66, s. 2, where authority was based on the statutory declaration of B.C. Tel as a work for the general advantage of Canada pursuant to the *Constitution Act, 1867* (*ibid.*, s. 92(10)(c)). See also *An Act to amend the Act incorporating "The Bell Telephone Company of Canada"*, S.C. 1882, c. 95, s. 3 [hereinafter *An Act to amend Bell Canada*], where Bell was also designated a federal work, but its interprovincial character made this designation unnecessary to fall within federal jurisdiction.

[4] *An Act to incorporate The Bell Telephone Company of Canada*, S.C. 1880, c. 67.

[5] *An Act to amend Bell Canada*, *supra* note 3.

[6] S.C. 1903, c. 58. See also *An Act to amend The Railway Act,* 1903, S.C. 1906, c. 42. The regulator was originally known as the Board of Railway Commissioners, then the Board of Transportation Commissioners, and finally the Canadian Transport Commission.

and the approval of agreements.[7] Most aspects of the business were subject or susceptible to regulation.

In 1976, the CRTC was given responsibility for federally regulated telecommunications undertakings, as well as broadcasting.[8] This regulatory scheme was in addition to the powers of Parliament to control entry through the federal statutory scheme covering Bell and BC Tel, and through the federal authority to license "radiocommunication" transmissions and undertakings, as well as telegraph.[9]

The provinces regulated, or operated as crown monopolies, the other telephone companies which operated within their territories, founded - it was thought at the time - on their constitutional authority over local works and undertakings.[10]

Until the developments of the last two decades, virtually all Canadian telecommunications markets, whether federally or provincially regulated, exhibited a monopoly structure subject to tight regulatory control. This structure was the product of a policy approach which held that the industry was subject to "natural monopoly" characteristics, under which competition would be inefficient and harmful to suppliers and consumers because a single firm could supply the market at lowest cost.[11] Thus, telephone service was typically provided by a single telephone company (referred to below as the "telcos" or "incumbent telephone companies") whose monopoly position was protected by municipal, provincial or federal laws prohibiting entry by competitors. This protection, is was thought, was necessary to permit the incumbent firm to recover the significant fixed investments needed to offer high quality telephone services to the public.[12]

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[7] *Railway Act*, R.S.C. 1985, c. R-3, ss. 340(1), 334-339. With respect to the terms of service, see *Review of the General Regulation of the Federally Regulated Terrestrial Telecommunications Common Carriers* (1986), C.R.T. 86-7.

[8] *Canadian Radio-television and Telecommunications Commission Act*, R.S.C. 1985, c. C-22.

[9] See *Broadcasting Act*, S.C. 1968, c. 25 (wireless transmission); *Radio Act*, R.S.C. 1985, c. R-2 (wireless transmission); *Reference Re Regulation and Control of Radio Communication*, [1932] 2 D.L.R. 81, 1 W.W.R. 563 (P.C.) (wireless transmission); *An Act to provide by one General Law for the Incorporation of Electric Telegraph Companies*, S.C. 1852, c. 10 (telegraph companies); *The Railway Act*, 1903, *supra* note 6, as am. by S.C. 1908, c.61 (telegraph companies).

[10] See *Constitution Act, 1867*, *supra* note 3, s. 92(10).

[11] See *e.g.* Economic Council of Canada, *Reforming Regulation* (Ottawa: Supply and Services Canada, 1981) at 41, where the Council explained that: "The presumption that large segments of the telecommunications industry are characterized by sufficiently large economies of scale that they are natural monopolies has been a major rationale for much of the regulation in this industry". See also W.K. Viscusi, J.M. Vernon & J.E. Harrington, Jr., *Economics of Regulation and Antitrust*, 2d ed. (Cambridge: MIT Press, 2000) at 82, where it is explained that a "natural monopoly" exists when economies of scale are such that the long-run average cost curve reaches its minimum point at an output level that is very large relative to market demand. When that occurs, production can most cheaply be carried out by a single firm.

[12] Senate of Canada, Interim Report of the Subcommittee on Communications of the Standing Senate Committee on Transportation and Communications, *Wired to Win! Canada's International Competitive Position in Communications* (Ottawa: Senate of Canada, 1997), online: Senate of Canada <http://www.parl.gc.ca/35/2/parlbus/commbus/senate/com-e/COMM-E/rep-e/interim-e.htm> (date accessed: 10 March 2002).

Added to this economic rationale for monopoly was a desire to further various policy objectives through these protected monopolies, such as to achieve high penetration of telephone service. This was furthered through subsidies of local rates from long distance and optional services.[13]

The evolution of new technology, lowering prices and expanding demand, eroded the natural monopoly assumption surrounding telecommunications services. Fibre optics, wireless transmission and digital technology are some of the developments which have increased the capacity and speed of transmission by large multiples with each passing year. New or expanding uses for telecommunications lines (such as fax, Internet and video), as well as computerized services requiring instantaneous connection (such as automatic tellers and point-of-sale debit cards), have increased the commercial appetite for high speed and large capacity transmission.[14] These forces have produced substantial capacity expansion by incumbents and competitive entry by medium or even small-sized competitors, at all levels of the market, from long distance transmission to local services.

Along with these technological developments have been significant legal changes in telecommunications regulation in Canada. Two can be singled out as critical. The first involved decisions of the Supreme Court of Canada which confirmed broad federal jurisdiction over most telecommunications undertakings.[15] The second was the passage of the 1993 federal *Telecommunications Act*.[16]

With respect to the former, the decisions of the Supreme Court of Canada in 1989 and 1994 have given the CRTC and other federal policy makers broad authority over both interprovincial *and* local telecommunications service providers.[17] This has created the potential for a single regulator applying a coherent policy approach in developing the rules governing deregulation and the transition to competition. This situation can be contrasted to that in the United States, where jurisdiction is divided between the federal and state governments; a structure which has complicated the transition to competitive markets.

The second major development, the 1993 *Telecommunications Act*, brought together federal telecommunications regulatory authority in a central piece of legislation

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[13] See *e.g. Review of Regulatory Framework* (1994), C.R.T. 94-19 [hereinafter *Review of Regulatory Framework*].

[14] See *e.g.* Canadian Radio-television and Telecommunications Commission, *Report to the Governor in Council: Status of Competition in Canadian Telecommunications Markets: Deployment/Accessibility of Advanced Telecommunications Infrastructure and Services* (Ottawa: CRTC, 2001) at 9 (Chairperson: D.C. Colville) [hereinafter *Report to the Governor in Council*], where it is noted that Canadian telecommunications date revenues grew 28% in calendar year 1999-2000, while Internet revenues grew 63% in that same period.

[15] *Alberta Government Telephones*, *supra* note 2; *Téléphone Guèvremont*, *supra* note 2.

[16] S.C. 1993, c. 38, passed as Bill C-62 on October 25, 1993.

[17] See generally R.W. Crandall & L. Waverman, *Talk Is Cheap: The Promise of Regulatory Reform in North American Telecommunications* (Washington: Brookings Institution, 1995) at 40-56.

which provided new powers to, and imposed new obligations on, the CRTC.[18] These included the requirement to remove regulation where competition is capable of looking after the public interest.[19] The Federal Court had earlier ruled that the CRTC did not have the power to forbear from regulation in the absence of explicit authority to do so.[20] The Act gave the CRTC the clear authority to engage in such forbearance.

Another aspect of the 1993 Act was directed toward bringing greater political control over policy. This was reflected in section 7, which set out nine specific objectives of "Canadian telecommunications policy", and section 8, permitting the Governor in Council to issue "directions of general application on broad policy matters with respect to the Canadian telecommunications policy objectives".[21] These provisions supplemented the existing legislative appeal to Cabinet as measures of executive control over the CRTC.[22] In spite of the impression left that these provisions shifted the balance in favour of greater political control, the CRTC has in most areas retained the dominant hand in shaping evolving policy.[23] The CRTC's decisions thus arguably provide the most important source of material on the regulatory changes leading to liberalized telecommunications markets in Canada over the last two decades.

B. *Other Determinants of Market Structure*

The market structure of Canadian telecommunications has been, and continues to be influenced, of course, by Canada's physical setting, featuring an immense land mass and the concentration of most of the population in a relatively narrow band near the American border. This geography has created its own competitive challenges, in creating practical barriers to entry.

Historically, the Canadian market was dominated by a few regional

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[18] *Telecommunications Act*, *supra* note 16, s. 9,permitting the CRTC to exempt a carrier from the application of the Act; s. 34(1), permitting forbearance where same is consistent with telecommunications policy objectives set out in the Act.

[19] *Ibid.*, s. 34(2), under which the CRTC <u>must</u> forebear where a service is found to be subject to a degree of competition sufficient to protect the interests of users.

[20] See *T.W.U.* v. *Canada (Canadian Radio-television and Telecommunications Commission)* (1988), [1989] 2 F.C. 280, 98 N.R. 93 (C.A.); leave to appeal quashed 1990, 102 N.R. 79 (S.C.C.).

[21] *Telecommunications Act*, *supra* note 16, ss. 7-8.

[22] *Ibid.*, s. 12. See *e.g.* Industry Canada, *Telecommunications Service in Canada: An Industry Overview 1999-2000* (Ottawa: Industry Canada, 2001), online: Industry Canada <http://www.strategis.ic.gc.ca/SSG/sf05452e.html> (date accessed: 10 January 2002) at s.6.2 [hereinafter *Telecommunications Service in Canada*] where it is noted that the Governor-in-Council review power over the CRTC has only been exercised 22 times in the 24 years it has been in existence. In that time, there were 26,000 CRTC decisions.

[23] See *e.g.* R.J. Schultz, "Still Standing: The CRTC, 1976-1996" in G.B. Doern *et al.*, eds., *Changing the Rules: Canadian Regulatory Regimes and Institutions* (Toronto: University of Toronto Press, 1999) 29 at 42, where Schultz summarized the Commission's policy role on key regulatory developments as follows: "Rather than providing direction and setting the goals for the CRTC, political authorities were reduced to a supporting, noninitiating, and nondirecting role that limited them simply and solely to indicating agreement with the basic decisions and the larger policy framework developed by the CRTC". Nonetheless, as will be seen below, Cabinet has reversed the CRTC on occasion, in areas including resale and directory listings.

monopolies, most of which were under provincial Crown ownership or regulation. There were nine principal monopoly telcos serving this area in the late 1980's (from west to east): BC Tel, Alberta Government Telephones (AGT), Saskatchewan Telephone, Manitoba Telephone Systems, Bell Canada, New Brunswick Telephone Co. Limited, The Island Telephone Company Limited, Maritime Telephone & Telegraph Company Limited, and Terra Nova Telecommunications. Smaller areas were served by numerous other regional or municipal operators.

The current market structure continues to be concentrated, given existing corporate alliances and ownership patterns. BCE Inc. is a conglomerate which controls not only Bell Canada, the dominant supplier in Ontario and Quebec, but also the principal incumbent telcos in New Brunswick, Nova Scotia, P.E.I., Newfoundland and the Canadian north.[24] BCE's subsidiaries in directory publishing are also dominant players. Its other interests include Bell Mobility, a wireless telephone services operator, Teleglobe Inc., Canada's leading international carrier, and Telesat Canada, the principal domestic satellite carrier.

With the merger of B.C. and Alberta telcos BC Telecom Inc. and Telus Corporation (the corporate successor of AGT) in 1998, a substantial new telecommunications player has emerged, with the potential to challenge the BCE-related companies. This is particularly true since the unwinding of Stentor, which was a national cooperative telecommunications organization which included in its membership all of the dominant provincial carriers except AGT. Telus' interests include Telus Quebec, formerly Quebec Telephone (Quebec Tel), a telco serving parts of Quebec, and Clearnet Communications Inc., a wireless service provider.

Other important competitors have emerged amid the relaxing regulatory rules, particularly in market segments such as business and long distance services. American competitors Sprint and AT&T have given their names to Canadian competitors prominent in the long distance market (such foreign ownership is currently limited by law to 20 percent of the voting shares of the entity in question[25]). Microcell and Clearnet have gained significant market share in the supply of wireless services.[26] Well-resourced cable television companies such as Vidéotron have also entered segments of the market.

International arrangements are another feature of the current market structure. Partnerships affecting Canada have included those formed between MCI (U.S.) and Stentor, and Bell Canada and Mercury (Britain). More recently, Ameritech took a $5.1 billion, 20% stake in Bell Canada in March, 1999 and Microsoft invested $600 million in Rogers in June, 1999. In December, 2000, BCE's acquisition of CTV was approved

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[24] BCE Inc.'s interests have included Northwestel Inc. (which provides services in the Yukon and Northwest Territories), NewTel Enterprises Inc. (Newfoundland), Bruncor Inc., which controlled NB Tel (New Brunswick) and MT&T Company Inc., controlling Maritime Tel & Tel and Island Telephone Company (Nova Scotia and P.E.I.). Aliant Telecom Inc. was formed in early 2001 from a merger of MT&T, NB Tel, Island Telecom and NewTel. In 2001, BCE owned 53.3% of Aliant, *Telecommunications Service in Canada*, *supra* note 22 at s.4.1.

[25] See *Telecommunications Act*, *supra* note 16, s. 16(3)(b).

[26] Even these players have their corporate connections. For example, Microcell is part owned by interests connected to Vidéotron (a Quebec cable operator), Sprint (a long distance market competitor), and Teleglobe (an international monopoly telecommunications carrier). For its part, Clearnet is a subsidiary of Telus, *Telecommunications Service in Canada*, *supra* note 22.

by the CRTC.[27] These transactions reflect a global trend in consolidation, partnerships and mergers among telecommunications, broadcasting, cable and other media companies in recent years.

It is evident from the foregoing that a monopolistic or concentrated market structure has been the historic feature of the Canadian telecommunications landscape. This structure has likely had an impact on the speed of competitive entry. However, this structure has begun to change substantially. Segments of the market are already highly competitive.

C. *The Record of Deregulation*

The following summarizes some of the key regulatory steps in the progression toward competitive telecommunications markets in Canada .

1. *Terminal Equipment*

From the days in which consumers had little choice beyond a black rotary phone leased from the local telephone company, there are now virtually limitless options and numerous suppliers. This choice had to be fought for. After a period of legal and regulatory battles between the telcos and their customers over the right to attach terminal equipment in the late 1970's,[28] entry restrictions were relaxed in the CRTC's decisions in 1980 and 1982 allowing consumers the freedom to purchase and use the terminal equipment of their choice.[29] Later decisions removed most regulatory oversight from the activities of the monopoly local telephone companies in this market.[30]

Another aspect of opening the terminal equipment market to competition was

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[27] *Transfer of Effective Control of CTV Inc. to BCE Inc.* (2000), C.R.T. 2000-747, online: CRTC <http://www.crtc.gc.ca/archive/Decisions/2000/DB2000-747e.htm> (date accessed: 15 March 2001).

[28] See *e.g. Garden of the Gulf Court and Motel* v. *Public Utilities Commission of P.E.I.*, (1981), 32 Nfld. & P.E.I.R. 476, 126 D.L.R. (3d) 281 (P.E.I. S.C. (A.D.)); *Bell Telephone Co. of Canada* v. *Harding Communications* (1978), [1979] 1 S.C.R. 395, 92 D.L.R. (3d) 213; *Bell Canada* v. *Challenge Communications* (1978), [1979] 1 F.C. 857, 86 D.L.R. (3d) 351 (C.A.).

[29] See *Bell Canada - Interim Requirements Regarding the Attachment of Subscriber-Provided Terminal* Equipment (1980), C.R.T. 80-13; *Attachment of Subscriber-Provided Terminal Equipment* (1982), C.R.T. 82-14.

