COMPETITION IN TELECOMMUNICATIONS: WHO POLICES THE TRANSITION?

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I. The Problem Defined

The Canadian telecommunications industry has undergone a profound transformation in the past decade. One of the most important features of this transformation is the shift from a largely monopolistic industry structure to one characterized by vigorous and sustained competition in a growing number of market segments. Whatever the merits of this transformation from an *economic* perspective, unless it is accompanied by corresponding changes in the legislative-regulatory-judicial framework governing commercial conduct in what were once monopoly markets, the emergence of competition will inevitably raise a number of troubling *legal* questions. These include: (1) the extent to which the rights, duties, obligations and especially liabilities of regulated firms may be altered by the very appearance of one or more rivals, whether regulated or not; (2) the change, if any, in the statutory rights and remedies available to dissatisfied monoply subscribers of firms which may now face competitors in other markets; (3) the effect, if any, of regulatory forbearance on the reach of Canadian competition law; and (4) in general, the question of whose responsibility[1] it is to police the market conduct of "competitors" (broadly defined to include incumbent suppliers and new and potential entrants) in the telecommunications industry during the transition to full-fledged competition. The objective of this article is to begin providing some answers to these questions, focussing in particular on the latter two.

It must be emphasized from the outset that the issue of where responsibility resides for policing competitive conduct in telecommunications markets — especially when the possibilities for and reality of regulatory forbearance are factored into the equation — is far from academic or easy to resolve. In the first instance, the stakes involved in a multi-billion dollar industry such as telecommunications are enormous. If the introduction of competition, and most recently, new competition legislation, together imply a new set of rules by which industry participants are to conduct their affairs, then those rules, and the identity of those responsible for enforcing them, should be clearly spelled out in advance. Elementary considerations of fairness and economic efficiency dictate that, at a minimum, former monopoly suppliers of telecommunications products and services as well as their new rivals should be aware of the potential legal (and collateral economic) consequences of different forms of market conduct in the new competitive environment. Corporate and residential users of telecommunications products and services should similarly have some notion of how the new regime of competition in telecommunications may be expected to alter their rights and liabilities as consumers.

Unfortunately, there exists at present no body of law (whether in the form of legislation, case law or the historical record of administrative rulemaking) which even approaches a comprehensive statement or overview of

[1] Actors include: the Canadian Radio-television and Telecommunications Commission (CRTC); the competition law authorities (including the Director of Investigation and Research and the newly created Competition Tribunal); the federal Cabinet; the Minister of Communications; and the courts.

Canadian competition policy as it applies to the telecommunications industry. On the contrary, those sources of law which might normally be expected to guide the decision-making processes of telecommunications service providers and users alike as regards required, permitted, and/or illegal market conduct and the enforcement thereof, are so fragmented and lacking in consistency and overall perspective as to be all but incoherent.

As will be seen,[2] there exists at the federal level alone well over a dozen statutes (dating from 1880 to 1986) bearing directly upon one or another aspect of market conduct in various telecommunications markets. *Yet, no single federal statute concerns itself exclusively with the telecommunications industry as a whole.* Rather, there exists a hodge-podge of legislation dealing with individual companies, individual market segments and different departmental and regulatory bodies. One series of statutes, for example, addresses particular aspects of the operation of certain major common carriers. Many companies are not dealt with at all. There are statutes focussing specifically on broadcasting, radio-communication and telegraphy, but not with their interrelation, either among themselves or with telephony. Other statutes concern themselves with different industries altogether, particularly railroads, touching upon telecommunications only incidentally, although with enormous impact. Still other statutes define the powers, duties and obligations of different persons in, and departments and agencies of the federal government in respect of telecommunications, with little if any mention of the public policy objectives of the governmental intervention so authorized. Finally, there is the new competition legislation[3] which, if it applies to telecommunications activities otherwise within the statutory jurisdiction of the federal administrative apparatus, may be of immense significance to the industry. However, as will be elaborated below, the new Act is sufficiently vague as to leave in genuine doubt its relevance to all but a very small subset of competitively provided telecommunications services.

The confusion resulting from the piecemeal approach taken by federal legislation with respect to appropriate market conduct in the provision of telecommunications services and the division of responsibility for policing such conduct, unfortunately, has not been dispelled by judicial law-making nor by much administrative rule-making premised, it would appear, upon this judge-made law.

Two initial points deserve mention in this regard. First, the prevailing assumption has been that the judicially created "regulated conduct exemption" from this country's competition laws is very broad — much broader, it will be argued, than appears justified by the legislation itself. This, in turn, has arguably contributed to the regulatory activism of the past decade: the regulator interpreting its mandate in such a manner as to

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[2] *See* Section III of text (STATUTORY CONSIDERATIONS), *infra*.

[3] *See Competition Act* (being part 2 of *An Act to Establish the Competition Tribunal and to Amend the Combines Investigation Act and the Bank Act and Other Acts in Consequence Thereof*, 1st Sess., 33d Parl., 1986 (assented to 17 June 1986)).

preclude all but a consultative role for the competition law authorities. The peculiar result has been a type of "regulated competition" which at times bears little resemblance to any solution which might have been forthcoming from the strict enforcement of competition law alone. This is because the penalties and remedies for anti-competitive conduct at the disposal of the competition law authorities are very different, and in some ways much more limited in scope, than those available to the regulator. "Competition" in a number of telecommunications markets, therefore, is qualitatively very different from that accepted as the norm in unregulated sectors of the economy. Overall, competition has not been seen as a substitute for regulation, but as a supplement to regulation.

The second initial point to observe, in this case with respect to court decisions dealing expressly with telecommunications — as opposed to regulated industries in general — is that the courts have promoted a regulatory version of competition policy in telecommunications markets by upholding decisions of the regulatory authorities when challenged on jurisdictional grounds. The basis of this judicial role, however, has not been a concern for competition as such, but rather a propensity to liberally interpret regulatory authority. In this sense, and somewhat ironically, the courts have (admittedly unconsciously) played an important role in mitigating some of the more extreme consequences of the "regulated conduct exemption", a doctrine of their own creation.

Where all of this leaves the industry today, especially given the enactment of new competition legislation, is the subject which concerns us here. Now, more than ever, some effort is clearly required to provide a coherent and comprehensive reply to those who understandably ask: "What are the legal implications of the emergence of competition in telecommunications?"

The second part of this paper will be concerned with the structure of the telecommunications industry and the third part with a detailed analysis of the governing legislation. This will be followed by a systematic analysis of Canadian caselaw and administrative policy and precedent. Although, strictly speaking, only the first two of these three sources of law are determinative, judical deference to ministerial, departmental and regulatory agency decision-making greatly enhances the importance of administrative policies in individual cases which end up before the courts.

As discussion in the remainder of the article will seek to show, answers to the questions posed here will depend on a number of important considerations. These considerations include the nature of the activity or conduct in question; the identity, nature and size of the market participants involved; the degree to which regulatory powers and jurisdiction are actually being exercised with respect to the conduct in issue; and the manner in which the enabling legislation is interpreted by the relevant enforcing authority — the final arbiter in all cases being the courts themselves.

Contemporary issues in telecommunications regulation and the emerging role for competition policy can only be fully appreciated in an historical context. Despite all the current talk about the "information

revolution", the past continues, to a considerable extent, to dictate present policies. While it must be recognized that, "[t]he dogmas of the quiet past are inadequate to the stormy present",[4] here an understanding of history provides not only a useful background context but also a sharp reminder that there can be no *tabula rasa* in telecommunications policy making.

II. Organization of the Telecommunications Industry

A. *Traditional Natural Monopoly Model*

A century after the invention of the telephone,[5] Mr. Justice J. Skelly Wright of the United States Court of Appeals, District of Columbia Circuit, noted in the first major challenge by Microwave Communications Incorporated (MCI) to the exclusive provision of public long distance telephone service by the American Telephone and Telegraph Company (AT&T) that the latter had never been granted a *de jure* monopoly.[6] As a matter of fact, its monopoly had "just grown like Topsy" and was thus not insulated from attack in the courts.[7] It would, however, be to indulge in legalistic myopia to conclude that this absence of specific legal sanction to monopoly demonstrated that it had come about merely by chance and with little careful thought and planning.

Alexander Graham Bell filed, on February 14, 1876, his patent application which "became the cornerstone of the Bell System".[8] In 1877, the Bell Telephone Company (Bell) was established,[9] and in 1882 Bell

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4 Abraham Lincoln, *Second Annual Message to Congress*, 1 December 1862.

5 Just when and where the telephone was "invented" remains somewhat controversial. Canadians like to point out that Bell wrote up the specifications for the patent applications when visiting his parents' home in Brantford, Ontario in September, 1875. However, a United States patent was issued in March, 1876 and the first ever telephone conversation took place in Boston on March 10, 1876. The first long distance call was made in Canada, from Brantford to Paris, Ontario, on August 10, 1876.

6 *M.C.I. Telecommunications Corp.* v. *Federal Communications Comm'n*, 561 F.2d 365 at 380 (1977) [hereinafter *MCI Telecommunications*].

7 The court insisted that the regulator could not simply reject MCI's application out of hand, but had to make a positive, reasoned finding that competition was not in the public interest if AT&T's monopoly were to be preserved.

> [T]he Commission must be ever mindful that, just as it is not free to create competition for competition's sake, it is not free to propagate monopoly for monopoly's sake. The ultimate test of industry structure in the communications common carrier field must be the public interest, not the private financial interests of those who have until now enjoyed the fruits of *de facto* monopoly.

Ibid.

8 R. Bornholz & D.S. Evans, *The Early History of Competition in the Telephone Industry* in D.S. Evans, ed., Breaking up Bell: Essays on Industrial Organization and Regulation (New York: North-Holland, 1983) 7 at 8 [hereinafter Bornholz & Evans].

9 For a comprehensive history of this period, *see* R.W. Garnet, The Telephone Enterprise: The Evolution of the Bell System's Horizontal Structure, 1876-1909 (Baltimore: The Johns Hopkins University Press, 1985) [hereinafter Garnet].

established Western Electric as its manufacturing arm.[10] Up until the expiration of the basic patents in 1894, Bell grew by licensing operating companies and entering into contracts with them which provided for annual payments per telephone. Temporary contracts were replaced with permanent contracts which continued the licence fees and provided Bell with thirty to fifty percent ownership in the operating companies.[11]

The essential components of what was later to be known as the Bell System were in place within a decade of the basic patent grant. However, expiration of the Bell patents led to a period of intense competition, and by the first decade of this century, half of all the telephones in the United States were provided by independent companies.[12]

To combat this competitive encroachment, Bell vigorously expanded by establishing new exchanges, enlarging old exchanges and extending its long distance network. Most important, it took full advantage of the centripetal forces of its rapidly growing telephone *system*, now that it had lost control over the basic telephone *instrument*. It denied non-Bell companies access to its long distance network, thereby isolating the independents. Further, new patents were assigned exclusively to Bell System companies and Western Electric refused to sell equipment to independent companies.[13] In this manner, "[a] telephone patent was transformed into a corporate monopoly".[14]

This aggressive strategy ran the risk of being *too* successful and thereby attracting the attention of turn-of-the-century corporate trust busters. In a brilliant pre-emptive strategic move devised by Theodore N. Vail, AT&T (Bell's new name) discontinued its battle with the independents and agreed to accept government regulation in return for the continuation of monopoly.[15] "As Bell invented the telephone, so Vail invented the Bell System" which was to survive largely intact until its breakup in the early 1980's.[16] "Vail's accomplishments were immense, but his enduring legacy

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[10] The importance of this vertical integration in the evolution of the Bell system is comprehensively discussed in G.D. Smith, THE ANATOMY OF A BUSINESS STRATEGY: BELL, WESTERN ELECTRIC, AND THE ORIGINS OF THE AMERICAN TELEPHONE INDUSTRY (Baltimore: The Johns Hopkins University Press, 1985).

[11] *See* Bornholz & Evans, *supra*, note 8 at 11; Garnet, *supra*, note 9, who concludes at page 90, "The 1890's marked the end of an era. In 1893 and 1894 the original Bell telephone patents expired, and with them went the durable foundation upon which the firm's monopoly had been built."

[12] *See generally* Bornholz & Evans, *supra*, note 8.

[13] *See* Bornholz & Evans, *ibid.* at 25-8; Garnet, *supra*, note 9 at 90-127. The classic study is R. Gabel, *The Early Competitive Era in Telephone Communication, 1893-1920* (1969) LAW & CONTEMP. PROBS. 340.

[14] M.R. Irwin, *The Telecommunications Industry* in W. Adams, ed., STRUCTURE OF AMERICAN INDUSTRY, 7th ed. (New York: MacMillan, 1985) at 262.

[15] *See* Garnet, *supra*, note 9 at 128-54; I. de Sola Pool, FORECASTING THE TELEPHONE: A RETROSPECTIVE TECHNOLOGY ASSESSMENT OF THE TELEPHONE (Norwood, N.J.: Ablex, 1983) at 77-8.

[16] A. von Auw, HERITAGE & DESTINY: REFLECTIONS ON THE BELL SYSTEM IN TRANSITION (New York: Praeger, 1983) at 5-7 [hereinafter von Auw].

was a philosophy."[17] So enduring was Vail's philosophy that almost seventy-five years after its first articulation, Charles Brown, Chairman of the Board of AT&T, felt obliged, in explaining his agreement with the Justice Department to divest the Bell operating companies, to conclude by acknowledging: "Mr. Vail may not be very comfortable today, but he acted boldly in his time, as we must in ours."[18]

Vail set out his vision most fully in AT&T's *Annual Report* for 1910:

> It is believed that the telephone system should be universal, interdependent and intercommunicating, affording opportunity for any subscriber of any exchange to communicate with any other subscriber of any other exchange. . . . It is believed that some sort of a connection with the telephone system should be within reach of all.
>
> It is not believed that this can be accomplished by separately controlled or distinct systems nor that there can be competition in the accepted sense of competition.
>
> It is believed that all this can be accomplished to the reasonable satisfaction of the public with its acquiescence, under such control and regulation as will afford the public much better service at less cost than any competition or government-owned monopoly could permanently afford and at the same time be self-sustaining.[19]

This amounted to an assertion of "natural monopoly" status for telephone service in which costs would be lower if services were provided by a single supplier.[20] This, in turn, would make it possible to achieve "universal service" by taking advantage of economies of scale and by adopting system wide pricing which would maximize the availability of service. As AT&T advertising proclaimed as early as 1908: "ONE POL-

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[17] H.M. Boettinger, THE TELEPHONE BOOK: BELL, WATSON AND AMERICAN LIFE, 1876-1983 (New York: Stearn, 1983) at 170 [hereinafter Boettinger]. He further observed at page 100:

> Theodore Vail, the first general manager of the telephone business, brought managerial skills of an order close to genius in forging the organization needed to transform Bell's discoveries into a widespread social and economic force. No aspect of the present System is without the imprint of Vail's original thoughts and vigorous actions.

[18] *See* von Auw, *supra*, note 16 at 7.

[19] *Ibid.* at 5. Vail went on to write of the necessity of "standardization, uniformity of apparatus and operating methods, and an effective common control over all". He considered it inevitable that the "process of combination" would lead to telephone companies being "closely associated under the control of one central organization exercising all the functions of centralized general administration". *Ibid.*

Vail's grand design was to apply these principles to *all* forms of telecommunications. In 1909 AT&T acquired the telegraph company, Western Union, and could boast in its advertising: "When you lift the receiver of a Bell Telephone and call 'Western Union' you are in communication with the world." AT&T was forced to divest Western Union in 1913. Boettinger, *supra*, note 17 at 167-8.

[20] For an excellent overview of the concept of natural monopoly, *see* A. Kahn, THE ECONOMICS OF REGULATION: PRINCIPLES AND INSTITUTIONS, vol. 2 (New York: John Wiley & Sons, 1971) at 113-71.

ICY, ONE SYSTEM, UNIVERSAL SERVICE".[21] Finally, monopoly status was seen as requiring some form of public control, but not such as would deprive AT&T of the ability to raise the massive amounts of capital necessary to build a truly ubiquitous network. As Vail had put it in 1907: "It is contended that if there is to be no competition there should be public control. It is not believed that there is any serious objection to that control . . . provided that capital is entitled to its fair return . . . and enterprise its just reward."[22]

Furthermore, public control should not be such as would inhibit creative management. Thus, in 1910, Vail asserted a contentious claim to a distinction which has been echoed in many subsequent regulatory proceedings: "Let regulators regulate and managers manage."[23]

Vail actively supported the establishment of state regulatory commissions. Regulation, he urged in AT&T's *Annual Report* for 1914, "will soon bring order and security out of the present uncertainty and be a bulwark against future economic disturbance".[24] In 1910 the jurisdiction of the federal Interstate Commerce Commission was expanded to cover telegraph and telephone carriers, and in 1920 Congress immunized them from antitrust attack if acquisitions were sanctioned by regulatory agencies. By thus clearing away barriers to the consolidation of competing systems, this legislation implicitly reflected "a recognition that the provision of telephone service facilities within a single exchange area was a natural monopoly which should be protected from the deleterious effects of competition".[25] Finally, in 1934 a separate regulatory agency, the Federal Communications Commission (FCC) was established with jurisdiction over interstate rates, service facilities and construction certificates.[26]

Overall, telephone developments in Canada were similar to those in the United States. The Bell Telephone Company of Canada was incorporated in Montreal in 1880, and in 1882 a manufacturing department, the forerunner of today's Northern Telecom, was established. Eventually, Bell Canada (Bell Telephone Company's later corporate name) was to grow into a widely held Canadian company operating in Ontario and Quebec and having extensive investments in the provincial companies in Eastern Canada. Only in Western Canada did impatience with the spread of Bell service in rural areas, combined with the public ownership convictions of "Prairie Populism", lead to the establishment of three government owned telephone systems in the provinces of Manitoba, Saskatchewan and

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21 Boettinger, *supra*, note 17 at 166.

22 Von Auw, *supra*, note 16 at 68 (originally cited in AT&T, *Annual Report*, 1907 at page 18).

23 *Ibid.* at 70 (originally cited in AT&T, *Annual Report*, 1910 at page 32).

24 M.R. Irwin, TELECOMMUNICATIONS AMERICA, MARKETS WITHOUT BOUNDARIES (Westport, Conn: Quorum Books, 1984) at 27 (originally cited at pages 47-9 of the *Annual Report*) [hereinafter TELECOMMUNICATIONS AMERICA].

25 G.H. Loeb, *The Communications Act Policy Towards Competition: A Failure to Communicate* (1978) DUKE L.J. at 15.

26 *Communications Act*, 47 U.S.C. §151 (1934).

Alberta. By contrast, on the west coast, the major company, British Columbia Telephone Company (BC Tel), was established as a subsidiary of the largest American independent telephone company, General Telephone.[27]

While all the hallmarks of Vail's philosophy were to be present — predominant private ownership, vertical integration in the manufacturing sector and independent commission regulation — three important differences between the American and Canadian situations must be noted.

First, no single separate long distance company, such as AT&T Long Lines, was to emerge. When inter-provincial long distance services were developed, they were provided either within Bell Canada, or by way of agreements between the single province companies. Even when trans-Canada service was inaugurated in 1932, it was by way of an agreement among all the companies involved to provide facilities and share revenues. In this manner, each company preserved its territorial exclusivity intact, there being no separate ownership of the facilities used in long distance communication.[28] Second, federal jurisdiction was not asserted to the same degree as in the United States. While Bell Canada and BC Tel were brought under federal jurisdiction, all other companies were subject only to provincial regulation or ownership. Federal jurisdiction was never even established over interprovincial services outside of Quebec and Ontario.[29] Third, provincial Crown corporation telephone companies, because of close ties with their respective governments, have had a far greater influence than their relative size would otherwise indicate.[30]

Territorial exclusivity, provincial ownership and long established provincial regulation, and the absence of a separate long distance tele-

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27 For popular histories of these developments, *see* R.J. Collins, A VOICE FROM AFAR (Toronto: McGraw-Hill Ryerson, 1977); E.B. Ogle, LONG DISTANCE PLEASE: THE STORY OF THE TRANSCANADA TELEPHONE SYSTEM (Toronto: Collins, 1979).

For an overview of the present situation, *see* H.N. Janisch, *Telecommunications Ownership and Regulation: Compatibility or Confusion?* (1984), 5 C.R.R. 5-23; R. Schultz & A. Alexandroff, *Economic Regulation and the Federal System* in M. Krasnick (Research Co-ordinator) PERSPECTIVES ON THE CANADIAN ECONOMIC UNION, vol. 42 (Toronto: University of Toronto Press, 1985) at 63-101 (published in co-operation with the Royal Commission on the Economic Union and Development Prospects for Canada) [hereinafter Schultz & Alexandroff].

28 For a comprehensive account of this development, *see Bell Canada, British Columbia Tel. Co. and Telesat Canada, Telecom. Decision CRTC 81-13*, 7 C.R.T. 716 at 735-97 (7 July 1981) [hereinafter *The TCTS Decision*].

29 *See* R. Buchan et al., TELECOMMUNICATIONS REGULATION AND THE CONSTITUTION (Montreal: Institute for Research on Public Policy, 1982); C.M. Dalfen & L.J.E. Dunbar, "Transportation and Communications: The Constitution and the Canadian Economic Union" in M. Krasnick, ed., *Case Studies in the Division of Powers* in M. Krasnick (Research Co-ordinator) PERSPECTIVES ON THE CANADIAN ECONOMIC UNION, vol. 62 (Toronto: University of Toronto Press, 1985) at 139-202 (published in co-operation with the Royal Commission on the Economic Union and Development Prospects for Canada) [hereinafter Dalfen & Dunbar].

30 *See* H.N. Janisch, *Federal-Provincial Relations in Canadian Telecommunications* (Paper presented at the 14th Annual Telecommunications Policy Research Conference, 28 April 1986) at 16-9.

phone carrier have made it very difficult to assert a "national dimension" in Canadian telecommunications policy.[31] As well, this suggests that Vail's private ownership monopoly-regulation model cannot be said to have been transposed to Canada without some substantial modifications. At the same time, it must be recognized that, unlike all European nations, in Canada the telephone industry was not deemed suitable for outright government ownership. This is all the more striking given the Canadian propensity for government ownership of other infrastructure industries such as electrical power utilities and transportation companies.

In its most fully developed form the regulated natural monopoly approach to the telephone industry mandated a perfectly hermetically sealed network in which not only could there not be competition in the provision of services, but no device whatsoever could be attached to the network without telephone company permission. Although this was to lead to occasional instances of regulatory network integrity *reductio ad absurdum*,[32] regulation proved to be an appropriate response to presumed natural monopoly.

Having accepted monopoly, measures had to be taken to limit the profit-maximizing incentive of a monopolist to restrict output, raise prices and earn excessive monopoly profits. Regulation sought to control this tendency by scrutinizing historical accounting costs of service and by limiting profits to a prescribed percentage of assets. Rates would be subject to public scrutiny, not only to ensure that they were "just and reasonable" overall, but also to ensure that they were not "unjustly discriminatory" between classes of subscribers. Most important, there was considerable congruence between the objectives of the government regulators and the telephone companies with respect to "universal service".

> So long as AT&T was protected by regulation from competitive entry and was permitted to average costs nation-wide over high and low cost routes and facilities, AT&T had a strong financial incentive to expand the availability of telephone service and to provide both local and long distance telephone service at acceptable levels of quality. Such incentives probably eliminated the need for much regulatory prodding by the FCC.[33]

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[31] *See, e.g.*, J.S. Schmidt & R.M. Corbin, *Telecommunications in Canada: The Regulatory Crisis* (1983) 7 TELECOMMUNICATIONS POLICY 215.

[32] *See, e.g., Hush-A-Phone Co.* v. *United States*, 238 F.2d 266 (D.C. Cir. 1956), where the regulator denied the attachment of a harmless plastic cup-like device to the telephone instrument to ensure greater privacy; *Shulman & Bell Canada* (1975), [1975] C.T.C. 244, where a member of the Ontario Legislature was denied permission to attach a "Magicall [automatic] Dialer".

[33] W. Bolter, ed., TELECOMMUNICATIONS POLICY OF THE 1980'S: THE TRANSITION TO COMPETITION (Englewood Cliffs, N.J.: Prentice-Hall, 1984) at 28 [hereinafter THE ANNENBERG STUDY].

As well, as Manley Irwin noted, this adoption of telephone company practices gave them additional vitality.

> Company policies became more than management decisions; they now possessed the force and power of the government. Violation of company practices transcended management decisions and provoked the police power of the state.

TELECOMMUNICATIONS AMERICA, *supra*, note 24 at 28.

Indeed, this meant that regulation could be by way of gentle "continuing surveillance", while cost-saving new technologies reduced the need for expensive, time-consuming rate cases. Regulatory activity was similarly modest and non-confrontational in Canada, largely because of the coincidence of governmental and telephone company objectives and the benign influence of newer technology on rates.[34]

Overall, the North American telephone industry through to the 1960's was organized along sophisticated, highly integrated monopoly lines. This organization was effective, coherent, widely accepted and subject to little serious challenge. It seemed to be the natural order of things. Its primary mission was to achieve the universal spread of service, and as John Kenneth Galbraith has argued, it is quite possible that no other form of organization could have achieved that goal as successfully.[35]

B. *The Advent of Competition*

In a series of decisions, commencing in the late 1960's in the United States and in the late 1970's in Canada, many segments of the telecommunications industry have been opened to competition.[36] The Canadian regulator, the CRTC, has recognized a positive role for competition. For instance, in liberalizing the rules governing the attachment of terminal equipment to the telephone network, it noted the following benefits: enhanced consumer choice, both in the equipment available and in the sources of supply; lower prices, as competition encourages each firm to reduce its costs; and, especially for business subscribers, increased flexibility and efficiency.[37] With respect to services, the CRTC has acknowl-

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[34] Between 1906 and 1968 there were only five rate proceedings for each of Bell Canada and BC Tel, and for both companies, four of the proceedings were in the twenty years following 1949. Schultz & Alexandroff, *supra*, note 27 at 81.

[35] *See* J.K. Galbraith, THE NEW INDUSTRIAL STATE, 3d ed. (Boston: Houghton Mifflin, 1978) at 390.

Telephony had flourished, Galbraith concluded, because of the "subordination of the market at all points to comprehensive planning". Modern revisionist historical theory argues that this might not have had to have been so had there not been "government failure".

> Had state and federal governments simply imposed interconnection obligations on all local exchange and long distance carriers and defined rights and conditions for public access to publicly owned rights of way, i.e., defined "market rules" for this particular industry (possibly excepting basic local exchange services) there might have been little need to replace totally telephone competition with government regulation.

THE ANNENBERG STUDY, *supra*, note 33 at 27.

[36] For a particularly insightful review of the developments in the United States by a former chairman of the FCC, *see* R.E. Wiley, *The End of Monopoly: Regulatory Change and the Promotion of Competition* in H.M. Shooshan III, ed., DISCONNECTING BELL: THE IMPACT OF THE AT&T DIVESTITURE (New York: Pergamon Press, 1984) at 23-46.

[37] *Attachment of Subscriber-Provided Terminal Equip., Telecom. Decision CRTC 82-14*, 8 C.R.T. 848 at 860 (23 November 1982).

edged that the following potential benefits could flow from competition in long distance: lower rates, increased productivity, improved customer choice and supplier responsiveness, increased flexibility with respect to pricing and marketing and better diffusion of new technology.[38]

Despite these moves to competition, there has been no formal deregulation. Substantial change has been brought about with virtually no amendment of the legislation of the Vail-inspired monopoly era. In the United States, the *Communications Act*[39] of 1934 remains in effect, while in Canada, the *Railway Act*,[40] which dates back to 1903, continues to provide the basis for regulation.

This situation is very different from other industries in which greater reliance has been placed on competition. For example, in the United States, in the field of air transport, the governing legislation was repealed and the regulatory agency, the Civil Aeronautics Board, abolished.[41] In Canada, it is similarly proposed to repeal the *National Transportation Act* and abolish the Canadian Transport Commission.[42] *Change in telecommunications has not come about by way of broad-based legislative reform, but by a series of incremental judicial and administrative decisions which has left extensive continuing regulatory obligations in its wake.*

It is possible to identify a number of factors which have led to only partial deregulation. First, much of the market remains monopolistic and in need of regulation; second, telephone companies continue to occupy positions of considerable market dominance; third, unique industry structure has created "strategic bottlenecks"; fourth, there is great concern that universal service, the crowning achievement of the natural monopoly era, not be placed at risk; fifth, there is no general agreement, especially in Canada, on the virtues of competition policy; sixth, in Canada, fragmented jurisdiction and provincial government ownership are substantial inhibiting forces to change; seventh, there is concern in Canada that our relatively small market increases the need for planning capability and protection for domestic industry; and, eighth, no political consensus has yet emerged to supplant natural monopoly and regulation.

By the time AT&T was broken up in 1984, it had assets of nearly 150 billion dollars. AT&T retained assets of only some 25 billion dollars, the

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38 In this regard, *see Interexchange Competition and Related Issues, Telecom. Decision CRTC 85-19*, 11 C.R.T. 1611 at 1659 (29 August 1985) [hereinafter *Interexchange Competition*].

39 47 U.S.C. §151 (1934).

40 R.S.C. 1970, c. R-2.

41 For an excellent account of events leading up to airline deregulation, *see* S.G. Breyer, REGULATION AND ITS REFORM (Cambridge, Mass.: Harvard University Press, 1982) cc. 11, 16 [hereinafter Breyer].

42 *See* Ministry of Transport, *Freedom to Move: A Framework for Transportation Reform* (Ottawa: Minister of Supply and Services, 1985). *See also* Bill C-126, *National Transportation Act*, 1st Sess., 33d Parl., 1984-86 (first reading: June 26, 1986) which would have repealed the *National Transportation Act*, R.S.C. 1970, c. N-17. The proposed legislation died on the Order Table with the proroguing of Parliament. *See now* Bill C-18, *National Transportation Act*, 2d Sess., 33d Parl., 1986 (first reading: 4 November 1986).

rest going to the now independent regional holding companies. As it was envisaged that they would, by and large, continue to operate on a monopoly basis with only AT&T being exposed to competition, it could by no means be said that the industry, as a whole, had become completely competitive. Nor could it even be said that all long distance markets had become competitive since the federal decree did not apply to long distance service still provided by regional companies. In 1984 the Bell regional companies shared 16.9 percent of total long distance revenues of 52.3 billion dollars, while MCI had only a 2.8 percent share.[43]

While generally optimistic about the chances for increased competition, the 1981 Congressional study, *Telecommunications in Transition*,[44] also pointed to many barriers to further competition. It envisaged that the transition to competition might stretch over many decades because of the dominance of the existing telephone companies. This dominance included excess capacity and alternative routing capability; customer goodwill; vertical integration and research capability; access to, and information about, the customer base; an unparalleled presence in financial markets and unusually large internal financing options.[45]

Despite their apparent advantages of size, the incumbent telephone companies may turn out to be straw giants. Competitors are free to enter attractive portions of the market, such as high density business traffic, without assuming any obligations towards less attractive portions of the market such as low density, rural traffic. Nor are they subject to regulatory burdens such as an obligation to file tariffs and defend them as cost-justified. Moreover, it has been argued that natural monopoly may be unsustainable in the event of even limited competition because of the extensive pattern of cross-subsidies which typify this type of market structure (a matter to be discussed shortly).[46] Again, this must be a matter of continued regulatory concern.

Looked at broadly, the shift to competition from monopoly may be most easily understood diagramatically. In Figure 1, below, panel A illustrates, in a highly simplified way, the traditional end-to-end model of telephone industry organization as conceived by Vail. It suggests that the

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43 J. Guyon, "And Then There Were . . .", *The Wall Street Journal* (24 February 1986) 7D.

