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POLICY MAKING IN REGULATION: TOWARDS A NEW DEFINITION OF THE STATUS OF INDEPENDENT REGULATORY AGENCIES IN CANADA

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I. INTRODUCTION

The purpose of this article is to explore the subject of policy making in regulation and particularly how it affects the relationship between independent regulatory agencies and the rest of government.¹ Two years ago,

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¹ As Richard Schultz has pointed out, "Compared to their American counterparts, Canadian independent regulatory agencies have been almost completely ignored by both academic students of public administration and governmental inquiries into administrative issues and problems." *Book Review* (1978), 21 Can. Pub. Adm. 291 at 291. There are, however, some encouraging recent signs of greater academic interest in regulation. Schultz himself has contributed an excellent introductory overview, "Regulatory Agencies and the Canadian Political System" in Kernaghan, ed., *Public Administration in Canada* (3d ed. Toronto: Methuen, 1977) at 333-43, and *Intergovernmental cooperation, regulatory agencies and transportation regulation in Canada: the case of Part III of the National Transportation Act* (1976), 19 Can. Pub. Adm. 183. For more specialized studies of transportation regulation, see for example, Purdy, *Transport Competition and Public Policy in Canada* (Vancouver: University of British Columbia Press, 1972); Studnicki-Gizbert, ed., *Issues in Canadian Transport Policy* (Toronto: Macmillan of Canada, 1974), and Ruppenthal and Stanbury, eds., *Transportation Policy: Regulation, Competition and the Public Interest* (Vancouver: The Centre for Transportation Studies, University of British Columbia, 1976). For similar studies on telecommunications regulation, see English, ed., *Telecommunications for Canada* (Toronto: Methuen, 1973), and Janisch, ed., *Telecommunications Regulation at the Crossroads*, Dalhousie Continuing Legal Education Series, No. 13 (Halifax: Faculty of Law, Dalhousie University, 1976).

The start of a much needed reassessment of the role and effectiveness of regulation can be most usefully seen in the Ontario Economic Council's *Government Regulation: Issues and Alternatives, 1978* (Toronto: Ontario Economic Council, 1978).

The Law Reform Commission of Canada in its Administrative Law Series has sponsored a number of agency studies: Doern, *The Atomic Energy Control Board* (Ottawa: Minister of Supply and Services, 1976); Lucas and Bell, *The National Energy Board* (Ottawa: Minister of Supply and Services, 1977) and Janisch, *The Regulatory Process of the Canadian Transport Commission* (Ottawa: Minister of Supply and Services, 1978). A shortened version of a number of these agency studies as well as a number of original research papers may be found in the first comprehensive Canadian text, Doern, ed., *The Regulatory Process in Canada* (Toronto: Macmillan of Canada, 1978).

The Institute for Research on Public Policy is currently undertaking a series of studies of government regulation, see *Annual Report 1977* at 3-4. Its first three publications are: Rowley and Stanbury, eds., *Competition Policy in Canada* (Toronto: Butterworths, 1978), Stanbury, ed., *Studies on Regulation in Canada* (Toronto: Butterworths, 1978), Reschenthaler and Roberts, eds., *Perspectives on Canadian Airline Regulation* (Toronto: Butterworths, forthcoming).

This article is part of a continuing study of policy making in regulation. The subject was first tackled in Chapter VII "The Commission and Transportation Policy," of the author's agency study (*supra*) of the Canadian Transport Commission for the Law

while still Chairman of the National Energy Board, Marshall Crowe stated that

[T]he central issue that regulatory agencies face today [is probably] the relations of these agencies with the government and with government policy and how they are to play their role of independent regulatory bodies when at the same time, clearly they have very close connections with the government. The government is ultimately responsible under Parliament for policies that are going to be followed and the rôle of the regulatory agency necessarily puts it right in the centre of very important policy questions.²

On the same occasion, Guy Roberge, Vice Chairman of the Canadian Transport Commission, observed: "a regulatory body cannot be half-slave and half-free."³ Since then, this issue has become even more acute and gives every indication of heading towards crisis proportions.