[30] See *Participation of Bell Canada and British Columbia Telephone Company in the Multiline and Data Terminal Equipment* Market (1986), C.R.T. 86-5, rejecting structural separation in favour of costing oversight to guard against cross-subsidy of this market by the telcos; *Floor Price Filing Requirements for the Sale of New Terminal Equipment* (1993), C.R.T. 93-3, dealing with the tariff requirements; *Forbearance - Sale of Terminal Equipment by Canadian Carriers* (1994), C.R.T. 94-14 [hereinafter *Forbearance - Sale of Terminal Equipment*], regarding forbearance under ss. 34(1)-(3) of the powers and duties under ss. 25, 31, 27(1), and 27(5)-(6) of the *Telecommunications Act*, *supra* note 16, with respect to the sale of terminal equipment by Canadian carriers; *Review of Regulatory Framework*, *supra* note13 at 76-80, adding ss. 24, 27(2), and 27(4) to the list of forborne powers in respect of the sale, lease and maintenance of terminal equipment by the telcos, i.e., AGT, BC Tel, Bell, Island Tel, MT&T, NB Tel, and Newfoundland Tel. The case also dealt with the handling of competitor confidential information and terminal equipment supplied on a monopoly basis were not forborne.

ensuring the transparency of the technical information concerning the interface between such equipment and the network. The CRTC required telcos to disclose network changes so that equipment competitors could build compatible products.[31] Without such requirements, competition would almost surely be frustrated.

2. *Long Distance Competition and Resale*

Consumers now have numerous choices of long distance telecommunications suppliers - whether from facilities - based carriers (which own their own microwave or fibre long distance facilities) such as the telcos, AT&T Canada and Sprint Canada, or from resellers (which lease all or part of their facilities from the others). The story of competition in this area, as with terminal attachment, has largely been one of the elimination of various *regulatory* barriers to entry.

Limited competition began with the CRTC's decision in 1979 to permit CNCP, owner of long distance facilities associated with its telegraph and affiliated railway businesses, to interconnect privately leased voice and data lines with the telephone companies' local facilities.[32] After its entry, CNCP was made subject to lightened regulatory rules requiring tariff filings.[33]

Barriers to entry were further lowered by opening the way to resale in several decisions governing various services over the period from 1985 to the early 1990's.[34] Resellers often own switches but may not own long-distance transmission lines or equipment. They purchase long distance services in volume and parcel them for end-use customers, providing choice, innovative services and competitive pricing. The liberalization of the reselling rules only occurred, however, after appeals to the political

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[31] See *Re: Notification of Network Changes, Terminal-to-Terminal Network Interface Disclosure Requirements and Procedures for the Negotiation and Filing of Service Arrangements*, C.R.T. 94-11; Telecom Order CRTC 97-1055, (1994), online: CRTC <http://www.crtc.gc.ca /archive/ENG/Orders/1997/O97-1055.HTM> (date accessed: 10 March 2002), ordering Bell and AGT to disclose their terminal-to-network interfaces.

[32] See *CNCP Telecommunications: Interconnection with Bell Canada* (1979), C.R.T. 79-11; *CNCP Telecommunications: Interconnection with the British Columbia Telephone Company* (1981), C.R.T. 81-24.

[33] See *CNCP Telecommunications - Application for Exemption from Certain Regulatory Requirements* (1987), C.R.T. 87-12, exempting CNCP from certain tariff requirements. The jurisdiction for this "detariffing" was later successfully challenged, *T.U.W.*, *supra* note 20.

[34] *Interexchange Competition and Related Issues* (1985), C.R.T. 85-19 at 90, 89, requiring that tariffs be issued by the telcos to permit resale and sharing beyond special agreements, leaving resellers unregulated [hereinafter *Interexchange Competition*]; *Tariff Revisions Related to Resale and Sharing* (1987), C.R.T. 87-1; *Resale to Provide Primary Exchange Voice Systems* (1987), C.R.T. 87-2 [hereinafter *Resale to Provide Primary*]; *Teleglobe Canada Inc. - Resale and Sharing of International Services* (1990), C.R.T. 90-2 at 7, permitting such resale, subject to certain limitations; *Reslae and Sharing of Private Line Services* (1990), C.R.T. 90-3 at 37, 49, permitting resale of private lines for joint use for voice purposes, subject to the payment of contribution; *Applications by Fonorola Inc. and ACC Long Distance* (1990), C.R.T. 90-19; *Trunk-Side Access by Resellers to the Public Switched Telephone Network* (1993), C.R.T. 93-8. Resale was also permitted for satellite services in *Telesat Canada - Final Rules for 14/12 Ghz Satellite Service and General Review of Revenue Requirements* (1984), C.R.T. 84-9 [hereinafter *Telesat Canada*].

level were made from restrictions against resellers that were initially tolerated by the CRTC.[35]

Unitel (previously CNCP, now AT&T Canada) made a significant breakthrough in the introduction of long distance competition in 1992, when its second application to enter into residential long distance services was granted.[36] Unitel is a facilities-based carrier, owning its own transmission network for the carriage of long distance communications. The decision also further liberalized the rules governing resale and sharing.[37]

In order for the promise of this new entry to be realized, a number of technical issues had to be addressed. These included equal access, by which all customers may use a competing long-distance carrier without keying lengthy codes into their phones before calling; co-location, whereby competitors are permitted to connect their networks more easily to those of the telcos; and 800-number portability, whereby businesses can keep the same 800 number if they change carriers. These issues have been dealt with by the CRTC both through formal regulatory rulings and through industry committees in which the Commission plays the role of facilitator or mediator.[38]

Increased competition and entry reduced the need for regulation. In subsequent decisions the CRTC granted forbearance from regulation of non-dominant long distance competitors,[39] and held that resellers were not covered by the new regulatory scheme put in place in 1993.[40] Competition also resulted in less regulation of the telcos. This began

[35] R.J. Schultz, *supra* note 23 at 44-45.

[36] Unitel (now AT&T) first attempted entry as CNCP, but it was denied in *Interexchange Competition*, *supra* note 34.

[37] *Competition in the Provision of Public Long Distance Voice Telephone Services and Related Resale and Sharing Issues* (1992), C.R.T. 92-12.

[38] An example of a formal proceeding was in *Implementation of Regulatory Framework - Co-location*, Telecom Public Notice C.R.T. 95-13, (1995), by which comment was sought on the telephone companies' co-location tariffs.

[39] *Forbearance - Services Provided by Non-Dominant Canadian Carriers* (1995), C.R.T. 95-19 at 3 [hereinafter *Forbearance - Services Provided*], the Commission decided to forbear under s. 25 (tariffs) and s. 31 (limitations of liability) of the *Telecommunications Act*, *supra* note 16 from services offered by fONOROLA, Rogers Network Services, Sprint, Unitel, VTL and Westel except switched local voice services, operator services, and certain broadcast-related services. The Commission ruled hat it would continue to exercise the powers and duties under s.24 (conditions), s.27(2), s.27(4) (unjust discrimination and undue preference) and s.29 (agreements) of the *Telecommunications Act* (*Forbearance - Services Provided, ibid.*, at 2, 15-16). The Commission expressly sanctioned the concept of different rules for different carriers. The companies were also required to register the services they require to assist collection of contribution charges.

[40] CRTC News Release "CRTC Concludes that Resellers not Subject to Regulation Under the New Telecommunications Act" (4 October 1993), referring to Telecom Public Notice CRT 93-62. The Release states "...resellers will no longer be required to have their rates approved by the CRTC, and that any reseller tariffs already filed with the CRTC will cease to have effect..." In *Application by TWO - Status of Resellers under the Railway Act* (1992), C.R.T. 92-11, the CRTC reversed an earlier finding and held that resellers were "companies" and subject to the *Railway Act*, *supra* note 7.

with the relaxation of telco competitive tariff oversight,[41] and culminated in the CRTC's December 1997 decisions to forbear from requiring prior approval of the telephone companies' long distance toll and 800-888 service tariffs,[42] as well as those for high-speed private lines (extended in 1999).[43]

3. *Satellite Services, Domestic and International*

Canadian satellite telecommunications services in both international and domestic markets were historically supplied by Crown corporations subject to protected monopoly status. Teleglobe, the overseas telecom carrier, was privatized in 1987.[44] Telesat Canada, providing domestic and Canada-U.S. satellite services, was privatized in 1991.[45] These companies' monopoly status took longer to change than their ownership. As with other long distance services, resale was permitted first.[46]

In February 1997, Canada agreed in the Fourth Protocol to the General Agreement on Trade in Services (GATS) to open its market as a result of the telecommunications negotiations before the World Trade Organization. On October 1,

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[41] *Information Requirements for Competitive Toll Filings by the Telephone Companies* (1993), C.R.T. 93-12; *Review of Regulatory Framework - Targeted Pricing, Anti-Competitive Pricing and Imputation Test for Telephone Company Toll Filings* (1994), C.R.T. 94-13; *Tariff Filings Relating to Promotions* (1996), C.R.T. 96-7.

[42] *Forbearance - Regulation of Toll Services Provided by Incumbent Telephone Companies* (1997), C.R.T. 97-19 at paras 4, 65, 68, 95-109 [hereinafter *Forbearance- Regulation of Toll Services*]. The Commission withdrew from requiring prior approval of tariffs for basic toll, discount toll and 800-888 (toll free) services, removing price floors from these services (s.25 of the *Telecommunications Act, supra* note 16); and from regulating limitations of liability surrounding those services (s.31 of the *Telecommunications Act, ibid.*). The Commission continued to place conditions dealing with matters including: control of cross-subsidy from uncompetitive to competitive markets through an upward pricing constraint on these services; disclosure of price increases in basic toll services; and confidentiality requirements (s.24 of the *Telecommunications Act, ibid.*). The Commission forbore from regulating the 'just and reasonable' level of most rates, except in areas where competition had not yet taken hold due to lack of 'equal access' (retaining authority under s.27(1) of the *Telecommunications Act, ibid.*, in respect of those services). Finally, the Commission also retained authority over resale and sharing of telco facilities (s.27(2) of the *Telecommunications Act, ibid.*) and agreements entered into by the telcos (s.29 of the *Telecommunications Act, ibid.*).

[43] *Stentor Resource Centre Inc. - Forbearance from Regulation of Interexchange Private Line Services* (1997), C.R.T. 97-20. Forbearance was granted for certain of Stentor's routes for high speed services (e.g. Megaplan) and digital data systems (e.g. Dataroute) for which there was sufficient competitive capacity; regulation was denied, however, for voice grade analogue services, and the remaining digital routes, where it found competition had not yet sufficiently evolved (*ibid.* at paras. 52-67). In Telecom Order CRTC 99-913, (1999), however, forbearance was granted for additional high-capacity data service markets, reflecting increased competition by firms such as AT&T, Videotron, Call-Net, Fundy Telecom and Shaw Fibre Link.

[44] *Teleglobe Canada Reorganization and Divestiture Act*, S.C. 1987, c. 12.

[45] *Telesat Canada Reorganization and Divestiture Act*, S.C. 1991, c. 52.

[46] *Teleglobe Canada Inc. - Resale and Sharing of International Services* (1990), C.R.T. 90-2, permitting such resale, subject to certain limitations; resale was also permitted for satellite services in *Telesat Canada, supra* note 34; *Teleglobe Canada Inc. - Resale and Sharing of International Private Line Service* (1997), C.R.T. 97-10.

1998, Teleglobe's monopoly over Canada-overseas telecommunications services was eliminated. On March 1, 2000, regulatory restrictions, which ensured Telesat a monopoly position over fixed satellite services for domestic and Canada-U.S. markets, were eliminated.[47] Other commitments made by Canada in exchange for gaining more open access to world telecom markets included unrestricted foreign ownership with respect to resale, submarine cable landings and mobile satellites, as well as the removal of routing restrictions on international traffic.[48] Canada retained, however, its restrictions on foreign ownership of telecommunications carriers at 46.7% combined direct and indirect investment.

In May 1998, Parliament passed legislation implementing the GATS telecom agreement.[49] In October 1998 the CRTC issued a decision setting out the rules applicable to the liberalization of international markets. CRTC's decision dealt with licensing of new international services competitors. It eliminated regulation dealing with the routing of calls. However, it did not result in immediate forbearance from regulation from Teleglobe's international services, given the lack of competition in that market.[50] With the growth of competition from falling international barriers, however, in late 1999 the CRTC eliminated regulation governing most aspects of Teleglobe's international direct dial services, as well as approval of Teleglobe's agreements with other carriers.[51] This was followed by forbearance from the supervision of the incumbent telephone companies' agreements with foreign carriers.[52]

On the North American front, falling entry barriers also permitted the CRTC to substantially forebear from regulating Telesat's fixed satellite services in late 1999.[53]

4. *Reform of the Regulatory Framework*

In 1993, the CRTC held a watershed public hearing to consider whether its method of regulating telecommunications firms should be re-thought in light of competition, changing technology and its new mandate in the *Telecommunication Act*. In the 1994 *Regulatory Framework* decision, the CRTC answered "yes". The principal findings of that decision included the following:

1. local telephone service rates should rise to reflect their costs more

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[47] WTO, Group on Basic Telecommunications, *Communication from Canada: Schedule of Specific Commitments on Basic Telecommunications, Revision* (1997), WTO Doc. S/GBT/W/1/Add.6/Rev.2 at 4-5.

[48] *Ibid.* See also Government of Canada, News Release "Canada Welcomes Telecom Deal" (15 February 1997).

[49] *An Act to Amend the Teleglobe Reorganization and Divestiture Act and the Telecommunications Act*, S.C. 1998, c. 8.

[50] *Competition in the Provision of International Telecommunications Services*, Telecom Public Notice CRT 97-34, (1997), resulting in *Regulatory Regime for the Provision of International Telecommunications Services* (1998), C.R.T. 98-17.

[51] *Teleglobe Canada Inc. - Forbearance for Globeaccess Tel and Related Matters* (1999), C.R.T. 99-14.

[52] Telecom Order CRTC 99-1202, (1999), online: CRTC <http://www.crtc.gc.ca /archive/ENG/Orders/1999/099-1202.HTM> (date accessed: 4 March 2002).

[53] *Telesat Canada - Transitional Regulatory Framework and Forbearance for Fixed Satellite Services* (1999), C.R.T. 99-6.

closely;

2. the telephone companies' operations should be split for regulatory purposes into monopoly and competitive segments;
3. earnings-based regulation of rates should be replaced by "price cap" regulation for the utility segment. ("Price caps" impose an upper limit on what telcos can charge but let them keep at least a portion of the gains achieved by innovation and efficiencies.) The Commission found that price caps are likely to reduce regulatory costs, increase incentives to be efficient and reduce the potential for anti-competitive cross subsidy; and
4. competition should continue to be introduced on the basis of principles relating to access to essential facilities, reduced barriers to entry, and forbearance, set out by the Commission.[54]

Following an appeal to Cabinet, the Commission's decision to increase local rates was referred back to it by Cabinet for reconsideration. After a further hearing, the CRTC essentially stuck by its original decision.[55] Cabinet ultimately modified the CRTC's decision, electing to keep local rate increases of $2.00 per month for 1996 and 1997, but to eliminate required long distance rate reductions.[56] This was followed by a further local rate increase as of January 1, 1998 for most telcos, as described below.

