THE QUEST FOR REGULATORY FORBEARANCE IN TELECOMMUNICATIONS

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I. INTRODUCTION

Telecommunications is of central importance in all advanced industrial countries and its effective regulation a matter of pressing concern. This has not always been so. In 1981 *The Economist* noted:

> Once upon a time the world of telecommunications was cosy and boring. Few national leaders paid much attention to it and no political hostess felt her dining table adorned by the presence of a minister for posts and telephones. . . . All that is changed utterly. Telecommunications has moved to the top of the political agenda.[1]

The crucial role of telecommunications has been widely recognized in Canada. In 1981 the Clyne Committee concluded that "telecommunications, taken in the broadest sense, will form the infrastructure of the new industrial society that is now coming into being around the world".[2] Six years earlier André Lapointe, formerly a senior official at the federal Department of Communications and now Executive Vice-President, Corporate Affairs at Teleglobe Canada, had observed:

> Under conditions of advanced industrialization, telecommunications can no longer be considered as simply one among a number of important industrial sectors; rather it must be seen as the nervous system of the entire economic order. . . . [it] is a crucial component of the economic infrastructure; if it fails to perform adequately, all the rest of the economy suffers.[3]

More recently Marcel Masse, federal Minister of Communications, prefaced his first major statement on telecommunications policy in June 1985 with this assessment:

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[1] *The Born-Again Technology*, THE ECONOMIST, 22 Aug. 1981, at 1 (Supp.).

[2] CONSULTATIVE COMMITTEE ON THE IMPLICATIONS OF TELECOMMUNICATIONS FOR CANADIAN SOVEREIGNTY, TELECOMMUNICATIONS AND CANADA 1 (Clyne J. Chairman 1979). *See also* S. NORA AND A. MINC, THE COMPUTERIZATION OF SOCIETY, A REPORT TO THE PRESIDENT OF FRANCE (1981).

[3] Address by A. Lapointe, Sixth Annual Meeting of Canadian Telecom. Carriers Assoc., at 19 (1975).

> Today, 98 percent of Canadian households have access to the telephone network. The Canadian telecommunications infrastructure has about 23 billion dollars in assets, and employs some 120 thousand workers. Not only is it an enormous industry, but it is also central to our economy. Its importance cannot be measured only by the size of its assets or revenues in relation to the economy. The telecommunications industry is a key infrastructure industry which provides services that are increasingly essential to one of the fastest growing sectors of the economy: the information-based services and high technology sectors.[4]

A 1984 study for the Ontario Ministry of Transportation and Communictions found that almost half of Canada's gross domestic product is attributable to information-related activities and that the "information economy", encompassing all information-related activities in the economy, had grown from thirty-five percent of the gross domestic product in 1971, to forty-seven percent in 1981.[5] It was also reported that between 1971 and 1982 the "primary information economy", comprised of industries producing information, goods, or services that are freely exchanged in a market context, had grown nearly twice as quickly as the total economy.[6] As the Science Council of Canada concluded in a 1982 report:

> The information society is upon us. The manner in which Canadians choose to participate will have far-reaching implications. The microelectronics revolution, upon which the information society is predicated, presents both threats and opportunities. How we respond will determine the shape of our own lives and Canada's future role in the world community.[7]

This move towards an information economy has been accompanied, and partly made possible, by massive changes in the structure of the telecommunications industry. While the most far-reaching changes have been in the United States, major industry shifts are underway in a number of parts of the world.

In the United States, AT&T, the world's largest corporation with $150 billion in assets, annual sales of $65 billion and over one million employees, has been dismantled in order to eliminate its control over "bottle neck" local distribution facilities.[8] AT&T now operates primarily as a long distance communications company and manufacturer of

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[4] Address by The Honourable Marcel Masse, Electrical & Electronic Manufacturers Assoc. Meeting, 20 Jun. 1985, at 4.

[5] THE CANADA CONSULTING GROUP INC., THE INFORMATION ECONOMY, A REPORT FOR THE ONTARIO MINISTRY OF TRANSPORTATION AND COMMUNICATIONS 3 (1984).

[6] *Id.* at 6. The classic study of the "information" or "post-industrial" society, originally published in 1973, is D. BELL, THE COMING OF POST-INDUSTRIAL SOCIETY, A VENTURE IN SOCIAL FORECASTING (1973). A popular view may be found in A. TOFFLER, THE THIRD WAVE (1981).

[7] SCIENCE COUNCIL OF CANADA, PLANNING NOW FOR AN INFORMATION SOCIETY 56 (1982). *See also* A. CORDELL, THE UNEASY EIGHTIES (1985).

[8] The major decision was that of Judge Greene of the United States District Court, District of Columbia in United States v. American Telephone and Telegraph

telecommunications equipment. It has also been allowed to enter the computer market. Its former local operating companies have been reorganized into seven regional companies that provide local telephone service on a monopoly basis. There is now extensive competition in both the telecommunications equipment market, Northern Telecom of Canada being the major beneficiary of this liberalization, and the long distance communications market, where MCI and GTE Sprint are AT&T's major competitors.

The explosive convergence of computer and telecommunications technology has provided significant impetus for these developments.[9] This convergence has led to the blurring of separate industry identities and to the softening of industrial boundaries. Manley Irwin has graphically captured this phenomenon:

> Two decades ago a telephone, a computer, a copier, a PBX, a TV set or newspaper appeared separate entities. Today such identity is softened. The latest telephone embodies a handset, a CRT and a printer, a blend of the new and the old. Today's nomenclature suggests the blurring of product boundaries. A typewriter is a word processor; a PBX — an information switch; a copier — a document distributor; a TV set — electronic publishing; a cash register — a point of sales device; a computer — a work station.
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> Yesterday's telephones were regarded as natural monopolies. Today, the telecommunication industry is inhabited by telephone carriers, resellers, satellite carriers, commercial banks, courier services and aerospace firms. As industries converge, borderless markets erupt as a new economic reality in a traditionally regulated industry.[10]

There has been some speculation that this technological convergence will eventually lead to a "Battle of the Titans" between AT&T and IBM that will make the skirmishes to date pale in comparison. Indeed,

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Company, 524 F. Supp. 1336 (1981). For an excellent review of this decision and its implications *see* MacAvoy & Robinson, *Winning by Losing: The AT&T Settlement and its Impact on Telecommunications*, 1 YALE J. REG. 1 (1983); MacAvoy & Robinson, *Losing By Judicial Policymaking: The First Year of the AT&T Divestiture*, 2 YALE J. REG. 225 (1985). *See also* BREAKING UP BELL, ESSAYS ON INDUSTRIAL ORGANIZATION AND REGULATION (D. Evans ed. 1983); TELECOMMUNICATIONS REGULATION TODAY AND TOMORROW (E. Noam ed. 1983); DISCONNECTING BELL, THE IMPACT OF THE AT&T DIVESTITURE (H. Shooshan ed. 1984). For an assessment of the social and political implications, *see* TELECOMMUNICATIONS ACCESS AND PUBLIC POLICY (A. Baughcum ed. 1984). *See also* Janisch, *Winners and Losers: The Challenges Facing Telecommunications Regulation*, in COMPETITION AND TECHNOLOGICAL CHANGE: THE IMPACT ON TELECOMMUNICATIONS POLICY AND REGULATION IN CANADA 43 (1985). For a fascinating account of events leading up to divestiture, *see* A. VON AUW, HERITAGE AND DESTINY (1983).

[9] For an assessment of the wide variety of services possible with computerized telephone technology, *see* Saddler, *AT & T and Regionals Are Ready to Set Up Computerized Services*, The Wall Street Journal (New York), 29 Oct. 1985, at 1, col. 2.

[10] Irwin, *Global Cross Currents of an Information Economy*, in THE INFORMATION ECONOMY: ITS IMPLICATIONS FOR CANADA'S INDUSTRIAL STRATEGY 14, at 16 (C. Gotlieb ed. 1985). These proceedings of a conference jointly sponsored by the Royal Society of Canada and the University of Toronto-Waterloo University Co-operative on Information Technology contain a valuable Canadian perspective on the information economy.

AT&T has boldly entered the computer arena while IBM has purchased ROLM, a major telecommunications equipment manufacturer. In June 1985 two further developments greatly increased prospects for a clash between the telecommunications and computer giants with the emergence of "compunications". IBM formed an alliance with AT&T's largest and most effective competitor, MCI, with the purchase of a sixteen percent share in MCI. Coupled with the likelihood of further similar investments, this purchase brings IBM and AT&T into direct competition in the long distance market.[11] At the same time, AT&T "stole a march" on IBM by winning a Pentagon contract worth close to one billion dollars. This success dramatically demonstrated AT&T's breakthrough into the computer business.[12] With each unprecedented intrusion into what was formerly exclusive territory, further major confrontations are inevitable.[13]

Until very recently, Canada and the United States were the only major nations in which telecommunications services were provided primarily by private companies subject to public regulation.[14] Now they are to be joined by the United Kingdom and Japan. Both countries have transferred telecommunications out of government departments and state corporations and into the private sector. In neither case, however, has the move to privatization and competition been as complete as in the United States.

The sale of British Telecom to private investors in 1985 was the largest single offer of shares ever made. Provision has also been made for competition in long distance communications through Mercury, a subsidiary of Cable & Wireless.[15] In Japan, legislation has been passed

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[11] Marcom, Barnes & White, *IBM Agrees to Acquire Initial 16% Holding in MCI: Alliance Would Create Powerful Challenge to AT&T*, The Wall Street Journal (New York), 26 Jun. 1985, at 3, col. 1; Marcom & White, *IBM-MCI Pact Portends Big Changes*, *id.* 27 Jun. 1985, at 2, col. 2; *MCI Deal Enhances IBM's Position in Communications*, The Globe & Mail (Toronto), 27 Jun. 1985, at B14, col. 1; *MCI Sets Final Pact to Acquire Assets of IBM's SBS Unit*, The Wall Street Journal (New York) 22 Oct. 1985, at 18, col. 2.

[12] Sanger, *Big U.S. Computer Deal for A.T.&T.*, The New York Times, 28 Jun. 1985, at D1, col. 3; Barnes, *AT&T Wins Computer Job of $946 Million*, The Wall Street Journal (New York), 28 Jun. 1985, at 2, col. 2. *See also* Barnes, *AT & T Introduces a Personal Computer To Compete With IBM's PC AT*, The Wall Street Journal (New York), 11 Oct. 1985, at 26, col. 1; *AT & T is Still Considering Buying Computer Concern*, *id.*, 15 Oct. 1985, at 6, col. 1.

[13] Pollack, *The Battle of the Titans: Part II*, The New York Times, 30 Jun. 1985, at F1, col. 2. *See also A Threatening Telephone Call from the Computer Company*, THE ECONOMIST, 29 Jun. 1985, at 69; de Mott, *Star Wars of a Different Kind*, TIME, 15 Jul. 1985, at 42.

[14] Canada has a highly complex pattern of ownership that includes government ownership. However, Bell Canada and B.C. Tel, companies which generate well over 60% of Canada's total telecommunications operating revenues, are privately owned and subject to federal regulation. For details, *see* Janisch, *Telecommunications Ownership and Regulation in Canada: Compatibility or Confusion?*, 5 C.R.R. 5 (1984).

