Controlling the Habit

A Paper Submitted in Support of the TELUS Submission to the Broadcasting and Telecommunications Legislative Review Panel

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Broadcasting and Legislative Review Panel Terms of Reference Priority 7. - Governance and Effective Administration

Questions

7.1 Is the current allocation of responsibilities among the CRTC and other government departments appropriate in the modern context and able to support competition in the telecommunications market?

7.2 Does the legislation strike the right balance between enabling government to set overall policy direction while maintaining regulatory independence in an efficient and effective way?

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"You play rather loosely with the Act."

Anthony Manera, President of the CBC

"It's an old habit."

Keith Spicer, Chair of the CRTC[1]

Introduction:

1. This memorandum is offered in support of TELUS's overall submission and in particular its comments and recommendations regarding Question 7.2 set out in the Terms of Reference for the Broadcasting and Telecommunications Legislative Review Panel.

2. The overall conclusion of the TELUS Submission is that the current *Telecommunications Act* does not strike the right balance "between enabling government to set overall policy direction while maintaining regulatory independence in an efficient and effective way." TELUS recommends in particular that the objectives set out in the current legislation are fundamentally flawed and need to be replaced. It also recommends that, assuming that amended legislation would also continue to include the current policy directive power, the existing political appeal power is no longer appropriate and should be eliminated, or as a distinct second-best alternative, be revised to limit the Governor in Council to sending back CRTC decisions for reconsideration or setting them aside, which is the existing provision governing appeals on Broadcasting decisions.

3. This memorandum will elaborate on the three aspects of the TELUS submission pertinent to Question 7.2, namely the deficiencies in the current objectives and the need to replace them; the need to continue the inclusion of a policy directive power; and problems with the existing legislated political appeal provision and how these problems can be ameliorated.

[1] Quoted in Hudson Janisch "In Search of Common Themes in an Apparently Confused Regulatory World," *Media & Communications Law Review,* 4, p. 260.

Part 1: Some Preliminary Comments on the Historical Background Relevant to Terms of Reference Question 7.2

4. Independent regulatory agencies, such as the Canadian Radio-television and Telecommunications Commission (CRTC) in our parliamentary system are one of the category of non-departmental forms which are, to employ Hodgetts' phrase, "structural heretics"[2] They merit this nomenclature because, in a system premised on ministerial responsibility for both public policy and governmental behaviour to Parliament, they lay outside the traditional norms. Designated ministers for individual regulatory agencies such as the CRTC are not responsible or accountable to Parliament for the decisions or other actions of such agencies. They are only answerable, but not accountable, to Parliament, subject of course to the qualifications discussed below when the Government issues a policy direction or "varies or rescinds" a decision which consequently makes the Government, and the answerable Minister, accountable to Parliament for such actions.

5. By way of introduction, it is important to note that the question of the appropriate balance between government policy control and regulatory independence is of relatively recent origin. In the first six or seven decades after the creation of the Board of Railway Commissioners in 1904 or its successor, the Board of Transport Commissioners (1937-1967), the issue of balance between political control and regulatory independence simply did not arise. (I ignore, for purposes of this submission, the fact that the latter Board was stripped of its air licensing responsibilities in 1944 because of a decision that conflicted with stated Government policy and replaced by an advisory Air Transport Board- a sure way to guarantee balance.)

6. The question of balance did not arrive because of the narrow set of responsibilities and roles delegated to the Board of Railway/Transport Commissioners. As one of the leading students of transport regulation, has noted, the Board "… functioned only in comparatively narrow fields, where its duties can be precisely defined by Parliament or where the determination of what ought to be done can be fairly clearly arrived at by means of

[2] J.E. Hodgetts, *The Canadian Public Service* (Toronto: University of Toronto Press, 1973) Chapter 7.

engineering and statistical data."[3] In short, to use a colloquialism, the Board was asked to and "stuck to its knitting". As another student noted, the Board "… time and time again emphasized that it is empowered to deal with transportation matters only. It refused to order experimental or developmental rates…. The board has refused to change rates to offset the effect of a tariff, and will not alter rates on the grounds of desirable public policy, because, it says, Parliament is the proper place for such matters."[4] The Board's repeated refusal to address larger issues surrounding the "railway question" such as regional disparities was one of the direct causes for the regular governmental recourse to royal commissions to address such questions.

7. When the Board of Railway Commissioners was given responsibility in 1906 for the regulation of telephone rates and practices, it adopted the same narrow, focussed definition of its responsibilities and roles. It declared at various times that it was not regulating the telephone industry but individual telephone companies; that its job was "to regulate not initiate"; that its responsibilities were remedial or corrective and *ex post facto*; that they were not managerial. As with regulation of the railways, the Board and its successor the Canadian Transport Commission (CTC) routinely rejected proposals well into the first half of the 1970s when it had jurisdiction to adjust telephone rates for what it called social welfare purposes. For example, in 1972, the CTC noted

> The impact of rate increases on persons who are in a position of economic disadvantage is of great concern to the Commission. It is not, however, within the Commission's discretion to adjust rates to meet the individual economic circumstances of subscribers belonging to the same category.[5]

Similarly, in 1975 in response to a telephone company request for a discount in telephone rates for senior citizens, the regulator described the proposal as "… a form of social assistance as might properly be funded by the general taxpayer…. [and that] We believe

[3] A.W.Currie, "The Board of Transport Commissioners as an Administrative Body" in *Canadian Public Administration* edited by J.E.Hodgetts and D.C.Corbett, (Totonto:Macmillan,1960) p.224.