The *Regulatory Framework* decision spawned a series of further proceedings and decisions over the following years. One such proceeding dealt with the detailed accounting principles governing splitting the rate base, and also determined that price caps would be implemented January 1, 1998. A separate regulatory process was set up to deal with developing price cap design principles.[57] The Commission issued its decision on the appropriate regulatory framework for a price cap regime on May 1,

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[54] *Review of Regulatory Framework*, *supra* note 13.

[55] The CTA (whose members included the principal competitors such as Unitel) brought the 'Petition to the Governor-in-Council to Rescind Portions of the Telecom Decision 94-19, (1994). Order-in-Council P.C. 1994-2036, 13 December 1994, referring back to the Commission for reconsideration of the portion of *Review of Regulatory Framework*, *ibid.*, where the telcos were to increase local rates and decrease long-distance rates by an offsetting amount. The Commission reconsidered the matter in *Implementation of Regulatory Framework - Splitting of the Rate Base and Related Issues* (1995), C.R.T. 95-21 [hereinafter *Implementation of Regulatory Framework*]. The Commission found that the record confirmed its earlier decision. Stentor companies affected by the decision (other than the Manitoba Telephone System), as well as a consumer group, petitioned Cabinet for a variation of the rate-rebalancing initiative and Cabinet obliged.

[56] Order-in-Council P.C. 1995-2196, 19 December 1995, the Cabinet ordered rate increases of $2.00 per month effective January 1, 1996 and 1997, but modified the CRTC's decision by eliminating required reductions in long-distance rates.

[57] *Implementation of Regulatory Framework*, *supra* note 55 at 30, the Commission followed its decision in *Review of Regulatory Framework*, *supra* note 13, that a transition period to price caps was needed and they should come into effect on January 1, 1998. A separate proceeding was established by *Price Cap Regulation and Related Issues*, Telecom Public Notice CRTC 96-8, (1996), and an oral public hearing held in the fall of 1996. In *Review of the Regulatory Regime for Teleglobe Canada Inc.* (1996), C.R.T. 96-2 at 65-70, the Commission approved a form of price cap regime to govern that company.

1997.[58] This required yet a further proceeding to implement price cap regulation for each telco and to determine the utility segment rates prior to price caps (the so-called 'going in' rates). This final step led to a third year of regulated local price increases.[59] Increases on January 1, 1998 varied between zero for N.B. Tel and $3.20 per month for British Columbia Telephone Company (B.C. Tel.).

Under the price cap regime, for a four year period commencing January 1, 1998, regulated rates were permitted to change based upon a formula including parameters of price and efficiency changes, not a detailed analysis of the telcos' costs and revenues. A public hearing reviewing the price cap regime was held by the CRTC in late 2001.[60]

5. *Local Competition*

Competition in traditional local telephone services (that is, the provision of a telephone line to local businesses and residences, and communications within local markets or "local loops") is still in its infancy, and its prospects will become known in coming years. The CRTC has pointed out in a recent industry overview:

> [New local competitors] have several options to access their customers: resale of retail services, the lease of [telcos'] unbundled loops and building their own facilities...[a] fourth option involves the provision of local services using wireless infrastructure.[61]

As occurred with long distance services, resale preceded active facilities-based competition in local services markets. Resale of the telephone companies' enhanced services (e.g. voice mail) was permitted in 1984.[62] Resale to provide primary exchange voice services was permitted in 1987.[63] However, resale of local services has not yet been a significant competitive factor. It has generally been uneconomic because local service rates have historically been kept artificially low for policy reasons.

With respect to facilities-based competition, in the 1994 *Regulatory Framework* decision, the CRTC stated: "In the opinion of the Commission, restrictions on entry into the local market should be removed and principles of open access,

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[58] *Price Cap Regulation and Related Issues* (1997), C.R.T. 97-9.

[59] *Implementation of Price Cap Regulation - Decision Regarding Interim Local Rate Increases and Other Matters* (1997), C.R.T. 97-18; see also *Implementation of Price Cap Regulation and Related Issues* (1998), C.R.T. 98-2.

[60] *Price Cap Review and Related Issues*, Telecom Public Notice CRTC 2001-37, (2001).

[61] *Report to the Governor in Council, supra* note 14 at 22.

[62] *Enhanced Services* (1984), C.R.T. 84-18 at 17-25, 30-31, the Commission noted that it did not have the jurisdiction to regulate enhanced services offered by competitors to the telephone companies who were not "operating a telephone or telegraph system"; see also *Bell Canada - Application to Deny the Resale by Call-Net Telecommunications Ltd. of Services and Facilities Provided by Bell Canada and CNCP Telecommunications* (1987), C.R.T. 87-5, disallowing resale of certain services by Call-Net.

[63] *Resale to Provide Primary, supra* note 34. Note the pricing of local services has meant that little competitive impact has been realized from this permission.

unbundling and co-location ... should be pursued."[64] "Access" refers to the right of competitors to send their customers' messages down the telcos' lines and receive telephone traffic from telcos' customers in exchange. For example, cellular and long distance competitors were allowed to do this when they entered. "Unbundling" permits new entrants to lease those portions of the telcos' networks which are needed for entry and which would be uneconomic for them to duplicate. "Co-location" provides competitors the right to place their own switching and other equipment in telcos' premises, physically or virtually.[65] All these principles are prerequisites to effective local competition.

A specific proceeding was convened by the CRTC to deal with these and other issues, with a public hearing held in the summer of 1996.[66] The *Local Competition* decision was released on May 1, 1997 and it created a complex framework for regulating incumbents and new entrants alike in local markets, including:

5. requiring the telcos to interconnect their local networks to new entrants' facilities on specified terms and conditions;
6. requiring the unbundling of certain of the telcos' service and facility components which are essential to the operations of new entrants and developing a definition of what constitutes such "essential facilities";
7. putting in place certain regulatory rules designed to restrain the competitive reaction of the telcos to entry, such as ceilings on the pricing of essential facilities and floors on price reductions;
8. making a share of the subsidy flowing from long distance services available to new entrants; and
9. setting out the regulatory requirements new entrants must satisfy.[67]

A range of technical issues, from local number portability (the ability to keep the same number after changing to another local telephone company) to the arrangements needed to interconnect different networks and who should bear the interconnection costs[68] had to be dealt with to permit competition. As with long distance competition, the CRTC has addressed these issues through a combination of formal

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[64] *Forbearance-Sale of Terminal Equipment, supra* note 30 at 33.

[65] Co-location has been defined as "the rates, terms, and conditions under which competitors of the incumbent telephone company may terminate their facilities at the telephone company's central offices. Co-location refers to an arrangement whereby customers of the telephone company can terminate their own transmission facilities in the telephone company's central office. Physical co-location allows competitors to physically terminate transmission facilities in the telephone company's central office. Virtual co-location allows competitors to terminate facilities at a point outside the central office, but in all material aspects provides the same service at the same rate as would physical co-location". A. J. Black, "Co-location and Convergence of Public Utility Easements" (1999) 5:2 NAFTA: Law & Bus. Rev. of the Americas 292 at para 17, online: QL (BPEL).

[66] *The Implementation of Regulatory Framework - Local Interconnection and Network Component Unbundling,* Telecom Public Notice CRTC 95-36, (1995), initiating a proceeding to establish principles and procedures that would permit competitive entry into the local exchange market.

[67] *Local Competition* (1997), C.R.T. 97-8 [hereinafter *Local Competition*].

[68] See *e.g. Local Competition Start-Up Costs Proceeding,* Telecom Public Notice CRTC 98-10, (1998).

public proceedings and more informal industry committees,[69] backed up by orders to force telcos to adopt the procedures required to facilitate competition.[70]

Resolution and implementation of these technical matters has taken time. For example, in 2000, only 37% of working telephone numbers were in exchanges where local number portability was available.[71]

Effective local competition may take some time to become established. In December, 2000, the Commission concluded that there was a "limited level of competition" in the local market.[72] This was reflected, for example, by Bell Canada's retention of 97.1% of local market revenues in 2000.[73] In March, 2001 the CRTC concluded that local competitors face "substantial barriers to entry" and that competition was unlikely to evolve in the near future; it therefore indefinitely extended certain unbundling rules to facilitate entry.[74] The September, 2001 CRTC *Report to the Governor in Council on the Status of Competition* concluded that in local markets, "to date, competition has primarily been in the urban business market".[75]

6. *Wireless Services*

In its September 2001 *Status of Competition* report, the CRTC found that

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[69] *Implementation of Regulatory Framework - Local Number Portability and Related Issues*, Telecom Public Notice CRTC 95-37, (1995), requested parties to address the issues; *Implementation of Regulatory Framework - Local Number Probability and Related Issues*, Telecom Public Notice CRTC 95-48, (1995), established a working group; *Implementation of Regulatory Framework - Development of Carrier Interfaces and Other Procedures*, Telecom Public Notice CRTC 96-28, (1996), established the CRTC Interconnection Steering Committee ("CISC") to deal with issues regarding the implementation of local competition, including portability, interconnection standards, 911 and customer transfers. This committee was also tasked with identifying issues and proposing solutions for Commission consideration in *Local Competition, supra* note 67. The question of co-location was addressed in *Co-location* (1997), C.R.T. 97-15 at para 3, which provides for both physical and virtual co-location. The co-location group of CISC, which included CRTC staff, was also created to deal with disputes in this area. With respect to local number portability, the CRTC set out the rules governing the governance, administration and funding of a central number administration system, at arm's length to any one carrier in Telecom Order CRTC 97-1243, (1997), and dealt with cost issues in *Responsibility for Carrier Specific Costs for the Provision of Local Number Portability*, Telecom Order CRTC 97-591, (1997). With respect to operator services, the CISC issued a report: CISC, *Consensus Report to the Commission: DOTF009 - Operator Processes* (Ottawa: CISC, 1997), online: CISC <http://www.crtc.gc.ca/cisc/COMMITTE/D-docs/Dotf009.doc> (date accessed: 6 March 2002).

[70] See *e.g. Transiting and Points of Interconnection*, Telecom Order CRTC 98-486, (1998), online: CRTC <http://www.crtc.gc.ca/archive/ENG/Orders/1998/O98-486.HTM> (date accessed: 4 March 2002).

[71] *Report to the Governor in Council, supra* note 14 at 27.

[72] *CRTC Denies Bell Canada's Proposal to Increase Prices for Calling Features*, Telecom Order CRTC 2000-1148, (2000), online: CRTC <http://www.crtc.gc.ca/archive /ENG/Orders/2000/O2000-1148.htm> (date accessed: 4 March 2002).

[73] Bell Canada Enterprises, *Annual Report* (2000) at 21.

[74] *Local Competition: Sunset Clause for Near-Essential Facilities*, Telecom Order CRTC 2001-184, (2001), online: CRTC <http://www.crtc.gc.ca/archive/ENG/ Orders/2001/O2001-184.htm> (date accessed: 4 March 2002).

[75] *Report to the Governor in* Council, *surpa* note 14 at i.

"Mobile telephony reaches over 94% of the Canadian population, and the industry expects to achieve 50% penetration of the Canadian population by 2004".[76] With such penetration, increased competition to the telephone companies' local services may come from wireless services, which do not require the extensive infrastructure of traditional wireline services.

Canadians' first widespread exposure to wireless services was cellular, introduced after the federal Department of Communications announced in 1982 that it would license two national cellular providers.[77] The CRTC permitted cellular licensees to interconnect to the telephone network in 1984.[78] The economics and pricing of cellular services, however, meant that it was not capable of being a substitute for basic service for most subscribers. The introduction of cellular was followed by the licensing of public cordless telephone services (PCTS), another wireless technology. Unlike cellular, PCTS proved to be a failure.[79]

Further competition came in 1995 when four national licenses were granted for personal communications services (PCS), a digital cellular technology which permits lower prices as well as improved and expanded services.[80] PCS licensees have achieved substantial market share in numerous urban markets in Canada. Two of the new PCS licensees in each market were the existing cellular licensees.

A further wireless technology is Local Multipoint Communications Systems (LMCS), for which spectrum was licensed in 1996[81] and 1998.[82] LMCS differs from PCS and traditional cellular in that it is a stationary service (a fixed antenna is installed on the receiver's premises) and "broadband" (it has greater capacity, permitting the delivery of services such as cable TV and high-speed Internet). Thus, it is potentially competitive to both cable and telephone services. However, the market for LMCS has

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[76] *Report to the Governor in Council*, supra note 14 at 36.

[77] In *Radio Common Carrier Interconnection With Federally Regulated Telephone Companies* (1984), C.R.T. 84-10 at 2, online: CRTC<http://www.crtc.gc.ca/archive/eng/Orders/1997/..%5C..%5CDecisions%5C1984%5CDT84-10.htm> (last modified: 6 March 2002): citing the decision of the federal Department of Communications in October 23, 1982: *Cellular Mobile Radio Policy and Call for Licence Applications*, Notice no. DGTN-006-82/DGTR-017-82.

[78] *Ibid.* at 8-9.

[79] In *Regulation of Mobile Wireless Telecommunications Services* (1996), C.R.T. 96-14 [hereinafter *Regulation of Mobile Wireless*], the CRTC states at 1: "[I]t now appears that PCTS services will not develop as envisaged in Decision 94-15, and that new personal communication services (PCS) using the 1.8 - 2 GHz portion of the radio spectrum, recently licensed by the federal government, will supplant PCTS services...".

[80] Industry Canada, Press Release "Personal Communications Services (PCS) Being Introduced in Canada" (15 June 1995).

[81] Industry Canada, News Release, "More Communications Choices for Canadians" (26 October 1996), online: Industry Canada <http://www.ic.gc.ca/cmb/Welcomeic.nsf/ ffc979db 07de 58e68 52564e400603639/ edbc5c227a40906285256612004d9104.htm> (last modified: 1 January 2001).

[82] Industry Canada, News Release, "Industry Minister Manley Announces Plans for New Broadband Services" (1 June 1998), online: Industry Canada <http://spectrum.ic.gc.ca/auctions/engdoc/nr980601.html> (last modified: 5 March 2002). See also Industry Canada, Backgrounder, "Local Multipoint Communications Systems" (29 February 1996), online: Industry Canada <http://strategis.ic.gc.ca/SSG/sf01816e.html> (last modified: 6 January 1999).

been slow to develop, given the cost and availability of equipment, the evolution of the technology, and delays in licensing in the U.S. and other countries.[83]

The CRTC has consistently been in favour of reduced regulatory oversight for competing wireless services. This began with its finding in 1984 which determined that it was not necessary or desirable for Rogers Cantel Inc. to file tariffs for its cellular services.[84] In 1989, the Federal Court of Appeal ruled that the CRTC did not have the authority to forbear from the regulation of Cantel, a company as defined in the *Railway Act*.[85] Parliament, however, gave the CRTC the necessary power in the 1993 *Telecommunications Act* which was used in 1994 to withdraw most regulatory requirements from cellular and PCTS services.[86]

In late 1996, the Commission extended this forbearance to all "public switched mobile voice services"[87] (wireless services which connect with the telephone companies' public networks). In the same decision, other mobile services not connected to the telephone network, such as radio paging, were made subject to virtually complete

[83] See "Local Multipoint Communications Systems", *ibid.* at 1. See also Industry Canada, "Questions and Answers re LMCS" (Ottawa: Ministry of Industry, 1996). According to Angus TeleManagement Group Inc., Agnus TeleManagement's Weekly News Bulletin, "Telecom Update #260" (27 November 2000), online: Agnus TeleManagement Homepage <http://www.angustel.ca/update/up260.html> (last modified: 15 March 2001), the sole Canadian competitor (MaxLink), which rolled out services in June 1999, was in receivership by November, 2000.