[15] For a critical overview of these developments, *see* Garnham, *Telecommunications*

converting Nippon Telegraph and Telephone Public Corporation (NTT) into a private company which will be sold incrementally to private investors. Competition is already allowed in value added networks where, for example, computers can use the telecommunications network to communicate with each other. It is envisaged that within five years a coalition of major industrial companies will create "The Second NTT".[16]

In Canada, regulatory decisions by the Canadian Radio-television and Telecommunications Commission (CRTC) have permitted competition in the provision of telecommunications equipment.[17] There is now extensive competition in that market. The recent acquisition of Mitel by British Telecom, itself an example of the internationalization of telecommunications markets, will ensure continued competition for Northern Telecom in its home market.[18] In 1979 CNCP Telecommunications was permitted to provide data and private line voice services in competition with Bell Canada and BC Tel.[19] In 1983 CNCP filed an application with the CRTC for full system interconnection with the

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Policy in the United Kingdom, 7 MEDIA, CULTURE & SOC'Y 7 (1985). *See also The Rules of the New Telecoms Game Change Every Day*, THE ECONOMIST, 27 Jul. 1985, at 63; *British Telecom Has a Thing or Two to Learn from Ma Bell, id.*, 7 Sep. 1985, at 91; Anders, *British Telecom Thrives in Public Sector, But Many Criticize Its Monopoly Position*, The Wall Street Journal (New York), 17 Oct. 1985, at 30, col. 1. In particular, there has been much criticism of the inadequacy of the regulatory scheme in the face of large profits and rate increases. *See, e.g.*, Samstag, *Telephone Charges to Go Up*, The Times (London), 5 Oct. 1985, at 1, col. 6; Smith, *BT Rise Angers Consumers*, Manchester Guardian Weekly, 13 Oct. 1985, at 5, col. 1.

[16] OUTLINE OF TELECOMMUNICATIONS REFORM IN JAPAN, NTT Publication G-114 (Jul. 1984); TELECOMMUNICATIONS REFORM AND NTT PRIVATIZATION, NTT Publication G-115 (Feb. 1985). *See also* Janisch & Kurisaki, *Reform of Telecommuncations Regulation in Japan and Canada*, 9 TELECOMMUNICATIONS POL'Y 31 (1985); Kosuji, *New Developments in the Telecommunications Industry*, in LEGAL ASPECTS OF DOING BUSINESS WITH JAPAN 363 (1985); Maeda, *Privatization of Japanese Telecommunications*, 9 TELECOMMUNICATIONS POL'Y 93 (1985).

[17] Bell Canada — Interim Requirements Regarding the Attachment of Subscriber-Provided Terminal Equipment, Telecom. Decision CRTC 80-13, 114 CAN. GAZETTE PT. I, 4937, 6 C.R.T. 203 (5 Aug. 1980); Attachment of Subscriber-Provided Terminal Equipment, Telecom. Decision CRTC 82-14, 116 CAN. GAZETTE PT. I, 9067, 8 C.R.T. 848 (23 Nov. 1982).

[18] Davis, *BT Pays 'Strategic' £180m for Controlling Stake in Mitel*, The Times (London), 11 May 1985, at 21, col. 3; Johnstone, *Telecom Deal Opens Up World Market, id.* at 1, col. 2; Wilmott, *Wooing Was Swift, Sure*, Financial Post (Toronto), 13 Jul. 1985, at 15, col. 1. The acquisition has to be approved by the British Monopolies and Mergers Commission and Investment Canada. *See* Surtees, *Britain to Review Mitel Deal*, The Globe & Mail (Toronto), 26 Jun. 1985, at Bl, col. 1; Roberge, *Government Agency Eyes British Tel's Bid for Mitel*, Financial Post (Toronto), 24 Aug. 1985, at 10, col. 1; Surtees, *Mitel Clears Its First Hurdle to Give Control to British Tel*, The Globe & Mail (Toronto), 7 Sep. 1985, at B9, col. 6.

[19] CNCP Telecommunications: Interconnection with Bell Canada, Telecom. Decision CRTC 79-11, 113 CAN. GAZETTE PT. I (Supp. 21 Jul. 1979), 5 C.R.T. 177 (17 May 1979), *aff'd* P.C. 1979-2036.

public switched telephone network in order to offer an alternative to the long distance telephone service provided by the telephone companies through Telecom Canada.

In its August 29, 1985 decision, *Interexchange Competition and Related Issues*,[20] the CRTC rejected CNCP's application. The Commission noted that there could be substantial benefits from competition, including lower long distance rates, increased productivity, improved rates of technology diffusion and greater customer choice and supplies responsiveness.[21] However, the CRTC ruled that because of the size of subsidies which flowed from long distance revenues to support local rates under pricing appropriate to monopoly, rates needed to be rebalanced over time. Once this rebalancing process was substantially complete, there would be less risk of uneconomic entry should competition appear desirable.[22]

In considering the two types of applications for interconnection, attachment of terminal equipment to the network and access to the local switched networks, the CRTC has been required to apply railway legislation dating back to the turn of the century.[23] As it happens, this legislation does at least refer to interconnection and the exchange of traffic, even though there are some disconcerting references to the return of "rolling stock". Provided the underlying circumstances of telecommunications regulation remained approximately the same as those which formed the basis of traditional railway regulation, general principles could be extracted and applied to the new services made possible by new technology.[24] New wine, the Biblical injunction notwithstanding, could thus be put into old bottles.

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[20] Telecom Decision CRTC 85-19 (29 Aug. 1985).

[21] *Id.* at 44.

[22] *Id.* at 67. The precise width of the decision is not clear. CRTC Chairman André Bureau stated on the decision's release that "it would be wrong to interpret the decision as a reflection of the Commission's general position with respect to increased competition in the long distance telephone market. I want to make it clear that the decision was based on the merits of this particular application". CRTC New Release, 29 Aug. 1985. However, a reading of the decision as a whole appears to indicate that competition will only be allowed *after* a rebalancing schedule is in place. Thus, the decision may, the Bureau's statement notwithstanding, amount, in practice, to a "reflection of the Commission's general position with respect to increased competition".

[23] The nexus between telecommunications and railway legislation goes back to the earliest days of telegraphy and telephony. As telegraph services were typically operated by the railways or, at a minimum, relied on the railways' rights of way, it was logical to treat these services as simply the communications analogue of the freight and passenger transport services offered by the railway carriers. Although the *Railway Act*, R.S.C. 1970, c. R-2 has been altered in several respects since it was first enacted, the key provisions relating to telecommunications have remained essentially unchanged for nearly eight decades.

[24] For an assessment of these developments *see* Kaiser, *Competition in Telecommunications: Refusal to Supply Facilities by Regulated Common Carriers*, 13 OTTAWA L. REV. 95 (1981).

However, the same dynamic forces that have brought so much change in industry structure, have also fundamentally undermined the rationale for public utility regulation. This traditional form of regulation was predicated on the existence of firm industry boundaries with few, if any, new entrants and a stable technology allowing for long periods of depreciation. Regulators of telecommunications are now faced with product fusion, multiple entry, industry boundary line decay, a high rate of technological innovation and short product life cycles.[25] Thus, the danger arises that a form of regulation appropriate in a stable monopoly environment will be applied unselectively to a changed industry structure in which some new services may best be provided on a competitive basis. It would, however, be irresponsible to advocate any across-the-board deregulation. The unique nature of the telecommunications industry means that its central core of basic switched transmission services, characterized by long run declining costs especially at the local level, may continue to be most efficiently provided on a monopoly basis.[26] The existence of any monopoly will require a form of regulation appropriate to monopoly. Yet where it would be in the public interest to allow competition, a lighter regulatory hand will be appropriate. Not only would over-regulation inhibit the variety and quality of the new services made possible by the convergence of technologies, but regulators would also be overwhelmed were they to try to regulate the plethora of new services in the same manner as POTS (plain old telephone service).

The need to balance competition and regulation has been recognized in Canada. For example, the Macdonald Commission has concluded that it would be most appropriate to adopt "selective deregulation" in Canada.[27] It is evident that this country is not prepared to follow the drastic American structural approach. As Marcel Masse indicated in his policy statement with reference to developments in the United States:

> There has been considerable disruption in the provision of local services in the time it has taken to organize the regional companies. There have also been significant price increases in some areas for basic telephone service, and there continues to be great uncertainty for the customer with respect to how much local prices will eventually increase.

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[25] *See* Janisch & Irwin, *Information Technology and Public Policy: Regulatory Implications for Canada*, 20 OSGOODE HALL L.J. 610 (1982) for an analysis of regulation under the growing technological siege. *See also* M. IRWIN, TELECOMMUNICATIONS AMERICA, MARKETS WITHOUT BOUNDARIES (1984).

[26] Thus Stephen Breyer, who elsewhere was a strong advocate of deregulation and competition, was not persuaded that such a policy would be appropriate in telecommunications. S. BREYER, REGULATION AND ITS REFORM (1982). For an excellent industry study, *see* G. BROCK, THE TELECOMMUNICATIONS INDUSTRY, THE DYNAMICS OF MARKET STRUCTURE (1981).

[27] ROYAL COMMISSION ON THE ECONOMIC UNION AND DEVELOPMENT PROSPECTS FOR CANADA, VOL. 2, at 254 (1985). In so doing the Commission adopted the recommendations of SCHULTZ & ALEXANDROFF, ECONOMIC REGULATION AND THE FEDERAL SYSTEM, RESEARCH STUDIES, VOL. 42 (1985).

> This is an unfortunate situation for our American neighbours and I assure you that it will not be repeated in Canada.[28]

Any "uniquely Canadian answers" will place much emphasis on regulation. Yet, even here, reliance cannot be solely on established forms of regulation. The CRTC itself has already recognized this fact in its proposal to place at least some reliance on structural techniques by way of "separate subsidiaries".[29] CRTC decisions are also beginning to address the need to forbear from full regulation in at least some situations.

The new regulatory environment is necessarily one of considerable subtlety in which blunt regulatory instruments will have to be pared down or employed with a very deft touch. It presents a particular challenge to lawyers as it requires an appreciation of economic considerations, a mastery of complex statutory provisions and an ability to keep overall regulatory purposes in sight.

The purpose of this paper is to examine, from a legal and economic perspective, the meaning and nature of regulatory forbearance, the various rationales underlying it and the statutory scope, if any, available to the CRTC in exercising it.

The article will begin by seeking to develop an operative definition of forbearance, based largely on American regulatory practice and jurisprudence. Although the Canadian experience with forbearance has not been extensive, a number of recent examples that illustrate a retreat from reliance on traditional tools and techniques of public utility regulation in telecommunications and cable broadcasting will be critically analyzed. In particular, these examples will serve to demonstrate the distinctions which exist between forbearance on the one hand, and deregulation, the absence of authority to regulate and the improper abdication of regulatory jurisdiction, on the other.

The reasons given for regulatory forbearance in the United States will be compared with those that have been offered in Canada. Both sets of rationales will then be assessed in terms of the statutorily defined powers and duties of the federal regulator in each country. A comparison will be made between the abilities of each agency to forbear from the exercise of its powers in light of its legislative mandate. It will be argued that the total absence of any reference to efficiency as a policy goal in the Canadian legislation will likely make it more difficult for the

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[28] *Supra* note 4, at 6. Significantly, American assessment is not as negative and balances the benefits of competition (for example, substantially lower long distance rates and enhanced innovation) against pressures on local rates (a result it recognizes as inevitable). *See, e.g.*, Maremont, *Did it Make Sense to Break Up AT&T?*, BUSINESS WEEK, 3 Dec. 1984, at 86; Gannes, *The Judge Who's Reshaping the Phone Business*, FORTUNE, 1 Apr. 1985, at 134-40.

