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I. INTRODUCTION

Canada, like all western industrialized economies, extensively uses direct regulation. It regulates entry, output, prices, and rates of return of a wide variety of economic activities including airlines, agricultural products, broadcasting, financial services, railroad freight, telecommunications, and trucking services (see Figure 1).

Direct regulation in Canada, as in many other industrialized nations, particularly the United States, has been in a state of flux in recent years. There has been little outright deregulation, but in a number of industries regulatory regimes have been liberalized in important ways. Greater emphasis has been placed on the role of competition, while the scope and stringency of the regulator's grasp has been reduced. Regulatory reform has come to Canada both later and more slowly than it did in the United States. Recently, it has been accompanied by efforts to privatize some of Canada's main Crown corporations.[1]

This paper deals only with direct regulation, in contrast to social regulation, which includes health, safety, fairness, and environmental regulation. A large number of generalizations are necessary in an order to span the many specific types of direct regulation. Not surprisingly, Alexandre Dumas' observation on

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1. *See generally* PAPERS ON PRIVATIZATION (T. Kierans & W.T. Stanbury eds. 1985); W.T. STANBURY, PRIVATIZATION IN CANADA (1986).

generalizations comes to mind: "All generalizations are dangerous, even this one."[2] The problem of generalization is exacerbated by the dynamics of regulatory regimes, even before notable reforms occur. To help alleviate this problem, a few examples will be given to illustrate or to support each general observation or proposition.

A. Outline of the Article

This article addresses two principal issues: (1) the distinctive characteristics of direct regulation in Canada, and (2) the nature and extent of regulatory reform in recent years. Section II of this article identifies the distinctive features of Canada's "system"[3] of direct regulation. These characteristics of direct regulation in Canada have been divided into two sets. The first set consists of a number of factors such as geography, population, extent of government intervention generally, the Canadian variant of federalism, and the basic values that together define the broad context in which regulatory regimes function. While these factors are exogenous to the actors in the regulatory system, even to the government in the short run, they have directly or indirectly influenced the creation and functioning of the many regimes of direct regulation in Canada (see Figure 2). These factors also explain the ways in which such regulation has been changed by reform, or lack thereof, in the past decade.

The second set of distinctive characteristics of Canada's system of direct regulation are behavioral and institutional in nature. They are general attributes of the way in which Canada conducts direct regulation. These include the following: (1) the use of direct regulation to achieve social (non-efficiency) objectives; (2) the extensive political influence over direct regulation by means of political appeals, policy statements as guidelines to regulatory agencies, and cabinet approval of subordinate legisla-

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2. J. COHEN & M. COHEN, THE PENGUIN DICTIONARY OF QUOTATIONS 149 (1962).

3. The word "system" is in quotation marks to indicate that the many varieties of direct regulation in Canada are not the result of any grand plan in which the pieces are carefully coordinated and harmonized. Such regulation has grown in response to a variety of forces at different times. Even within a specific field of direct regulation such as telecommunications, the statutory framework—let alone all of the other components—is a disjointed patchwork. *See generally* C. BAGGALEY, THE EMERGENCE OF THE REGULATORY STATE IN CANADA, 1890-1939 (Economic Council of Canada Technical Report No. 15, 1981); J. BALDWIN, THE REGULATORY AGENCY AND THE PUBLIC CORPORATION (1975); Romaniuk & Janisch, *Competition in Telecommunications: Who Polices the Transition?*, 18 OTTAWA L. REV. 561 (1986).

tion drafted by regulatory agencies; (3) the broad mandates conferred on regulatory agencies under which they exercise great discretion in translating policy goals into case-by-case decisions; and (4) broad regulated conduct exemption from antitrust legislation.

Section III deals with the nature and extent of regulatory reform in industries subject to direct regulation in Canada. After defining the emotive term "regulatory reform," two important characteristics of the reform process are discussed: (1) the influence of regulatory spillover from the United States, and (2) Canada's evolutionary approach to regulatory reform. Finally, an attempt is made to summarize the extent of reform across major directly regulated industries. In some cases regulation has been, or is about to be, dismantled. In other industries, however, stringent regulation remains in place, and in some instances more direct regulation has been imposed.

B. Direct Regulation and Its Scope

Direct regulation is also described as economic regulation, industry-specific regulation, or even as traditional regulation.[4] All of these terms refer to regulatory regimes that impose constraints on one or more of the following variables: price (rates, tariffs, tolls), rate of return (earned by suppliers of regulated services), entry (to the industry and to specific geographic or product markets in the industry), exit (from a specific market or from the regulated industry), and output (the volume or type of goods or services that may be produced and sold).[5]

Perhaps the classic type of direct regulation is regulation of public utilities. Direct regulation is also applied to various transportation services including airlines, trucking, rail freight, commodity pipelines, intercity buses, local public transit, and taxi cabs. Agricultural products marketing boards, notably national supply management schemes, are subject to direct regulation in

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4. Perhaps the classic piece that draws the distinction between direct and social regulation is Lilley & Miller, *The New Social Regulation*, 47 PUB. INTEREST 53 (1977). *See also* ECONOMIC COUNCIL OF CANADA, RESPONSIBLE REGULATION 44 (1979) [hereinafter RESPONSIBLE REGULATION]; Nemetz, Stanbury & Thompson, *Social Regulation in Canada: An Overview and Comparison With the American Model*, 9 CAN. PUB. POL'Y 434 (1983).

5. Priest, Stanbury & Thompson, *On the Definition of Economic Regulation*, in GOVERNMENT REGULATION: SCOPE, GROWTH, PROCESS 1 (W.T. Stanbury ed. 1980).

Canada.[6] This article discusses the regulation of energy, financial services, and broadcasting as forms of direct regulation (see Figure 1).

In each of these cases not all of the variables listed above are actively controlled.[7] For example, in the case of financial services, entry is controlled. Although the legal barriers vary across specific fields such as brokerage services/securities dealers, insurance, trust companies, banks, and credit unions, the stringency of such barriers has been reduced, particularly with respect to ownership of one type of financial institution by another or by foreigners.[8] However, federal and provincial regulators specify in some detail the scope of activities in which firms can be engaged (*e.g.*, securities dealers vs. banks vs. trust companies).[9] Regulators also specify numerous financial criteria that must be met to protect depositors and customers. With the exception of brokerage fees, which were set by the Toronto Stock Exchange prior to April 1, 1983, the prices of financial services are not set by any regulatory body. Furthermore, the outputs of individual firms are not restricted, except for foreign-owned banks operating in Canada, which collectively may not account for more than 16% of total domestic deposits.[10]

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6. *See* Gorecki, *Regulating Price and Output in Canadian Agriculture*, in REGULATORY REGIMES IN CONFLICT: PROBLEMS OF REGULATION IN A CONTINENTAL PERSPECTIVE 31, 32-33 (F. Thompson ed. 1984).

7. *See generally* R. BABE, CANADIAN TELEVISION BROADCASTING STRUCTURE, PERFORMANCE AND REGULATION (1979); G. CAPLAN & F. SAUVAGEAU, REPORT OF THE TASK FORCE ON BROADCASTING POLICY (1986); J. CLIFFORD, CONTENT REGULATION IN PRIVATE FM RADIO AND TELEVISION BROADCASTING: A BACKGROUND STUDY ABOUT CRTC SANCTIONS AND COMPLIANCE STRATEGY (1983) (study prepared for the Law Reform Commission, Ottawa); Baum, *Broadcasting Regulation in Canada: The Power of Decision*, 13 OSGOODE HALL L.J. 693 (1975).

8. In most areas of financial services there are two types of restrictions on ownership: the fraction of equity in individual firms held by non-Canadians and the fraction of equity held by individuals or firms in other financial industries or in non-financial industries. *See generally* ECONOMIC COUNCIL OF CANADA, A FRAMEWORK FOR FINANCIAL REGULATION (1987); ECONOMIC COUNCIL OF CANADA, COMPETITION AND SOLVENCY: A FRAMEWORK FOR FINANCIAL REGULATION (1986). In late 1986 the federal government proposed important changes in the ownership rules. *See generally* MINISTER OF STATE FOR FINANCE, NEW DIRECTIONS FOR THE FINANCIAL SECTOR (1986).

9. *See generally* DEPARTMENT OF FINANCE, THE REGULATION OF FINANCIAL INSTITUTIONS: PROPOSALS FOR DISCUSSION (June 1985) (Technical Supplement); *see also supra* note 8.

10. The limit was set at 8% in 1980 when foreign banks were first permitted to operate in Canada but increased to 16% in June 1984. There are over 50 subsidiaries of foreign banks operating in Canada.

II. Distinctive Characteristics of Direct Regulation in Canada

A. *The Social, Economic, and Political Context*

No regulatory regime exists in a vacuum. A regulating regime exists in a social, economic, and political context, which influences its creation, current status, and future evolution. A nation's regulatory pattern is in large part a reflection of the essential characteristics of that nation. Thus, regulatory regimes are shaped by both unique local considerations and by the more cosmopolitan forces that influence a number of nations. Figure 2 identifies some of the major characteristics of Canada's environment and how they have influenced direct regulation in Canada.

1. *Population, geography, neighbors*

Canada has a relatively small population (25.3 million in 1986[11]) scattered across a land mass slightly larger than the United States. Approximately 80% of that population lives in urban centers within 100 miles of the United States border. These factors have profoundly influenced the growth, scope and nature of government intervention generally, including direct regulation. It is a truism in Canada that because of the small population scattered across a vast land, the harsh climate, the several economically distinct regions,[12] and the various attractions of its overwhelming neighbor, it is necessary for the state to use its powers extensively to unify the nation, to sustain its own cultural identity, and to attempt to offset economic forces that promote integration with the United States. As Sylvia Ostry stated: "The solution to these problems came to be seen in terms of a kind of partnership between the private and public sectors; working together industry and government would surmount the obstacles of distance and fend off the strong pull from south of the border."[13]

For example, regulation, together with public enterprise, has been used in a conscious effort to provide a national, integrated

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11. Statistics Canada Daily, July 9, 1987, at 5 (Cat. No. 11-0001E).

12. *See generally* The Canadian Economy: A Regional Perspective (D. Savoie ed. 1986); O. Sitwell & N. Seifried, The Regional Structure of the Canadian Economy (1984). On the politics of regionalism, see R. Gibbins, Conflict and Unity: An Introduction to Canadian Political Life 81 (1985).

13. Ostry, *Government Intervention: Canada and the United States Compared*, Pol'y Options, Mar. 1980, at 26, 27.

system of transportation services. This is due to the widely-held beliefs that unregulated private enterprise would meet this need too slowly, and that it would serve only a few large markets concentrated in central Canada.[14] Moreover, it was believed that without regulation there would be wasteful competition with a duplication of expensive facilities, or that a few large firms would achieve positions of market power, thereby exploiting shippers and travelers. While such beliefs may not be internally consistent, politicians have acted upon them to create an elaborate body of direct regulation and other forms of intervention.[15] The politicians have never worried about justifying their actions on the basis of economists' arguments concerning market failure.[16] They have been much more concerned about increasing the rate of economic growth and the development of all regions by facilitating the development of the infrastructure.

The need to maintain unity has been a paramount theme in Canadian politics. It has been used as a justification for massive government transfer programs to deal with social assistance, pensions, baby bonuses, and the provision of hospital and medical care at a uniformly high standard throughout Canada. These programs have been financed by extensive fiscal transfers from the federal to provincial governments.[17] Variants of the same arguments of national unity have been used in part to justify direct regulation of various transportation services, broadcasting, and telecommunications.

By regulating entry, competition, and prices, it has been possible to extend services on a comparable basis across the breadth of the nation.[18] There is the feeling that no one must be

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14. *See, e.g.*, M. GORDON, GOVERNMENT IN BUSINESS (1981); PUBLIC CORPORATIONS AND PUBLIC POLICY IN CANADA (A. Tupper & G. Doern eds. 1981); Trebilcock & Prichard, *Crown Corporations: The Calculus of Instrument Choice*, in CROWN CORPORATIONS IN CANADA: THE CALCULUS OF INSTRUMENT CHOICE (J. Prichard ed. 1983).

15. *See* Howard & Stanbury, *Appendix to Measuring Leviathan: The Size, Scope and Growth of Governments in Canada*, in PROBING LEVIATHAN: AN INVESTIGATION OF GOVERNMENT IN THE ECONOMY 127 (G. Lermer ed. 1984).

16. The various normative arguments for government intervention generally are identified, classified, and summarized in W.T. STANBURY, THE NORMATIVE BASES OF GOVERNMENT ACTION (Commission of Inquiry into Residential Tenancies Research Study No. 16, 1985).

17. *See* ECONOMIC COUNCIL OF CANADA, FINANCING CONFEDERATION: TODAY AND TOMORROW (1982) [hereinafter FINANCING CONFEDERATION].

18. The Royal Commission on Broadcasting stated in 1929 that radio coverage should provide "good reception over the entire settled region of the country." To achieve this objective both a regulation and public enterprise, the Canadian Broadcasting Corporation, was needed. As another inquiry into broadcasting noted 57 years later, this was

left out—for that would constitute discrimination and reinforce the persistent centrifugal forces that threaten Canadian nationhood, not the least of which is the proximity of the higher standard of living in the United States. In telecommunications, route-averaged tolls and system-wide pricing of local services (with some variation to reflect the size of the local calling area) have been used to extend the network to over 98% of all households.[19] Many forms of cross-subsidization and price discrimination have been built into telephone rates other than that from monopoly toll services to local service. Fairness has traditionally been interpreted as charging everyone the same price, with some exceptions for long distance, regardless of actual service costs. Fairness has only very rarely been interpreted as "user pay" or as charging prices that recover the costs of serving individuals in similar circumstances.[20] Not only is the redistribution ethic strong in Canada,[21] but in some cases it amounts to Rawlsian ethics in action because of the focus on the position of the least advantaged in judging possible changes in public policy.[22]

Much public policy, including direct regulation, is based on an implicit belief in Canada's precarious existence as a nation—due to its closeness to the United States, conflicts between its two founding linguistic groups, and its unnatural economy.[23] There is a constant effort by the federal government to bring to all citizens "a sense of Canadianism that is distinct from the American mould."[24] The official concern for the sovereign's ability to exercise control over the direction of economic, social, cultural, and political change must strike foreigners as being an obsession.[25] The concern about Canada's identity and sovereignty

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an "expensive enterprise in a country with the geography of Canada." G. CAPLAN & F. SAUVAGEAU, *supra* note 7, at 7.

19. In the U.S. the telephone penetration rate in March 1987 was 92.5%. FCC Press Release, June 8, 1987. The Canadian figure (98.2% for 1985) is taken from Federal-Provincial Examination of Telecommunications Pricing and the Universal Availability of Affordable Telephone Service, WORKING PAPERS 205 (1986).

20. *See* Globerman & Stanbury, *Changing the Telephone Pricing Structure: Allocative, Distributional and Political Considerations*, 12 CAN. PUB. POL'Y 214 (1986).

21. *See* H. HARDIN, A NATION UNAWARE: THE CANADIAN ECONOMIC CULTURE 300-15 (1974).

22. Stanbury, *Decision Making in Telecommunications: The Interplay of Distributional and Efficiency Considerations*, in TELECOMMUNICATIONS POLICY AND REGULATION: THE IMPACT OF COMPETITION AND TECHNOLOGICAL CHANGE 481 (W.T. Stanbury ed. 1986).

23. *See infra* notes 39-46 and accompanying text.

24. Ostry, *supra* note 13, at 30.

25. *See, e.g.*, CONSULTATIVE COMMISSION ON THE IMPLICATIONS OF TELECOMMUNICATIONS FOR CANADIAN SOVEREIGNTY, TELECOMMUNICATIONS IN CANADA (1979); G. CAPLAN &

is driven in large part because many Canadians have strong feelings of ambivalence about their nearest and most powerful neighbor. The elephant and mouse analogy is one they use constantly. The size and sheer vitality of the American economy, the almost unavoidable influence of United States communications media, and the political reach of the United States as a superpower are seen as threatening by many Canadians. At the same time, many Canadians find much to admire about the United States—its openness, its democratic institutions, and its high standard of living.

While the many manifestations of cultural nationalism strike some observers at home and abroad as chauvinism, there is obviously considerable support in Canada for the idea "we shall not be swamped."[26] The Canadian Radio League, whose lobbying was instrumental in the creation of the Canadian Broadcasting Corporation (CBC) and a nationalist broadcasting policy, used the slogan: "The State or the United States."[27] The idea is still prominent in Canada in a variety of areas. Canada's location results in its being subject to regulatory spillover from the United States. This can occur in several ways, as noted in Figure 2 and developed in more detail in Section III of this article.

Regulation is only one of many instruments that is used by all three levels of government (national, provincial, and local) in the name of protecting Canada's sovereignty and cultural identity. Direct expenditures, tax expenditures, cash subsidies, cash grants, and public enterprise are also employed extensively.[28]

The history of broadcasting regulation reflects Canadians' desire to use government intervention to achieve a set of social objectives that reflect their concern about Canada as a nation. Broadcasting has been regulated in some form since 1919. The

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F. SAUVAGEAU, *supra* note 7.

26. One of the most pervasive forms of influence is that of television programming. For example, sampling during the week of January 16-22, 1986, revealed that of the top ten television shows in English Canada, only three originated in Canada and they ranked 7, 8 and 9. For French channels, only one American show, "Dallas," was in the top 10 and it ranked 9. The top three shows on English channels were "Cosby Show," "Family Ties" and "Miami Vice." The three most popular Canadian shows were "CBC National News," "Hockey Night in Canada," and "The Nature of Things." G. CAPLAN & F. SAUVAGEAU, *supra* note 7, at 210.

27. F. PEERS, THE POLITICS OF CANADIAN BROADCASTING, 1920-1951 (1969).

28. *See generally* P. AUDLEY, CANADA'S CULTURAL INDUSTRIES: BROADCASTING, PUBLISHING, RECORDS AND FILM (1983).