Not only is this issue deserving of study on pathological grounds, but there are also encouraging signs of a ground-swell of concern which may lead to that type of fundamental reappraisal which must precede reform. It is thus possible, amidst much depressing evidence of chaos throughout the regulatory system, to subscribe to Pope's view of the innate optimism of man (and particularly law professors): "Hope springs eternal in the human breast,/ Man never is, but always to be blest."

Hopeful omens are to be found in a number of places. First, the Royal Commission on Corporate Concentration concluded that there was an urgent need to reexamine the whole nature of economic regulation in Canada and identified some of the many questions that needed to be answered.

For example, is there any acceptable way of reconciling the principle of regulatory independence with political control? Should government be able to overrule, direct or otherwise interfere with the decisions of independent regulatory boards exercising powers given them by Parliament and, if so, on what grounds? To what extent and in what manner should such executive interference be subject to the supervision of Parliament? What should be the proper scope of interest group participation in the regulatory rule-making process, and how can this be both assured and controlled? How often, in what way and in what respects should regulatory boards be accountable to the legislatures that create them? Is Parliament able to examine critically the policies and decisions of regulatory boards (remembering that it is already widely criticized for its inability to monitor regular government activity). Is it realistic to expect legislators to be interested in doing so?⁴

Reform Commission of Canada [hereinafter CTC Study]. These initial ideas were further developed in a paper presented to the Administrative Law Section of the Canadian Association of Law Teachers at the Learned Societies Conference at Fredericton in June 1977, Janisch, *The Role of the Independent Regulatory Agency in Canada* (1978), 27 U.N.B. L.J. 83, and in a paper presented to the Conference on Administrative Justice sponsored by the Common Law Students' Society, Faculty of Law, University of Ottawa and the Canadian Institute for the Administration of Justice held in Ottawa on January 26-27, 1978, entitled, "Political Accountability for Administrative Tribunals," *Conference on Administrative Justice 1978: Papers and Comments*, 1-44. The author is presently engaged in a comprehensive study of regulatory policy making for the Institute for Research on Public Policy which will take the form of a monograph to be completed early in 1979.

² Law Society of Upper Canada, *The Conduct of Hearings by Federal Administrative Agencies* (Toronto: Law Society of Upper Canada, 1977) at 31.

³ *Id.* at 30.

⁴ Can., Royal Commission on Corporate Concentration, *Report* (Ottawa: Minister of Supply and Services, 1978) at 404.

Second, the Royal Commission on Financial Management and Accountability will be dealing in its report with some aspects of the accountability of independent regulatory agencies.⁵ Third, the government has recently released a Blue Paper on the direction, control and accountability of crown corporations, and a similar statement on regulatory agencies may be forthcoming.⁶ Fourth, finally, and most significantly, in July, 1978, the Economic Council of Canada was requested to undertake a full-scale review of government regulation in Canada with terms of reference which clearly call for an intensive assessment of the techniques employed in regulatory policy making and the role of the independent regulatory agencies.⁷

Before proceeding further, a caveat must be entered. As must be obvious to even the most casual observer, North America is currently going through a period of profound reexamination of the value and effectiveness of regulation.⁸ It may well be that no amount of organizational tinkering will overcome

⁵ Can., Royal Commission on Financial Management and Accountability, *Progress Report* (Ottawa: Minister of Supply and Services, 1977) at 45-48.

⁶ Privy Council Office, *Crown Corporations: Direction, Control, Accountability: Government of Canada's Proposals* (Ottawa: Minister of Supply and Services, 1977). Gordon S. Smith, Senior Assistant Secretary, Privy Council Office, was of the view that a similar systematic assessment of the independent regulatory agencies was planned by government but warned that there may be a delay due to the great variety of types of such agencies. His remarks were made in April, 1978; see *Speakers' Remarks, Seminar for Members of Federal Administrative Tribunals* (Ottawa: Law Reform Commission of Canada, 1978) at 177.

⁷ Letter from Prime Minister Trudeau to Dr. Sylvia Ostry, Chairman of the Economic Council of Canada (July 12, 1978).