[4] Quoted in *ibid.*, pp. 236-237. On this topic the work of Howard Darling is also instructive in *The Politics of Freight Rates* (Toronto: McClelland and Stewart, 1980).

[5] Canadian Transport Commission (CTC), *Canadian Transport Cases* Vol. 1972, (Ottawa: Information Canada) p. 183.

that relief to groups or individuals in need should be met by adjustments in pensions and allowances by the Federal, Provincial and Municipal Government bodies concerned."[6]

8. Balance obviously is a two-way street and it is important to note that, notwithstanding its power to vary, rescind or refer back for review the regulator's decisions, the Federal Government demonstrated considerable reluctance to exercise such powers from 1906 to 1976. As Ryan has found in his comprehensive analysis of Cabinet appeals in the telecommunications sector, only 6 appeals were entertained in those seventy years.[7] Although referring mainly to railway cases, Currie's explanation is relevant: cabinet had a "strong inclination to support the judgment of the board" and in support he cited a Cabinet comment on one of the appeals:

> A practice has grown up not to interfere with an order of the board unless it is manifest that the board has proceeded upon some wrong principle, or that it has been otherwise subject to error. Where the matters at issue are questions of fact depending on their solution upon a mass of conflicting testimony, or are otherwise such as the board is particularly fitted to determine, it has been customary, except as aforesaid, not to interfere with the findings of the board.[8]

9. In short, prior to 1976, the year it should be noted that the CRTC was given responsibility for the regulation of telecommunications matters, there was no question that balance had been established between the regulator and the government. One of the major reasons for this is that, despite the apparent openness of the terms "just and reasonable rates" or "undue discrimination," the regulatory agency, to use language I have employed elsewhere, was a quintessential "economic policing agency."[9] Its role was to constrain, and if necessary discipline, the behaviour of individual firms subject to its jurisdiction. It was proscriptive

6 CTC, Telecommunication Committee, Decision, "In the matter of the application of Bell Canada dated May 30, 1975 … for approval of revisions of certain of its rates for service, equipment and facilities," Nov. 22 1975, Attachment 2, "Extract from the Decision of the Telecommunications Committee dated November 3, 1975, on an application by British Columbia Telephone Company," p. 2.

7 Michael H. Ryan, "Executive Control of Administrative Action: "Cabinet Appeals" and the CRTC" 2014. Available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2403402.

8 Currie, *op. cit.*, p. 229.

9 Richard Schultz and Alan Alexandroff, *Economic Regulation and the Federal System* (Toronto: UofT Press, 1985) pp. 1-24.

not prescriptive, remedial not managerial, reactive not initiating. It was not regulating industries but specific firms. Exogenous objectives were neither imposed on it nor pursued by it. Indeed, it vigorously and effectively eschewed such objectives. Although unavoidably its responsibilities and its decisions were "political" in the larger meaning of the term, the nature of its mandate and the self-imposed interpretation of that mandate resulted in a regulatory process largely insulated from the wider political process. As far as the regulator and the government were concerned, the appropriate balance between the two had been established and continued until 1976.

Part 2: The CRTC Years and the Loss of Balance

10. The difference in the post-1976 years in telecommunications regulation from the previous period could not be starker. One measure of the difference is that according to Ryan's study, the number of cabinet appeals went from 6 to 59 in the years from 1976-2012. Another feature of this development was the increasing perception that, given the Cabinet appeal provision, decisions by the CRTC were increasingly considered as simply the first step in the decision-making process.as telecommunications went from being largely insulated from to being integrated into the political process. The CRTC became embroiled in inter-governmental and intra-governmental turmoil and conflicts, and its Chair once threatened to sue the government of the day, albeit over a broadcasting intervention. Although there were multiple factors that caused the politicization of telecommunications post-1976, it is indisputable that one of the major causes was the widely-perceived lack of balance in the respective roles of the regulator and the government in policy-making. It is my argument that this lack of balance was caused initially by the rather "loose" interpretation of its mandating statute, to use Manera's description, in the years prior to 1993 and subsequently the comprehensive but incoherent set of policy objectives that were found in the 1993 *Telecommunications Act* that virtually transferred substantial policy-making authority to the CRTC. The conflicts which culminated in the 2006 Policy Direction, I argue, had their roots in the inadequacy of the legislated policy objectives as a constraint on the CRTC.

11. To fully understand the lack of balance in both the years 1976-1993 and the subsequent years to the present, I suggest that it is necessary to understand the roles and powers assigned to the CRTC when it was created as broadcasting regulator in 1968. The CRTC as broadcast regulator was the model that the CRTC adopted for telecommunications after 1976, a model that has caused the lack of balance in the respective roles of the agency and the government.