CBC, a federal Crown corporation, was created in 1932, and Canadian content regulations were introduced in 1958.[29] The latest federal report on broadcasting stated that "the assignment of radio frequencies for broadcasting in Canada is an essential component of national sovereignty. Because of the urgency of the issue, Canada has always expected broadcasting to reflect the country's identity."[30] The report also states that broadcasting "was to play the role of both the railways and the telegraph in binding a geographically absurd entity together. It was to be a key instrument in the *never-ending* task of affirming a sense of Canadian consciousness."[31]

Section 3 of the *Broadcasting Act* of 1968[32] states that "the Canadian broadcasting system should be effectively owned and controlled by Canadians so as to safeguard, enrich and strengthen the cultural, political, social and economic fabric of Canada."[33] Programming should use "predominantly Canadian creative and other resources."[34] The section states that "all Canadians are entitled to broadcasting service in English and French as public funds become available."[35] In addition to regulation, there should be a federal Crown corporation to provide "a national broadcasting service that is predominantly Canadian in content and character."[36] Robert Babe correctly concludes that:

> Canadian public policy with regard to broadcasting has reflected a belief that broadcasting is of special significance for the survival of the nation, that it is not "just another industry" to be governed by the impersonal forces of the market place. It has been seen by government as an instrument for binding the country together.[37]

Broadcasting regulation in Canada is also used to allocate a unique common property resource (the radio spectrum), but the control of the resulting market power is not an important concern. Rather, regulation is used to require privately-owned firms to produce more of a particular output (Canadian content pro-

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29. *See* R. BABE, *supra* note 7.
30. G. CAPLAN & F. SAUVAGEAU, *supra* note 7, at 36.
31. *Id.* (emphasis added).
32. Broadcasting Act, R.S.C. 1970, ch. B-11, § 3.
33. *Id.* § 3(b).
34. *Id.* § 3(d).
35. *Id.* § 3(e).
36. *Id.* § 3(f).
37. R. BABE, *supra* note 7, at 6.

grams) than they would in the absence of such legal constraints. The effect of such regulation is to absorb part, but not all, of the excess profits associated with the limited supply of licenses granted in each geographic market area.[38]

2. *Canada as an unnatural economic entity*

Canada is a nation that represents the triumph of political will over enduring, contrary economic forces.[39] The size and shape of the land, the importance and location of its natural resources, its relationship to the much larger United States economy, and the location of natural transportation and communications corridors all militate in varying degrees against an east-west nation in the northern half of North America. Economic logic suggests there should be a number of north-south political entities stretched across what is now the United States and Canada. Not surprisingly, Canada has been described as a "geographically absurd entity, [and as] a nation that in some ways defied common sense."[40] Some scholars have suggested that "if the bottom line were all, Canada itself would never have been built and would indeed soon cease to have any meaningful existence."[41]

To integrate a very small population stretched across almost 3500 miles into an east-west nation has required extensive state intervention. Writing in his first of two reports on broadcasting in 1957, Robert Fowler, president of the Canadian Pulp and Paper Association, emphasized the apparent willingness of Canadians to defy their circumstances in the interests of a distinctive nationhood: "We are prepared, by measures of assistance, finan-

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38. In short, first the regulators create legal "monopolies" and then they impose conditions on their "product" that soak up most of the excess profits. The very recent Caplan-Sauvageau report indicates that regulators are leaving a lot of money on the table for the owners of broadcasting licenses. G. CAPLAN & F. SAUVAGEAU, *supra* note 7. The report suggests the private broadcaster is simply a tax collector operating as an intermediary between listeners, viewers, taxpayers and the federal government. While the government achieves its symbolic political objectives concerning Canadian content, the suppliers of Canadian content programs gain a windfall. The listener and viewer is forced to consume programming that is not their first choice while paying more for the products that advertise on Canadian broadcasting outlets due to the excessive restriction on the supply of broadcasting licenses.

39. For the most comprehensive recent analysis, see volumes 1, 2 and 3, ROYAL COMMISSION ON THE ECONOMIC UNION AND DEVELOPMENT PROSPECTS FOR CANADA, REPORT (1985).

40. G. CAPLAN & F. SAUVAGEAU, *supra* note 7, at 35-36.

41. *Id.* at 36.

cial aid and a conscious stimulation, to compensate for our disabilities of geography, sparse population and vast distances, and we have accepted this as a legitimate role of government in Canada."[42]

In 1937 a federally-owned Crown corporation, now called Air Canada, was created to provide transcontinental air travel and thereby ensure that Canadians did not travel from coast to coast via the United States, which already had such service.[43] Active economic regulation of airlines began in 1938 to accelerate the expansion of this new technology so well suited to Canada's geographic size and distribution of population. By regulating entry and licensing so that only one or two carriers service most destinations, it was believed that the private carriers would be more financially stable and able to rapidly extend the scope of scheduled air service to more cities. The federal government ensured that Air Canada retained its monopoly on transcontinental service until 1959. Regulation did achieve this objective, although it also created a relatively high-cost airline industry. Even under deregulation as proposed in Bill C-18,[44] the fears of United States domination of the industry are indicated by the requirement that Canadian residents own 75% of the voting shares of domestic airlines. Such requirements address serious concerns that are appropriate given the hub and spoke organization of the American airline industry, its cost structure relative to Canada's, and the proximity of major Canadian cities to the United States border.[45]

The time has not eliminated or even reduced the conflict between economic forces and political aspirations.

> Moreover, 118 years after its creation Canada is no less an unnatural economic entity. Like a leaky ship, continuous bailing operations must be maintained or the sea will reclaim the vessel. In effect, many Canadians (*not* all) must bear a substantial "tax" just to keep the economic engine going to service

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42. *Id.* at 12 (quoting ROYAL COMMISSION ON BROADCASTING, REPORT 10 (1957)).

43. *See generally* C. ASHLEY, THE FIRST TWENTY-FIVE YEARS: A STUDY OF TRANS-CANADA AIR LINES (1963).

44. National Transportation Act, Bill C-18, 33d Parl., 2d sess., (1986). The first reading of this Bill was in the House of Commons on November 4, 1986. The Bill was passed by the Commons in June 1987 and by the Senate in August 1987, and it is expected to take effect in January 1988.

45. *See* Gillen, Stanbury & Tretheway, Analysis of the Takeover of Canadian Pacific Air by Pacific Western Airlines (Jan. 1987) (unpublished paper submitted to the Canadian Transport Commission).

> the political aspirations of nationhood. Canada is, by policy, a club with high annual dues (which vary greatly by the regional and other characteristics of members) merely for the privilege of membership.[46]

3. *Government intervention*

If Canadians make more extensive use of direct regulation than do Americans or other western countries, they do so in the context of a large amount of government intervention in general. Recently, after a lengthy survey of the size, scope, and growth of governments in Canada, a study concluded that government has become the "dominant entity in the nation's economic life. Indeed, Canada has become a government-centered society."[47] In the view of some scholars, when the full range of governing instruments is taken into account, "the government sector in Canada has become Leviathan."[48] The type of evidence they use to support their conclusion includes the following:[49]

a. Government expenditures. The expenditures of all three levels of government combined amount to about 47% of the Gross National Product (GNP). One-half of total expenditures consist of transfer payments that have recently grown much more rapidly than exhaustive expenditures. For the past several years provincial governments have been running substantial deficits, and for the same period, federal revenues have been only about 70% of expenditures.[50]

b. Tax expenditures. Tax expenditures at the federal level have been rising more rapidly than direct expenditures over the past decade. They now amount to about one-half the level of direct or cash expenditures. In other words, if all tax expenditures were counted as subsidies, federal expenditures—which now amount to about 23% of GNP—would increase by about 50%.[51] (No requirement exists that the federal government pub-

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46. Stanbury, *The Psychological Environment of Business-Government Relations in Canada,* 50 Bus. Q. 105, 109 (1985).

47. Howard & Stanbury, *Measuring Leviathan: The Size, Scope and Growth of Governments in Canada,* in PROBING LEVIATHAN: AN INVESTIGATION OF GOVERNMENT IN THE ECONOMY 87, 94 (G. Lermer ed. 1984) (emphasis omitted).

48. *Id.*

49. The illustrations have been updated or extended in a number of cases.

50. *See generally* Canadian Tax Foundation, Provincial Finances (biannual); Canadian Tax Foundation, National Finances (biannual).

51. Based on data in Howard & Stanbury, *supra* note 15. For the latest estimates of tax expenditures, see DEPARTMENT OF FINANCE, ACCOUNT OF THE COST OF SELECTIVE TAX

lish annual estimates of the size of tax expenditures as is the case in the United States.).

c. Regulated industries. Khemani estimates that in 1980 "government supervised or regulated" industries accounted for 38% of the Gross Domestic Product or 34% if the public administration and defense section is removed.[52] Stanbury and Thompson estimated that 29% of Canada's Gross Domestic Product (GDP) at factor cost in 1978 originated in industries subject to some form of direct regulation. The comparable figure for the United States was 25.7%.[53]

d. Public sector employment. When the public sector in Canada is defined to include government departments, educational institutions, government-funded hospitals, and public enterprises, it employs one-quarter of all employed persons. Government departments, however, employ only about one-half of all persons in the public sector if broadly defined.[54]

e. Government corporations. The Economic Council indicates that as of the end of 1985 there were fifty-six parent and eighty-one subsidiary corporations owned or effectively controlled by the federal government.[55] Provincial governments owned or controlled 203 parent and 187 subsidiary corporations.[56] In addition, there are over 500 public enterprises at the local level, but, according to the Council, "they are small and represent a minor portion of total public-enterprise assets."[57] The Council indicates that government-owned and controlled enterprises accounted for 26% of the net fixed assets of all Ca-

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52. Khemani, *The Extent and Evolution of Competition in the Canadian Economy*, in CANADIAN INDUSTRY IN TRANSITION 135, 140-41 (D. McFetridge ed. 1986).

53. Stanbury & Thompson, *The Scope and Coverage of Regulation in Canada and the United States*, in GOVERNMENT REGULATION: SCOPE, GROWTH, PROCESS 17, 35 (W. Stanbury ed. 1980).

54. *See* S. SUTHERLAND & G. DOERN, BUREAUCRACY IN CANADA: CONTROL AND REFORM 81-140 (1985).

55. ECONOMIC COUNCIL OF CANADA, MINDING THE PUBLIC'S BUSINESS 7 (1986).

56. The Council concluded that

> [b]y comparison with other mixed industrialized economies, Canada is more representative of the middle ground than the extremes, in terms of its use of public corporations. Public enterprise is more important in Canada than in Switzerland, Australia, Japan and the United States . . . . On the other hand, government ownership in Canada is very modest by comparison with Austria . . . . In France, Italy and the United Kingdom, public corporations have also played a more prominent role than in the Canadian economy.

Id. at 1.

57. *Id.* at 7.

nadian corporations in 1983. However, they accounted for less than 5% of total employment in the economy, but over 35% of total government employment, including government enterprises. While government enterprises existed as early as 1841, two out of three in existence at the end of 1985 were established after 1960.[58] In 1985, forty-three Crown corporations were large enough to rank among the 500 largest non-financial enterprises in Canada. Twenty were among the 200 largest. Thirteen of the 100 largest financial enterprises in Canada in 1984 (measured by assets, but excluding insurance companies) were federal or provincial Crown corporations.[59] Many of the largest Crown corporations are also subject to direct regulation, e.g., Air Canada, CBC, Canadian National Railways, provincial telephone, and hydro-electricity enterprises.

f. Partially-government-owned corporations. There were more than 300 mixed enterprises in Canada in 1983, *i.e.*, those market-oriented businesses in which the federal or a provincial government had some equity interest but not 100% of the voting shares.[60] Twenty-two of those enterprises, where a government had legal or effective control, were among the 500 largest non-financial enterprises in the nation in 1983.[61]

g. Government loans. The value of federal and provincial loans and investments, and credit insurance provided to the private sector amounted to 18.5% of GNP in 1980.[62] In certain sectors (e.g., agriculture, export financing, housing) government loans/guarantees are of particular significance. The importance of this government instrument has become even more important in the years since the Economic Council made these estimates in 1982.

h. Government suasion. There is evidence indicating that the federal government (and to a lesser extent the provinces) has been increasing its use of suasion to influence private sector actors. Examples of suasion include voluntary quotas on the export of Japanese cars to Canada, the "6 and 5" wage and price

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58. *Id.* at 5-20.

59. The calculations are the author's. The data for 1984 can be found in W.T. STANBURY, BUSINESS-GOVERNMENT RELATIONS IN CANADA: GRAPPLING WITH LEVIATHAN 64 (1986).

60. Elford & Stanbury, *Mixed Enterprises in Canada*, in CANADIAN INDUSTRY IN TRANSITION 261 (D. McFetridge ed. 1986).

61. *Id.* at 278-79.

62. *See* ECONOMIC COUNCIL OF CANADA, INTERVENTION AND EFFICIENCY: A STUDY OF GOVERNMENT CREDIT AND CREDIT GUARANTEES (1982).

guidelines, the Food and Prices Review Board (1972-75), and the growth of government advertising.[63]

Recently, the European Management Forum, an independent, nonprofit organization based in Geneva, ranked the twenty-two Organization for Economic Cooperation & Development (OECD) countries on their degree of international competitiveness. Canada ranked sixth overall, up from 11th in 1984.[64] One of the elements in the index was the extent of government intervention in such areas as investment spending and employment, the fiscal burden, subsidies, and regulatory restraints. Among the seven major Western industrialized nations, Canada ranked third in the extent of government intervention in 1986 (behind the United States and Japan) and fifth in 1985.[65]

4. *The Canadian variant of federalism*

Canadian federalism varies significantly from United States federalism.[66] Jurisdictional and policy disputes between the federal government and the provinces are endemic in Canada. This is attributable only in part to division of powers set out in the British North America Act of 1867 (BNA).[67] This British statute was Canada's constitution until May of 1982 when the federal government enacted the Constitution Act.[68] Jackson stated that "[w]ith respect to the machinery of formal executive power, the Act is reasonably detailed, but on matters concerning the division of authority between the federal and provincial governments it is notably vague. The intent of the authors . . . was the creation of a strong central government."[69]

Today, however, there are very few areas of responsibility that are handled exclusively by one level of government. Responsibility at the federal level includes: defense, veterans, post office, and monetary policy. Responsibility at the provincial level includes: municipal institutions, elementary and secondary edu-

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63. Stanbury & Fulton, *Suasion as a Governing Instrument,* in How Ottawa Spends, 1984: The New Agenda 282 (A. Maslove ed. 1984).

64. Financial Post, Sept. 27, 1986, at 41, 47.

65. *Id.* at 47.

66. *See generally* K. Norrie, R. Simeon & M. Krasnick, Federalism and the Economic Union in Canada (1985).

67. British North America Act, 1867, 30 & 31 Victoria, ch. 3. In 1982 this Act was renamed the Constitution Act, 1867.

68. Constitution Act, 1982 30 & 31 Elizabeth II, ch. 11.

69. R. Jackson, D. Jackson & N. Baxter-Moore, Politics in Canada: Culture, Institutions, Behaviour and Public Policy 183 (1986).

cation, some areas of law related to property and other non-criminal matters. There is conflict over such areas as external trade, manpower training, communications, language, and culture. In many areas there is *de facto* concurrent jurisdiction via the federal government's control of spending power, *e.g.*, education, consumer protection, and environment. Because of the importance of conventions (rules that are accepted practice or tradition but not in the constitution) and political bargains over the years, one authority, Professor Ronald Cheffins, states that "[a] literal reading of the [BNA] Act itself is not only of little value in understanding the realities of political life, but is in fact dangerously misleading."[70] As the September 1981 decision of the Supreme Court of Canada[71] indicated, convention in constitutional matters is almost as important as formal legal authority in Canada.[72]

Ambiguities and conflicts regarding the constitutional division of labor in Canada have been handled less by judicial interpretation and more by political bargaining between federal and provincial governments. In general terms, the provinces have more powers (wider subject matter jurisdiction) than do states in the United States. Moreover, there is no counterpart to the United States Constitution's Interstate Commerce Clause. In practice, federalism in Canada consists of a varying combination of conflict and cooperation.[73] Both are fueled by the large stakes involved, the desire of each government for autonomy, and by the regional and linguistic rivalry in the case of the two founding peoples. As a result, there is a large and growing industry of federal/provincial relations, larger in fact than Canada's external affairs function.

Intergovernmental fiscal transfers were central to the Confederation bargain and they have become even more important over the decades. They are now embedded in the 1982 Constitution. Moreover, these pure transfers are dwarfed by the flows associated with shared-cost programs together with revenues diverted to the provinces.[74]

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70. *Id.* at 182.

71. Reference Regarding Amendment of the Constitution of Canada (Nos. 1, 2 and 3) 125 D.L.R.3d 1 (1981).

72. *See* AND NO ONE CHEERED: FEDERALISM, DEMOCRACY AND THE CONSTITUTION ACT chs. 9-11 (K. Banting & R. Simeon eds. 1983).

73. *See generally* K. NORRIE, R. SIMEON & M. KRASNICK, *supra* note 66; R. SCHULTZ, FEDERALISM AND THE REGULATORY PROCESS (1979).

74. FINANCING CONFEDERATION, *supra* note 17.

The fields of regulation in which concurrent or overlapping federal and provincial jurisdiction is important include the following:

a. Trucking. The provinces regulate intra-provincial trucking, while the federal government's jurisdiction over extra-provincial trucking was delegated to the provinces in 1954. It may be retracted if the provinces fail to substantially deregulate.

b. Financial services. Financial services are subject to complex regulatory jurisdiction. For example, securities regulation is a provincial responsibility. Banks are regulated by the federal government, while credit unions are regulated by the provinces. Trust companies and insurance companies are regulated by both levels of government—depending on where they are incorporated.

c. Telecommunications. The federal jurisdiction consists of firms operating in British Columbia, Quebec, and most of Ontario, while the provinces hold sway over the rest of the country[75]

d. Agricultural products marketing boards. These fall under provincial jurisdiction, but a supply management scheme requires a federal provincial agreement to be enforceable.[76]

Provincial governments have pressed to influence, or at least be consulted about, federal policies in several areas, including foreign ownership, energy regulation, broadcasting and cable TV, and railroad freight rates.[77]

The Economic Council recognized the complexity of regulatory jurisdiction for agriculture:

> Jurisdiction over [agricultural products] marketing boards may be federal, provincial, or joint. The British North America Act originally granted the provincial governments jurisdiction over intraprovincial trade and gave the federal government jurisdiction over interprovincial and international trade. Against this broad canvass a number of important institutional changes have taken place. The Agricultural Products Marketing Act of 1949 allowed provincial boards to exercise their jurisdiction even when some, or indeed most, of a provincially raised produce was sold in another province. This encouraged the forma-

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75. *See* H. Janisch, Federal-Provincial Relations in Canadian Telecommunications (Apr. 27, 1986) (unpublished paper presented at the Fourteenth Annual Telecommunications Policy Research Conference, Airlie House, Virginia).

76. *See infra* notes 87-95 and accompanying text.

77. *See* R. SCHULTZ, *supra* note 73; *see generally* Schultz & Alexandroff, *Economic Regulation and the Federal System*, in 42 ROYAL COMMISSION ON THE ECONOMIC UNION AND DEVELOPMENT PROSPECTS FOR CANADA, RESEARCH STUDIES (1985).

> tion of provincial marketing boards, and by 1979 marketing authority had been assumed by eighty provincial boards . . . . [T]he . . . federal Farm Products Marketing Agencies Act [of 1972] . . . allowed national or regional supply management schemes to be created for eggs and poultry. Under federal-provincial agreements, the federal power over interprovincial and export trade is combined with the provincial power over intra-provincial trade, in a marketing plan approved by farmers and the provinces and administered by a national board, which specified the level of output allowed for each province. These allocations are then divided among individual producers by each provincial board, which usually also sets prices.[78]

In the case of telecommunications, federal jurisdiction over interprovincial services has never been established outside of British Columbia, Quebec, and Ontario. However, if the *Alberta Government Telephones*[79] case, now before the Supreme Court of Canada, is upheld, the federal jurisdiction will be extended to all provinces. To complicate matters, in three provinces (Alberta, Saskatchewan, and Manitoba) the telephone company is a Crown corporation whose strategic activities are closely controlled by the Cabinet. Indeed, in Saskatchewan the Cabinet acts as the regulator and sets the tariffs for local service and intra-provincial toll calls.[80] In short, regulatory jurisdiction over telecommunications is complicated and it is layered over a variety of ownership patterns.[81]

Because of divided jurisdiction and the federal government's failure to press its apparent authority over interprovincial telecommunications, there is no counterpart in Canada to American Telephone & Telegraph (AT&T), a single company which was once responsible for long distance service. Transcontinental long distance service in Canada has been provided since 1932 by a unique agreement among seven provincially-regulated telephone companies and two federally-regulated companies under Telecom Canada. Telecom Canada is

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78. ECONOMIC COUNCIL OF CANADA, REFORMING REGULATION 55-57 (1981) [hereinafter REFORMING REGULATION].