⁸ The most useful quick reference source to these developments is the American Enterprise Institute's journal on government and society, *Regulation*, a bimonthly publication which commenced in July/Aug. 1977.

It is not yet clear whether in Canada current expressions of concern about excessive regulation will actually be acted on. In their communique on "The Business Environment" in February, 1978, the First Ministers stated: "The burden of government regulation on the private sector should be reduced and the burden of overlapping federal and provincial jurisdictions should be eliminated. Procedures will be instituted to review the effects of regulatory action on jobs and costs. First Ministers agreed that the whole matter of economic regulation at all levels of government should be referred to the Economic Council for recommendations for action, in consultation with the provinces and the private sector." Sylvia Ostry, Chairman, Economic Council of Canada, *Regulation Reference: a Preliminary Report to First Ministers*, November, 1978, at 80. In his subsequent letter to the Chairman of the Economic Council, Prime Minister Trudeau observed: "As you know, there has developed in Canada a strong concern that increasing government regulation might be having serious adverse effects on the efficiency of Canadian firms and industries and on the allocation of resources and distribution of income." *Id.* at 78. The *Preliminary Report*, released on November 28, 1978, contains this same sense of urgency and it is clear that the Economic Council is determined to undertake a fundamental reconsideration of the efficacy of the existing regulatory system. The report includes a revealing overview of what is actually being done to reduce government regulation and the burden it places on the private sector. This is a modest inventory of deeds when compared with the copious catalogue of expressions of concern by all levels of government. For example, at the federal level, the only significant development has been the establishment of a Socio-Economic Impact Analysis (SEIA) program for major proposed health, safety and fairness (HSF) regulations. *Id.* at 75-77. At the provincial level emphasis would appear to be on the simplification and rationalization, rather than elimination, of regulation. For instance, in Ontario it has been announced that a number

the problems inherent to regulation itself. For Roger Noll, for example, it is regulation itself that "is inherently flawed, regardless of the form of the organization of the regulatory agencies."⁹ Yet, it is also apparent that regulation is not going to disappear overnight, and even if there were a substantial reduction in the amount of pure economic regulation in favour of unregulated competition, there would also be other areas of state regulation demanding rational organization such as those concerning health, safety and the environment.¹⁰ Nevertheless, it should be noted that this discussion of the organization of regulation should not be taken as implicitly endorsing the effectiveness of such regulation.

II. SOME WORKING DEFINITIONS

While it is not proposed to wander into any unproductive semantic thickets, it is essential to get an early grasp, at a pragmatic level at least, of the most prominent features of the area under investigation. The major focus of this article will be on what is known as "economic regulation." This involves the role of government in the setting of prices, the controlling of entry into particular sectors of economic activity and the establishment of standards of service. The main actors will be the so-called "independent regulatory agencies," such as the Canadian Radio-television and Telecommunications Commission (CRTC), the Canadian Transport Commission (CTC) and the National Energy Board (NEB), which are charged with varying degrees of authority to supervise and regulate the industries that come within their jurisdiction. The uniqueness of these agencies lies in the fact that they do not fall within established departmental hierarchies and are run by commissioners who have tenured appointments—hence the appellation "independent." Two main reasons are normally advanced to justify this independence. First, it is said that economic regulation requires a high degree of expertise, continuity and stability, and this cannot normally be obtained in traditional departmental structures. Second, because many regulatory decisions impinge on private rights and often involve the weighing up of competing claims to licences and the like, it is necessary to insulate regulation from the political

of inactive tribunals will be eliminated and greater use made of general appeal tribunals; "Cabinet approves proposal to trim 46 agencies," *Globe and Mail*, Dec. 1, 1978. At the same time, however, the government has backed away from any substantial deregulation of the trucking industry; "OTA told Davis not proceeding with selective deregulation bill," *Globe and Mail*, Nov. 22, 1978. This decision may be contrasted with the profound changes underway in the United States; "Truckers Roll Toward Deregulation," *Fortune*, Dec. 18, 1978, 74.