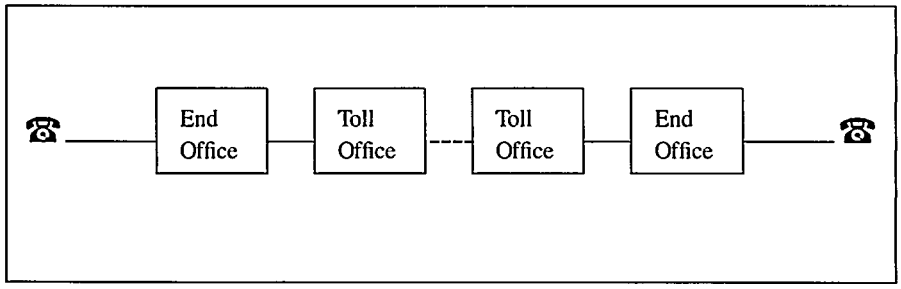
44 Majority Staff of the Subcommittee on Telecommunications, Consumer Protection and Finance of the House Committee on Energy and Commerce, *Telecommunications in Transition: The Status of Competition in the Telecommunications Industry* (Washington: U.S. Gov't Printing Office, November 3, 1981) (Chairman: T. E. Wirth) [hereinafter *Telecommunications in Transition*].

45 *Ibid.* at 14-6.

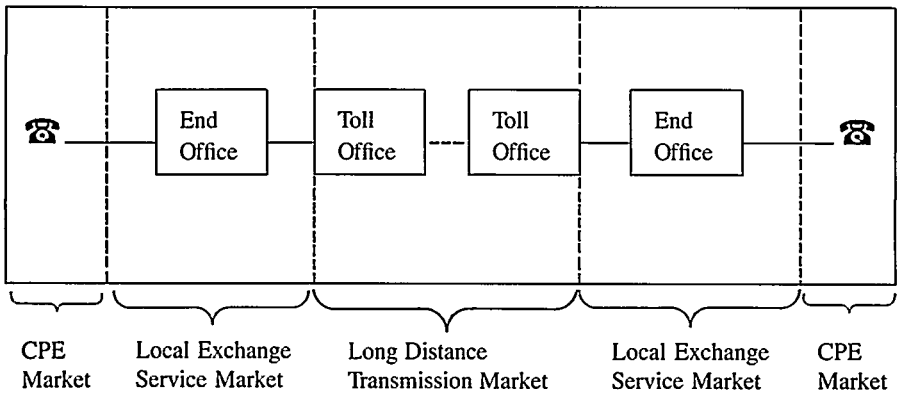
46 *See Comments of American Telephone and Telegraph Company In the Matter of Long Run Regulation of AT&T's Basic Domestic Interstate Services,* FCC Docket No. 83-1147, April 2, 1984. Note, particularly, the evidence (at 53-60) of the ability of competitors to target and penetrate lucrative business and high-expenditure residential markets. *See also* Appendix 1 of the above document, an outstanding piece by economists Robert Willig and Michael Katz of Princeton University.

telephone system should be viewed as a seamless network connecting any telephone through local and long distance facilities to any other telephone. Panel B illustrates, in a similarly simplified way, that in a discrete market model there should be separate markets for customer premises equipment (CPE), local exchange and long distance.

Figure 1: ALTERNATIVE MODELS OF TELEPHONE INDUSTRY ORGANIZATION[47]



Panel A. End-to-End Model of Telephone Industry Organization



Panel B. Discrete Market Model of Telephone Industry Organization

So far, competition has been largely confined to the equipment and long distance markets and has not extended to the local exchange market. *Yet all three markets remain interconnected and interdependent.* A high degree of common costs suggests that the advent of competition will be

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47 THE ANNENBERG STUDY, *supra*, note 33 at 349.

significantly more difficult here than in other industries.[48] For instance, any competitive long distance carrier will have to go through the telephone company's end office in order to reach its customers in a local exchange. Since the telephone company may be providing long distance service itself, concern for discrimination will be high, as will be the need for continued regulatory surveillance.

This issue of "equal access" to the local switched network is particularly acute in Canada because, unlike the United States, there is little likelihood of divestiture which, by strictly separating the providers of long distance from local service, has removed the incentive to discriminate. For example, should CNCP receive permission to provide competitive public long distance service, it will be competing with Bell Canada and other telephone companies which themselves provide a similar service and control access to the local switched network.

It is possible, of course, to bypass the local network.[49] A large corporate user might find it feasible to construct its own inter-office communications network which does not go through the telephone company local exchange. As it may not be desirable to have such traffic move "off network", the terms on which access is provided to local exchanges must remain matters of regulatory concern.

Not only is it an unusual form of competition in which one competitor has to use another's facilities, but it also appears that the immediate consequence of competition in telecommunications may well be substantial increases in rates for most subscribers.[50] This seemingly perverse result flows from the elimination of the internalized cross-subsidies characteristic of a natural monopoly.

Historically, telephone companies, in keeping with their monopoly status, have priced their services system-wide and not on a service-by-service basis.[51] Concern has been with *total* costs and not with costs of individual services. In the post-World War II years, cost-saving transmission technologies such as microwave and satellite were accompanied by substantial increases in demand for long distance service. As a result, it

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[48] For insightful discussion of the extent of common costs and its significance for competition, *see ibid.* at 349-57.

[49] The CRTC is not of the view that bypass is, at the moment at least, a serious threat in Canada. *See Interexchange Competition, supra*, note 38 at 1674-7. This conclusion finds further support in a recent study jointly sponsored by the federal and provincial governments. *See* D.A. Ford & Associates, *The Impact of International Competition on the Canadian Telecommunications Industry and its Users* (Ottawa, August, 1986).

[50] This concern is reviewed in H.N. Janisch, *Winners and Losers in Telecommunications Competition* in W.T. Stanbury, ed., TELECOMMUNICATIONS POLICY AND REGULATION (Montreal: Institute for Research on Public Policy, 1986) at 307-400.

[51] *See* J.R. Meyer et al., THE ECONOMICS OF COMPETITION IN THE TELECOMMUNICATIONS INDUSTRY (Cambridge, Mass.: Oegeschlager, Gunn & Hain, 1980) at 75-109 (c. 3: "Pricing").

was possible to lower long distance rates without bringing them all the way down to cost, thereby providing a substantial subsidy to local service[52]. Once again, there was congruence between the objectives of telephone companies and regulators. The former sought ever increasing penetration rates, thereby enhancing the value of the network as a whole, while regulators were concerned with keeping politically damaging local rate increases to a minimum.

This type of arrangement could only work if the regulator lived up to the bargain implicit in natural monopoly regulation: no new entrants would be allowed.[53] But federal decision-makers in the United States, not being directly accountable for local rates as are the state regulators, were prepared to allow competitive entry. As a result, telephone companies have had to push rates down towards costs, the cross-subsidy has been reduced and local rates have had to go up.

It might be possible to require new entrants to make the same level of contribution to local rates as the telephone companies. The problem is, as Bell Canada forcefully pointed out to the CRTC with respect to CNCP's application to provide competitive public long distance service: if CNCP attempted to offer the same quality of service as Bell, but at substantially lower rates, and to make a profit, it would not be possible for CNCP to make a full contribution to local rates.[54] Moreover, it would be a highly artificial form of competition if Bell were prevented from moving to cost-based rates. Rather than allow immediate competition, the CRTC was persuaded in favour of "rate rebalancing" which will likely be undertaken through long drawn-out regulatory proceedings.[55] It is envisaged that full fledged competition may be allowed once rates are "balanced".

American experience suggests that few, if any, subscribers will *actually* be forced to drop off the network as a result of increased local rates, and that there has been a great deal of exaggeration by consumer groups in

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[52] In its evidence at the CRTC interexchange competition proceedings, Bell Canada indicated that its studies showed that in 1982 it cost $1.93 to generate $1 in revenue for local services, while $1 of revenue in non-competitive long distance service cost Bell only 32 cents. The annual shortfall of approximately $1.2 billion from the provision of local service was said to be offset by revenues from long distance. Bell Canada, *Memorandum of Evidence, CRTC Telecom. Public Notice 1984-6, Interexchange Competition and Related Issues* (April, 1984) at 6 [unreported] [hereinafter *Memorandum of Evidence*].

The CRTC, while not accepting these precise figures concluded, on the basis of the evidence before it, that a shift to cost-based rates would lead to a doubling of local exchange rates and a reduction in long distance rates in excess of fifty percent. *Interexchange Competition*, *supra*, note 38 at 1673.

[53] For a highly critical assessment of the way in which competition has been introduced, *see* J.J. Hillman, *Telecommunications Deregulation: The Martyrdom of the Regulated Monopolist* (1985) 79 N.W.U.L. REV. 1183.

[54] *Interexchange Competition*, *supra*, note 38 at 1647-9.

[55] *Ibid.* at 1681-6.

this regard.[56] Nevertheless, the need to protect universal service remains a political priority, and has been declared to be the highest priority by Canadian policy makers.[57]

This concern over the protection of universal service reflects a conflict between the economist's *efficiency values* and the politician's concern for *distributive effects*. To economists, a move toward marginal cost pricing would be welcome as a step towards greater economic efficiency in which all will, eventually, benefit. To the politician, such a move adversely affects the distributional balance between winners and losers. Since there are many more winners (domestic and small business subscribers) than losers (large corporations) under the existing rate structure, change would be most unwelcome, whatever the overall (and politically unrewarding) effect might be on the economy as a whole.[58] Above all else, considerations such as these indicate that it will be very difficult to move with any dispatch from monopoly to competition in telecommunications.

Overall attitudes towards competition should not be overlooked. In the United States, analysis of telecommunications policy starts from a

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[56] *See* National Telecommunications & Information Administration (NTIA), *Telephone Subscribership in the United States: A Post Divestiture Analysis* (Washington D.C., 1985). This is the first study based on actual census data. For earlier estimates of the impact of increases in local rates, *see* L. J. Perl, *Economic and Demographic Determinants of Residential Demand for Basic Telephone Service*, FCC Docket No. 20003; AT&T/DOJ Anti-trust case, Defendant's Exhibit D-4-518; and L. J. Perl, *Residential Demand for Telephone Service 1983*, NERA, 1983.

[57] In a major policy speech to the Electrical and Electronic Manufacturers' Association, Marcel Masse, then Minister of Communications, declared that four principles would govern in any review of Canadian telecommunications policy:

1) Maintaining universal service at affordable rates.
2) Finding Canadian solutions to Canadian problems.
3) Ensuring that all Canadians share the benefits of technological advances in telecommunications.
4) Maintaining the international competitiveness of the Canadian telecommunications sector and the industries it serves.

Marcel Masse, "Looking at Telecommunications — The Need for Review" (Montebello, Quebec, June 20, 1985).

Subsequently, in federal-provincial discussions, two additional "fundamental principles" were added and some changes were made in the order, except for number 1.

1) Universal access to telephone service at affordable prices.
2) Technological progress to benefit all Canadians.
3) International competitiveness of Canadian industries.
4) A uniquely Canadian approach.
5) Regional economic development.
6) Government responsibility for policy development.

Department of Communications, Press Release, "Ministers Establish Cooperative Basis for New Telecommunications Policy" (February 28, 1986) at 1.

[58] A point more fully developed in L. Johnson, COMPETITION AND CROSS-SUBSIDIZATION IN THE TELEPHONE INDUSTRY (Santa Monica, Cal.: The Rand Corporation, 1982).

common agreement on the virtues of competition.[59] Such is not the case in Canada. Consider, for example, the views of John Meisel, a former Chairman of the CRTC:

> In this country, we have always tempered the desire for economic prosperity with a broad, public concern for the achievement of political and social ends. . . . I think it has enabled us to fashion a society that rests on a shared sense of decency and moral principle and that, whatever its faults, has attempted to engrain justice and humanity into its social organization.[60]

The problem for Canadians is that even though there may be substantial disagreements as to how competition is best attained, it is likely that that quest will be less arduous than any search for "a shared sense of decency and moral principle" and "justice and humanity".[61] Canadian policy is a complex melange of equity and efficiency considerations, with much emphasis being placed on the uniqueness of particular situations.[62] It must also be borne in mind that Canadian competition policy has long failed to inspire confidence, being regarded by many commentators as the weakest national policy of any industrial democracy.[63] Under such circumstances, competitors may well be fearful of leaving the known protections

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[59] This is particularly evident in the opinion of Judge Harold Greene implementing, with some modifications, the divestiture settlement agreed to between the Department of Justice and AT&T. *See United States* v. *AT&T*, 552 F. Supp. 131 (D.D.C. 1982). As he was to put it:

> Competition has not been endorsed by the Congress and the courts as a purely academic matter. The need to safeguard free competition is a direct result of the fundamental premise of our economic system that unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic political and social institutions.

Ibid. at 149-50.

[60] CRTC, *Annual Report 1981-1982*, at ix.

[61] *Ibid.*

[62] The CRTC has been criticized by the Economic Council of Canada for being too particularistic in its approach to policy making. *See* Economic Council of Canada, *Reforming Regulation* (Ottawa: Ministry of Supply and Services, 1985) at 49.

[63] As Patrick Monahan has observed:

> Few areas of public policy in Canada have been in greater disarray over the past decade than has competition policy. Regardless of idealogical perspective, commentators have come to share the view that current competition policy is "almost rudderless, lacking a sense of purpose".

P. Monahan, "The Supreme Court and the Economy" in A. Lajoie & I. Bernier, eds., *The Supreme Court of Canada as an Instrument of Political Change* in M. Krasnick (Research Co-ordinator) PERSPECTIVES ON THE CANADIAN ECONOMIC UNION, vol. 47 (Toronto: University of Toronto Press, 1986) 105 at 109 (published in co-operation with the Royal Commission on the Economic Union and Development Prospects for Canada).

of regulation in favour of the notoriously weak embrace of competition policy. It remains to be seen whether the new competition legislation will rectify this perception.

In the United States, as we have seen, the push for competition was to come at the federal level and has been implemented by way of widespread federal pre-emption of inconsistent state regulation.[64] In Canada, while the federal authorities have been in the vanguard of moves towards competition, there is federal authority over only some sixty percent of the industry. This absence of uniform federal jurisdiction has had a substantial inhibiting effect on change.[65]

Canadian observers of developments in the United States commonly point out that the sheer size of the American telecommunications market might justify the extravagance of full-fledged facilities-based competition, despite the danger of technological disruption and wasteful duplication. It is also suggested that with computer based operating systems, the integrity of the network becomes even more important. Hence "the importance of conveying to regulators that systemic integrity — unitary planning and design — is more than ever crucial to the achievement of the network's potential in view of the increasingly complex interactions of software and hardware required to fulfill that potential".[66]

In Canada, where the largest telecommunications undertaking is much smaller than even the smallest of the divested Bell regional holding companies,[67] concern for systemic integrity has taken on special significance. As Bell Canada has argued before the CRTC, "the impact of competition on the efficiency of telecommunications network planning and design will be to add complexity, reduce efficiency and increase the risks associated with provisioning".[68] While concerns such as these do not appear to have been adopted directly by the CRTC, they must be kept in mind as factors cautioning against any abrupt move to competition.

As previously noted, the move to competition in the United States has been accomplished without any significant change in the governing legislation. Major changes have been brought about by non-elected officials

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64 The FCC has, however, recently suffered a setback with respect to its jurisdiction over intrastate depreciation rules. *See* S. Wermiel, "Justices Rule Against FCC in Dispute on Regulating Intrastate Phone Service", *The Wall Street Journal* (28 May 1986) 2.

65 *See* Dalfen & Dunbar, *supra*, note 29, for a contemporary account of the inhibiting effect of limited federal authority.

66 A point made at a 1978 meeting of AT&T's top managers by the president of Bell Laboratories. *See* von Auw, *supra*, note 16 at 147.

67 A point stressed by A.J. de Grandpré, Chairman of the Board and Chief Executive Officer of Bell Canada Enterprises (BCE) in evidence to members of Parliament. *See* House of Commons, *Minutes of Proceedings and Evidence of the Standing Committee on Communications and Culture respecting Bill C-19, An Act Respecting the Reorganization of Bell Canada*, Issue No. 36 at 4-5 (17 December 1985) [hereinafter *Minutes of Proceedings Respecting Bill C-19*].

68 Bell Canada, *Memorandum of Evidence*, *supra*, note 52 at 60-79.

such as Judge Harold Greene of the United States District Court, District of Columbia, who originally presided at the anti-trust case brought against AT&T, then approved the terms of the divestiture settlement,[69] and is now very actively involved in its implementation.[70]

In Canada, where independent regulatory agencies have come under growing criticism for not being politically accountable for the policy decisions they make,[71] new legislation has been proposed to provide for government policy directives to the CRTC and politicians have strongly asserted their role in policy making.[72] However, such assertions of political responsibility have not been accompanied by any political consensus as to how competition or rate rebalancing should be handled. If there is to be no distancing between initial decision-makers and politicians (as there could be by involving the courts or independent regulatory agencies) there may be too much politics, too soon. This will mean delay and fudging of tough issues. It may be a sad comment on the state of democratic political institutions, but if tough decisions have to be made, it might be wise to give them to a Judge Greene, rather than any federal-provincial committee. There can be no guarantee that either the judicial or the political actors will get it right, but at least the former will get on with it!

In light of all the above factors, a clean-cut shift from monopoly to competition is clearly not possible. Ironically, as Alvin von Auw, for many years a senior officer at AT&T, has pointed out, some form of continuing regulation may have been the only way that the telephone companies could

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[69] *United States* v. *AT&T*, *supra*, note 59. Judge Greene's decision was affirmed, without reasons, by the Supreme Court. Justice Rehnquist, joined by Chief Justice Burger and Justice White, dissented on the ground that it was inappropriate for a judge to employ a broad "public interest" standard in reviewing a settlement agreed to between the parties. *See Maryland* v. *United States*, 460 U.S. 1001 (1983).

[70] The settlement was largely predicated on an understanding that the divested companies would become public utility style local service companies. Instead, they have sought to diversify and have even sought to enter the long distance market. *See* B. Rudolph, "Putting Out Lines in All Directions" *Time* (5 May 1986) 50; M. McFadden, "Bullish on the Baby Bells" *Fortune* (23 June 1986) 129; and J.L. Roberts, "Ex Bell Units Eye Long Distance Sectors", *The Wall Street Journal* (26 June 1986) 6.

Judge Greene's restrictive approach has recently been successfully appealed: *see* A. Pagztor & J. Guyon, "Regional Firms May Sell Services Outside of Areas Without Prior Approval", *The Wall Street Journal* (18 August 1986) 5 and J.L. Roberts, "Bell Firms Say Ruling Lets Them Buy Phone Concerns Outside Their Regions", *The Wall Street Journal* (22 August 1986) 3.

Administration backed legislation (S. 2565, 99th Cong., 2d Sess. (1986)) has been introduced to take authority away from Judge Greene. As its sponsor, Senator Dole remarked: "Plain and simply, the FCC is the place to make telecommunications policy, with Congress playing an active oversight role." Cong. Rec. (June 18, 1986) at S7742.

[71] *See* H.N. Janisch, *Policy Making in Telecommunications Regulation: An Assessment of Bill C-20* (1986), 7 C.R.R. 5-11. *But see infra*, note 82.

[72] Note that one of the new "fundamental principles" added in federal-provincial negotiations provides for "government responsibility for policy development". *See supra*, note 57.

reach the marketplace, *with regulation being justified on exactly the opposite ground from that advanced by Vail.*

> Regulated competition in Bell System rhetoric is the worst of both worlds. Railing against it is probably a necessary component of business strategy. And yet regulated competition is in all probability what the company confronts for as far ahead as prophecy dares venture. Indeed, regulation may be the price of AT&T's ticket to the marketplace.[73]

> What Vail saw as the occasion for regulation — the absence of competition — no longer prevails. Paradoxically, however, regulation — or something like it — may be prerequisite to freedom, including the freedom to compete.[74]

Yet this is not to suggest that there should continue to be uniform regulation of *all* aspects of telecommunications. The challenge, as Stephen Breyer, formerly of the Harvard Law School and now of the United States Court of Appeals, First Circuit, recognized, is to identify just where regulation or competition, or some transitional variation, is appropriate. He cautioned: "Those who argue automatically for competitive solutions may be wrong. And detailed analysis is required before one can determine just where and how much regulation is required."[75] And this requires, in turn, a clear understanding of the complex legislation which still governs telecommunications.

III. Statutory Considerations

The unique hybrid nature of the present telecommunications industry in which some parts, such as terminal equipment and long distance, are arguably capable of sustaining competition while other parts, such as local service, remain natural monopolies, means that complexity cannot be avoided. Complexity which flows from efforts to address necessary nuances and subtle distinctions might have at least the virtue of grappling with contemporary issues. However, the complexity of the Canadian legislative scheme governing telecommunications springs from its initial inadequacies and is compounded by a series of patchwork amendments. It is the complexity wrought of past solutions being applied to present problems. Yet it must be struggled with because, inadequate as it may be, it still governs and there is little likelihood of substantial reform in the near future. As well, a careful analysis of existing legislation will indicate the sort of issues which will, eventually, have to be addressed in new legislation.

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73 Von Auw, *supra*, note 16 at 81.

74 *Ibid.* at 83. It should be borne in mind that in the United States, AT&T had been excluded entirely from the computer market prior to 1982.

75 Breyer, *supra*, note 41 at 314.

A. *Conduct in Regulated Markets and the Statutory Mandate of the CRTC*

The first step in the analysis must be to define the statutory jurisdiction and powers of the regulator with respect to the market conduct of firms in the telecommunications industry. For the purpose of this paper, "market conduct" will be taken to include the following strategic economic behaviour: pricing, output, marketing and sales promotion, intra-corporate relations, capacity expansion (whether by construction of new facilities or acquisition of existing plant and equipment), research and development, terminal attachment, network interconnection, horizontal and vertical integration and other commercial conduct and decision-making of a similar nature. It will be assumed, at least initially, that those elements of market conduct not explicitly, or by necessary implication, falling within the purview of the regulator, must by default come within the jurisdiction of the competition law authorities.

The most important statutes to consider include the *Canadian Radio-television and Telecommunications Commission Act*,[76] the *National Transportation Act*,[77] the *Railway Act*,[78] the dozen or so Bell Canada Acts,[79] and the new *Competition Act*.[80] Potentially important developments on the legislative horizon, including Bills C-19[81] and C-20,[82] need

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[76] S.C. 1974-75-76, c. 49 [hereinafter *CRTC Act*].

[77] R.S.C. 1970, c. N-17 [hereinafter *NTA*].

[78] R.S.C. 1970, c. R-2.

[79] *An Act to Incorporate the Bell Telephone Company of Canada*, S.C. 1880, c. 67, *as am.* S.C. 1882, c. 95; S.C. 1884, c. 88; S.C. 1892, c. 67; S.C. 1894, c. 108; S.C. 1902, c. 41; S.C. 1906, c. 61; S.C. 1920, c. 100; S.C. 1929, c. 93; S.C. 1948, c. 81; S.C. 1957-58, c. 39; S.C. 1964-65, c. 69; S.C. 1967-68, c. 48; S.C. 1977-78, c. 44.

[80] *Competition Act* (being part 2 of *An Act to Establish the Competition Tribunal and to Amend the Combines Investigation Act and the Bank Act and Other Acts in Consequence Thereof*, 1st Sess., 33d Parl., 1986 (assented to 17 June 1986)).

[81] Bill C-19, *An Act Respecting the Reorganization of Bell Canada*, 1st Sess., 33d Parl., 1984.

[82] Bill C-20, *An Act to Amend the Canadian Radio-television and Telecommunications Act, the Broadcasting Act and the Radio Act*, 1st Sess., 33d Parl., 1984. For a summary of the provisions of Bills C-19 and C-20, *see* H.N. Janisch & B.S. Romaniuk, *The Quest for Regulatory Forbearance in Telecommunications*, 17 OTTAWA L. REV. 455 at 483-8 [hereinafter *Regulatory Forbearance*]. Notwithstanding the potentially significant changes these Bills may have brought to the telecommunications industry, and the fact that both came very near to being passed during the First Session of the 33d Parliament, the future of Bills C-19 and C-20 remains in doubt. Both died on the Order Paper with the proroguing of Parliament on August 28, 1986. Neither Bill was mentioned in the Special Order of October 3, 1986 (House of Commons, *Votes and Proceedings*, October 3, 1986) pursuant to which certain proposed legislation suffering the same fate at the end of the First Session was resurrected for the purpose of expedited passage through Parliament during its Second Session, beginning on October 1, 1986. Bill C-19 was eventually reintroduced as Bill C-13. *See Senate of Canada Proceedings of the Standing Committee on Banking Trade and Commerce on Bill C-13, "An Act respecting the reorganization of Bell Canada"*, Issue Nos. 3-8 (19 November - 10 December 1986); Report, *Senate Debates*, No. 131-17 at 317 (16 December 1986).

also to be noted, although no substantial changes to the existing statutory framework now appear imminent.

1. *The CRTC Act*

The CRTC was created in 1976 with enactment of the *CRTC Act*.[83] Subsection 14(2) provides that the CRTC "shall exercise the powers and perform the duties and functions in relation to telecommunication, other than broadcasting, vested by the *Railway Act*, the *National Transportation Act* or any other Act of Parliament in the Canadian Transport Commission". Subsection 14(3) further provides that sections 17-19 and 43-82 of the *National Transportation Act*[84] specifically apply (after appropriate modifications) to all inquiries, complaints, applications or other hearings to or before the CRTC. In case of conflict between these provisions and corresponding provisions in the *Railway Act*,[85] the former are to govern.

As subsections 14(2) and (3) are the only provisions germane to our discussion, it is evident that the *CRTC Act* amounts to little more than "house-keeping" legislation.[86] It creates a new regulatory body. It transfers to this new agency all the powers and functions in relation to telecommunications formerly assigned to the Canadian Transport Commission (CTC). Finally, it clarifies which statutory provisions setting out the jurisdiction and powers of the regulator are to govern in the event of conflict with similar provisions in other statutes dealing with telecommunications.

What the *CRTC Act* fails to do is to define the statutory mandate of the CRTC or to provide any indication of the underlying social and economic purpose of telecommunications regulation. Both are simply left to be determined by reference to other statutes. Ironically, these other statutes are, for the most part, concerned not with telecommunications, but with transportation.

2. *The Railway Act*

Of all federal statutes dealing with telecommunications, by far the most important is the *Railway Act*,[87] especially sections 320 and 321 thereof. These latter sections not only set out the jurisdiction, duties and most of the powers of the CRTC, but also outline a number of the

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[83] S.C. 1974-75-76, c. 49.
[84] R.S.C. 1970, c. N-17.
[85] R.S.C. 1970, c. R-2.
[86] In fact, this is how the Minister described the Act when it was first introduced in Parliament. *See* House of Commons, *Debates*, No. 301-4 at 3782 (4 March 1975).
[87] R.S.C. 1970, c. R-2.

responsibilities, duties and obligations of the telecommunications service providers coming within the Commission's jurisdiction. Sweeping as these provisions may be, sections 320 and 321 of the *Railway Act* still fall considerably short of providing a comprehensive statement of parliamentary intent with respect to the policing of market conduct in the telecommunications industry. Among the more serious shortcomings of the telecommunications provisions of the *Railway Act*, in this regard, are the following.

First, nowhere in the Act (or, for that matter, any other federal statute) is there a general policy statement outlining the overall *aims and objectives* of telecommunications regulation. As remarkable as it may appear to those unfamiliar with its provisions, the *Railway Act* is, quite literally, a statute *without express purpose*. Second, the terminology defining the scope of the regulator's jurisdiction has remained frozen in time. References to "telegraph and telephone systems" are no longer sufficiently precise to provide a clear indication of the boundaries of the Commission's regulatory authority. Third, even where jurisdiction is readily ascertainable, because it is "company" and not "activity-specific", the type of market conduct which may be regulated is still largely an open question. The Act, it is submitted, expressly authorizes the regulation of fewer types of market conduct and corporate decision-making than are, in fact, presently subject to Commission overview. A final source of uncertainty is that nowhere in the *Railway Act* is there any mention of whether Canada's competition laws apply in any way to the market conduct of firms within the Commission's jurisdiction — regardless of whether such conduct is actually regulated by the CRTC.

The significance of these shortcomings in the *Railway Act* cannot be overstated. Discussion will therefore turn to a more detailed analysis of each.

(a) *The Mandate of the CRTC*

As stressed above, there are no provisions in the *Railway Act* which expressly provide a *rationale* for telecommunications regulation. The closest the *Railway Act* comes to providing a justification for regulation is to be found in those provisions directing that rates shall be "just and reasonable"[88] and "not unjustly discriminatory or unduly preferential".[89] It is no exaggeration to suggest that *the statutory mandate of the CRTC both begins and ends with the responsibility of ensuring that these two requirements are met.*

To call this function a "mandate", however, is something of a misnomer. While the Commission clearly has a duty to see that rates are just and reasonable and not unduly discriminatory, the Act leaves it entirely

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[88] S. 321(1).
[89] S. 321(2).

without guidance as to the ultimate social, economic and/or political goals to be furthered by rate regulation. The *Railway Act* also fails to provide any standards or criteria by which to assess the justness and reasonableness of rates, which further compounds the problem. What, after all, is a "just and reasonable" and "not unduly discriminatory" rate? Is it one based on the firm's cost of providing the service or one based on the value of the service to each customer? Is it one which promotes the economic goal of efficient resource allocation or one which promotes the social goal of universal access to basic services at affordable prices? Is it one which promotes regional economic development or one which favours the rapid growth of existing business and commercial centres? Are just and reasonable rates meaningful only in a monopoly environment or does the duty to ensure that rates meet this rather elastic standard extend to actively promoting a more competitive environment in telecommunications?

Despite the critical importance of these questions, the Act is of little assistance in answering them. The result is that the regulator — whether by design or default — appears to have been granted extremely broad discretion in exercising its statutory "mandate". Moreover, the CRTC, unlike its predecessors, has not hesitated to use this discretion to assert its authority over virtually every aspect of the market conduct of firms within its jurisdiction.

(b) *The Jurisdiction of the CRTC*

The *Railway Act* limits the jurisdiction of the CRTC to "companies" as defined in subsection 320(1) of the Act. Unfortunately, the terminology employed in this definition has failed to keep pace with the technological developments of the past two decades, thereby greatly diminishing its predictive value. According to subsection 320(1), "company" means:

> a railway company or person authorized to construct or operate a railway, having authority to construct or operate a telegraph or telephone system or line, and to charge telegraph or telephone tolls, and includes also telegraph and telephone companies and every company and person within the legislative authority of the Parliament of Canada having power to construct or operate a telegraph or telephone system or line and to charge telegraph or telephone tolls.

Recently, as part of two separate issue hearings, the federal regulator has held cellular radio providers to be "companies", as contemplated under the Act,[90] while finding non-telephone company suppliers of enhanced services not to be "companies" and, hence, to be outside the

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90 *Cellular Radio Service, CRTC Telecom. Public Notice 1984-85*, 118 Can. Gazette Pt. I, 8472 (25 October 1984) [hereinafter *Cellular Radio Service*].

Commission's jurisdiction.[91] No supporting rationale for either of these determinations has been offered by the CRTC even though, in the case of the latter decision, a strong argument might have been advanced for treating all enhanced service providers as "companies" under the *Railway Act*. While neither decision has thus far been challenged in the courts, the possibility of such a challenge at some future date must be kept in mind.

As competition heats up in the industry and the number of non-telephone company telecommunications service providers continues to grow, the issue of where the jurisdiction of the regulator ends and where that of the competition law authorities begins can only increase in importance. Barring revisions to the *Railway Act*, the role, initially of the regulator and ultimately of the courts, in resolving these jurisdictional disputes, will become correspondingly more prominent.