[29] Structural Separation — Multiline and Data Terminal Equipment, CRTC Telecom. Public Notice 1984-66, 118 CAN. GAZETTE PT. I, 9012 (9 Nov. 1984) [hereafter referred to as Structural Separation].

CRTC to disengage itself to the same extent as appears possible in the United States from traditional means of regulation. The potential ameliorating effect of two federal telecommunications-related bills, now in second reading, on the CRTC's ability to forbear, will also be discussed. Some tentative conclusions will then be offered.

II. THE MEANING OF REGULATORY FORBEARANCE

"Regulatory forbearance" is not a legal term of art, nor is it an expression of such common usage as to be capable of unambiguous interpretation. Instead, it is a broadly descriptive, if poorly articulated, concept generally capable of encompassing a variety of regulatory initiatives that have the effect of lessening, if not eliminating altogether, the constraints imposed on industry participants by existing, legislatively-sanctioned administrative practices, procedures and controls. In this respect forbearance is no different from deregulation. Both result in greater freedom from public intervention in private markets. It is the means by which this freedom is conferred that sets apart forbearance from deregulation.

Forbearance may be immediately distinguished from deregulation to the extent that forbearance involves the *discretionary* exercise of a delegated power. Once it has been determined that the power to forbear exists, the terms and conditions of its implementation are usually left to the judgment of the regulator.[30] The only proviso attached to this discretionary authority, of course, is that its exercise must remain consistent with the overriding purposes of the enabling legislation.[31] Deregulation, by comparison, is not always discretionary; for example,

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[30] *See, e.g.*, Computer and Communications Indus. Ass'n v. Federal Communications Comm'n, 693 F.2d 198 (D.C. Cir. 1982) in which the FCC's *Computer II* decision and subsequent modifications, as reported in Second Computer Inquiry Final Decision, 77 F.C.C. (2d) 384 (1980); Second Computer Inquiry Memorandum Opinion and Order, 84 F.C.C. (2d) 50 (1980); and Second Computer Inquiry Memorandum Opinion and Order on Further Reconsideration, 88 F.C.C. (2d) 512 (1981), were upheld. In supporting the FCC's finding that it possessed a power to forbear from the regulation of enhanced services and new customer premises equipment (CPE), while retaining ancillary jurisdiction over these markets, the Court concluded that:

> Because the Commission's judgment on "how the public interest is best served is entitled to substantial judicial deference," the Commission's choice of regulatory tools in *Computer II* must be upheld unless arbitrary or capricious. Our review of the Commission's decision convinces us that the Commission acted reasonably in defining its jurisdiction over enhanced services and CPE. We therefore uphold the *Computer II* scheme.

Computer & Communications Indus. Ass'n v. Federal Communications Comm'n, 693 F.2d 198, at 214 (D.C. Cir. 1982).

[31] *See, e.g*, the discussion and various U.S. authorities cited in Further Notice of Proposed Rulemaking, 84 F.C.C. 2d 445, at 472-74, 478 (1981).

it may come into effect by virtue of legislation directly removing from the regulator's purview the power to control various aspects of an industry's conduct and performance. Under these circumstances, the regulator is clearly not exercising a discretion not to regulate those matters excluded from its competence. Where, however, the enabling legislation expressly authorizes the regulatory agency to selectively implement a lessened degree of regulation according to its judgment or, as sometimes occurs, according to a conditional schedule based, in part, on less than objective criteria,[32] no real distinction between forbearance and deregulation may be said to exist.

There are three other important aspects or features of forbearance. First, the power to forbear may be exercised in whole or in part. For example, in its *Computer II* decision the United States Federal Communications Commission (FCC) determined that it had the power to *entirely* forbear from the traditional regulation of enhanced services and customer premises equipment[33] under Title II of the *Federal Communications Act of 1934*.[34] Similarly, in Canada, the CRTC's decision to refrain entirely from regulating the cellular radio market,[35] despite the

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[32] Economic deregulation, for example, may be programmed to coincide with the emergence of certain structural conditions in relevant markets, as evaluated by the regulatory agency itself. To the extent that measurements of structural characteristics, for example market share, elasticity of supply, conditions of entry and exit, are not entirely, or even largely, without a subjective element, this type of legislation arguably grants the regulator a discretionary power to forbear. Recent U.S. bills that would have incorporated such "discretionary deregulation" have included Bill S.898, The Telecommunications Competition and Deregulation Act of 1981, and Bill H.R. 5158, The Telecommunications Act of 1982. Neither Bill passed into legislation.

[33] Second Computer Inquiry Final Decision, *supra* note 30, at 432-35, 450-52. "Enhanced services" are distinguished from basic telecommunications services to the extent that they involve more than merely the provision of "transmission capacity for the movement of information". Thus, while ordinary local and toll service falls within the basic service category, enhanced services may involve computer processing applications, voice and data storage and retrieval and/or other enhancements to basic service. For a more extensive discussion of the differences between these two categories of service, *see* Enhanced Services, Telcom. Decision CRTC 84-18, at 6-17, 118 CAN. GAZETTE PT I, 6117, at 6123-25 (12 Jul. 1984).

[34] 47 U.S.C.A. ss. 201-22. Chapter 5 of the Act deals with Wire or Radio Communication and is subdivided into six subchapters or Titles. The most important of these for telecommunications purposes is Title II, which sets out the FCC's duties and responsibilities with respect to common carriers. Also of considerable importance are Title I which, in s. 151, articulates the policy goals underlying this legislation, and Title III which contains a number of special provisions relating to radio.

[35] Cellular Radio Service, CRTC Telecom. Public Notice 1984-55, 118 CAN. GAZETTE PT. I, 8472 (25 Oct. 1984). Cellular radio is a relatively new technology combining elements of radio, telephone and computer technology into a single service similar to mobile radio-telephone, but far superior to it. A cellular radio system requires a city to be divided into a honeycomb pattern of "cells" each of which ranges from several square blocks to several square miles in size. All cells are interconnected with each other as well as with the regular telephone network by means of a central tower located in each cell. A computer automatically switches calls from tower to tower

Commission's finding that all service providers within that market fell within its jurisdictional competence, constitutes a prime example of total regulatory forbearance. Partial regulatory forbearance, by comparison, is essentially of two varieties. It may consist of either a limited withdrawal or abstention from traditional forms of regulation[36] or, just as importantly, may involve a substitution of a less burdensome form of regulation, whether of the traditional variety or not.[37]

Second, the decision to forbear from traditional regulation does not prevent the regulatory agency from exercising its jurisdiction under alternate sections of the relevant legislation. Just as significantly, the exercise of forbearance is not irreversible. As the FCC has recently made clear, "a decision to remove entities from Title II regulation . . . does not remove our Title I and Title III jurisdiction over such entities, nor does it foreclose our ability to reimpose Title II regulation upon a principled finding that such action would be warranted under the Act".[38]

Third, forbearance is consistent with at least two different approaches. Upon consideration of the goals and objectives underlying the statute, the regulatory agency may determine either that continued full regulation of the market or any supplier within it is no longer in the public interest or that, owing to circumstances not foreseen by the legislature, the statute should be read so as to exclude certain activities or service providers.[39] It is important to emphasize that this latter "definitional approach" is not equivalent to a finding that no jurisdiction exists. Where there is no jurisdiction, no opportunity to forbear arises as no initial jurisdiction resides in the regulator. By comparison, forbearance may be warranted in a situation where, despite a positive finding of regulatory competence, the regulatory agency determines that had the activity been within the contemplation of the legislature, it would have been expressly excluded from the scope of regulation.

The above discussion, when considered in its entirety, appears to

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as mobile users travel through the various cells within a city. As several callers can use the same frequency simultaneously provided only that they are located in non-adjacent cells, a cellular radio system is much more efficient in utilizing the radio frequency spectrum than are conventional mobile radio systems. In addition, cellular radio offers much greater clarity in voice communication and the advantage of greater portability than is possible with existing systems.

[36] *E.g.*, in American Satellite Corp., 55 F.C.C. (2d) 1 (1975) forbearance was limited to permitting a single request for a tariff reduction which otherwise did not conform with Commission policy.

[37] The CRTC's willingness to lessen and modify, but not entirely remove, the tariffing and reporting requirements to which regulated common carriers will be subject, in so far as their participation in enhanced services markets is concerned, constitutes a *prima facie* instance of this type of partial forbearance. *See* Enhanced Services, *supra* note 33.

[38] *Supra* note 31, at 448.

[39] *Id.* at 447.

warrant the following working definition. *Regulatory forbearance consists of any act, pursuant to legislative authority vested in the regulator, tending to lessen the regulatory burden an economic entity or activity is, or may be subject to and which follows a positive determination by the regulator that the purposes of the relevant legislation are best served by such action, or inaction.*[40] Although this definition captures the essential features of regulatory forbearance, it still remains to be determined under what conditions such action may be considered and, more importantly, the circumstances in which it may be *warranted,* given the purposes of the relevant legislation.

III. ALTERNATIVE RATIONALES FOR REGULATORY FORBEARANCE

Regulators in Canada and the United States have enunciated two closely related grounds for regulatory forbearance: the first is based on the existence of competition in various markets, while the second is premised on the costs of regulation.

A. *Competition and Lack of Market Power as a Ground for Forbearance*

It is a fundamental principle of economics that competitive markets allocate resources in an efficient manner. Resources are free in competitive markets to move into those occupations and activities in which their value is maximized. Such shifting of resources will continue until the marginal benefits of remaining in a particular use are equated with the marginal costs of that use. The resulting outcome — in terms of the quantity of goods and services ultimately produced and the prices at which such goods and services are made available — is said to maximize social welfare.

There is an alternative way of stating the above conclusion: given

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[40] It is to be observed that this definition of "forbearance" is rather sweeping in its scope. It would capture, for example, the automatic rate adjustment formula once considered by the CTC — but later rejected by the CRTC — as a means of reducing the regulatory burden attending frequent rate increase applications during periods of rapid inflation. *See* Rate Adjustment Formula, Cost Inquiry and Other Pending Proceedings, CRTC Public Announcement, 2 C.R.T. 646 (7 Sep. 1976). This early example of potential regulatory forbearance in Canadian telecommunications will be examined more closely later in the paper. *See* note 81 *infra.* A second prominent, if disguised form of regulatory forbearance falling within the above definition has been the reluctance of successive federal regulatory agencies to assert their jurisdiction over interprovincial telecommunications undertakings. In particular, the almost total absence of regulatory scrutiny over the affairs of Telecom Canada must be considered a prime example of regulatory forbearance, especially in light of *Re* Alberta Gov't Tel. and CRTC, 15 D.L.R. (4th) 515 (F.C. Trial D. 1985).

competitive markets in which entry and exit are rapid and relatively costless, consumers will be able to obtain as much of any good or service as they may demand at a price no greater than its cost of production. This result occurs because firms in a competitive industry are unable to raise prices above their costs for any longer than it takes a new entrant using similar technology to begin production or an existing supplier to expand its output. In economic terms, competitive firms tend to behave as "price takers", possessing no market power. Thus, competitive markets also ensure that firms, and hence their shareholders, are unable to earn supra-normal profits in the long run.