79. Re CNCP Telecommunications and Alberta Government Telephones, 24 D.L.R.4th 608 (Fed. Ct. App. 1985).

80. *See* L. WAVERMAN, THE PROCESS OF TELECOMMUNICATIONS REGULATION IN CANADA, (Economic Council of Canada Regulation Reference Working Paper No. 28, Jan. 1982).

81. Janisch, *Telecommunications Ownership and Regulation in Canada: Compatibility or Confusion?*, 5 REG. REP. 5 (1984).

neither a partnership nor a corporation.[82] The result has been that the rates for interprovincial long distance calls were effectively set by the telephone companies through Trans Canada Telephone System (TCTS). It was not until the 1980s that federal regulators began to assert any control over such tolls. More generally, active regulation by the federal government did not occur until the 1960s.[83]

B. Behavioral/Institutional Factors Influencing Direct Regulation

1. The use of direct regulation to achieve social objectives

How can economic objectives of various types of direct regulation be distinguished from the possible social objectives of such regulation? The crux of the matter is that direct regulation is often used to redistribute income among consumer groups (taxation by regulation), from consumers to producers (*e.g.*, some kinds of marketing boards) or from producers to consumers (*e.g.*, rent controls).[84] Is income redistribution an economic or a social objective? The choice is almost arbitrary. Certainly redistribution can be clearly distinguished from efficiency objectives, but economists often lose sight of the fact that an improvement in allocative efficiency is not, *ipso facto*, an improvement in society's welfare. In virtually all social welfare functions, distribution counts—for many people it counts a great deal. Indeed, using regulation to redistribute income almost always has the effect of reducing efficiency in all its forms.[85] But efforts to redistribute income are clearly economic in character even if they are smothered in rhetoric about some broader social objective such as ameliorating poverty, saving the family farm, or extending telephone service to the most remote village regardless of cost. Non-efficiency objectives have historically dominated di-

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82. *See generally* E. OGLE, LONG DISTANCE PLEASE: THE STORY OF THE TRANSCANADA TELEPHONE SYSTEM (1979).

83. Between 1906 and 1948 Bell Canada and BC Tel were subject to only one rate proceeding. Between 1950 and 1968 they were subject to four rate hearings. In effect, technological change and economies of scale and scope offset inflation so that in real terms rates fell while service gradually became universal. Long distance rates were not regulated until 1978. *See* Schultz & Alexandroff, *supra* note 77.

84. *See* Stanbury & Lermer, *Regulation and the Redistribution of Income and Wealth*, 26 CAN. PUB. ADMIN. 378 (1983).

85. *See, e.g.*, Lermer & Stanbury, *Measuring the Cost of Redistributing Income by Means of Direct Regulation*, 18 CAN. J. ECON. 190 (1985).

rect regulation in Canada. The most important involve the redistribution of income (from consumers to producers, among groups of consumers, and from producers to consumers) and various nationalist objectives. In many cases of regulation, market failure is not substantial, and even though regulation is not the most efficient solution, the extent of regulation in Canada is seldom explained by efficiency rationales. Economists point out that there are numerous failures in political markets that greatly influence the demand for and supply of regulation.[86]

a. Marketing boards. While there are five types of agricultural products marketing boards,[87] the most stringent form of direct regulation occurs in a national supply management scheme, which amounts to a government-mandated cartel. The five commodities under such schemes (eggs, broilers, milk, turkeys, tobacco) account for almost one-quarter of all farm receipts in Canada.[88] Forbes, Hughes, and Warley described the objectives that poultry regulation advocates claimed in the 1970s would be provided: " 'orderly marketing;' enhanced sectoral stability; increased efficiency in production and marketing; balanced benefits for producers, processors, distributors and consumers; . . . and the establishment of a dynamic and outward looking poultry sector."[89]

The reality has been quite different. Supply management has been used to redistribute income in massive amounts from consumers to farmers.[90] As Forbes, Hughes, and Warley put it, "[s]omehow, things have got badly out of hand."[91] An "inflexible monopolistic regulatory system [was established providing] extravagant returns to producers on modest-sized holdings operated in inefficient ways . . . . [Moreover,] the national market for eggs and chickens has been effectively balkanized."[92]

The scale of redistribution can be gauged by the amount farmers are willing to pay for the right to sell a specified volume of output at the controlled price. Brinkman estimated that as of

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86. *See generally* Trebilcock, Waverman & Prichard, *Markets for Regulation: Implications for Performance Standards and Institutional Design*, in ISSUES AND ALTERNATIVES 1978 (Ontario Economic Council, 1978).

87. REFORMING REGULATION, *supra* note 78, at 76.

88. Gorecki, *supra* note 6, at 31.

89. J. FORBES, T. WARLEY & D. HUGHES, ECONOMIC INTERVENTION AND REGULATION IN CANADIAN AGRICULTURE 49 (1982).

90. Stanbury & Lermer, *supra* note 84.

91. J. FORBES, T. WARLEY & D. HUGHES, *supra* note 89, at 49.

92. *Id.*

1980 the value of quotas was between $2.8 billion and $3 billion for the five commodities.[93] Today, given the fact that regulated prices have outpaced the cost of inputs, such quota values would be somewhat greater. In 1982, Forbes noted that 4600 egg and chicken producers received over $100 million per year.[94] As a result, eggs were 13 to 26 cents per dozen and broilers were 9 to 17 cents per pound above the market price that would have prevailed in the absence of supply management.[95]

b. Airlines.[96] From the 1930s to the 1970s, direct regulation was used to achieve the social objective of a national network of regularly scheduled service to as many points as possible. Direct regulation was also used to minimize the need for direct government subsidies through the use of cross-subsidies. Regulators exhibited a strong desire to prevent instability in the industry, i.e., failure/reorganization of individual carriers. Politicians exercised tight control over both the Crown airline and the industry's regulators. Regulators divided up markets to control competition for several reasons, including the desire to avoid wasteful competition in small markets that could only support one or two carriers.[97] Implicit in their decisions was the idea that unregulated competition would result in excess capacity and hence higher costs and/or inadequate returns, instability in the level of service due to entry and exit, and the failure of any carrier to achieve minimum efficient scale. It was not until 1959 that Air

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93. G. BRINKMAN, FARM INCOMES IN CANADA 28 (1981).

94. J. FORBES, T. WARLEY & D. HUGHES, *supra* note 89, at 49.

95. Veeman, *Social Costs of Supply-Restricting Marketing Boards*, 30 CAN. J. AGRIC. ECON. 21, 32-33 (1982).

96. *See generally* J. BALDWIN, *supra* note 3; TRANSPORT CANADA, ECONOMIC REGULATION AND COMPETITION IN THE DOMESTIC AIR CARRIER INDUSTRY (1981); ELLISON, AIR CANADA: THE CUCKOO IN CANADA'S AVIATION NEST, (Treasury Board Canada, Office of Regulatory Reform, June and McGill University Centre for the Study of Regulated Industries, Working Paper No. 1983-32, 1984); Ellison, *Regulatory Reform in Transport: A Canadian Perspective*, 23 TRANSPORT. J. (1984); Harris, *The Regulation of Air Transportation*, in THE REGULATORY PROCESS IN CANADA 212 (B. Doern ed. 1978); G. Reschenthaler & W.T. Stanbury, Canadian Airlines and the Visible Hand (January 1982) (unpublished book manuscript); W.T. Stanbury, Evolution of Airline Regulation in Canada, (Dec. 1986) (unpublished paper, Faculty of Commerce and Business Administration, University of British Columbia).

97. The emphasis was not on the interests of business or on "must-go" travelers who are more interested in convenient schedules and a wide network of services than they are in the level of fares. It was not until 1977 that the first domestic charter flight was permitted in Canada—and it had to operate from U.S. airports connected to Canada by a bus ride. Discount fares with fences that would attract visiting friends and relations or discretionary travelers were first permitted in 1979, although the regulators were much concerned to see that fares covered variable cost.

Canada's monopoly on transcontinental routes was broken when Canadian Pacific Air Lines (CP Air) was allowed one flight per day, but this occurred only after the Conservatives replaced the long-lived liberal government in Ottawa.[98] Air Canada, politicians from small cities, and regulators opposed CP Air's entry because it would reduce the Crown carrier's profits that were being used to offset losses on uneconomic routes.[99]

Both the regulators and the Crown airline (which today has 60% of the domestic market) engaged in systematic support maximization behavior in the 1950s to the 1970s.[100] The principal tool used was control over entry to allow cross-subsidization.[101] By operating uneconomic routes[102] and communicating this to the beneficiaries, political support for regulation and the protection of Air Canada was increased. Political support was also gained by using regulation to obviate the need for government subsidies while at the same time extending scheduled airline service as widely as possible.

It should be noted, however, that questioning of senior executives of all the major carriers (accounting for more than 90% of domestic revenues) revealed in 1982 that there were no routes that were failing to cover their variable costs.[103] In other words, cross-subsidization had disappeared between the mid-1970s and the early 1980s. It had done so because carriers had gained permission to rationalize their route structures in the face of liberalized regulation and the pressure of greater competition.

c. Broadcasting/Cable TV.[104] As noted above, the federal regulators have been given a host of social objectives: to enrich Canadian culture and thereby protect national identity, to en-

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98. While capacity controls on CP Air's share were eased in 1967, 1970, and 1974, they were not removed until 1979.

99. J. BALDWIN, *supra* note 3, at 145-57.

100. J. BALDWIN, *supra* note 3.

101. *See supra* notes 96-99 and accompanying text.

102. Baldwin's data for Air Canada in the 1960s indicates that substantial profits on international and transcontinental routes offset substantial losses on short-haul domestic routes, including Montreal-Toronto, and smaller losses on transborder routes. J. BALDWIN, *supra* note 3, at 98-99.

103. *Minutes of Proceedings and Evidence of the Standing Committee on Transport Respecting the Document Entitled "Proposed Domestic Air Carrier Policy (Unit Toll Services), August 1981,"* 32d Parl., 1st Sess., Issues 42, 43, 45, 46 (Feb. 1982).

104. *See generally* R. BABE, *supra* note 7; G. CAPLAN & F. SAUVAGEAU, *supra* note 7, H. HARDIN, CLOSED CIRCUITS: THE SELLOUT OF CANADIAN TELEVISION (1985); C. JOHNSTON, THE CANADIAN RADIO-TELEVISION AND TELECOMMUNICATIONS COMMISSION (1980); S. MCFADYEN, C. HOSKINS & D. GILLEN, CANADIAN BROADCASTING: MARKET STRUCTURE AND ECONOMIC PERFORMANCE (1980); Baum, *supra* note 7.

hance national unity, and to ensure domestic ownership of broadcasting enterprises. Regulation focuses on "promises of performance" attached to licenses[105] and on the enforcement of Canadian content requirements first introduced in 1959 with respect to television. The potential excess profits earned from these licenses are tacitly viewed as a pool of resources to be used to achieve the social objectives specified by Parliament and dynamically adjusted by regulators.

Caplan and Sauvageau argue that the Canadian Radio-Television and Telecommunication Commission's (CRTC) approach to regulation consists of three stages. First,

> it acts for the sake of cultural goals. [Second,] it ensures the economic viability of the industry so that the broadcasters will be able to afford to cross-subsidize from their profits on American programming the production and scheduling Canadian programs. [Third,] the CRTC protects the industry for its own sake, as an end in itself.[106]

This is done in order to achieve "employment, trade balances and foreign exchange investment" benefits.[106.1]

The first set of Canadian content regulations in 1959 specified that 55% of all television broadcasting time be essentially of Canadian content and character.[107] While the details of content regulation have been changed, their intent remains the same.

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105. Broadcasting licenses are required for all broadcasting activities (radio or TV station, network, cable TV, pay TV) and are issued for not more than five years. The Broadcasting Act declares that the radio frequencies used by broadcasters are "public property." The CRTC may suspend or revoke any license or set conditions for renewal. Capital Punishment (license cancellation) has never been invoked, although expressions of disappointment, tongue lashings, tortured explanations, contrition and promises to do better are quite common. "Promises of performance are like campaign promises, glowingly presented by potential licensees but not scrupulously adhered to once the license is granted." F. Spiller & K. Smiley, Regulatory Environment Background Paper (unpublished paper prepared for the Canadian Conference of the Arts, Conference on the Future of the Canadian Broadcasting System, Oct. 15-18, 1985), *quoted in* CAPLAN & SAUVAGEAU, *supra* note 7, at 38.

106. G. CAPLAN & F. SAUVAGEAU, *supra* note 7, at 39-40.

106.1 *Id.*

107. Canadian content was then defined to include the following: any program produced by a licensee in his studio or using his remote facilities and broadcast initially by him; news broadcasts and commentaries; broadcasts of events occurring outside Canada in which Canadians are participating; programs featuring special events outside Canada and of general interest to Canadians (this was later held to include the World Series!); 50% of programs produced in Commonwealth or French language countries; and programs or films that have been made in Canada that meet certain specified criteria. R. BABE, *supra* note 7, at 20-21.

Moreover, content regulations were extended to AM radio in 1971 and FM radio in 1977 and applied to pay-TV when it was introduced in 1983. Even cable TV is subject to a form of such regulation.[108]

The regulation of Canadian content has been a permanent battleground. The stakeholders in these hostilities include Canadian artists and producers, private broadcasters, the CBC (a federal Crown corporation whose grant from the government was $849 million in 1986/87), the regulators, and "professional" Canadian nationalists. The focus of the battles have been over such matters as the definition of prime time, the specified criteria necessary for programs made in Canada to qualify as Canadian content, the percentage of the broadcasting day (notably prime time) that must be Canadian content, and the period over which the required content percentage is to be calculated. [109]

In some ways, Canadian content regulations reflect a clever choice of governing instruments compared, for example, to direct subsidies. These regulations are simultaneously visible, negotiable, and difficult to enforce. There is, not surprisingly, a large gap between the public's perception of such regulation and its results.[110]

d. Telecommunications.[111] In this industry the social objec-

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108. Since active regulation began with the creation of the CRTC in 1968 (the first cable TV system was established in 1952), Canada has become the second most wired nation in the world after Belgium. By 1985, 76% of the homes that were passed by cable (61% of all households) were subscribers. The regulators have, over time, increased the performance requirements (e.g., Canadian content, program diversity and the provision of a community access channel at no cost to public interest groups).

109. *See* R. BABE, *supra* note 7; H. HARDIN, *supra* note 104; M. TREBILCOCK, D. HARTLE, R. PRICHARD & D. DEWEES, THE CHOICE OF GOVERNING INSTRUMENT: SOME APPLICATIONS (1982) [hereinafter TREBILCOCK].

110. *See* TREBILCOCK, *supra* note 109.

111. *See generally* CNCP TELECOMMUNICATIONS, MEETING THE CHALLENGE (1985); CNCP TELECOMMUNICATIONS, THE CRISIS IN CANADIAN TELECOMMUNICATIONS POLICY AND REGULATION (1982); R. COLLINS, A VOICE FROM AFAR: THE HISTORY OF TELECOMMUNICATIONS IN CANADA (1977); CONSUMER'S ASSOCIATION OF CANADA, EMERGING TELECOMMUNICATIONS ISSUES: THE CAC PERSPECTIVE (1986); E. OGLE, *supra* note 82; R. WOODROW, K. WOODSIDE, H. WISEMAN & J. BLACK, CONFLICT OVER COMMUNICATIONS POLICY: A STUDY OF FEDERAL-PROVINCIAL RELATIONS AND PUBLIC POLICY (1980); Dalfen, *Competition and Interconnection in the Canadian Telecommunications Industry*, in KOMMUNIKATION OHNE MONOPOLE 73 (E.J. Mestmacker ed. 1980); Dalfen, *Regulatory Responses*, in THE INFORMATION ECONOMY: ITS IMPLICATIONS FOR CANADA'S INDUSTRIAL STRATEGY (C. Gotlieb ed. 1984) (proceedings of a Conference jointly sponsored by the Royal Society of Canada and the University of Toronto-Waterloo University Co-operative on Information Technology); Dalfen & Dunbar, *Transportation and Communications: The Constitution and the Canadian Economic Union*, in CASE STUDIES IN THE DIVISION OF POWERS 139 (M. Kras-

tives of direct regulation include universal service and affordable rates for low-income subscribers. Cross-subsidization is strongly fostered to achieve these ends. More recently, rhetorical emphasis has been placed on efficiency, international competitiveness, and the benefits of innovation. Entry and rates have been very carefully controlled, although some liberalization has occurred with respect to system interconnection and terminal attachment.[112] There has also been some regulatory forbearance.[113]

In a recent decision,[114] the CRTC rejected CNCP Telecommunication's application for entry into the long distance public voice telephone market (MTS and WATS) and refused to allow Bell Canada and BC Tel to rebalance their rates so that they more closely reflected the relative costs of providing local and long distance services. This decision provides a superb illustration of the importance of social objectives in telecommunications regulation in Canada. With respect to the CNCP application, it appears that the decision was based on the following conclusion: "[T]he Commission is not convinced that CNCP would be able to meet its commitment to provide universal service [within 10 years] and to offer price discounts of the order of magnitude [20% to 30%] assumed in its business plan."[115] Notwithstanding their decision, the Commission's view of the potential impact of competition in MTS/WATS markets was highly favorable.

The crux of the issue for the regulators appears to be that "the benefits of customer choice and supplier responsiveness would, both in the short term and the long term, accrue only to a small number of primarily high volume toll users or those in the limited number of serving areas selected by CNCP for en-

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nick research coord. 1986); TELECOMMUNICATIONS FOR CANADA: AN INTERFACE OF BUSINESS AND GOVERNMENT (H. English ed. 1973); Globerman, *Economic Aspects of Telecommunications Regulation in Canada*, in TELECOMMUNICATIONS POLICY AND REGULATION IN CANADA: THE IMPACT OF COMPETITION AND TECHNOLOGICAL CHANGE (W.T. Stanbury ed. 1986); Janisch, *Winners and Losers: The Challenges Facing Telecommunications Regulation*, in TELECOMMUNICATIONS POLICY AND REGULATION IN CANADA: THE IMPACT OF COMPETITION AND TECHNOLOGICAL CHANGE (W.T. Stanbury ed. 1986); Janisch & Romaniuk, *The Quest for Regulatory Forbearance in Telecommunications*, 17 OTTAWA L. REV. 455 (1985); Romaniuk & Janisch, *supra* note 3.

112. H. Janisch, *An Introduction to the Telecommunications Industry: From Monopoly to Competition*, in THE AGE OF REGULATORY REFORM (K. Button & D. Swann eds. 1987).