[84] *Cellular Radio Service*, Telecom Public Notice CRTC 1984-55, (1984), online: CRTC <http://www.crtc.gc.ca/archive/ENG/Notices/1984/PT84-55.HTM> (last modified: 6 March 2002).

[85] *T.U.W.*, *supra* note 20.

[86] *Regulation of Wireless Services* (1994), C.R.T. 94-15 at 7, online: CRTC <http://www.crtc.gc.ca/ archive/ ENG/Decisions/1994/DT94-15.HTM> (last modified: 6 March 2002). Forbearance under s. 34(1)-(3) from ss. 25, 29, 31, 27(1), (5) and (6) in respect of cellular services and PCTS offered by Canadian carriers other than the telcos, exemption under s. 9 of other wireless services providers, other than the telephone companies, was also provided, and forbearance until the exemption order was laid before Parliament and became effective (*ibid.* at 11) [hereinafter *Regulation of Mobile Wireless*]; *supra* note 75 at 5, where the CRTC expressly states that it will refrain from exercising its powers pursuant to ss. 34(1) and (2) from ss. 24 (in part), 25, 29, 31, 27(1), (5) and (6) in respect of public switched mobile voice services provided by Canadian carriers, other than by in-house dominant service providers. The CRTC felt it necessary to continue to oversee unjust discrimination and unreasonable preference in respect of these carriers, in addition to filing agreements between affiliated wireless suppliers on the public record.

[87] *Regulation of Mobile Wireless, ibid.* at 4, where the CRTC retained the requirements of s. 24 for public switched mobile voice services, in order to impose the condition that providers of such services comply with the "terms and conditions currently applicable to cellular service providers governing the protection of the confidentiality of customer information" (*ibid.* at 5). The CRTC did not require inter-carrier agreements to be approved pursuant to s. 29, except "that the Mobility family of companies and Cantel [must] file agreements with their affiliated PCS carriers on the public record" (*ibid.* at 6). Finally, the CRTC retained authority over these carriers under ss. 27(2), (3) and (4) to deal with "unjust discrimination or undue preference" (*ibid.* at 5). With respect to the other mobile wireless services, forbearance was complete (ss. 24, 25, 27, 29 and 31).

forbearance.[88]

While the CRTC forbore from regulating new wireless competitors, telco affiliates (such as Bell Mobility) were not the beneficiaries of this degree of deregulation. Rather, they were made subject to certain specific additional regulatory rules to ensure that they do not receive special treatment from their parent companies.[89] One area that the telco affiliates have been free from, however, is mandated resale. The CRTC ruled that all wireless carriers, telco affiliated or not, are not mandated to supply resellers, given the existing level of competition and forbearance.[90]

While forbearance in this area has been substantial, wireless competitors who wish to enter into competition for local telephone services under the regime established in the *Local Competition* decision, have to voluntarily submit to increased regulation. For example, to obtain the local service subsidy available to the telcos, they have to register with the CRTC and undertake to provide a certain minimum services such as 911, customer information on billing policies and services as well comply with general regulatory rules governing customer privacy.[91] Microcell and Clearnet did just that in September, 2000 when their terms and conditions of service were established by the CRTC following a regulatory proceeding.[92] Thus, bringing competition to local markets may have the unanticipated effect of increasing the regulatory burden on non-dominant

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[88] *Ibid.* at 6. The commission did not completely exempt the latter services so that Canadian ownership and control regulations would continue to apply to them.

[89] See *e.g.*, *British Columbia Telephone Company - Portable Communications Division* (1985), C.R.T. 85-15 at 3, online: CRTC <http://www.crtc.gc.ca/archive/ENG/Decisions /1985/DT85-15.HTM> (last modified: 6 March 2002), where the Commission denied forbearance for cellular, mobile radio and paging services of B.C. Tel on the basis of concerns over cross-subsidy; *Cellular Radio - Adequacy of Structural Safeguards* (1987), C.R.T. 87-13 [hereinafter *Cellular Radio*], dealt with inter-corporate transactions, financing, joint marketing activities and access to customer information; *Rogers Cantel Inc.* v. *Bell Canada - Marketing of Cellular Service* (1992), C.R.T. 92-13, online: CRTC < http://www.crtc.gc.ca/archive/ENG/Decisions/ 1992/DT92-13.HTM> (last modified: 6 March, 2002), reviewed these requirements and extended them to other telcos; *Regulation of Mobile Wireless*, *supra* note 75 at 4, continued this regime for new wireless services offered through non-arms' length affiliates of telcos, and provided no forbearance applied to such "in-house dominant service providers".

[90] Telecom Order CRTC 97-1797, (1997) at 6, online: CRTC <http://www.crtc.gc. ca/ archive/ ENG/ Orders/1997/O97-1797.HTM> (last modified: 6 March 2002), referring back to the forbearance rulings in Decisions 94-15 and 96-14.

[91] *Local Competition, Supra* note 67 at paras. 275-294.

[92] *General Tariff Approved on an Interim BasIs With Modifications for Clearnet PCS Inc.*, Telecom Order CRTC 2000-830, (2000), online: CRTC <http://www.crtc.gc.ca/archive/ENG/ Orders/2000/O2000-830.htm> (last modified: 6 March 2002). See *General Tariff Approved on an Interim Basis With Modifications for Microcell Connexions Inc.*, Telecom Order CRTC 2000-831, (2001), online: CRTC <http://www.crtc.gc.ca/archive/ENG/Orders/2000/O2000-831.htm> (last modified: 6 March 2002), where Microcell was subject to a similar order. This Tariff was extended to affiliated companies in *Affiliate Rule for Competitive Local Exchange Carriers*, Telecom Order CRTC 2001-3, (2001), online: CRTC <http://www.crtc.gc.ca/archive/ENG/ Orders/2001/O2001-3.HTM> (last modified: 6 March, 2002). Microcell applied for certain exemptions and theses were made the subject of *Conditions of Service for Wireless Competitive Local Exchange Carriers and for 9-1-1 Services Offered by Wireless Service Providers*, Telecom Public Notice CRTC 2001-110, (2001), online: CRTC < http:// www.crtc.gc.ca/ archive/ ENG/ Notices/2001/pt2001-110.htm> (last modified: 6 March 2002).

firms.

7. *Convergence*

Convergence is an amorphous term which includes technological change permitting increasing innovation and entry in telecommunications and broadcasting; the cross-over of existing players into both fields and the regulatory rules which govern this process.[93] The Government of Canada summarized the historical situation succinctly in a 1996 policy paper:

> Until now, cable and telephone companies have been in very different businesses. Cable-TV companies, with their one-way broadband distribution systems, have delivered broadcasting services that are regulated in light of the cultural objectives of the *Broadcasting Act.* In contrast, the telephone companies, with their switched networks, have provided telecommunications services, regulated under telecommunications legislation. Historically, broadcasting and telecommunications have been the "two solitudes" of the Canadian communications system, separated from each other by protective layers of policy, legislation, regulation and technology.[94]

This is changing. Cable companies such as Rogers[95] and Vidéotron began

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[93] One paper on convergence put it this way: "Convergence refers to the coming together of the underlying mechanisms-broadcasting, telecommunications and the Internet-that are used to deliver content and services. Within broadcasting, convergence has traditionally referred to channel proliferation and the provision of radio and television over digital distribution mechanisms, such as wireless, digital cable, satellite, or the Internet. Similarly, the telecommunications sector has long used the term to describe the coalescence of telecommunications technologies: telephone and cable, telephone and the Internet, wireless and the Internet, and telecommunications and broadcasting. In the context of Internet itself, convergence refers to the development of an interconnected broadband communications system, a 'network of networks', over which service providers will carry voice, data and video. The present-day conception of convergence incorporates these ideas and more. Virtually any innovation having a cause or effect relationship with another aspect of communications technology can potentially be described in terms of convergence". A. Gates, "Convergence and Competition: Technological Change, Industry Concentration and Competition Policy in the Telecommunications Sector" (2000) 58 U.T. Fac. L. Rev. 83 at 86.

[94] Canada, CRTC, *Building the Information Society: Moving Canada into the 21st Century* (Ottawa: CRTC, 1996) at 6. The government asked the CRTC to conduct a hearing on convergence in October, 1994 (8 October 1994, Order in Council PC 1994-1689); the CRTC produced its report entitled: Canada, CRTC, *Competition and Culture on Canada s Information Highway: Managing the Realities of Transition* (Ottawa: CRTC, 1995), online: CRTC < http://www.crtc.gc.ca/ ENG /HIGHWAY /HWY9505 . HTM> (last modified: 6 March 2002) [hereinafter *Competition and Culture*]. See Canada, CRTC, *Connection, Community, Content: The Challenge of the Information Highway,* (Ottawa: CRTC, 1995) [hereinafter *Connection, Community, Content*].

[95] Note that Rogers' competitive subsidiary, Rogers Telecom, was sold to Metronet in May, 1998 for $600 million cash and $400 million in non-voting shares: see Angus TeleManagement Group Inc., Agnus TeleManagement's Weekly NewsBulletin, "Telecom Update #134" (25 May 1998) at 1, online: Agnus TeleManagement Homepage <http://www.angustel.ca/update/up134.html> (last modified: 15 March 2001). Metronet was in

offering business telecommunications services many years ago. The cable companies have also been offering non-programming services such as Internet access to their customers.[96] With the *Local Competition* decision, these players are positioned to offer traditional local telephone services. In Britain, for example, cable companies have offered local telephone service as a package with cable and other services for some time.

Competition has also come to broadcasting from telecommunications carriers. In 1994, the CRTC let the door open a crack when it granted an exemption to allow experimental video-on-demand programming to be offered by telcos.[97] This was extended in May, 1997 when the CRTC granted broadcasting licenses to Bell Canada for trials of certain video services in London, Ontario and Repentigny, Quebec.[98] At the same time, a license was granted to Telus for similar trials in Calgary and Edmonton.[99] Also in May, 1997, the CRTC decided that telcos would be permitted to seek broadcast licenses for entry into distribution after January 1, 1998, therefore, to comply with the federal government's *Convergence Policy Statement*,[100] the regulatory barriers to competition in local telephone service were sufficiently removed by the *Local Competition* decision.[101] The New Brunswick Telephone Company was the first Canadian telco to apply for a broadcast license in August, 1997, offer cable TV service by way of hybrid fibre and offer coaxial cable facilities. In its June, 1998 decision, the CRTC approved the application for the Moncton and St. John areas.[102] The provision

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turn acquired by AT&T Canada.

[96] Regulation of Certain Telecommunications Services Offered by Broadcast Carriers, Telecom Public Notice CRTC 96-36, (1996) at 2, online: CRTC <http://www.crtc.gc.ca /archive / ENG / Notices / 1996/PT96-36.HTM> (last modified: 6 March 2002). The issues discussed in the decision include whether forbearance from regulation for services such as Internet access should occur.

[97] *Exemption Order Respecting Experimental Video-on-Demand Programming Undertakings*, Telecom Public Notice CRTC 1994-118, (1994), online: CRTC <http://www. crtc.gc.ca/ archive/ ENG/ Notices/1994/PB94-118.htm> (last modified: 6 March 2002).

[98] *Bell Canada* (1997), C.R.T. 97-11, online: CRTC <http://www.crtc.gc.ca/ archive/ ENG/ Decisions/1997/DT97-11.HTM> (last modified: 6 March 2002) [hereinafter *Bell Canada*].

[99] *TELUS Cable Holdings Inc.* (1997), C.R.T. 97-193, online: CRTC < http://www. crtc.gc.ca/archive/ENG/Decisions/1997/DB97-193.HTM> (last modified: 6 March 2002); *TELUS Cable Holdings Inc.* (1997), C.R.T. 97-12, online: CRTC <http://www.crtc.gc.ca/archive/ ENG/Decisions/1997/DT97-1 2.HTM> (last modified: 6 March 2002).

[100] *Bell Canada*, *supra* note 98 at 1; Industry Canada, *Convergence Policy Statement* (Ottawa: Informational and Communications Technology Branch, 1996) [hereinafter *Convergence Policy Statement*].

[101] *Local Competition*, *supra* note 67 at 3. This was the language of the condition to entry by telcos into broadcasting in the *Convergence Policy Statement*, *ibid.* at 3. Confirmation of the timetable was made in *Applications by Telephone Companies to Carry on Broadcasting Distribution Undertakings*, Telecom Public Notice CRTC 1997-49, (1997), online: CRTC <http://www.crtc.gc.ca/archive/ ENG/ Notices/ 1997/PB97-49.HTM (last modified: 6 March 2002). For an earlier reference to this issue, see *Review of Regulatory Framework*, *supra* note 13 at 46-52, online: CRTC <http://www.crtc.gc. ca/ archive/ENG/Decisions/1994/DT94-19.HTM> (last modified: 6 March 2002).

[102] *Canadian Satelite Communications Inc.* (1998), C.R.T. 98-7, online: CRTC < http://www.crtc. gc.ca/archive/ENG/Decisions/ 1998/DT98-7.HTM> (last modified: 6 March 2002); *Notice of Public Hearing CRTC 1998-1*, Telecom Public Notice CRTC 98-1, (1998), online: CRTC <http://www.crtc.gc.ca/archive/ENG/Notices/1998/PT98-1.HTM> (last modified:

for non-programming services, such as Internet, was left largely unregulated. The provision for cable TV was left to be regulated by the *Broadcasting Act*. The CRTC held that the potential for cross-subsidy from monopoly telephone to competitive services had been dealt with in the creation of a split rate base in the *Regulatory Framework* decision, discussed above.

Internet services, as noted above, are being offered by companies whose primary business is in both the broadcasting and telecommunications fields, as well as by specialist Internet services providers. There is much competition, with over 700 Internet service providers operating in Canada in 2001.[103]

The Internet can offer forms of both broadcasting and telecommunications services. In July, 1998, the CRTC issued a decision setting out the regulatory regime for such services provided by cable companies and other broadcast carriers.[104] It decided that it would not regulate the rates at which broadcast carriers offered retail Internet services, and forbore from regulating most aspects of such services. However, the rates and terms by which incumbent telcos and cable companies provided access to their facilities to independent Internet providers, because of the continued dominance of the incumbents, were held to require continued regulation. A separate decision mandated the terms and conditions under which Internet service providers could resell cable companies' high-speed Internet services.[105] This decision allowed for bundling of Internet and cable services.

In May, 1999 the CRTC determined that "new media" services, primarily Internet, would not be regulated under the *Broadcasting Act*.[106]

In September, 1999 the Commission issued a general decision covering Internet services offered by telecommunications companies, having already lifted such regulation from several telco Internet providers.[107] Most aspects of regulation were removed for those companies which had in place a system to ensure accounting separation between competitive and non-competitive services to guard against cross-subsidy. Rules governing such matters as confidentiality of information and the prohibition against carriers granting "undue preferences" were, however, retained.

Another factor contributing to convergence is the emergence of new

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6 March 2002); *Canadian Satellite Communications Inc.* (1998), C.R.T. 98-194, online: CRTC <http://www.crtc.gc.ca /archive/ENG/Decisions/1998/DB98-194.HTM> (last modified: 6 March 2002).

[103] *Report to the Governor in Council, supra* note 14 at 62.

[104] *Regulation Under the Telecommunications Act of Certain Telecommunications Services Offered by Broadcast Carriers* (1998), C.R.T. 98-9, online: CRTC <http:// www.crtc.gc.ca/ archive/ ENG/Decisions/1998/DT98-9.HTM> (last modified: 6 March 2002).