12. The 1968 *Broadcasting Act* created perhaps the most powerful regulatory agency that Canada has ever known. As one commentator described it at the time, the CRTC was "an almost completely independent body."[10] The power of the Federal Government to review and control CRTC decisions was much more constrained than the power over decisions of other agencies such as the NEB whose decisions required governmental approval or as noted in the case of the transport regulator whose decisions could be sent back, rescinded, and, as noted above, most importantly varied, with little constraint on the nature of the variance - a no could be changed to a yes. In the case of the CRTC, its decisions could only be sent back for review and/or set aside. There was no possibility for the Federal Government to vary a decision. The new legislation did contain a novel provision for the Federal Government to issue a policy direction - perhaps influenced by the recent quarrel with the Governor of the Bank of Canada which led to the inclusion of a similar provision in the *Bank of Canada Act*. This power, however, was severely circumscribed as it was limited to only 3 matters originally of which arguably only one was truly political, namely the ineligibility of a class of applicants to be granted or hold a broadcasting licence. This provision was directed at non-Canadian applicants or current licence holders and was extremely political inasmuch as it was primarily directed at Americans and thus raised international issues deemed appropriately to be assigned to the Federal Government.

13. What was particularly significant about the CRTC was first the broadcasting policy objectives it was to pursue and secondly the role assigned to the Commission. The *Broadcasting Act* of 1968 in s. 2, set out a broad range of policy objectives perhaps the most important of which at the time was the statement that the broadcasting system was to

[10] Ronald G. Penney, "Telecommunications Policy and Ministerial Control" *Canadian Communications Law Review,* 1968, p. 14.

be considered "a single system" and that "it should be effectively owned and controlled by Canadians *so as to safeguard, enrich and strengthen the cultural, political, social and economic fabric of Canada*." (emphasis added) The open-ended, undefined nature of the latter objective was such that in combination with the limited government controls over the CRTC, the Commission, in the words of Penney, was a "mini-legislature" as it was given in effect the power to define the substance of Canadian broadcasting policy. It was to be "the parliament of broadcasting."

14. Just as important as the open-ended nature of the policy objectives was the role assigned to the regulator. Unlike the Board of Transport Commissioners or its successor, the CTC, which was to be an economic policeman, the CRTC was to be much more. It would be a planning agency, with largely unconstrained responsibility for setting the objectives and roles for the individual participants. This was made clear by the final section of the statement of policy which declared that "the objective of broadcasting policy for Canada enunciated in this section can best be achieved by providing for the regulation and *supervision* (emphasis added) of the Canadian broadcasting system by a single independent pubic authority." By "supervision" the Act intended and the CRTC so interpreted, that it was to manage the broadcasting sector. As such the Government had in effect assigned, some might say abdicated, its responsibilities and thereby thrown any sense of balance by the wayside. Penney claims Peter Grant's description of the Broadcasting Board of Governors (BBG), the predecessor was equally applicable to the CRTC: "the government in effect left it to the Board both to define and solve the current problems."[11]

15. The CRTC had in effect been granted a blank cheque to develop Canadian broadcasting policy and it proceeded to cash it. Although challenged through both political and court appeals, the Commission successfully developed the habit of "loosely" interpreting its mandate to create policies governing cable rates and hardware ownership, Canadian content, simultaneous substitution, and pay-television to mention but a few. The only setback in its first decade was its proposed policy to prohibit the use of microwave to extend

[11] Penney citing Peter Grant "The Regulation of Program Content in Canadian Television: An Introduction" *Canadian Public Administration*, 11 (1968) at p. 326.

the reach of cable to Canadians beyond the major cities near the Canada -US border. Popular opposition, voiced through MPs, forced the Commission to withdraw the proposal.

16. It was with this background as an assertive, aggressive, independent policy-maker and regulator in broadcasting that the CRTC acquired responsibility to regulate the telephone companies in 1976. It is worth noting that the CRTC did not seek such responsibility and in fact would come to see it as a potential threat to some of its broadcasting policies. The push to transfer telecommunications from the transport regulator to an expanded communications regulatory authority came largely from within the Department of Communications (DOC) established one year after the CRTC. The first Minister, Eric Kierans, had promised in the Commons debates on creating the new department that the goal was "to evolve a national communications plan and a national communications policy to integrate and rationalize all systems of communications…." [12] As Mussio notes, the departmental objective was "total regulation" of telecommunications falling under its jurisdiction. [13]Departmental ambitions were focussed on two concerns. First was, following the example of broadcasting, how to use the regulation of telecommunications for the attainment of exogenous objectives through the use of "chosen instruments". To the senior public servants in DOC it was unacceptable that telecommunications was the only network industry not under effective public control for a broad range of public purposes such as "strengthening the bonds of nationhood," defending national sovereignty, or promoting Canada's dual cultures.[14] Another central purpose was to submit to public control the telephone companies, especially Bell Canada, which through its role in the TransCanadaTelephone System, was exercising "… functions which in all western nations are considered to be the prime responsibility of government."[15] In short, the DOC at this time was largely focussed on changing the purposes and roles of government vis-à-vis the federally-regulated telephone companies and by extension if it acquired regulatory control over TCTS the other Canadian telephone companies. In terms of the purpose of this paper,

12 Hon. Eric Kierans, Minister of Communications, House of Commons *Debates*, February 27, 1969, p. 6079.
13 Laurence B. Mussio, *Telecom Nation* (Montreal: McGill-Queens University Press, 2001) p. 104.
14 See the discussion based on interviews with Alan Gotlieb, the first DOC Deputy Minister, in Lawrence Surtees, *Wire Wars* (Scarborough: Prentice-Hall, 1994) pp. 52-53.
15 Mussio, op.cit., p.106. See also the positions papers (Green and Grey) issued by the Minister of Communications on behalf of the Government of Canada in 1973 and 1975 for support for these arguments.

it is noteworthy that initially advocates of the transfer appeared to have paid little attention to the question of the appropriate balance between the government and the regulator.