Telecommunications markets, however, have at different times failed to exhibit many of the characteristics described above. In particular, the "sunk cost" nature of much of the technology of telecommunications service provision has been such as to preclude the easy entry and exit of rival producers. Economies of scale and scope associated with network provisioning, for example, tend to discourage new entrants by virtue of the advantages that long run declining average costs of production confer on the existing producer. While this suggests from a technical perspective that monopoly supply may be, or historically may have been, the most efficient means of organizing the provision of telecommunications — so much so that the industry is often referred to as a "natural monopoly" — this type of industry structure is not without its drawbacks. The most significant of these drawbacks is that no market forces exist to prevent the monopolist from raising prices above costs. If the monopolist acts as a profit maximizer, output will be lower than optimal and resources will be less than efficiently allocated.

It is this net welfare loss arising from monopoly supply or, more accurately, from the potential abuse of the monopolist's market power, that has traditionally been offered as the rationale for regulatory intervention in telecommunications markets.[41] The conclusion to be drawn from this argument is that once the conditions which precipitated regulation are no longer in evidence, the rationale for continued regulation also disappears. The absence of market power has, in fact, been held by the FCC and CRTC to be a sufficient ground for the

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[41] *See, e.g.*, S. BREYER, *supra* note 21, at 15; A. KAHN, 1 THE ECONOMICS OF REGULATION 11 (1970); Further Notice of Proposed Rulemaking, *supra* note 31, at 547-59.

Whether telecommunications supply is, or ever was, characterized by conditions of natural monopoly, however, has never been definitively established. In the *Interexchange Competition* Decision, *supra* note 20, at 48, the CRTC expressly refrained from reaching any conclusion as to whether the long distance market was, or was not, a natural monopoly. Richard Gabel, for example, has called into question the dominant view that regulation in telecommunications was a response to the unsustainability of effective competition and the consequent need to administratively restrain potential abuses of monopoly power during the early period of U.S. telephony. Gabel instead argues that regulation was introduced at the insistence of the dominant firm to limit competition and, hence, protect its own interests, rather than being the inevitable result of the failure of competitive

exercise of regulatory forbearance,[42] especially where such forbearance is likely to result in consumers benefitting from the various advantages of unrestricted competition.[43] In the FCC decision, however, this finding was premised on a careful review of the relevant statutory provisions setting out the goals and objectives the Commission was to pursue in the exercise of its authority.[44] No similar exercise in statutory interpretation relating to the purposes of the *Railway Act*[45] has ever been undertaken by the CRTC, even on those occasions when it has explicitly chosen to forbear.[46] The significance of this failure will be addressed later in the paper.

B. *The Direct and Indirect Costs of Regulation as a Ground for Forbearance*

The second major rationale offered to justify regulatory forbearance has been that regulation imposes considerable costs on the industry and its consumers, as well as on the regulator and ultimately the taxpayer. The catalogue of regulatory costs has been observed to include:

1) the detrimental effect on the overall quality of regulation as scarce regulatory resources are pushed to their limits;[47]
2) the fiscal burden on taxpayers;[48]
3) a reduced willingness on the part of firms to undertake risk-laden investments;[49]

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markets to sufficiently protect subscriber interests. *See* Gabel, *The Early Competitive Era in Telephone Communication, 1893-1920*, LAW AND CONTEMPORARY PROBLEMS 340 (Spring, 1969). *See also* Bornholtz & Evans, *The Early History of Competition in the Telephone Industry*, in BREAKING UP BELL: ESSAYS ON INDUSTRIAL ORGANIZATION AND REGULATION, *supra* note 8, at 7. Gabel's interpretation of the genesis of U.S. telecommunications regulation is not inconsistent with the economic literature on the theory of regulation. *See* in particular the seminal article by Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. & MANAGEMENT SCI. 3 (1971); *see also* Posner, *Theories of Economic Regulation*, 5 BELL J. ECON. & MANAGEMENT SCI. 335 (1974); Peltzman, *A More General Theory of Regulation*, 19 J. OF L. & ECON. 211 (1976).

[42] *See, e.g.*, Further Notice of Proposed Rulemaking, *supra* note 31, at 472.

[43] Enhanced Services, *supra* note 33, at 6132; Cellular Radio Service, *supra* note 35, at 8473.

[44] Further Notice of Proposed Rulemaking, *supra* note 31, at 457-59, 478-92.

[45] R.S.C. 1970, c. R-2 (as amended).

[46] Thus, in its Cellular Radio Service decision, *supra* note 35, to be discussed in more detail below, the Commission was extremely circumspect in linking its decision to forbear and the expected benefits of such course of action with any possible *statutory basis* which might justify its abandonment of the traditional tariffing requirement in this new market.

[47] *Supra* note 29, at 9013.

[48] Further Notice of Proposed Rulemaking, *supra* note 31, at 452.

[49] *Id.* at 453-54. The logic underlying this proposition is that the necessary return to capital invested in risky projects is typically higher than that which is likely to be allowed under rate of return regulation. This argument figured prominently in Bell

4) an impairment in the ability of firms to react rapidly to changing market conditions;[50]
5) the risk that "regulated competition [may become] cartel management" and hence result in the worst of both worlds;[51]
6) the dampening of incentives to innovate;[52] and
7) the sheer waste of resources attending the regulation of firms that have no market power to begin with.[53]

In addition to having articulated its various arguments in support of regulatory forbearance much more eloquently than the CRTC, the FCC has also extended these arguments further. Particularly significant, with respect to the regulatory cost rationale for forbearance, has been the FCC's apparent willingness to give it precedence over the competition rationale.[54] The FCC has stated that even where a market participant is not entirely without market power, that is, where the industry is not entirely competitive, the FCC is prepared to consider exercising its discretion to forbear if the costs of continued regulation exceed the expected benefits to consumers. In particular,

> [t]he lack of market power is, in our view, clearly a sufficient ground upon which to exercise such discretion. We also find that other entities, with

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Canada's various submissions to the CRTC in a number of proceedings dealing with the appropriate treatment to be accorded Bell's investments in the Saudi Arabian Telephone Project. *See, e.g.*, Bell Canada, Increase in Rates, Telecom. Decision CRTC 78-7, 112 CAN. GAZETTE PT. I, 5802, 4 C.R.T. 313 (10 Aug. 1978); Bell Canada Request to Review that Part of Telecom Decision CRTC 78-7 of August 10, 1978 dealing with the Saudi Arabian Telephone Project, Telecom. Decision CRTC 79-1, 113 CAN. GAZETTE PT. I, 996, 4 C.R.T. 619 (2 Feb. 1979); Bell Canada, General Increase in Rates, Telecom. Decision CRTC 80-14, 114 CAN. GAZETTE PT. I, 5105, 6 C.R.T. 222 (12 Aug. 1980); Bell Canada, General Increase in Rates, Telecom. Decision CRTC 81-15, 115 CAN. GAZETTE PT. I, 6712, 7 C.R.T. 851 (28 Sep. 1981).

[50] Further Notice of Proposed Rulemaking, *supra* note 31, at 454. *See also* Enhanced Services, *supra* note 33, at 6132.

[51] Further Notice of Proposed Rulemaking, *supra* note 31, at 454. *See also* Structural Separation, *supra* note 29, at 9013. While there may be significant economic and social benefits to either regulated monopoly or unregulated competition as technological and cost conditions warrant, according to Alfred Kahn,

> there [is] no rational halfway house between thorough regulation and free competition. . . . [R]egulation confronted with competition will have a systematic tendency either to suppress it . . . or to orchestrate it and control the results it produces. Why? Because competition is unpredictable and messy, and the regulator prizes predictability and tidiness. Businesses move in and out of competitive markets. They are constantly changing their product and service offerings, schedules, and prices. The regulator, in contrast, prefers continuity of service and stability and uniformity of prices and service offerings.

Kahn, *The Uneasy Marriage of Regulation and Competition*, 1 TELEMATICS 1, at 8-9 (Sep. 1984).

[52] Further Notice of Proposed Rulemaking, *supra* note 31, at 454. *See also* Enhanced Services, *supra* note 33, at 6132.

[53] Further Notice of Proposed Rulemaking, *supra* note 31, at 454-55.

[54] *Id.* at 496.

> only limited, transitional market power, need not be regulated where a further cost/benefit analysis compels the conclusion that regulation will harm consumer welfare.[55]

IV. THE POWER TO FORBEAR

As important as any rationale for regulatory forbearance may be, the issue is rendered moot if there is no statutory authority to exercise the presumed discretion. The only Canadian regulatory proceedings to consider the issue of a statutory basis for the exercise of forbearance were the CRTC's *Enhanced Services*[56] and *Cellular Radio Service*[57] decisions. A third set of decisions applied, but did not add to, the reasoning developed in the first two cases.

A. *The Enhanced Services Decision*

The major issue resolved in this proceeding, in addition to developing an appropriate definition of "enhanced services", was the regulatory treatment to be accorded carrier and non-carrier participants in this market.[58] The Commission concluded that it was "neither necessary nor desirable that enhanced services provided by parties other than common carriers be regulated".[59] This conclusion was based on two arguments. The first was essentially an amalgam of the "competition — regulatory cost" rationales discussed above. More precisely, in the Commission's judgment,

> the market for enhanced services being competitive, the benefits to be derived from competition, especially innovation, market flexibility, competitive pricing and user choice, would be more likely to result from an environment governed, to the maximum extent possible, by market forces rather than by regulation.[60]

As was mentioned earlier, however, the Commission neglected to support this rationale with any discussion of its power to forbear. Hence, the first ground offered by the CRTC as a basis for not regulating non-carrier enhanced service providers cannot be viewed as determinative.

The second ground offered for the decision was that the definition of "companies" in subsection 320(1) of the *Railway Act*[61] did not extend to the commercial entities it proposed to exempt from regulation.

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[55] *Id.* at 472.
[56] *Supra* note 33.
[57] *Supra* note 35.
[58] Enhanced Services, *supra* note 33, at 6118.
[59] *Id.* at 6132.
[60] *Id.*
[61] R.S.C. 1970, c. R-2.

> [T]he jurisdiction granted to [the Commission] by the *Railway Act* may properly be viewed as extending only to those companies within federal jurisdiction that may be considered to be operating a telephone or telegraph system. Accordingly, the Commission has concluded that its statutory mandate does not require it to regulate a potentially wide range of enhanced service providers who make use of underlying basic telecommunications services for the provision of their service offerings.[62]

Putting aside the merits of this determination, if the basis of the Commission's decision was that it had no jurisdiction over non-carrier enhanced service providers, then the issue of forbearance never arises. The Commission is without power to forbear from that over which it has no authority to regulate.[63]

Even if this is a correct interpretation of the Commission's finding, the decision in *Enhanced Services* may still be of some value on the issue of whether the Commission possesses a power to forbear. Its contemporaneous determination of the treatment to be accorded federally regulated common carriers providing enhanced services is arguably an example of forbearance, as defined in this article. In particular, the CRTC's willingness to adopt an "aggregate rate evaluation test" for all carrier-provided enhanced services on an annual basis, in place of rate evaluation studies on a service by service basis every time proposed rates for these services are to be changed, represents a significant example of regulatory streamlining. In the Commission's opinion this lessening of the regulatory burden shouldered by the affected common carriers could be justified on the basis that market forces themselves would provide an extra measure of protection for monopoly subscribers against potential abuses of market power.[64]

The Commission failed once again, however, to provide any statutory justification for this retreat from a more burdensome form of regulation. In the result, the Commission has left unclear the grounds upon which it perceives itself statutorily authorized to engage in regulatory forbearance. Further, it has offered regulated carriers and potential new entrants within the Commission's jurisdiction no clear indication of how far the Commission may proceed with its ill-defined powers of forbearance.