⁹ Noll, *Reforming Regulation: An Evaluation of the Ash Council Proposals* (Washington: The Brookings Institution, 1971) at vii.

¹⁰ This is the position of Ralph Nader, for example. In his foreword to Green, ed., *The Monopoly Makers* (New York: Grossman, 1973), he argued very forcefully that while competition may be an efficient and equitable allocator of some resources, it is still imperfect as may be seen in the continuing need for safety regulation and the inability of the market adequately to take into account externalities in pollution. Thus he would argue in favour of the dismantling of economic regulation which inhibits competition but retention of health and safety regulation. All too often, of course, "deregulation" is seen by the business community as a means to escape unwanted health and safety regulation and not as a requirement that they should get out and compete in a less controlled environment.

process in order to ensure impartiality.¹¹ But this is not an easy thing to do in a parliamentary system of government. Thus, for the constitutional purist, independent regulatory agencies are "structural heretics" which do violence to the constituted system of ministerial responsibility.¹²

A comparison will be made in this article between an adjudicative role for a regulatory agency and a policy-making role. The difference, of course, is only one of degree, but it is of the greatest significance. In an adjudicative role, an agency concentrates on deciding matters on a case by case basis, seeking to apply known principles to the facts of each case. In an extreme form, this leaves little room for policy making, because it is assumed that the policy is contained in the empowering legislation and the agency simply has to apply it in the particular case. At the other end of the spectrum is the role of a conscious policy maker, wherein a regulatory agency embarks on an essentially legislative role and seeks to set out in advance the factors that it will take into account in deciding individual cases. This distinction may be seen in the manner in which a regulatory agency might approach the issuance of licences under a legislative standard which provides that they are to be issued where "public convenience and necessity" so indicates. An agency committed to an adjudicative approach will wait for licence applications and deal with them one at a time on their individual merits. Over time a certain pattern may develop, and the agency may treat its decisions to some degree as precedents; this means that a policy on the issuance of licences will eventually emerge. On the other hand, an agency could announce at the outset the type of factors it is going to apply—what evidence it will require of "need," for example, or whether "public convenience" would be served by granting competing licences. In reality, neither extreme is likely to be adopted, but there can still be significant differences in approach. An active policy-making approach by an independent regulatory agency immediately raises questions as to political accountability for that policy and the legitimacy of nonelected officials making major policy determinations for which there will be no ministerial responsibility. An excessively adjudicative approach by an independent regulatory agency raises acute problems of lack of consistency and predictability in decision making, as well as creating a policy vacuum which is difficult to fill. This leads to the ironic situation which we have in Canada today in which one regulatory agency, the CRTC, is criticized for making too much policy on its own, while another independent regulatory agency, the CTC, is criticized for not making enough policy!

Sections III and IV of the article will look at the two models at either end of the adjudicative-policy making spectrum which are to be found in England and the United States. It will be pointed out that major recent developments in both countries should be of particular interest to Canadians, since they demonstrate the type of subtle techniques for reconciling independence and accountability which have so far not been thought through in Canada. Section V contains an extensive analysis of the present confusion in regulation in this country, which to a large extent has flowed from a lack

¹¹ For an introductory overview, see Schultz, *supra* note 1.

¹² Hodgetts, *The Canadian Public Service* (Toronto: University of Toronto Press, 1973) at 143-47.

of any agreement on the role of the independent regulatory agency in contemporary government. Finally, in section VI some indication will be given of the road which reform will have to take if a way is to be found out of the present destructive muddle.