17. Initially, the CRTC was supportive of the DOC's ambitions in telecommunications. This changed, however, when the intergovernmental negotiations began as the provinces were not prepared to surrender the control over telecommunications that they currently exercised or wanted to exercise, especially given their fear of federal sympathy for some degree of competition. For its part the CRTC became apprehensive that the federal government was prepared not only to sacrifice federal, i.e., CRTC, control over cable television in order to overcome provincial opposition, an action that would threaten its policies of protecting the traditional broadcasters both public and private from cable competition. The DOC was also prepared to allow provincial governments a role in making CRTC appointments.

18. The result was an intragovernmental struggle pitting the DOC against the CRTC. It was at this point that the DOC came to realize that the issue of the policy-making balance could not be ignored. In this struggle the Federal Government promised the provinces that federal legislation would reverse the existing policy direction provisions wherein the Federal Government's power to issue directions was limited to three very specific areas to one where the power would be provided for the Federal Government to issue a direction on all topics except where specifically excluded.[16] This would, the government argued, "… ensure that the development of policy would be, and would clearly be seen to be, under the control of the elected representatives of the people."[17] In addition such directions would be developed through a proposed intergovernmental ministerial committee for communications policy, a committee which would exclude CRTC participation.

19. Following the 1975 transfer of responsibility for telecommunications regulation from the CTC to the renamed Canadian Radio-television and Telecommunications Commission, a transfer which took effect in April 1976, the Federal Government introduced a combined

[16] The original subject areas were the licence eligibility of applicants, reservation of frequencies or channels for the CBC and the maximum number of channels or frequencies in a given area. Subsequently this was expanded to include granting licences to provincial agents and implementation of Article 2006 of the Canada-US Free Trade Agreement.

[17] Hon. Gerard Pelletier, Minister of Communications, "Communications: Some Federal Proposals" April 1975, p. 10.

telecommunications and broadcasting act in the House of Commons that was to establish both a new set of policy objectives for telecommunications, while continuing with most of the original broadcasting objectives, and a directive power. With respect to the former, the legislation reflected the original ambitions of the DOC for the first objective declared

> 3 (a) … efficient telecommunications systems are essential to the sovereignty and integrity of Canada, and telecommunications services and production resources should be developed and administered so as to safeguard, enrich and strengthen the cultural, political, social and economic fabric of Canada;[18]

Notably, the legislation continued the "regulation and supervision" responsibilities of the CRTC. As promised, the legislation provided for a comprehensive power of direction for the Government "respecting the implementation of the telecommunications policy for Canada…" found in s. 3 subject to very limited qualifications. It is also worth noting that the legislation, reflecting the intergovernmental conflict of the previous years, would have permitted the Minister of Communications both to seek the advice of a provincial regulatory authority on any matter and, most significantly, to delegate to a provincial regulator any of the ministerial and CRTC powers.[19]

20. Notwithstanding the fact that the Government of the day had a majority in the House of Commons, the proposed legislation inexplicably never went beyond First Reading after being introduced three times, twice in 1977 and once in 1978. Consequently, the CRTC assumed jurisdiction over telecommunications without any legislative guidance to guide its decision-making over the powers found in the 1906 *Railway Act*, or subject to a directive power.

21. It would be an understatement of the first order to suggest that the CRTC exercised its new powers based on a loose interpretation of the provisions of the *Railway Act.* Building on the precedent of the CRTC as broadcasting regulator from 1968 to 1976, within months of assuming responsibility, the CRTC, in a rather anodyne statement of "draft procedures and

[18] He House of Commons, Bill C-43, An Act respecting telecommunications in Canada, First Reading, March 22, 1977.
[19] *Ibid.* s. 6(a) and 7.

practices," announced that it was radically reinterpreting its responsibilities. Although its legislation made no mention of the "public interest", the CRTC declared that the public interest required that telecommunications services "should be responsive to pubic demand over as wide a range as possible, and equally responsive to social and technological change."[20] The CRTC also indicated that it would not be bound by its predecessor's interpretation of its statute:

> 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 the telecommunications services are fully responsive to the public interest.[21]

22. In its first five years as telecommunications regulator, without, it bears repeating, any statutory change, the CRTC proceeded to overturn recent precedents involving awarding intervenor costs and customer attachment of terminal equipment, imposed quality of service standards on federal carriers and subjected their TCTS rates to regulatory approval. Most importantly, it introduced a significant degree of service competition when it authorized private line long distance interconnection in 1979.[22] It is worth noting that, with one exception, neither the Federal Cabinet nor the Courts overturned any of these decisions when challenged.