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[62] Enhanced Services, *supra* note 33, at 6132.

[63] Unfortunately, the actual basis of the Commission's decision not to regulate non-carrier enhanced service providers is not entirely clear. According to the Commission "its statutory mandate does not *require* it to regulate . . .". *Id.* at 31 (emphasis added). This, however, suggests a discretion to forbear. In contrast, the entire tenor of the Enhanced Services decision, including the total absence of any discussion of the forbearance power or the circumstances under which its use might be appropriate, suggests, as we conclude in this paper, that what the Commission intended to say was that "its statutory mandate does not *allow* it to regulate" non-carrier enhanced service providers.

[64] Enhanced Services, *supra* note 33, at 6140.

B. *The Cellular Radio Service Decision*

The *Cellular Radio Service* case[65] was the first major proceeding before the CRTC in which the Commission embarked upon an unambiguous policy of complete regulatory forbearance in a new and prospectively competitive telecommunications service market. The Commission first found that all service providers which had been authorized by the Minister of Communications to enter this market were "companies" as defined in subsection 320(1) of the *Railway Act* and hence fell within its jurisdiction. Having made this determination the Commission then proceeded to give reasons why it felt the cellular radio services market *should not* be regulated. In particular,

> [t]he Commission considers that as a matter of regulatory policy it is neither necessary nor desirable, at this time, that Cantel or an arms' length telephone company affiliate be required to file tariffs for the provision of cellular service to the public. This conclusion is based on the Commission's opinion that the benefits which users may derive from this innovative service are likely to be greater if the terms of its provision are governed, as much as possible, by market forces rather than by regulation.[66]

The Commission was careful to point out that this conclusion was conditional "on their being adequate safeguards to ensure that . . . the cellular activities [of telephone company affiliates] are at arms' length from, and are not cross-subsidized by revenues from, regulated telephone company activities".[67]

As in the decision in *Enhanced Services*, the Commission offered no systematic statutory justification for the particular type of forbearance it evidently considered itself authorized to pursue. It simply concluded

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[65] *Supra* note 35.

[66] *Id.* at 8473. The cellular radio service market in Canada has been subdivided by the Department of Communications, the body responsible for licensing all communications service providers utilizing the radio frequency spectrum, into twenty-three metropolitan areas. Commencing 1 Jul. 1985, each of these metropolitan areas will be served by a single national cellular radio service provider (Cantel) and the individual telephone company serving that area. Thus far the sole exception to this rule is Bell Canada. In an announcement dated 13 Mar. 1984, the Minister of Communications at the time, Francis Fox, made public his department's decision to only permit Bell cellular service to be provided by a separate BCE subsidiary and not Bell Canada, in those metropolitan areas falling within Bell Canada's operating territory. This explains the Commission's reference to "arms' length telephone company affiliates" in the above excerpt from the CRTC's decision in *Cellular Radio Service.*

[67] *Id.* The importance of the interrelationship between forbearance and structural issues may be seen in the Commission's rejection of an application by B.C. Tel to forbear from tariff regulation of its radio paging and land mobile radio-telephone services, including both conventional and cellular services. In so doing, it emphasized that forbearance would only be appropriate where such services are provided by a telephone company on a genuinely arms' length basis. B.C. Tel's Portable Communications Division was held not to be a sufficient structural safeguard against cross-subsidization. CRTC Telecom Decision 85-15 (7 Aug. 1985).

that, pursuant to subsection 320(3) of the *Railway Act*,[68] it was free to authorize all cellular radio services providers within its jurisdiction to engage in the supply of these services without having to submit to any prior tariffing requirement.

C. *The Resale, Sharing and Intraexchange Systems Decisions*

As well as dealing with the central issue of facilities based competition by CNCP, the CRTC dealt with certain "related issues" in its August, 1985 *Interexchange Competition* decision.[69] It approved important, although apparently limited, forms of resale, sharing and intraexchange competition.[70] In keeping with the overall thrust of the main decision, public voice services were not included. Again, the Commission's approach seemed, at first glance, to be one of regulatory forbearance. As in the *Enhanced Services* decision,[71] the CRTC concluded that non-telephone company resellers and sharers would not be "companies" under the *Railway Act.* As a result this was not an instance of forbearance proper. Nor was there any relaxation of the regulation of the common carriers because of the dependence of resellers and sharers on underlying carrier services.

With respect to intraexchange systems, the Commission was of the view that given the prospective benefits to be derived from competition, especially innovation, flexibility, competitive pricing and user choice, market forces and not regulation should prevail. Therefore, it would forbear from regulating participants in this market, whether it had the jurisdiction to do so or not.

> [T]he Commission does not intend to regulate the rates for service offered by service providers other than the federally regulated carriers. That being the case, the Commission is of the view that it is not necessary in this decision to make a determination as to whether such systems are companies within the meaning of section 320(1) of the *Railway Act.*[72]

This has things back to front. If providers of public non-voice intraexchange systems are not "companies" under the *Railway Act*, the

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[68] R.S.C. 1970, c. N-17.

[69] *Supra* note 20, at 70-104.

[70] A typical resale opportunity might involve the lease of bulk-rate services to be reoffered in smaller quantities at a discount relative to the telephone company's unit rates. In sharing, users having similar traffic distribution patterns could jointly lease bulk rate services. Intraexchange systems provide users with alternatives to telephone company dedicated local channels for the carriage of voice, data or video traffic as, for example, in a private local area network (LAN) for carriage of a customer's computer communications traffic. Interconnection could allow for access to the carrier's network services.

[71] *Supra* note 33.

[72] Interexchange decision, *supra* note 20, at 104.

Commission cannot forbear from regulation. It simply cannot regulate. If they are "companies", and thus subject to its jurisdiction, much more is needed from the CRTC by way of systematic statutory interpretation to justify regulatory forbearance. The issue cannot simply be avoided. Regrettably, "[i]t is much easier to abdicate than to analyze".[73]

This is not to suggest, however, that no justification for such forbearance exists in the relevant legislation. Arguments based solely on the *Railway Act* will first be considered. Then an alternative basis for the authority to forbear found in the *National Transportation Act*[74] will also be explored.

D. *The Enabling Legislation*

1. *The Railway Act*

The principal regulatory powers and duties of the Commission with respect to telecommunications are contained in sections 320 and 321 of the *Railway Act.* Section 2 of the Act provides a definition of "telephone toll" as it applies to these sections.[75] The most important provisions are reproduced below:

> 320. (2) . . . all telegraph and telephone tolls to be charged by a company, other than a toll for the transmission of a message intended for general reception by the public and charged by a company licensed under the *Broadcasting Act, are subject to the approval of the Commission.* . . . (emphasis added)
>
> (3) The company *shall* file with the Commission tariffs of any telegraph or telephone tolls to be charged, and such tariffs shall be in such form, size and style, and give such information, particulars and details, as the Commission, from time to time, by regulation, or in any particular case, prescribes, and unless with the approval of the Commission, the company shall not charge and is not entitled to charge any telegraph or telephone toll in respect of which there is default in such filing. . . . (emphasis added)
>
> . . . .
>
> (12) . . . the jurisdiction and powers of the Commission . . . extend and apply to all companies as in this section defined, and to all telegraph and telephone systems, lines and business of such companies within the legislative authority of the Parliament of Canada. . . .
>
> 321. (1) All tolls shall be just and reasonable and shall always, under substantially similar circumstances and conditions with respect to all traffic of the same description carried over the same route, be charged equally to all persons at the same rate.
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> (2) A company shall not, in respect of tolls or any services or facilities provided by the company as a telegraph or telephone company,

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[73] Burk Bros. v. National Lab. Rel. Bd., 117 F. 2d 686, at 688 (3rd Cir. 1941).

[74] R.S.C. 1970, c. R-2 (*as amended by* R.S.C. 1970, c. 35 (1st Supp.), ss. 2, 3; S.C. 1974-75-76, c. 41, s. 1).

[75] R.S.C. 1970, c. R-2 (*as amended by* R.S.C. 1970, c. 35 (1st Supp.), s. 1).

> (a) make any unjust discrimination against any person or company;
> (b) make or give any undue or unreasonable preference or advantage to or in favour of any particular person or company or any particular description of traffic, in any respect whatever; or
> (c) subject any particular person or company or any particular description of traffic to any undue or unreasonable prejudice or disadvantage, in any respect whatever;
>
> and where it is shown that the company makes any discrimination or gives any preference or advantage, the burden of proving that the discrimination is not unjust or that the preference is not undue or unreasonable lies upon the company.
>
> . . . .
>
> (5) In all other matters not expressly provided for in this section the Commission may make orders with respect to all matters relating to traffic, tolls and tariffs or any of them.

A reading of these sections in the absence of any general policy statement in the *Railway Act* defining the overall aims and objectives of the telecommunications component of this legislation, indicates that the principal mandate of the Commission is to ensure that rates are both just and reasonable and not unreasonably or unduly discriminatory. The CRTC has interpreted this mandate rather expansively to justify further interventionary measures.[76] In particular, it has treated the obligation to ensure that rates are just and reasonable as providing the authority to regulate and/or monitor service quality, proposed capital investments, financial positions of carriers within its jurisdiction, intercorporate relations and proposed rate structures.[77] In a similar spirit, it has extended the concept of nondiscrimination to cover not only the rates that common carriers charge their customers, but also the rates these carriers implicitly charge themselves relative to those demanded of competing service providers or product suppliers.[78]

Given the Commission's legislative mandate and the broad interpretation it has given it, what statutory grounds, if any, may be found in the *Railway Act* that grant the Commission a discretionary authority to relax the regulatory controls which are currently in place? Consider first subsection 320(3). It requires companies, as defined in subsection 320(1), to file tariffs of all telephone tolls with the Commission on

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[76] The Commission has stated, for example, that:

> [T]he principle of "just and reasonable" rates is neither a narrow nor a static concept. . . . Indeed, the Commission views this principle in the widest possible terms, and considers itself obliged to continually review the level and structure of carrier rates to ensure that telecommunications services are fully responsive to the public interest.

C.R.T.C., TELECOMMUNICATIONS REGULATION — PROCEDURES AND PRACTICES (Ottawa, 20 Jul. 1976).

[77] *See, e.g.*, CRTC Telecom. Public Notice 1977-1, 111 CAN. GAZETTE PT. I, 899. *See also* Dalfen, *Telecommunications and Regulation*, in PROCEEDINGS OF THE SIXTH ANNUAL MEETING, CANADIAN TELECOMMUNICATIONS CARRIERS ASSOCIATION (1977).

[78] CRTC, ANNUAL REPORT 1980-81 26 (1981).

whatever terms the Commission may prescribe. This section grants the Commission considerable discretion to demand as much or as little information as it feels is necessary to enable the Commission to discharge its principal mandate with respect to the nature of the tolls charged by the company. In fact, subsection 320(3) goes even further. It provides that even where tariff filings are in default of the Commission's regulations, they may yet be validated by Commission approval. If this interpretation of the Act is correct, it is submitted that subsection 320(3) provides sufficient grounds to justify the type of regulatory forbearance exercised by the Commission in the decision in *Enhanced Services.*[79] The Commission's decision to relax the reporting requirements of the common carriers engaged in the provision of enhanced services appears to fall within the discretionary authority granted the CRTC in this subsection.[80] Similarly, subsection 320(6) appears to afford the Commission a similar discretion in setting public notice requirements with respect to carriers' tariffs.