III. THE ENGLISH ADJUDICATIVE MODEL

H. W. R. Wade has recently stated: "Tribunals are normally employed where decisions can be decided according to rules and there is no reason for the minister to be responsible for the decision."¹³ The only major exception to this rule is to be found with respect to the regulation of transportation, particularly air transportation, where administrative tribunals are used in a "licensing system dominated by policy."¹⁴ An anomalous feature of such tribunals has been that much of their work is governed by policy rather than by law. They constitute those abnormal cases where appeal lies only to a minister and thus "the minister's policy may influence the tribunal through the minister's appellate decisions, but then this is what Parliament intended. In all other cases, tribunals are completely free from political control, since Parliament has put the power of decision into the hands of the tribunal and of no-one else. A decision taken under any sort of external influence would be invalid."¹⁵ Wade has even suggested that the term "administrative" tribunal may be a misnomer. "[T]he decisions of most tribunals are in truth judicial rather than administrative, in the sense that the tribunal has to find facts and then apply legal rules to them impartially, without regard to executive policy."¹⁶

Lord Denning, in his 1949 Hamlyn Lecture, captured the essence of the English strictly adjudicative model.

The uneasiness which has been felt about the tribunals is undoubtedly due to the fact that their development is closely linked with the enforcement of policy: and on that account their independence is suspect. It is felt, rightly or wrongly, that, as the Government Departments appoint the members, they have power indirectly to influence the decisions of the tribunals. Indeed, one of the advantages claimed for the tribunals is that greater uniformity of decision can be obtained in them than in the ordinary courts. If that is so, it can only be done by circulars or directions from the Government Departments, explaining their view of the law which the tribunals should apply. Uniformity achieved by such means is bought at too high a price. The tribunals have to decide issues between the individual and the State: and, if the scales are to be kept even it is vital that the law they apply should be laid down by a Superior Court and not by a Government Department.¹⁷

It must be recognized that the possibilities for growth of independent

¹³ Wade, *Administrative Law* (4th ed. Oxford: Clarendon Press, 1977) at 744-45.

¹⁴ *Id.* at 745. As another commentator put it, the Air Transport Licensing Board was "given the duty of regulating competition among airlines in this country in the best interests of the public; it is left to the Board to determine what these interests are. The discretion is so wide that these tribunals are, in effect, policy making bodies, rather than administrative or even judicial." Elcock, *Administrative Justice* (London: Longmans, 1969) at 30.

¹⁵ *Supra* note 13, at 746.

¹⁶ *Id.* at 743.

¹⁷ Denning, *Freedom Under the Law* (London: Stevens and Sons, 1949) at 83.

regulatory agencies with extensive policy-making capability has been severely curtailed in England by the decision to nationalize, rather than regulate, key industries. Nevertheless, it should be noted that the reluctance to grant policy-making powers to bodies for which there is no direct political accountability has been based, in large measure, on respect for a constitutional commitment to the doctrine of ministerial responsibility. Indeed, the Civil Aviation Authority (CAA), the only English equivalent to a typical Canadian regulatory agency,¹⁸ was described at its creation as a "constitutional innovation," and subsequently as being possessed of a "peculiar status" as a government agency.¹⁹

It had been felt that it was essential to set up an impartial, independent body to deal with competition among air carriers so as to reassure the parties that they would receive even-handed decision making. This, of course, is particularly critical in the regulation of competition in the provision of air services because of the built-in conflict of interest between government-owned and privately owned airlines and the concern that a government department would inevitably favour the public airline. While this pointed in the direction of granting wide policy-making capability to a body independent of departmental control, it was realized that any such development would run counter to the whole notion of direct ministerial responsibility for major policy decisions. The initial attempt to blend together regulatory independence and political accountability was not successful.

The Air Transport Licensing Board (ATLB), an independent licensing authority, was set up by the *Civil Aviation (Licensing) Act, 1960*.²⁰ This legislation, however, failed to deal with the vital question of how government policy was to be transmitted to the Board. Admittedly there was a provision for appeal to the Minister, but, as has been the experience in Canada, such appeals constituted an inherently unsatisfactory technique for transmitting policy. The Minister was to allow many appeals, but this merely disrupted the nascent attempts by the Board to establish a coherent policy on competition. The Act made no clear provision for policy direction from government, and thus when general directives were issued, the Board simply ignored them. To add still further to the confusion, the ATLB did not resort to the policy-making tools available to an American-style independent regulatory agency, such as open precedents and rule making, which could possibly have made up for the lack of any effective direction from government. The result was the worst of all possible worlds—none of the benefits of either ministerial responsibility or of independent decision making.