(c) *The CRTC's Authority to Regulate Market Conduct*

As noted above, the CRTC's jurisdiction is defined in terms of "companies" and not markets or market activities. This raises the question of what types of market conduct, engaged in by companies within the Commission's jurisdiction, the CRTC is statutorily empowered to regulate. Close inspection of sections 320-22[92] reveals that the Commission is *expressly* authorized to regulate the following: (1) pricing,[93] (2) the terms and conditions of network interconnection (that is, access to bottleneck facilities),[94] (3) all working agreements to be entered into between the company and other providers of telecommunications services, whether or not the latter are otherwise subject to the Commission's jurisdiction[95] and (4) the terms and conditions under which traffic may be carried by the company.[96]

To this list should also be added those forms of market conduct indirectly coming within the CRTC's jurisdiction by virtue of a number of Special Acts of Parliament. These Acts include: the various Bell Canada Acts,[97] the British Columbia Telephone Company Act of incorporation and subsequent amendments,[98] the *Telegraphs Act*[99] and other similar

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91 *Enhanced Services, Telecom. Decision CRTC 84-18*, 118 Can. Gazette Pt. I, 6117 (12 July 1984) [hereinafter *Enhanced Services*].

92 *Railway Act*, R.S.C. 1970, c. R-2.

93 Ss. 320(2)-(6), (10) and 321(1)-(5).

94 Ss. 320(7)-(9) and 265.

95 S. 320(1).

96 S. 322(3).

97 *See, e.g.*, the several Acts cited in note 79, *supra*.

98 The British Columbia Telephone Company was originally incorporated as the Western Canada Telephone Company. *See An Act to Incorporate the Western Canada Telephone Company*, S.C. 1916, c. 66, *as am. An Act Respecting British Columbia Telephone Company*, S.C. 1940-41, c. 36.

99 R.S.C. 1970, c. T-3.

statutes.[100] Among the restrictions imposed on specific carriers, and which it is the Commission's responsibility to enforce pursuant to these other statutes, are: (1) the obligation to serve all customers under specified circumstances;[101] (2) the terms and conditions which such carriers may impose on the attachment to the network of customer owned equipment;[102] (3) an outright ban on entry into certain types of markets (for example, broadcasting and equipment manufacturing);[103] (4) limits on the issue and sale of company stock;[104] and (5) a host of restrictions on the size, dimensions, location, physical appearance, *et cetera*, of physicial plant and equipment erected on public property.[105]

Comprehensive as this extended list may appear to be, there still exist a number of very important elements of market conduct for which the Commission does *not* possess authority to regulate. These include corporate policies related to the nature, level and quality of service provision, marketing and sales promotion (excluding pricing), investment in new capacity, research and development expenditures and, to some extent, horizontal and vertical integration. But as will be seen later in the paper,[106] this has *not* prevented the regulator from asserting its authority over every one of these elements of market conduct on the grounds that such intervention is necessary to ensure that rates are just and reasonable and not unduly discriminatory.[107]

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[100] Special Act is defined in the *Railway Act*, R.S.C. 1970, c. R-2, s. 320(1) as:

> any Act under which the company has authority to construct or operate a telegraph or telephone system or line, or which is enacted with special reference to any such system or line, and any letters patent constituting a company's authority to construct or operate a telegraph or telephone system or line, granted under any Act, and the Act under which such letters patent were granted, and includes the *Telegraphs Act* and any general Act relating to telegraphs or telephones.

[101] *See An Act Respecting the Bell Telephone Company of Canada*, S.C. 1902, c. 41, s. 2.

[102] *See An Act Respecting the Bell Telephone Company of Canada*, S.C. 1967-68, c. 48, s. 6.

[103] *See An Act Respecting the Bell Telephone Company of Canada*, S.C. 1967-68, c. 48, s. 6.

[104] *See An Act Respecting the Bell Telephone Company of Canada*, S.C. 1957-58, c. 39, s. 2. This provision was first introduced in an earlier Act with the same title, S.C. 1929, c. 93, s. 1(2).

[105] *See, e.g., An Act Respecting the Bell Telephone Company of Canada*, S.C. 1967-68, c. 48, s. 10.

[106] *See generally* Section IV (THE ROLE OF THE REGULATOR), *infra*.

[107] Among the most important statutory means available to the CRTC in giving effect to its mandate under the *Railway Act*, R.S.C. 1970, c. R-2, are the following powers:

> (1) The power to suspend, postpone and disallow tolls, to require new tariffs to be submitted, or to prescribe other tolls in lieu of ones which have been disallowed (s. 321(4)).

Indeed, as will be reviewed somewhat later,[108] the CRTC on occasion has contemplated, if not actually resorted to, using means arguably beyond its statutory authority to employ. The primary focus of this later discussion will be to explore the implications of such regulatory actions on the efficacy of Canadian competition policy.

(d) *The Role of Competition Law in Telecommunications Markets*

If there is a role to be played by competition and, hence, competition law, within the telecommunications industry, it is given no concrete expression in the *Railway Act*.[109] At the same time, the Act contains little to suggest that many telecommunications markets could not be competitive or subject to at least some provisions of the *Competition Act*.[110]

Consider, first, the statutory mandate of the CRTC. It consists of the duty to ensure that rates are just and reasonable and not unjustly discriminatory or unduly preferential. Strictly speaking, the pursuit of these limited ends is market structure neutral. That is to say, just and reasonable and not unduly discriminatory rates are equally compatible with monopolistic and competitive market structures.

Of course, viewing this legislation from the historical perspective developed above in Section II, it is difficult to argue that Parliament envisioned anything other than regulated monopoly as the appropriate

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(2) The power to classify services and establish different rate structures (s. 320(4)).
(3) The authority to prescribe the form and manner in which all tariffs are to be filed and published (s. 320(3), (6)).
(4) The ability to approve or disallow applications for network interconnection or to order interconnection on whatever terms and conditions it deems proper (s. 320(7), (8), (9)).
(5) The power to order a discontinuance of network interconnection (s. 320(10)).
(6) The power to prescribe the terms upon which terminal attachment may be permitted if the requirements established by companies within its jurisdiction are unreasonable (*An Act Respecting the Bell Telephone Company of Canada*, S.C. 1967-68, c. 48, s. 6).
(7) A general power "to make orders with respect to all matters relating to traffic, tolls and tariffs" not dealt with elsewhere in s. 321 (s. 321(5)).
(8) The power to compel production of various types of financial information (ss. 325, 335).
(9) And, finally, the power to forbear from regulating rates (s. 320(3)).

Significantly, the Commission has not hesitated to rely on any of these powers, with the exception of the fifth, in pursuing what it considers to be its statutory mandate.

108 *See* Section IV (THE ROLE OF THE REGULATOR), *infra*.

109 R.S.C. 1970, c. R-2.

110 (Being part 2 of *An Act to Establish the Competition Tribunal and to Amend the Combines Investigation Act and the Bank Act and Other Acts in Consequence Thereof*, 1st Sess., 33d Parl., 1986 (assented to 17 June 1986)).

market structure for the telecommunications industry. The crucial point is that, as in the United States, this assumption was never given statutory expression. Neither the *Railway Act*[111] nor any other federal statute confers a legal monopoly upon an individual telecommunications carrier. New entry, thus, has always remained a possibility requiring no special legislative amendment to the *Railway Act*.

It might, of course, be argued that although the *Railway Act* nowhere directly favours one market structure over another *for the industry as a whole*, there appears to be a bias in favour of monopoly in so far as the provision of basic local services is concerned. Subsection 320(8), in particular, appears to suggest that not only is the regulator not to encourage network interconnection of competing telecommunications systems at the local level, but that it is entirely without authority to do so, except in certain very limited circumstances.

On the other hand, there is nothing in the *Railway Act* to suggest that competition in long distance markets is to be discouraged by the regulator. In fact, paragraph 274(1)(c) and subsection 274(4), which apply to the telecommunications industry by virtue of subsection 320(12), appear to anticipate competition among rival carriers in long distance markets by expressly authorizing companies to issue "competitive rate tariffs" to "meet competition".

Even accepting for the moment that the *Railway Act* when first introduced was not designed with competition in mind, there exist at least four different avenues, short of legislative amendment, by which competition — and to a lesser extent, competition law — may begin to play a greater role in the evolution of the industry.

First, the regulator (and/or the courts on appeal) may determine that the *Railway Act* does not apply to certain suppliers of telecommunications services. This would require a finding that such businesses fall outside the definition of telephone and telegraph "companies" as set out in subsection 320(1) of the Act. As a result, the CRTC would be entirely without jurisdiction to regulate the operations of such enterprises. Responsibility for policing the market conduct of such firms would instead reside exclusively with the competition law authorities.

Second, the regulator (and/or the courts on appeal) might find that even though the firms in question come within the jurisdiction of the Commission, not all aspects of the market conduct of these firms are similarly within the statutory authority of the CRTC to regulate. This possibility arises because the regulator's overall jurisdiction is company specific, while its express regulatory powers are activity specific. An important implication is that the statutory jurisdictions of the regulator and competition law authorities may not be mutually exclusive. For any given "company", those aspects of market conduct not expressly subject to

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[111] R.S.C. 1970, c. R-2.

regulation may by default fall within the ambit of the power to police given to the Director of Investigation and Research.

Third, the regulator (and/or the courts on appeal) may determine that the CRTC is authorized by the relevant legislation (in this case subsection 320(3) of the *Railway Act* and section 46 of the *National Transportation Act*[112]) to forbear from regulating certain types of conduct within specified telecommunications markets on the grounds that competitive forces therein are sufficient to ensure that the Commission's statutory mandate will continue to be met.[113] In such circumstances there is nothing in the *Railway Act* to suggest that competition law should not apply to those elements of market conduct the Commission has declined to actively regulate, notwithstanding its authority to do so. Moreover, this conclusion holds true whether regulatory forbearance is a manifestation of deliberate Commission policy or is simply the result of inadvertence.[114]

This is not to suggest that regulatory forbearance implies a permanent loss of regulatory jurisdiction. As we have argued elsewhere,[115] forbearance is not irreversible. If, in the opinion of the regulator, the circumstances upon which forbearance was premised have changed to such an extent as to warrant a return to active regulation, there is nothing to prevent the Commission from adopting such course of action. During the interregnum — that is, during the period in which the regulator has seen fit to rely on market forces rather than administrative fiat as the preferred means of giving effect to its mandate — the rights and liabilities of competitors with respect to their customers, suppliers and each other should be governed by competition law. They should not be governed retroactively by that body of regulatory law temporarily suspended with the shift to forbearance, nor should they be subject to no law at all.

The fourth and final means by which competition may come to play a more important role in telecommunications, unlike the previous scenarios,

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

[113] Examples of markets in which there has been forbearance include cellular radio, enhanced services, data and multi-line terminal equipment and satellite earth station services.

[114] To argue otherwise inexorably leads to some very unpalatable conclusions. Either, (1) regulatory forbearance is without legal force, in which case the only remedy available to competitors harmed by conduct later deemed inappropriate by the regulator may be the (*de facto*) retroactive imposition of remedial regulation, or (2) neither competition law nor regulation apply to such markets until regulation is actively asserted or reasserted, as the case may be. It follows that in the interim market rivalry may be governed by no legal rules at all.

The correct, and certainly more acceptable legal view, it is contended, is that having been granted free reign to compete in markets nominally subject to regulation, competitors engaging in potentially illegal conduct should be estopped from arguing that federal competition laws do not apply to them. Competition and competition law should go hand in hand, especially where the decision to forbear is premised on the conviction that the "discipline of the market" is the best means by which the statutory mandate of the regulator may be achieved.

[115] *See Regulatory Forbearance*, *supra*, note 82 at 465.

appears to offer little or no corresponding role for Canadian competition law. What this last scenario envisages is liberalized entry into specified markets (whether initiated by the regulator, the Cabinet or the Minister of Communications)[116] without provision for any concommitant reduction in the regulatory requirements imposed on the conduct and operations of market participants. Since in this situation regulation continues to be actively (and by assumption, legally) exercised, there appears to be little scope for the enforcement of federal competition laws. In any event, the *Railway Act*[117] will be of no further assistance in this regard. If additional insights are to be had, they will have to be found in other statutes.

Next to be considered will be the *National Transportation Act*[118] and, much more important for the purposes of this article, the *Competition Act*[119] itself.

3. *The National Transportation Act*

If the *Railway Act*[120] is inconclusive with respect to the division of responsibilities between the regulator and the Director in policing market conduct within the telecommunications industry, then the *National Transportation Act* (*NTA*)[121] is certainly no better. At first glance, it is not evident that the *NTA* even deals with telecommunications, much less the role of competition law within the industry. Its relevance to telecommunications comes only by way of reference to other statutes, principally, the *CRTC Act*,[122] the *Railway Act* and the various Special Acts.[123]

Subsection 14(3) of the *CRTC Act*, it will be recalled, provides that sections 17-19 and Part IV of the *NTA* (sections 43-82) apply *mutatis mutandis* to telecommunications. This being the case, neither section 3 nor section 27 of the *NTA*, which provide a number of insights into the role of competition and competition law in the transportation industry, are of much relevance to this discussion. It should be noted that section 3 of the *NTA* provides, in effect, that the objectives of Canadian transportation

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116 Entry into all forms of communications supply relying on microwave technology requires a licence issued by the Minister of Communications. Entry into local markets through switching facilities of existing carriers requires the further approval of the regulator, without which interconnection may not proceed.

117 R.S.C. 1970, c. R-2.

118 R.S.C. 1970, c. N-17.

119 (Being part 2 of *An Act to Establish the Competition Tribunal and to Amend the Combines Investigation Act and the Bank Act and Other Acts in Consequence Thereof*, 1st Sess., 33d Parl., 1986 (assented to 17 June 1986)).

120 R.S.C. 1970, c. R-2.

121 R.S.C. 1970, c. N-17.

122 S.C. 1974-75-76, c. 49.

123 "Special Acts" is not defined in the *NTA*, however, s. 43 gives words used in Part IV "the same meaning as in the *Railway Act*". *See supra*, note 100.

policy (as enumerated therein) are most likely to be achieved in an environment characterized by relatively unhindered *intermodal* competition. Much of the remainder of the Act concerns itself with facilitating this type of competition.[124]

Of those provisions in the *NTA* which are relevant to telecommunications, the most important for the purposes of this paper are subsection 45(2) and section 46. For convenience, these are reproduced below.

> 45(2) The Commission may order and require any company or person to do forthwith, or within or at any specified time, and in any manner prescribed by the Commission, so far as is not inconsistent with the *Railway Act*, any act, matter or thing that such company or person is or may be required to do under the *Railway Act*, or the Special Act, and may forbid the doing or continuing of any act, matter or thing that is contrary to the *Railway Act*, or the Special Act, and for the purposes of this Part and the *Railway Act* has full jurisdiction to hear and determine all matters whether of law or of fact.
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> 46(1) The Commission may make orders or regulations
>
> (a) with respect to any matter, act or thing that by the *Railway Act* or the Special Act is sanctioned, required to be done, or prohibited;
>
> (b) generally for carrying the *Railway Act* into effect; and
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> (c) for exercising any jurisdiction conferred on the Commission by any other Act of the Parliament of Canada.
>
> (2) Any such orders or regulations may be made to apply to all cases or to any particular case or class of cases, or to any particular district, or to any railway or other work, or section or portion thereof; 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 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.
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> (3) The Commission may by regulation or order provide penalties, when not already provided in the *Railway Act*, to which every company or person who offends against any regulation or order made by the Commission shall be liable.
>
> (4) The imposition of any such penalty does not lessen or affect any other liability that any company or person may have incurred.

Taken together these provisions suggest that one of the purposes of the *NTA*, in so far as it relates to telecommunications, is to provide the CRTC

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124 Section 27 of the *NTA*, meanwhile, directly addresses the nexus between federal competition law and regulation in the transport sector. Although beyond the scope of this paper to discuss, it is sufficient to observe that at least with respect to mergers, take-overs and acquisitions the *NTA* expressly provides that final approval of such transactions involving undertakings or businesses engaged in transportation, lies not with the Canadian Transport Commission but, rather, with the Director. Whether the Director's authority to enforce competition policy inside the transport sector is limited to mergers and acquisitions, however, is left unclear by section 27 and the remaining provisions of the Act.

with greater flexibility in ensuring that its statutory mandate is met. The *NTA* accomplishes this by expressly affording the CRTC a remarkable breadth of discretion in exercising its *existing* statutory powers. What the *NTA* does not do is enhance, diminish, or alter in any substantial way the jurisdiction, powers, or duties of the Commission as set out in the *Railway Act* and various Special Acts.

Consider, for example, subsection 45(2) of the *NTA*. It provides, in part, that whenever any act, matter or thing *is required to be done* under the *Railway Act* or a Special Act, by any person or company, the Commission may order or require such act, matter or thing to be done *in any manner* it chooses to prescribe, provided only that such order *is not inconsistent with* the *Railway Act*. In other words, it is the *Railway Act* and not the *NTA* which ultimately governs the statutory powers and duties of market participants and the regulator alike and which, in the limit, defines the permissible means by which such powers and duties are to be exercised.

Subsection 46(1) of the *NTA*, although capable of supporting the above interpretation, is somewhat more ambiguous, particularly paragraphs (b) and (c) thereof. Paragraph 46(1)(a), in contrast, poses no problems. In expressly granting the CRTC the power to make *orders and regulations* with respect to any matter, act or thing sanctioned, required to be done, or prohibited under the *Railway Act* or any relevant Special Act, it adds little to what is already found in subsection 45(2). Its purpose, like that of subsection 45(2), is merely to ensure that the Commission, in seeking to perform its duties, possesses the necessary flexibility to exercise the statutory powers vested in it elsewhere. While the same rationale may be said to underlie paragraphs 46(1)(b) and (c) of the *NTA*, the process of reaching this conclusion is somewhat more difficult. Paragraphs 46(1)(b) and (c) authorize the CRTC to make orders and regulations "generally for carrying the *Railway Act* into effect" and "for exercising any jurisdiction conferred on the Commission by any other Act of the Parliament of Canada", respectively. Clearly, neither provision expands in any way the *jurisdiction* or *duties* of the CRTC. The question that remains, however, is whether the very broad wording of these paragraphs create any new *powers* in the Commission.

The answer to this question, it is suggested, is in the negative. A *general* power to make orders and regulations for the purpose of carrying other statutes into effect or exercising a jurisdiction conferred by other statutes cannot be construed as creating fundamental new powers, that is, powers that cannot logically be derived from the original enabling legislation. The only way in which Parliament can substantially alter existing regulatory powers is to either (1) expressly amend the earlier legislation and/or (2) explicitly define the nature and scope of the new powers it seeks to vest in the regulator in the later-enacted legislation. To argue otherwise raises a very disturbing possibility, namely, that paragraphs 46(1)(b) and (c) of the *NTA* potentially authorize the CRTC to use any means it sees fit, regardless of how extreme, in pursuing its statutory duties. The courts have

consistently rejected such extremes of statutory interpretation for essentially the same reasons as those given above.[125]

Subsection 5(1) of the *NTA* may also be marshalled in support of a more limited interpretation of the types of powers vested in the CRTC by virtue of paragraphs 46(1)(b) and (c). It provides that:

> Except as otherwise expressly provided by this Act, the provisions of Part IV [which includes paragraphs 46(1)(b) and (c)] relating to sittings of the Commission and the disposal of business, witnesses and evidence, practice and procedure, orders and decisions of the Commission and review thereof and appeals therefrom apply in the case of every inquiry, complaint, application or other proceeding under this Act, the *Railway Act*, the *Aeronautics Act* or the *Transport Act* or any other Act of the Parliament of Canada imposing any duty or function on the Commission; and the Commission shall exercise and enjoys the same jurisdiction and authority in matters under any such Acts as are vested in the Commission under Part IV of this Act.

Before commenting on the significance of the above provisions it is important to recall that at the time the *NTA* was first introduced, the Canadian Transport Commission (CTC) was responsible for regulating both transportation and telecommunications at the federal level. The statutory jurisdiction, powers and duties of the CTC with respect to railways, airlines, water transport, extra-provincial motor vehicle transport, commodity pipelines and telecommunications, unfortunately, could only be determined by reference to a maze of unrelated statutes. The purpose of Part IV of the Act, it is submitted, was to clarify, consolidate in one Act and render more uniform the exercise of all such powers vested in the CTC as were minimally necessary for it to adequately conduct and/or dispose of all *inquiries, complaints, applications and other proceedings* with respect to matters within its jurisdiction, regardless of the federal statute under which such administrative actions were begun. This explains why Part IV of the Act, the statutory title of which is "General Jurisdiction and Powers in Respect of Railways", expressly applies not only to railways (and telecommunications), but, in so far as provided for in section 5, to all other forms of transport as well.

If, however, paragraphs 46(1)(b) and (c) are interpreted as conferring sweeping and virtually limitless new powers upon the CRTC, then, by virtue of the last clause in section 5, they must also confer the same new powers upon the CTC with respect to all sectors of the transportation industry within the latter's jurisdiction. Surely this possibility strains this interpretation of paragraphs 46(1)(b) and (c) to the breaking point. Were it really Parliament's intention to confer upon the CRTC and CTC any and all such powers necessary to effect the purpose of all federal statutes dealing with transportation and telecommunications, then most of the other provisions of the *NTA* would have been redundant. The implausibility of this

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125 As H.W. Arthurs observed in evidence to the MacGuigan Report, a power to make regulations "for carrying out the purpose and provisions of this Act [are] . . . not usually held to sustain anything more than fairly routine procedural regulations". *Third Report of the Special Committee on Statutory Instruments* (Ottawa: Queen's Printer, 1969) (Chair: M. MacGuigan) at 31.

result clearly compels one to accept the narrower interpretation of what paragraphs 46(1)(b) and (c) in fact seek to accomplish.

If in reaching this conclusion it appears that we have belaboured the obvious, it must be stressed that the central argument to be developed in this article depends critically on the *NTA not* being able to support a substantially wider interpretation of the CRTC's statutory powers than it presently enjoys under the *Railway Act*. As has already been intimated, one of the more important assumptions of this article is that while the CRTC possesses, both under the *Railway Act* and the *NTA*, at least a limited power to forbear from regulation, it does not, for example, have the power to police competition by ordering structural separation pursuant to either of these same two statutes. The significance of these various statutory limitations on the CRTC's ability to police market conduct in a competitive environment, and the concommitant importance of the competition law authorities more aggressively asserting their jurisdiction, will be explored in much greater detail below.[126]

Before leaving the *NTA* to examine the statutory mandate of the Director of Investigation and Research and the Competition Tribunal under the *Competition Act*,[127] two final and potentially very significant provisions of the *NTA* should be noted.

The first relates to subsection 46(3) which authorizes the CRTC to penalize any person or company contravening an existing Commission regulation or order, even though no penalty for such offence may be provided for under the *Railway Act*. Exactly how drastic this power may be is not made explicit in the *NTA*. It thus raises precisely the same questions as paragraphs 46(1)(b) and (c) and demands precisely the same type of answer. That is, the power vested in the Commission to penalize conduct not expressly subject to sanction under the *Railway Act*[128] should not be construed as empowering the regulator to create entirely new and possibly draconian forms of penalties. The better view, it is submitted, is that subsection 46(3)[129] goes no further than to authorize the Commission to enforce new varieties of orders and regulations not explicitly covered by the *Railway Act* with penalties of a quality and character similar to those actually mentioned in the *Railway Act*. Lending some support to this view is the argument that subsection 46(3) of the *NTA* goes no further than to make explicit (and perhaps elaborate somewhat upon) the Commission's latent authority to penalize conduct in violation of regulations relating to traffic, tolls and tariffs found in subsection 321(5) of the *Railway Act*.

A final issue with respect to the *NTA* that demands comment is the significance to be assigned subsection 46(4). That subsection provides that

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126 *See* section IIIB (*The Statutory Mandate of the Competition Law Authorities*), *infra*.

127 *Competition Tribunal Act* (being part I of *An Act to Establish the Competition Tribunal and to Amend the Combines Investigation Act and the Bank Act and Other Acts in Consequence Thereof*, 1st Sess., 33d Parl., 1986 (assented to 17 June 1986)).

128 R.S.C. 1970, c. R-2.

129 *NTA*, R.S.C. 1970, c. N-17.

where a penalty has been imposed pursuant to subsection 46(3) of the *NTA*, it "does not lessen or affect any other liability that any company or person may have incurred". What is unfortunately missing from subsection 46(4) is any indication of whether the "other liability" referred to is restricted to such as may be found in the *Railway Act* or whether it includes liabilities created by other Acts of Parliament. If the latter interpretation was in fact intended, it leaves wide open the possibility that, at least in certain circumstances, conduct in violation of regulations governing competitive behaviour may also be subject to sanction under federal competition laws. These circumstances will be explored more fully in the discussion of the regulated conduct exemption.[130]

B. *The Statutory Mandate of the Competition Law Authorities*

Bill C-91,[131] which amends and replaces the *Combines Investigation Act*[132] with the *Competition Tribunal Act*[133] and a new *Competition Act*,[134] received Royal Assent on June 17, 1986. This legislation brings with it a number of important changes.

The Restrictive Trade Practices Commission (RTPC) has been abolished and replaced by a new quasi-judicial Competition Tribunal,[135] the jurisdiction of which is confined to civil law matters.[136] The principal duties of the Tribunal will be to enforce the Act's merger provisions[137] and to deal with a number of restrictive trade practices (formerly reviewable by the RTPC), as well as a new category of specifically enumerated "anticompetitive acts" constituting the newly created offence of "abuse of dominant position".[138]

Hand in hand with the creation of the Competition Tribunal is the decriminalization of the former merger and monopoly offences. Mergers are now simply a matter reviewable by the Tribunal, while the "old" monopoly offence has been repealed altogether and replaced by an array of proscribed types of anticompetitive conduct coming within the definition

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130 *See* section VIII, *infra*.

131 Bill C-91, *An Act to Establish the Competition Tribunal and to Amend the Combines Investigation Act and the Bank Act and Other Acts in Consequence Thereof*, 1st Sess., 33d Parl., 1986 (assented to 17 June 1986) [hereinafter Bill C-91].

132 R.S.C. 1970, c. C-23.

133 (being part 1 of *An Act to Establish the Competition Tribunal and to Amend the Combines Investigation Act and the Bank Act and Other Acts in Consequence Thereof*, 1st Sess., 33d Parl., 1986 (assented to 17 June 1986)).

134 (being part 2 of *An Act to Establish the Competition Tribunal and to Amend the Combines Investigation Act and the Bank Act and Other Acts in Consequence Thereof*, 1st Sess., 33d Parl., 1986 (assented to 17 June 1986)).

135 Bill C-91, cls. 2, 3, 20(1), (2) and 24.

136 Cl. 8.

137 Cl. 47 (*Competition Act*, ss. 63-75).

138 Cl. 47 (*Competition Act*, ss. 50-51).

of "abuse of dominant position".[139] Significantly, most of the remaining criminal provisions of the *Combines Investigation Act* have been retained in the new *Competition Act*.[140]

The *purpose* of the *Competition Act*, as set out in section 1.1 of the new legislation is to:

> maintain and encourage competition in Canada in order to promote the efficiency and adaptability of the Canadian economy, in order to expand opportunities for Canadian participation in world markets while at the same time recognizing the role of foreign competition in Canada, in order to ensure that small and medium-sized enterprises have an equitable opportunity to participate in the Canadian economy and in order to provide consumers with competitive prices and product choices.[141]

In other words, the *statutory mandate* of the Director and the Competition Tribunal is to "maintain and encourage competition in Canada" in order to promote specified economic and social objectives. Although these objectives may be comparatively clear, the actual scope of the Director's and Competition Tribunal's authority to promote them — through the enforcement of the Act's various provisions — is much less obvious. This is because the Act only indirectly defines the reach of Canadian competition law.

In order to determine the jurisdiction of the competition law authorities one must first turn to the interpretation section of the *Competition Act*.[142] Section 2 declares that, unless elsewhere provided, the Act applies to all "businesses", "corporations", "companies", "articles", "products" and "services". *Prima facie, therefore, the Act would appear to extend to all forms of economic activity and endeavour, whether regulated or not.*

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139 Sections 2 and 33 of the *Combines Investigation Act*, R.S.C. 1970, c. C-23 (which used to define and set out penalties for the formation of a monopoly, respectively) have been repealed pursuant to clauses 20 and 33 of Bill C-91. Indeed, so thorough has been the effort to decriminalize the monopoly offence that the new *Competition Act* is entirely devoid of all reference to the term "monopoly". Under the new legislation neither the process of acquiring a monopoly nor maintaining or aggrandizing it are in any way objectionable, provided only that these results are achieved by superior economic performance and not the exercise of restrictive trade practices, as defined in the Act, or through the consummation of anti-competitive mergers.

140 For example, price discrimination, the use of discriminatory promotional allowances, misleading advertising, double-ticketing, pyramid selling, referral selling, bait and switch selling, resale price maintenance, bid-rigging and conspiracy in restraint of trade will all continue to be prosecuted under the criminal law. The only major amendments to these provisions in Bill C-91 relate to the conspiracy offence. These, however, need not concern us here.

141 Bill C-91, cl. 19.

142 S. 2 (Bill C-91, cl. 20). For the purposes of the discussion here, section 2 of the *Competition Act* is identical to section 2 of the *Combines Investigation Act*, R.S.C. 1970, c. C-23.

This presumption, however, is somewhat undermined by sections 97 and 98 of the *Competition Act*.[143] For example, subsection 97(1) stipulates that:

> The Director, at the request of any *federal board, commission or other tribunal* or on his own initiative, may, and on direction from the Minister shall, make representations to and call evidence before the board, commission or other tribunal in respect of competition, whenever such representations are, or evidence is, relevant to a matter before the board, commission or other tribunal, and to the factors that the board, commission or other tribunal is entitled to take into consideration in determining the matter.[144]

Subsection 97(2) goes on to define "federal board, commission or other tribunal". It is immediately apparent from this definition that the CRTC is precisely the type of regulatory agency Parliament sought to capture in subsection 97(1).

Subsection 98(1)[145] is worded identically to subsection 97(1) in all but three very important respects. First, it deals with appearances of the Director before *provincial* as opposed to federal boards, commissions or tribunals. Second, it denies the Director the right to appear before provincial regulatory bodies (as defined in subsection 98(2)) absent their express request or consent. Third, no provision exists in subsection 98(1) by which the Director may be compelled by ministerial direction to appear and give evidence before a provincial regulatory commission in a matter related to competition.

Together, sections 97 and 98 might appear to suggest that the Director may at best play only an *advisory role* with respect to the maintenance of competition in federally regulated industries, and possibly no role whatsoever with respect to provincially regulated activities and undertakings.[146] It could be argued on this basis that there exists, at least implicitly, a form of "regulated conduct exemption" in the *Competition Act*.

It is submitted, however, that this interpretation of the jurisdictional limits of federal competition policy is flawed for two reasons. First, had Parliament intended to exempt all regulated industries from the operation

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143 Part IX (Bill C-91, cl. 47).

144 Bill C-91, cl. 47 (emphasis added).

145 Bill C-91, cl. 47.

146 Section 97, it should be noted, is not new. It appeared in essentially the same form as section 27.1 of the former *Combines Investigation Act*, R.S.C. 1970, c. C-23. Section 98, on the other hand, is an entirely new statutory provision. Although there is nothing in the *Competition Act* to suggest why it was included in the new Act, the rationale, in all likelihood, was to *clarify* the authority of the Director to appear before provincial tribunals rather than to *remove* from the Director any authority he might have had in this respect under the earlier legislation. The need for such clarification is amply demonstrated by two cases presently before the Supreme Court of Canada in which the issue to be resolved is precisely that addressed by section 98 of the *Competition Act*. *See*, along with annotations by A.J. Roman, *Newfoundland Tel. Co.* v. *TAS Communications* (1985), 11 Admin. L.R. 211; *Hunter* v. *New Brunswick Pub. Util. Comm'n* (1985), 11 Admin. L.R. 221.

of the Act, it could have done so directly. The Act, after all, is replete with specific exemptions. Section 4, for example, removes from the scope of federal competition law various groups and activities including labour unions, fishermen, securities dealers and amateur sport. Paragraph 32(6)(a) excludes from liability for criminal conspiracy any "combination, agreement or arrangement [that] relates only to a service and to standards of competence and integrity that are reasonably necessary for the protection of the public in the practice of a trade or profession relating to such service". Elsewhere in Bill C-91 provisions exist that explicitly exclude from prosecution under the *Competition Act* the activities of agricultural marketing boards (section 57) and shipping conferences (section 63). In light of these and other exemptions in the legislation, the fact that no exemption was expressly included for regulated industries in general, and the telecommunications industry in particular, strongly suggests that none was intended.