Finally, subsection 320(2) provides that telephone tolls and the charges for telephones are subject to Commission approval. It does not, however, require prior approval nor does it state what manner such approval may take. Thus, it appears possible to argue that the Act permits the Commission to deem telephone tolls and other charges as having been automatically approved, subject to any complaints which may thereafter arise.[81] In the event of a complaint, subsection 321(2) requires the company to prove that the toll was just and reasonable and not unjustly or unduly discriminatory. If the tolls are found to be unjust, unreasonable, or otherwise unduly discriminatory, the Commission's power to substitute tariffs pursuant to paragraph 321(4)(b) may provide sufficient compensation to those adversely affected. Therefore, a deemed approval process need not be immediately dismissed as contrary to the Commission's mandate in all circumstances.

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[79] *Supra* note 33.

[80] Sub. 321(5), to the extent that it is an entirely permissive provision, appears to afford the Commission a similar degree of discretion in respect of all "matters relating to traffic, tolls, and tariffs, or any of them" not expressly dealt with in other sections of the Act.

[81] The issue of the Commission's power to authorize automatic tariff approval has surfaced on at least two occasions in proceedings before the CRTC. The first of these proceedings was in fact initiated by the Commission's predecessor, the Canadian Transport Commission, to examine the appropriateness of adopting an automatic rate adjustment formula to assist regulated common carriers in coping with the financial strains of rapid inflation and regulatory lag. The CRTC, in one of its first decisions after assuming jurisdiction over federal telecommunications, rejected the concept of automatic rate adjustment formulas on a number of procedural, technical and public interest grounds. At no point, however, did the Commission give any indication that it considered the matter of automatic rate approval to be outside its statutory competence *per se. See supra* note 40. This observation is supported by the Commission's finding in the second major proceeding in which it considered the same issue. *See* Telesat

The efficacy of any complaint procedure, of course, will depend on the vigilance of users and competitors in monitoring changes in the rates charged by companies within the Commission's jurisdiction. There is no reason to believe that unfair or discriminatory prices will go unnoticed. For example, competitors have every incentive to carefully monitor common carrier rates for evidence of predation. Also, larger more sophisticated commercial customers may also be expected to quickly detect any price changes that reflect undue discrimination or monopoly pricing. Finally, the active, interventionist role played by various consumer and public interest groups in the regulatory process in recent years suggests that the interests of the majority of smaller users and subscribers will also be protected through the complaint procedure. The efficacy of the system is, however, dependent upon it remaining relatively informal and not unduly burdensome to participants.[82]

In summary, therefore, the *Railway Act* appears to provide an arguable basis for the proposition that the Commission possesses a discretionary, if limited, authority to forbear from certain types of regulation, provided its primary legislative mandate is not in any way jeopardized. It appears, however, that a much stronger statement in support of the Commission's power to forbear may be made on the basis of authority granted to it under the *National Transportation Act.*

Canada — Final Rates for 14/12 GHz Satellite Service and General Review of Revenue Requirements, Telecom. Decision CRTC 84-9, 118 CAN. GAZETTE PT. I, 1827, 9 C.R.T. 742 (20 Feb. 1984). In that proceeding, the Commission had occasion to extensively review a Telesat Canada proposal for automatic approval of all new and amended tariffs after sixty days if no objections were raised by either the Commission or intervenors. Telesat had also proposed that where such concerns were raised within the sixty day period, automatic interim approval should be granted until the issue was resolved "in order to assure that the Company does not unduly incur losses due to the length of the regulatory process". *Id.* at 1036. Although the Commission eventually rejected Telesat's proposal, it is significant to observe that it did not do so on the grounds submitted by CNCP, one of the intervenors in this proceeding, that automatic rate approval is not permitted under the *Railway Act* except with respect to rail tariffs. According to the CRTC:

> The Commission is committed to ensuring that all tariffs filed by federally regulated carriers, especially tariffs for competitive services, are disposed of as expeditiously as possible, consistent with appropriate public process. However, the Commission is not of the opinion that a system of automatic approvals, interim or otherwise, would, *at this time*, be a necessary or desirable means to this end (emphasis added).

Id. at 1036-37. The inescapable conclusion to be drawn from this Commission holding, is that *at some later time*, automatic tariff approvals may indeed be viewed by the Commission as an appropriate means of facilitating the participation of regulated carriers in competitive markets.

[82] In order that any complaint procedure be meaningful, and that it not degenerate into a form of competitive handicap faced by companies subject to regulatory overview, frivolous and strategically motivated complaints would have to be discouraged or dismissed at a relatively early stage in the investigatory process. This might require

2. *The National Transportation Act*

The rather haphazard design of federal telecommunications legislation requires that the *Railway Act*, the *National Transportation Act*[83] and the *Canadian Radio-television and Telecommunications Act*[84] be read together in order to divine the full extent of the Commission's statutory powers and obligations. For the purposes of this paper the relevant sections of the latter two statutes are set out below.

> *CRTC Act*
> 14. (2) The Executive Committee and Chairman shall exercise the powers and perform the duties and functions in relation to telecomunication, other than broadcasting, vested by the *Railway Act*, the *National Transportation Act* or any other Act of Parliament in the Canadian Transport Commission. . . .
>
> (3) For greater certainty but without limiting the generality of subsection (2), sections 17 to 19 and 43 to 82 of the *National Transportation Act* apply, with such modifications as the circumstances require, in the case of every inquiry, complaint, application or other proceeding to or before the Executive Committee of the Canadian Radio-television and Telecommunications Commission under the *Railway Act* or any other Act of Parliament other than the *Broadcasting Act* and, in the event of any conflict between those sections of the *National Transportation Act* and the provisions of the *Railway Act* or any other such Act in relation to any such inquiry, complaint, application or other proceeding to or before the Executive Committee of the Canadian Radio-television and Telecommunications Commission, those sections of the *National Transportation Act* prevail.
>
> *National Transportation Act*
> 46. (1) The Commission may make orders or regulations
> . . . .
> (b) generally for carrying the *Railway Act* into effect. . . .
> . . . .
> (2) . . . and the Commission may exempt any railway or other work, or section or portion thereof, from the operation of any such order or regulation for such time or during such period as the Commission deems

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that a different approach be taken with respect to complaints initiated by competitors on the one hand and those submitted by relatively disinterested users on the other. One way in which competitive fairness could be introduced into the complaint procedure would be to require a higher threshold of proof for competitors in establishing the existence of unjustness, unreasonableness or discrimination in rates. Only after the Commission has determined that sufficient evidence exists to warrant an investigation would the burden of justifying its rates shift to the regulated carrier. Whether rates which are being investigated should be immediately suspended, or be given interim approval, would arguably be a matter for the Commission's discretion on a case by case basis. An analysis of the type of evidence which might be required of a competitor initiating a complaint of predatory pricing against a regulated carrier is developed in some detail in Willig & Katz, *Statements of Drs. Robert D. Willig and Michael Katz*, in COMMENTS OF AMERICAN TELEPHONE AND TELEGRAPH, CC Docket No. 83-1147, Attachment 1, at 36-46 (1984).

[83] R.S.C. 1970, c. N-17.

[84] S.C. 1974-75-76, c. 49.

> expedient; and such orders or regulations may be for such time as the Commission deems fit, and may be rescinded, amended, changed, altered or varied as the Commission thinks proper.

It will be observed that section 46 of the *National Transportation Act* applies to telecommunications (after appropriate modifications to the language of that section) by virtue of subsection 14(3) of the *CRTC Act*. This latter subsection also defines the circumstances under which the provisions of the *National Transportation Act* prevail over those of the *Railway Act*.

Considered in this light, section 46 of the *National Transportation Act* appears rather remarkable. It not only provides the Commission with virtually unlimited authority to make regulations "generally for carrying the *Railway Act* into effect" but, more importantly, also appears to allow the Commission to exempt any company within its jurisdiction, as defined in subsection 320(1) of the *Railway Act*, from the operation of any such regulations for any length of time it considers appropriate. Further, any such regulations "may be rescinded, amended, changed, altered or varied as the Commission thinks proper". In other words, by virtue of section 46 the Commission appears to have been granted almost unlimited discretion to effect the *purposes* of the *Railway Act*.[85] Therefore, to the extent the Commission is persuaded on reasonable grounds that the purposes of the *Railway Act* (including, in particular, the preservation of just and reasonable and otherwise not unduly discriminatory rates) may be furthered by selective forbearance, there appears little to prevent the Commission from exercising such a discretion. Conversely, whether such discretion extends to a *general* finding that competitively determined prices are just and reasonable in all circumstances is more difficult to assess.

The problem the Commission faces with respect to this discretion is that nowhere in the relevant statutory provisions is there any guidance

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[85] The recent Federal Court of Appeal decision in the case of CNCP Telecommunications v. Canadian Business Equip. Mfrs. Ass'n, 60 N.R. 364 (F.C. App. D. 1985) appears to confirm this assessment. The issue in this case was whether certain provisions of the *Railway Act* and the *National Transportation Act* permit the CRTC to set floor prices on the sale of terminal equipment by common carriers in order to ensure that no subsidization of equipment purchases at the expense of monopoly subscribers can occur. A unanimous Court on this point not only held that the Commission was empowered to set floor prices on such equipment, but also that the Commission was authorized pursuant to subs. 45(2), 46(1) and 57(1) of the *National Transportation Act* and subs. 321(2) and 321(5) of the *Railway Act* to "prevent unjust discrimination or undue or unreasonable preference or advantage *by any means it sees fit*". *Id.* at 369 (emphasis added). If the Commission's statutory powers of regulation in achieving the ends of the *Railway Act* are as sweeping as the decision in this case appears to indicate, then the converse may also be true. The scope of regulatory forbearance may also be very broad provided only that any such forbearance is first determined to be the best means "generally for carrying the *Railway Act* into effect" as required by sub. 46(1) of the *National Transportation Act*.

as to what is just and reasonable, nor is there any mention of economic efficiency as an objective or goal of telecommunications regulation. Thus, unlike its American counterpart, the Commission must make a "leap of faith" whenever it determines that reliance on market forces is a proper substitute for traditional instruments of telecommunications regulation in effecting its statutory mandate.[86]

The United States *Communications Act of 1934*, by comparison, makes the FCC's task much easier. It expressly states that the purpose of "regulating interstate and foreign commerce in communication by wire and radio [is] to make available, so far as possible, to all the people of the United States a rapid, *efficient*, Nation-wide, and world-wide wire and radio communication service".[87] The FCC, in turn, has interpreted this legislative mandate as equating the beneficial properties of com-

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[86] This observation is reinforced considerably when one examines past efforts at legislative reform in the area of telecommunications. *See, e.g., Telecommunications Bill*, Bill C-16, 30th Parl., 4th sess., 1978, which received first reading in the House of Commons on 9 Nov. 1978 and remains the last major effort on the part of the federal government to extensively revise telecommunications legislation in this country. While this Bill would have enshrined "efficiency" as a major objective of Canadian telecommunications policy, it did not contemplate reliance on market forces to accomplish this end. To the contrary, s. 3 provided that "the telecommunications policy for Canada . . . can best be achieved by providing for . . . the regulation of the telecommunication undertakings . . . by a single independent public body". The only reference to competition in the entire Bill is found in s. 56 which would have granted the CRTC the power to *restrict* competition if the public interest so required. If anything, therefore, Bill C-16 contained a built-in bias against competition and in favour of regulation to achieve the various objectives set out in the Bill's extensive policy section. It is still far from clear to what extent the passage of several years and a change in government have altered this aversion to competition as a means of furthering policy objectives in telecommunications. Marcel Masse, the Federal Minister of Communications, in a recent address strongly intimated that competition will continue to take a back seat to regulation as the preferred means of furthering government policies in Canadian telecommunications. While Mr. Masse expressly affirmed his government's commitment to preserving the social welfare functions of the Canadian telecommunications system, including the government's intention to ensure the preservation of high quality service at "universally affordable rates" and to maintain Canada's *international* competitiveness in this area, he was virtually silent on the prospective role, if any, that *domestic* market forces might have in securing these ends. *Supra* note 4. Yet, a month earlier during an appearance before the House Standing Committee on Communications and Culture considering Bill C-20, Mr. Masse stated unequivocally that:

> The power to deregulate is one specific example of the government's general power of direction. This prerogative coincides with the government's plan for economic renewal through which we are seeking to release the dynamic forces of free enterprise by eliminating regulations. If Canada wishes to encourage job creation and investment, it should review the role of the state and establish an atmosphere more conducive to economic growth. I see no reason why the telecommunications sector should escape this review.