Despite the shortcomings of the ATLB, the 1969 Edwards Committee Report, *Air Transport in the Seventies*,²¹ advocated continued reliance on the

¹⁸ Baldwin, *A British Independent Regulatory Agency and the "Skytrain" Decision*, [1978] P.L. 57. The balance of this section of the article is based very largely on Baldwin's most valuable analysis.

¹⁹ All this should be of particular interest to Canadians in view of the statement in the preamble to the *British North America Act* that Canada is to have "a constitution similar in principle to that of the United Kingdom."

²⁰ 8 & 9 Eliz. 2, c. 38 (U.K.).

²¹ *Report of the Committee of Inquiry into Civil Aviation Transport, British Air Transport in the Seventies* (Cmnd. 4018, 1969).

concept of an independent licensing authority subject to two critically important improvements. As G. R. Baldwin notes:

The major problem in setting up a powerful agency was to create a workable relationship with the Minister. The Committee was aware that this presented "parliamentary and constitutional difficulties" but favoured the use of a written policy guidance system. Edwards saw the guidance as the key to the framework of the new Authority. It would eliminate the problems encountered in ATLB appeals and would mean that ministerial policy would have to be formulated precisely. The Committee stated that "far from reducing the responsibility of Ministers for producing and defending a civil aviation policy and keeping it up to date we want to see that responsibility actively discharged."

Edwards proposed that the appeals dilemma be solved by allowing appeals from CAA decisions not to the Minister but to the courts or to a special tribunal. They recommended that appeals should be allowed only on points of law or on its being shown that a decision was not consistent with the declared policy of the Government as set out in the guidance.²²

The policy guidance system was implemented in the 1971 *Civil Aviation Act*,²³ which established the CAA. However, contrary to the recommendations of the Edwards Report, ministerial appeals were retained on the ground that it would not be possible to set out guidance in terms sufficiently precise to restrict appeals and yet leave the CAA any real discretion.

The CAA has been much more successful than its predecessor. Three factors have apparently been essential to this improvement. First, the government made it clear from the outset that it would not allow as many appeals as previously, thereby giving the CAA an opportunity to formulate consistent policy. Second, the government has framed its policy guidance to the CAA with considerable precision. Third, as envisaged in the Edwards Report, the CAA has itself been actively involved in the formulation of policy guidance.

This is not to say that the CAA was simply handed over a policy-making blank cheque. Far from it. Thus, with respect to competition in long-haul scheduled service and in fares, the government has insisted on intervening, but only after extended consultation with the CAA.

On most matters the CAA has long been free to follow up its researches by developing its own medium or long term policy. It has done this, for example, on European routes and fares by introducing new fares structures and in generally re-shaping the charter/scheduled balance. Where the CAA has been overruled by the Secretary of State for Trade is on the competition policy on long-haul scheduled services and on the Skytrain issue. . . . [I]t should be noted that the CAA was at no time expected to be totally independent from government. On balance it would appear that a reasonable compromise has been struck. The CAA has on the whole been free to develop its own policies and has a very large say in any revision of its Guidance, [while] the Government has retained its power to control matters of major political concern.²⁴

While the CAA would thus appear to be an example of a workable compromise between independence and accountability in policy making, it has to be remembered that the whole concept of an independent regulatory

²² Baldwin, *supra* note 18, at 62.

²³ 1971, c. 75 (U.K.).

²⁴ Baldwin, *supra* note 18, at 69.

agency is alien to the English legal tradition, which favours the notion of an administrative tribunal undertaking only what amounts to judicial functions (in which there should be no government interference), rather than regulatory policy making (in which there should be government involvement). The need for a new legal perception was to become apparent in the celebrated Laker Airways case.²⁵