Second, over the past decade Parliament has on more than one occasion considered various amendments to the *Combines Investigation Act* that would have expressly exempted regulated industries from the scope of federal competition law in certain circumstances.[147] The complexity and sophistication of some of these earlier-proposed, but never enacted, statutory exemptions for regulated industries clearly indicate that Parliament had given the matter considerable attention. The fact that Parliament chose not to include a statutory exemption for regulated industries in the version of new competition legislation that was finally enacted thus suggests that the omission was by design rather than inadvertence or oversight.

But even if the courts were to interpret sections 97 and 98 of the *Competition Act* as creating a regulated industries exemption, rather than merely setting out the Director's authority to appear before federal and provincial regulatory tribunals in the capacity of intervenor, without otherwise limiting his powers to enforce the *Competition Act*, a critical question would remain unanswered. Sections 97 and 98 still leave unclear whether the relevant tribunal must actually be *exercising* its express statutory authority, or whether it is sufficient for it merely to *possess* such authority, to render the conduct of market participants within its jurisdiction immune from prosecution under federal competition law. Stated somewhat differently, and in a manner of particular relevance to telecommunications, the *Competition Act* leaves open the question of the Director's and the

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147 *See, e.g.*, Bill C-13, *An Act to Amend the Combines Investigation Act and to Amend the Bank Act and Other Acts in Relation Thereto or in Consequence Thereof*, 3d Sess., 30th Parl., 1977, ss. 4.5-4.6. *See also* the discussion with respect to these provisions of Bill C-13 in G.S. Kaiser, *Competition Law and the Regulated Sector* in J.R.S. Prichard, W.T. Stanbury & T.A. Wilson, eds., CANADIAN COMPETITION POLICY: ESSAYS IN LAW AND ECONOMICS (Toronto: Butterworths, 1979) 347 at 350-7 [hereinafter Kaiser]; W.T. Stanbury, *How Wide The Ocean? The Regulated Conduct Exemption in Canada* (1984) 29 ANTITRUST BULLETIN 577 at 599-601 [hereinafter Stanbury].

Competition Tribunal's ability to enforce competition policy in markets subject to regulation, but in which there has been regulatory forbearance.

C. *The Statutory Powers and Responsibilities of the Federal Cabinet and the Minister of Communications in Relation to Competition in Telecommunications Markets*

Neither the federal Cabinet nor the Minister of Communications has express statutory authority to encourage or police competition, *per se*, in telecommunications markets. Nevertheless, it is within the power of Cabinet and the Minister of Communications to significantly affect the degree of competition in telecommunications markets by virtue of:

(a) their shared authority to control entry into various service markets;[148]
(b) Cabinet's power to "vary or rescind any order, decision, rule or regulation" of the CRTC;[149] and
(c) the residual authority in relation to telecommunications vested in the Minister and federal Cabinet under the *Government Organization Act, 1969*.[150]

1. *Control Over Entry*

The vigour of competition in any market is to a large extent a function of the ease with which rival suppliers may enter (and exit) that market.[151] In Canada, entry into most telecommunications service markets is governed by the *Radio Act*. Section 3 of that Act provides:

> no person shall (a) establish a *radio station*, or (b) install, operate or have in his possession a *radio apparatus* at any place in Canada . . . except under and in accordance with a licence . . . issued by the Minister under this Act.[152]

From the definitions of "radio apparatus", "radio station", "radiocommunications" and "telecommunications" provided in section 2 of the Act, it would appear that "radio apparatus" and "radio station" include all terrestrial and satellite microwave facilities used in the provision of tele-

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[148] *See, e.g., Radio Act*, R.S.C. 1970, c. R-1, ss. 3-7.

[149] *See NTA*, R.S.C. 1970, c. N-17, s. 64(1).

[150] S.C. 1968-69, c. 28, s. 9.

[151] On this particular point in the recent economic literature on contestability: *see, e.g.*, W. Baumol, *Contestable Markets: An Uprising in the Theory of Industry Structure* (1982) 72:1 AM. ECON. REV. 1; E.E. Bailey, *Contestability and Design of Regulatory Anti-Trust Policy* (1981) 71:2 AM. ECON. REV.(PAPERS AND PROCEEDINGS OF AM. ECON. ASSOC.) 178; A. Dixit, *Recent Developments in Oligopoly Theory* (1982) 72:2 AM. ECON. REV. (PAPERS AND PROCEEDINGS OF AM. ECON. ASSOC.) 12. *See also* R.L. Morris & R.S. Preece, *A Roadmap for Deregulating AT&T* (Paper presented at the 11th Annual Telecommunications Policy Research Conference, 26 April 1983); S.M. Besen and J.R. Woodbury, *Regulation, Deregulation and Antitrust in the Telecommunications Industry* (1983) 28 ANTITRUST BULLETIN 39.

[152] *Radio Act*, R.S.C. 1970, c. R-1 (emphasis added).

communications services. As a result, any person in Canada wishing to supply telecommunications services by means of microwave technology must first obtain a licence from the Minister of Communications. Market structure in various segments of the telecommunications industry thus may be as much, if not more, a function of political considerations as it is of economic ones.

Telecommunications services for which ministerial approval is required as a condition of entry appear to include cellular radio, mobile telephone, radio paging and all local and long distance services in which the transmitted signals are propagated, for however short a distance, through open space without benefit of a tangible, physical medium of carriage.[153] A significant corollary of sections 2 and 3 of the *Radio Act* is that no federal licence appears to be required for a carrier to begin offering any telecommunications service the transmission path of which consists of an unbroken physical medium, such as copper wire, coaxial cable, optic fibre or any combination thereof, from the point of transmission to the point of reception (for example, basic local telephone service). As discussed earlier, however, at least with respect to basic local services, various economic considerations, including existing pricing practices sanctioned by the regulator, militate strongly against entry into this market. The fact that no federal licence is required for entry into local service provision (not relying on microwave technology) thus appears to be of little immediate practical importance.

Potential entrants wishing to provide services for which a licence is required must surmount at least two hurdles before permission to enter may be granted. First, they must meet all qualifications for entry which may be specified by Cabinet pursuant to subparagraph 6(1)(c)(i) of the *Radio Act*. Second, they must demonstrate to the satisfaction of the Minister why their application should be approved. Unfortunately, the Act nowhere provides specific criteria which the Minister is to consider in evaluating applications for new entry. Instead, it accords the Minister a very broad degree of discretion in formulating federal microwave licensing policy. According to the Act: "The Minister *may* . . . issue . . . licences in respect of radio stations and apparatus to the extent that they are not broadcasting undertakings . . . *for such terms and subject to such conditions as he considers appropriate for ensuring the orderly development and operation of radio communication in Canada*".[154] How this statutory mandate has been discharged in practice is explored later in the article.

2. *The Cabinet Review Power*

A second method by which the federal government, in this case the federal Cabinet (technically the Governor in Council), may affect the

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153 This follows directly from the definition of "radiocommunication" in section 2 of the *Radio Act*, R.S.C. 1970, c. R-1.

154 R.S.C. 1970, c. R-1 (emphasis added).

competitiveness of telecommunications markets springs from the powers conferred upon Cabinet by virtue of subsection 64(1) of the *NTA*.[155] Subsection 64(1) provides that:

> The Governor in Council may at any time, in his discretion, either upon petition of any party, person or company interested, or of his own motion and without any petition or application, vary or rescind any order, decision, rule or regulation of the Commission . . . and any order that the Governor in Council may make with respect thereto is binding upon the Commission and upon all parties.

The authority vested in Cabinet by this subsection to alter existing regulatory policy is extreme to say the least. Cabinet's review power may be exercised upon application by interested parties or upon its own motion. It captures virtually every formal pronouncement the regulator may make in its official capacity, and it permits the government to alter such at any time and in any way it sees fit, provided (as will be shown) that the result is still consistent with the purposes of the enabling legislation. Cabinet is under no statutory obligation to render a review decision within any specific length of time, nor must it provide any reasons for its eventual decision.[156]

The actual manner in which this broad power to second-guess the regulator has been exercised in practice will be discussed later.[157]

3. *Powers Under the Government Organization Act, 1969*

The third, albeit somewhat less important, avenue by which the federal government may influence the degree of competitiveness of telecommunications markets arises from the residual powers conferred upon the Minister of Communications by virtue of sections 9 and 10 of the *Government Organization Act, 1969*.[158] Subsection 9(a) provides that:

> The duties, powers and functions of the Minister of Communications extend to and include all matters over which the Parliament of Canada has jurisdiction, not by law assigned to any other department, branch or agency of the Government of Canada, relating to telecommunications.

Section 10, meanwhile, provides in part:

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155 R.S.C. 1970, c. N-17.

156 *See, e.g., Consumers Ass'n of Canada* v. *A.G. Canada* (1978), [1979] 1 F.C. 433 at 440, 87 D.L.R. (3d) 33 at 38-9 (T.D.); *A.G. Canada* v. *Inuit Tapirisat of Canada*, *infra*, note 266 at 746, 115 D.L.R. (3d) at 9.

157 *See* section VI (THE ROLE OF THE MINISTER OF COMMUNICATIONS AND THE FEDERAL CABINET), *infra*. For a review of the unsettled nature of the relationship between government and its agencies, *see generally* H.N. Janisch, *Policy Making in Regulation: Towards a New Definition of the Status of Independent Regulatory Agencies in Canada* (1979) 17 OSGOODE HALL L.J. 46.

158 S.C. 1968-69, c. 28.

> (1) The Minister of Communications, in exercising his powers and carrying out his duties and functions under section 9, shall . . .
>
> (b) promote the establishment, development and efficiency of communications systems and facilities for Canada; [and]
>
> (c) assist Canadian communications systems and facilities to adjust to changing domestic and international conditions.

Given the residual nature of the powers and duties conferred upon the Minister by section 9, it is unlikely that the requirement in section 10 that the Minister "*shall . . . promote . . .* efficiency of communication systems and facilities for Canada" literally translates into a mandate to promote competition by whatever means available. Nevertheless, in light of "changing domestic and international conditions", section 10 of the *Government Organization Act, 1969* would appear to give the Minister considerable leeway to promote increased competition as an integral element of telecommunications policies formulated by his Department.

IV. The Role of the Regulator

In his well-known thesis on "The Life Cycle of Regulatory Commissions", Marver Bernstein suggested that regulatory agencies go through a general pattern of evolution from gestation to youth to maturity and old age.[159] While the CRTC was to display much of the vigour associated with youth in introducing selective competition in Canadian telecommunications as a *supplemental regulatory tool*, it has been largely unable to allow for competition as a *substitute for regulation* because of its lack of clear legal authority to resolve crucial structural issues. As we have seen, this is because its mandate is better suited to monopoly regulation and deals only tangentially with competition.

What the CRTC mandate lacks is any underpinning gestation described by Bernstein: "After a period of earnest agitation for enabling legislation, the statute is finally enacted. It represents the culmination of study of what has come to be recognized as an acute public problem."[160] By contrast, when the CRTC took over responsibility for telecommunications regulation in 1976, it did so on the basis of inherited legislation. As Schultz and Alexandroff have pointed out: "In 1975 when the legislation was before the House of Commons creating the new CRTC, the minister described the move as mere 'housekeeping' introduced to tidy up the federal regulatory system."[161] Although the Commission received no new mandate responsive to the changing telecommunications environment,

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159 *See* M. Bernstein, Regulating Business by Independent Commission (Princeton, N.J.: Princeton University Press, 1955) c. 3, at 74-102 [hereinafter Bernstein].

160 *Ibid.* at 75.

161 Schultz & Alexandroff, *supra*, note 27 at 94.

this was not to diminish the CRTC's "spirit of youthful vigor" described by Bernstein as the predominant attribute of a new agency.[162]

The CRTC's ambitious and assertive stance was reflected in two revealing documents issued shortly after it succeeded the CTC. The first was a statement prepared in advance of a public hearing in July, 1976;[163] the second was by way of a response to the public hearings in which the *July Statement* was closely, and often critically, analyzed.[164]

In the *July Statement*, the CRTC sought to distance itself from the CTC, whose procedures were characterized as being only appropriate to a passive court-like approach to regulation.[165] It was stressed that a responsible regulatory agency should not merely be reactive to particular applications, but should take the initiative by way of broad "issue hearings".[166] Unlike its predecessors, which had always emphasized that they were limited, governed and controlled by their statutory mandate, the *July Statement* conceded only that the CRTC must "have regard to its enabling legislation".[167] Although there had been no actual change in legislative mandate, the CRTC also indicated that it envisaged that substantial change was possible by way of re-evaluation. According to the CRTC: "The new Act has given the Commission not only an opportunity but an obligation to re-examine and re-evaluate regulatory practices and procedures which have been built up since telephone rates were first brought under regulation in 1906."[168]

As for the "objectives of telecommunications regulation", the *July Statement* cast the Commission's primary authority over rates in expansive and malleable terms:

> The principle of "just and reasonable" rates is neither a narrow nor a static concept. As our society has evolved, the idea of what is just and reasonable has also changed, and now takes into account many considerations that would have been thought irrelevant 70 years ago, when regulatory review was first instituted. 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.[169]

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[162] Bernstein, *supra*, note 159 at 80. Of particular relevance to the CRTC was his view that a youthful agency such as the Commission "tends to take a broad view of its responsibilities; and some members of the commission, at least, will develop a fair measure of daring and inventiveness in dealing with their regulatory problems".

[163] *See* CRTC, *Telecommunications Regulation — Procedures and Practices* (Ottawa, 20 July 1976) [hereinafter *July Statement*]. *See also CRTC — Public Notice 1976-2*, 110 Can. Gazette Pt. I, 3804 (20 July 1976).

[164] *CRTC Procedures and Practice in Telecommunications Regulation, Telecom. Decision CRTC 78-4*, 112 Can. Gazette Pt. I, 3610, 4 C.R.T. 104 (23 May 1978) [hereinafter *CRTC Procedures*].

[165] *July Statement*, *supra*, note 163 at 5-6.

[166] *Ibid.* at 12.

[167] *Ibid.* at 3.

[168] *Ibid.* at 4.

[169] *Ibid.* at 3.

At hearings in October, 1976, the telephone companies (in keeping with Vail's philosophy on regulation and employing the very distinction he had himself urged almost 70 years previously) strenuously argued that "regulatory" functions should be kept separate from "managerial" functions. Any such distinction was firmly rejected by the CRTC as a "purely conceptual dividing line".[170]

Overall, the CRTC indicated that it would take full advantage of the width of the discretion granted it and would actively use older legislation to achieve contemporary ends. Far from being hamstrung by antiquated legislation, the Commission saw ample opportunities for it to pour new regulatory wine into old statutory bottles. As Charles Dalfen, then CRTC Vice Chairman of Telecommunications, was to explain to a German audience:

> The legislation is neutral with regard to technology, but not with regard to fairness and reasonableness, and this explains why a statute drafted in the early decades of this century has proven itself adaptable to the challenge of this past decade when the opportunities of new technologies have upset previous divisions among telecommunications companies and blurred the distinctions between industries.[171]

The CRTC's "exuberance of youth" carried over into its actual decisions. As Schultz and Alexandroff have noted, the record shows that CRTC regulation was, in many respects, fundamentally different in process, scope and objective from that of the CTC. As they saw it: "The CRTC, acting under the *Railway Act* of 1906, rejected the traditional limited, negative, proscriptive role of its predecessor and assumed an expanded, positive and prescriptive role."[172]

Indeed, it soon became apparent that the new regulator was willing to involve itself in issues such as quality of service standards,[173] adequacy of service to remote communities[174] and the adequacy and location of pay telephones[175] — matters which in an earlier era of federal regulation would

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170 *CRTC Procedures*, *supra*, note 164 at 3612-3, 4 C.R.T. at 105-6.

171 C. Dalfen, *Competition and Interconnection in the Canadian Telecommunications Industry* in E-J. Mestmacher, ed., KOMMUNIKATION OHNE MONOPOLE (Baden-Baden, FDR: Nomos Verlagsgesellschaft, 1980) 73 at 85 [hereinafter Dalfen].

172 Schultz & Alexandroff, *supra*, note 27 at 95.

173 *See, e.g., Bell Canada, Increase in Rates, Telecom. Decision CRTC 78-7*, 112 Can. Gazette Pt. I, 5002, 4 C.R.T. 313 (10 August 1978), in which the Commission first required Bell Canada to provide it with quarterly reports of its service quality as measured by fifteen indicators of performance.

174 *See, e.g., Bell Canada, General Increase in Rates, Telecom. Decision CRTC 80-14*, 114 Can. Gazette Pt. I, 5105, 6 C.R.T. 222 (12 August 1980), with respect to service in remote portions of Northern Ontario.

175 *Ibid.* at 5152-3, 6 C.R.T. at 266, in which the CRTC rejected Bell Canada's 1979 application for an increase in local call rates from ten to twenty cents at certain pay telephone locations at which the company believed much of the calling would be of a discretionary nature. Instead, the Commission invited "the Company to file tariff revisions . . . to put into effect a 20¢ rate for all pay telephones".

most likely have been left to management discretion.

With respect to the introduction of competition in telecommunications, the Commission's record, especially in the earlier years of its mandate, reflects a similarly activist stance with competition being allowed in data and private line long distance service,[176] resale and sharing[177] and with respect to the provision of terminal equipment,[178] radio paging and related services,[179] cellular radio[180] and enhanced services.[181]

As in the United States in Judge Skelly Wright's "Topsy" judgment,[182] the starting point of the analysis developed in these decisions was the absence of any specific legal basis for monopoly. There was, moreover, provision in section 265 of the *Railway Act*[183] for "interconnection". This provision had *originally* been designed to allow for only non-competitive interconnection where, for example, one of the remaining small independent rural telephone companies could connect with Bell Canada so as to make long distance service available to its subscribers. In the post-monopoly context, section 265 was to be used to provide competitive interconnection where, for example, CNCP was able to provide private line long distance service in competition with Bell Canada by way of access to the latter's local switched network.[184] This was possible because only competition within a local exchange was specifically barred in the *Railway Act*[185] and it was therefore possible for a young agency, dominated by the qualities of youth, to conclude that that which was not specifically excluded, should be allowed. As Charles Dalfen explained: "The Commission has no policy of promoting or inhibiting competition *per se*. However, its governing legislation in principle permits system interconnection, and this has tended to recently favour competition."[186]

A central tenet of regulated monopoly had, of course, been that a carrier would be entitled to control access to its network. Thus it had long

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176 *See CNCP Telecommunications, Interconnection with Bell Canada, Telecom. Decision CRTC 79-11*, 113 Can. Gazette Pt. I (Supp. 21 July 1979), 5 C.R.T. 177 (17 May 1979) [hereinafter *CNCP Interconnection*].

177 *See Interexchange Competition*, *supra*, note 38 at 1690-715. For highlights of this part of the decision only, *see* 119 Can. Gazette Pt. I at 6049.

178 *See 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 August 1980); *see also Attachment of Subscriber-Provided Terminal Equipment, Telecom. Decision CRTC 82-14*, 116 Can. Gazette Pt. I, 9067, 8 C.R.T. 848 (23 November 1982).

179 *See Radio Common Carrier Interconnection with Federally Regulated Tel. Cos.*, Telecom. Decision CRTC 84-10, 118 Can. Gazette Pt. I, 2715, 9 C.R.T. 1061 (22 March 1984).

180 *Cellular Radio Service*, *supra*, note 90.

181 *See Enhanced Services*, *supra*, note 91.

182 *MCI Telecommunications*, *supra*, note 6.

183 R.S.C. 1970, c. R-2.

184 *See CNCP Interconnection*, *supra*, note 176.

185 S. 320(8).

186 Dalfen, *supra*, note 171 at 85.

been assumed that section 321 of the *Railway Act*, which prohibits the imposition of any "undue or unreasonable prejudice or disadvantage", was concerned only with the way the telephone companies dealt with their customers. In a sweeping decision in *Challenge Communications Ltd.* v. *Bell Canada*,[187] the CRTC held that section 321 was not to be restricted to discrimination *between customers* but also applied to discrimination *against competitors* seeking access to the telephone company's local network. As Gordon Kaiser was pleased to note, section 321 could now be used as "a competitor's 'Bill of Rights'".[188]

Subsection 321(2) provides that "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". In practice, the telephone companies found it impossible to establish any significant specific harm in the context of an incremental series of limited applications. Nor could they show that competition, at least outside of long distance public voice, would harm the provision of local service.[189]

Just how far the CRTC would be prepared to stretch its authority to ensure that rates were "just and reasonable" may be seen in its attempts to address certain aspects of industry structure. These aspects included both older issues such as vertical integration in manufacturing, as well as new issues such as the activities of subsidiaries involved in directory publishing and international consulting.

With respect to vertical integration in manufacturing the Commission set a deemed rate of return of fifteen percent on BC Tel's investment in Automatic Electric and on Bell Canada's investment in Northern Telecom as a safeguard against any possible subsidization of the carriers' manufacturing subsidiaries.[190] As for Tele-Direct Limited, Bell Canada's subsidiary which managed the production and distribution of telephone directories, it was declared to be engaged in an enterprise which was an integral part of the operations of the parent company's telephone business. As a result, Tele-Direct net income was included in Bell Canada's.[191] This "principle of integrality" was subsequently applied on a far wider basis when it was held that Bell Canada's contract to upgrade Saudi Arabia's

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187 *Telecom. Decision CRTC 77-16*, 112 Can. Gazette Pt. I, 61, 3 C.R.T. 489 (23 December 1977), *aff'd* (1978), [1979] 1 F.C. 857, 86 D.L.R. (3d) 351 (A.D.).

188 G. Kaiser, *Competition in Telecommunications: Refusal to Supply Facilities by Regulated Common Carrier* (1981) 13 OTTAWA L. REV. 95 at 97 [hereinafter Kaiser].

189 The actual loss of revenue to Bell Canada proved to be very small. *See CRTC 80-14*, *infra*, note 190; *CRTC 81-15*, *infra*, note 193.

190 *See British Columbia Tel. Co. — Proposed Acquisition of GTE Automatic Electric (Canada) Ltd. and of Microtel Pacific Research Ltd., Telecom. Decision CRTC 79-17*, 113 Can. Gazette Pt. I, 6128, 5 C.R.T. 585 (18 September 1979) and *Bell Canada, General Increase in Rates, Telecom. Decision CRTC 80-14*, 114 Can. Gazette Pt. I, 5105, 6 C.R.T. 222 (12 August 1980).

191 *See Bell Canada, Increase in Rates, Telecom. Decision CRTC 77-7*, 111 Can. Gazette Pt. I, 3158, 3 C.R.T. 87 (1 June 1977).

telephone system was integrally related to Bell Canada's telephone business. As a result, revenues from the Saudi Arabia project were included in the Company's estimated revenues for regulatory purposes rather than going to shareholders.[192]

Finally, in 1981, the CRTC decided that while Tele-Direct would continue to be treated as an integral part of Bell Canada, with its net income being included in the Company's income, a required rate of return on Bell Canada's average common equity investment in all other subsidiaries and associated companies would be deemed to be 15.5 percent on an after-tax basis.[193] This was too much for Bell Canada, which declared in its 1980-81 *Annual Report*: "We believe that such treatment is unique in the history of regulation and is against the long-term interests of subscribers and shareholders alike. We are assiduously exploring means to correct the consequences of this aspect of the decision."[194] This eventually led to the creation of a new parent, Bell Canada Enterprises (BCE), and a whole new set of issues concerning the appropriate ambit of regulatory authority.[195]

Whatever the intrinsic merit of these CRTC decisions may have been (which is not a matter of direct concern to us in this article), they do constitute examples of exceptional regulatory reach. While it is possible to agree with the *July Statement* that the principle of "just and reasonable rates" is neither a narrow nor a static concept, it is not readily apparent that jurisdiction over rates, comprehensive as it may be in *that* regard, can be extended to cover far-ranging issues of industry structure such as those addressed by the Commission. Nor is it apparent that the CRTC had ever been granted an adequate mandate enabling it to address other competition issues head on.

A central issue in the debate about the most appropriate response to competition in telecommunications concerns the choice between behavioural and structural regulation.[196] "Behavioural regulation" refers to governmental rules and conditions which directly interfere with the conduct of a specific firm or firms. "Structural regulation" involves the forced separation of competitive from monopolistic operations of the regulated firm, with the intent of altering market structure and the incen-

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[192] *See Bell Canada, Increase in Rates, Telecom. Decision CRTC 78-7*, 112 Can. Gazette Pt. I, 5002, 4 C.R.T. 313 (10 August 1978).

[193] *See Bell Canada, General Increase in Rates, Telecom. Decision CRTC 81-15*, 115 Can. Gazette Pt. I, 6712, 7 C.R.T. 851 (28 September 1981).

[194] Bell Canada, *Annual Report 1981* at 14.

[195] *See generally* CRTC, *Report of the Canadian Radio-television and Telecommunications Commission on the Proposed Reorganization of Bell Canada* (Ottawa: CRTC, 18 April 1983). Proposed legislation was discussed very fully before the Parliamentary Committee. *See Minutes of Proceedings Respecting Bill C-19, supra*, note 67 at Nos. 31-41 (5 December 1985 – 25 March 1986). *See also* T.A. Hockin et al., *Bell Canada's Corporate Reorganization* in M.C. Baetz & D.H. Thain, eds., CANADIAN CASES IN BUSINESS-GOVERNMENT RELATIONS (Toronto: Methuen, 1985) 75; H.N. Janisch, *Bell Canada's Reorganization: Private Interests and Public Concerns* (1982), 3 C.R.R. 5-43.

[196] For a particularly valuable discussion of the two different approaches, *see generally Telecommunications in Transition, supra*, note 44 at 33-9.

tives facing the formerly integrated monopoly supplier. Structural regulation also seeks to permit freedom of decision-making within the newly imposed constraints and does not require regulators to closely monitor the behaviour of regulated firms. Behavioural constraints, on the other hand, require continuous monitoring and involve (as we have seen in the context of the CRTC) some degree of substitution of the judgment of regulators for that of management.

In the particular context of telecommunications regulation, one structural response — that of separate subsidiaries — has had considerable support. It has been suggested that should a telephone company wish to enter a potentially competitive market it should only be allowed to do so by way of a "separate subsidiary". While there is no agreement as to just how much separation should be required, "maximal" separation might include (in addition to structural separation of corporate activities) separate directors, officers and operating personnel and possibly outside equity participation. It is claimed that without a high degree of structural separation it will be impossible to ensure that monopoly subscribers are not required to subsidize entry into competitive markets. Opponents of the separate subsidiaries concept argue that significant "network economies" could be lost; that it does not adequately address the crucial issue of incentives; and that, in any event, a genuinely separate subsidiary is a contradiction in terms.[197]

There were a number of signs that the CRTC might favour a structural approach with respect to the terminal equipment market. In 1981 the Restrictive Trade Practices Commission considered the conditions under which telephone companies should be allowed to participate in terminal equipment supply, and concluded that it should only be by way of separate subsidiaries.[198] "Placing the subsidiary at arms length", it noted, "would serve the very important purpose of signalling to would-be competitors that there is no danger of predatory pricing."[199] As well, the CRTC had to deal with a number of concerns in 1983 when BC Tel carried out an internal reorganization in response to competition in the terminal equipment market. The vehicle chosen was an internal company division rather than a separate subsidiary. The Commission was harshly critical of the Company and concluded that it had not adequately appreciated its responsibility to

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197 For a review of the arguments for and against separate subsidiaries, and for an analysis of just what is meant by "separate" in this context, *see generally* United States, Comptroller General, *Report to the Congress of the United States: Legislative and Regulatory Actions Needed to Deal with a Changing Domestic Telecommunications Industry* (Washington, D.C.: General Accounting Office, 24 September 1981) at 106-12; THE ANNENBURG STUDY, *supra*, note 33 at 102-8.

198 Canada, RTPC, *Telecommunications in Canada — Part I —Interconnection: Report in the Matter of an Inquiry under Section 47 of the Combines Investigation Act relating to the Manufacture, Production, Distribution, Purchase, Supply and Sale of Communications Systems, Communications Equipment and Related Products* (Ottawa: Minister of Supply and Services, 1981).

199 *Ibid.* at 221.

prevent any possible cross-subsidy from its monopoly operations.[200] It seemed that this foretaste of what might lie ahead in the absence of a structural solution might incline the Commission to move away from exclusive reliance on behavioural regulation.

In addition, in 1984, the Department of Communications insisted that competitive cellular radio telephone service be provided by a separate BCE subsidiary and not directly by Bell Canada itself, as had been originally proposed.[201] Subsequently, when the CRTC made its decision on cellular radio it provided that if an "arms' length telephone company affiliate" was employed, it would not be subject to tariff regulation.[202] It thus appeared quite possible that structural separation would be regarded generally as a prerequisite to regulatory forbearance.

Under all these circumstances, Don Braden, President of the Association of Competitive Telecommunications Suppliers, could state on March 5, 1986 to a parliamentary committee that "the CRTC has indicated an increasing preference for structural separation in dealing with questions of cross-subsidization and regulatory forbearance".[203]

It was not to be. On March 20, 1986 the CRTC announced that it would not require separate subsidiaries of Bell Canada and BC Tel when they participate in the terminal equipment market.[204] The decision is more revealing for what it does not say than for what it does say. In November, 1984, when the Commission initiated a hearing on structural separation, its Public Notice focussed on the feasibility of implementing structural separation should regulation be lessened or eliminated.[205] In their responses, both Bell Canada and BC Tel, in addition to identifying the economic disadvantges of structural separation, argued cogently that the Commission did not have the legal authority to adopt such an approach.[206] In its decision in March, 1986, the CRTC concluded that *both* a structural separation approach and a costing approach could meet its objectives of establishing a regime that protects against cross-subsidy, that eliminates the need for the filing of tariffs and that allows any profits or losses to flow to shareholders. It went on to conclude that considerations of expense and

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200 *See British Columbia Tel. Co., General Increase in Rates, Telecom. Decision CRTC 83-8*, 117 Can. Gazette Pt. I, 6175, 9 C.R.T. 520 (22 June 1983).

201 *See* Letter of Francis Fox, Minister of Communications, to Claude Cyr, President, Bell Canada, March 13, 1984.

202 *See Cellular Radio Service, supra*, note 90.

203 *See Minutes of Proceedings Respecting Bill C-19, supra*, note 67, No. 38 at 18 (5 March 1986).

204 *See Bell and British Columbia Tel. Cos., Multiline and Data Terminal Equip., Telecom. Decision CRTC 86-5* (20 March 1986) [unreported].

205 *See Structural Separation — Multiline and Data Terminal Equip., CRTC-Telecom. Public Notice 1984-66*, 118 Can. Gazette Pt. I, 9012 (9 November 1984).