HOUSE OF COMMONS, MINUTES OF PROCEEDINGS AND EVIDENCE OF THE STANDING COMMITTEE ON COMMUNICATIONS AND CULTURE, ISSUE NO. 10, 6 May 1985, at 5.

[87] 47 U.S.C.A. 151 (emphasis added).

petition with the public interest.[88] Thus, the Commission has had little difficulty in finding that, where competition exists, the exercise of traditional regulation becomes unnecessary.[89] In particular, the Commission has stated that whenever competition exists to a sufficient degree:

> (i) the statutory obligation to provide service upon reasonable request becomes redundant as the market assures a readily available supply;
> (ii) the need to regulate prices disappears, as competitively determined prices are inherently reasonable; and
> (iii) the obligation to screen and approve new facilities investments is no longer necessary because investors, and not telecommunications subscribers, bear the burden of inefficient capital outlays.[90]

Even if it is conceded that the CRTC's authority to forbear is much more circumscribed than that available to its American counterpart, a limited power still offers more leeway than no power at all. Consider, for example, Telesat Canada's recent application to the Commission for permission to charge tolls for its commercial earth station services without first filing tariffs with the Commission.[91] In place of this requirement, Telesat Canada has offered to provide the CRTC with cost studies prepared once every three years, establishing that its services, when considered in the aggregate, are at least compensatory. As the CRTC indicated in its Public Notice of this application, Telesat Canada has not requested a complete removal of the Commission's regulatory scrutiny of its services. Rather, Telesat Canada is seeking a selective reduction in the regulatory burden it faces in preparation for the Department of Communication's liberalized earth station licensing policy to take effect.

Telesat Canada's application in all probability will be resolved under subsection 320(3) of the *Railway Act.* If any authority to forbear exists under that subsection, as has been previously argued, then provided the Commission is satisfied that subscriber interests will not be harmed under this forbearance proposal, there is little reason to refuse the application. As such, this application demonstrates the *potential* available for meaningful forbearance even within the limited confines of the *Railway Act.*

A considerably less defensible example of potential forbearance is the CRTC's proposed cable and subscription television (STV) regulations.[92] Although these new regulations were drafted pursuant to the

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[88] Further Notice of Proposed Rulemaking, *supra* note 31, at 456.

[89] In Western Union Tel. Co. v. F.C.C., 674 F.2d 160, at 166 (1982) the United States Second Circuit Court of Appeals even went so far as to describe competition as an alternative tool of regulation on which the Commission had a discretion to rely.

[90] Further Notice of Proposed Rulemaking, *supra* note 31, at 457-59.

[91] Telesat Canada — Deregulation of Earth Station Services, Telecom. Public Notice CRTC 1985-21, 119 CAN. GAZETTE PT. I, 1649, and Telcom. Public Notice CRTC 1985-23, 119 CAN. GAZETTE PT. I, 1877.

[92] Proposed New Cable and Subscription Television Regulations, Telecom. Public Notice CRTC 1984-305, 118 CAN. GAZETTE PT. I, 9629.

Broadcasting Act[93] and hence are not directly related to the telecommunications legislation discussed above, they are still significant for at least three reasons. First, one of the *express* objectives of these new regulations is to "lighten the burden of regulation with respect to the operation of cable and STV".[94]

Second, if implemented, these regulations will have precisely their intended effect. Section 7 of the new regulations, for example, will remove the requirement of prior Commission approval for the introduction and distribution of specified optional signals. Section 17 will eliminate all regulation of installation rates for all classes of cable and STV licensees. Most significantly, section 18 will result in virtually complete forbearance from rate regulation of companies with less than 6000 subscribers. Also, cable licensees with more than 6000 subscribers will have the option of raising their rates, provided certain notice requirements are met, within a predetermined range each year. This range will be based on the previous year's Consumer Price Index and will not require Commission approval.

The third and most important observation is that nowhere does the *Broadcasting Act* appear to authorize the type of forbearance contemplated in these new regulations. Neither the main charging provisions of the Act, sections 15 to 17, nor the extensive statement of legislative policy underlying the Act contained in section 3, make any mention of a discretionary authority to "lighten the burden of regulation".[95]

The existence of competition was an unlikely factor in the Commission's reasoning if for no other reason than that cable licences are *de facto* granted on a monopoly basis. Although various authorities have observed that cable television is not without competition from substitute products and services, including over-the-air radio and television, direct satellite broadcasts to privately owned satellite dishes, video cassettes, videodisc recorders and live entertainment,[96] the fact remains that the licensees most significantly affected by this example of forbearance are the least likely to be subject to these competitive pressures. Therefore, it is submitted that the regulator's exercise of its discretion to forbear

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[93] R.S.C. 1970, c. B-11.

[94] Proposed New Cable and Subscription Television Regulations, *supra* note 92, at 9630.

[95] Perhaps equally cogent is the observation that there exists no *specific* provision for the regulation of cable rates in the *Broadcasting Act* either. However, the power to regulate such rates was held to be implicit as a means of implementing the broadcasting policy contained in s. 3 of the Act. *See* Canadian Broadcasting League v. CRTC, [1983] 1 F.C. 182, 138 D.L.R. (3d) 512 (App. D.), *aff'd* [1985] 1 S.C.R. 174. *Quaere*: if the power to regulate is implicit, can the power to forbear also be implied?

[96] *See, e.g.*, Kahn, *The Passing of the Public Utility Concept*, in TELECOMMUNICATIONS REGULATION TODAY AND TOMORROW, *supra* note 8, at 8; Dalfen, *Regulatory Responses*, in THE INFORMATION ECONOMY: IT'S IMPLICATIONS FOR CANADA'S INDUSTRIAL STRATEGY, *supra* note 10, 273, at 274.

may have been questionable with respect to the new regulations. In particular, it appears that the motive underlying the changes in these regulations may have been more closely related to the desire to reduce regulatory overload than to improve the public welfare.

V. BILL C-20: FORBEARANCE BY DIRECTIVE

Bill C-20[97] was given second reading on 30 January 1985. If passed into law, this Bill will confer upon the federal Cabinet the power, *inter alia*, to direct the CRTC to forbear from the ordinary exercise of its regulatory powers and jurisdiction in such matters as the direction may specify. The relevant provisions of this proposed legislation are as provided below:

> 14.1(1) . . . the Governor in Council may, of his own motion or at the request of the Commission, issue to the Commission a direction concerning any matter that comes within the jurisdiction of the Commission and every such direction shall be carried out by the Commission under the Act of Parliament that establishes the powers, duties and functions of the Commission in relation to the subject-matter of the direction.
> 14.6(1) Where the Governor in Council of his own motion or on the recommendation of the Commission is of the opinion that a service or activity provided or carried on by one or more companies, within the meaning of subsection 320(1) of the *Railway Act*, is or will be subject to a degree of competition that, in the opinion of the Governor in Council, is sufficient to ensure just and reasonable tolls, rates or charges for the service or activity, the Governor in Council may, by order, direct the Commission to refrain from exercising the powers and performing the duties and the functions that, but for the order, the Commission would perform and exercise in relation to the service or activity, and while any such order remains in effect, the Commission shall not have any powers, duties or functions in relation to the service or activity in respect of which the order is made.

One of the most significant attributes of subsection 14.6(1) is that it bridges, to a considerable extent, the gap which presently exists between the United States and Canadian telecommunications legislation. It establishes a correspondence between the regulatory concept of just and reasonable rates and the equity and efficiency properties of prices established in "suffficiently competitive" markets.[98]

A second important feature of subsection 14.6(1) is that it provides the Commission with an alternative means of trying to effect a lessening

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[97] *An Act to Amend the Canadian Radio-television and Telecommunications Act, the Broadcasting Act, the Radio Act*, 33rd Parl., 1st Sess., 1984.

[98] Somewhat surprisingly, however, sub. 14.6(1) makes no mention of the nondiscrimination criterion contained in s. 321 of the *Railway Act*. By comparison, subs. 13(1) and (2) of Bill C-19 which are in certain respects similar to sub. 14.6(1) of Bill C-20, expressly mention this additional standard.

in regulation: not only may the Commission continue to exercise any discretion to forbear that it may currently possess, it may also make a specific recommendation to Cabinet to issue a forbearance direction provided certain other conditions are met. The final authority to issue this type of direction, however, is left with the Minister, together with the federal Cabinet.

Third, although Commission compliance with this type of direction is mandatory if the direction concerns a matter within the jurisdiction of the Commission pursuant to subsection 14.1(1), the implementation of any such order may still be considered an exercise in forbearance as defined in this paper. The body statutorily authorized to initiate a lessening in regulation (the "regulator") is, in this instance, the Cabinet itself.[99] To thwart any potential conflicts which may arise between the Cabinet's view of the proper jurisdiction of the Commission and the Commission's own opinion on this matter, Bill C-20 provides for prior consultation with the Executive Committee of the CRTC under section 14.5, together with a parliamentary review period between the issuance of the directive and its implementation under section 14.2. As well, should a directive be misinterpreted or implemented other than as contemplated by the Cabinet, the government will still have at its disposal subsection 64(1) of the *National Transportation Act*.[100] This subsection provides that the "Governor in Council may at any time . . . vary or rescind any order, decision, rule or regulation of the Commission . . .".

Fourth, subsection 14.6(1) deals with markets, that is, services and

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[99] That the Commission remains unsatisfied with this arrangement is evidenced in the OPENING REMARKS TO THE STANDING COMMITTEE ON COMMUNICATIONS AND CULTURE: BILL C-20 (A. Bureau, CRTC Chairman) which was first tabled 28 May 1985. Among the amendments to Bill C-20 proposed by the CRTC is that a paragraph be added to sub. 14.6(1) the effect of which would be to grant an explicit power of regulatory forbearance to the Commission which it could exercise of its own initiative, provided, of course, that such action remained consistent with the purposes of the *Railway Act*. Significantly, the very fact that the Commission felt compelled to request an explicit statutory power of forbearance suggests that it is unsure of the scope of its present authority to forbear under existing legislation. A recent letter from Mr. Bureau to Francis Fox, the former Minister of Communications, dated 16 Feb. 1984, supports this proposition. In the letter, the CRTC Chairman strongly recommended that Bill C-20 be revised to include "a provision giving the Commission the right to forebear [*sic*] from rate regulation, in circumstances where traditional reasons for regulation do not exist". According to Mr. Bureau, "[t]his provision is necessary because the *Railway Act* appears to require all companies within the meaning of the Act to file tariffs and to obtain Commission approval prior to charging any toll." It is to be observed that some seven months later the Commission went ahead with its decision not to regulate the cellular radio services market, notwithstanding these doubts as to its power to forbear.