113. Romaniuk & Janisch, *supra* note 3.

114. Interexchange Competition and Related Issues, Telecom Decision CRTC 85-19, 119 CAN. GAZ. PT I, 6046 (Aug. 29, 1985). For a critique, see Stanbury, *supra* note 22.

115. Interexchange Competition and Related Issues, Telecom Decision CRTC 85-19 at 45, 119 CAN. GAZ. PT I, at 6047.

try."[116] Moreover, the Commission concluded that "any advantages of lowering MTS/WATS rates considered necessary or desirable could be achieved without competitive entry."[117] The CRTC decided not to require rate rebalancing (although it did put a cap on increases in long distance rates).

The Commission saw in selective entry by CNCP a threat to the "principle that, in general, telephone subscribers should pay comparable rates for MTS calls over comparable distances . . . ."[118] The Commission also reasoned that CNCP's service would not be financially viable if it was required to pay a full contribution to access costs.[119] After entry, CNCP might be forced to apply for a discount on its contribution level thereby limiting the CRTC's options.

The CRTC rejected CNCP's application because they believed that it threatened the large and largely hidden cross-subsidies that are used to keep the average bill for local service in Canada at about $12/month for unlimited local calling. For example, Bell Canada estimated in 1984 that it cost $1.96 to produce $1 in local revenues and it cost only 31 cents to produce $1 in non-competitive toll revenues (MTS/WATS).[120]

The Commission may have been influenced by a recent speech of the federal Minister of Communications. He had, a few months earlier, declared:

> First and foremost, we must develop a policy which preserves universal access to the telecommunications system at affordable prices. Canadian telephone service to individuals and households is among the very best in the world. No policy, no matter what its industrial or economic benefits, can be considered acceptable if it lowers the current level of service, which is so essential to so many Canadian citizens. Similarly, no policy can be considered acceptable if it means that this essential service will not continue to be universally affordable.[121]

It has been observed that the CRTC's decision

> prevented a Pareto improvement for telephone subscribers as a whole within its jurisdiction. Why should big users (likely

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116. *Id.* at 46, 119 CAN. GAZ. PT I, at 6047.
117. *Id.* at 47, 119 CAN. GAZ. PT I, at 6048.
118. *Id.* at 47, 119 CAN. GAZ. PT I, at 6047.
119. *Id.* at 45, 119 CAN. GAZ. PT I, at 6048.
120. Bell Canada, Report on the 5-Way Split Study of 1984 (unpublished paper).
121. Speech by the Hon. Marcel Masse, given to the Electrical and Electronic Manufacturers Association, in Montebello, Quebec, p. 4 (June 20, 1985).

> to be large businesses) or those living in larger cities (the origin and destination of large volumes of traffic) be denied a substantial improvement in their welfare just because comparable benefits cannot be extended to everyone?[122]

Given the rejection of CNCP's application for entry, it was not surprising that the CRTC also rejected rate rebalancing, even though it had said that any advantage of lower MTS/WATS rates could be achieved by regulation as well as entry. What was at stake? In CRTC's words, "the principal element of the proposed rebalancing involved decreases in MTS/WATS rates of up to 70% and increases of as much as 150% in average rates for primary local service."[123]

Despite the fact that the Commission saw considerable virtue in reducing the price of public toll calls,[124] the CRTC rejected "full" rate rebalancing for the following reasons: (1) a majority of subscribers would face increased total telephone bills (85% according to Bell Canada and 70% according to BC Tel); and (2) without a subsidy plan, many subscribers could find that "ordinary telephone service would be unaffordable."[125] The justification for these reasons was provided earlier in its rebalancing decision when the CRTC stated that "the universal accessibility of service is, and will remain, of fundamental importance both to protect subscribers and to maintain the value of the telephone network."[126] This is a superb example of Rawlsian ethics: "The regulator is unwilling to require changes in the price structure of an important service that could increase GNP by some $2 billion annually and produce a gain in consumer surplus of some $500 million annually because a tiny percentage of telephone subscribers will drop off the network."[127] It is necessary, however, to look beyond the "deserving poor" who are forced off the telephone network.

> As Bell Canada, CAC [Consumers' Association of Canada] and the CRTC point out, under full rebalancing some 85% of households will find their telephone bills have increased. For the vast majority of households, the doubling of local rates

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122. Stanbury, *supra* note 22, at 492.

123. Interexchange Competition and Related Issues, Telecom Decision CRTC 85-19, at 50, 119 CAN. GAZ. PT I, 6046 (Aug. 29, 1985).

124. *Id.* at 67.

125. *Id.* at 66-67.

126. *Id.* at 64.

127. Stanbury, *supra* note 22, at 500.

> would more than offset the savings on long distance calls largely because they make relatively few toll calls. The CRTC's emphasis on the drop off, therefore, may simply be a way of justifying a decision to protect the interests of many more middle class subscribers in the name of the poor.[128]

2. *Extensive political influence over direct regulation*

Trebilcock has identified one of three myths about regulation: "[m]ost regulation involves technical questions which are of little interest and relevance to the average person and which can safely be left to 'experts' for disposition. Nothing could generally be further from the truth."[129] Regulation is created in the political arena, sometimes after long and heated debate. Statutory amendments require the approval of the legislature, and, in Canada, the Cabinet must approve virtually all changes in subordinate legislation. The case by case decisions of regulators are not technical decisions by experts conducted in a value-free context. They have a heavy normative content.

From the nature of the relationship between the politicians in power and regulatory bodies, whether they consist of a statutory regulatory agency or part of a line department, it is apparent Canadians believe that regulation is too important to be left to appointed regulators. Consider the following list of ways[130] in which the current Government is able to influence direct regulation:

1. Appointments of regulators, including the heads of agencies;
2. The nature of a regulator's appointment (does he hold office

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128. *Id.*

129. Trebilcock, *The Consumer Interest and Regulatory Reform*, in THE REGULATORY PROCESS IN CANADA 94 (G. Doern ed. 1978).

130. In addition to these, RESPONSIBLE REGULATION, *supra* note 4, at 59, adds the following:

1. Legal authority: The government can, of course, enact new legislation and change the mandate of any SRA (statutory regulatory agency).
2. Direct departmental action: the government can influence industries that are directly regulated by taxation, tax expenditures, expenditures (*e.g.*, subsidies and grants), etc. The most obvious example is the role of the Department of Transport in the provision of infrastructure.
3. Legislative committees: They can review the performance of SRAs, but generally committees play a small role (the House of Commons Standing Committee on Transport is one exception); and
4. Political and moral support: For example, do ministers vigorously defend an agency (or 'wash their hands of it') when its decisions are attacked by the opposition, the newspapers, or disappointed regulatees?

"at pleasure", is he subject to removal only "for cause", or does he hold office "during good behavior"?);
3. Appeals to the Cabinet, (including those on its own motion, e.g., section 64(1) of the National Transportation Act);[131]
4. Appeals to a minister from the decision of officials in a line department of a statutory regulatory agency (SRA);
5. Ministerial policy statements (e.g., the federal Minister of Transport's statement regarding airlines);
6. The requirement that the Cabinet approve subordinate legislation proposed by SRAs;
7. The use of a line department *instead* of an SRA to act as the regulator (this generally gives the minister more control);
8. The use of the Cabinet itself as a regulatory body (e.g., telephone and electricity rates in Saskatchewan) and the federal regulation of foreign ownership between 1974 and 1985;
9. Controls over Crown corporations in a regulated industry (e.g., TCA/Air Canada contract with the federal government from 1937-1977);
10. The funding of regulatory bodies (an indirect method that is seldom used);
11. "Decisions" of regulators subject to the approval of a minister or the Cabinet, (e.g., airline licenses 1944-66); NEB's recommendations concerning export of energy;
12. The power of the minister and Cabinet to issue binding policy directives to SRAs as proposed in Bill C-20 (telecommunications) in 1984 and in Bill C-18 (transportation) in 1986.

a. SRA's versus independent agencies. The independent regulatory agency, which has been a familiar landmark in the United States, has no exact counterpart in Canada. For this reason, the Economic Council of Canada in 1979 coined the term "statutory regulatory agency" instead.[132] Essential differences exist between a United States-style independent regulatory agency (*not* an executive branch agency) and SRAs in Canada. First, virtually all SRAs in Canada are subject to appeals to the Cabinet (in some cases to a single minister) on broad policy grounds as well as to the courts. Second, with very few exceptions, the subordinate legislation (i.e., regulations) drafted by an SRA must be approved by the Cabinet before it becomes law. Third, on some matters (e.g., the export of energy) members of an SRA merely recommend action to the Cabinet, which holds the power of decision. Fourth, the members of many SRAs hold

131. National Transportation Act, R.S.C. 1970, ch. N-17, § 64(1).
132. RESPONSIBLE REGULATION, *supra* note 4, at 53.

office at "the pleasure" of the Cabinet or only "during good behavior." As a result, their independence may be limited, although it is fair to say there are very few cases in which the Cabinet recommends a regulator as a result of a dispute over policy. Fifth, in a very few cases the Cabinet itself acts as a regulatory body. For example, in Saskatchewan the Cabinet sets electricity, natural gas and telephone rates. Under the Foreign Investment Review Act (1974-1985),[133] the federal Cabinet regulated applications by non-Canadians to invest in Canada.[134] However, a single minister has that responsibility. Sixth, Crown corporations in regulated industries may be subject to political direction that overrides the powers of the SRA. For example, between 1937 and 1977 airline regulators had to approve routes assigned by the Cabinet to Air Canada, which had more than one-half the domestic market. Finally, the government may choose to employ a line department rather than an SRA to regulate a particular activity. While this is more common in the case of social regulation, it usually has the effect of increasing the degree of influence exercised by the minister responsible for the department.

b. Cabinet appeals. Both applicants and intervenors in cases before SRAs may appeal not only to the courts on matters of law and jurisdiction, but they may also appeal to the Governor in Council (in essence, the Cabinet) on other policy grounds. Moreover, in some cases (e.g., the *National Transportation Act*,[135] which governs appeals from the Canadian Transport Commission with respect to airlines, rail freight, pipelines, and marine transport), the Cabinet in its own motion may vary or rescind the orders of an SRA following its decision.[136] Under section 23 of the Broadcasting Act,[137] the Cabinet may, within sixty days, set aside prior CRTC decisions on its own initiative or upon request. This is not an appeal provision, although the Cabinet can reverse an unwanted decision. Without procedural

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133. Foreign Investment Review Act, R.S.C. 1973-74, ch. 46.

134. R. SCHULTZ, F. SWEDLOVE & K. SWINTON, THE CABINET AS A REGULATORY BODY: THE CASE OF THE FOREIGN INVESTMENT REVIEW ACT (1980) (Economic Council of Canada Working Paper No. 6).

135. National Transportation Act, R.S.C. 1970, ch. N-17.

136. *See* H. JANISCH, THE REGULATORY PROCESS OF THE CANADIAN TRANSPORT COMMISSION (1978) [hereinafter REGULATORY PROCESS]; Janisch, *Policy Making in Regulation: Towards a New Definition of the Status of Independent Regulatory Agencies in Canada*, 17 OSGOODE HALL L.J. 46, 62-65 (1979) [hereinafter *Policy Making*].

137. Broadcasting Act, R.S.C. 1970, ch. B-11, § 23.

guidelines, the resort to the Cabinet "favours those who are adept by skill, interest, or experience at influencing government."[138]

Appeals to the Cabinet are political in a number of ways. There is no requirement that other parties of interest be notified that an appeal has been launched. The grounds for appeal are whatever policy considerations the appellant believes the Cabinet will accept. The department concerned with the industry in question is usually called upon to prepare a paper advising the Cabinet, but their submission is not available to other parties. It may advance arguments or deal with issues that were never raised in the SRA's hearings on the case. There are no criteria to guide the Cabinet in deciding the appeal. Also, there is no requirement that the Cabinet justify its decision. Nor is there any convention as to how appeal decisions are to be incorporated into the SRA's future decision making.[139] In summary, Cabinet appeals are a quagmire with respect to procedural justice.[140] Moreover, the courts have generally reinforced the Cabinet's discretion in such appeals.

It should be emphasized, however, that appeals to the Cabinet from decisions of SRAs are not launched in a high percentage of cases. Moreover, the cabinet refuses to hear a substantial percentage of requests for an appeal. Finally, the effect of such appeals in particular cases cuts both ways.[141]

c. Policy statements. A second way in which the Government, through the minister responsible, is able to influence the actions of SRAs is through policy statements. While these do

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138. G. CAPLAN & F. SAUVAGEAU, *supra* note 7, at 173.

139. *See Policy Making, supra* note 136, at 67-74.

140. *Id.*

141. For example, in 1978 the federal Cabinet, in response to an appeal from the Consumer's Association, ordered airline regulators to increase the number of domestic advanced booking charter flights. The experiment proved so successful that it created much support for further liberalization of airline regulation. *See generally* Kane, *Canadian Consumers Learn their ABCs,* in PERSPECTIVES ON CANADIAN AIRLINE REGULATION (G. Reschenthaler & B. Roberts eds. 1979). In the 1977 *Telesat* case, the federal Cabinet reversed the decision of the CRTC refusing to allow Telesat (a mixed enterprise that is Canada's only satellite carrier) to join the TransCanada Telephone System. As a result of the appeal, the opportunity for competition between terrestrial microwave systems and satellite transmission was lost. The Minister of Communications justified the cabinet decision in terms of "the broad public policy of the government with respect to fostering satellite communications . . . [that lay] beyond the reasonable purview of the CRTC." *See* W.T. STANBURY & F. THOMPSON, REGULATORY REFORM IN CANADA 64-66 (1982). One newspaper described the result of the appeal as "outrageous," arguing that the Cabinet had given in to pressure by the telephone companies. *Id.*

not have the same legal force as statutes, regulations, court decisions, or even the cases decided by the SRA, they do guide regulatory agencies in their job of interpreting the usually broad statutory mandates with which they must deal. An excellent example of the use of ministerial policy statements are those by various Ministers of Transport in respect to airline regulation over the years.[142]

While some of these policy statements were formally made in the House of Commons, most were merely press releases. Airline regulators in Canada appear to have paid close attention to such policy statements. In general, they have sought to make their decisions consistent with such policy pronouncements, although on occasion the results of cabinet appeals can be inconsistent with policy statements.[143] Airline regulators are, however, constrained by the statutes and subordinate legislation that they are required to follow. For example, in May 1984, the Minister of Transport, in his "New Canadian Air Policy," made it clear that he favored greatly liberalized regulation of airlines,[144] but the Canadian Transport Commission (CTC) was still bound to follow the longstanding "public convenience and necessity test" in considering applications for entry to the industry or for entry

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142. Consider the following incomplete list:
1. "Statement on Civil Aviation Policy," Apr. 24, 1964 and June 1, 1965.
2. "Statement of Principles for Regional Air Carriers," Oct. 20, 1966.
3. "Regional Air Carrier Policy," Aug. 15, 1969.
4. "Principles Governing International Civil Aviation," Nov. 23, 1973.
5. "International Air Charter Policy," Sept. 5, 1978; Statement of the Minister of Transport, March 27, 1967, February 14, 1974, June 28, 1977, regarding capacity of CP Air, Nov. 7, 1978, regarding CP Air serving Halifax.

Reschenthaler & Stanbury, *supra* note 96.

143. In 1978 the Minister of Transport said he had no objection to CP Air applying to the Air Transport Committee to serve Halifax as part of his general announcement that all capacity restrictions were being lifted on CP Air so it could compete freely with Air Canada on transcontinental routes. CP Air applied to serve Halifax non-stop from Toronto and Montreal and the ATC amended its license accordingly in 1980. The regional carrier in the Maritimes, Eastern Provincial Airways (EPA), appealed the decision to the Cabinet. EPA obtained the support of the premiers of all four Maritime provinces. Furious lobbying worked. The Cabinet greatly altered the CTC's decision by requiring CP Air to make a stop in Montreal on the Halifax-Toronto route. Moreover, it awarded non-stop service to EPA though Toronto was outside its assigned region. In other words, the Cabinet violated the Minister of Transport's 1969 policy statement assigning each of the five Level 2 carriers to a specified region in which competition was to be carefully controlled.

144. *See* MINISTER OF TRANSPORT, NEW CANADIAN AIR POLICY (1984); D. GILLEN, T. OUM & M. TRETHEWAY, CANADIAN AIRLINE DEREGULATION AND PRIVATIZATION: ASSESSING EFFECTS AND PROSPECTS 223 (1985); Oum & Tretheway, *Reforming Canadian Airline Regulation*, 20 THE LOGISTICS AND TRANSP. REV. 261, 262 (1984).

to new routes. To impose a new test, it was necessary for the Minister to get the legislation amended.[145]

d. Binding policy directives. In recent years there have been a number of proposals to strengthen the government's influence with SRAs by amendments that would give the Cabinet or the Minister the authority to issue *binding* policy directives.[146] With the directive power the Government could, for example, before a particular case is heard by the SRA, lift it out of the stream and decide it itself on broad policy grounds. Another form of directive would be to make certain policy statements binding on the SRA in its future decisions. There could be a problem, however, if the binding directive was found in certain cases to be inconsistent with the relevant statutes or subordinate legislation. Many politicians like the idea of a directive power because it allows the Cabinet to effectively make new law without legislative approval.

The directive power already exists in a very few cases. For example, in the Broadcasting Act[147] the Cabinet has the authority to issue directions to the CRTC on some matters, primarily foreign ownership. This power has been used twice.[148] The Law Reform Commission in 1985 recommended that policy directives should be subject to the following guidelines: (1) they should take the form of regulations and thereby be subject to the Statutory Instruments Act;[149] (2) they should not be retroactive; (3) directives should be made only by the Government, not an individual minister; and (4) directives should be formulated in general terms, like regulations, with the SRA having the responsibility for interpreting them and monitoring their application.[150]

Some of these have been followed in Bill C-18, the National Transportation Act, 1986,[151] under which the federal Cabinet, either at the request of the regulatory agency, or on its own motion, may issue binding policy directions to the agency. However,

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145. The "present and future public convenience and necessity" test can be found in *Aeronautics Act*, R.S.C. 1970, ch. A-3, § 16(3), as amended.

146. *Policy Making, supra* note 136, refers to Bill C-14, the Nuclear Control and Administration Act, Bill C-33, an Act to Amend the National Transportation Act, and Bill C-43, the Telecommunications Act (which would replace the Broadcasting Act, Telegraphs Act, Radio Act, and CRTC Act). In 1984 Bill C-20 permitted the Minister of Communications to give policy directives to the CRTC.

147. Broadcasting Act, R.S.C. 1970, ch. B-11.

148. RESPONSIBLE REGULATION, *supra* note 4, at 59.

149. Statutory Instruments Act, R.S.C. 1970-72, ch. 38.

150. *See generally* LAW REFORM COMMISSION, REPORT NO. 26, REPORT ON INDEPENDENT ADMINISTRATIVE AGENCIES: A FRAMEWORK FOR DECISION MAKING (1985).