206 *See Bell Canada Reply Argument, Structural Separation — Multiline and Data Terminal Equip.* (28 October 1985) at 40-5 and *British Columbia Tel. Co. Reply Argument* (28 October 1985) at 20-2.

delay favoured a costing approach.[207] No mention whatsoever was made of the serious questions which had been raised as to its legal authority to insist on structural separation. Lack of confidence in its authority to decide questions of industry structure in response to broader considerations of competition policy may well have been crucial, unspoken considerations in the decision. It should be recalled that the RTPC had recognized that the real value of separate subsidiaries lies in their contribution to a perception of a fair marketplace, something which the CRTC could never openly acknowledge given its restricted concern with the protection of monopoly subscribers by way of "just and reasonable" rates.

As we have seen, the structure of the telecommunications industry is such that there can be no clean-cut shift from regulation to competition.[208]This means that there is a considerable risk that public policy will become trapped in what should be a transitional period from competition as a supplementary regulatory tool to competition as a substitute for regulation. In this period of "regulated competition" telephone companies may, when providing what are deemed to be competitive services, continue to be required to file cost-justified tariffs, to respond to competitors' interventions and to offer products and services throughout their entire market area at the same price.

There are three main dangers with regulated competition. First, a sense of procreative responsibility will incline regulators to keep new entrants in business; second, there is an irresistible temptation to play the role of handicapper; and, third, there are inviting opportunities created for strategic use of the regulatory process.

"What happens", Carl Beigie asked in 1973, "if a new entrant in the transmission field is unable to attract sufficient new business to cover its investment? Will some form of inefficient division of the business be forced upon the industry to keep the firm viable?"[209] This concern was to be repeated, in much more emphatic terms, by Elizabeth Bailey and William Baumol in 1984:

> Regulators are all too often tempted to keep firms alive by subverting competitive pressures — specifically by establishing what amounts to a cartel in which each enterprise is protected from the competition of the others. But an arrangement of that sort is a monstrosity that keeps up the appearance of competition by assuming the survival of firms as an end in itself, by completely undermining the competitive process and imposing a heavy cost upon the consuming public.[210]

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207 *See Bell and British Columbia Tel. Cos., Multiline and Data Terminal Equip., Telecom. Decision CRTC 86-5* (20 March 1986) [unreported].

208 In section II (ORGANIZATION OF THE TELECOMMUNICATIONS INDUSTRY), *supra*.

209 C.E. Beigie, *An Economic Framework for Policy Action in Canadian Telecommunications* in H.E. English, ed., TELECOMMUNICATIONS FOR CANADA: AN INTERFACE OF BUSINESS AND GOVERNMENT (Toronto: Methuen, 1973) at 194.

210 E. Bailey & W. Baumol, *Deregulation and the Theory of Contestable Markets* (1984) 1 YALE JOURNAL ON REGULATION 111 at 121.

This "monstrosity" is particularly possible in telecommunications because a regulator will be loathe to leave customers stranded without essential communications services and because regulators have at their disposal the means of manipulating market shares by, for example, raising or lowering access charges to the local switched network or holding tariffed rates above cost while allowing competitors to price according to their costs.

Stephen Breyer, in describing the practices of the FCC in the early 1980's, also captures the overall direction of contemporary developments at the CRTC:

> It will allow entry, but seek to restrict it to a portion of the long-distance market. It will allow AT&T to cut its prices in response, but not allow it to cut those prices to incremental costs. In following this approach the FCC acts as a handicapper. It will allow competitors to enter but not far enough to hurt AT&T, and it will protect them from AT&T's price responses. One can argue that any resulting inefficiency in private-line service (some amount of higher-cost facilities) is simply a price worth paying in order to obtain new competitors who can put pressure upon AT&T to innovate, to operate more efficiently, and to try to cut its prices. But this approach is dangerous, for the FCC is without standards to determine which competitors to allow to enter where, and how much protection to give them.
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> [T]he risk in this approach is that it abandons economic criteria, because there are no such criteria that would tell the FCC how to handicap. And once economic criteria are abandoned, there is likely to be no consistent set of principles upon which the FCC can base its handicapping decisions.[211]

Given the continued existence of the regulatory process, creative exploitation of regulatory procedures can be used to advance the private interests of both incumbents and potential entrants while producing few benefits for consumers. The net effect of the strategic use of the regulatory process "may be to focus actual or potential competitive rivalry away from the market and toward competition for favourable decisions from a regulatory commission".[212]

Successful manipultion of the regulatory process by an incumbent may serve as the means of raising rivals' costs by creating substantial delays and legal expenses. Once allowed in, a new entrant has every interest to do unto others what had been done unto it. As Manley Irwin perceptively noted: "Regulated entry creates institutional resistance to subsequent market access. Entry no longer becomes a process but an event. Indeed, firms employ due process to retard rivalry. Yesterday's hero becomes tomorrow's obstructionist."[213] Alternatively, the new entrant

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211 Breyer, *supra*, note 41 at 313.

212 THE ANNENBURG STUDY, *supra*, note 33 at 89. In a shift to competition "[f]irms are to compete in the market, rather than before regulators, in order to bring consumers high quality, innovative services at the lowest possible prices". *Comments of the American Telephone and Telegraph Company in the Matter of Long Run Regulation of AT&T's Basic Domestic Interstate Services*, FCC Docket No. 83-1147 (April 2, 1984), App. 1 at 1-2.

213 TELECOMMUNICATIONS AMERICA, *supra*, note 24 at 106.

may insist on the continuation of restrictive regulation, a strategy not lost on Bill McGowan of MCI who was pleased to point out that: "Those who have used regulation in the past to insulate themselves from competition will be left hamstrung by continuing regulation and unable to compete with unregulated entities."[214]

That these concerns for the dangers of regulated competition are far from academic may be seen in two recent decisions by the CRTC. In the first, CNCP sought to have its tariff for private line voice services set fifteen percent below that of Bell Canada. In the second, CNCP applied to provide public voice services in competition with Bell Canada.

When CNCP applied to have its private line voice service rate discounted by fifteen percent, it alleged that the perceived value of its service was significantly less than that of its competitor, Bell Canada. In part, it argued that it was perceived not to have the experienced staff and resources of Bell Canada. It also pointed out that it was not permitted to provide services equal to that of a telephone company because it could not offer a full range of voice services such as public long distance service.

Bell Canada responded by pointing out that approval of a discount would give CNCP a guaranteed competitive advantage, diminish any incentive for CNCP to improve the quality of its service and virtually remove the advantages that competition is supposed to bring to subscribers. In addition, Bell Canada contended that the Commission should not use its rate approval powers as a tool to guarantee one of two competing telecommunications carriers a share of the market presently served by the other carrier, and questioned whether the CRTC had jurisdiction to approve rates to achieve that purpose.

While the CRTC was not prepared to take into account aspects of supposed lower quality service which were within the control of CNCP, it did recognize that the telephone companies had a significant marketing advantage over CNCP because of both the fuller range of services they were permitted to provide and their broader geographical coverage. As a result, the CRTC allowed discounts of five percent and ten percent for different portions of CNCP's private line voice services.[215]

While it strenuously denied that it was setting rates at a specified level for the purpose of guaranteeing a carrier a share of the market, it seems this is exactly what it did. This is because there was, ultimately, no adequate basis on which to justify a rate differential other than on a market share prediction. The Commission had referred to traditional value of service

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214 *Communications Daily* (26 September 1983) at 3, *reprinted in Comments of AT&T*, *supra*, note 212 at 87.

215 *See CNCP Telecommunications — Rates for the Provision of Interconnected Private Line Voice Services, Telecom. Decision CRTC 83-10*, 117 Can. Gazette Pt. I, 7143, 9 C.R.T. 543 (26 July 1983). *See also Bell Canada — Destandardization and Withdrawal of Mobile Tel. Service, Telecom. Decision CRTC 86-14*, (31 July 1986) [unreported] where Bell Canada was refused permission to discontinue conventional mobile telephone service in the face of cellular radio competition.

criteria, but value of service pricing has always been associated with monopoly, not competition, and it makes little sense to apply it in a competitive environment. Moreover, the imprecise, undifferentiated reasoning employed[216] directly reflects Breyer's concern that handicapping cannot involve any consistent set of principles.

CNCP's application to compete in the whole public long distance market, and not just in private line service, raised many complex and difficult issues for the CRTC. One particular concern overshadowed all others and revealed the Achilles heel of regulated competition. CNCP claimed that it would be able to provide service of equal quality to that of the telephone companies, that it would make the same contribution they made to support local rates, make a reasonable profit, and that its long distance rates would be significantly lower than those of the telephone companies. Those opposing CNCP argued that this was impossible. They maintained that something had to give, most likely, the level of contribution to local rates.

The CRTC was clearly very concerned that if it allowed CNCP in, it would for all practical purposes not be able to force CNCP out of business if it failed to live up to its obligations. The only way the Commission envisaged that CNCP could be a viable competitor would be if it were granted a contribution discount.

> Were the Commission to approve CNCP's application without a contribution discount, the Commission foresees, based on the evidence as to CNCP's financial ability, that CNCP would, within the near future, seek Commission approval for a substantial contribution discount. In such a circumstance, *the Commission is concerned that its options for regulatory action to protect the interests of the general body of telephone subscribers would be limited, CNCP already being in the market*. The Commission is strongly of the view that such a limitation should not be placed on its ability to ensure that the price structure for toll and local service balances fairly the need for lower toll rates against the need for affordable local rates.[217]

This approach may be criticized for being prematurely faint-hearted, as the very nature of the telecommunications industry necessitates a continued willingness on the part of regulators to make tough decisions even when new entrant competitors are already "in the market". Be that as it may, *the decision brings into sharp focus the inherent limits of regulated competition as perceived by the regulator*.

What appears to be needed is less regulation and more competition. As Willig and Katz have urged: "The end state of regulatory reform should

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[216] Its reasoning in totality was as follows:

> Taking all the evidence in this proceeding into account, and exercising its best judgment in establishing just and reasonable rates pursuant to subsection 321(1) of the *Railway Act*, the Commission has decided. . .

CNCP Telecommunications — Rates for the Provision of Interconnected Private Line Voice Services, Telecom. Decision CRTC 83-10, 117 Can. Gazette Pt. I, 7143 at 7149, 9 C.R.T. 543 at 548 (26 July 1983).

[217] *Interexchange Competition, supra*, note 38 at 1665 (emphasis added).

be one of regulatory forbearance in order to achieve the full benefits of undistorted competition."[218] While there has been some regulatory forbearance in Canada,[219] there continues to be too much emphasis on regulation and not enough on competition. The reason for this is the way competition in telecommunications is still perceived in Canada.

This limited approach leads Kaiser to conclude that "competition is the creation of regulation".[220] This suggests that competition is a wholly artificial construct requiring continuous regulatory intervention and support. It also leads to a focus on narrow problems of immediate regulatory concerns and not on broader issues in competition policy. This may be seen in Dalfen's perception of a highly constrained role for competition in telecommunications.

> Competition is not an end in itself; rather it must serve the attainment of other policy goals. The provision of high-quality, low-priced, diverse telephone services, the most important of which is universal basic telephone service to the general public, remains the chief aim of the Commission; and the justification for the regulation of the carriers. Only to the extent that competition can serve these goals should it be permitted.[221]

Recall Bernstein's life cycle thesis. It started, not with youth, but with gestation, when the problems needed to be addressed by the agency were identified and legislative solutions proposed. While a great deal of regulatory discretion would still have to be granted to the agency, there would be, at least at the outset, legislative agreement on the essential nature of the issues that needed to be addressed. The CRTC, however, was never to have the benefit of any such gestation period. While this did not prevent it from initially acting with the fervour of youth, this absence of firm foundations has meant that youth has, all too rapidly, given way to maturity and premature old age.

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218 *Comments of American Telephone and Telegraph Company In the Matter of Long Run Regulation of AT&T's Basic Domestic Interstate Services*, FCC Docket No. 83-1147 (April 2, 1984), App. 1 at 3. They later observed at page 33 that "[t]he best test of whether competition can replace regulation is to give competition a chance".

219 *See Regulatory Forbearance*, *supra*, note 82 at 459. More recently, the CRTC decided that Telesat Canada need not continue filing earth station tariffs in view of the liberalization which has created a competitive environment. *See Telesat Canada — Changes in Earth Station Services Regulation, Telecom. Decision CRTC 86-6* (24 March 1986) [unreported].

As well, following implementation of Phase III of the Cost Inquiry, tariff filing requirements will be eliminated with respect to services in the multiline and data equipment categories. *See Bell and BC Tel Terminal Equip., Telecom. Decision CRTC 86-5* (20 March 1986) [unreported].

220 Kaiser, *supra*, note 188 at 96. *See also* G. Kaiser, *Competition in North American Telecommunications: Implications for West Germany* in E-J. Mestmacher, ed., KOMMUNIKATION OHNE MONOPOLE (Baden-Baden, FDR: Nomos Verlagsgesellschaft, 1980) 91 at 109.

221 Dalfen, *supra*, note 171 at 87.

At one time the CRTC was confident and assertive in the face of criticisms that it was playing too large a policy-making role.[222] More recently, it has had to conform to a more modest role in the face of clear ministerial assertions of departmental primacy in policy-making and in the face of legislation which will allow for policy directives from government.[223] At the same time, it now displays far more caution and hesitation in its decisions. The whole issue of long distance competition has become one of "rate rebalancing" to be dealt with by way of federal-provincial negotiations.[224] Resale and sharing, which were regarded as major steps towards greater competition, have been so narrowly construed as to deny their initial promise.[225] All in all, today's CRTC displays many of the

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222 *See, e.g.*, the Commission's initial CNCP decision (*CNCP Interconnection*, *supra*, note 176 at 101, 5 C.R.T. at 260-1), in which it stated very firmly in response to its critics:

> The Commission is obliged by the statute to reach a decision on the merits of the Application, based on the record of evidence before it. The Commission is aware of the importance of the issues raised in the present case and of the fact that various [policy making] committees may be deliberating on certain of the same issues. It does not, however, consider that a delay in deciding the Application pending any results of such deliberations would either be desirable in the public interest or indeed lawful.

See also The TCTS Decision, *supra*, note 28 at 21-50, 7 C.R.T. at 735-52.

223 As the former Minister of Communications, Marcel Masse, stated in introducing this legislation:

> The purpose . . . is to establish clearly and unequivocally that only the government, which is accountable to parliament for its actions, is empowered to develop major telecommunications policies. This responsibility should not be borne by the CRTC, since it is a quasi judicial organization that does not have to answer to the public for its actions.

See Canada, House of Commons, *Minutes of Proceedings and Evidence of the Standing Committee on Communications and Culture Respecting: Bill C-20, An Act to amend the Radio-television and Telecommunications Commission Act, the Broadcasting Act and the Radio Act*, No. 10 at 4 (6 May 1985).

224 In the *Interexchange Competition* decision, *supra*, note 38, the Commission stated (at 1689) that "outstanding issues must be resolved with as little delay as possible" and that "details of the public process to consider these matters will be announced in the near future". In the year since that decision, the issue of rate rebalancing has been moved entirely into the federal-provincial sphere, and the Commission has had no role to play other than as a participant in federal-provincial studies. All this activity behind closed doors is very far removed from the brisk "public process" envisaged in August 1985.

225 *See Tariff Revisions Related to Resale and Sharing, CRTC Telecom. Public Notice 86-42* (3 July 1986) [unreported], in which the Commission agreed with BC Tel and Bell Canada that only "facilities based" and not "service based" resale and sharing be permitted. As Canada Systems Group (CSG) has argued in a submission to the Commission on August 1, 1986, this would restrict the benefits of resale and sharing to the purchase of interexchange circuits in bulk and the resale of the same circuits in smaller quantities to specific customers. In what it sees as an overreaction to a concern that resellers and sharers might attempt to enter the public long distance market, CSG, which is Canada's leading supplier of computer based services and products, believes that it will be denied any opportunity to approach resale and sharing as an innovative packager of telecommunications and value-added services. Under this regulatory approach, only the telephone

attributes of regulatory old age: "In the phase of old age the regulatory objectives of a commission are no longer meaningful and appropriate. Not only are there growing doubts about the original objectives laid down vaguely in the enabling statute, but there is even greater doubt about what the objectives ought to be."[226]

The danger in all this, as Kaiser recognized, is that by ineffectually occupying the field, the CRTC may forestall any substantial role for competition policy while multiplying unnecessary regulation.

> There is a basic question as to whether any governmental authority can regulate competition. In fact there is a conflict between the principles of competition and regulation, and where competition is mandated by regulatory bodies who continue with oversight authority, the potential for increasing regulatory burden on the participants arises.[227]

V. The Role of the Courts

There has been a tendency to overlook the importance of the role played by Canadian courts in the move towards greater competition. An initial impression might suggest that our courts have been completely overshadowed by the activities of the United States Court of Appeal, District of Columbia Circuit, and of Judge Greene of the United States District Court, District of Columbia. Actually, Canadian courts have played a similarly important, though somewhat different, role.

The principal legal technique employed by the courts of the United States was to insist that, should the FCC wish to exclude competition, the FCC had to make detailed, specific findings with respect to the public interest.[228] This requirement substantially undermined the regulator's ability to introduce competition on a controlled, one-step-at-a-time, basis. By the time the FCC was finally in a position to determine the public interest in, for example, long distance competition, it was already a *fait accompli*.[229] Although ostensibly not substituting their opinion for that of the regulator, the courts, by insisting on precise public interest determinations to justify a continued monopoly, imposed a pro-competitive policy on the FCC in practice, if not also in strict legal theory. As FCC Commissioner Tyrone Brown complained at a meeting of the Federal Communications Bar Association in October, 1978:

> My thesis, simply is this: Some of the Judges on the Court of Appeals are increasingly acting as though that Court were a super-FCC. They have, in

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companies would be in a position to take full advantage of the convergence of computer and telecommunications technology.

226 Bernstein, *supra*, note 159 at 94.

227 Kaiser, *supra*, note 188 at 119.

228 *See*, *e.g.*, the discussion of *MCI Telecommunications*, *supra*, note 7.

229 *See* von Auw, *supra*, note 16 at 155, where the author forcefully makes this point.

> effect, taken over the role which Congress assigned to the so-called expert independent agency.[230]

Further, the crucial divestiture decision which, by eliminating strategic bottlenecks, has made competition (particularly in long distance) much more feasible in the United States than in Canada, was not made by the FCC at all, but by Judge Greene.[231] Although the Justice Department and AT&T agreed, between themselves, to the general terms of the settlement, it was reached largely as a result of the tough way in which Judge Greene handled the anti-trust trial up to the point of settlement.[232] As well, Judge Greene insisted that the settlement be subject to an extensive public interest review, and he went on to make a number of major changes in the settlement and claimed continued responsibility for deciding whether any of the limitations placed on the divested operating companies should be relaxed. As there is a growing demand for an expanded role by the operating companies, Judge Greene continues to act as a major regulatory policy-maker.[233]

In Canada, the courts' main role has been that of upholding CRTC decisions dealing with competition and, more recently, greatly enhancing federal authority over telecommunications. While the individual decisions are narrow, legalistic and conventional in their analysis, their impact, as we shall see, has been far broader than the immediate legal issue that was before the courts.

In *Bell Canada* v. *Challenge Communications Ltd.*,[234] for example, the apparently narrow issue before the courts was whether subsection 321(2) of the *Railway Act*[235] was "customer-oriented"; that is, whether it

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230 As quoted in the evidence of Alan Pearce, *New Brunswick Tel. Co. Ltd., Memoranda of Evidence, In the Matter of a Hearing to Review Issues Relating to Interconnection, Notice of Public Hearing* (January 20, 1984) at 35.

231 *See United States* v. *AT&T*, *supra*, note 59.

232 In September 1981, Judge Greene rejected a petition from AT&T that the anti-trust proceedings be dropped. The rejection was not unexpected, but what was unexpected was the language he employed. As Jeremy Tunstall saw it, Judge Greene went

> to the very borders of judicial rectitude, if not beyond: Greene's preliminary opinion was that AT&T had "violated the anti-trust laws in a number of ways over a lengthy period of time". This did not leave much room for the imagination; Greene was signalling his total rejection of the reasonable-sounding argument that as a regulated entity, AT&T was exempt from anti-trust.

B. Blackwell, ed., COMMUNICATIONS DEREGULATION (Oxford, 1986) at 106. *See also* von Auw, *supra*, note 16 at 115; W.B. Tunstall, DISCONNECTING PARTIES: MANAGING THE BELL SYSTEM BREAK-UP; AN INSIDE VIEW (New York: McGraw Hill, 1985) at 15. Judge Greene refuses to be drawn into speculation as to how he might have ruled had no settlement been reached. *See*, *e.g.*, S. Gannes, "The Judge Who's Reshaping the Phone Business", *Fortune* (1 April 1985) 134 at 134-6.

233 *See generally* note 70, *supra*.

234 (1978), [1979] 1 F.C. 857, 86 D.L.R. (3d) 351 (A.D.), leave to appeal to S.C.C. refused (1978), [1978] 1 S.C.R. v., 23 N.R. 358 [hereinafter *Challenge Communications*].

235 R.S.C. 1970, c. R-2.

applied only to discrimination *between customers* and not *against competitors*. The Federal Court of Appeal upheld the CRTC's decision and ruled against Bell Canada's assertion that the section is only "customer oriented". The Court also held that Bell Canada's *General Rules* had to conform to the non-discrimination requirement of subsection 321(2). Although, technically, it was only a decision dealing with a specific tariff item concerning one form of mobile telephone service, the repercussions of the denial of Bell Canada's application for leave to appeal to the Supreme Court of Canada were immense. This is because it was recognized that this interpretation of subsection 321(2) of the *Railway Act* had entirely undermined the manner in which the attachment of terminal equipment to the network had historically been controlled by the telephone companies. Leave to appeal to the Supreme Court of Canada was denied in June, 1978; Bell Canada, in a strategic defensive move, applied to the Commission in November, 1979 to amend its *General Rules*,[236] and, by August, 1980, the CRTC had interim rules in place allowing for the attachment of non-telephone company provided equipment to the network.[237]

Further indication that the courts would be sympathetic to the breadth of Commission authority in any questioning of its decisions may be seen in *Consumers' Assoc. of Canada* v. *British Columbia Tel. Co.*[238] In that case, it was argued that where the CRTC was required to approve an acquisition of shares, which would have allowed BC Tel to replicate Bell Canada's vertically integrated equipment manufacturing structure, the burden was on the applicant to demonstrate that the acquisition was in the public interest. In fact, the CRTC concluded that the weight of the case for and against the application was equally balanced, but went on to approve it, subject to certain regulatory safeguards. The Federal Court of Appeal substantially rewrote the Commission's decision so as to meet the applicant's case, and then upheld it!

This approach was further illustrated in a challenge to the CRTC's authority to set minimum "floor prices" when telecommunications carriers sold new terminal equipment.[239] This authority was said to be necessary to protect monopoly subscribers, but, as the Commission was only authorized to control "facilities", it was argued that a sale of telecommunications equipment did not fall within that term. Mr. Justice MacGuigan of the Federal Court of Appeal consulted numerous dictionaries, in

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236 *Bell Canada — Connection of Customer Provided Terminal Devices, CRTC - Telecom. Public Notice 1979-35*, 113 Can. Gazette Pt. I, 7790, 5 C.R.T. Part II 49 (30 November 1979).

237 *Bell Canada — Interim Requirements Regarding the Attachment of Subscriber-Provided Terminal Equip., Telecom. Decision CRTC 80-13*, 114 Can. Gazette Pt. I, 4937, 6 C.R.T. 203 (5 August 1980).

238 (1980), [1981] 2 F.C. 461, 118 D.L.R. (3d) 748 (A.D.).

239 *See CNCP Telecommunications* v. *Canadian Business Equip. Mfrs. Assoc.* (1985), [1985] 1 F.C. 623, 20 D.L.R. (4th) 179 (A.D.) [hereinafter *CNCP Telecommunications*].

both official languages, and concluded that telephone and telegraph terminal equipment did qualify as "facilities".[240] Other arguments were met by the reproduction *in extenso* of the governing legislative provisions with the observation that they indicated "a legislative intent to confer great breadth of power on the CRTC".[241]

These decisions are disappointing in that they contain neither close technical legal analysis nor a broader recognition of the economic or technological context. Moreover, unlike their counterparts in the United States, they do not challenge the regulator to justify its public interest determinations. This overall deference to regulatory authority makes it all the more ironic that the most ambitious decision made by any court in North America with respect to competition in telecommunications was made by a Canadian court.

In *Garden of the Gulf Court and Motel Inc.* v. *Island Tel. Co.*,[242] the Prince Edward Island Supreme Court sitting *in banco* considered an appeal from the provincial Public Utilities Commission. In that case the Commission had denied the appellant the right to attach its own switchboard to the telephone company's network. The decision was struck down as manifestly wrong and Chief Justice Nicholson concluded:

> In allowing the appeal I make a strong recommendation that necessary regulations governing the requirements regarding attachment of customer owned or private terminal equipment be formulated and approved by the Commission within six months of this date so that the appellant and other like-minded customers of the respondent will be in a position to know where they stand on this very important subject. I must again make it clear that the Commission and the respondent should realize that customer owned terminal equipment is a "fact of life" in the telecommunications industry; and, so long as the governing legislation remains permissive in its intent, immediate steps must be taken to pass fair and reasonable regulations governing the connection of such equipment to the respondent's facilities.[243]

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[240] *Ibid.* at 633-4, 20 D.L.R. (4th) at 185.

[241] *Ibid.* at 634-5, 20 D.L.R. (4th) at 186-7. This degree of deference to CRTC authority has not gone unnoticed by communications lawyers. Peter Grant, in a comprehensive review of 270 cases dealing with communications law and policy, concluded that the courts have overwhelmingly given the regulatory agencies involved — particularly the CRTC — a broad jurisdiction, even when the statutes have not been clear. P. S. Grant, *Canadian Communications Law and Policy: Five Important Themes* (1986), 7 C.R.R. 5-25 at 5-26. *See also* H. Intven, *New Developments in Communications Law* (paper prepared for the Law Society of Upper Canada's Conference on Administrative Law) (November 6, 1986). Bell Canada's challenge to a recent decision requiring it to roll-back its rates and give its customers a $200 million rebate (*Bell Canada, Review of Revenue Requirements for 1985, 1986 and 1987, Telecom. Decision 86-17* (14 October 1986)) provides the courts with an excellent opportunity to review the governing legislation and develop a definitive exposition of the ambit of regulatory powers. *See Bell Canada and CRTC, Originating Notice under Section 28 of the Federal Court Act* (23 October 1986) No. A-646-86.

[242] (1981), 32 Nfld. & P.E.I.R. 476, 126 D.L.R. (3d) 281.

[243] *Ibid.* at 494-5, 126 D.L.R. (3d) at 295.

He went on to specify a precise date by which new regulations should be approved, specified that a public hearing should be held on the new regulations and its date, and added that, in formulating the regulations governing the connection of privately owned terminal equipment, "the respondent [telephone company] and the Commission may well take into consideration the interim requirements . . . set out in the decision of the Canadian Radio-television and Telecommunications Commission".[244]

This extraordinarily sweeping judicial decision was possible because of the unusually broad right of appeal which entitled the Court to "decide any question of fact or otherwise and examine the evidence taken before the Commission or . . . hear further evidence, and . . . confirm, vary or reverse the decision or order".[245] In contrast, subsection 64(2) of the *National Transportation Act*[246] provides only for an appeal on questions of law and jurisdiction.

As noted earlier in this paper, unlike in the United States, federal authority over telecommunications has never been fully asserted in Canada.[247] This has had a significant inhibiting effect on the move toward greater competition. If upheld in the Supreme Court of Canada, recent Federal Court decisions in favour of federal jurisdiction over telecommunications will have far-reaching impact.[248] Although the federal government has by no means been aggressive in claiming jurisdiction, it seems very likely that if granted exclusive jurisdiction over telecommunications by the courts, it will not simply hand it back to the provinces. What is likely, in the absence of an agreement for joint federal-provincial regulation, is that the federal government will return regulation of intra-provincial service to the provinces, but retain control over interconnection, terminal attachment and inter-provincial rates. Both scenarios are much more favourable to competition than the present jurisdictional "crazy quilt" which, as Charles Dalfen and Laurence Dunbar have pointed out, seriously impedes the development of a competitive telecommunications system in Canada and will likely result in a piecemeal approach to the introduction of new enhanced or value-added computer-oriented telecommunications services.[249]

At the outset of his judgment upholding the authority of the CRTC to set minimum "floor prices" for terminal equipment, Mr. Justice MacGuigan of the Federal Court of Appeal remarked that "[d]espite the

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244 *Ibid.* at 495-6, 126 D.L.R. (3d) at 296.

245 *Public Utilities Commission Act*, R.S.P.E.I. 1974, c. P-31, s. 16(1). This section was amended by S.P.E.I. 1984, c. 33, s. 3 which substituted the phrase "question of fact or otherwise" with "question of jurisdiction or any question of law".

246 R.S.C. 1970, c. N-17.

247 *See generally* section II (ORGANIZATION OF THE TELECOMMUNICATIONS INDUSTRY), *supra*.

248 *See, e.g., Alberta Gov't Tels.* v. *Canadian Radio-television and Telecommunications Comm'n* (1984), [1985] 2 F.C. 472, 15 D.L.R. (4th) 515 (T.D.), *rev'd in part* (*sub nom. CNCP Telecommunications* v. *Alberta Gov't Tels.*) (1985), 63 N.R. 374, 24 D.L.R. (4th) 608 (A.D.), leave to appeal granted (22 May 1986) (S.C.C. file No. 19731).

249 *See* Dalfen & Dunbar, *supra*, note 29 at 193-4.

passage of more than four years from the first notice dealing with the subject-matter of this appeal, and the 56 volumes in the record before us, the issue before this Court is one of narrow statutory interpretation".[250] While it would be inappropriate to expect the courts to take on an explicit policy-making role, there must be recognition that court decisions have substantial policy implications that cannot be addressed in a retreat to dictionary definitions. A broader approach is going to be necessary, particularly when, as is inevitable, courts are called upon to decide where the jurisdiction of the regulators ends and that of the competition law authorities begins.

VI. The Role of the Minister of Communications and the Federal Cabinet

As noted previously, the Minister of Communications has extensive authority with respect to entry into telecommunications markets while the federal Cabinet may, on appeal, substitute its decisions for those of the CRTC. Despite the apparent amplitude of this authority, it is not clear that it constitutes a sufficient legislative base capable of supporting the breadth of considerations which the political actors will wish to address.

Thus far, the Minister has exercised his authority over entry restrictively with the result that there exists very little head-to-head competition in Canada in the provision of most telecommunications services. What is significant from the perspective of this article, however, is that there is nothing in the *Radio Act*[251] requiring the Minister to continue pursuing a restrictive microwave licensing policy. To the contrary, subsection 8(2), to the extent that it does not deal only with technical issues, appears to allow, if not positively compel, the Minister to adopt a much more liberal licensing policy, especially in light of the technological changes observed in the last two decades. It provides, insofar as is relevant here, that:

> 8(2) The Minister shall . . .
>
> (b) encourage the development and more efficient operation of radiocommunication facilities in Canada,
>
> for the purpose of improving the efficiency of radiocommunication services and increasing their usefulness and availability in the public interest.

To the extent that actual competition and/or the credible threat of new entry may act as a spur to greater efficiency and lead to the greater availability and usefulness of telecommunications services, subsection 8(2) of the *Radio Act* arguably calls for a liberalization of federal microwave licensing policy. Against this consideration, however, stand the very real political concerns of the Minister of Communications, and the federal government as a whole, regarding the potentially adverse consequences of

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250 *CNCP Telecommunications*, *supra*, note 239 at 629, 20 D.L.R. (4th) at 182.
251 R.S.C. 1970, c. R-1.

liberalized entry on the ability of existing carriers to continue providing universal local service on a subsidized basis. Unless and until the government can be persuaded that this increased competition will not lead to the demise of universality (which at present appears very difficult) the prospect of a more liberalized microwave licensing policy appears dim. In all probability, entry will continue to be restricted until existing carriers succeed in aligning their local rate structures with the costs of providing such services.