[100] *National Transportation Act*, R.S.C. 1970, c. R-2 (*as amended by* R.S.C. 1970, c. 35 (1st Supp.), ss. 2, 3; S.C. 1974-75-76, c. 41, s. 1).

activities, as opposed to firms *per se*.[101] The significance of this is, of course, that it reflects the reality that many companies operate in more than one market. Thus, subsection 14.6(1) may permit a company to enjoy the benefits of deregulation in competitive markets while continuing to be regulated in those areas where it still possesses significant market power.

Finally, and most critically, a condition precedent to the issuance of a forbearance directive under subsection 14.6(1) is the existence, or anticipated existence,[102] of a degree of competition that in the Cabinet's opinion is sufficient to ensure just and reasonable rates. A potential problem, however, lies in the fact that no definition of competition, or the standards by which competition may be measured, are included in Bill C-20.[103] This raises the question of what criteria the Minister, or the CRTC in any recommendation to the Minister, will rely upon in assessing the existence or potential existence of competition of a sufficiently robust character to trigger the issuance of a direction. The problem is far from trivial. If the *object* of the direction is to eliminate any regulation not required to ensure just and reasonable rates, then, depending upon the criteria actually employed:

> 1) regulation may be kept in place much longer than necessary, with all the attendant costs this would imply; or
> 2) regulation may be removed too soon, to the detriment of competition, captive subscribers in other markets and, ultimately, consumers of the services so affected.

Such problems, however, are more likely to occur in the case of threshold determinations than in situations in which competition either patently does or does not exist. It is interesting to speculate, therefore,

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[101] The FCC has explicitly adopted the same approach. Where a firm with market power operates in other markets in which it has no similar power, any decision to forbear in the competitive market must focus on the firm's performance in that market and not on the firm itself. *See* Further Notice of Proposed Rulemaking, *supra* note 31, at 456.

[102] This also appears to reflect earlier FCC policy. *See* note 32 and accompanying text *supra*.

[103] Canadian courts have up to now been less willing to question the exercise of discretion by ministers or the Cabinet than have the courts in the United Kingdom. *See* annotation to Macmillan Bloedel v. Minister of Forests of B.C., 4 ADMIN. L.R. 1, at 3-6 (1984). In light of the strong assertion in Operation Dismantle Inc. v. The Queen, [1985] 1 S.C.R. 441, 59 N.R. 1, as to the applicability of the *Charter* to the Cabinet, this reticence may change. English authorities suggest that should the Cabinet misdirect itself, misconstrue its legal authority or act without due appreciation of its responsibilities, its direction could be subject to judicial censure. *See* J. EVANS, H. JANISCH, D. MULLAN & R. RISK, ADMINISTRATIVE LAW, CASES TEXT AND MATERIALS 632-45 (2d ed. 1984).

It must always be recalled that a direction is a *subordinate* legislative instrument and must not conflict with the Act itself. *See, e.g.*, Laker Airways Ltd. v. Department of Trade, [1977] Q.B. 643 (C.A. 1976).

whether the type of forbearance initiated by the CRTC in it's proposed new cable and STV regulations could possibly occur under subsection 14.6(1), were it also to apply to broadcasting service providers. It is submitted that it likely would not for the same reasons as given above.

VI. THE EFFECT OF BILL C-19

Bill C-19[104] is a legislative response to the Bell Canada reorganization of 1982.[105] Of principal concern are subsections 13(1) and (2) which would grant the Commission certain extraordinary powers. They are reproduced below, along with certain relevant definitions:

> 2. In this Act,
> "affiliate", in respect of the Company, means any person that controls or is controlled by the Company or that is controlled by the same person that controls the Company;
> . . . .
> "control" includes control in fact, whether or not through one or more persons.
> . . . .
> 13.(1) Where on any matter before the Commission or of its own motion, the Commission determines as a question of fact that a telecommunication activity carried on by an affiliate of the Company, other than an affiliate whose telecommunication activity is subject to the legislative jurisdiction of a province, is not subject to a degree of competition that, in the view of the Commission, is sufficient to ensure just and reasonable tolls, rates or charges and ensure against unjust discrimination or undue or unreasonable preference, advantage, prejudice or disadvantage, the Commission may order the Company to undertake that activity in such manner, to such extent and on such terms and conditions, if any, as the Commission may specify. . . .
>
> 13.(2) Where on any matter before the Commission or of its own motion, the Commission determines as a question of fact that an activity of the Company is a competitive activity, the Commission may, where it is satisfied that such action would constitute an effective means of achieving the purposes of section 321 of the *Railway Act* in respect of the Company, order the Company to divest itself of that activity in such manner, to such extent and on such terms and conditions, if any, as the Commission may specify. . . .

Of these two subsections, only the latter deals with what might be called a forbearance power. Specifically, subsection 13(2) would permit the Commission to order Bell Canada to divest itself of any activity upon a determination by the Commission that the activity was competitive and that such divestiture "would constitute an effective

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[104] *Bell Canada Act*, 33rd Parl., 1st sess., 1984 (2d reading, 15 Apr. 1985).

[105] In particular, Bill C-19 appears to be based largely on the REPORT OF THE CANADIAN RADIO-TELEVISION AND TELECOMMUNICATIONS COMMISSION ON THE PROPOSED REORGANIZATION OF BELL CANADA (Ottawa, 18 Apr. 1983) [hereafter cited as REPORT], which was submitted to Cabinet by the Commission pursuant to Orders in Council P.C. 1982-3253 (22 Oct. 1982) and P.C. 1983-862 (24 Mar. 1983).

means of achieving the purposes of section 321 of the *Railway Act* in respect of the Company". Moreover, it would virtually grant the Commission a free hand in setting the terms and conditions of any such structural separation.

A close examination of subsection 13(2) suggests that its primary purpose is not merely to further fair competition but also to preserve just and reasonable rates for monopoly subscribers. Arguably, it seeks to accomplish this by vesting the regulator with the power to prevent Bell Canada from subsidizing competitive ventures. Subsidization occurs when a new venture is kept within the company during its costly and risky start-up period and only spun off as a separate subsidiary once the venture has proven to be profitable.[106] Thus, whenever a company chooses to operate in this way, it is likely to become a prime target for regulatory suspicion and scrutiny given the powers in subsection 13(2).

Significantly, however, subsection 13(2) directs the regulator to order divestiture only where it will serve the purposes of section 321 of the *Railway Act*, as it concerns the company. This would appear to require the regulator to consider both the positive and negative implications of integrated, rather than structurally separated, supply. For example, it is entirely consistent with both good business judgment and the interests of monopoly subscribers if the most efficient way to provide the service is as an integral part of the company's operations. This will require the regulator to conduct a careful study of relevant costs and benefits before concluding that the mere possibility of external arm's length supply also dictates the necessity of such supply.

The power which would vest in the Commission as a result of subsection 13(1) would have essentially the opposite effect. Under this subsection, the Commission would have the authority to, in effect, reintegrate production inside Bell Canada by removing an activity from an unregulated "affiliate" and directing Bell Canada to take over its operation. An affiliate, as defined in section 2 of Bill C-19 includes any company in which either Bell Canada or its parent company Bell Canada Enterprises (BCE), has a *de facto* controlling interest.

An important factor limiting the scope of the CRTC's authority under subsection 13(1) is the fact that only telecommunications activities are subject to this power of "recapture". It is interesting to speculate whether the recent, rather surprising, corporate acquisitions of BCE may not be explained in part by an awareness of the potential reach of the CRTC should Bill C-19 become law.

The difference in the wording of the "competition" standard between subsections 13(1) and (2) is also revealing. Arguably, the legislature

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[106] This possibility was in fact considered by the Commission in its REPORT, *id.* at 43, and appears to have been the most important concern underlying the Commission's request for a power such as that contained in sub. 13(2).

was more concerned with recapture and the type of abuse to which corporate reorganizations might lead under subsection 13(1), than the type of conduct sought to be prevented under subsection 13(2).

The potential problems with defining competition in Bill C-19 are of the same nature as in Bill C-20. However, as the objects of their respective provisions differ, so too will the results of having made incorrect determinations. Finally, as Bill C-19 applies only to Bell Canada and because the two major powers to be granted the Commission under section 13 are quite extraordinary, it is not likely that they will be exercised without very careful consideration. It is arguable, therefore, that the impact of this Bill on the overall structure of the industry will be much less dramatic than that likely to follow from the exercise of the Commission's existing powers of regulation and forbearance.[107]

VII. CONCLUSION

In his policy statement, Marcel Masse correctly emphasized that "final authority over important policy issues rests with the Governor in Council".[108] However, it must also be recognized that much policy making is incremental and not inspirational in nature.[109] As Benjamin Cardozo cautioned: "Justice is not to be taken by storm. She is to be wooed by slow advances."[110]

Given the faint prospects for any comprehensive revision of Canadian telecommunications legislation in the near future, it is probable that policy formation, especially with respect to the role of competition and the appropriate degree of regulation in various markets, will continue

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[107] One of the statutory powers explicitly requested by the Commission in its REPORT, *id.*, but which was rejected by the government, was the authority to order the creation of a minority shareholding interest in Bell Canada. At present BCE, Bell's parent company, owns one hundred percent of Bell's outstanding shares. The Commission had stated in its REPORT that while it saw no immediate need to exercise such a power, it nonetheless regarded it as "a very useful regulatory safeguard". *Id.* at 58. Whether the Commission also regarded this market, as opposed to administrative, "safeguard" as a potential means of effecting regulatory forbearance is not clear. It was the Commission's view that absent other statutory provisions, such as those now embodied in ss. 12 and 13 of Bill C-19, the creation of a minority shareholding might serve as an effective external check against potential abuses of the parent-subsidiary relationship and in the process might also reduce the strain on the Commission's own resources. Of particular concern to the CRTC was its ability to access financial data and monitor intercorporate transactions, following Bell Canada's reorganization, using only traditional tools of regulation.

[108] *Supra* note 4, at 11.

[109] Janisch, *Policy Making in Regulation: Towards a New Definition of the Status of Independent Regulatory Agencies in Canada*, 17 OSGOODE HALL L.J. 46, at 101-02 (1979).

[110] B. CARDOZO, THE GROWTH OF THE LAW 133 (1961).

to fall within the discretion of the broadly defined "regulator". As forbearance constitutes one of the most powerful means of implementing such policy, it seems likely that individual decisions on forbearance, as epitomized by the decision in *Cellular Radio Service*, will become a prominent feature of Canadian telecommunications regulation. In practice, their cumulative effect may well overshadow broader, but necessarily more vague, statements of general policy. "Policy implementation is always in the hands of adminstrative agencies," Peter Woll has insightfully observed, "and it is through implementation that policy is really shaped."[111]

[111] P. WOLL, AMERICAN BUREAUCRACY 7 (2d ed. 1977).