[105] *Application Concerning Access by Internet Service Providers to Incumbent Cable Carriers Telecommunications Facilities* (1999), C.R.T. 99-11, online: CRTC <http://www.crtc.gc.ca/archive/ENG/ Decisions/1999/DT99-11.HTM> (last modified: 6 March 2002).

[106] *New Media*, Telecom Public Notice CRTC 1999-84, (1999) at 2, online: CRTC <http://www.crtc.gc.ca/ archive/ENG/Notices/1999/PB99-84.HTM> (last modified: 6 March 2002).

[107] *Forbearance From Retail Internet Services*, Telecom Order CRTC 99-592, (1999), online: CRTC<http://www.crtc.gc.ca/archive/ENG/Orders/1999/O99-592.HTM> (last modified: 6 March 2002) [hereinafter *Forbearance From Retail*].

technologies, such as LMCS and new satellite services, which may offer wireless or satellite delivery of both traditional telecommunications and broadcasting services and thus serving a further source of competition.[108]

These changes and new sources of entry strained the historical regulatory rules which sought to place watertight compartments around telecommunications and broadcasting. Historical examples include: the prohibition on telecommunications carriers from controlling or influencing the content of telecommunications (subject to CRTC approval);[109] the limitation in Bell Canada's enabling legislation from holding a broadcasting license;[110] and Canadian ownership rules which prevented B.C. Tel and Quebec Tel from engaging in broadcasting.[111] These rules had to change. The Commission, as indicated above, has set out the conditions for entry by telcos into broadcasting. This is evidenced by Bell Canada's statutory fetters having been released and the Cabinet granting permission to BC Tel and Quebec Tel to apply for broadcasting licenses.

An example of the strains convergence placed upon regulation was the CRTC's 1995 decision concerning the telephone companies' so-called "Beacon Initiative" investments. Such infrastructure could be used for one or both of local telephone (monopoly) and "video dial tone" (competitive) services. The CRTC opted to treat such investments as competitive for regulatory purposes so that local customers did not pay for the telcos' more risky forays into competitive waters.[112] This example illustrates that mixing regulated monopoly and competitive services in the same firm often leads to a familiar solution: more regulation. The alternative, structural separation (the forced separation of competitive from monopoly services within a company into independent corporate entities), is one that the CRTC has historically rejected for telecommunications markets.[113]

In its *Convergence Policy Statement* of August 6, 1996, the federal government, however, referred to structural separation as a way of simplifying regulation in converging markets in respect of certain overlapping investment in telecom and broadcasting:

> Where a broadcasting distribution undertaking or a telecommunications

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[108] *Ibid.* at 3.

[109] *Telecommunications Act*, *supra* note 16, s. 36. In *Review of Regulatory Framework*, *supra* note 13 at 52, the CRTC said it was prepared to entertain such applications by telcos favourably.

[110] *Bell Canada Act*, S.C. 1987, c.19, s. 7.

[111] *Broadcasting Act*, R.S.C. 1985, c. B-9, s. 3(b), dealing with Canadian ownership.

[112] *Implementation of Regulatory Framework*, *supra* note 55 at 17.

[113] See *e.g.*, *Review of Regulatory Framework*, *supra* note 13 at 29-30: rejecting divestiture of competitive assets to deal with cross-subsidy and vertical integration in telecommunications, rejecting it for convergence markets at 52; *Participation of Bell Canada and British Columbia Telephone Company in Multiline and Data Terminal Equipment Market* (1986), C.R.T. 86-5 at 7, online: CRTC < http://www .crtc.gc.ca/archive/ENG/Decisions/1986/DT86-5.HTM> (last modified: 6 March 2002): rejecting structural separation in favour of costing oversight to guard against cross-subsidy of this market by the telcos. The telcos did use structural separation to offer cellular services; this did not eliminate the need for regulatory oversight of such matters as inter-corporate transaction; but see *Cellular Radio, supra* note 89.

> carrier wishes to provide a broadcast programming service, the programming license must be held by a structurally separate entity. The Government considers that structurally separate entities would also be an effective means to avoid anti-competitive behaviour arising from cross-subsidization and/or market dominance where anyone offers both telecommunications services and broadcasting distribution services. This could be done through separate subsidiaries using the same facilities.[114]

Structural separation has not, however, been the policy option of choice by the CRTC. For example, in granting Bell Canada a short-term broadcasting license to permit it to conduct market trials in 1997, the CRTC did not insist upon structural separation of the trial operations. It held that the government's *Convergence Policy Statement* did not cover trials and that "there will be direct benefit to consumers arising from such economies of scope as do exist"[115] in the joint provision of telephone and broadcasting services. The licensing conditions surrounding NB Tel's broadcasting services in 1998 similarly did not include structural separation.

The *Convergence Policy Statement* also took a novel approach to mandatory access and interconnection in telecommunications and broadcasting markets. While interconnection between providers was to be mandatory for all telecommunications providers, it was not required for cable facilities used for broadcast distribution. This apparent anomaly was explained on the basis that "competition can be better achieved through the creation of alternative broadcasting distribution networks".[116] This view was apparently based upon the ability of telcos to finance their own broadband architecture without the need for access to cable facilities. What this policy does not deal with, however, is the potential for telcos to do an end-run by simply combining with cable companies.

The *Convergence Policy Statement* also indicated that the government did not intend to follow trends in technology and markets by creating a legal convergence between telecommunications and broadcasting regimes. The apparent reason was the desire to continue to supervise Canadian content and other regulatory policy objectives for services deemed to be "broadcasting".[117] This approach demands that the regulator make judgements of what falls within the "broadcasting" and or "telecommunications" pigeon holes, a pastime which has already consumed a certain amount of effort.[118]

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[114] *Convergence Policy Statement, supra* note 100 at 7.

[115] *Bell Canada, supra* note 98 at para 23.

[116] *Convergence Policy Statement, supra* note 100 at 2.

[117] See *e.g., Convergence Policy Statement,* supra note 100 at 4. See also, *Competition and Culture, supra* note 94; and *Connection, Community, Content, supra* note 94: both also endorsed this report. For a critical view, see S. Globerman, H.N. Janisch & W.T. Stanbury, Convergence, Competition and Canadian Content in W.T. Stanbury, ed., *Perspectives on the New Economics and Regulation of Telecommunications* (Ottawa: Institute for Research on Public Policy, 1996).

[118] See *e.g., Regulation of Broadcasting Distribution Undertakings that Provide Non-Programming Services* (1996), C.R.T. 96-1 at 7-8, online: CRTC <http://www.crtc.gc.ca/archive/ENG/ Decisions/ 1996/DT96-1.HTM> (last modified: 6 March 2002): concluding that "full channel TV services" are subject to the *Telecommunications Act, supra* note 16, but should be forborne from regulation. Forbearance under ss. 25(1)-(3), 27(1), 27(5), 27(6), 29 and 31 was confirmed in *Regulation of Full Channel TV Services (E.g. Alphanumeric Services)*

8. *Directory Listings*

Telephone directories are a rich source of revenues for the telephone companies. One of the historical barriers to entry of competing directories was the limited availability of lists of customer names, addresses, telephone numbers and other information needed to publish a directory and its yellow pages companion. Until 1992, Bell Canada provided this subscriber listing information to its directory publishing affiliate, Tele-Direct, exclusively. This ended after the CRTC found that Bell had conferred an undue preference on its affiliate through such exclusivity and required Bell to make non-confidential listing information generally available pursuant to a tariff as "Directory File Service".[119] While such a tariff was filed, it was on terms so restrictive that they were not commercially viable for competitors. The Commission, acting on a complaint from such a competitor, White Directories, re-initiated a proceeding to examine the terms of the tariff, and broadened the proceeding to cover all federally regulated telcos.[120] In March, 1995, the Commission finally issued a further order requiring that directory lists be unbundled on a more commercially viable basis and price.[121]

However, these terms permitted telephone subscribers to have their names withdrawn from the lists given to competing publishers at no cost to the subscriber, while similar de-listing from the telcos' books involved charging the subscriber a fee. This continued the preferential treatment of telco affiliate publishers, such as Tele-Direct and restricted open competition. White Directory asked the CRTC to reconsider its decision, but the application was denied. Four out of nine Commissioners dissented. The dissenters stated that they would have granted White Directory's application to vary "for competitive parity reasons".[122]

(1997), C.R.T. 97-2, online: CRTC <http://www.crtc.gc.ca/archive/ ENG/ Decisions/1997/DT97-2.HTM> (last modified: 6 March 2002): placing certain conditions on this forbearance. In the *Convergence Policy Statement*, *supra* note 100 at 4-5, the government stated it "will continue to review" the CRTC's proposal that new and emerging services be excluded from the ambit of the *Broadcasting Act* where the Act's objective would not be furthered through their regulation; see *Competition and Culture*, *supra* note 94 at 30. See also S. Scott, "Regulation on the Information Highway: Capturing the Elusive Butterfly" (1996) 9 C.J.A.L.P. 305 at 307.

[119] *Bell Canada - Provision of Telephone Directory Data Base Information in Machine - Readable Form* (1990), C.R.T. 90-12 at 13, online: CRTC <http:// www.crtc.gc.ca/ archive/ENG/ Decisions/ 1990/DT90-12.HTM> (last modified: 6 March 2002); *Bell Canada - Directory File Service* (1992), C.R.T. 92-1, online: CRTC <http://www.crtc.gc.ca/archive/ ENG/Decisions/1992/DT92-1.HTM> (last modified: 6 March 2002).

[120] *Telecommunications Service in Canada*, *supra* note 22 at s.6; *Provision of Directory Database Information*, Telecom Public Notice CRTC 94-3 at 6, (1994), online: CRTC <http://www.crtc.gc.ca/archive/ENG/Notices/1994/PT94-3.HTM> (last modified: 6 March 2002).

[121] *Provision of Directory Database Information and Real-Time Access to Directory Assistance Databases* (1995), C.R.T. 95-3, online: CRTC <http://www.crtc.gc.ca/ archive/ENG/ Decisions/1995/DT95-3.HTM> (last modified: 6 March 2002).

[122] White Directory of Canada Inc., *Application to Review and Vary*, 28 March 1995; *White Directory - Application to Review and Vary Decision 95-3* (1995), C.R.T. 95-14, online: CRTC < http: // www.crtc.gc.ca/archive/ENG/Decisions/1995/DT95-14.HTM> (last modified: 6 March 2002): dissent of Vice-Chairman F. Bélisle, Acting Vice Chairman D. Colville & Commissioner P. Senchuk.

White launched appeals to the Federal Court and to Cabinet. The latter appeal was, at long last, successful. Cabinet substituted the minority for the majority decision and the telcos were thus required to make listings available to competitors on more equal terms.[123]

9. *Miscellaneous Services*

Other areas of regulatory forbearance have included certain of Telesat's satellite video services,[124] its sale and lease of earth stations[125] and the telcos' data packet[126] and electronic messaging and information ("EMI")[127] services. The CRTC from time to time denied forbearance from regulation for certain services it found were insufficiently competitive.[128]

Barriers to competition have taken some time to fall with respect to pay

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[123] Order Varying Telecom Decision CRTC 95-14 and Requiring the CRTC to Report on the Matter of Directory Subscriber Listings (1996), S.O.R./96-322 at 2, online: Department of Justice<http://laws.justice.gc.ca/en/T-3.4/SOR-96-322/165455.html> (last modified: 17 March 2000). See *e.g.*, *Directory Subscriber Listings-Report to the Governor In Council*, Telecom Public Notice CRTC 96-27, (1996) at 2, online: CRTC http://www.crtc.gc.ca/archive/ENG/Notices/1996/PT96-27.HTM (last modified: 6 March 2002).

[124] *Telesat Canada - Forbearance for Digital Video Compression Services* (1994), C.R.T. 94-20, online: CRTC <http://www.crtc.gc.ca/archive/ENG/Decisions/1994/DT94-20.HTM> (last modified: 6 March 2002): forbearance under s. 34 (1)-(3) from ss.25, 29, 31 and s. 27(1), (5) and (6) with respect to Telesat's provision of Digital Video Compression (DVC).

[125] *Telesat Canada - Forbearance for the Sale and Lease of Earth Stations* (1994), C.R.T. 94-23, online: CRTC <http://www.crtc.gc.ca/archive/ENG/Decisions/1994/DT94-23.HTM> (last modified: 6 March 2002): forbearance under s. 34 from ss.25, 29, 31, 27(1), (2), (4) and (6); Telecom Order CRTC 95-892, (1995), online: CRTC <http://www.crtc.gc.ca/archive/ENG/Orders/1995/O95-892.HTM> (last modified: 6 March 2002): extending such forbearance.

[126] Telecom Order CRTC 96-130, (1996), online: CRTC <http://www.crtc.gc.ca/archive/ ENG/ Orders/1996/O96-130.HTM> (last modified: 6 March 2002). Forbearance under ss. 34 (1)-(3) from ss. 25, 29, 31, 27(1), (5) and (6) in respect of all federally regulated Stentor companies' Datapac, Hyperstream, Postpac and similar future packet data and frame relay services (*ibid.* at 4-5).

[127] *Stentor - Forbearance Application for Electronic Messaging and Information Services*, Telecom Public Notice CRTC 96-16, 14 May 1996. These services include Envoy 100, iNet and ICN Enhanced Fax. In Telecom Order CRTC 96-1392, 2 December 1996, the CRTC found that "the Canadian EMI market is highly competitive and the Stentor companies' ability to control this market in any way is very limited". Forbearance was granted pursuant to s.34(4) of the Act from ss.25, 27(1), 27(5), 27(6), 29, and 31. Powers under s.24 to set terms and conditions on the offering of these services were retained "to deal with issues related to customer confidentiality and sharing and resale." Subsection 27(2), (3) and (4) powers were retained "to deal with issues relating to the sharing and resale of the forborne services."

[128] See Telecom Order CRTC 96-129, 19 February 1996, online: CRTC <http://www.crtc.gc.ca/archive/ENG/Orders/1996/O96-129.htm> (date accessed: 10 March 2002), denying NB Tel's request for forbearance in respect of its digital broadband service, finding NB Tel "enjoys a high degree of market power", *Teleglobe Canda Inc. – Regulation after the Transitional Period* (1991), C.R.T. 91-21 at 43-46, online: CRTC <http://www.crtc.gc.ca/archive/ENG/Decisions/1991/DT91-21.htm> (date accessed: 15 March 2002) denying forbearance from Teleglobe's international telecommunications services given its continuing monopoly.

telephone services. The Commission denied applications for entry by competing services in 1995 and 1996.[129] A proceeding to review the issue was initiated in 1997,[130] and in June 1998 this market was finally opened to competition. New entrants services were largely deregulated, with the exception of certain basic service obligations such as the provision of 911 services.[131] By January 2001, 300 potential service providers had registered with the CRTC, although only 3,500 competitive pay telephones were in service.[132]

III. THE PHASES OF REGULATORY REFORM

A number of telecommunications market segments are described in the chronology above, including terminal equipment, long distance services, international services, wireless and traditional local service. In all cases, albeit to different degrees, competitive markets have emerged from pre-existing monopoly market structures. The evolution toward competition has been shaped in large part by changes to the tight regulatory regime that previously protected and regulated these monopolies. In tracing the path of change in these different markets, it is possible to identify three overlapping but sufficiently distinct phases in government or regulatory policy governing the liberalization of regulation toward competition:

A. permitting entry or requiring incumbents to become more open to entry;

B. putting in place "competitive safeguards" which restrain the competitive reaction of incumbent firms to entry; and

C. forbearance or withdrawal from regulation.

In the remainder of this section, the legal or regulatory tools employed in each of these phases are described and analysed in greater detail.