23. Despite the repeated refusal to intervene, successive Ministers of Communications were critical of the policy-making power assumed by the Commission. In the one decision which Cabinet reversed on appeal, for example, the Minister lamented the fact that the appeal provision had to be employed because "… adequate statutory mechanisms through which the government could have provided clear policy guidance to the CRTC are not yet

20 CRTC, "Telecommunications Regulation- Procedures and Practices" July 20, 1976, p. 3.
21 *Ibid.*
22 Canadian Radio-television and Telecommunications Commission, Telecom Decision CRTC 79-11, 17 May 1979, *CNCP Telecommunications, Interconnection with Bell Canada.*

available…."[23] Several years later, one of her successors, Marcel Masse, argued legislation was necessary "… to establish clearly and unequivocally that only the government … is empowered to develop major policies."[24]

24. It was during this period after the failure to legislate a new telecommunications act and the turmoil resulting from the CRTC's radical reinterpretation of its 1906 powers, that several expert commentaries appeared calling for clarity in the relationship between regulatory agencies and governments and Parliament. All placed considerable priority on the need for a clear legislative statement of public policy objectives to guide regulatory agencies in their decision-making as the first instrument for providing balance between the government and regulators for establishing policy.

25. As explained below, there emerged a consensus that the enabling statutes for these independent regulatory agencies gave them far too much policy-making power in large part because of the open-ended, almost blank cheque, nature of the statutory statement of policy objectives. The concern was that elected authorities, the Federal Government and Parliament, had transferred far too much decision-making not on specific regulatory matters but on the policy to guide that decision-making to agencies under minimal political control.

26. This concern was first articulated by the Lambert Royal Commission on Financial Management and Accountability in 1979. As its title indicates one of its two central concerns was accountability for public decision-making and in this regard, it was highly critical of contemporary practice respecting regulatory agencies. In its report it stated:

> (For some of these agencies) … the constituent acts are neither clear nor unambiguous. This is especially true of … regulatory agencies which more often than not are given only the most rudimentary guidance…. Even when more extensive guidelines are provided, enormous scope for interpretation is granted to those agencies. In such situations the agencies, by virtue of the substantial

[23] Quoted in Ryan, op.cit., p. 16.
[24] Marcel Masse, Minister of Communications "Minutes of Proceedings and Evidence of the Standing Committee on Communication and Culture," Issue 10, 6 May 1985, p. 10.4.

> discretionary authority delegated to them, can become primary policy-makers. Indeed, in developing and refining their mandates, they can play a role not unlike that of Parliament itself.[25]

27. The Lambert Royal Commission consequently recommended that for regulatory agencies "the goals and public policies they are to implement, or be guided by, be clearly set out in their constituent acts."[26] The Royal Commission's concerns and recommended ameliorative measures were picked up by subsequent governmental advisory bodies such as the Economic Council of Canada and the Law Reform Commission of Canada. They recommended that regulatory agency statutes should contain clear statements of policy objectives and goals.

28. The original Bill-62, An Act respecting telecommunications, given First Reading in February 1992 which ultimately was passed as the *Telecommunications Act 1993*, was built on a four-pronged approach to ensuring balance between the regulator and the government. The Bill was sent to the Senate for "pre-study" which turned out to be the primary legislative review of the legislation. One of the prongs caused little debate, namely the inclusion of a policy directive power (s. 12) The maintenance of the traditional political appeal provision enabling the Federal Government to vary or rescind a CRTC decision drew, the Senate Committee noted, "widespread criticism from many witnesses" which persuaded the Committee to recommend that the appeal power be limited to sending back or setting aside.[27]

29. The other two prongs were much more controversial. The first was the proposal to confer on the Minister of Communications the power to issue licences for Canadian telecommunications carriers. This drew on the department's 1987 proposed policy framework although it was never clear in that framework who the licensing authority would be and reverted back to the pre-CRTC era where ministerial licensing of broadcasting was

25 Royal Commission on Financial Management and Accountability, *Final Report*, (Ottawa: Supply and Services Canada, 1979), p. 314.
26 *Ibid.,* p. 315.
27 Senate of Canada, Report of the Standing Committee on Transport and Communications on the "Subject matter of Bill C-62, An Act respecting telecommunications," Third session, Thirty-Fourth Parliament, June 1992, pp. 24-25.

the norm.[28] If enacted, the CRTC would be limited, as was the BBG before it, to an advisory role for the issuance of licences.

30. The Committee referred to a "mood of controlled indignation" over the proposed licensing system and was dismissive of the Minister's reasons for it. In particular it dismissed the primary reason, namely allowing the Minister to develop inter-governmental agreements, as being "unwise to put into Bill C-62 a power which could so easily undermine the primary justification of the legislation itself - national regulation for a national industry." Consequently, it recommended that the licensing scheme- its word- be stripped from the legislation.[29]

31. There was also considerable criticism of the proposed statement of telecommunications policy objectives from both witnesses and the Committee itself. The Committee cited the Canadian Bar Association which contended that the section's "listing approach is rife with inconsistencies" and a senior provincial official who stated that "the clause contains too many qualifiers to rank as a true statement of objectives."[30] For its part, the Committee concluded that the policy statement "has grown up, a bit like Topsy, over many years on an incremental rather than systematic basis. It is encrusted with too much history and not enough logic". Most significantly, the Committee noted the CRTC's decision in June 1992 to embrace open competition and, as noted above, pointedly stated that new legislation "will have to be capable of accommodating, guiding and furthering this massive transition."[31] The Committee concluded that section 7 suffered from what it called a "central weakness … namely the lack of a clear distinction between ends and means." Consequently, the Committee recommended that section 7 should be redrafted "to address the core issues" and "in a manner which distinguishes carefully between ends and means, and which constitute a coherent, integrated whole."[32]