151. Bill C-18, 33d Parl., 2d Sess., §§ 23-36 (1986).

this power can only be exercised under certain conditions. First, directions may not become effective until thirty days have passed in which Parliament is sitting. Second, directions cannot deal with specific cases already before the agency. Third, after directions have been tabled they must be referred promptly to the committee for study. Fourth, the Minister of Transport must consult with the regulatory agency before a policy direction is issued.

e. Subordinate legislation. Unlike independent agencies in the United States, Canadian regulators cannot enact their own subordinate legislation, i.e., regulations, except those dealing purely with procedure (even those must be approved in some cases).[152] While it is true that as much law is made outside the legislature in Canada as within it by means of subordinate legislation, SRAs rarely have the power to make new substantive regulations on their own volition.[153] As a practical matter, the initiative for new regulations usually comes from the SRA, a unit of a line department. In most cases approval is routine. However, officials in the responsible department (e.g., Communications for the CRTC; Transport for the CTC) can be relied upon to bring to their Minister's and the Cabinet's attention new regulations that embody important policy issues. In short, the SRAs are not autonomous legislative bodies, since they are subject to Cabinet approval.

f. Appointments. The executive arm of the federal government has been able to assert its interest in specific regulatory regimes by its power to appoint the members of each regulatory agency. Given the very substantial discretion exercised by the regulators, the qualities of the men and women appointed as regulators is of considerable importance. Traditionally, a disproportionate number of federal regulators were previously public servants or politicians—groups with considerable sensitivity to

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152. *See generally* Anderson, *The Federal Regulation-Making Process and Regulatory Reform, 1969-1979,* in GOVERNMENT REGULATION: SCOPE, GROWTH, PROCESS (W.T. Stanbury ed. 1980); C. JOHNSTON, *supra* note 104; REGULATORY PROCESS, *supra* note 136; *Policy Making, supra* note 136.

153. Unlike most federal and provincial SRAs, the CRTC's regulations are not subject to the Cabinet's approval. The CRTC has the power to make regulations on any of the matters falling within its broad jurisdiction—including programming standards, the allocation of air time to various types of programs, types of advertising and the amount of advertising time permitted, the assignment of time for partisan political purposes and the information to be provided by licensees to the CRTC. *See* C. JOHNSTON, *supra* note 104.

political realities. For example, since its creation in 1967, four of the presidents of the CTC have been former cabinet ministers. The Economic Council in 1979 suggested that "the same care has not been exercised in the selection of commissioners as has been evident in the selection of judges."[154] Moreover, there are at least three different types of regulatory appointments in terms of their security of tenure. The first type provides the appointee with the greatest degree of independence, because he can be removed only "for cause." Somewhat less secure are appointees who hold office "during good behavior." Finally, there are regulators who hold office at the "pleasure" of the Cabinet.

3. Broad mandates, wide discretion

Most regimes of direct regulation are characterized by broad mandates that effectively confer a great deal of discretion on regulatory agencies. Two types of statutory mandates can be identified. First, there are those in which the governing legislation provides only a few objectives that are expressed in general terms—the key phrases are not defined. For example, the Aeronautics Act[155] specifies that licenses for entry to the industry or a specific route are to be issued only when the CTC finds that it is "warranted according to the test of public convenience and necessity."[156] Therefore, the SRA must exercise its judgment, subject to the various constraints imposed by the executive, in interpreting and applying the key phrases in the individual cases that come before it. Moreover, where the legislative mandate is brief and enigmatic, it is also open to the SRA to develop its own policy agenda, provided that it does not overtly conflict with the words engraved in statutory stone.

An excellent example of the brief and enigmatic regulatory mandate is that given to the CRTC with respect to the regulation of telecommunications under federal jurisdiction (essentially the carriers operating in Ontario, Quebec and British Columbia). Key provisions for the regulation of telephone services are contained in the *Railway Act*,[157] originally enacted in 1906. Section 321 specifies that rates shall be "just and reasonable"

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154. RESPONSIBLE REGULATION, *supra* note 4, at 59.

155. Aeronautics Act, R.S.C. 1970, ch. A-3, § 16(3).

156. *See* CANADIAN TRANSPORT COMMISSION, AIR TRANSPORT COMMITTEE POLICIES AND PRACTICES IN THE REGULATION OF AIR FARES 9 (1984) [hereinafter CANADIAN TRANSPORT COMMISSION].

157. Railway Act, R.S.C. 1970, ch. R-2, § 321.

and not give "undue or unreasonable preference."[158] The regulators are obviously left an enormous amount of discretion in the interpretation of these words in case by case decision making. Should they focus on costs or the value of service? Is the economic goal of allocative efficiency to be served or the social one of universal access to basic (local) services by means of rates below the apparent cost of providing such service? Whose interests are to be advanced—individuals in more remote centers or businesses in already large commercial centers? The list of such questions is virtually endless. According to Romaniuk and Janisch,

> [w]hat the CRTC Act fails to do is to define the statutory mandate of the CRTC 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.[159]

This is in distinct contrast to the explicit nature of the 1968 Broadcasting Act.[160] As a result, the CRTC has moved to fill the vacuum by developing a long list of policy objectives.[161]

The second type of regulatory mandate, which also effectively confers substantial discretion on SRAs and the executive, is the one that specifies a long list of policy objectives couched in undefined emotive terms. It is the multiplicity and vagueness of the statutory provisions that require the SRA to exercise its discretion in several ways. The most important is the necessity for the agency to explicitly or implicitly assign weights to each of the several objectives; the larger the number of objectives, the greater the chance that resulting conflict will require trade-offs.

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158. *Id.* §§ 321(1), 321(2).

159. Romaniuk & Janisch, *supra* note 3, at 584.

160. Broadcasting Act, R.S.C. 1970, ch. B-11.

161. For example, here is the list of factors the CRTC says it considers in dealing with applications for interconnection with the network: universality of service; consumer choice and responsiveness to consumer need; quality of service; the reasonableness of subscriber rates (including subscribers of connecting companies); the requirement that rates and conditions of service not confer an undue preference or disadvantage; innovation in the telecommunications industry and in Canadian business generally; efficiency of telecommunications systems; optimal allocation of resources taking account of geographic differences; the structure of rates, including route-averaged pricing, rate group structures, and rural service rates; and industry structure. *See generally* Interexchange Competition and Related Issues, Telecom Decision CRTC 85-19, 119 CAN. GAZ. PT I, 6046 (Aug. 29, 1985).

A careful reading of SRA decisions indicates that these weights change over time, and therefore reflect a serial attention to policy goals.

The vagueness of the undefined key phrases in the statutes requires the exercise of discretion by an SRA. The Broadcasting Act provides an excellent illustration of this type of regulatory mandate. Under that Act, the CRTC is charged with regulating and supervising "all aspects of the Canadian broadcasting system with a view to implementing the broadcasting policy enunciated in section 3 . . . ."[162] The policy objectives include:

> 1. Effective ownership and control of the broadcasting system by Canadians so as to "safeguard, enrich and strengthen the cultural, political, social and economic fabric of Canada;" [163]
> 2. Programming should be "varied and comprehensive and should provide reasonable, balanced opportunity for the expression of differing views on matters of public concern . . . .;"[164]
> 3. "[P]rogramming provided by each broadcaster should be of high standard, using predominantly Canadian creative and other resources;"[165]
> 4. "[A]ll Canadians are entitled to broadcasting service in English and French as public funds become available;"[166] (presumably this refers to the CBC);
> 5. By means of a federal Crown corporation (the CBC), there should be a "national broadcasting service that is predominantly Canadian in content and character."[167]

Such words or phrases as "effectively owned and controlled," "varied and comprehensive" programming, "using predominantly Canadian creative and other resources," and "predominantly Canadian in content and character" are wonderfully emotive and subject to radically differing interpretations. It is simply a huge step from these general phrases to the "nitty gritty" rules that are designed to implement them.

Section 3 of the Broadcasting Act is interesting not only because it provides such an extensive policy mandate, and because it also provides a policy mandate for the Crown corporation,

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162. Broadcasting Act, R.S.C. 1970, ch. B-11, § 15.
163. *Id.* § 3(b).
164. *Id.* § 3(d).
165. *Id.*
166. *Id.* § 3(e).
167. *Id.*

which plays a major role in the industry, but also because it gives some direction on the matter of conflicting objections. Section 3(h) states that where there is a conflict between the objectives of the CBC and the interests of private broadcasters, "it shall be resolved in the public interest but paramount consideration shall be given to the objectives of the national broadcasting service."[168]

The Air Transport Committee (ATC) of the CTC, in setting air fares, has to make its decisions in light of the Air Carrier Regulations. The committee ensures that all tolls and terms or conditions of carriage are just and reasonable.[169] Moreover, tolls may not be unjustly discriminatory against any person or other air carrier.[170] Nor may they make or give any undue or unreasonable preference or advantage.[171] The ATC is to determine the meaning of such phrases as "unjust discrimination" and "unreasonable preference." It appears, however, that the ATC has not limited itself to the bare words of the statute. It has described the objectives of the ATC in setting air fares as follows:

> Fundamentally, the Committee strives for fares that will result in the highest standard of service commensurate with traffic demand at the lowest possible cost to the travelling public consistent with the preservation of a financially viable, reasonably stable, accessible and equitable air service having regard for Government policy and the views and expectations of Canadians and visitors to Canada for air transportation.[172]

Obviously, the writer of this description is in the "political mode" as he fails to recognize the internal contradictions in the statement.

4. *The regulated conduct exemption*

The judicially-created "regulated conduct exemption" from the antitrust laws[173] is very broad in Canada.[174] It does not re-

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168. *Id.* § 3(h).

169. *See generally* CANADIAN TRANSPORT COMMISSION, *supra* note 156.

170. *Id.*

171. *Id.*

172. *Id.* at 9.

173. Effective June 19, 1986 the venerable Combines Investigation Act was replaced by the Competition Act and Competition Tribunal Act. *See* Stanbury, *The New Competition Act and Competition Tribunal Act: Not With a Bang But a Whimper*, 12 CAN. BUS. L.J. 2 (1986).

174. Milligan, *Competition Law and Regulation: Exploring the Boundaries of the Regulated Conduct Defence*, 7 CAN. COMPETITION POL'Y REC. 14 (1986); Stanbury, *How*

quire federal or provincial agencies to specifically mandate the restraint of trade for it to be exempt from the antitrust laws as does the state action doctrine in the United States. The problem is compounded by the fact that it is widely agreed that Canadian competition policy, except perhaps in the areas of horizontal agreements and resale price maintenance, has been weak, ineffective or irrelevant. The new Competition Act of 1986[175] closes several judicially created loopholes and abolishes the criminal law provisions respecting mergers and monopolies; they are replaced by new civil reviewable matters adjudicated by a new specialized tribunal composed of both judges and laypersons.[176]

Jabour v. Law Society of B.C.,[177] is the leading case defining the regulated conduct exemption. In *Jabour*, the Supreme Court of Canada unanimously held that the governing body of a self-governing profession, functioning under a constitutionally valid statute, is not subject to the criminal law provisions of the federal competition legislation.[178] The nominal issue in *Jabour* was the discipline of a lawyer for "conduct unbecoming" a member of the provincial law society by reason of advertising his services via an external sign and newspaper ads. The real issue concerned the relationship between restraints of trade effected within a federal or provincial regulatory regime and competition policy. The distinction should be drawn carefully. Under regulation, the state or its agents imposes restraints on competitive behavior in the name of public interest. Under competition policy, the state seeks also to strike down private restraints of trade in the name of the public interest in free competition and the efficient allocation of resources.

The Supreme Court held that regulatory bodies exercising their disciplinary powers under a valid provincial statute cannot

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Wide the Ocean? The Regulated Conduct Exemption in Canada, 29 ANTITRUST BULL. 577 (1984); Stanbury, *Provincial Regulation and the Combines Investigation Act: The Jabour Case*, in 3 ACCESS TO LAW YEAR BOOK 291 (1983); Romaniuk & Janisch, *supra* note 3; Address by Calvin S. Goldman to the Canadian Association of Members of Public Utility Tribunals (Sept. 10, 1986).

175. Competition Act of 1986, R.S.C. 1986, chs. C-23, C-26.

176. *See* Stanbury, *supra* note 22.

177. 137 D.L.R.3d 1 (S.Ct. 1982) (also cited as *Attorney Gen. of Canada v. Law Soc'y of B.C.*).

178. *See* Stanbury, *How Wide the Ocean? The Regulated Conduct Exemption in Canada*, 29 ANTITRUST BULL. 577 (1984); Stanbury, *Provincial Regulation and Federal Competition Policy: The* Jabour *Case*, in 3 WINDSOR YEARBOOK OF ACCESS TO JUSTICE 291 (1983).

be said to have made an agreement as contemplated in section 32(1) of the Combines Investigation Act, which deals with agreements to fix prices, limit output, etc.[179] The Court found that section 32(1) is directed against voluntary agreements, while the Benchers, in making a decision in a discipline case, were engaged in a coercive procedure provided for in a provincial statute.[180] The Court also held that the intent of Parliament in making services subject to the 1976 Act was not to make the governing bodies of professions subject to the Act.[181]

To ascertain the impact of *Jabour*, several scenarios must be distinguished. First, self-governing professions regulated by a valid provincial statute appear to be clearly exempt from competition legislation. Second, provincially-regulated occupations where the regulatory body is elected by members of the occupations groups, or a line department or provincial agency, would also appear to be exempt. Third, is the case of an industry subject to direct regulation by a line department or statutory regulatory agency of a province, or the federal government. Several questions must be answered to determine what it means to be regulated in respect to the restraints of trade in question. Is the conduct in question expressly described in the statute, suggesting that the legislature focused on the issue? Is the conduct expressly described in the regulations? Is it possibly established by the regulatory agency? If it is, such conduct would very likely

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179. *Jabour*, 137 D.L.R.3d at 31-43.

180. *Id.* at 38-41. In contrast to the *Jabour* decision, the United States has the state action doctrine. *See* Handler, *The Current Attack on the* Parker v. Brown *State Action Doctrine*, 76 COLUM. L. REV. 1 (1976); Verkuil, *State Action, Due Process and Antitrust: Reflections on* Parker v. Brown, 75 COLUM. L. REV. 328 (1975). It provides for an exemption from the Sherman Act (following *Parker v. Brown*, 317 U.S. 341 (1943)), where state action, (*e.g.*, in the form of regulation) creates a restraint of trade by reason of state policy and where the state's supervision is active. The United States Supreme Court's approach is distinguished by two recent cases. In *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975), a tariff of fees adopted by the voluntary bar association was not subject to state statutes and the Court held that such fee fixing was not compelled by an agency of the state. Therefore, the state action exemption did not apply and the bar association was subject to the Sherman Act regarding its efforts to fix legal fees.

In *Bates v. State Bar of Arizona*, 433 U.S. 350 (1979), the Court found that the rules governing advertising by lawyers were administered by the Supreme Court of Arizona on behalf of the State. Hence the policy was clearly and affirmatively expressed under active supervision of an agency of the state. Therefore, the state action exemption applied in this case.

181. *Jabour*, 137 D.L.R.3d at 40-41. This is simply factually incorrect. The author testified and provided documentary evidence at the original trial that indicated that both members of Parliament and the Minister responsible for the legislation intended that it apply to all professions.

be exempt under the *Jabour* decision. Two possible situations arise when conduct is not expressly described but may fall under the powers of the regulatory body:

> 1. The regulatory body expressly approves and requires therestrictive conduct, and the regulatory body is entirelyself-elected, or the regulatory body is appointed by government and is not dominated by industry people; or
> 2. The regulatory body does not expressly approve or require the restriction conduct and that the body is composed of persons entirely from the industry (e.g., marketing board), or the regulatory body is appointed by government and is not dominated by industry persons.

If the facts are as in situation (1), it appears that the impugned conduct would be exempt. This may also be true in situation (2) where the regulators are independent of the industry being regulated.[182] In situation (2), however, *Jabour* may not apply if all of the regulators represent the industry. This interpretation may be unduly pessimistic.

The present Director of Investigation and Research is much more sanguine.[183] He emphasizes that the so-called regulated conduct exemption is really a defense to be considered when adjudicating a charge under the Competition Act. Moreover, it is conduct specific; it is not a defense to all types of behavior in an industry. Further, the Director argues that the *Jabour* decision may be a somewhat unique case largely based on its particular facts,[184] and that the restrictive conduct did not arise from a voluntary agreement among members of a regulated industry. Mr. Goldman indicates three different approaches are being studied to challenge the assertion of a regulated conduct defense. These relate to "demonstrating either that: (1) the regulation has been hindered by the behaviour subject to regulation; or (2) the regulator has not exercised its authority [i.e., has engaged in passive regulation]; or (3) the regulatory enabling legislation may be subject to the [civil law] provisions of the Competition Act."[185]

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182. In *Jabour* 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. 137 D.L.R.3d at 27.

183. *See* Address by Calvin S. Goldman, *supra* note 174.

184. Romaniuk and Janisch argue that "the Court nowhere suggested or implied that its decision was to be of general application." Romaniuk & Janisch, *supra* note 3, at 644.

185. Address by Calvin S. Goldman, *supra* note 174, at 32.

III. Reforming Direct Regulation in Canada: Making Haste Slowly

A. Defining Reform

The word "reform" is hardly a neutral term. At least five different uses of the phrase "regulatory reform" can be identified:

1. Outright deregulation. The total removal of a set of regulatory constraints either at once or in stages (e.g., airlines, buses, trucking in the United States and brokerage rates in Canada).

2. Liberalization or partial deregulation. Here the scope and intensity of regulation are reduced to a notable degree. In Canada this has occurred with respect to airlines, energy (the pricing of oil and natural gas), and telecommunications.

3. Process/procedural changes. These focus on the flow of new regulatory initiatives or changes in existing regimes. Included here are such devices as a regulatory agenda, notice and comment provisions regarding new regulations, requirement to use benefit-cost analysis and structured reviews of new regulations, and/or existing regimes by legislative committees.[186]

4. New regulatory statutes. When such legislation extends the scope of regulation, its desirability is obviously debatable. But not all regulation restricts the freedom of producers and consumers, which results in a net loss of welfare to society. For example, how do we classify the new Competition Act that strengthened Canada's notoriously weak antitrust laws?

5. Amendments to existing regulatory statutes designed to increase their effectiveness. Amendments dealing with social regulations, which have been found to be ineffective (e.g., acid rain, toxic chemicals, transportation of dangerous goods, and railroad safety), are described by most Canadians as "reforms." It should be emphasized that in 1981 the Economic Council, which supported phased removal of many types of direct regulation (*e.g.*, marketing boards, railroads, trucking, and airlines), also recommended that more stringent and effective social regulation be

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186. Responsible Regulation, *supra* note 4, at 69; Stanbury & Thompson, *The Scope and Coverage of Regulation in Canada and the United States: Implications for the Demand for Reform,* in Government Regulation: Scope, Growth, Process ch. 2 (W. Stanbury ed. 1980).

made, especially regarding air and water pollution, toxic chemicals, and fisheries.[187]

This paper concentrates on the first two types of regulatory reforms.