In 1972, Sir Freddie Laker (later to be described by Lord Denning with characteristic cryptic understatement as "a man of enterprise") proposed to the CAA his revolutionary low fare, walk on, no reservation North Atlantic Skytrain Service. Despite Laker's assurances that his service would tap an entirely new market, it was argued that Skytrain would have a damaging effect on more conventional scheduled carriers such as British Airways. Very clearly, Laker's proposal called for a major policy decision. The CAA granted Laker permission for his proposed service, and this decision was upheld in an appeal to the Minister, the Secretary of State. In January, 1975, British Airways applied to the CAA to have this permission reversed. The CAA refused to do so. In July, 1975, the Secretary of State made an announcement in the House of Commons on future civil aviation policy. It contained a complete reversal of the previous policy on competition and indicated, quite specifically, that the Skytrain service would not be allowed. Six months later, when a new policy guidance was issued to the CAA, it provided that in long-haul scheduled services the CAA should not license more than one British airline to serve the same route. However, where British Airways provided service, another British airline could be licensed, but only if British Airways gave its consent.²⁶

The basis for Laker's successful challenge to the legal validity of the new guidance rested on the duty imposed on the CAA in the *Civil Aviation Act* to perform its functions "in the manner which it considers is best calculated . . . (b) to secure that at least one major British airline which is not controlled by the British Airways Board has opportunities to participate in providing [services]. . . ."²⁷ The argument put forward was that the guidance, either by excluding any competition or by making it subject to the consent of the government-owned airline, ran counter to the commitment to competition found in the Act itself.

As Lord Denning put it:

The new policy guidance of 1976 cuts right across those statutory objectives. It lays down a new policy altogether. Whereas the statutory objectives made it clear that the British Airways Board was not to have a monopoly, but that at least one other British airline should have an opportunity to participate, the new policy guidance says that the British Airways Board is to have a monopoly. No competition is to be allowed. And no other British airline is to be licensed unless the British Airways had given its consent. This guidance was not a mere temporary measure. It was to last for a considerable period of years.

²⁵ *Laker Airways Ltd. v. Dept. of Trade*, [1977] Q.B. 643, [1977] 2 W.L.R. 234, [1977] 2 All E.R. 182.

²⁶ For a detailed analysis of the background to the Laker Airways case, see Baldwin, *supra* note 18, at 72-73.

²⁷ *Supra* note 25, at 711 (Q.B.), 255 (W.L.R.), 197 (All E.R.).

Those provisions disclose so complete a reversal of policy that to my mind the White Paper cannot be regarded as giving 'guidance' at all. In marching terms it does not say 'right incline' or 'left incline'. It says 'right about turn'. That is not guidance, but the reverse of it.

There is no doubt that the Secretary of State acted with the best of motives in formulating this new policy—and it may well have been the right policy—but I am afraid that he went about it in the wrong way. Seeing that the old policy had been laid down in an Act of Parliament, then, in order to reverse it, he should have introduced an amending bill and got Parliament to sanction it. He was advised, apparently, that it was not necessary, and that it could be done by 'guidance'. That, I think, was a mistake.²⁸

This decision of the Court of Appeal has obvious implications for Canada, since recent legislative reforms propose to give the Cabinet authority to issue policy "directions" to the regulatory agencies.²⁹ Clearly, as with guidance, these policy statements will have to conform to the policy objectives contained in the empowering acts. The potential for legal challenge here may be even greater in view of the more extensive policy objectives set out in the proposed Canadian legislation.

While the issue of whether the guidance really did conflict with the Act is a nice one (the statutory commitment to competition was somewhat opaque, to say the least, and certainly was not as strong as the Court of Appeal made it ought to be), the real importance of the *Laker* case lies in the overall approach adopted by the courts. Rather than recognize that the CAA was involved in an on-going policy-making process in which government involvement through guidance was a valid and essential part, conventional legal analysis proceeded on the basis that *Laker* had acquired certain rights before a judicial tribunal and that he could not be deprived of them except by act of Parliament or after a rehearing by the CAA. As a result, the guidance power, which had been so carefully designed as an imaginative means to ensure political accountability, was dismissed as a source of unwarranted interference.

As Baldwin has suggested,

[i]t is strongly arguable that all the judges failed fully to appreciate the way the Policy Guidance was intended to work. The Guidance provided a key link between government control and the expert agency. It has been clear since 1960 that the Government will have the final say on major competition policy. The Guidance gave a method of setting this government policy down clearly rather than using a messy combination of appeals, section 4 powers or withdrawals of designation.