Understandable as this *political* concern to guard against the threat of possible increased local rates might be, it is not immediately evident that there is *legal* authority to do so. The *Radio Act* is essentially concerned with technical questions of spectrum allocation. Section 4, which provides for licensing of "radio stations" that are "not broadcasting undertakings" and for the imposition of "such conditions . . . for ensuring the orderly development and operation of radiocommunication in Canada", must be read in its limited context to include only considerations of technical interference and access to radio frequencies. Unlike the *Broadcasting Act*,[252] which clearly authorizes the CRTC to take into account broad-ranging *social* considerations, and the *Railway Act*,[253] which authorizes it to take into account *economic* considerations with respect to just and reasonable rates, the *Radio Act* is primarily confined to radio apparatus and its *technical* transmission characteristics.

The implications of the limited nature of the mandate granted the Minister for the future of competition may be seen in a probable scenario where a large business user applies for a license for a microwave link between its plants. This may be motivated by cost, security considerations, or both. It may well be able to show that there are no technical reasons why a licence should not be granted. May a licence be denied on the ground that such "corporate bypass" threatens the viability of the telephone system and its ability to support low local rates? Might not such considerations be considered extraneous to the *Radio Act*? Might it not be said that the Minister would thereby be seeking an unauthorized purpose?

A series of highly suspect decisions has already been made under the *Radio Act* with respect to the introduction of competition in the cellular radio market.[254] Because of the essentially "engineering" thrust of the Act, the Department of Communications has not developed a set of procedures appropriate for competitive licensing applications. While this omission might have been acceptable with respect to relatively narrow spectrum allocation questions, it is not acceptable with respect to the broad political and economic considerations which went into the cellular radio decisions.

The Department of Communications issued a call for licence applications in October, 1982, which significantly narrowed opportunities for competition by specifying that only two licences would be granted in each of only twenty-three metropolitan areas and that one would be reserved in

252 R.S.C. 1970, c. B-11.
253 R.S.C. 1970, c. R-2.
254 *See generally* Dalfen & Dunbar, *supra*, note 29.

each area for the local telephone company.[255] Following receipt of applications, but without any public hearing process, the Department then announced that only those applications offering nation-wide service to all designated metropolitan areas would be considered further and, on December 14, 1983 announced that Cantel Cellular Radio Group Incorporated had been awarded the national, non-telephone company licence.[256]

From a procedural point of view, the absence of public hearings and lack of any adequate opportunity to comment on rival applications, combined with extensive *ex parte* contacts, must render the final decision somewhat questionable. As well, the substantive limits adopted, inasmuch as they bore no discernible relationship to the *Radio Act*, are equally questionable. While admittedly a degree of competition was accomplished by this means, the decision's legal pedigree seems sufficiently dubious to render it of little value as a precedent.

In addition to this legally limited, though for practical purposes, crucial control over entry, the federal Cabinet is granted an extraordinarily broad power in subsection 64(1) of the *NTA*[257] to vary or rescind any decision of the CRTC.[258] So far, this power has not been exercised in a manner which could be said to undermine the CRTC's ability to deal with the transition to competition. For example, Cabinet upheld both the 1979 decision to allow CNCP to compete with the telephone companies in long distance with respect to private line and data services[259] and the 1980 decision to allow competition in the terminal attachment market.[260] In a series of decisions with respect to Telesat Canada, however, the federal Cabinet overruled the CRTC's wish to see the national satellite service provider operating independently of the telephone companies.[261] This

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255 *See Cellular Mobile Radio Policy and Call for Licence Applications*, Department of Communications, Ottawa, Notice No. DGTN-006-82/DGTR-017-82, 116 Can. Gazette Pt. I, 7799 (15 October 1982).

256 *See* Dalfen & Dunbar, *supra*, note 29 at 178.

257 R.S.C. 1970, c. N-17.

258 *See generally* section IIIA3 (*The National Transportation Act*), *supra*.

259 O.I.C., P.C. 1979-2036 (26 July 1979) [unreported].

260 O.I.C., P.C. 1981-1223 (7 May 1981) [unreported]. For a summary of what was involved, *see Petition by Bell Canada and the Government of Ontario to Review Telecom. Decision CRTC 80-13* (1981), 2 C.R.R. at 3-26.

261 *See Telesat Canada, Proposed Agreement with Trans-Canada Tel. Sys., Telecom. Decision CRTC 77-10*, 111 Can. Gazette Pt. I, 4838, 3 C.R.T. 265 (24 August 1977), *varied by* O.I.C., P.C. 1977-3152 (3 November 1977) [unreported]; *Bell Canada, BC Tel and Telesat Canada — Increases and Decreases in Rates for Services and Facilities Furnished on a Canada Wide Basis by Members of the Trans-Canada Tel. Sys. and Related Matters, Telecom. Decision CRTC 81-13*, 115 Can. Gazette Pt. I (Supp. 18 July 1981), 7 C.R.T. 716 (7 July 1981), *varied by* O.I.C., P.C. 1981-3456 (8 December 1981) [unreported]. In more recent developments the CRTC's initial concern that Telesat Canada would not develop into a viable carrier if integrated too firmly into Telecom Canada, would appear to have been vindicated. In *Telecom. Decision CRTC 86-9*, (May 8, 1986) [unreported] amendments were made to the Agreement which allows for direct access to customers by Telesat Canada and provides that guarantees for the satellite carrier's rate of return will shortly be wound down. This should allow Telesat Canada to act much more independently and enhances opportunities for competition with the terrestrial carriers as envisaged by the CRTC a decade earlier.

would have made competition between satellite and terrestrial microwave technology possible. These decisions suggest that the government considered financial security to be more important than competition, at least when it came to its own investment in satellite technology. As well, Telesat decisions have raised difficult, and as yet unresolved questions as to the practical co-existence of regulatory and political decision-making.

In a statement which accompanied Cabinet's first decision with respect to Telesat, the Minister of Communications explained that the CRTC had only looked at regulatory and competition issues, but that "the range of factors affecting these policy issues is far wider than that which the CRTC could be reasonably expected to consider. *Many of these factors lie beyond the purview of the Commission.*"[262] This suggests that there is a national interest which exists over and above the interests which could be addressed by the regulator. And it raises, in turn, the question of whether Cabinet is limited to the same statutory authority as the CRTC, or whether it can, by taking into account "factors beyond the purview of the Commission", employ different legal criteria. In other words, is Cabinet confined to looking, from a political rather than a regulatory perspective, at the same legal criteria as the CRTC, or is section 64 [263]so broad that it empowers Cabinet to do anything it wishes with respect to telecommunications matters?

This is no idle concern, as may be seen from the terminal attachment decision. There, the government of Ontario launched an appeal to Cabinet which would have required that only equipment from countries which permitted Canadian competition could be attached to the telephone network of this country.[264] Suppose that this approach had been accepted by Cabinet and subjected to judicial scrutiny. Would international trade concerns be considered relevant to the *Railway Act*?[265] Suppose further that the CRTC's decision had been reversed on the sole ground that it would greatly increase the importation of terminal equipment without enhancing export opportunities for Canadian manufacturers. Would this be considered an irrelevant consideration? Would Cabinet be held to be pursuing an unauthorized purpose?

Some extravagant language in *A.G. Canada* v. *Inuit Tapirisat of Canada*,[266] a decision of the Supreme Court of Canada, appears to support the notion of Cabinet omnipotence. For instance, Mr. Justice Estey stated that "[w]hile the CRTC must operate within a certain framework when rendering its decisions, Parliament has in s. 64(1) not burdened the

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262 Statement by the then Minister of Communications, Jeanne Sauve, in respect to O.I.C., P.C. 1977-3152, *ibid.*, to vary *CRTC Decision 77-10*, *ibid.*, and to approve a proposed agreement for membership of Telesat Canada in Trans-Canada Telephone System. (Department of Communications, Ottawa, 3 November 1977) at 2 (emphasis added).

263 *NTA*, R.S.C.1970, c. N-17.

264 *See* J.M. Evans et al., ADMINISTRATIVE LAW: CASES, TEXT AND MATERIALS, 2d ed. (Toronto: Emond Montgomery, 1984) at 711.

265 R.S.C. 1970, c. R-2.

266 (1980), [1980] 2 S.C.R. 735, 115 D.L.R. (3d) 1 [hereinafter *Inuit Tapirisat*].

executive branch with any standards or guidelines in the exercise of its rate review function".[267] He also stated, "[i]n short, the discretion of the Governor in Council is complete provided he observes the jurisdictional boundaries of s. 64(1)".[268]

There are six interrelated reasons which indicate that this decision should not be read in a manner which would allow Cabinet to ignore the limits placed on the CRTC's jurisdiction over telecommunications.

First, it must be recognized that the decision deals only with the appropriate procedures to be applied in a subsection 64(1) appeal[269] and does not directly address the issue of the substantive powers of Cabinet on such an appeal. The colour of the language employed was chosen to reinforce the view that an appeal from a Bell Canada general rate case should be characterized as far more "legislative" than "quasi-judicial", thereby rendering trial type procedures inappropriate.

Second, there was no question that the CRTC had jurisdiction over rates. Mr. Justice Estey appears to imply that in exercising that jurisdiction on appeal, Cabinet, unlike the CRTC, does not have to observe any standards or guidelines. However, he should not be regarded as thereby attributing a broader jurisdictional scope to Cabinet than that of the CRTC, but only as indicating how that jurisdiction is to be exercised. For reasons set out below, it is submitted that his statement cannot be taken to mean that Cabinet may entirely abandon the notion of just and reasonable rates and non-discrimination.

Third, there is language in the decision itself to indicate that the Court had not completely set aside its concern about confining Cabinet strictly to the legal authority granted to it by Parliament. As further observed by Mr. Justice Estey, in this situation, "the Court must fall back upon the basic jurisdictional supervisory role and in so doing construe the statute to determine whether the Governor in Council has performed its functions within the boundary of the parliamentary grant and in accordance with the terms of the parliamentary mandate".[270]

Fourth, it is most important to recall that Cabinet has no inherent authority and cannot act as a roving commission to rectify wrongs. As H.W.R. Wade has pointed out:

> The rule of law has a number of different meanings and corollaries. Its primary meaning is that everything must be done according to law. Applied to the powers of government, this requires that every government authority . . . must be able to justify its action as authorized by law — and in nearly every case this will mean authorized by Act of Parliament. Every act of governmental power, i.e. every act which affects the legal rights, duties or liberties of any person, must be shown to have a strictly legal pedigree.[271]

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267 *Ibid.* at 753, 115 D.L.R. (3d) at 15.

268 *Ibid.* at 756, 115 D.L.R. (3d) at 17.

269 *NTA*, R.S.C. 1970, c. N-17.

270 *Inuit Tapirisat*, *supra*, note 266 at 758-9, 115 D.L.R. (3d) at 19.

271 H.W.R. Wade, ADMINISTRATIVE LAW, 5th ed. (Oxford: Clarendon Press, 1982) at 22.

Fifth, subsection 64(1) deals exclusively with the power of Cabinet to vary or rescind CRTC decisions. It would be inappropriate in principle to attribute substantive law-making capacity to a statutory provision which merely creates a power of appeal or review. In any event, Cabinet's competence is confined to "any order, decision, rule or regulation of the Commission" which must mean any order, decision, rule or regulation made within the Commission's jurisdiction, as there can be no appeal from a nullity.[272] In other words, Cabinet is not given any new authority to deal with telecommunications matters *ab initio*. Cabinet's authority is restricted to matters already dealt with by the Commission, and such matters must be orders, decisions, rules or regulations, that is to say, intra-jurisdictional matters.

Sixth, it is apparent from recent cases such as *Operation Dismantle Inc.* v. *R.*[273] that the Supreme Court of Canada has no intention of exempting Cabinet from judicial scrutiny. As Chief Justice Dickson succinctly stated: "I have no doubt that the executive branch of the Canadian government is duty bound to act in accordance with the dictates of the *Charter*."[274] Under these circumstances, it would seem highly unlikely, to say the least, that the Court would be prepared to allow Cabinet to act as a law unto itself under subsection 64(1). As Mr. Justice Le Dain remarked in the *Inuit Tapirisat* case: "The Governor in Council is expected to direct his mind to telecommunications policy in the broadest sense and not to considerations which are clearly foreign to this particular governmental responsibility".[275]

VII. The Role of the Competition Law Authorities

The statutory mandate of the Director and Competition Tribunal is to "maintain and encourage competition in Canada" in order to promote the economic and social objectives specified in section 1.1 of the *Competition Act*.[276] This mandate differs very little from what the competition law authorities perceived their role to be under the previous legislation, notwithstanding that the *Combines Investigation Act*[277] contained no express statement of statutory purpose. The *1985 Annual Report* of the Director of Investigation and Research, for example, contains the following description of the former Act:

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272 *NTA*, R.S.C. 1970, c. N-17, s. 64(1).

273 (1985), [1985] 1 S.C.R. 441, 12 Admin. L.R. 16.

274 *Ibid.* at 455, 12 Admin. L.R. at 33.

275 *Inuit Tapirisat* v. *Leger* (1978), [1979] 1 F.C. 710 at 719, 95 D.L.R. (3d) 665 at 673.

276 (Being part 2 of *An Act to Establish the Competition Tribunal and to Amend the Combines Investigation Act and The Banking Act and Other Acts in Consequence Thereof*, 1st Sess., 33d Parl., 1986).

277 R.S.C. 1970, c. C-23.

> The purpose of the Combines Investigation Act is to assist in maintaining effective competition as a prime stimulus to the achievement of maximum production, distribution and employment in a mixed system of public and private enterprise. To this end, the legislation seeks to eliminate certain practices in restraint of trade, and to overcome the negative effects of concentration, both of which tend to prevent the economic resources of Canada from being used most effectively to the advantage of all.[278]

The *1985 Annual Report*, however, clearly suggests that insofar as the competition law authorities themselves are concerned, this mandate to enforce competition law ends, more or less, where regulation begins. According to the *Report*:

> In some areas of the economy, commercial activity, including some of its competitive aspects, is subject to regulation under federal, provincial or municipal legislation. Examples may be found in the fields of marketing legislation, resources conservation and regulation of communications systems. *Although such controls may restrict competition, if they are imposed pursuant to valid legislation they may provide a defence to charges under the Combines Investigation Act.*[279]

Furthermore, the *1985 Annual Report* elsewhere states that one of the primary functions of the Regulated Sector Branch of the Bureau of Competition Policy (the head of which is the Director of Investigation and Research) is to "enforce sections of the Act which may be applicable to the *unregulated activities of regulated industries*".[280]

This interpretation of the role of the Director is certainly consistent with the statutory analysis developed above, especially with regard to the Director's authority to enforce competition policy in markets in which there has been regulatory forbearance. The Director, in fact, has been relatively active in policing market conduct in a number of regulated industries, particularly transportation.[281] Yet, there do not appear to have been any prosecutions initiated by the Director against firms in the telecommunications industry, at least not in recent memory. Instead, the Director, in addition to his role in RTPC inquiries, has apparently confined his activities in the telecommunications sector of the economy to numerous, and at times very detailed, interventions at hearings before the CRTC, pursuant to section 27.1 of the former Act.[282] He has, as well, intervened before provincial regulatory bodies.

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278 Canada, *Director of Investigation and Research, Combines Investigation Act, Annual Report* (Ottawa: Minister of Supply and Services, 31 March 1985) at 1 (Director: M.P. O'Farrell) [hereinafter *1985 Annual Report*].

279 *Ibid.* (emphasis added).

280 *Ibid.* at 56 (emphasis added).

281 *See, e.g., R.* v. *Lorne Wilson Transp. Ltd.* (1982), 40 O.R. (2d) 86, 138 D.L.R. (3d) 690 (C.A.); *R.* v. *Allied Van Lines* (14 December 1983), (Ont. H.C.) [unreported].

282 *Combines Investigation Act*, R.S.C. 1970, c. C-23.

Just how effective these interventions have been is difficult to assess.[283] But in the words of Lawson Hunter, the former Director of Investigation and Research, "I would be less than candid if I did not say that these interventions have left me with strong concerns about the effectiveness of direct regulation in this new environment."[284] As elaborated by the former Director in a recent policy paper, the optimal mix of regulation and competition in telecommunications cannot be brought about or sustained through regulation alone, regardless of how useful intervention by the Director in the regulatory process might be. Increased involvement on the Director's part in policing market conduct in telecommunications, however, was said to require: (1) a more liberal federal microwave licensing policy and (2) an increased willingness on the CRTC's part to forbear from regulating those telecommunications activities most amenable to competitive market supply.[285]

While not necessarily agreeing with the terms and conditions (including structural separation) proposed by the Director pursuant to which regulatory forbearance should take place, there is much to commend the argument that entry into various telecommunications markets should be liberalized while regulation is simultaneously wound down. Where we disagree is that there is little for the competition law authorities to do in telecommunications markets, other than to intervene in regulatory proceedings, until such time as the above conditions are met or the Director's mandate is expressly extended by way of new legislation. The next section of the article will explore possible reasons for the competition law authorities' reluctance to test their authority in regulated telecommunications markets. In the meantime, a closer look at the nature of past interventions by the Director in the regulatory arena is warranted.

Among the most important regulatory proceedings at which the Director has made representations are the following: (a) the 1976 CNCP application for (limited) system interconnection with Bell Canada; (b) the *Challenge Communications* case;[286] (c) the hearing dealing with Telesat Canada's proposed connection agreement with TCTS; (d) the Bell Canada terminal interconnection hearings; (e) the Bell Canada and BC Tel applications for approval of rate increases for TCTS services; (f) Phase III of the CRTC cost inquiry; (g) the Bell Canada corporate reorganization; (h) the radio common carrier interconnection decision; (i) the interexchange

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283 A study for the Neilson Task Force on the activities of the Bureau of Competition Policy, Regulated Sector Branch, found that there was a good deal of support for the role played by the Director. *See* Canada, *Regulatory Programs: A Study Team Report to the Task Force on Program Review* (Ottawa: Minister of Supply and Services, May 1985) at 167-8. For a further assessment, *see* G.E. Kaiser, *Canada*, in J.O. Kalinowski, ed., Vol. A3, Pt. 2, c. 11, §11.05 at 15-23, WORLD LAW OF COMPETITION (New York: Matthew Bender, 1985) [hereinafter WORLD LAW OF COMPETITION].

284 L.A. Hunter, *An Agenda for Telecommunications Policy Change* (1984), C.R.R. 5-55 at 5-55.

285 *Ibid.* at 5-58-9.

286 *Supra*, note 234.

competition proceedings; (j) the structural separation hearings with respect to multiline and data terminal equipment; (k) the enhanced services decision; (l) a host of Bell Canada and provincial telephone company rate increase applications; as well as (m) a number of other proceedings involving both federal and provincial telecommunications service providers.

The Director's involvement in these regulatory proceedings has been, for the most part, very intense. He has submitted detailed interrogatories to the major participants, actively cross-examined witnesses, called expert economic evidence and presented detailed submissions and proposals for the Commission's consideration. In addition, the Director has participated in a number of cases which have been appealed to the courts. Although it is difficult to ascertain whether the outcome of any of these hearings would have been substantially different absent the Director's involvement, the fact that several Commission decisions have explicitly recognized and accepted arguments put forward by the Director suggests that his role has been far from unimportant.[287]

Recurrent themes in representations made by the Director to the CRTC include the importance, from a competition policy perspective, of (a) minimizing barriers to terminal and network interconnection,[288] and ensuring that whenever the latter is provided, it is done on the same terms and conditions as are available to the telephone companies themselves;[289] (b) requiring that the onus of proof that new entry and competition are not in the public interest be placed on incumbent firms opposing such entry;[290] (c) eliminating tariffs which discriminate against competitive entry into new and existing services (excluding, perhaps, basic local services);[291] (d) requiring vertically integrated telecommunications companies to implement competitive bidding systems for their major equipment purchases;[292]

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287 Kaiser has argued that there are principally two benefits from interventions by the Director in regulatory proceedings. First, since in many instances the regulator has sole responsibility for making decisions affecting competition within the industry, the further development of competition policy depends in no small measure on the regulator being able to consider the Director's view. Second, the interests of parties to regulatory proceedings do not always conflict. Absent interventions from the Director relating to the public interest in preserving and enhancing competition, the Commission would not be in a position to independently consider such evidence. *See* Kaiser, *supra*, note 147 at 364.

288 Canada, *Director of Investigation and Research, Combines Investigation Act, Annual Report* (Ottawa: Minister of Supply and Services, 31 March 1980) at 34-5 (Director: R.J. Bertrand) [hereinafter *1980 Annual Report*].

289 Canada, *Director of Investigation and Research, Combines Investigation Act, Annual Report* (Ottawa: Minister of Supply and Services, 31 March 1984) at 79, 92 (Director: L.A.W. Hunter) [hereinafter *1984 Annual Report*].

290 *1980 Annual Report*, *supra*, note 288 at 35; *1985 Annual Report*, *supra*, note 278 at 69.

291 Canada, *Director of Investigation and Research, Combines Investigation Act, Annual Report* (Ottawa: Minister of Supply and Services, 31 March 1979) at 45 (Director: R.J. Bertrand) [hereinafter *1979 Annual Report*].

292 *Ibid. See also* Canada, *Director of Investigation and Research, Combines Investigation Act, Annual Report* (Ottawa: Minister of Supply and Services, 31 March 1981) at 65 (Director: L.A.W. Hunter) [hereinafter *1981 Annual Report*].

(e) keeping Telesat Canada out of TCTS (and later, Telecom Canada) so as to ensure a maximum degree of competition between different service providers and technological modes of service carriage;[293] (f) permitting resale and sharing of services;[294] (g) adopting fully distributed as opposed to marginal costing principles in developing a costing methodology for regulated carriers;[295] (h) structural, as opposed to accounting, separation of the competitive activities of regulated carriers to prevent subsidization of competitive services by monopoly revenues;[296] and (i) recognizing that full rate rebalancing is not an essential prerequisite for fair competition.[297] Finally, and as might be expected, the Director has consistently argued that the benefits of competition include increased innovation and efficiency, lower rates, greater consumer choice and generally, positive income and employment effects in other sectors of the Canadian economy.[298]

In addition to these various appearances before, and interventions in, regulatory proceedings and appeals therefrom, the Director has also participated in drafting proposed new telecommunications legislation — most recently Bill C-19.[299]

While the Director has undoubtedly played a major role in persuading the regulatory authorities to acknowledge a greater role for competition, a price has had to be paid for all this intimate involvement in the regulatory process. The Director has to some extent been co-opted by the regulator's view that competition should be seen as a subordinate and not a primary value. Rather than pushing for competition as a full-blown alternative to regulation, the Director has tended to accept the regulatory premise that competition should be viewed as a supplement to regulation and not as a substitute. Thus, in explaining why he had intervened in the 1978 Bell Canada rate case, the Director noted his concern for "the development of expanded opportunities for *competition as a regulatory instrument* to improve the effectiveness of the regulatory process and to reduce the continuing upward pressure on prices in the telecommunications sector".[300] Moreover, this approach has led the Director to favour an expan-

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293 Canada, *Director of Investigation and Research, Combines Investigation Act, Annual Report* (Ottawa: Minister of Supply and Services, 31 March 1978) at 38 (Director: R.J. Bertrand) [hereinafter *1978 Annual Report*]; *1981 Annual Report*, *ibid.* at 63.

294 Canada, *Director of Investigation and Research, Combines Investigation Act, Annual Report* (Ottawa: Minister of Supply and Services, 31 March 1982) at 63 (Director: L.A.W. Hunter) [hereinafter *1982 Annual Report*]; *1985 Annual Report*, *supra*, note 278 at 68; *1984 Annual Report*, *supra*, note 289 at 80, 89.

295 Canada, *Director of Investigation and Research, Combines Investigation Act, Annual Report* (Ottawa: Minister of Supply and Services, 31 March 1983) at 73 (Director: L.A.W. Hunter) [hereinafter *1983 Annual Report*]; *1985 Annual Report*, *supra*, note 278 at 68.

296 *1984 Annual Report*, *supra*, note 289 at 80; *1985 Annual Report*, *supra*, note 278 at 71.

297 *1985 Annual Report*, *ibid.* at 69.

298 *Ibid.* at 61.

299 Bill C-19, *An Act Respecting the Reorganization of Bell Canada*, 1st Sess., 33d Parl., 1984.

300 *1979 Annual Report*, *supra*, note 291 at 45 (emphasis added).

sionist view of the CRTC's regulatory jurisdiction, as may be seen in his support of the Commission's claim to set "floor prices" for terminal equipment when that matter was tested in the courts.[301]

Some degree of co-optation appears inevitable given both the prevailing ethos of the forums in which pro-competitive arguments have had to be made and the limits of the statutory authority granted the Director. With respect to the latter, it should be recalled that the 1976 amendments to the *Combines Investigation Act* (which have since been incorporated into the *Competition Act* and expanded to include provincial regulatory bodies) provide that where the Director intervenes in regulatory proceedings, it must be only with respect to factors that the regulator itself is entitled to take into consideration.[302]

In addition to this activity by the Director, the Restrictive Trade Practices Commission (RTPC) undertook a wide ranging inquiry into the telecommunications industry in the 1970's and early 1980's. In September, 1981 it issued a report on terminal attachment: *Telecommunications in Canada —Phase I, Interconnection.*[303] This report complemented and reinforced moves already underway at the CRTC to allow for competition in the telecommunications equipment market. The RTPC's second report[304] dealt with Bell Canada's reorganization and played a role in persuading the government that a public inquiry into this development was needed. Such an inquiry was undertaken by the CRTC with very active participation by the Director, and the Commission's recommendations, which reflected the competition authorities' concerns, were largely adopted in the proposed legislation.[305] The RTPC's final report, *Telecommunications in Canada — Part III, The Impact of Vertical Integration on the Equipment Industry*,[306] concluded, rather lamely, that there was no

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301 *See 1985 Annual Report, supra*, note 278 at 55. *See also CNCP Telecommunications, supra*, note 239.

302 *Competition Act* (being part 2 of *An Act to Establish the Competition Tribunal and to Amend the Combines Investigation Act and The Banking Act and Other Acts in Consequence Thereof*, 1st Sess., 33d Parl., 1986).

303 Canada, RTPC, *Telecommunications in Canada — Part I —Interconnection: Report in the Matter of an Inquiry under Section 47 of the Combines Investigation Act relating to the Manufacture, Production, Distribution, Purchase, Supply and Sale of Communications Systems, Communications Equipment and Related Products* (Ottawa: Minister of Supply and Services, 1981).

304 Canada, RTPC, *Telecommunications in Canada — Part II — The Proposed Reorganization of Bell Canada: Report in the Matter of an Inquiry under Section 47 of the Combines Investigation Act relating to the Manufacture, Production, Distribution, Purchase, Supply and Sale of Communications Systems, Communications Equipment and Related Products* (Ottawa: Minister of Supply and Services, 1982).

305 CRTC, *Report of the Canadian Radio-television and Telecommunications Commission on the Proposed Reorganization of Bell Canada* (Ottawa: CRTC, April 18, 1983).

306 Canada, RTPC, *Telecommunications in Canada — Part III —Impact of Vertical Integration on the Equipment Industry: Report in the Matter of an Inquiry under Section 47 of the Combines Investigation Act relating to the Manufacture, Production, Distribution, Purchase, Supply and Sale of Communications Systems, Communications Equipment and Related Products* (Ottawa: Minister of Supply and Services, 1983).

need for any change with respect to this aspect of the industry's structure, notwithstanding earlier concerns which had been expressed by the Director.

Overall, proceedings by the RTPC have provided full opportunity for public discussion of telecommunications related issues: between June, 1977 and May, 1981 the Commission held 228 days of hearings across Canada and heard 218 witnesses. By and large, however, these proceedings must be considered something of a disappointment in that they did not lead to recommendations which really came to grips with contemporary telecommunications issues.

VIII. The Regulated Conduct Exemption

Notwithstanding that various activities and types of market conduct are expressly exempted from the provisions of the *Competition Act*,[307] there is not at present, nor has there ever been, a general statutory exemption in favour of regulated conduct under federal anti-combines legislation. Therefore, what authority there is for the existence and extent of this exemption must be found in judge-made law. Unfortunately, the caselaw on this question remains surprisingly thin and underdeveloped. For the most part, it is limited to the following three decisions: *Reference Re Farm Prods. Marketing Act*,[308] *R.* v. *Canadian Breweries Ltd.*[309] and *A.G. Canada* v. *Law Soc'y of British Columbia.*[310]

A. *The Farm Products Marketing Reference*

The principal issue in this case was the constitutional validity of a provincial statute creating a farm products marketing board. A secondary issue considered by the Supreme Court of Canada was whether or not the price-fixing activities of the marketing agency contravened the criminal provisions of the *Combines Investigation Act*,[311] which prohibits agreements that unduly restrict competition.

The Court, in finding the provincial marketing agency not to be in violation of federal anti-combines law, offered several reasons in support of this conclusion. First, Mr. Justice Fauteux observed:

> The object of Parliament in legislating with respect to private agreements involving monopolies is to protect the public interest in free competition. The

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307 (Being part 2 of *An Act to Establish the Competition Tribunal and to Amend the Combines Investigation Act and The Banking Act and Other Acts in Consequence Thereof*, 1st Sess., 33d Parl., 1986).

308 (1957), [1957] S.C.R. 198, 7 D.L.R. (2d) 257 [hereinafter *Re Farm Products*].

309 (1960), [1960] O.R. 601, 126 C.C.C. 133 (H.C.) [hereinafter *Canadian Breweries*].

310 (1982), [1982] 2 S.C.R. 307, [1982] 5 W.W.R. 289 [hereinafter *Jabour*].

311 R.S.C. 1970, c. C-23, ss. 32-46.1 (Parts V & VI).

> adoption by Parliament of an "Act to assist and encourage co-operative marketing of agricultural products", 3 Geo. VI, c. 28, now R.S.C. 1952, c. 5, does not suggest that marketing schemes devised by Parliament or a Legislature within their respective fields, are *prima facie* to be held to come within the scope of the anti-monopoly legislation.[312]

In other words, there exists no general presumption in law that federal anti-combines legislation must automatically supercede all other validly enacted statutes — whether federal or provincial. But if, pursuant to the above judgment, Mr. Justice Fauteux had in mind circumstances in which the federal Act would prevail over apparently conflicting legislation at the federal or provincial level, he provided no indication as to what those circumstances might be.

Chief Justice Kerwin and Mr. Justice Locke, in separate but concurring judgments on this point, went a considerable step further. Both held that where market conduct is regulated pursuant to valid provincial legislation, such conduct is deemed to be in the public interest and, hence, cannot offend federal competition law and the public interest protected thereunder.