B. Regulatory Spillover From The United States

Canada's location and the existence of a common language results in it being subject to regulatory spillover from the United States. This occurs in two ways. First, in transportation industries in which each country's carriers handle a substantial amount of transborder traffic, a change in one country's regulatory regime can have a considerable impact on the other. For example, once the United States deregulated the trucking industry, Canadian truckers quickly sought operating authorities in the United States, while Americans complained that Canada's continuing restrictive approach denied them access to Canadian shippers with freight bound for the United States.[188] A somewhat similar conflict occurred with respect to rail freight. When Bill C-18, passed in 1987, takes effect, the shoe will be on the other foot. United States railroads will have easier access to Canadian shippers than Canadian lines will have to United States shippers.[189]

Deregulation of United States airlines, which preceded that in Canada, resulted in United States carriers offering discount fares on transborder routes. That action frustrated Canadian regulators and some of the carriers under their jurisdiction, particularly Air Canada.[190] Soon Canadian airlines began periodic "seat sales" at up to 75% off the regular economy fares. Then United States carriers complained to the Civil Aeronautics

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187. *See generally* REFORMING REGULATION, *supra* note 78.

188. *See* Madar, *Songs of the Open Road: The Politics of Trucking Deregulation in the United States and Canada*, 14 POL'Y STUD. J. 621 (1986).

189. Ellison, *Regulatory Reform in Canada: A Different Ball Game*, in REGULATORY REGIMES IN CONFLICT: PROBLEMS OF REGULATION IN A CONTINENTAL PERSPECTIVE 103, 113-19 (F. Thompson ed. 1984) [hereinafter *Regulatory Reform*]; A. Ellison, The Formation and Dissolution of the Canadian Rail Cartel (Sept. 1986) (unpublished paper)[hereinafter Formation and Dissolution].

190. ELLISON, AIR CANADA: THE CUCKOO IN CANADA'S AVIATION NEST (Treasury Board Canada, Office of Regulatory Reform, June and McGill University Centre for the Study of Regulated Industries, Working Paper No. 1983-32, 1984); Ellison, *Regulatory Reform in Transport: A Canadian Perspective*, 23 TRANSP. J. (Summer 1984); A. Ellison, The New Air Transport Policy: Liberalization Not Deregulation (Jan. 1985) (Economic Council of Canada Government Enterprise Project) (unpublished paper).

Board, which threatened to hold up approval.[191] People Express, a child of United States deregulation, caused an influx of air travelers to the United States as Canadians flocked to Burlington, Vermont and Buffalo, New York to take the low-price airline to New York and then on to other United States destinations. Air Canada continued to fight the liberalization of regulation until March 1984 when the federal Minister of Transport, its only shareholder, persuaded it to accept the virtues of phased deregulation.

Second, given the proximity of Canada to the United States, the common language and the widespread distribution of American media in Canada, it is not surprising that ideas about regulation and how it can or should be changed flow freely from the United States to Canada. These ideas create a variety of interesting responses. Dyed-in-the-wool nationalists see any suggestion that Canada adopt American-style institutions or regulatory (particularly deregulatory) practices as inherently inappropriate to Canada's unique circumstances.[192] The advocates of reform, particularly outright deregulation, have argued that, given the high degree of integration of the two economies, Canada should quickly adopt the new United States ideas. Advocates use information about the United States experience with reform to point to its beneficial results.[193] They ask why Canadians should be denied the same benefits when, at the stroke of a pen, the same result would occur here. Finally, there are the pragmatists who appreciate both that there are some important differences between the two countries that have to be taken into account, and that it is necessary to modify foreign innovations to suit Canadian circumstances and values.[194]

C. Evolutionary Approach to Reform

Canadians have a reputation as a cautious, conservative people strongly concerned that change occur in a controlled and

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191. *See* REGULATORY REGIMES IN CONFLICT: PROBLEMS OF REGULATION IN A CONTINENTAL PERSPECTIVE 137 app. (F. Thompson ed. 1984).

192. *See generally* S. CLARKSON, CANADA AND THE REAGAN CHALLENGE: CRISIS IN THE CANADIAN-AMERICAN RELATIONSHIP (1982).

193. *See* Formation and Dissolution, *supra* note 189; *Regulatory Reform, supra* note 189; A. ELLISON, U.S. AIRLINE DEREGULATION: IMPLICATIONS FOR CANADA (Economic Council of Canada, Regulation Reference Technical Report No. 11, June 1981).

194. *See* D. GILLEN, T. OUM, & M. TRETHEWAY, *supra* note 144; REFORMING REGULATION, *supra* note 78; Reschenthaler & Stanbury, *Deregulating Canada's Airline Grounded by False Assumptions*, 9 CAN. PUB. POL'Y 210 (1983).

orderly fashion.[195] They do not believe in a big bang theory of regulatory change.[196] The liberalization of airline regulation in Canada, for example, can fairly be described as incremental in character. Some would say it has been a policy of disjointed incrementalism.

1. Airlines

The following list of regulatory or policy events illustrates how airline regulation reform in Canada has evolved:

1951: The Air Transport Board created Class 9-4 licenses to permit charter flights to the United States.[197]

1954: Class 9-4 licenses were extended to all international charters. (By 1971 international charter volume from Canada reached two-thirds of domestic travel volume largely due to the relentless efforts of Wardair.).[198]

1958: Diefenbaker's Government began conducting a limited experiment with the deregulation of carriers using only small aircraft. This lasted until 1963.[199]

1959: CP Air was allowed to operate one flight per day between Vancouver-Toronto and Montreal in competition with Air Canada.[200]

1967: CP Air was allowed to add points to its licenses and to provide 25% of transcontinental capacity by 1970, Air Canada having the balance.[201]

1973: The affinity rule for international charters was abolished and international ABCs were allowed. This greatly facilitated the enormous growth of low-cost, international charter flights.[202]

1977: Air Canada's contract was ended; the Crown airline was subject to the same regime concerning routes, etc., as all

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195. While the preamble of the American Constitution speaks of "life, liberty and the pursuit of happiness," U.S. CONST. preamble., Canada's original Constitution referred to "peace, order and good government," Constitutional Act, 1867 30 & 31 Victoria, ch. 3, § 91.

196. *See Big Bang Briefs*, THE ECONOMIST Aug. 2, 1986, at 60-61, Aug. 9, 1986, at 66-67, Aug. 16, 1986, at 54-55, Aug. 23, 1986, at 60-61, 72-73, Sept. 6, 1986, at 70-71, Sept. 20, 1986, at 84; Henry, *Bang-Up Time in London*, TIME, Aug. 25, 1986, at 49.

197. Reschenthaler & Stanbury, *supra* note 96.

198. *Id.*

199. *Id.*

200. *Id.*

201. *Id.*

202. *Id.*

other carriers; CP Air was allowed to increase its capacity from 25% to 35% of the growth in 1978 and 45% of the growth in 1979.[203]

1978: Following an appeal by the Consumers' Association, the Cabinet permitted the first interregional domestic ABCs on scheduled flights.[204]

1979: All capacity restrictions on CP Air were removed and the airline was encouraged to apply to serve Halifax and to consolidate its licenses; Wardair was issued a domestic charter license—this intensified competition in the charter class market.[205]

1980: The short-lived Tory Government reduced the restrictions on domestic charter operations (*e.g.*, allowed one-third, last minute top-off sales).[206]

1984: The Minister of Transport announced the "New Canadian Air Policy," which proposed to greatly liberalize regulation over the next two years. The "public convenience and necessity" test, however, was retained to avoid having a statutory change. The Air Transport Committee recommended some relaxation of regulation, but no deregulation. There was a new air agreement with the United States to increase competition on transborder routes; ATC established two zones of fare flexibility with different restrictions for discount fares.[207]

1985: The Minister of Transport issued his *Freedom to Move* policy paper proposing almost total deregulation of the airlines in Canada.[208]

1986: Bill C-126, the National Transportation Act, 1986, was introduced in June, and it proposed deregulation of airlines in southern Canada and somewhat liberalized regulation for the North. It was reintroduced in essentially the same form as Bill C-18 in November 1986.[209]

The slow and cautious approach to changing airline regulation is evident in Bill C-18.[210] While the government proposed almost total deregulation in 1985, political pressure resulted in

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203. *Id.*
204. *Id.*
205. *Id.*
206. *Id.*
207. MINISTER OF TRANSPORT, NEW CANADIAN AIR POLICY (May 10, 1984).
208. D. MAZANKOWSKI, MINISTER OF TRANSPORT, FREEDOM TO MOVE: A FRAMEWORK FOR TRANSPORTATION REFORM (July 1985) [hereinafter, FREEDOM TO MOVE].
209. National Transportation Act, Bill C-18, 33d Parl. 2d Sess., 1986.
210. *Id.* Part II, §§ 67-109.

continued regulation in northern Canada, defined roughly as the area north of a line stretching from the 55th parallel on the Pacific coast to the 50th parallel on the Atlantic. Entry into the industry to serve points in northern Canada will be based on the "fit, willing and able" test. In addition, if there is an objection by an "interested community, person or entity," the regulator must be satisfied that entry "would not lead to a significant decrease or instability in the level of domestic service." [211] The regulator may impose conditions on licenses such as "routes to be followed, points or areas to be served, schedules, places of call, tariffs, fares, rates and charges, insurance, carriage of passengers and . . . carriage of goods."[212] Conditions for exit or reduction of service are the same as in southern Canada, namely sixty days notice. An "unreasonable basic fare level" or an "unreasonable basic fare increase" are subject to regulation where the regulatory agency has received a complaint in writing.[213] The agency may disallow or reduce the fare increase, and it may require that refunds be made to passengers. Finally, there is a provision for direct subsidies where the Minister of Transport determines that a domestic service is essential and that direct or indirect financial assistance is necessary to maintain it at some level. The Minister of Transport is obligated, where feasible, to "ascertain by public tender the most economical and efficient method by which the service can be provided."[214]

But even under deregulation in southern Canada, several notable restrictions will remain when Bill C-18 is enacted. First, while entry is based on the "fit, willing and able" test, 75% of the shares in Canadian carriers must be owned by Canadian residents.[215] Second, "unreasonable" increases in the "basic fare" are subject to regulation by the new National Transportation Agency where there has been a complaint and where the Agency finds "there is no other alternative, effective, adequate and competitive transportation service . . . ."[216] Third, where there is an objection, a proposed acquisition or merger involving at least 10% of the voting shares of a carrier with assets or revenues of $20 million is subject to review by the NTA to determine if it is

211. *Id.* § 72(2)(b).
212. *Id.* § 72(4).
213. *Id.* § 80(2).
214. *Id.* § 85(2).
215. Bill C-18, 33d Parl., 2d Sess., § 72 (1986).
216. *Id.* at § 80.

in the public interest.[217] This exceeds the provisions in the new Competition Act.

2. *Trucking*

Despite the phased deregulation of the trucking industry in the United States that began in 1980, and its direct impact in Canada through transborder traffic,[218] Canada has been slow to deregulate the industry. The problem is compounded because the provinces have jurisdiction over intra-provincial trucking, while the federal government has authority over inter-provincial and transborder trucking.[219] However, in 1954 the federal government delegated its jurisdiction to the provinces. With the notable exception of Alberta, the provinces have imposed price and entry control regulations of somewhat varying stringency and scope.[220] The provinces have been reluctant to deregulate, although some (e.g., Ontario and Quebec) have been forced to liberalize their regulations in response to deregulation in the United States. All provinces took steps to at least slightly liberalize trucking regulations between 1983 and 1986.[221]

The new Conservative Government in Ottawa, as part of a general program of liberalizing and deregulating transportation industries, was prepared to reassert federal jurisdiction over inter-provincial and transborder trucking. Only five months after the election, on February 27, 1985, federal and provincial ministers of transportation signed an agreement to change the regulations governing inter-provincial and transborder trucking. They agreed to take the following actions in a phased manner during 1985 and 1986:

1. Shift the burden of proof on entry from the applicant to the respondent ("reverse onus").
2. Eliminate rate approval requirements.
3. Develop common lists of exempt commodities among juris-

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217. *Id.* at § 74.

218. Chow, *Prospective Changes in the United States-Canada (Transborder) Trucking Industry*, in LOGISTICS: CHANGE & SYNTHESIS (P. Gallagher ed. 1984); Madar, *supra* note 188.

219. *See* Nix, House & Clayton, *Motor Carrier Regulation: Institutions and Practices* (Economic Council of Canada and Institute for Research on Public Policy, Working Paper E/I 1, Aug. 1980).

220. Chow, *How Much Longer Can We Live with Regulation of Canada's Trucking Industry?*, CAN. BUS. REV. 44-52 (1983); Nix, House & Clayton, *supra* note 219.

221. *See* Western Transportation Advisory Council, *Under Debate: The Framework for Canadian Trucking*, 12(1) WESTAC NEWSLETTER (Jan. 1986).

dictions for which no public convenience and necessity test would apply.
4. Simplify license categories and enhance compatibility between jurisdictions.
5. Streamline the application processes including revising the entry standard.
6. Examine the feasibility of integrating all reporting and enforcement mechanisms, the collection of all truck-related taxes and insurance and establishing uniform taxation categories for commercial vehicles.
7. Develop a uniform national definition of "fitness".[222]

In his major policy paper *Freedom to Move*, the federal Minister of Transport proposed to change the legislation to replace the "public convenience and necessity" test for entry with a "fit, willing and able" test, i.e., essentially the ability to provide the proposed service safely and with the necessary liability insurance. In addition, he proposed to eliminate the regulation of tariffs.[223] The reaction of most of the provinces and many industry executives was to argue for a longer period in which to phase in deregulation.

Bill C-127, a new federal Motor Vehicle Transport Act,[224] was given first reading in June 1986. It was more cautious than the previous policy paper:

1. The "fit, willing and able" license test, based on safety and insurance requirements, was to become effective on January 1, 1988, and will encourage expanded and improved services.
2. For a three-year transition period, new service applications were also to be subject to a public interest test, with the onus placed upon objectors to prove that the public interest will not be served by any new operator.
3. Rate regulation is to be eliminated and other license conditions such as route and commodity restrictions are to be removed at the end of the transition period.

In October 1986 the federal and provincial transport ministers disagreed on the speed of trucking deregulation. Ontario, Quebec, and British Columbia wanted a five-year phase-in period before full deregulation began on January 1, 1988, rather than three years as proposed in Bill C-127. In November, Bill C-

222. Minister of Transport, Press Release (Feb. 27, 1985).
223. FREEDOM TO MOVE, *supra* note 208, at 41-42.
224. Motor Vehicle Transport Act, Bill C-127, 33d Parl., 1st sess., (first reading June 26, 1986).

19 replaced C-127, but its substance was unchanged.[225] Hearings were held in 1987, and amendments were made to introduce changes more slowly.

3. *Telecommunications*

Changes in the regulation of telecommunications have also been evolutionary, but they have not proceeded as far down the road to deregulation as is the case with airlines. The process by which change has occurred has also been different. Romaniuk and Janisch emphasize that "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."[226]

Members of the CRTC have emphasized that competition is not an end in itself, rather it is a means to attain other policy goals such as the provision of high quality, low-priced, diverse telephone services. But most importantly, whether regulation or competition is the instrument, the central goal is affordable, universal basic telephone service to the general public.

The CRTC has recognized a positive role for competition in the market for equipment attached to the network. Resulting advantages would be enhanced consumer choice, lower prices and increased flexibility and efficiency, especially for business subscribers. In the case of competition in long distance services, notably MTS and WATS, the CRTC has recognized the potential benefits of competition (lower rates, increased productivity, improved customer choice, better supplier responsiveness, increased innovation, more flexibility with respect to pricing and marketing and better diffusion of new technology). However, in the 1985 *Interexchange*[227] decision, it denied CNCP Telecommunications entry into MTS/WATS markets.[228]

In practice, the decisions of the CRTC have been a complex mixture of broadly defined equity (very broadly and dynamically defined) and efficiency considerations. For example, the CRTC

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225. *Id.*

226. Romaniuk & Janisch, *supra* note 3, at 573.

227. Interexchange Competition and Related Issues, Telecom Decision CRTC 85-19, 119 CAN. GAZ. PT I, 6046 (Aug. 29, 1985).

228. *See* Stanbury, *supra* note 22.

has made pro-competition, efficiency-oriented decisions with respect to:

1. Attachment of subscriber-owned terminal equipment (1980,1982).
2. System interconnection relating to private line voiceand date transmission (1979, 1981, 1985).
3. Enhanced services (1984).
4. Decision not to regulate the rates of cellular radiotelephone service (1984).
5. Interconnection by radio common carriers (1984).
6. Resale and sharing (1985), but this was later interpreted in a highly restrictive fashion (1986).[229]

In *Challenge Communications Ltd. v. Bell Canada*,[230] the CRTC held that section 321 of the Railway Act, which prohibits the imposition of any "undue or unreasonable prejudice or disadvantage,"[231] was not limited to discrimination between customers, but also applied to discrimination against competitors seeking access to the telephone company's local network. As one observer put it, the decision was "a competitor's Bill of Rights' " because section 321(2) provided that the telephone company had the burden of proving that discrimination was not unjust.[232]

On the other hand, the CRTC has supported continued regulation, the prohibition of entry and the *status quo* in pricing structure in a number of cases. For example, in the 1985 *Interexchange* decision, the CRTC refused to allow the entry of CNCP Telecommunications into MTS and WATS markets.[233] It also refused to undertake rate rebalancing to reduce or eliminate what Bell Canada's costing methodology indicates is a massive cross-subsidy of local services by toll services.

The CRTC has also extended the reach of regulation. For example, it developed and applied the "principle of integrality" to (1) BC Tel's investment in Automatic Electric (an equipment manufacturing subsidiary); (2) Bell's investment in Northern

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229. *See* W.T. STANBURY & F. THOMPSON, *supra* note 141, at 55-65; Dalfen, *supra* note 111; Janisch & Romaniuk, *supra* note 111; Kaiser, *Competition in Telecommunications: Refusal to Supply Facilities by Regulated Common Carriers*, 13 OTTAWA L. REV. 95 (1981); Romaniuk & Janisch, *supra* note 3.

230. Challenge Communications Ltd. v. Bell Canada, Telecom Decision CRTC 77-16, 3 C.R.T. 489 (Dec. 23, 1977), *aff'd*, 86 D.L.R. 3d 351 (Fed. Ct. App. 1978).

231. Railway Act, R.S.C. 1970, ch. R-2, § 321.

232. Kaiser, *supra* note 229, at 97.

233. Stanbury, *supra* note 22.

Telecom by setting a deemed rate of return of 15%;[234] (3) Bell's Tele-Direct subsidiary which handles its directory business;[235] and (4) Bell's large contract to upgrade the Saudi Arabian telephone system (1978).[236] The revenues of (3) and (4) were to be included in the telephone companies estimated revenues for rate setting purposes. In 1981 a deemed return was applied to Tele-Direct. This series of moves prompted Bell Canada to undertake a major reorganization in 1982 with the purpose of narrowing the scope of the CRTC's jurisdiction over the company's activities. Bell also wanted to be able to diversify into areas unrelated to the provision of telephone service. In the view of Romaniuk and Janisch, these decisions "constitute instances of exceptional regulatory reach."[237]

Romaniuk and Janisch identify seven reasons for the lack of full deregulation of the telecommunications industry:

> 1. Much of the market remains monopolistic and in need of regulation.
> 2. Telephone companies continue to occupy positions of considerable dominance. Unique industry structure has created strategic bottlenecks.
> 3. There is great concern that universal service not be placed at risk and that it continue to be achieved by means of large-scale cross-subsidization rather than overt taxation and redistribution within the system of telecommunications or by means of cash transfers like any other social welfare program.
> 4. There is no general agreement in Canada on the virtues of competition policy (despite the fact that substantial revisions have been made to Canada's antitrust laws in the new Competition Act effective June 19, 1986).
> 5. Fragmented jurisdiction and provincial government ownership (of the three prairie telcos) are substantial inhibiting forces to change.
> 6. Concern that Canada's relatively small market increases the

234. *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. GAZ. PT. I, 6128, 5 C.R.T. 585 (18 Sept. 1979); Bell Canada, General Increase in Rates, Telecom, Decision CRTC 80-14, 114 CAN. GAZ. PT. I, 5105, 6 C.R.T. 22 (12 Aug. 1980).