32. The Senate Committee's criticism of the licensing scheme was obviously persuasive because the licensing scheme was omitted in the revised version of the legislation

28 Department of Communications "A policy Framework for Telecommunications in Canada" July 1987.
29 *Ibid.,* pp. 26-27.
30 *Ibid.,,* p. 21.
31 *Ibid.,* p. 10.
32 *Ibid.,* p. 22.

submitted to and approved by Parliament. What was little appreciated at the time, including by this author, was the significance of the Federal Government not accepting the Committee's recommendations for re-writing the statement of policy objectives. However misguided the proposal for the licensing scheme was, its removal meant that a check on the CRTC's powers was deleted and more importantly a widely criticized statement of policy objectives was conferred on the CRTC which can only be described as a blank cheque to govern its regulatory decision-making. Indeed, its powers were enlarged when the CRTC acquired the power, originally granted to the Cabinet in s. 9 of Bill C-62, to exempt a carrier from the application of the legislation.

33. Here one need only refer to assessment of the consequences offered by the Telecommunications Policy Review Panel. The Panel found the 1993 statutory objectives severely wanting. It concluded that they did not provide responsible authorities "practical guidance in the discharge…"[33] of their responsibilities because they were neither clear nor explicit. The Panel argued that it was difficult to reconcile different objectives and suggested that the objective for "orderly development" (policy objective 7(a)) was "reminiscent of a government-planned program"[34] and conflicted with the objective of relying on market forces. It went further to argue that "… s. 7 is vague in that it provides no guidance on how much reliance should be placed on market forces as opposed to regulation…."[35]

34. The result was that, after almost a decade of decisions that appeared to favour competition, the CRTC slipped back into its broadcasting regulatory mode to supervise, i.e. manage, competition through an emphasis on "orderly development" as permitted by s. 7. In order to ameliorate the situation, as we know, the Government in 2006 was compelled to issue a policy directive to the Commission instructing it to place primary emphasis on the promotion of competition.

35. To conclude this section, a review of the development of the current telecommunications policy objectives supports the argument that these objectives are fundamentally flawed as

33 *Telecommunications Policy Review Panel Final Report 2006*, page 2-5.
34 *Ibid.*
35 *Ibid.*

an instrument for balancing the roles of the Government, and Parliament, in developing telecommunications policy and the role of the CRTC in implementing that policy. The author concurs with the assessment developed in the TELUS submission that the current statement of objectives in the *Telecommunications Act* "lacks a clear, consistent, unambiguous statement of contemporary and future-oriented policy objectives. Instead the legislation contains an open-ended, unranked, largely undefined and indeed often contradictory policy statement that has the effect of governmental abdication to the regulatory agency to be the primary policy maker."

Part 3: The Policy Directive Power

36. There is a widespread consensus that the policy directive power is a valuable tool to assist in ensuring balance between the respective roles of the Government and the CRTC, particularly after the successful use of such a power in 2006.[36] I support that consensus but think it is important to make two comments on such a power. The first is that it is important to remember that the policy directive power is not a substitute for a well-crafted legislative statement of regulatory policy objectives. It is meant to supplement such a statement first, when new conditions emerge that may not have been anticipated when the statute was passed such that the policy requires adjusting or recalibrating that falls short of a requirement for a statutory change, or secondly when the regulator acts contrary to, or in some ways not supportive of, the existing policy objectives.

37. Related to this last point, it should always be remembered that exercising the policy directive power requires a significant act of political will. This was clearly demonstrated in the case of the 2006 directive where it took a determined minister opposed by his officials, the CRTC and senior personnel in central agencies, and a fortuitous set of circumstances, to demonstrate the value of the directive power.[37] Absent such political will, a poorly crafted statutory statement of policy objectives can lead to a fundamental

[36] See *Order issuing a Direction to the CRTC on Implementing the Canadian Telecommunications Policy Objectives,* PC 2006-1534 (14 December 2006), 140:26 Canada Gazette II 2344.

[37] Richard Schultz, "What a Difference a Minister Can Make" in Alan Maslove (ed.) *How Ottawa Spends 2008-2009* (Montreal: McGill-Queen's University Press, 2008).

imbalance in the relationship between governmental policy control and regulatory independence.

Part 4: Cabinet Power to Vary, Rescind or Refer Back Regulatory Decisions

38. With a clearly crafted statement of policy objectives, supplemented by a policy directive power, the question arises as to whether the traditional power assigned to Cabinet to review and vary CRTC telecommunications decisions is necessary to ensure balance in the roles of the Cabinet and the regulator. I would answer in the negative and support this answer by drawing on long-standing criticisms of such a power. Two former Chairs of the CRTC, for example, have argued for the power to be removed or circumscribed. John Meisel was critical of the power in 1982 noting that the Cabinet appeal process was "… an invitation to vested interests and lobbyists to converge on ministers in an effort to undo, behind closed doors, decisions reached by the Commission and based on public hearings where interested parties can react to one another's argument openly." For his part, Andre Bureau suggested that such appeals "pose a threat to the independence of the regulator and the integrity of the regulatory process."[38] Bureau also questioned the legitimacy of such appeals if a political directive power which was then being contemplated, was imposed. His successor, Keith Spicer was much blunter with his comments about the use of such a combination when he stated that he was concerned about "the risk of the CRTC becoming the monkey to the government's organ-grinder." He went on to argue that "… it's not the CRTC, but Cabinet itself, which would come to rue the so-called 'tandem powers" of direction and review … (as) overuse of these powers would quickly discredit any government's commitment to a non-partisan, impartial process, and burden Cabinet with line-ups of unwelcome petitioners."[39]