According to the Chief Justice:

> With respect to [the Combines Investigation Act] and also to the sections of the Criminal Code referred to, it cannot be said that any scheme otherwise within the authority of the Legislature is against the public interest when the Legislature is seized of the power and, indeed, the obligation to take care of that interest in the Province.[313]

Mr. Justice Locke was even more emphatic:

> In my opinion, neither the provisions of the *Combines Investigation Act*, R.S.C. 1952, c. 314 nor of s. 411 of the *Criminal Code*, 1953-54 (Can.), c. 51, are objections to the schemes in question to the extent that they are within the powers which may be validly granted by the Legislature under the terms of the *British North America Act*. It cannot be said, in my opinion, that within the terms of para. (a)(vi) of s. 2 of the *Combines Investigation Act* the scheme "is likely to operate to the detriment or against the interest of the public, whether consumers, producers or others". Rather it is a scheme the carrying out of which is deemed to be in the public interest. Furthermore, the offence defined by s. 2 which renders a person subject to the penalties prescribed by s. 32 is a crime against the state. I think that to perform an act which the Legislature is empowered to and has authorized cannot be an offence against the state.[314]

Conspicuously absent from these judgments, however, is any suggestion that the "public interest" may be more than uni-dimensional. By denying that the public interest is, in effect, an amalgam of an infinity of competing interests, the court appears to have been seduced by an illusion of its own creation. Where two valid statutes conflict — be they both

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312 *Re Farm Products*, *supra*, note 308 at 258, 7 D.L.R. (2d) at 314.
313 *Ibid.* at 206, 7 D.L.R. (2d) at 265.
314 *Ibid.* at 239, 7 D.L.R. (2d) at 296.

federal or one federal and the other provincial — it is no answer to suggest that because the conduct authorized by one is in the public interest, the prohibition against the same conduct, in the other statute, suddenly no longer applies. The prohibitory statute, when enacted, presumably was also cloaked in the public interest. The question left unanswered in the judgments of Mr. Justice Locke and Chief Justice Kerwin, therefore is: when did the public interest served by the *Combines Investigation Act* cease to warrant this protection with respect to the conduct in question?[315]

Clearly, a more principled basis is required for the resolution of conflicts between statutes than that provided in these two judgments. Two possibilities suggest themselves. The courts could either determine that the so-called conflict is more apparent than real by finding, for example, that the type of activity authorized in one statute was not of the variety sought to be prohibited in the other. Or, alternatively, they could expressly concede that a conflict exists and, where the invocation of federal paramountcy is inappropriate or impossible (as where both statutes are federal), they may proceed to devise a solution that leads to the least amount of discord between the different elements of the public interest sought to be protected by each statute. By way of contrast, the judgments of Chief Justice Kerwin and Mr. Justice Locke amount to little more than an implicit assertion of provincial paramountcy with respect to the matters in question and a complete rejection of the possibility that consumers, and even some producers, may be worse off under a marketing scheme than under more competitive conditions of market supply.

It is submitted that a far better approach, and one consistent with the first of the two alternatives suggested above, is that taken by Mr. Justice Rand in the same case. According to Mr. Justice Rand:

> The Provincial statute contemplates *coercive regulation* in which both private and public interests are taken into account. The provisions of the *Combines Investigation Act* and the *Criminal Code* envisage voluntary combinations or agreements by individuals against the public interest that violate their prohibitions. The public interest in trade regulation is not within the purview of Parliament as an object against which its enactments are directed.[316]

The first point to note with respect to the above reasoning is that it makes no attempt to finesse the question of whether validly enacted statutes

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315 It should be noted that soon after the decision in this case, the *Combines Investigation Act* was amended to explicitly exempt farm products marketing schemes from its operation. *See An Act to Amend the Combines Investigation Act and the Criminal Code*, S.C. 1960, c. 45, s. 1(2)(e) *amending An Act to Provide for the Investigation of Combines, Monopolies, Trusts and Mergers*, R.S.C. 1952, c. 314, s. 2(a). The fact that the Supreme Court of Canada may have reached the desired or appropriate conclusion in view of federal competition policy, however, does not mean that it reached this result on the best legal reasoning.

316 *Re Farm Products*, *supra*, note 308 at 219-20, 7 D.L.R. (2d) at 278 (emphasis added). *See also* the discussion in E. Milligan, *Federal Competition Law and Provincial Regulation*, LL.M. Thesis, University of Toronto, 1979 at 150-1 [unpublished][hereinafter Milligan].

may conflict. Notwithstanding that each statute purports to be, or is invariably deemed to be, in the public interest, these validly enacted statutes may clearly conflict.

The second, and far more important point, is the reason offered for why the two statutes in question did not, in fact, conflict. This explanation was as simple as it was insightful. The *Combines Investigation Act* makes anti-competitive conduct *voluntarily engaged in* by market participants illegal, the presumption being that private actions in restraint of trade are contrary to the public interest in free competition. But where the anti-competitive conduct of market participants is the result of *coercion* by the state (in this case, provincially authorized regulation of market prices), there is no voluntary conduct in respect of the activities being regulated such as would bring them within the ambit of federal competition law. It is submitted that it is this fact, and not the presumption that regulated conduct is in the public interest (however defined), that provides a principled basis for the regulated conduct exemption, at least from the perspective of those persons and firms whose activities are subject to regulation.[317]

B. *The Canadian Breweries Decision*

As important as the *Re Farm Products* case may have been in establishing that a valid regulatory scheme need not offend the *Combines Investigation Act*,[318] it must not be forgotten that the principal issue before the Court was a constitutional one. Thus, while the case may be authority for the existence of a regulated conduct exemption, this decision, excluding the judgment delivered by Mr. Justice Rand, provides little guidance as to the limits of the exemption. *Canadian Breweries*,[319] by comparison, tackled this question more or less head on.

Unlike *Re Farm Products*, *Canadian Breweries* was a prosecution under the *Combines Investigation Act*.[320] The accused, Canadian Breweries Limited, was charged under subsection 32(1) of the Act with having been "a party to . . . or [having] knowingly assisted in the formation or operation of a combine . . . to wit a merger, trust or monopoly . . . [which] has operated or was likely to operate to the detriment or against the interest of the public".[321]

The essence of the Crown's argument was that the accused had sought to "eliminate all substantial competition" in the industry including, especially, price competition, by pursuing an aggressive merger policy.[322]

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317 The distinction between voluntary and coerced conduct was to figure prominently in the Supreme Court of Canada's later decision in *Jabour*. *See* text accompanying notes 350-3, *infra*.

318 At the time, the legislation under consideration was R.S.C. 1952, c. B-14.

319 *Supra*, note 309.

320 The relevant legislation at this time, like in the *Re Farm Products* case a few years earlier, remained R.S.C. 1952, c. B-14.

321 *Canadian Breweries*, *supra*, note 309 at 629, 126 C.C.C. at 167.

322 *Ibid.* at 606, 126 C.C.C. at 139-40.

At trial it was alleged, and not disputed, that the accused had acquired control over twenty-three rival breweries between 1930 and 1953. In the process, the accused raised its overall share of the Canadian market from eleven to over sixty percent.[323]

The position taken by the defence was that the mergers in question had no effect either on price competition or the ability of other competitors to enter the market since both these matters were subject to "restrictions . . . validly imposed by government authorities".[324] It was also contended that competition remained vigorous in respect of activities untouched by provincial regulation.

Two preliminary points emerging from the above arguments warrant particular emphasis. First, there was no dispute at trial as to the validity, constitutional or other, of the provincial legislation authorizing the regulation of the brewing industry. Thus, most of the arguments canvassed in the *Re Farm Products* case were of no relevance to this particular dispute. Second, and even more important, the defence advanced by the accused was not that its acquisitions were authorized or sanctioned by the relevant regulatory board, rendering the accused immune from anti-combines prosecution. Rather, it was submitted that the restrictions on competition in the industry were the direct consequence of the state's intervention and not a by-product of the accused's merger activities. Causation, therefore, was a central issue to be determined at trial.[325]

This last point was not lost on the Court. According to Chief Justice McRuer of the High Court of Ontario, the task facing the prosecution, under these circumstances, was as follows:

> When a provincial legislature has conferred on a commission or board the power to regulate an industry and fix prices, and the power has been exercised, the Court must assume that the power is exercised in the public interest. In such cases, in order to succeed in a prosecution laid under the Act with respect to the operation of a combine, I think *it must be shown that the combine has operated, or is likely to operate, so as to hinder or prevent the provincial body from effectively exercising the powers given to it to protect the public interest.*[326]

In the alternative, the prosecution must show that, "the formation or operation of the merger lessened or is likely to lessen competition to an unlawful degree in the areas where competition is permitted".[327]

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323 *Ibid.* at 609, 126 C.C.C. at 144.

324 *Ibid.* at 610, 126 C.C.C. at 145.

325 However, there is no unanimity on this point. At least two commentators have suggested, incorrectly in our view, that the Court found the accused not guilty of the merger offence *because* of the immunity provided by the regulation of its prices. *See* C.J.M. Favell, CANADIAN COMPETITION LAW (Toronto: McGraw-Hill, 1979) at 49; Kaiser, *supra*, note 147 at 352. The correct interpretation of the Court's decision, in our view, is that the accused was found not guilty because its merger policy was found not to have affected industry prices.

326 *Canadian Breweries*, *supra*, note 309 at 629, 126 C.C.C. at 167 (emphasis added).

327 *Ibid.* at 611, 126 C.C.C. at 146.

After reviewing the evidence, the Chief Justice made the following findings of fact and law. First, the relevant legislation gave "the board a very wide and comprehensive control over every phase of the production and sale of beer in Ontario".[328] Second, the board exercised its jurisdiction by fixing the prices for beer at all relevant times,[329] vigorously policing instances of price-cutting,[330] and controlling entry into the industry through its power to issue licences.[331] Third, the merger in question did not confer on the accused "the power to control the market so that the provincial authority in the exercise of its duty in fixing prices [could not] protect the public interest".[332] Finally, in those activities not affected by provincial regulation, "competition between the accused and others in the industry [was] without restraint".[333] In the result, the accused was acquitted.

Notwithstanding it was only a trial court decision, the significance of the *Canadian Breweries* case cannot be overstated. For one thing, it is the only Canadian decision, *Jabour*[334] included, to directly consider the scope of the regulated conduct exemption in so far as *regulated industries* are concerned. In doing so, it provides authority for a number of propositions. First, there exists no *automatic* immunity from anti-combines prosecution in regulated industries, even where (a) the industry is regulated pursuant to valid legislation and (b) the conduct in question is subject to active, let alone passive, regulation. With respect to this latter point, *Canadian Breweries* establishes that the successful prosecution of anti-competitive conduct which is subject to regulation requires that the conduct be such that it prevents the regulatory agency from effectively exercising its powers in the public interest. Unfortunately, no effort was made to elaborate upon the circumstances which might be sufficient to produce this result.[335]

Perhaps of even greater import, at least with respect to the telecommunications industry, is the corollary of the above proposition. That is, where the regulatory agency is *not exercising* its authority over the conduct of the person or firm in question, that conduct is automatically subject to the provisions of the *Competition Act*.[336] This means that where a tribunal has forborne from regulating a particular activity, no immunity from

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328 *Ibid.* at 614, 126 C.C.C. at 149.

329 *Ibid.*, 126 C.C.C. at 150.

330 *Ibid.* at 615, 126 C.C.C. at 151.

331 *Ibid.* at 625, 126 C.C.C. at 152.

332 *Ibid.* at 630, 126 C.C.C. at 168.

333 *Ibid.*

334 *Supra*, note 310.

335 There is, however, one reference by McRuer C.J.H.C. (*Canadian Breweries*, *supra*, note 309 at 629-30, 126 C.C.C. at 167), suggesting that if the merger had resulted in a "substantial monopoly" this would have been sufficient to nullify the exemption. As this reasoning clearly has no application to industries which are or were considered natural monopolies, it is of little relevance here. *See* Milligan, *supra*, note 316 at 151-2, 156-60.

336 (Being part 2 of *An Act to Establish the Competition Tribunal and to Amend the Combines Investigation Act and The Banking Act and Other Acts in Consequence Thereof*, 1st Sess., 33d Parl., 1986).

Canadian competition law is available with respect to that activity unless, and until such time as the regulator chooses to (once again) exercise its authority to control that activity.

Although Chief Justice McRuer made no mention of the *Re Farm Products* case in reaching his decision, the above considerations strongly suggest that he was influenced by the concept of "coerced regulation" first introduced by Mr. Justice Rand in that case. In particular, by suggesting that the regulated conduct exemption applies only to conduct expressly required by the regulator (as opposed to the authorizing legislation itself), the *Canadian Breweries* decision arguably confined the scope of the exemption to involuntary conduct engaged in to comply with regulatory fiat. All other conduct voluntarily engaged in, whether subject to active or passive regulatory oversight, may legitimately come within the jurisdiction of the competition law authorities.[337]

C. *Jabour*

The *Jabour* decision actually involved two closely related actions heard together by the Supreme Court of Canada. The event triggering these proceedings was the decision of the Benchers of the Law Society of British Columbia to discipline Jabour for "conduct unbecoming a member of the Society" contrary to paragraph 48(b)(iii) of the *Legal Professions Act*.[338] The conduct in question was Jabour's decision to advertise his practice.[339]

Upon being notified of the Law Society's intention to institute disciplinary proceedings against him, Jabour sought a declaration that the Law Society's rules and orders prohibiting advertising, *inter alia*, constituted

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337 The *Canadian Breweries* case was recently followed (although not referred to) by the Ontario Court of Appeal in *R.* v. *Lorne Wilson Transp. Ltd.*, *supra*, note 281. This case involved a charge of bid-rigging in response to a call for tenders for school transportation services, contrary to the provisions of the *Combines Investigation Act*, s. 32.2, *enacted by* S.C. 1974-75-76, c. 76, s. 15, *amending* R.S.C. 1970, c. C-23. In finding the accused to be guilty, the Court held that:

1) the provisions of *The Public Vehicles Act*, R.S.O. 1970, c. 392 (now R.S.O. 1980, c. 425) pursuant to which the accused were subject to various forms of regulation, did "not have the effect of precluding the operation of s. 32.2 of the *Combines Investigation Act*" (*ibid.* at 88, 138 D.L.R. (3d) at 692), and
2) "the existence of a bid-rigging arrangement would prevent the appropriate authority from effectively exercising the power given to protect the public interest under that Act" (*ibid.*).

338 R.S.B.C. 1960, c. 214 (now the *Barristers and Solicitors Act*, R.S.B.C. 1979, c. 26, s. 50(a)(iii)).

339 There were no regulations or express statutory impediments barring lawyers in British Columbia from engaging in such advertising activities. The Law Society, however, had published and distributed a handbook setting out guidelines to assist its members in achieving and maintaining proper standards of professional conduct. *See Jabour*, *supra*, note 310 at 337, [1982] 5 W.W.R. at 314. One of the rules in this Professional Conduct Handbook, itself not legally binding, expressly cautioned against self-advertisement.

an illegal restraint of trade contrary to the provisions of the *Combines Investigation Act*,[340] and, hence, were null and void. In addition, he sought an injunction to halt the disciplinary proceedings against him.

These developments, in turn, led the Director of Investigation and Research to cause the Restrictive Trade Practices Commission (RTPC) to begin an inquiry into the conduct of the Law Society to determine whether its regulation of advertising was in violation of section 32 of the *Combines Investigation Act*. The Law Society responded by starting an action in the Supreme Court of British Columbia for a declaration that the federal Act did not apply to it, or if it did apply, it was *ultra vires* the Parliament of Canada.

The pivotal issue to be resolved in this case, therefore, was the "right of the Benchers to define and prohibit the type of advertising in which Jabour, as a member, engaged".[341] Mr. Justice Estey, speaking for a unanimous Supreme Court of Canada, held that (1) the actions of the Benchers of the Law Society were within the discretionary authority granted them under valid provincial legislation[342] and (2) that in the circumstances of this appeal the *Combines Investigation Act* did not apply.[343] His Lordship made clear, however, that the Court's decision should not be construed as providing a *blanket-exemption* for the Law Society, its governing body, or any of its members from the provisions of the federal statute.[344]

In arriving at these findings of law the Court first examined the relevant provisions of the enabling provincial statute. It then reviewed the considerations which may have prompted the provincial legislature to favour self-regulation as the most appropriate administrative mechanism for supervising the activities and conduct of the legal profession in British Columbia. Finally, the Court extensively reviewed a number of regulated industry cases, including *Re Farm Products*[345] and *Canadian Breweries*,[346] to extract and then apply those principles most germane to the issue raised in *Jabour*.

As a preliminary matter, the Court had (surprisingly) little difficulty in finding that the actions of the Benchers were authorized by valid provincial legislation. As Mr. Justice Estey observed:

> The statute directs the Law Society acting through the Benchers to determine in the public interest what "matter, conduct or thing" is "conduct unbecoming a member of the Society". . . . The decision of the Discipline Committee presumably reflects the announced policy of the Law Society on the matter of advertising. None of the parties has said otherwise. The statute does not limit

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340 R.S.C. 1970, c. C-23.
341 *Jabour*, *supra*, note 310 at 342, [1982] 5 W.W.R. at 319.
342 *Ibid.* at 341, [1982] 5 W.W.R. at 318.
343 *Ibid.* at 359, [1982] 5 W.W.R. at 333.
344 *Ibid.* at 354, [1982] 5 W.W.R. at 330.
345 *Supra*, note 308.
346 *Supra*, note 309.

> the Benchers in the regulation of advertising nor does it confine them to matters of standards of "competence and integrity" in the words of s. 32(6) [of the *Combines Investigation Act*]. The statute authorizes disciplinary action for "conduct unbecoming a member of the Society" and the mandate was broadly styled by the Legislature when it saw fit to define "conduct unbecoming" as including "any matter, conduct or thing that is deemed in the judgment of the Benchers to be contrary to the best interest of the public or of the legal profession".[347]

In other words, the Court clearly rejected the proposition that for the prohibition against advertising to be valid, the provincial legislature must have *expressly* directed its attention to this matter in the enabling statute. The Court, in fact, went to great lengths to explain why the legislature may have wished to confer so much discretion on the Law Society in the regulation of its members' conduct:

> The independence of the Bar from the state in all its pervasive manifestations is one of the hallmarks of a free society. Consequently, regulation of these members of the law profession by the state must, so far as by human ingenuity it can be so designed, be free from state interference, in the political sense, with the delivery of services to the individual citizens in the state, particularly in fields of public and criminal law. The public interest in a free society knows no area more sensitive than the independence, impartiality and availability to the general public of the members of the Bar and through those members, legal advice and services generally. *The uniqueness of position of the barrister and solicitor in the community may well have led the province to select self-administration as the mode for administrative control over the supply of legal services throughout the community.*[348]

Having determined that the Benchers' prohibition against advertising by way of a disciplinary decision was authorized by valid legislation, the Court still had to determine whether such conduct on the part of the Benchers was proscribed by section 32 of the *Combines Investigation Act*. Specifically, did the Law Society's disciplinary proceedings amount to a "conspiracy, combine, agreement or arrangement" to "prevent, limit or lessen, unduly, competition in the . . . supply of a product . . . or to otherwise restrain or injure competition unduly", as required by that section?[349]

In answering in the negative, the Court relied heavily on Mr. Justice Rand's distinction between voluntary conduct and coercive regulation in the *Re Farm Products* case.[350] In the instant case, the Court held that the Benchers had not acted voluntarily. To the contrary, their actions were not only authorized by a valid provincial statute, but they constituted the discharge of a positive (if broadly worded) duty under that statute. According to Mr. Justice Estey:

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347 *Jabour*, *supra*, note 310 at 341, [1982] 5 W.W.R. at 318.
348 *Ibid.* at 335-6, [1982] 5 W.W.R. at 313-4 (emphasis added).
349 S.C. 1974-75-76, c. 76, s. 14, *amending* R.S.C. 1970, c. C-23, s. 32(1).
350 *See Jabour*, *supra*, note 310 at 352, 354-5, [1982] 5 W.W.R. at 327-8, 330.

> The words adopted by Parliament in s. 32 . . . are not ordinarily found in language directed to the actions of persons holding office under a provincially authorized regulatory body and discharging their responsibilities to the community pursuant to their constitutive statute. This is particularly so where the group said to be acting "conspiratorially" was in fact proceeding at the time in question as a deliberative body whose existence was mandated by a provincial statute. When a federal statute can be properly interpreted so as not to interfere with a provincial statute, such an interpretation is to be applied in preference to another applicable construction which would bring about a conflict between the two statutes.[351]

The Court was quick to point out, however, following the principle set out in Mr. Justice Rand's judgment in *Re Farm Products*, that not all actions of the Law Society or its members could be considered exempt from the (criminal) provisions of the *Combines Investigation Act*,[352] and especially section 32 thereof. As noted by the Court:

> The operative words at the beginning of s. 32 are: "Every one who conspires, combines, agrees or arranges with another person". These words are broad enough to include all the Benchers acting as a group or individually or the Law Society as a corporate entity and any one or more of the Benchers or of its statutory officers, or indeed any one with whom the Law Society may have acted jointly. Consequently if any two of these persons, natural or legal, voluntarily entered into an agreement condemned by the *CIA*, the offence would be constituted, and on suspicion of such a situation an inquiry under s. 48 might well be ordered.[353]

Thus, the concept of coercion, compulsion, duty or other obligation under a statute is the critical determinant of whether regulated conduct will be exempted from anti-combines prosecution.

One of the questions raised by the *Jabour* decision is to what extent, if any, the definition of the regulated conduct exemption provided therein differs from that found in the *Canadian Breweries* decision. The Supreme Court of Canada (based on the references to *Canadian Breweries* which were cited with its approval in *Jabour*[354]) appeared to feel that there were no substantial differences. Closer inspection of these decisions, however, indicates that this may not, in fact, be the case.

In *Canadian Breweries*, the relevant regulatory body was *expressly* authorized to fix the price of beer in the province as well as to regulate various other aspects of the brewing industry, including the ability of new firms to enter. Since the provincial board, at all relevant times, also *exercised* its jurisdiction with respect to these matters, the accused's merger activities were held not to have caused the restricted level of competition actually observed in the industry. The lessening of competition was, instead, the result of a conscious decision of the provincial

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351 *Ibid.* at 355-6, [1982] 5 W.W.R. at 330-1.
352 R.S.C. 1970, c. C-23.
353 *Jabour*, *supra*, note 310 at 354, [1982] 5 W.W.R. at 329-30.
354 *See ibid.* at 352-3, [1982] 5 W.W.R. at 228-9.

legislature. Although there is nothing in the judgment of Chief Justice McRuer to suggest that an immunity from anti-combines prosecution exists where regulated conduct is *expressly authorized* by the legislature, neither is there anything in *Canadian Breweries* which is inconsistent with this requirement.

In *Jabour*, by comparison, the legislature did not, in fact, address its attention to whether advertising by the legal profession should be regulated. It left this to the discretion of the profession's governing body. In holding this authority to be sufficient to insulate the Benchers of the Law Society from anti-combines prosecution, and glossing over whether this authority had actually been "exercised",[355] the Supreme Court of Canada appears to have expanded the scope of the regulated conduct exemption well beyond the limits contemplated by the Court in *Canadian Breweries*. A rather unwelcome possibility flowing from this, as Stanbury has forcefully pointed out, is that:

> So long as the firms (or individuals) subject to regulation are able to persuade the statutory body that regulates them to impose the desired restraint of trade on all those subject to the provincial statute, such restraints will not be subject to the *Combines Investigation Act*.[356]

Indeed, the problem envisioned by Stanbury, to the extent that it materializes, is likely to be most serious in self-regulated professions. This is because the interests of the regulator and the interests of those being regulated are apt to be indistinguishable. Therefore, the Supreme Court of Canada's decision may have provided the legal profession in particular, and other self-regulated professions in general, a convenient means of evading liability for restraints of trade under federal competition laws.

Whatever the likelihood of this possibility, a very strong case can be made for the proposition that if the *Jabour* decision has expanded the regulated conduct exemption for persons in *regulated professions*, this wider immunity does not extend to persons or firms in *regulated industries*.[357] For one thing, the Court nowhere suggested or implied that its decision was to be of general application. Instead, it went to great lengths to stress the "unique" nature of the legal profession and the importance of minimizing direct state interference in the management of its affairs. While there may be an overriding public interest to be observed in preserv-

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355 The Benchers "exercised" their statutory authority in a peculiar manner. Rather than promulgating rules or regulations with respect to advertising and then enforcing them, they chose to enforce a policy which, in itself, was without force of law, by way of disciplinary proceedings against Jabour.

356 W.T. Stanbury, *Provincial Regulations and Federal Competition Policy: The Jabour Case* (1983) 3 WINDSOR Y.B. ACCESS JUST. 291 at 341.

357 The newly appointed Director of Investigation and Research, Calvin S. Goldman, certainly appears to be of this view. *See* C.S. Goldman, "The Competition Act as it Relates to the Regulated Sector", Address to the Canadian Association of Members of the Public Utility Tribunals, Saskatoon (10 September 1986). *See* in particular pages 32 and 33.

ing the "independence and impartiality" of the legal profession, no similar danger would appear to attend legislative directions as to how telecommunications services, for example, should be provided or how telecommunications suppliers should conduct their business. Thus, while in *Jabour* there may have been good reasons for not requiring *express legislative sanction* for different types of professional conduct as a condition of anti-combines immunity, no similar rationale exists for omitting this requirement with respect to the conduct of market participants in regulated industries. More importantly, there is no language in *Jabour* to suggest that a court, in the future, could not formally make express legislative sanction a prior condition to the availability of the regulated conduct exemption in regulated industries.

Even assuming that the scope of the regulated conduct exemption as defined in *Canadian Breweries*, rather than in *Jabour*, remains the relevant benchmark for regulated industries, it, too, is not beyond criticism. Perhaps the most frequently heard objection is that the immunity afforded to regulated conduct under this exemption is still much too broad, especially relative to what is available in the United States.

The rule which appears to have emerged in the United States is that unless the regulated conduct in question has been "compelled by the direction of the State acting as a sovereign"[358] or is required by a "clearly and affirmatively expressed" and actively supervised state policy,[359] federal anti-trust law will continue to apply. Under the *Canadian Breweries* standard, by comparison, immunity does not appear to be conditional on the legislature expressly compelling, requiring or actively supervising the conduct in question, although, as mentioned above, such interpretation is not inconsistent with what was said in *Canadian Breweries*. Narrowly interpreted, all that appears necessary for the exemption to apply to a particular activity under the *Canadian Breweries* test is that the authority, however broadly worded, exists for such activity under a valid statute and that a subordinate regulatory body exercise its jurisdiction with respect to it.

A second objection with respect to the scope of the regulated conduct exemption as defined in *Canadian Breweries* is that it appears to turn critically on what the "exercise" of a regulatory body's jurisdiction actually consists of. This, unfortunately, was not dealt with in that case. But, as Kaiser has noted, "it may prove difficult to determine whether [a] power has been actually or effectively exercised".[360] Indeed, "[d]eliberate non-action can constitute both actual and effective exercise of regulatory jurisdiction".[361] It is submitted that, should the issue ever be litigated, the

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358 *Goldfarb* v. *Virginia State Bar*, 95 S. Ct. 2004 at 2015 (1975).

359 *Bates* v. *State Bar of Arizona*, 97 S. Ct. 2691 at 2698 (1977).

360 G.E. Kaiser, *Federal Competition Law and the Professions: Problems of Jurisdiction*, in P. Slayton & M.J. Trebilcock, eds., THE PROFESSIONS AND PUBLIC POLICY (Toronto: University of Toronto Press, 1978) 46 at 50.

361 *Ibid.*

courts should take a narrow view of what the "exercise of regulatory jurisdiction" actually entails.

Assuming that the definition of the regulated conduct exemption provided in *Canadian Breweries*, as opposed to *Jabour*, remains the relevant standard in telecommunications markets, the following categories of activity should arguably come within the ambit of the *Competition Act*:[362]

1) All activities of persons and firms who are not "companies" under the *Railway Act*.[363]

2) Conduct within the relevant tribunal's jurisdiction to oversee but which remains unregulated or, if regulated, is not compelled by the tribunal.[364]

3) Conduct which hinders or prevents the regulator from "effectively exercising the powers given to it to protect the public interest".[365]

A final consideration emerging from *Jabour*, and one which may be relevant to regulated professions and regulated industries alike, relates to whether the exemption, however understood, is available only with respect to the criminal provisions of the *Competition Act* or whether it also applies to conduct subject to civil review.[366] There is language in *Jabour* to suggest that the exemption may be restricted to criminal offences. In its review of past "regulated industries cases" the Supreme Court of Canada in *Jabour* noted that:

> The courts in these cases have said in various ways that compliance with the edicts of validly enacted provincial measures can hardly amount to something contrary to the public interest. Since all the cases examined above approach the *CIA* on the basis of a criminal charge, actually or potentially arising under it, the element of public interest was always present. . . . *So long as the CIA, or at least Part V, is styled as a criminal prohibition, proceedings in its implementation and enforcement will require a demonstration of some conduct contrary to the public interest.* It is this element of the federal legislation that these cases all conclude can be negated by the authority extended by a valid provincial regulatory statute.[367]

Unlike the criminal provisions of the *Combines Investigation Act* (and now, the *Competition Act*) which require competition to be lessened

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362 (Being part 2 of *An Act to Establish the Competition Tribunal and to Amend the Combines Investigation Act and The Banking Act and Other Acts in Consequence Thereof*, 1st Sess., 33d Parl., 1986).

363 R.S.C. 1970, c. R-2. Included in this category are non-telephone company enhanced service providers and non-telephone company equipment sellers.

364 Cellular radio service provision is perhaps the best example.

365 *Canadian Breweries*, *supra*, note 310 at 629, 126 C.C.C. at 167. It has, on occasion, been suggested that certain activities of Telecom Canada may fall into this category.

366 *See generally* note 311, *supra*. *See also* WORLD LAW OF COMPETITION, *supra*, note 283 at c. 11, pp. 5-6.

367 *Jabour*, *supra*, note 310 at 354, [1982] 5 W.W.R. at 329 (emphasis added).

"unduly",[368] matters subject to civil review under the Act do not appear to incorporate this public interest standard. Thus, as Kaiser and Stanbury have argued (and the Supreme Court of Canada in *Jabour* appears to have implied), the scope of the regulated conduct exemption may not be as broad as appears at first sight.[369] The significance of this possibility is considerably magnified once it is recalled that the former section 33 (criminal merger and monopoly offence) has been repealed in the new *Competition Act* and replaced with civil offences relating to mergers and the abuse of dominant position.[370]

Stanbury, in fact, takes this argument one step further. In his view not only are all matters which are subject to civil review potentially outside the scope of the exemption, but certain criminal offences may be as well. In his words:

> Even among the criminal offences, a number do not require the Crown to prove that the accused's actions resulted in conduct contrary to the public interest. For example, section 38, dealing with price maintenance, is a per se offence. Only time and more (expensive) litigation will reveal the true scope of the jurisprudential exemption of regulated conduct established by *Jabour*.[371]

IX. Towards Less Regulation and a More Meaningful Role for Competition Policy in Telecommunications Markets

We have discussed the historical evolution of the telecommunications

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368 The term "unduly" was held in *Canadian Breweries*, *supra*, note 309 at 605, 126 C.C.C. at 139, to be equivalent to conduct harmful or detrimental to the public interest. This was approved in *Jabour*, *supra*, note 310 at 354, [1982] 5 W.W.R. at 329.

369 *See* Stanbury, *supra*, note 147 at 602; World Law of Competition, *supra*, note 283 at c. 11, pp. 6-7.

370 R.S.C. 1970, c. C-23, s. 33, *as rep. Competition Act* (being part 2 of *An Act to Establish the Competition Tribunal and to Amend the Combines Investigation Act and The Banking Act and Other Acts in Consequence Thereof*, 1st Sess., 33d Parl., 1986), cl. 34. The civil offences may be found in sections 47-79 of the *Competition Act* (being part 2 of *An Act to Establish the Competition Tribunal and to Amend the Combines Investigation Act and The Banking Act and Other Acts in Consequence Thereof*, 1st Sess., 33d Parl., 1986).

371 Stanbury, *supra*, note 147 at 602. It is striking that despite this confusion about the scope of the regulated conduct exemption, no provision was made in Bill C-91 to put it on a more secure statutory basis.

Several prominent witnesses before the Legislative Committee urged that this be done. For example, Professor William Stanbury spoke of a "gigantic loophole" created by *Jabour* and warned that in an era of partial deregulation, some firms might be subject neither to direct government regulation of price and entry nor to competition legislation. "What I want to make sure of" he added, "is that . . . we integrate our deregulatory policy and our competition policy." Canada, House of Commons, *Minutes of Proceedings and Evidence of the Legislative Committee on Bill C-91*, No. 3 at 11-12, 23 (29 April 1986). *See also* the evidence of Gordon Kaiser, *ibid.*, No. 9 at 58 (15 May 1986).