235. *See* Bell Canada, Increase in Rates, Telecom. Decision CRTC 77-7, 111 CAN. GAZ. PT. I, 3158, 3 C.R.T. 87 (June 1, 1977).

236. *See* Bell Canada Increase in Rates, Telecom. Decision CRTC 78-7, 112 CAN. GAZ. PT. I, 5002, 4 C.R.T. 313 (Aug. 10, 1978).

237. Romaniuk & Janisch, *supra* note 3, at 609.

need for planning capability and protection for domestic industry.

7. No political consensus has yet emerged to supplant natural monopoly and regulation (although the academic literature has seen a veritable revolution in this regard).[238]

4. *Timing Relative to the United States*

Changes that have resulted in substantial liberalization of directly regulated industries have occurred in Canada between five and ten years after they occurred in the United States (see Figure 3). Just a few examples make the point. First, fixed brokerage rates were abolished in the United States in 1975, but not until 1983 in Canada. Second, the phased deregulation of the airlines was legislated in October 1978 in the United States, while a bill to deregulate the airlines in southern Canada in one step was not introduced until June 1986. Third, the United States began phasing out the controls over natural gas prices in 1978 and totally decontrolled them in 1985. Canada imposed controls on prices and exports in the 1970s and did not begin deregulation until November 1985. While the United States decontrolled oil prices in 1981, this was not done in Canada until 1985. Fourth, the phased deregulation of interstate trucking began in 1980 in the United States. In November 1986, the federal government introduced Bill C-19 to phase out the regulation of extra-provincial trucking (interprovincial and transborder).[239] Although the bill was passed in 1987, the phase-in period was lengthened. Fifth, while the United States deregulated radio broadcasting in 1981, Canada increased the stringency of its con-

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238. *Id.* at 573. Romaniuk and Janisch note, however, that competition could play a greater role in the industry—without legislative amendment—in several ways:

1. The regulator, or the courts upon appeal, may determine that the Railway Act does not apply to certain suppliers of telecommunications services.

2. The regulator or courts may find that not all aspects of market conduct of these firms are within its statutory authority.

3. The regulator or courts may determine that it is authorized to forbear from regulating certain types of conduct.

4. Liberalized entry may be granted in specified markets (whether initiated by the CRTC, Cabinet or Minister of Communications) without the provision for any concomitant reduction in regulatory requirements imposed on all participants.

Romaniuk & Janisch, *supra* note 3, at 590-92.

239. The draft legislation was originally introduced as Bill C-127 in June 1986.

tent regulations in the early 1980s and shows no sign of changing.[240]

D. The Extent of Regulatory Reform

As of the end of 1986, Canada had not deregulated as many industries previously subject to direct regulation as had the United States (see Figures 3 and 4). Canada has, however, eliminated fixed brokerage rates, removed price controls on natural gas and petroleum, eliminated controls over export contracts for gas and oil for up to two years, and abolished the notorious Crow's Nest Pass grain rail freight rates. To "kill the Crow" it was necessary, however, to pay full compensation for the "Crow Benefit" as of 1980-81.[241] As noted in Figure 4, the legislation for the outright deregulation of the airlines in southern Canada and the phased deregulation of rail freight and extra-provincial trucking was introduced in 1986, passed in 1987, and is expected to go into effect in 1988.

In addition, a milder form of liberalized reform has occurred in a number of other industries: telecommunications, foreign investment, cable-TV rates and broadcasting, and financial services. For example, in 1980 foreign banks were allowed to enter the market and take up to 8% of total domestic deposits. In 1984 this ceiling was raised to 16%. By 1986, over 50 subsidiaries of foreign banks were operating in Canada. Recently, as Figure 4 indicates, Ontario, Quebec, and the federal government have made changes designed to increase competition among different types of financial institutions.[242]

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240. *See* J. CLIFFORD, *supra* note 7.

241. *See* J. FORBES, INSTITUTIONS AND INFLUENCE GROUPS IN CANADIAN FARM AND FOOD POLICY ch. 6 (1985).

242. The federal reforms are described in MINISTER OF STATE (FINANCE), NEW DIRECTIONS FOR FINANCIAL INSTITUTIONS (Dec. 18, 1986). More generally, see MINISTER OF STATE FOR FINANCE, *supra* note 8; DEPARTMENT OF FINANCE, CANADIAN FINANCIAL INSTITUTIONS: TRENDS AND POLICY PERSPECTIVES (Jan. 1984) (Capital Markets Division Working Paper); DEPARTMENT OF FINANCE, CANADIAN FINANCIAL INSTITUTIONS: SOME POLICY ISSUES (Jan. 1984) (Capital Markets Division Working Paper); ECONOMIC COUNCIL OF CANADA, A FRAMEWORK FOR FINANCIAL REGULATION (1987); ECONOMIC COUNCIL OF CANADA, COMPETITION AND SOLVENCY: A FRAMEWORK FOR FINANCIAL REGULATION (1986); JOINT SECURITIES INDUSTRY COMMITTEE, REGULATION AND OWNERSHIP OF MARKET INTERMEDIARIES IN CANADA (Sept. 1984) (Alberta, Montreal, Toronto and Vancouver Stock Exchange and the Investment Dealers Association of Canada); ONTARIO SECURITIES COMMISSION, A REGULATORY FRAMEWORK FOR ENTRY INTO AND OWNERSHIP OF THE ONTARIO SECURITIES INDUSTRY (1985); ONTARIO TASK FORCE ON FINANCIAL INSTITUTIONS, FINAL REPORT (Dec. 1985) (Dupre Report); W. ESTEY, REPORT OF THE INQUIRY INTO THE COLLAPSE OF THE CCB AND

The new Conservative Government moved quickly after its election to declare that "Canada is open for business." In June of 1985 the Investment Canada Act and its corresponding agency replaced the Foreign Investment Review Act and its corresponding agency.[243] The new agency has a mandate not only to screen foreign direct investment (albeit less rigorously than its predecessor), but also to promote foreign investment in order to stimulate growth and create jobs in Canada.[244] Given a persistent double-digit national unemployment rate, the latter is likely to be emphasized.

Effective August 1, 1986 the CRTC allowed cable-TV operators to increase their rates without a hearing by 80% of the annual increase in the Consumer Price Index.[245] This is a two-year experiment that has been strongly opposed by the Consumers' Association of Canada. While the reform of telecommunications regulation has not gone nearly as far as in the United States, federal regulators have introduced competition in a number of areas: interconnection (private line services only), terminal attachment, resale and sharing, enhanced services, and cellular radio. There have been a number of instances of "regulatory forbearance."[246]

The "almost no change" category in Figure 4 includes the provincial regulation of public utilities.[247] The cartels governing the five agricultural products are in no danger of extinction.[248] They are not even seriously threatened despite the extensive evidence of their inefficiency and large amounts of income they are able to redistribute to farmers from consumers.[249] The regula-

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NORTHLAND BANK (1986); HOUSE OF COMMONS, STANDING COMMITTEE ON FINANCE, TRADE, AND ECONOMIC AFFAIRS, CANADIAN FINANCIAL INSTITUTIONS (Nov. 1985); SENATE OF CANADA, STANDING SENATE COMMITTEE ON BANKING, TRADE & COMMERCE, DEPOSIT INSURANCE (1985); SENATE OF CANADA, STANDING SENATE COMMITTEE ON BANKING, TRADE & COMMERCE, TOWARDS A MORE COMPETITIVE FINANCIAL ENVIRONMENT (May 1986); K. WYMAN, REPORT OF THE INQUIRY OFFICER WITH RESPECT TO THE INQUIRY INTO TELECOMMUNICATIONS CARRIERS' COSTING AND ACCOUNTING PROCEDURES: PHASE III—COSTING OF EXISTING SERVICES (Apr. 30, 1984) (CRTC).

243. *Investment Canada Act*, R.S.C., 1985, ch. 20.

244. *See* Grover, *The Investment Canada Act*, 10 CAN. BUS. L.J. 475 (1985).

245. Wylie, *CRTC Eases Regulation of Cable Television Rates*, 7 CAN. COMPETITION POL'Y REC. 18 (1986).

246. *See* Janisch & Romaniuk, *supra* note 111.

247. The wholesale price of natural gas was deregulated November 1, 1986, but the base rate of return regulation of distributors did not change.

248. Gorecki, *supra* note 6.

249. Stanbury & Lermer, *supra* note 84.

tion of taxi cabs has not been changed.[250] Although Ontario eliminated the regulation of fares in 1986, inter-city buses are regulated now essentially as they have been for decades.[251] However, interprovincial and transborder bus travel will be subject to Bill C-19, which comes into effect in 1988.

Unfortunately, as Figure 4 indicates, there are several instances of going backwards. These are actions or proposals to extend direct regulation. The most massive intervention—and one that caused considerable friction in Canada-United States relations—was the National Energy Program introduced in October 1980.[252] The Minister who introduced it did not exaggerate when he said it would "impinge in almost every sphere of Canadian activity, on the fortunes of every Canadian, and on the economic and social structure of the nation for years to come."[253] Fortunately, the policy's life was fairly brief, and it was modified several times.[254] The new Tory government promised to dismantle it and did so beginning in mid-1985.[255]

As if five supply management boards are not enough, there were serious proposals to extend the existing tobacco board and create a new one for potatoes. Neither succeeded. The federal government did succeed in putting in place some form of wage and price controls several times between 1973 and 1985 (see Figure 4). During 1974 and 1975 eight provinces introduced rent controls. Quebec's and Newfoundland's had been established earlier. Several provinces phased them out between 1977 and 1983, but Ontario, with over one-third of Canada's population, kept them in place. Then in 1985, Ontario extended them to cover previously exempt units, lowered the annual increase al-

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250. *See* B. PAPILLON, THE TAXI INDUSTRY AND ITS REGULATION IN CANADA (Economic Council of Canada Regulation Reference Working Paper No. 30, Mar. 1982).

251. *See* G. RESCHENTHALER, PERFORMANCE UNDER REGULATION: THE CANADIAN INTERCITY BUS INDUSTRY (Bureau of Competition Policy, Research Monograph No. 10, 1981).

252. *See* S. CLARKSON, *supra* note 192, at 3-5; DEPARTMENT OF ENERGY, MINES AND RESOURCES, THE NATIONAL ENERGY PROGRAM, 1980 (1980); G. DOERN & G. TONER, THE POLITICS OF ENERGY: THE DEVELOPMENT AND IMPLEMENTATION OF THE NEP (1985); REACTION: THE NATIONAL ENERGY PROGRAM (G. Watkins & M. Walker eds. 1981); P. FOSTER, THE SORCERER'S APPRENTICES: CANADA'S SUPER-BUREAUCRATS AND THE ENERGY MESS (1982).

253. G. DOERN & G. TONER, *supra* note 252.

254. *See generally Id.*

255. *See* Toner, *Stardust: The Tory Energy Program*, in HOW OTTAWA SPENDS 119-23 (M. Prince ed. 1986).

lowable without review and made the controls more restrictive in other ways.[256]

The CRTC did a "wrong way Corrigan" on the matter of pay-TV. It prevented its introduction until 1982, when it limited the number of entrants and set Canadian content requirements. It did not, however, set the tariffs. With respect to telephone rates, the CRTC rejected competition in the public voice long distance market and rate rebalancing in 1985.[257] The federal Cabinet, in the 1977 *Telesat* appeal,[258] effectively ruled out competition between satellite and terrestrial (wire and microwave) modes for long distance transmission.

The urge to regulate and to use the powers of the state to refashion the world is very strong in Canada. There are at least as many proposals to create more government intervention as there are to curb it—even in this the age of regulatory reform.[259] In summary, regulatory reform in directly regulated industries in Canada has been a case of two steps forward and one step backward.

IV. CONCLUSION

Four distinctive characteristics of direct regulation in Canada are: (1) its widespread use to achieve certain "social" objectives; (2) extensive opportunities for the exercise of political influence; (3) the use of broad legislative mandates and the conferral of wide discretion on regulators; and (4) a broad exemption for regulated conduct with respect to competition legis-

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256. W.T. STANBURY & P. THAIN, THE ORIGINS OF RENT REGULATION IN ONTARIO ch. 9 (Ontario Commission of Inquiry into Residential Tenancies, Research Study No. 17, 1986).

257. For a more detailed discussion, see *supra* notes 111-28 and accompanying text.

258. Telesat Canada, Proposed Agreement with TCTS, Telecom. Decision CRTC 77-10, 3 C.R.T. 265 (Aug. 24, 1977) (varied by Order-in-Council PC 1977-3152, Nov. 3, 1977).

259. For example, the Caplan-Sauvageau report recommends that "broadcasting licenses should include an obligation to establish an equal employment opportunity program" and referred specifically to women and members of minority groups. Not only that, but "all broadcasters should ensure that women and minority groups have an equal opportunity to produce and disseminate their works." With the sharp drop in energy prices, the Province of Alberta wants to deregulate natural gas prices. G. CAPLAN & F. SAUVAGEAU, *supra* note 7, at 144. *See Globe and Mail*, Oct. 30, 1986 at 86, Oct. 23, 1986 at B19. For earlier examples, see Stanbury & Thompson, *supra* note 53; Stanbury, *Reforming Regulation in Canada: Political Pressure and Policy Responses*, in PAPERS AND COMMENTS DELIVERED AT THE EIGHTH ANNUAL WORKSHOP ON COMMERCIAL AND CONSUMER LAW 115 (J. Ziegel ed. 1980).

lation. The most common, but usually implicit, reason for the use of direct regulation is to redistribute income in a generally less visible fashion. For example, instead of paying even larger cash subsidies to the farmers, supply management regulation has been used to raise consumer prices and provide better returns to farmers.

Canada has made more extensive use of direct regulation than the United States. It also has been slower and more reluctant to reform such regulation, including outright deregulation, than has the United States. The scope and nature of direct regulation and its reform in Canada has been strongly influenced by the nation's size (both in area and population), its location adjacent to the economically and politically more powerful United States and by the nation's political institutions, including its particular variant of federalism. Direct deregulation has both been shaped by Canada's industrial structure and has played an important role in shaping that structure.

The basic values that have influenced the design of political institutions have also influenced the Canadian regulatory structure. For example, the desire to resolve conflicts by political bargaining rather than litigation is reflected in the political control over regulation in Canada and in the bargaining that ensues between the federal and provincial governments. This bargaining even takes place in areas where one level appears to have exclusive jurisdiction.

Direct regulation in Canada exists in the context of a government sector that is substantially larger than that in the United States. For example, in railroads, airlines, broadcasting, telecommunications, and public utilities, federal or provincial Crown corporations are major suppliers. It is no wonder that deregulation has prompted efforts to privatize some of these firms.

Direct regulation in Canada has been strongly marked by the federal government's virtual obsession with national unity and identity in the face of powerful centrifugal forces: the wealth and power of the United States; regional cleavages based on different economic interests and cultural values; pressures within Quebec; and economic forces (north-south) that are perpetually at odds with political ties (east-west). The regulation of broadcasting has been used to require the production of a higher level of Canadian content in the name of maintaining unity and protecting Canada's cultural sovereignty. The fear of United States domination is also the basis of the general regulation of

foreign ownership and highly specific controls in certain industries (*e.g.*, banking, airlines, and broadcasting). The regulation of transportation has been used to foster a level and distribution of transportation infrastructure beyond that which the market would provide.

Direct regulation is seen in Canada as a supremely political, rather than a technical, instrument of government. Two types of evidence attest to this fact: the purposes to which such regulation is put (often best identified from its effects when the policy is a long-standing one) and the design characteristics of the regulatory process. The political nature of direct regulation in Canada is apparent by the fact that regulatory regimes are designed to give the government of the day a number of means of influencing the behavior of regulatory agencies. The decisions of most regulatory agencies are subject to appeal to the Cabinet as well as the courts. On some matters, some agencies only make recommendations to a minister or the Cabinet. Some agencies are subject to political directives. It is a fairly common practice for the minister responsible to issue policy statements to guide the deliberations of regulators. It is also common to appoint former politicians and public servants to regulatory bodies. The overall effect of such practices is to make regulation a political process despite the trappings of judicialized decision making.

Direct regulation has been used extensively to redistribute income in a variety of ways: from consumers to producers, among groups of consumers and from producers to consumers. Indeed, it is impossible to find an example of direct regulation in Canada where redistribution has not been an important objective. The use of regulation to enhance national unity, identity or sovereignty objectives is not confined to broadcasting or foreign ownership. Some aspects of the regulation of transportation, telecommunications, energy and financial institutions are said to be for these purposes.

The reform of direct regulation has been less extensive in Canada than in the United States, and it has occurred from five to ten years after comparable changes in the United States. Canada has taken an evolutionary approach to reform, moving incrementally and slowly to allow the stakeholders time to adapt. However, changes in direct regulation in the United States have spilled over into Canada in two ways: (1) the transmission of ideas and accounts of experience with reform, which are attributable to a common language and the large scale importation of

United States communications; and (2) direct effects transmitted through industries in which transborder activity is substantial.

While deregulation has or is about to occur with respect to brokerage rates, airlines, rail freight, oil and natural gas prices and exports, and the ownership of securities dealers, Canada has also extended the scope or increased the stringency of direct regulation in the 1970s and 1980s. For example, regulation was extended to pay TV, Canadian content requirements for radio and TV were increased, rent controls were imposed and several efforts were made to generally limit wage and price increases. At the same time, several important types of direct regulation have been virtually untouched by the age of regulatory reform: the distribution of electricity and natural gas; supply management schemes for agricultural products; and the regulation of taxi cabs by local governments.

While reform in the form of deregulation has required changes in statutes or subordinate legislation, less far-reaching reforms have been accomplished by means of regulators reinterpreting existing legislation on a case by case basis. In some cases this has been preceded by government policy statements. In no case in Canada have the courts played a major role in the regulatory process.