A. *Permitting or Mandating Entry*

1. *Licensing New Entrants*

In some cases, such as wireless services, entry could not occur without a licence or the allocation of radio spectrum. The federal government stood as gatekeeper and could, by the policy choice of allocating more licences and spectrum, alter market structure (assuming there existed willing licencees). For example, in 1982, the

[129] *York University – Provision of Competition Local Pay Telephone Service* (1995), C.R.T. 95-20, online: CRTC <http://www.crtc.gc.ca/archive/ENG/Decisions/1995/DT95-20.htm> (date accessed: 1 March 2002), Telecom Public Order CRTC 96-583, 14 June 1996, online: CRTC <http://www.crtc.gc.ca/archive/ENG/Orders/1996/O96-583.htm> (date accessed: 10 March 2002).

[130] *Local Pay Telephone Competition,* Telecom Public Notice CRTC 97-26, 8 July 1997, online: CRTC: <http://www.crtc.gc.ca/archive/ENG/Notices/1997/PT97-26.htm> (date accessed: 10 March 2002).

[131] *Local Pay Telephone Competition* (1998), C.R.T. 98-8, online: CRTC: <http://www.crtc.gc.ca/archive/ENG/Decisions/1998/DB 98-8.htm> (date accessed: 15 March 2002).

[132] CRTC, *Report to the Governor in Council: Status of Competition in Canadian Telecommunications Markets* (September 2001) at 41.

Department of Communications decided cellular licences would be issued and two licencees - Rogers Cantel and the Mobility telco affiliates - were permitted in the cellular market.[133] Similarly, four PCS licencees were permitted to enter by the successor Department of Industry in 1995.[134]

The competitive impact of licensing is, of course, only as effective as the technology licensed. For example, PCTS licencees never became a competitive factor due to the limitations of that technology. On the other hand, PCS, given advantages of its digital technology and superior economics, threatens to sweep aside traditional cellular services, at least in urban areas.[135]

2. *Mandatory Interconnection and Related Matters*

In the case of terminal equipment, competition required the reversal of existing regulatory rules which banned the use of telephones and other telecommunications equipment not approved by the telco.[136] The Commission finally eliminated these restrictions, following numerous legal battles in 1982.[137]

In order to offer competing telephone services in long distance and local markets, new entrants must be able to send their calls and signals through the networks of the telcos to reach the telephones, computers or other devices of telco subscribers. The creation of competition in the long distance and local markets turned on the CRTC's decision to compel incumbent telephone companies to permit this. The first application before the CRTC for interconnection to permit entry of traditional long distance services was turned down in 1985 on the basis that the prospective entrant, CNCP, had not proven it would be viable.[138] Seven years later, the Commission relented, requiring interconnection for CNCP's successor Unitel.[139] In other decisions, the telcos were also required to interconnect with cellular and other wireless entrants.[140] More recently in 1997, a set of interconnection rules was established to permit the entry of competitors

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133 *Supra* note 77.

134 *Supra* note 80.

135 In *Regulation of Mobile Wireless Telecommunications Services* (1996), C.R.T. 96-14 at 1, online: CRTC <http://www.crtc.gc.ca/archive/ENG/Decisions/1996/DT96-14.htm> (date accessed: 15 March 2002) the CRTC states "it now appears that PCTS services will not develop as envisaged in Decision 94-15, and that new personal communications services (PCS)... will supplant PCTS services".

136 *Bell Canada General Regulations*, Rules 7 and 9. See Restrictive Trade Practices Commission, *Telecommunications in Canada* (1981), Vol. I, p.119.

137 *Bell Canada – Interim Requirements Regarding the Attachment of Subscriber-Provided Terminal Equipment* (1980), C.R.T. 80-13, *Attachment of Subscriber-Provided Terminal Equipment* (1982), C.R.T. 82-14.

138 *Interexchange Competition and Related Issues* (1985), C.R.T 85-19 at 43.

139 *Competition in the Provision of Public Long Distance Voice Telephone Services and Related Resale and Sharing Issues* (1992), C.R.T. 92-12, online: CRTC <http://www.crtc.gc.ca/archive/ENG/Decisions/1992/DT92-12.htm> (date accessed: 15 March 2002).

140 *Radio Common Carrier Interconnection with Federally Regulated Telephone Companies* (1984), C.R.T. 84-10.

at the local services level.[141]

The right to interconnect alone, however, is insufficient to permit workable competition to take hold. A range of technical matters, without which new entrants cannot offer their customers competitive services, have to be dealt with. Some of these were mentioned above. They include: equal access (the ability of entrants' customers to dial the destination number directly without complex access codes); co-location (the ability of entrants to install their equipment on competitors' premises); number portability (the ability of customers to shift between carriers without having to change phone numbers); and, open network architecture (the open disclosure of the technical specifications surrounding the network to permit competitors' equipment to be compatible with that of the telcos) . These and similar matters essential to effective competition have been dealt with by the CRTC over the period since competition was first introduced into long distance services, through formal orders and decisions,[142] informal dispute resolution procedures,[143] or through the creation of industry technical committees which meet under the watchful eye of the Commission.[144]

A companion to interconnection is the concept of "unbundling" -- the requirement that telcos offer parts of their network to competitors for lease. Unbundling was only required where deemed necessary to permit viable entry. For example, because it is uneconomic for an entrant in local markets to duplicate all of the "local loop" wiring that services certain areas such as sparsely populated rural exchanges, the Commission has required certain segments of the network which were deemed essential to competition to be unbundled. A facility was defined as "essential" if:

(a) an entrant requires it as an input to compete;

(b) the entrant is unable to economically or technically duplicate that facility; and

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[141] *Local Competition* (1997), C.R.T. 97-8, online: CRTC <http://www.crtc.gc.ca/archive/ENG/Decisions/1997/DT97-8.htm> (date accessed: 15 March 2002).

[142] See *Co-location* (1997), C.R.T. 97-15, online: CRTC <http://www.crtc.gc.ca/archive/ENG/Decisions/1997/DT97-15.htm> (date accessed: 15 March 2002) which provides for both physical and virtual collocation. Regarding local number portability, see Telecom Order CRTC 97-1243, 5 September 1997, online: CRTC <http://www.crtc.gc.ca/archive/ENG/Orders/1997/O97-1243.htm> (date accessed:10 March 2002).

[143] Such as the procedures set out in *New Procedures Regarding Competitive Issues*, Telecom Public Notice CRTC 95-51, 8 December 1995, online: CRTC <http://www.crtc.gc.ca/archive/ENG/Notices/1995/PT95-51.htm> (date accessed: 10 March 2002), which include staff mediation, staff assisted resolution and appointment of an inquiry officer.

[144] For example, in *Implementation of Regulatory Framework – Development of Carrier Interfaces and Other Procedures*, Telecom Public Notice CRTC 96-28, 1 August 1996, online: CRTC <http://www.crtc.gc.ca/archive/ENG/Notices/1996/PT96-28.htm> (date accessed: 10 March 2002), the Commission created the CRTC Interconnection Steering Committee 'regarding issues related to the implementation of local competition'. In *Implementation of Regulatory Framework – Local Number Portability and Related Issues*, Telecom Public Notice CRTC 95-48, 10 November 1995, online: CRTC: <http://www.crtc.gc.ca/archive/ENG/Notices/1995/PT95-48.htm> (date accessed: 10 March 2002), the Commission initiated a proceeding which resulted in a number of reports concerning local number portability.

(c) the facility is held by a dominant firm.[145]

The CRTC has also mandated unbundling of certain "non-essential" facilities for which competitive supply is limited. In March 2001 this requirement was extended for an indefinite period. The Commission placed the onus of proof on the telcos to demonstrate sufficient competition in the market to justify removal of this requirement.[146]

As with interconnection, the CRTC has been called upon to police the unbundling process and make orders to ensure that it is carried out properly.[147]

Finally, the terms and conditions under which interconnection and unbundling take place, particularly pricing, create a further set of problematic regulatory issues. For example, in the case of local competition, the Commission settled on a more-or-less-arbitrary price for unbundled facilities based upon "incremental cost" plus a 25% "mark-up".[148] The pricing of unbundled loops, including the mark-up issue, was the subject of a proceeding in 2001 which resulted in certain reductions in the prices paid by competitive entrants.[149] Pricing of essential facilities is a critical issue, because if it is set too high, this can prevent viable entry. On the other hand, if it is set too low, this can discourage the building of competitive facilities (which strengthens competition in the long run) or can create the incentive for uneconomic entry (entry which would not occur if true costs were charged). It remains to be seen if the Commission's pricing decisions have struck the right balance.

Related to the pricing issue is how to protect existing subsidies flowing from long distance and other services' revenues to below-cost local services. This structure originated in regulated pricing which set local telephone rates at low levels to be affordable and to ensure universal service. The policy was successful in Canada, achieving 99% penetration of telephone services to households. Entry and competition, however, introduce forces which drive subsidized prices toward cost and thus have a tendency to "squeeze out" subsidies. The Commission's solution was to require entrants to pay a fee which reflects the funds lost to the telco when, for example, a customer switches subsidy-producing long distance calling from a telco to a new entrant. The funds associated with this fee are known as "contribution".[150]

Another solution has been to "rebalance" local rates by raising them to more

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[145] *Local Competition* (1997), C.R.T. 97-8 at para 74, online: CRTC <http://www.crtc.gc.ca/archive/ENG/Decisions/1997/DT97-8.htm.

[146] *Local Competition Sunset Clause for Near-Essential Facilities,* Telecom Public Order CRTC 2001-184 at para 33, online: CRTC <http://www.crtc.gc.ca/archive/ENG/Orders/2001/O2001-184.htm> (date accessed: 15 March 2002).

[147] Letter in respect of *Commission Decision Regarding CRTC Interconnection Steering Committee Dispute on ILEC Service Intervals Associated with the Provision of New Unbundled Loops (Type A & B)* CRTC 2000-17, 31 October 2000, online: CRTC <http://www.crtc.gc.ca/archive/ENG/Letters/2000/lt001031.htm> (date accessed: 10 March 2002).

[148] *Supra* note 145 at paras 119-126.

[149] *Restructured Bands, Revised Loop Rates and Related Issues* (2001), C.R.T. 2001-238, online: CRTC <http://www.crtc.gc.ca/archive/ENG/Decisions/2001/DT2001-238.htm> (date accessed: 15 March 2002).

[150] *Changes to Contribution Regime* (2000), C.R.T. 2000-745, online: CRTC <http://www.crtc.gc.ca/archive/ENG/Decisions/2000/DT2000-745.htm> (date accessed: 15 March 2002) created a new regime for the collection of contribution based upon revenues.

closely match actual costs. As discussed above, local rates in Canada were increased in three phases beginning in January 1996. Monthly residential rate increases over this period were between $4.00 and $7.00, depending on the company and region. Rural rates have increased more than urban rates in the process.

These increases in local rates have been accompanied by reductions in long distance rates brought about by competition. For most customers, the reduction in long distance rates have more than offset the increase in the local phone bill.[151] However, because for some, affordability may become an issue, the increase in local rates led to a separate proceeding to examine what to do about this.[152]

The presence of such issues as subsidized services and "contribution" have complicated or delayed the regulatory steps for opening markets to competition and have often meant that new entrants must themselves be burdened with a certain amount of regulatory baggage. Nonetheless, with time these difficult issues have largely been addressed and most telecommunications markets now exhibit lower entry barriers and some form of competitive rivalry.

B. *Competitive "Safeguards" Applied to Incumbent Firms*

Once entry is permitted and the terms and conditions for access to essential facilities are settled, a further regulatory issue often driven by demands from the new competitors, is dealing with the competitive reaction of the telcos to the "infant" entrants. A leading concern has been the ability of the incumbents, with their operations spanning numerous market segments, to cross-subsidize low or "predatory" pricing in the newly competitive markets. The alleged source of cross-subsidy is revenue from other services existing in less competitive markets, protected by entry restrictions, whose prices may be set by regulation. Other concerns relate to the ability of incumbents to discriminate against competitors in the provision of access to essential facilities by, for example, charging the entrants a much higher price than they may charge their own affiliates, corporate divisions, or corporate partners.

In the United States, the concern for discrimination and cross-subsidy between the monopolist local telephone providers and their vertically-integrated long distance operations led to an antitrust suit which was settled in 1982[153] with the forced divestiture of the local "Bell Operating Companies" (BOCs) from the long distance, equipment and research operations of AT&T. This "structural" solution had the advantage of eliminating the source of the alleged cross-subsidy and the source of the incentive to discriminate, through the means of the sell-off of local market assets to arms-length purchasers.[154]

In Canada, structural separation has not been required except in certain limited

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[151] See *e.g. supra* note 132 at 44-46.

[152] See *e.g. Local Service Pricing Options* (1996), C.R.T. 96-10, online: CRTC <http://www.crtc.gc.ca/archive/ENG/Decisions/1996/DT96-10.htm> (date accessed: 15 March 2002).

[153] *U.S.* v. *American Tel. &Tel. Co.*, 552 F. Supp. 131 (1982), (D.C.D.C.), aff'd 460 U.S. 1001 (1983).

[154] Over the last several years, however, the divestiture has been partially reversed by mergers among the BOCs.

forms, such as the requirement that telcos offer cellular services through a physically separate affiliate.[155] The CRTC rejected structural separation, for example, as a way of dealing with the potential cross-subsidy between telcos' telephone service and terminal equipment operations, preferring the use of costing rules.[156] Further, in its recent *Regulatory Framework* decision, it found that structural separation was not in the public interest as a way of dealing with emerging competition (it also denied requests by the federal Competition Bureau during the hearing to question the telcos on the impact of structural separation). The Commission held:

> there is no compelling evidence to support the dismantling, through divestiture, of the telecommunications system in Canada. There are better methods for dealing with problems stemming from the vertically integrated structure of the Stentor companies. Divestiture could be damaging to the competitiveness of Canada in global markets and could dampen the emergence of integrated services evolving from the convergence of the communications, information, computing and entertainment industries.[157]

In place of structural separation, the CRTC has expended substantial time and resources in formulating elaborate costing rules aimed at ensuring that cross-subsidy from monopoly to competitive services is controlled. Such rules were used, for example, to deal with allegations that telcos were subsidizing low pricing in their terminal equipment operations with profits from other services.[158]

Another solution used to deal with the potential for cross-subsidy was the separation of the telcos' asset bases into "competitive" and "utility" segments.[159] Separate proceedings were held for each telephone company dealing with what assets should be placed into which pot and where to put so-called "common" costs. Following the split, and after a transition period, the monopoly segment continued to be subject to detailed ground-up rate of return regulation, while competitive services were made subject to lightened regulatory control under a "price cap" regime.[160]

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[155] See *British Columbia Telephone Company – Portable Communications Division* (1985), C.R.T. 85-15, online: CRTC <http://www.crtc.gc.ca/ENG/Decisions/1985/DT85-15.htm> (date accessed: 15 March 2002).

[156] *Participation of Bell Canada and British Columbia Telephone Company in the Multiline and Data Terminal Equipment Market* (1986), C.R.T. 86-5 at 11-12, online: CRTC <http://www.crtc.gc.ca/archive/ENG/Decisions/1986/DT86-5.htm> (date accessed: 15 March 2002).

[157] *Review of Regulatory Framework* (1994), C.R.T. 94-19 at 38, online: CRTC <http://www.crtc.gc.ca/archive/ENG/Decisions/1994/DT94-19.htm> (date accessed: 15 March 2002).

[158] *Bell Canada – Revenue Requirements for 1993 and 1994* (1993), C.R.T. 93-12 at 114-116, online: CRTC <http://www.crtc.gc.ca/archive/ENG/Decisions/1993/DT93-12.htm> (date accessed: 15 March 2002).