39. Other commentators have also been critical. The Lambert Royal Commission, for example, recommended that political appeals of regulatory decisions should be abolished. The Lambert Commission argued, as does this paper, that authorizing legislation "should be the primary instrument for overseeing, guiding and ultimately evaluating the work…" of

[38] Cited in Ryan, op.cit., pp. 2-3.
[39] Keith Spicer, Broadcasting in the Nineties: New Balances, New Perspectives, The Empire Club of Canada Addresses (Toronto, Canada), 24 May 1990 available at http://speeches.empireclub.org/61362/data?n=34).

regulatory agencies.[40] Anticipating the criticism of Chair John Meisel, the Commission argued that agency decisions were made in open hearings but appeals "are all made in private and subject to the requirements of cabinet confidentiality…. The integrity of these agencies will be undermined… if the principle of open and impartial proceedings is not applied to the appeal process."[41]

40. The Economic Council of Canada, in response to the Prime Minister's 1978 request to undertake a major review of "specific areas of government regulation which appear to be having a substantial economic impact on the Canadian economy," addressed a number of public administration aspects of regulation including the debates surrounding the use, efficacy and appropriateness of political appeals. The Report acknowledged that political appeals could be defended on several grounds including first, the need for the Federal Government to address broader public policy concerns than those that a regulatory agency might consider in addressing an application, secondly, the claim that given the rare use of such appeals they are not particularly disruptive or destructive of regulatory integrity and finally the fact that some decisions are "of such seminal significance that no government can afford not to be involved."

41. However, the Council was not persuaded by such arguments and concluded that political appeals were in fact disruptive and potentially destructive, permitted selective or discretionary accountability and possibly favoured some parties such as the wealthy and well-organized, at the expense of others. More importantly, the Council argued that political appeals may fail to serve their fundamental purpose of providing policy direction to a regulatory agency because they "may *not* actually result in any real clarification of the policy of the government… and [consequently] may thereby increase uncertainty and result in more political appeals…."[42] (emphasis in original) After reviewing the options, the Council recommended that political appeals should be abolished and following the recommendation of the Lambert Commission, urged the Government to amend relevant regulatory statutes to permit, subject to certain procedural constraints, the Government to

40 Royal Commission on Financial Management and Accountability, op.cit., p. 341.
41 *Ibid.*, p. 319.
42 Economic Council of Canada, *Responsible Regulation* (Ottawa, November 1979) pp. 63-64.

issue policy directions to specific regulatory agencies. It argued that its recommendations would provide for both greater political accountability and make best use of regulatory agency processes, expertise and performance of their adjudicatory responsibilities.[43]

42. A third independent analysis, this time by the Law Reform Commission of Canada, also recommended that political appeals be abolished. Its rationale is worth quoting at length:

> Cabinet "appeals" … are really policy appeals replete with lobbying external to any formal written representations made, and allow for reversal on grounds of "evidence" unrelated to the considerations an agency may have regarded as relevant. Such review may have a detrimental effect on agencies and detract from the integrity of the administrative process in the eyes of those who are parties to proceedings before the agencies. To be reversed on such an appeal can be demoralizing and can contribute to a less than conscientious approach to agency responsibilities. This is particularly so when the appeal is not well-documented and the reasons obscure.
>
> Policy appeals can also be used to change policy retroactively…. This can lead to public apprehension that the Cabinet has not really limited its terms of reference in policy review to the scope and intent of the statute in question, and that there has been an abuse of executive power through the taking of action contrary to the intent of Parliament.[44]

43. Apropos the criticism of the appeal mechanism as a means of setting regulatory agency policy, one need only recall, as a. telling example supporting such an argument, the refusal of the CRTC to give effect to the Cabinet's suggested policy in the appeal in 2006 that, as noted above, ultimately forced the Government of the day to issue a direction to the Commission.

44. The Law Reform Commission, recognizing that the Cabinet may not wish to give up its complete appeal power, offered an alternative that the TELUS submission supports. That

43 *Ibid*., pp.66-67.
44 Law Reform Commission of Canada, *Independent Administrative Agencies*, Working Paper #25 (Ottawa; 1980) pp. 88-89.

alternative is that Cabinet should be given only the power to set aside a regulatory decision and only after it had referred the matter back to agency indicating "… what aspects of its statutory mandate the government thought the agency should weigh in reconsidering its decision."[45] Subsequent governments in the 1991 *Broadcasting Act* and the 1993 *Telecommunications Act* incorporated this second part of this recommendation, although the latter Act did not limit the appeal power of cabinet. In this context it is worth noting that the telecommunications act given first reading in March 1977 did not grant the Cabinet the power to vary CRTC telecommunications decisions but the 1978 version did. No explanation was ever provided for the change.[46]

45. It is also worth noting that, in a Law Reform Commission seminar for members of federal administrative tribunals, Gordon Smith, then Assistant Secretary to Cabinet in the PCO, indicated that the Government was considering changes to the political appeal process in the context of expanding the policy direction power. He is quoted "we are also going to find changes in the appeal process. If the government of the day has the power to issue policy directions to agencies, it seems to me the other side of that coin will be the government may not feel it needs to have the power to overturn specific decisions. In other words, this process may enhance the independence of administrative agencies in decision-making."[47] As we know, however, no such change was introduced by the Government in subsequent telecommunications legislation.