Figure 1
Direct Regulation in Canada: Scope, Level, Institutional Design, Extent of Public Enterprise, 1986

Sector/ Industry/Product	Level(s)	Regulatory Body	Name of Regulatory Body	Extent of Public Ownership
• **Transportation**				
• airlines	F	SRA	Canadian Transport Commission	- Air Canada, has about one-half the domestic market
• rail passenger	F	SRA	CTC	- VIA Rail, a Crown corporation has 100% of the market
• rail freight	F	SRA	CTC	- CNR has about one-half the market
• marine	F	SRA	CTC	- very little (CNR sub.)
• trucking (inter-provincial & transborder)	F*	SRA	CTC delegated to provincial regulators	- none
• trucking (intra-provincial)	P	SRA	provincial public utilities commission	- none
• commodity pipelines	F	SRA	CTC	- none
• inter-city buses	P	SRA	provincial PUCs	- very little (Saskatchewan)
• local transit	L	L*	city council	- probably the majority
• taxi cabs	L	LD/SRA	city council/taxi commission	- none
• **Agricultural products**				
(a) supply mgt. bds.				
• milk	F/P	SRA	Canadian Dairy Commission	- none
• eggs	F/P	SRA	Canadian Egg Marketing Agency	- none
• broilers	F/P	SRA	Canadian Chicken Mktg Agency	- none
• turkeys	F/P	SRA	Canadian Turkey Mktg Agency	- none
• tobacco	F/P	SRA	Ontario Flue-Cured Tobacco Marketing Board	- none
(b) other boards				
• wheat	F	CC/SRA	Canadian Wheat Board	- none
• hogs	P	SRA	e.g. Alberta Hog Marketing Board	- none
• fruit & vegetables	P	SRA	various	- none
• other	P	SRA	various	- none

Figure 1 (contd.)

Sector/ Industry/Product	Level(s)	Regulation Body	Name of Regulatory Body	Extent of Public Ownership
• **Utilities**				
• electricity distribution	P	SRA	provincial PUCs.	- at least 90% by prov. Crown corps.
• natural gas distribution	P	SRA	provincial PUCs.	- a little by prov. Crown corps.
• **Telecommunications**				
• telephone	F,P	SRA/CAB	CRTC; prov. PUCs; Saskachewan Cabinet	- 3 prairie provinces own their telephone co.
• **Financial institutions/services**				
• banks	F	LD	Dept. of Finance, Inspector General of Banks	- none
• credit unions	P	LD	various departments	- none
• trust companies	F,P	LD	Dept. of Fin., Superintendent of Insurance, various prov. depts.	- 4 provinces have own auto insurance companies (compulsory)
• securities dealers/brokers	P	SRA/LD	e.g. Ontario Securities Comm; B.C. Superintendent of Brokers in Dept. of Consumer & Corp. Affairs	- none
• **Broadcasting**				
• radio	F	SRA	CRTC	- moderate, fed. Crown corp, CBC
• television	F	SRA	CRTC	- quite extensive via CBC
• cable TV	F	SRA	CRTC	- none
• pay TV	F	SRA	CRTC	- none
• **Energy (production export)**				
• oil	F,P	SRA	National Energy Bd; Alta	- moderate, Petro-Canada has 25% of retail market
• natural gas	F,P	SRA	NEB, APRCB	
• nuclear	F	SRA	AECB (re entry & safety)	- AECL builds 100% of reactors for provincial Crown corp.
• electricity	F	SRA	NEB (exports only)	- at least 90% by provincial Crown corps.

Figure 1 (contd.)

Sector/ Industry/Product	Level(s)	Regulation Body	Name of Regulatory Body	Extent of Public Ownership
• **Rent Controls**	P	SRA/LD	various, e.g. Residential Tenancies Commission in Ontario, 1979-1986	- in Ontario government owned or assisted rental housing is 14% of the market
• **Foreign Ownership**	P,F	SRA/LD	Investment Canada (federal)	- na
• **Wage and Price Controls**	F,P	SRA/LD	e.g., federal Anti-Inflation Board, 1975-78	- na

Notes

F = federal government
P = provincial government
F* = federal jurisdiction, but delegated to the provinces
L = local (municipal) government
L* = local government body, usually the city council, but in most cases fares are set in consultation with the province because of their subsidies
LD = line department
SRA = statutory regulatory agency
PUC = public utility commission (or board).
na = not applicable

Figure 2

Contextual Factors and Their Implications for Direct Regulation in Canada

Contextual Factors	Some Implications for Direct Regulation
* Small population (25.3 million in 1986) in an enormous land mass (slightly larger than U.S.) with a harsh climate	* Concern about national unity; regulation used in an effort to knit the country together. * Small markets, therefore often need only a very few suppliers so as to obtain economies of scale and avoid inefficient competition; use restrictive regulation to ensure financial viability of few existing suppliers to provide transportation and communications infrastructure. * Use regulation and public enterprise to ensure adequate infrastructure throughout the nation; private enterprise often deemed to be too slow, not able to take the risks, or only serve large centers. * Use control over entry to facilitate cross-subsidization and the extension of services to uneconomic markets in the name of political integration.
* United States as the closest neighbour; most Canadians live close to the border (common language; different history; economy over 11 times the size of Canada's; extensive U.S. investment in Canada)	* Considerable economic integration including regulatory systems that affect trans-border activities, e.g., airlines, rail freight, trucking, broadcasting, cable TV, export of energy. * Canadians fear U.S. domination in economic and political terms; regulation used to preserve Canadian identity and autonomy, e.g., Canadian content regulations in broadcasting. * Importation of U.S. ideas about regulation and regulatory reform; reaction to U.S. experience varies from completely uncritical embrace to unthinking hostility based on latent nationalism. * U.S. economy and political power has resulted in the general regulation of foreign investment in Canada and ownership controls in specific industries; also regulation of the export of oil, gas, electricity.

Figure 2 - continued

Contextual Factors	Some Implications for Direct Regulation
* Industrial structure — actually five distinct regions with different economic structures	* Primary resources in the West and Maritimes have required extensive regulation to collect rents (oil, gas, mining, forests, hydro electricity). * Central Canadian manufacturing has long been protected by tariffs and non-tariff barriers; tariffs stimulated foreign investment (branch plants) and inefficient manufacturing industries. * Continuous inter-regional tensions and desire to protect regional/local interests; regulation used to do this, e.g., preferential government purchasing policies, severe restrictions on interprovincial trade in beer and wine, use of local regulation to limit interprovincial competition in trucking. * Regulation of international trade has always been a significant issue, e.g., West generally supports free trade while central Canada is fearful.
* Political structure: Westminster or Cabinet government; Canadian variant of federalism	* Cabinet has a monopoly over the supply of legislation and can (and does) exercise a great deal of influence over regulatory regimes. * Regulatory jurisdiction is imperfectly divided, concurrent, vague, and gives the provinces a greater role by law and convention in more areas of regulation than in the U.S. * Concurrent federal-provincial regulatory jurisdiction is common in practice if not in law; the result is often conflict, rivalry, overlap and duplication; in general the effect is to politicize direct regulation, e.g., telecommunications, energy, trucking, energy. * By custom, ministers and regulators are accorded a great deal of discretion within broad statutory mandates. * Variety of ways in which politicians exercise influence over directly regulated industries: political appeals, policy statements, appointments, approval of subordinate legislation, federal-provincial agreements, etc. * Courts do not play a major role in direct regulation, but there is judicial review based on errors in law, natural justice and jurisdiction.

Figure 2 - continued

Contextual Factors	Some Implications for Direct Regulation
* Massive government intervention other than regulation (expenditures, tax expenditures, loans/ guarantees, public enterprises, suasion)	* Regulation is overlayed upon public enterprise in many sectors (airlines, railroads, electric and gas utilities, telephones, auto insurance). * Canadians accept extensive regulatory (and other types of) intervention to achieve a wide variety of non-efficiency goals. * Some privately and publicly owned firms in regulated industries are used as tacit or overt "chosen instruments" of government policy. * Some bailouts of firms and depositors in the financial sector in the past few years. * Some privatization of Crown corporations in 1985 and 1986.
* Basic values and attitudes	* Use direct regulation (and other forms of government action) to redistribute income in a wide variety of ways (groups, regions), to strengthen Canadian identity and unity, to protect existing economic interests from competitive forces. * Regulatory reform is a slow/evolutionary process, seldom the result of sudden legislative changes even with a new government. * Ideological conflicts over the extent of direct regulation are muted. The emphasis is on pragmatism, protecting existing interests from sudden negative shifts, and protecting Canadian identity and sovereignty. * Canadians are generally less litigious than Americans and this applies to direct regulation; they tend to use the political arena to bargain a solution. * There is a strong redistributionist ethic, concern to protect the weak or disadvantaged. Regulation and other governing instruments are used to effect the desired redistribution in energy pricing, rail freight rates, telephone rates, utility rates, some agricultural products.

Figure 3

Timing of Deregulation or Major Liberalization Initiatives in Canada and the United States

UNITED STATES	CANADA
Airlines	
* 1977, Air Cargo Deregulation Act * 1976-78 liberalization via CAB decisions (Robson, Kahn) * October 1978, Airline Deregulation Act, phased in over 4 years * 1980, International Air Transportation Competition Act	* 1970-79, CP Air allowed more capacity to compete with Air Canada * 1979-80, liberalization of domestic charter regulations * May 1984, "New Canadian Air Policy", liberalized regulation of scheduled and charter services * July 1985, "Freedom to Move" paper, proposed virtually complete deregulation * June 1986, Bill C-126 proposed to deregulate airlines in southern Canada and liberalize regulation in the north; reintroduced as Bill C-18 in November 1986. New legislation in effect in 1988.
Rail Freight	
* 1976, Railroad Revitalization and Reform Act * 1980, Staggers Rail Act - phased deregulation	* November 1983, Western Grain Freight Transportation Act - ends the low, fixed rates for grain with full compensation * April 1985, restrictive amendments to Western Grain Freight Transportation Act * July 1985, "Freedom to Move" paper proposes almost complete deregulation * June 1986, Bill C-126, proposed phased deregulation to beyond U.S. position on some issues (reintroduced in a somewhat modified form in November 1986 as Bill C-18 - to come into effect in 1988)
Trucking	
* 1980, Household Goods Transportation Act * 1980, Motor Carrier Reform Act - phased deregulation	* 1984, Ontario permitted inter-corporate trucking for two years * February 27, 1985, federal-provincial agreement to implement liberalized regulation for extra-provincial trucking (inter-provincial and transborder) * July 1985, "Freedom to Move" paper proposed phased deregulation of extra-provincial trucking * June 1986, federal Bill C-127, Motor Vehicle Transport Act, to reclaim federal authority over extra-provincial trucking and deregulate it in stages (reintroduced as C-19 in November 1986 - to begin in 1988).

Figure 3 - continued

UNITED STATES	CANADA
Inter-city Buses	
* 1982, Bus Regulatory Reform Act	* January 1, 1986, Ontario ended regulation of fares, but continued to regulate entry * June 1986, federal Bill C-127, proposed phased deregulation re extra-provincial trucking and buses; reintroduced as Bill C-19 in November 1986
Broadcasting/Cable TV	
* 1981, FCC deregulation of radio * 1984, Cable Communications Act * 1984, FCC deregulated television broadcasting (modified trusteeship notion)	* 1983, CRTC permitted multiple suppliers of pay TV and did not regulate rates * 1986, Canadian content regulations decreased for TV and pay TV * August 1986, CRTC adopted more flexible regulations re cable TV including automatic, but limited, rate increases as a 2-year experiment
Telecommunications	
* 1971, FCC specialized common carrier decision * 1972, FCC domestic satellite open skies policy * 1979, FCC deregulation of satellite earth stations * 1982, FCC deregulation of resale and transponders * 1983, AT&T settlement resulting in creation of 7 separate regional companies to supply local telephone service and AT&T (long distance services and Bell Labs)	* 1977, CRTC applied nondiscrimination requirement to competitors as well as customers * 1979, CRTC allowed system interconnection for CNCP private line voice and data (BC Rail allowed in 1985) * 1980, 1982, CRTC allowed attachment of customer-owned terminal equipment and competition in terminal equipment market * 1983, CRTC/Gov't allowed structural reorganization of Bell Canada * 1984, CRTC refused to regulate cellular telephone rates, but DOC dictated only 2 firms per market * 1984, CRTC allowed non-Bell companies to use Bell lines to provide enhanced services * 1985, CRTC allowed resale and sharing (except public later voice toll services) but regulations (1986) were quite restrictive * 1985, CRTC allowed attachment of customer-owned PBXs

Figure 3 - continued

UNITED STATES	CANADA
Energy (natural gas and petroleum prices)	
* 1978, Natural Gas Policy Act - phased decontrol of gas prices * 1981, Executive Order decontrolling crude oil and refined products * October 1985, natural gas prices totally decontrolled	* June 1, 1985, crude oil prices deregulated; 1 and 2 year export contracts no longer regulated * November 1, 1985, domestic natural gas prices deregulated for new contracts for large industrial users; minimum export price for gas reduced; and export contracts for up to 2 years no longer regulated * May 1986, new formula increased the total amount of natural gas that can be exported * November 1, 1986, domestic natural gas prices deregulated; minimum export price for natural gas removed, but policy is that export prices not be below domestic prices
Financial Institutions and Markets	
* 1980, Depository Institutions Deregulation and Monetary Control Act * 1982, Garn-St. Germain Depository Institution Act	* 1980, federal Bank Act liberalized regulation somewhat, including allowing foreign banks 8% of domestic markets; increased to 16% in 1984 * 1983, Quebec removed restrictions on ownership of underwriters and securities dealers; Ontario permitted banks to market limited brokerage services * 1984, Quebec permitted mutual insurance and other insurance companies to diversify into other financial services * December 1986, Ontario removed restrictions on ownership of securities dealers and underwriters as of June 30, 1987; foreigners may own 100% as of June 30, 1988 * December 1986, federal government proposes changes that would increase competition among banks, trust companies and insurance companies, and permit common ownership of these institutions and investment dealers; but more stringent regulation of ownership by non-financial interests and of self-dealing; more powers for regulators to assure solvency

Figure 3 - continued

UNITED STATES	CANADA
Brokerage Rates	
* 1975, fixed rates abolished by SEC	* April 1, 1983, fixed rates abolished by the Toronto and Montreal stock exchanges.
	Other
	* June 19, 1986, federal Competition Act and Competition Tribunal Act (replaces Combines Investigation Act)
	* June 30, 1985, Investment Canada Act to replace Foreign Investment Review Act of 1974

Figure 4

Regulatory Reform "Scorecard" re Direct Regulation in Canada

1. **"Deregulation"** - situations where all of the substantive elements of a direct regulatory system have been removed (or are in the process of being removed), or have been proposed to be removed by a government or one of its agencies. Deregulation may be implemented in stages or phases.

   (a) **Past**

   * Brokerage fees on the Toronto and Montreal stock exchanges, deregulated April 1, 1983.
   * Restrictions on ownership of securities/investment dealers in Quebec removed, 1983.
   * Grain freight rates deregulated (with compensation), November 1983; but some regulation reintroduced in 1985.
   * Oil prices deregulated and controls over short term export contracts removed, June 1, 1985.
   * Volume controls removed for natural gas export contracts of up to 2 years, November 1, 1985.
   * Domestic natural gas prices deregulated and the minimum export price for gas was removed (although subject to the general policy that it not be below the domestic price), November 1, 1986.
   * Inter-city bus fares deregulated by Ontario, January 1, 1986.

   (b) **Pending**

   * Airlines in southern Canada, virtual deregulation proposed in Bill C-18, November 1986 (to come into effect in 1988)
   * Rail freight, phased deregulation proposed in Bill C-18, November 1986 (to come into effect in 1988)
   * Inter-provincial and transborder trucking, phased deregulation proposed in Bill C-19, November 1986 (process begins in 1988).
   * Controls removed over the ownership of Ontario securities dealers by domestic financial or non-financial interests effective June 30, 1987. Foreign interests limited to 50% as of that date and 100% as of June 30, 1988.

2. **"Notable Liberalization"** - situations where the stringency and/or scope of direct regulation has reduced to a significant degree, but there has not been outright deregulation:

   * Airlines, by means of policy statements, changes in regulations and decisions of the regulator between 1979 and 1984.
   * Telecomunications, by means of decisions of the regulator between 1977 and 1985.
   * Foreign investment: replacement of the Foreign Investment Review Act by the Investment Canada Act in June 1985.

Figure 4 - continued

* Cable TV rates, limited automatic increases allowed for 2 years, effective August 1, 1986.
* Entry of foreign banks permitted in 1980 but limited to 8% of total domestic assets; increased to 16% in 1984.
* Reduction in Canadian content requirements for pay-TV in 1986
* Banks were permitted to offer discount brokerage services through their branches in 1984.
* Quebec permitted both financial and non-financial interests to own a securities dealer in June 1983. A bank started a brokerage firm in November 1986.
* Quebec permitted mutual insurance companies to set up "downstream" holding companies, broaden their access to new capital and invest in new activities. Quebec-based insurance companies were allowed to diversify into other financial services, and to accept deposits in June 1984.
* Method of determining the minimum export price for natural gas was altered, and effectively reduced as of November 1, 1985; the minimum export price requirement was officially eliminated November 1, 1986, but export prices are generally not to be below domestic prices.
* Certain changes in the federal regulation of financial institutions proposed in December 1986; common ownership of banks, trust and loan companies, insurance companies and investment dealers will be permitted; each institution will be permitted to offer a wider range of services in competition with other institutions. However, tighter restrictions were placed on the ownership of banks, trust, loan and insurance companies. See Figure 3.
* Ontario permitted intercorporate trucking on an interim basis, March 1, 1982.
* Limited liberalization of intra-provincial trucking regulation enacted or proposed in all provinces (except Alberta which does not impose economic regulation) between 1983 and 1986.

3. **"Almost No Change"** - situations in which little or no change was made to a regime of direct regulation.

* Public utilities: distribution of electricity and natural gas which is regulated by the provinces.
* Supply management marketing boards for eggs, milk, broilers, turkeys, tobacco.
* Inter-city buses (although Ontario eliminated fare regulation January 1, 1986).
* Taxi cabs (fares and entry regulated by local governments).

Figure 4 - continued

4. **"Going Backwards"** - examples of regulatory regimes where changes were made (or proposed) that made regulatory constraints more stringent or extended the scope of direct regulation.

   * 1980 National Energy Program: massive government intervention, but greatly reduced beginning in 1985.
   * Decision to regulate pay TV in 1982, although competition was permitted and rates were not regulated; substantial Canadian content requirements imposed.
   * More stringent Canadian content regulations in broadcasting in 1983.
   * Certain decisions of CRTC telecommunications, e.g., Telesat 1977, rejection of rate rebalancing, and entry of competition into the public voice toll market in 1985; also the Cabinet's decision to allow Telesat Canada to join TCTS and eliminate competition between satellite and terrestrial long distance transmission.
   * Imposition of rent controls by the provinces in 1974 and 1975; these were phased out by several provinces between 1977 and 1983. Ontario, however, extended the scope of its rent controls and made them more stringent in 1985 and 1986.
   * Various efforts by the federal government to control wages and prices: Food Prices Review Board (1973-75); Anti-Inflation Board — mandatory controls (1975-78); "6 and 5" program (1982-85) — mandatory for the federal government and most provincial governments, but "guidelines" for the private sector.
   * Proposed amendment to the Patent Act in 1986 that will permit compulsory licensing only after 10 years instead of immediately as required since 1969.
   * Proposed supply management marketing board for potatoes (not implemented).
   * Proposed broader supply management scheme for tobacco to include other producers besides Ontario (not implemented).
   * Recommendations of the Task Force on Broadcasting Policy (September 1986) propose more government intervention including higher Canadian content requirements.