[159] *Supra* note 157 at 39.

[160] *Implementation of the Regulatory Framework – Splitting the Rate Base and Related Issues* (1995), C.R.T. 95-21, online: CRTC <http://www.crtc.gc.ca/archives/ENG/Decisions/1995/DT95-21.htm> (date accessed: 15 March 2002); *Implementation of Price Cap Regulation- Decision Regarding Interim Local Rate Increases and Other Matters* (1997), C.R.T. 97-18, online: CRTC <http://www.crtc.gc.ca/archives/ENG/Decisions/1997/DT97-18.htm> (date

A further step in this process of dealing with the challenges arising from the telcos' operations straddling competitive and monopoly markets was the elimination of rate-of-return regulation for even monopoly local services and its substitution with price caps. Under rate of return regulation, the regulator performs a calculation of a detailed revenue requirement for the telephone company based upon a fixed percent return on investment, and then sets rates to cover these requirements. Price cap regulation involves setting prices over time based upon a fixed periodic percent increase from the starting or "going in" rates. The increase may be based upon such factors as inflation, technological change and likely efficiencies. One of the benefits of price cap regulation is said to be that it reduces or eliminates the incentive to use regulated monopoly services as a source of funds for cross-subsidy because profits cannot be increased by the shifting of regulated costs and other forms of regulatory gamesmanship. For example, with price caps applying to local services, no benefit is gained by the telcos' attempt to shift costs from competitive to local segments. Price caps were implemented January 1, 1998 for most telcos and were subjected to a review proceeding in late 2001.[161]

Another method of dealing with cross-subsidy has been to permit competition to move long distance rates down and eliminate the source of subsidy, while moving local rates upward, towards cost. This restricts the pool of funds available to cross-subsidize other services. The question of what the "costs" of various services actually are has proved controversial, but there has been general acceptance of the view that historic local residential rates were well below cost. With a series of recent local rate increases described above, the source of potential cross-subsidy is reduced, if not eliminated.

Direct price controls are another way of controlling cross-subsidy and predation. The Commission has, for example, imposed long distance "floor" pricing rules on incumbents to ensure that predation, as defined by the Commission, does not occur.[162] The mechanism has been the so-called "imputation" test under which competitive tariffs of the telcos are required to cover costs and a measure of the subsidies included in current rates. These rules are more stringent than the predatory pricing tests used by competition law, because the former assess only whether the pricing is below a measure of cost and not whether this pricing is likely to lessen competition, as competition law rules would require.[163]

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accessed: 15 March 2002).

[161] *Price Cap Review and Related Issues*, Telecom Public Notice CRTC 2001-37, 13 March 2001, online: CRTC <http://www.crtc.gc.ca/archive/ENG/Notices/2001/PT2001-37.htm> (date accessed: 10 March 2002).

[162] See *Review of Regulatory Framework – Targeted Pricing* (1994), C.R.T. 94-13 at 9, online: CRTC <http://www.crtc.gc.ca/archive/ENG/Decisions/1994/DT94-13.htm> (date accessed: 15 March 2002); *Tariff Filing Relating to Promotions* (1996), C.R.T. 96-7, online: CRTC <http://www.crtc.gc.ca/archive/ENG/Decisions/1996/DT96-7.htm> (date accessed: 15 March 2002); *Issues Related to the Imputation Test Methodology – Rebanding Decision Follow-up* (2001), C.R.T. 2001-737, online: CRTC <http://www/crtc.gc.ca/archive/ENG/Decisions /2001/DT2001-737.htm> (date accessed: 15 March 2002).

[163] Canada, Competition Bureau, *Predatory Pricing Enforcement Guidelines* (Ottawa: Consumer and Corporate Affairs Canada) at 6, online: <http://strategis.ic.gc.ca/pics /ct/ppeg_e.pdf> (date accessed: 10 March 2002) [hereinafter *Predatory Pricing Enforcement*

Other "competitive safeguards" imposed by the Commission on incumbents have been rules governing anti-competitive bundling of services[164] and the favourable treatment of affiliates by telco parent companies.[165]

C. *Forbearance and Exemption*

Once the *raison d'etre* for regulation has vanished -- whether it be through the erosion of monopoly power due to free entry, or the satisfaction of policy goals such as affordable services through the availability of choice and price competition -- regulatory requirements such as scrutiny of tariff filings, licensing or quality of service can be removed. Surprisingly, however, Canadian regulators did not initially possess the discretion to withdraw regulation when no policy rationale for its continued regulation could be found. As noted earlier, in 1988, the Federal Court held that the Commission had erred when it exempted cellular competitors from the filing of tariffs. It took an Act of Parliament - the 1993 *Telecommunications Act*[166] - to give the CRTC the power to forbear. Section 34 of the *Act* provides that the Commission *may* forbear where it finds that this would be consistent with Canadian telecommunications policy objectives, and *shall* forbear where the service in question "is or will be subject to competition sufficient to protect the interests of users".[167] In both cases the forbearance can cover all or part of the CRTC's regulatory powers, which encompass such matters as conditions of service, tariffs, rates, carrier-carrier agreements and limitations of liability.

Guidelines].

[164] See bundled tariffs rejected in Telecom Order CRTC 97-1408, 2 October 1997, online: CRTC <http://www.crtc.gc.ca/archive/ENG/Orders/1997/O97-1408.HTM> (date accessed: 10 March 2002); Telecom Order CRTC 97-1409, 2 October 1997, online: CRTC <http://www.crtc.gc.ca/archive/ENG/Orders/1997/O97-1409.HTM> (date accessed: 10 March 2002); Telecom Order CRTC 97-1764, 27 November 1997, online: CRTC <http://www.crtc.gc.ca/archive/ENG/Orders/1997/O97-1764.HTM> (date accessed: 10 March 2002). In *Forbearance – Regulation of Toll Services, supra* note 42 at para 124-131, special rules for bundling forborne and regulated services are set out. *Supra* note 141 at paras 195-199 endorsed bundling by telcos, but required filing of tariffs if forborne services were bundled with regulated ones. See *supra* note 157 at 100 and *Joint Marketing and Bundling* (1998), C.R.T. 98-4, online: CRTC <http://www.crtc.gc.ca/archive/ENG/Decisions/1998/DT98-4.htm> (date accessed: 15 March 2002), in which the Commission concluded that local and long distance service could be bundled if they complied with the bundling rules. In Telecom Order CRTC 98-669, 7 July 1998, online: CRTC <http://www.crtc.gc.ca/archive/ENG/Orders/1998/O98-669.htm> (date accessed: 10 March 2002), a bundled package of business local and long distance services was approved under the bundling rules. In Telecom Order CRTC 99-1203, 22 December 1999, online: CRTC <http://www.crtc.gc.ca/archive/ENG/Orders/1999/O99-1203.htm> (date accessed: 10 March 2002), the CRTC confirmed its preliminary view in *Joint Marketing and Bundling* (1998), C.R.T. 98-4, online: CRTC <http://www.crtc.gc.ca/archive/ENG/Decisions/1998/DT98-4.htm> (date accessed: 15 March 2002), that it was appropriate to remove the restriction on bundling terminal equipment with remaining tariffed network services.

[165] See *e.g.* with respect to cellular services, *Cellular Radio – Adequacy of Structural Safeguards* (1987), C.R.T. 87-13, online: CRTC <http://www.crtc.gc.ca/archive/ENG/Decisions/1987/DT87-13.htm> (date accessed: 15 March 2002).

[166] *Telecommunications Act*, S.C. 1993, c.38.

[167] *Ibid.* at s. 34.

A more complete form of deregulation than forbearance is possible under section 9 of the Act, which gives the Commission the power to fully exempt a service from the application of the *Telecommunications Act* if, following a public hearing on the proposed exemption, it finds "that the exemption is consistent with Canadian telecommunications policy objectives."[168] A proposed exemption order must be laid before Parliament before it is finally made, with or without changes, by the Governor in Council. Since its enactment, the Commission used the exemption power infrequently (*e.g.*, for radio paging and certain other wireless services.[169]) In contrast, the Commission has used the forbearance power extensively. Its use of the power is traced briefly below.

1. *Treatment of New Entrants*

In some cases, new entrants are not "telecommunications common carriers" because they do not possess telecommunications infrastructure. This means they are not covered by the *Telecommunications Act*, and thus the CRTC had nothing to forbear from. This was the case with suppliers of terminal equipment and resellers.[170]

In cases where entrants owned telecommunications facilities, such as facilities-based long distance entrants and cellular and PCS providers, a decision to forbear was needed to withdraw requirements such as the filing of tariffs and the approval of agreements.[171] Following the amendments in 1993 to add the forbearance power, it was quickly used in respect of cellular entrants in 1994,[172] non-dominant long distance competitors in 1995,[173] and PCS entrants in 1996.[174]

In all of these decisions, the CRTC retained aspects of its regulatory authority in spite of forbearance from exercising several powers. For example, in dealing with wireless services, the Commission retained requirements dealing with confidential information, "unjust discrimination and undue preference" and the filing of agreements with respect to certain services or carriers.[175]

2. *Incumbent Telcos*

The decision to withdraw from the regulation of the telcos was more difficult and took longer than for new entrants. New competitors lack market power and do not

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168 *Ibid.* at s. 9.

169 *Regulation of Wireless Services* (1994), C.R.T. 94-15 at 12-15.

170 CRTC, News Release, "CRTC Concludes that Resellers not Subject to Regulation Under the *Telecommunications Act*", (4 October 1993).

171 The CRTC's first decisions to forbear from the regulation of non-dominant carries actually came before its authority was challenged and found to be *ultra vires* - in decisions dealing with cellular entrants in 1984 and private line competitors in 1988. See previous discussion on deregulation in these areas.

172 *Supra* note 169 at 7-10.

173 *Supra* note 39 at 4-6.

174 *Regulation of Mobile Wireless Telecommunications Services* (1996), C.R.T. 96-14 at 6, online: CRTC <http://www.crtc.gc.ca/archive/ENG/decisions/1996/DT96-14.HTM> (date accessed: 11 March 2002).

175 *Supra* notes 80-85.

generally possess facilities essential to their competitors' operations. The incumbent telcos are dominant in certain segments and do possess such "essential facilities". Thus, the case is made for continued regulation until dominance is checked by the presence of sufficient competition. In its 1994 *Regulatory Framework* decision, the Commission set out the approach it would take to the determination of when to use its forbearance power. The factors it listed were as follows:

> (a) the market share of the regulated firm in a properly defined market;
> (b) an assessment of the market power of the firm and whether the market in question is "workably competitive", based upon:
>> (i) demand considerations, *e.g.*, available substitutes, switching costs for consumers, and whether the product is essential,
>> (ii) supply conditions, *e.g.*, the response of competitors to price increases and entry conditions;
>> (iii) evidence of rivalrous behaviour; and
>> (iv) innovation and change.[176]

The Commission first applied its forbearance power to the telcos with respect to terminal equipment in 1994.[177] The telcos' competitive long distance services were made subject to forbearance in 1997, only five years after competition had been introduced into public switched telephone services.[178] In the United States, such forbearance took nearly twenty years from the first entry of residential long distance service competitors.[179]

As with new entrants, the forbearance of the Commission in the foregoing decisions did not extend to all of the Commission's powers. For example, telcos were not required to file long distance tariffs for approval, but were still required to satisfy certain conditions relating to matters such as cross-subsidy and confidentiality of customer information.[180]

D. *The Role of Competition Law Enforcement*

The Competition Act[181] is a law of general application which provides rules intended to prohibit practices which harm the efficient operation of competitive markets. Examples of such rules are the criminal prohibition of price fixing and the civil regime for the reversal or prevention of mergers and the practices of dominant firms which may

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176 *Supra* note 13 at 64-70.

177 *Supra* note 156; *Floor Price Filing Requirements for the Sale of New Terminal Equipment* (1993), C.R.T. 93-3 at 1-2 [hereinafter *Floor Price*]; *Forbearance – Sale of Terminal Equipment, supra* note 30 at 12-13; *supra* note 13 at 76-78.

178 *Supra* note 42 at 9.

179 *Supra* note 17 at 51-53.

180 *Supra* note 42 at 12. The CRTC has also forborne from regulating incumbents' services offered outside their primary territory: *Forbearance from Regulation of Incumbent Local Exchange Carriers' Out-of-Territory Services* (2001), C.R.T. 2001-534, online: CRTC <http://crtc.gc.ca/archive/ENG/decisions/2001/DT2001-534.HTM> (last modified: 31 August 2001).

181 R.S.C. 1985, c. C-34, as amended.

substantially lessen competition. The premise of the *Act* is that competition can deliver consumers choice, competitive prices and innovation and should therefore be fostered.

As entry is permitted into telecommunications markets and competition is allowed to operate, generalist competition laws are sometimes seen as a replacement for the previous regulatory regime. However, while competition laws can protect against anti-competitive behaviour, they are not a direct replacement for regulation, for a number of reasons.

First, competition laws are not displaced in the first place by the mere presence of the regulatory regime. There is no statutory limit on the application of both the *Competition Act* and regulatory rules such as those under the *Telecommunications Act* and the jurisprudence provides little guidance.[182] Given that both are federal statutory schemes, competition laws arguably operate concurrently with telecommunications regulation and the application of the former does not depend on the existence of a forbearance order by the CRTC.[183] The normal rules governing statutory interpretation would resolve any conflicts where the schemes overlap. The application of competition laws may, however, be confined when competitive forces are replaced by certain types of regulatory rules governing specific conduct. For example, it may be difficult to show that a given practice constitutes a "substantial lessening of competition" in a market where competition in respect of that practice has already been severely limited by regulatory restrictions. Further, as a practical matter, competition authorities have been hesitant to venture into markets already the subject of detailed oversight by a regulatory regime with a broader policy mandate. Thus, there is increased "room" in a practical sense for the application of competition laws with decreased regulation.

Second, competition laws do not involve the direct overview or regulation of the competitive performance of individual firms. Competition laws, rather, are intended to ensure that competitive conduct is sufficiently vigorous, so that the competitive process produces outcomes desirable for consumers. For example, competition laws are not generally used to monitor or set "just and reasonable" prices to consumers or to monitor firm behaviour to ensure a given level of service is provided. The "regulator"

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[182] The so-called "regulated conduct defence", which can displace the application of competition law, has developed almost exclusively in the context of criminal competition law applied to provincial regulatory regimes (see *e.g. Jabour* v. *The Law Society of British Columbia*, [1982] 2 S.C.R. 307, 137 D.L.R. (3d) 1.) The doctrine has, however, been the source of considerable confusion and been termed "a very unsettled area of the law": see H.N. Janisch, "From Monopoly Towards Competition in Telecommunications: What Role for Competition Law?" (1994) Can. Bus. L. J. 239 at 263. The application of federal competition law to federal regulation would, however, seem to be a simple case of resolving conflicts, if they arise, by the normal rules of statutory construction governing two pieces of legislation passed by the same legislature. In short, unless compliance with one regime is frustrated by the other, the two schemes should be able to co-exist without one displacing the other.