The only formal move to amend the Bill was to come from the New Democratic Party which sought in debate on third reading to exempt the commercial activities of Crown corporations "that are subject to specific regulation under federal or provincial statute". This amendment was said to have been requested by the Manitoba Government on behalf of the Manitoba Telephone System. Ironically, by only exempting activities subject to *specific* regulation, the amendment might have substantially narrowed the regulated conduct exemption. *See Commons Debates* 13869-72 (June 2, 1986).

industry, its structure and organization and the very real problems now being encountered as it is both pushed and pulled into a new era of competition. We have also reviewed at considerable length statutory, administrative and judge-made law affecting market participants in telecommunications, focussing, in particular, on the statutory powers of various authorities to regulate and otherwise police the conduct and activities of telecommunications service providers. Our thesis has been that the advent of competition has led the regulator to so broadly interpret its statutory mandate as to render it capable of encompassing virtually any type of conduct or activity engaged in by "companies" within the Commission's jurisdiction.

One of the unfortunate consequences of this regulatory overreach has been the effective preclusion of any meaningful role for *competition law* in markets in which new entry has been allowed. Instead, what is increasingly being observed is a form of "regulated competition" which, while delivering few of the benefits of regulated monopoly or unrestricted competition, threatens to do so at greater cost than either alternative.

As the earlier discussion has shown, the principal barrier to the application of federal competition law in regulated telecommunications markets is the judicial concept of the regulated conduct exemption. Provided the regulator continues to exercise its statutory authority, and the courts remain content to interpret such authority expansively, the gap between what competition could offer and what it actually delivers in telecommunications will continue to widen.

This tendency towards over-regulation of the industry has not been limited to areas of concern to Canadian competition policy. Much regulation deals with activities and conduct with few, if any, competitive ramifications. Nevertheless, there is much to be said for streamlining regulation in such areas as well. In the discussion which follows we suggest a number of means by which the direct and indirect costs of regulation may be lowered, with little or no reduction in the regulator's ability to carry out its mandate effectively.

Besides arguing for the adoption of alternative mechanisms to achieve statutory goals in telecommunications, the discussion below suggests that it is time to reassess regulatory priorities and to redefine the role of the regulator in competitive markets. These initiatives will not only pave the way for greater participation by competition law authorities in policing market conduct in telecommunications, but should also serve to minimize the disadvantages of any remaining regulated competition.

We begin by setting out four propositions. The rationale, significance and implications of these propositions, with respect to the telecommunications industry, will then be discussed.

A. Competition, once allowed, is politically irreversible.

B. Regulation and competition are inherently incompatible.

C. Effective regulation is that which meets statutory goals with the least amount of interference in private markets.

D. Regulation must be neutral as between market participants.

A. *Competition as Slippery Slope*

From a political perspective, once new entry has been allowed and competition has begun, the rights thereby vested in competitors to continue supplying the market, and the rights vested in their customers to benefit from uninterrupted access to new services, are extremely difficult to withdraw. There is, in a word, no turning back.

On the other hand, this is not to suggest that any interests so acquired or created are absolute. A sharp distinction must be made between the right to compete and the right to prosper or survive. Once competition has begun, those responsible for permitting it have no further obligation to new entrants or to their customers other than to ensure that the competitive process is fair. Beyond this no guarantees can be provided; nor, in fact, is there any statutory authority for such guarantees. *Economic efficiency and competitive ability should dictate final market structure. It should not be dictated by political favour, patronage or any form of regulatory preference.*

A second factor irreversibly propelling the industry towards greater competition is the integrated nature of the North American economy. Canada's largest export market and single most important source of imports is the United States. In order to remain domestically and internationally competitive with the United States (and other foreign producers), Canadian manufacturers and service industries relying on telecommunications services must have available to them the same variety of communications services, on similar terms and conditions, as are available to their counterparts in the United States. Since lower telecommunications prices in the United States have largely been the result of liberalized entry and the abandonment of restrictions on resale and sharing, similar pressures for such changes in Canada will almost certainly intensify.[372]

If competition in Canadian telecommunications markets is to be in any sense meaningful, the existing regulatory apparatus must adapt to accommodate it. Traditional tools of regulation, forged and refined to deal with natural monopoly, are ill-suited for this purpose. New approaches and new solutions must, therefore, be sought to deal with the new problems competition entails. While this undoubtedly requires the development of new rules to guide the industry through the difficult period of transition, it most certainly should not require the regulator to manage this process as well. Above all else, the success of this shift to competition in Canadian

372 It should be noted that while lower long distance rates (and higher local charges) in the United States have coincided with increased competition, these results could also have been obtained (political considerations aside) by regulatory fiat under a purely monopolistic industry structure. Rate rebalancing is not dependant on new entry. However, once new entry has occurred, competitive market forces operate inexorably to drive prices to the level of costs.

telecommunications markets will depend upon the degree of freedom given to rival suppliers to meet the wants and needs of Canadian consumers. The less obtrusive the role of the regulator in this regard, the greater will be the likelihood of success.

B. *The Incompatibility of Regulation and Competition*

We have already discussed at length the magnitude of the dangers inherent in regulated competition. Excessive regulatory involvement in the competitive process protects the inefficient, stifles the innovative, dampens the responsiveness of markets to changing consumer demands, and, as if more were needed, overburdens the regulator. All of these objections, however, are in a sense peripheral. They are directed at the consequences of regulated competition and not at its cause. Why it is that regulation should have this effect on the competitive process was most cogently explained by Alfred Kahn, the former chairman of the United States Civil Aeronautics Board, when he observed that:

> 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.[373]

Given that a return to monopoly is no longer politically feasible or economically justifiable in those markets where new entry has been allowed, and given that competition and regulation are properly viewed as substitutes rather than complements, there is only one direction for the regulator to take. Every means available to streamline regulation, unshackle competition and thereby enhance the potential role of the competition law authorities in policing market conduct should be explored and, where possible, implemented.

C. *Streamlining Regulation*

1. *The Need For and Implications of Increased Regulatory Forbearance*

Empirical observation, if not simple common sense, frequently reminds us that "more is not always better". This certainly holds true of regulation. As argued earlier, the effectiveness, and therefore value, of

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

regulation (whether of the traditional or more recent interventionist variety) is directly related to the circumstances in which it is exercised. The greater the number of market participants, the faster the rate of technological innovation and new service introduction, and the stronger the external pressures for changes incompatible with existing regulation, the less effective and more burdensome that regulation becomes.

The question the CRTC must inevitably face, therefore, is to what extent it should (1) begin to dismantle the complex matrix of rules, procedures and administrative safeguards it has erected to supplement its statutory authority to regulate carrier rates and (2) selectively withdraw from even this minimal oversight of service pricing. That is, to what extent should the Commission begin to forbear, in whole or in part, from exercising its statutory powers over certain of the activities of carriers within its jurisdiction?

Part of the answer is to be found in the definition of forbearance itself:

> 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.[374]

Forbearance, in other words, should only — in fact, can only — be exercised after the regulator has determined that such action or inaction is the best means of giving effect to the enabling legislation.

In those instances where forbearance has taken place in Canada and the United States, the two most common grounds offered in support of this decision by respective regulators have been that:

> 1) market forces alone were sufficient to ensure that rates remained just and reasonable and not unduly discriminatory, and/or
>
> 2) even where there may have been residual advantages to continued active regulation, the costs thereof, to the industry and consumers of the services involved, far outweighed any possible benefits.[375]

What this suggests, in turn, is that the CRTC should undertake a thorough cost-benefit analysis of existing regulation of markets in which new entry has been allowed. The object of any such inquiry would be to identify those markets in which regulation could be streamlined or abandoned altogether, with no countervailing harm to telephone company subscribers.[376]

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374 *Regulatory Forbearance*, *supra*, note 82 at 466 (emphasis in original removed).

375 *Ibid.* at 466-70.

376 CNCP's recent application for extensive regulatory forbearance might provide a suitable occasion for such a general inquiry. *See CNCP Telecommunications, Application for Exemption from Certain Regulatory Requirements, CRTC Telecom. Public Notice* 1986-64 (24 October 1986) [unreported].

Alternatively, the Commission should perhaps consider issuing a policy statement outlining general criteria for forbearance. It could then begin to accept and evaluate applications from regulated companies for a lessening of their regulatory burden on the basis of these criteria. Among the factors which should be considered by the Commission in evaluating applications for forbearance are the following:

> 1) The extent to which technological change, competitive market forces, and the prospect of strict enforcement of the *Competition Act* in forborne markets render the present exercise of Commission jurisdiction unnecessary or wasteful.
>
> 2) The tangible benefits, if any, to the continued exercise of Commission jurisdiction over the service or carrier in question, *in light of the Commission's statutory mandate*.
>
> 3) Whether the continued exercise of the Commission's jurisdiction, in whole or in part, confers upon competing suppliers of the service or product in question, an undue or unfair competitive advantage, so as to negate the potential benefits of competition in that market.[377]

As the first of these three criteria clearly indicates, forbearance does not amount to an abdication by the regulator of its responsibility to consumers of the product or service in question. Rather, forbearance involves a *transfer* of the regulator's policing function to the market itself, supplemented by the enforcement apparatus of the competition law authorities acting pursuant to the *Competition Act*.[378] Once the regulator has ceased to exercise its jurisdiction over a particular activity or element of market conduct, immunity from anti-combines prosecution under the regulated conduct exemption, as defined in the *Canadian Breweries* case (and arguably left unaltered in respect of regulated industries by the *Jabour* decision), similarly disappears. The competition law authorities, in effect, simply step in where the regulator has left off.

The benefit to formerly regulated suppliers and their customers is that costly regulation is replaced by a much more efficient means of protecting individual consumers from potential abuses of market power. Even where the regulator may have erred in its assessment of the ability of the market to ensure that prices remain just and reasonable and not unduly discriminatory, and where remedies under competition law may ultimately prove to be inadequate, the option of renewing the exercise of its jurisdiction is always open to the regulator. As we have stressed, forbearance is not irreversible.

It goes without saying, of course, that the *Competition Act* will only apply to conduct or activities in respect of which there has been *complete*

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377 These principles are based on Indiana legislation expressly authorizing regulatory forbearance at the state level. *See* 1985 Ind. Acts 530.

378 (Being part 2 of *An Act to Establish the Competition Tribunal and to Amend the Combines Investigation Act and The Banking Act and Other Acts in Consequence Thereof*, 1st Sess., 33d Parl., 1986).

forbearance. Partial forbearance, in all likelihood, will not be sufficient to remove the immunity from competition law which exists under the regulated conduct exemption since jurisdiction, arguably, continues to be exercised by the regulator. The immunity is lost, it is submitted, only when there no longer exists a sufficient element of compulsion, coercion, or other pressure from the regulator with respect to the conduct in question.

An example of a market in which there has been complete forbearance, at least with respect to pricing, is the provision of cellular radio. Although each of the firms in this market has been held to be a "telephone company" within the meaning of the *Railway Act*[379] and, thus, subject to Commission jurisdiction, there is no regulatory requirement that rates be filed and approved by the CRTC before taking effect.[380] The *Competition Act*,[381] therefore, apparently applies to the pricing behaviour of all firms in this market.

By comparison, telephone company-provided enhanced services still require a sufficient degree of active regulatory oversight as to bar any application of the *Competition Act* to the pricing practices of such firms in relation to these services. Nonetheless, it might be argued that because telephone company-provided enhanced services will eventually be regulated only on an aggregate and not service-by-service basis, there may be insufficient "involuntariness" with respect to the pricing of any individual service to warrant the protection of the regulated conduct exemption.[382] This possibility brings into focus Kaiser's objection with respect to the *Canadian Breweries* definition of the exemption. That is, how active or specific need be the exercise of regulatory jurisdiction before immunity from the *Competition Act* becomes available?[383]

2. *Prospective Areas for Regulatory Forbearance*

Turning from past examples of the exercise of regulatory forbearance to present situations in which forbearance appears to be warranted, two markets in particular seem worthy of the regulator's attention. The first is the market for new terminal equipment. At present, tariffs charged by telecommunications carriers selling such equipment (whether through separate subsidiaries or separate company divisions) must be approved by

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379 R.S.C. 1970, c. R-2.

380 *Cellular Radio Service*, *supra*, note 90. It should be observed, however, that regulatory forbearance has not been extended to the rates charged by telephone companies to cellular radio suppliers for related switching and transmission services.

381 (Being part 2 of *An Act to Establish the Competition Tribunal and to Amend the Combines Investigation Act and The Banking Act and Other Acts in Consequence Thereof*, 1st Sess., 33d Parl., 1986).

382 *Enhanced Services*, *supra*, note 91. It must be noted that although the Commission fully committed itself to substantial forbearance in this market over two years ago, to date no formal retreat from detailed regulation of enhanced services has been observed.

383 *See* note 360, *supra*.

the CRTC before taking effect.[384] Non-telephone company suppliers of the same equipment, being outside the Commission's jurisdiction, are completely unregulated. Given the highly competitive nature of this market,[385] as well as the absence of major sources of potential cross subsidy from the monopoly operations of regulated telecommunications carriers to this particular market,[386] the need for tariff regulation is far from self-evident. Indeed, when it is seen that complete forbearance from rate regulation in this market would automatically transfer to the Director responsibility for policing potential violations of the *Competition Act* in respect of sales of new terminal equipment, there appears to be absolutely no advantage to continued regulation. On the other hand, continued regulation not only dissipates scarce resources, but also frustrates the ability of regulated carriers to respond rapidly to the pricing and related marketing initiatives of their unregulated rivals. In the result, the biggest losers would appear to be the consumers of these products themselves.[387]

A second major telecommunications market in which at least partial forbearance appears warranted is the market for switched long distance private line voice and data services. Although the number of suppliers in this market (in federal jurisdictions) is limited to Bell Canada and BC Tel (in their respective territories) on the one hand, and CNCP on the other, a number of considerations suggest that the market is sufficiently competitive to relax the pricing constraints imposed on each of these carriers.[388] Perhaps most important is the fact that CNCP is not an insignificant rival. CNCP is jointly owned by Canadian Pacific Limited and Canadian

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384 *Attachment of Subscriber-Provided Terminal Equip., Telecom. Decision CRTC 82-14*, 8 C.R.T. 848 (23 November 1982). There do, however, exist some exceptions. For certain single line sets, telephone companies need only file floor prices with the CRTC and are free to sell at any price above this level. In addition, certain subsidiaries offering terminal equipment such as that used in private mobile service are free to do so without filing tariffs with the CRTC.

385 For an overview of the volatile terminal attachment market in Canada, *see* J. Chevreau, "Bell Found Unprepared for Interconnect Ruling", *The [Toronto] Globe & Mail* (3 August 1982) B2; J. Chevreau, "A Transition Period is Looming for Interconnects", *The [Toronto] Globe & Mail* (15 June 1984) B14; L. Surtees, "Interconnect Firms Offer Monopolies Keen Competition", *The [Toronto] Globe & Mail* (24 February 1984) R16.

386 This distinguishes this market from the concerns expressed in *Telecommunications in Transition*, *supra*, note 44.

387 The CRTC's recent announcement in its structural separation decision of its intention to detariff the competitive multi-line terminal equipment market certainly appears to be in accord with the above view. *See Bell and British Columbia Tel. Cos., Multiline and Data Terminal Equip., Telecom. Decision CRTC 86-5* (20 March 1986) [unreported].

388 Such relaxation would appear to be particularly justified in view of the recent entry of new suppliers. For instance, Telesat Canada can now contract directly with customers to provide voice, data and video services in direct competition with existing terrestrial long distance carriers. *See supra*, note 261. In addition, B.C. Rail has been authorized by the CRTC to provide private line long distance services in British Columbia. In this regard, *see Interexchange Competition*, *supra*, note 38.

National Railways, the combined financial resources of which are certainly comparable to those of Bell Canada, BC Tel and their respective parent corporations. In addition, the corporate goodwill which has been earned by its parent corporations is equally available to CNCP in its quest for new customers.

Second, even though CNCP's present market share is very small relative to that of either Bell Canada or BC Tel, CNCP has the physical capacity to handle a considerable increase in demand with only modest increases in cost or any great delay in accommodating new subscribers. This is especially true given its significant and continuing progress in laying a transcontinental fibre optic network.

Finally, CNCP may have certain cost advantages not available to Bell Canada or BC Tel. The most important of these is its ability to acquire right-of-way along both its parent corporations' railway lines on potentially advantageous terms.

Against these considerations, all of which suggest that vigorous competition is possible in switched private line long distance voice and data markets, is the fact that Bell Canada and BC Tel control all points of access to local markets. Without such access network competition is, in fact, impossible. Even with interconnection, however, the existing incentives for local monopolists to provide access to their own long distance operations on more favourable terms and conditions than are made available to competitors are such that continuous and active regulatory oversight of these strategic bottlenecks cannot be avoided.

Nevertheless, the regulatory burden associated with such supervision need not be overwhelming or unduly pervasive. With the completion of Phase III of the CRTC's Cost Inquiry,[389] a regulator-sanctioned costing methodology will soon be in place. Upon its implementation, the regulator will be in a much better position to ensure that all costs deemed to be associated with providing local access for competitive switched private line long distance voice and data services are, in fact, attributed to these services. While the development of a costing methodology by the CRTC is in itself a considerable achievement, and provides grounds for some optimism, proof of its effectiveness is still some time off. If successful, however, local monopoly subscribers will be protected from any potential cross subsidies that might otherwise have flowed from their pockets to customers of competitive services.

Ensuring compliance with the official costing methodology is not the only task facing the regulator with respect to the provision of access to bottleneck facilities. A second necessary function relates to the enforcement of the actual terms and conditions upon which interconnection is authorized. The regulator must ensure that the physical quality of access and related elements of interconnection (for example, rate of installation of

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389 *Inquiry Into Telecommunications Carriers' Costing and Accounting Procedures: Phase III — Costing of Existing Services, Telecom. Decision CRTC 85-10*, 119 Can. Gazette, Pt. I, 5003, 11 C.R.T. 628 (25 June 1985).

connections, trouble-shooting, servicing, repair work, upgrading and increasing capacity) are precisely as mandated. Otherwise the integrated local monopoly carrier may have an incentive to discriminate in favour of its own competitive services.[390]

A third factor calling for continued regulation at the point of interconnection follows from the present rate structure. Local monopoly services continue to be substantially subsidized by long distance services, including switched private line voice and data communications. The purpose of this cross subsidy, as we have seen, is to ensure the continued provision of basic local service at affordable prices on a universal basis. The fact that this policy is nowhere mandated by legislation appears all but irrelevant: politically, it may as well be carved in stone.

This being the case, the regulator is placed in the position of having to ensure that all competitors obtaining access to the local network contribute their fair share to the local service subsidy. Were no such "contribution" required as a basic element of the access charge, monopoly carriers would either have to raise local rates to cover the costs of local service provision or be unfairly disadvantaged. Therefore, until such time as rates are rebalanced, the regulator will continue to be saddled with a political (as opposed to statutory) obligation to set the appropriate level of contribution as part of the local access charge.

The above considerations underscore two very important points. First, virtually all of the difficulties which are likely to be encountered by the regulator in protecting the interests of monopoly subscribers during the transition to network competition either originate or are best dealt with at the point of interconnection. Second, these types of problems are far from transitional. While it could be said that the bottleneck problem only arises with the advent of network competition, it cannot be said that it disappears after competition becomes vigorous and mature. As long as access to the local network is within the control of a long distance competitor, continuous regulation focussed at the point of interconnection is unavoidable.

The nature and intensity of regulatory supervision at the strategic bottleneck, in and of itself suggests that tariff regulation of services requiring local access need not be as intense. At the risk of oversimplification, this proposition follows from the fact that once the level of the access charge has been fixed by the regulator, a type of "floor price" for the service in question is also obtained. Any long distance rates near or below this charge will unquestionably be non-compensatory. In the result, detailed and costly rate regulation of competitively provided long distance services may not be as essential as appears at first sight. Partial forbearance

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390 If the terms of interconnection are ratified by contract between the carriers involved rather than being made subject solely to a regulatory order, it is conceivable that the regulator's involvement need not extend beyond approval of the contract itself. Enforcement of the provisions of the agreement could then be left to the courts.

from the regulation of long distance private line voice and data services may be possible after all.

This conclusion becomes still more acceptable once it is realized that an accessible, relatively informal, but vigorously enforced complaint procedure may largely fill any void created by a shift away from detailed rate regulation of competitively provided long distance services. As will become clear in the following section, however, reliance on the complaint procedure may involve sufficient exercise of regulatory jurisdiction to preserve the regulated conduct exemption for all firms supplying these markets.

3. *The Complaint Procedure*

Subsections 321(2) of the *Railway Act*[391] and 45(1) of the *National Transportation Act*[392] together envisage a complaint procedure pursuant to which an interested party may bring to the regulator's attention any conduct on the part of regulated companies which may offend statutory or regulatory requirements. It is submitted that this complaint procedure should be treated as a substitute for, rather than as an adjunct to, detailed regulation. While the complaint procedure undoubtedly has an important role to play in monopoly markets, it may have a much more important role to play in competitive and potentially competitive markets to the extent that increased reliance upon it may make partial forbearance a practical and reasonable alternative to comprehensive regulatory oversight. As will shortly become evident, the complaint procedure may even be of considerable utility in markets in which there has otherwise been complete forbearance.

Consider, first, markets in which the regulator has significantly reduced, but not entirely eliminated, the regulatory burden placed on market suppliers. Complaints that a carrier's competitive rates are too high, which will invariably be made by consumers rather than competitors, should only be acted upon with some hesitation by the Commission. Disenchanted consumers, by definition, will have other alternatives available to them. It should be of no concern to the regulator that one carrier may be losing market share to another competitor because of its high pricing policies.

The only exception to this occurs where the ability of competitors to expand their capacity to accommodate new subscribers is impeded by other anti-competitive conduct on the part of the high-priced carrier. In this latter situation a return to more detailed regulation may be called for. In addition, certain remedial measures may have to be ordered by the regulator.[393]

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391 R.S.C. 1970, c. R-2.

392 R.S.C. 1970, c. N-17.

393 The regulator, for example, might consider means by which subscribers may recoup this overpayment. Possibilities include (1) forcing the impugned carrier's rates down to a level deemed to be just and reasonable; (2) lowering, or where applicable, re-

Complaints that a carrier's competitive services are priced unreasonably low should be considered with great care by the regulator. Since the complainant in this situation will almost certainly be a competitor rather than a subscriber, strategic manipulation of the regulatory process for competitive ends must always be considered a possibility. This danger may be minimized by requiring the complainant, as a condition to ordering an investigation into the complaint, to establish on a *prima facie* basis that the rate in question is unjust or unreasonable. It is submitted that a *prima facie* case would require no more from the competitor than that it show the challenged rate to be below its own incremental cost of providing the same service using the regulator-approved costing methodology.[394]

Once an investigation has been initiated, the burden of showing that the rate is just and reasonable (that is, compensatory) would fall on the challenged carrier.[395] Unless there exist very strong grounds for doing so, the regulator should not suspend the impugned rate until such time as it is found by the Commission, pursuant to an investigation, to be unjust or unreasonable; otherwise the Commission invites strategic abuse of this process. If the complaint is upheld, the regulator should immediately rescind the rate, order any other remedial measures which may be justified and allow the complainant, if damages were suffered as a result of the challenged carrier's conduct, to seek redress in the courts pursuant to section 340 of the *Railway Act*.

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imposing allowed rates of return to a level deemed to be appropriate; or (3) ordering a refund to subscribers of that portion of past rates paid found to be excessive. This latter remedy, however, is of questionable validity since the *Railway Act* does not appear to directly authorize retroactive rate adjustments (unless subsection 321(5) is interpreted sufficiently broadly to allow for this possibility). This issue is now before the courts. *See supra*, note 241. In any event, where there has been complete, as opposed to partial forbearance *with respect to the activity in question*, excluding reliance on the complaint procedure, it is highly unlikely that retroactive remedies may be imposed by the regulator since by definition all regulation was suspended during the period in question. Injured competitors, similarly, would be without the extraordinary remedy available under section 340 of the *Railway Act* if the damages they suffered occurred during a period of complete regulatory forbearance with respect to the conduct in question. Section 340 normally allows competitors, with commission approval, to seek redress in the courts for treble damages where it can be shown that the harm suffered was the result of any infraction of the provisions of the *Railway Act* or of any order, direction, decision or regulation made or given by the Commission under the Act in respect of tolls.

It is submitted that the regulator should only consider re-imposing more detailed regulation where there exists overwhelming evidence that the conduct in question cannot be remedied through the operation of competition law itself. Evidence of anti-competitive conduct, in other words, should not be taken as an indication that the policy of forbearance has been a failure. Anti-competitive behaviour is a normal phenomenon in all markets and, absent evidence that it is the result of natural monopoly, should not be used as an excuse for the resurrection of a regulatory regime, the ultimate social costs of which may well exceed the intermittant harm occasioned by such conduct in unregulated markets. Competition law should at least be given a chance.

394 Such a test appears to be provided for in the *NTA*, R.S.C. 1970, c. N-17, s. 41(1) and in the *Railway Act*, R.S.C. 1970, c. R-2, s. 321(2).

395 *See Railway Act*, R.S.C. 1970, c. R-2, s. 321(2).

Precisely the same conclusions would appear to hold in the case of "complete" regulatory forbearance, provided, as a condition thereof, that it is made clear that complaints will be investigated and, where validated, remedied. In other words, to the extent that the complaint procedure is relied upon by the regulator to monitor and correct improper conduct, forbearance can never be complete. The regulator, in such circumstances, will not have suspended the exercise of its jurisdiction (as is required for complete forbearance) but rather, it will simply have shifted from one technique of supervision to another.[396] Therefore, as long as valid complaints continue to be enforced, the regulated conduct exemption will likely preclude parallel action by the competition law authorities under existing caselaw.

It is possible to envision at least one circumstance, however, in which the complaint procedure may still be of use but where no corresponding immunity from the *Competition Act*[397] is available. This might occur where the Commission explicitly indicates that it will completely forbear from regulating an activity and, as well, gives no indication that it will act directly upon any complaints it may receive. In practical terms this is most likely to occur where the Commission is satisfied that market forces are relatively robust and that remedies for anti-competitive conduct under the *Competition Act* are sufficient to protect monopoly subscribers from harm.

Under the above circumstances the Commission may, and indeed should, continue to receive and review complaints for at least two reasons. First, the information provided will allow it to better evaluate the success of forbearance in particular markets. Should it eventually appear that forbearance was premature, the Commission may decide to reassert its jurisdiction over the activity in question. Second, the Commission could periodically bring to the Director's attention complaints it may have received for the latter's consideration.

D. *Equitable Regulation*

Although there is nothing in the *Railway Act*[398] preventing the regulator from favouring a competitive over a monopolistic market structure in seeking to best achieve its statutory mandate, there is equally nothing in any of the relevant legislation authorizing the CRTC to favour one competitor over another. Therefore, in promoting what it considers to be fair

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396 The concept of "exercise" of regulatory jurisdiction contemplated here is similar to that found in *Jabour*, *supra*, note 310, where the act of the discipline committee was held to be the relevant "regulation". However, unlike *Jabour*, the requirement that rates be just and reasonable is expressly mandated in the legislation and has been interpreted by the regulator to be those rates which follow from its official costing methodology. In *Jabour* advertising was not expressly barred by actual regulation.

397 (Being part 2 of *An Act to Establish the Competition Tribunal and to Amend the Combines Investigation Act and The Banking Act and Other Acts in Consequence Thereof*, 1st Sess., 33d Parl., 1986).

398 R.S.C. 1970, c. R-2.

competition, the Commission must be careful to treat all service providers equitably, if not equally.

Equitable regulation may be defined as that which (1) confers no undue competitive advantages upon or (2) results in no undue competitive disadvantages to any given company relative to any other. "Equal" treatment of suppliers of comparable services in the same market will be "equitable" whenever the same two criteria are met.

In so far as network competition is concerned the one activity with respect to which regulation must be scrupulously even-handed is the provision of local access. Although physical constraints may make equal access unduly costly or impractical to provide, nothing short of equitable access is required in order for competition to be fair. This means that where a competitor requests interconnection it should be made available on either (1) the same terms and conditions upon which access is provided to the integrated monopoly carrier, if so desired by the former, or as near thereto as is physically possible or (2) on such other terms and conditions as the applicant may request, provided all costs associated with such interconnection and subsequent usage, calculated on the basis of the approved costing methodology, are covered by the applicant.

Secondly, so long as local services continue to be subsidized by other services, all firms interconnecting with the local network should be required to contribute on a proportionate basis to the local subsidy by way of an access charge premium. If this burden were left entirely with the underlying common carrier a considerable and unwarranted competitive advantage would be bestowed upon interconnecting long distance service providers.

Finally, care will have to be taken not to exaggerate the advantages of the incumbent telephone companies. As we have seen, selective entry and absence of an obligation to serve on the part of new entrants may reduce the incumbents to "straw giants". As previously emphasized, the crucial step will be to address the bottleneck issue and not to allow far less substantial issues of incumbency advantage to dissipate scarce regulatory resources. As long as freedom of entry exists (either by way of new entry or the ability of suppliers to expand capacity without artificial handicap) large market share, in and of itself, bestows no long run advantage. Any attempt to keep prices higher than prevailing rates will inevitably lead to erosion of market share — witness the continued success of MCI in the public voice long distance market in competition with AT&T.

X. Conclusion

In Canada, unlike the United States, emphasis is increasingly shifting towards directly political solutions to the issues raised by the advent of competition in telecommunications. Less reliance will be placed on non-elected officials such as regulators and judges. There is, as well, a tendency to exaggerate the importance of short-term declines in service quality which inevitably accompanied the divestiture of AT&T, and some degree

of smugness that we are not headed for what Marcel Masse has called, inaccurately but evocatively, American-style "dérégulementation brutale".[399]

Canadian assertions of the need for political accountability are commendable to the extent that truly political problems stand in need of political solutions. However, it is not yet apparent that elected officials will be prepared to grapple effectively with the necessity of dismantling the cross subsidies of the monopoly era. In the United States, competition itself (even, initially, somewhat artificial competition fueled by pockets of "cream" under monopoly) has been allowed to force rates down to cost. It is proposed in Canada to rebalance rates between long distance and local on a cost basis prior to possibly allowing competition in the public voice long distance market. In a perfect world this would, no doubt, be the technically correct approach, but in a political world of self-seeking winners and losers, this approach is not without its drawbacks.

Rate rebalancing is now firmly entrenched in the federal-provincial political process with considerable risk of delay.[400] A major task facing reformers will be the need to persuade politicians that any adverse impact on local rates will not be such as will outweigh the overall benefits of competition and that, in the end, all will benefit, not just large corporations. In that regard, as we have seen, recent American experience has been encouraging.

As we struggle to devise a new policy for telecommunications we will recall Theodore Vail's accomplishments with growing nostalgic respect. What we agree on will not be as succinct or as elegantly self-contained; however, it must have, as did his philosophy of regulated monopoly, the essential virtue of addressing the actual circumstances of its time.

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399 *See* Canada, House of Commons, *Minutes of Proceedings and Evidence of the Standing Committee on Communications and Culture respecting Bill C-19, An Act Respecting the Reorganization of Bell Canada*, No. 39 at 23 (13 March 1986).

400 *See generally Report of the Federal/Provincial Examination into Telecommunications Pricing and the Universal Availability of Affordable Telephone Service* (Ottawa: Minister of Supply and Services, October 1986) (The Mongeau Report). For an excellent review of the intractable issues involved in rate rebalancing through the regulatory process, *see* S. Globerman and W.T. Stanbury, *Changing the Telephone Pricing Structure: Allocative, Distributional, and Political Considerations* (1986) 12 CAN. PUB. POLICY 214.