46. While I personally believe that there is no need for both a political appeal mechanism and a policy direction power, I support the TELUS recommendation that, as a second best solution, if a cabinet appeal power is to be retained, the provisions governing telecommunications should be the same as those now for broadcasting decisions. Cabinet should only be permitted the power to refer back telecom decisions for reconsideration and if necessary to set decisions aside.

45 *Ibid*., p. 89.
46 House of Commons, Bill C-43, given first reading March 22, 1977 and Bill C-16, given first reading November 9, 1978.
47 Economic Council of Canada, Responsible Regulation (1979) fn 80.

Conclusion:

47. The Law Reform Commission contended that "our political traditions stress that power and responsibility should be placed in elected officials" and that consequently "in the absence of clear justification, governmental authority should not be exercised by non-elected officials unless some basis for responsiveness to the Cabinet and Parliament is retained."[48] The argument of this paper is that such a condition has largely not be met in the telecommunications sector in the relations between the Cabinet and Parliament and the CRTC. Between 1976 and late 1980s, the CRTC was able successfully for the most part to impose its self-defined, very loose interpretation of the *Railway Act* on the telecommunications sector. In the first few years of the millennium, the CRTC once again imposed its interpretation of statutory policy on the industry. In the latter case the Government was compelled to employ an external panel review and subsequently a policy directive to correct the problem.

48. These two episodes, plus the combined commentary and analysis from expert advisory commissions, the Telecommunications Policy Review Panel and most recently the Chair of the CRTC, all support the conclusion, that notwithstanding the continued utility of the 2006 policy directive, the relationship between the Federal Government and the CRTC suffers today from a fundamental imbalance.

49. The issue it needs to be emphasized is one of trying to find a balance between regulatory decision-making independence and political control over the objectives to be pursued through such independence. No statute can, or indeed should, attempt to be so precise as to deny regulatory discretion. Governments, on the one hand, need to be diligent in avoiding the existing situation with regards to the CRTC which has been given simply what concerns the current Chair, namely a comprehensive "list" of objectives that in essence gives no meaningful policy direction. On the other hand, governments need to be equally concerned, as the recent report on the National Energy Board concludes, with giving a regulator conflicting objectives which can lead to a profound regulatory failure.[49]

[48] *Ibid.*, p. 73.
[49] Expert Panel on the Modernization of the National Energy Board, *Report: Forward, Together,* n.d.

50. The *Telecommunications Act*, particularly the statement of policy objectives in Section 7 gives the CRTC far too much opportunity to engage in interpreting public policy in such a manner that it, not Cabinet and not Parliament, is not simply interpreting its mandating statute but is allowed, indeed encouraged, to be the primary policy maker for telecommunications. Section 7, as TELUS has argued, requires a fundamental rewrite so that the objectives are clear and the Commission is constrained and disciplined by such objectives in its decision-making. Such a rewrite can be supplemented by the policy directive power. The recent history of telecommunications regulatory decision-making argues persuasively that, unless such changes are made, Cabinet and Parliament are simply continuing to enable a bad habit.

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May 16, 1997

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Canadian Broadcasting Policy" Paper prepared for Max Bell Roundtable, Innovation and Implementation in Public Policy, McGill University March 26, 2009.

E. Consulting:

Royal Commission on Corporate Concentration (Bryce Commission)

Royal Commission on Financial Management and Accountability (Lambert Commission)

Economic Council of Canada, Regulation Reference

Royal Commission on the Economic Union and Development Prospects for Canada (Macdonald Commission)

Royal Commission on National Passenger Transportation (Hyndman Commission)

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Member, Organizing Committee, Eleventh Annual Telecommunications Policy Research Conference, 1982-83.

Member, Advisory Council, Institute of Intergovernmental Relations, Queen's University, 1982-1994

Associate Editor, Canadian Public Policy, 1980-1984.

Fellow, Council on Economic Regulation, Washington, 1985-90

Chairman, Organizing Committee for Annual Regulatory Studies Training Programme, sponsored by Canadian Association of Members of Public Utility Tribunals and CSRI, 1986-89

Member, Sectoral Advisory Group on International Trade to Minister for International Trade, Department of External Affairs, Ottawa, 1986-91

Organizer/Teacher, Training Program "Essentials of Telecommunications Regulation in a Changing Environment" Ghana Post and Telecommunications Corporation, Accra, July 1992 and Seychelles, June 1993 (Sponsored by Commonwealth Telecommunications Office)

Technical Coordinator, Commonwealth Telecommunications Office Conference "Regulatory Frameworks: Lessons of Experience for Developing Countries" Kuala Lumpur Malaysia. May 16-20, 1995

Associate Member, UNESCO-Bell Chair in Communications and International Development, University of Quebec at Montreal, May 1997-2000

Chair, Program Committee, International Telecommunications Society, Biennial Conference, Montreal June 2008.