[183] See *e.g. Director of Investigation and Research* v. *Teledirect*, (1997), CT-94/3 (Comp. Trib.), online: Competition Tribunal <http://www.ct-tc.gc.ca/english/cases/teledir/204_a.pdf> (date accessed: 08 March 2002), in which the competition authorities challenged Bell Canada's telephone book publisher, *inter alia*, over its rules governing the distribution of subscriber listing information, even though that very issue had been dealt with by the CRTC. The Director finally withdrew his complaint on this issue when the CRTC provided for more liberal rules.

is the competitive process itself. The Competition Tribunal, the body which adjudicates the civil provisions of the *Act,* has held that "[t]he Tribunal is not a rate-setting body. The implications of rate-setting is an ongoing regulatory oversight which is the antithesis of competition policy."[184]

Third, the Competition Bureau, the agency charged with enforcing the *Act,* does not have the resources or regulatory powers to carry out such monitoring or to become a policeman between telecommunications competitors, as the CRTC has done on occasion. While it develops expertise on various areas of Canadian industry, unlike an industry-specific regulator, it must assemble the necessary knowledge base and evidence in individual cases or over a series of cases. The rules of evidence it faces in both criminal and civil enforcement are also significantly more strict than those faced by the CRTC. Competition law enforcement is also generally brought to bear *after* anti-competitive conduct has already occurred. Furthermore, it cannot provide the remedies many complainants seek, such as rate rollbacks or detailed and ongoing policing of conduct.[185]

Competition laws rely more upon the deterrent effect of periodic enforcement rather than ongoing regulatory oversight to ensure that practices which harm competitive markets are discouraged.

Finally, the *Competition Act* does not give the same primacy to certain policy objectives pursued by regulation. For example, a preoccupation of the CRTC has been distributional concerns related to ensuring that local rates are kept low to ensure that they are affordable to low-income consumers. Another is the offering of specific kinds of services such as those for the hearing impaired or the provision of 911 emergency services. Competition law seeks to promote such benefits and services more indirectly, through fostering the choice and innovation typical of competitive market structures.

While competition laws cannot fully "replace" regulation, where regulation is withdrawn or ineffective, competition laws *can* address some of the same practices dealt with by regulatory regimes, primarily with respect to firms which possess or obtain market power. For example, competition law jurisprudence has developed certain rules governing access to "essential facilities" which can address network access problems.[186] Rules against "tying" can be used to address certain forms of anti-competitive bundling of services.[187] Predatory pricing rules in competition law deal with the most extreme forms of that practice by dominant firms.[188] While these rules can be used to address some of the same practices susceptible to regulation, the differing scope, enforcement mechanisms and purposes of competition laws and regulatory rules must be kept in mind.

The central question in relation to the process of deregulation is not whether *competition laws* can replace regulation, but whether *competition* can be introduced and

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[184] *Ibid.* at 257.

[185] See H.N. Janisch, "Competition Policy Institutions: What Role in the Face of Continued Sectoral Regulation?" in Doern *et al.*, eds. at *supra* note 23 at 113-115.

[186] See *e.g. Aspen Skiing Co.* v. *Aspen Highlands Skiing*, 472 U.S. 585 (1985), 105 S. Ct. 2847.

[187] *Supra* note 183 at 212-13.

[188] *Predatory Pricing Enforcement Guidelines, supra* note 163; *R.* v. *Consumers Glass Co. Ltd. and Portion Packaging Ltd.* (1981), 124 D.L.R. (3d) 274, 33 O.R. (2d) 228 (Ont. H.C.J.).

operate to promote the various aspects of the public interest that regulation seeks to foster. As the forbearance and exemption decisions of the CRTC show, competition is clearly capable of this in numerous market segments.

IV. THE ROAD AHEAD - REGULATORY REMNANTS

The foregoing review discloses an impressive record of reduced regulatory and legislative entry barriers, forbearance, and streamlined regulatory processes. The coming years will see continuing change, particularly in local markets, as they adjust to increasing competition and as new services and technology come on stream.

In spite of these developments, however, many vestiges of regulatory oversight remain. But why? Why would consumers of telephone and other telecommunications services not be sufficiently protected by the availability of competing suppliers and choice to eliminate the need for industry-specific regulation, as are consumers of, say home construction or electronic goods?

One major reason is the continuing existence of some subsidy flowing from long distance to local and rural rates. For example, the subsidy issue has led to the development of costing methodologies, the "split rate base", "contribution" charges[189] and other regulatory mechanisms.[190] Its presence has added an additional regulatory complication to the implementation of local competition. The subsidy also creates a justification for other rules, in order to guard against cross-subsidy of competitive services by regulated services. It may also create pressure to regulate emerging new services, such as long distance communications services offered over the internet, to protect sources of subsidy. Incentives for competitive entry into local competition are muffled by continuing subsidies, while artificial signals are sent in long distance telecommunications markets inducing inefficient entry. Progress toward dealing with the issue has been made through rate rebalancing. However, to the extent that the subsidy remains, so does the perceived need for some regulatory infrastructure to deal with it.

Another source of demand for regulation comes from new entrants, who wish the CRTC to act as a competitive policeofficer, or as a handicapper of incumbents.[191] As described above in respect of the "competitive safeguard" phase of market liberalization, the CRTC has demonstrated its willingness to perform this role.[192] Part

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[189] See *e.g. Changes to the Contribution Regime* (2000), C.R.T. 2000-745, online: CRTC <http://www.crtc.gc.ca/archive/ENG/decisions/2000/DT2000-745.HTM> (date accessed: 11 March 2002); *Revenue-Based Contribution Regime Interim Procedures* (2001), C.R.T. 2001-338, online: CRTC <http://www.crtc.gc.ca/archive/ENG/orders/2001/O2001-338.HTM> (last modified: 30 April 2001).

[190] For example, the problem of which services should pay contribution was made subject to a separate proceeding. See *Scope of IX Contribution Paying Services* (1996), C.R.T. 96-19, online: CRTC <http://www.crtc.gc.ca/archive/ENG/notices/1996/PT96-19.HTM> (date accessed: 11 March 2002). The CRTC also said that price caps had to be delayed until rates were closer to costs: see *supra* note 112 at 29.

[191] Janisch, *supra* note 175 at 249-55.

[192] See *e.g. Complaints by Unitel and Cantel Regarding MT&T Contract with the Province of Nova Scotia – Consent to Prosecution* (1995), C.R.T. 95-8 at 5, online: CRTC <http://www.crtc.gc.ca/archive/ENG/decisions/1995/DT95-8.HTM> (date accessed: 11 March

of the reason is that in spite of increased competition, incumbents still exhibit dominance or substantial market power in key markets. Witness for example, market leader Bell Canada's 2000 market share of 97.1% of local and 61% of long distance revenues, in spite of several years of more open markets.[193]

Even as competition increases, consumers across Canada may not gain equal access to new or emerging services.[194] For example, the National Broadband Task Force found that there are 4,781 communities in Canada (representing 6.4 million persons) which do not have access to high-speed internet services currently offered by cable and telephone companies. Many others which have such services available have no effective competition.[195] If pockets of market power remain, this may prolong the case for at least some patchwork of regulation, to protect low-income or geographically isolated consumers.

Policing access to "essential facilities" (facilities which are needed for competitors to operate and which cannot be economically duplicated) is another area where demand for regulation is likely to continue for some time to come. A difficult issue is how such facilities should be priced or offered. Once prices are set, they require adjustment and oversight.[196] Technical and specialized access issues are raised. The Commissioner of Competition has indicated that this area should remain primarily the domain of the regulator as competition emerges; "the Bureau and the Competition Tribunal are not well suited to deal with ongoing access and interconnection issues arising from pre-existing market arrangements in telecommunications and broadcasting markets. In these markets, access and interconnection should continue to be a main focus of economic regulation by the CRTC."[197]

With respect to the question of forbearance, the approach of the CRTC decisions suggests a reluctance to dispense with regulation entirely. While the CRTC has made extensive use of forbearance, it has seldom been complete. Even forborne competitors lacking market power in markets such as long distance and wireless services continue to be subject to CRTC oversight in respect of the "unjust discrimination and undue preference".[198] This might be explained, for example, by the fact that all

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[193] Bell Canada Enterprises, *Annual Report* (2000) at 21, online: BCE Homepage <http://www.bce.ca/en/investors/reports/annual/bce/2000annual> (date accessed: 11 March 2002).

[194] See *supra* note 93 at paras. 70-71.

[195] Industry Canada, *The New National Dream: Networking the Nation for Broadband Access, Report of the National Broadband Task Force* (2001) at section 4.1, online: Industry Canada Homepage <http://www.broadband.gc.ca/Broadband_document/english/chapter4.htm#chapter4.1> (date accessed: 11 March 2002).

[196] See *e.g.* the kind of complaint dealt with in *Unbundled Local Loop Fixed Rate Service Order Charges* (1999), C.R.T. 99-15, online: CRTC <http://www.crtc.gc.ca/archive/ENG/decisions/1999/DT99-15.HTM> (date accessed: 18 March 2002). See also *Interim Approval for Revised Unbundled Loop-Service Order Charges* (2001), C.R.T. 2001-694 at 14, online: CRTC <http://www.crtc.gc.ca/archive/ENG/decisions/2001/dt2001-694.htm> (last modified: 16 November 2001).

[197] K. von Finckenstein, "Remarks to the International Bar Association Conference" Remarks (1998) at 3, online: Competition Bureau Homepage <http://strategis.ic.gc.ca/SSG/ct01313e.html> (date accessed: 18 March 2002).

[198] *Supra* note 39 at 2; *supra* note 174 at 4.

telecommunications suppliers, by originating and terminating their customers' messages, contribute to the seamless functioning of the overall telecommunications "network". However, unless such factors related to the structural peculiarities of telecommunications markets can be shown, a competitor lacking market power would not generally have the incentive, or the ability, to act in a fashion that creates the need for such ongoing regulatory oversight.

The CRTC has also on occasion used the halfway house of streamlined regulatory oversight in preference to forbearance. An example of this is the approach to the provision of terminal equipment. The telcos' tariffs were initially made subject to a looser system of floor pricing before complete forbearance occurred.[199] A further example is long distance competition. The telcos were, over several years, made subject to more and more streamlined tariff procedures, with the requirement to have tariffs approved retained except with respect to the most competitive of services.[200] Forbearance finally occurred when competition became sufficiently established in the market.

The CRTC has also been reluctant to completely release its regulatory grip over companies offering services in markets where they possess dominance and are subject to regulation, as well as offering services in markets where effective competition has taken hold. A major rationale for the continued regulation of such entities' activities in competitive markets is their ability to cross-subsidize or otherwise leverage market power from the market of dominance into the competitive markets. An example of a regime designed to deal with such issues is the rules requiring the reporting of inter-corporate transactions between telcos and their non-dominant affiliates which operate in competitive markets. The CRTC reviewed these rules, and concluded that they should not be eliminated for transactions between the monopoly segment of the companies and affiliates.[201]

The need for, and presence of, regulation in many of the above areas will fade as competition evolves and strengthens. For example, if further local facilities-based competition emerges, the "bottleneck" nature of telcos' local facilities may weaken and with it much of the justification for mandating access to such "essential facilities". However, given the slow pace that such competitive entry has shown in non-business local markets to date, this may take a significant period of time.

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[199] *Floor Price, supra* note 177 at 8; *Forbearance- Sale of Terminal Equipment, supra* note 30; *supra* note 16 at 76-80.

[200] See *e.g. Information Requirements for Competitive Toll Filings by the Telephone Companies* (1993), C.R.T. 93-12; *Review of Regulatory Framework – Targeted Pricing, Anti-Competitive Pricing and Imputation Test for Telephone Company Toll Filings* (1994), C.R.T. 94-13 at 13; *Tariff Filings Related to Promotions* (1996), C.R.T. 96-7, online: CRTC <http://www.crtc.gc.ca/archive/ENG/decisions/1996/DT96-7.HTM> (date accessed: 11 March 2002); *supra* note 42.

[201] *Review of Intercorporate Transactions – Policies Rules and Procedures* (1997), C.R.T. 97-5 at 3, online: CRTC <http://www.crtc.gc.ca/archive/ENG/decisions/1997/DT97-5.HTM> (date accessed: 11 March 2002). Reporting of transactions between the telcos' competitive segment and affiliates was eliminated. Reporting of transactions with cellular affiliates was retained. Another example of such oversight were the reporting requirements put in place to monitor telcos' investments in broadband facilities as mentioned in *supra* note 112 at 33-38.

There are certain areas, however, where even viable competition is unlikely to eliminate the demand for regulatory oversight of basic telephone services. Privacy and confidentiality of customer data[202], emergency and hearing-impaired services as well as local service affordability[203] are examples of areas in which some form of regulatory rules or requirements are likely to be retained because they raise public policy goals which may or may not be served by the existence of competitive markets.[204] There is a tension created, however, between increased competition and such policy goals. The CRTC itself has recently stated, "[i]n carrying out its statutory mandate, the Commission is called upon to delicately balance often conflicting objectives, including affordability, access to high quality service, increased reliance on market forces, as well as enhancing competition."[205]

Conditions and standards of service were more easily imposed on incumbent carriers when regulatory barriers to entry also protected their profitability. However, they become harder to sustain as sources of subsidy are squeezed out by increasing competition and technological convergence.[206]

A further source of perceived need for regulatory oversight unaffected by the evolution of competitive choice relates to entities engaged in the provision of telecommunications services subject to content regulation associated with the *Broadcasting Act*. As the telephone companies, for example, start to offer what are deemed to be "programming services", the content and other rules of that regime will apply.[207]

Finally, consolidation in the industry in the form of transactions such as BCE's acquisition of CTV may lead to a form of re-regulation. One of the reasons the CRTC approved that transaction was that potentially anti-competitive practices by BCE, such as bundling of services and discrimination in access to facilities required for interconnection to offer services (*e.g.* internet), were or could be regulated by the Commission, if necessary.[208]

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202 See *e.g. Forbearance from Retail, supra* note 107 at para. 28.

203 See *e.g. Local Service Pricing Options* (1996), C.R.T. 96-10 at 13, online: CRTC <http://www.crtc.gc.ca/archive/ENG/decisions/1996/DT96-10.HTM> (date accessed: 11 March 2002); *Service to High Cost Areas* (1999), C.R.T. 99-16, online: CRTC <http://www.crtc.gc.ca/archive/ENG/decisions/1999/DT99-16.HTM> (date accessed: 11 March 2002).

204 For example, the CRTC at one point rejected entry by some competing pay phone service providers on the basis that it could not workably require such "consumer safeguards". *York University – Provision of Competitive Local Pay Telephone Service* (1995), C.R.T. 95-20, online: CRTC <http://www.crtc.gc.ca/archive/ENG/decisions/1995/DT95-20.HTM> (date accessed: 11 March 2002); *In the Matter of an Application by Canada Payphone Corporation* (1996) C.R.T. 96-583, online: CRTC <http://www.crtc.gc.ca/archive/ENG/orders/1996/O96-583.HTM> (date accessed: 11 March 2002). Both applications were denied.

205 *Supra* note 14 at 64.

206 *Supra* note 93 at para. 55.

207 See *e.g.* S. Scott, "Regulation on the Information Highway: Capturing the Elusive Butterfly" (1996) 9 C.J.A.L.P. 307 at 316 for a discussion of the meaning of "programming services"; see also *Regulation of Full Channel Television Services (E.g. Alphanumeric Services)* (1997), C.R.T. 97-2 at section F "Definition of Non-Programming Services", online: CRTC <http://www.crtc.gc.ca/archive/ENG/decisions/1997/DT97-2.htm> (date accessed: 18 March 2002).

208 *Supra* note 27 at 7.

For the foregoing reasons, even as competition continues to evolve in telecommunications markets, it can be anticipated that many markets and services will feature some hybrid of regulation and competition for some time to come. Regulators will be forced to continue to rethink previous policies, approaches and objectives as technological convergence, and competition, evolves.