The judges of the Court of Appeal strove to protect the CAA's discretion and to cut down the Minister's discretion. In doing so they conceived of the CAA as a traditional body with "quasi-judicial" functions. They saw it as a court giving licences with rights to be protected by legal due process and as a judicial body deserving protection from executive interference. They failed to see the significance of the CAA as a new form of multi-faceted agency of government, attempting to combine judicial and executive methods in a delicately balanced legal framework whilst acting in a politically contentious area. In attempting to preserve for the CAA an independent judicial status the judges sought to achieve the impossible. No one expected the CAA to be fully independent of government, in the

²⁸ *Id.* at 704 (Q.B.), 249 (W.L.R.), 191-92. (All E.R.).

²⁹ See *Role of the Independent Regulatory Agency in Canada*, *supra* note 1, at 101-02.

manner of a court. As was pointed out in the Court of Appeal, the Government could always control the agency in ways other than by using Guidance. The Court of Appeal decision damaged a system of balance based on compromise because the system of control fitted no neat jurisprudential category.³⁰

IV. THE AMERICAN INDEPENDENT POLICY-MAKING MODEL

The American independent regulatory agency may be usefully contrasted with a department. A department is an integral part of the executive hierarchy, headed by the President, who possesses complete powers of supervision and control. He has absolute removal powers over all departmental heads in order to ensure that the policies administered by them are not in conflict with his own. An independent regulatory agency is not part of that executive hierarchy, and is not subject to presidential direction. It is subject to congressional overview, but historically Congress has not had the power to reverse the agency's decisions except by legislation.

The key to independent status lies in the security of tenure of the commissioners who head the regulatory agencies. The classic reaffirmation of this security of tenure was provided in a well-known Supreme Court decision, *Humphrey's Executor v. United States*.³¹ President Roosevelt had discharged Humphrey from his position as a Federal Trade Commissioner, saying that, "I do not feel that your mind and my mind go along together on either the policies or the administering of the Federal Trade Commission." The issue then arose of the constitutionality of the statute limiting the removal power of the President to "inefficiency, neglect of duty or malfeasance in office."³² The Supreme Court held that it was indeed constitutional, and in so doing emphasized that its decision turned on the nature of the office involved. It would thus appear that this ruling applies to every regulatory agency regardless of whether the enabling statute provides express language on causes for removal.

In reality, "independence" must be relative. Regulatory bodies can never be autonomous from the rest of government. After all, they are created by Congress and may be abolished by it; they receive their legal mandate from Congress and the vigilance of the courts on judicial review will ensure that they do not overstep it; they are dependent on Congress for financial support, and the President in his appointments (both initial and in designating chairmen) may be able to influence the direction of an agency. Yet, in its classical form, an independent regulatory agency is to a very considerable extent free from direct control of the manner in which it carries out its mandate.³³ This structural independence is further enhanced by the very broad terms of the mandates of most agencies. For instance, the Federal Communications Commission is simply instructed to regulate in the "public interest." As K. C. Davis notes, this is the practical equivalent of instructing

³⁰ Baldwin, *supra* note 18, at 78.

³¹ *Humphrey's Executor v. U.S.*, 295 U.S. 602, 55 S. Ct. 869 (1934).

³² *Federal Trade Commission Act of 1914*, c. 311, 15 U.S.C. § 41 (1970).

³³ For a more detailed description, see, *The Role of the Independent Regulatory Agency in Canada*, *supra* note 1, at 87-94.

the agency: "Here is the problem. Deal with it."³⁴ This, of course, leaves a regulatory agency with very wide scope within which to develop and implement policy largely independent of both Congress and the President.

Over the years a number of reasons have been advanced to justify regulation by independent regulatory agencies. It has been said that regulation requires great expertise, and that it should be taken out of politics so that it can be dealt with dispassionately by persons with an appropriate level of skill and training. It has also been argued that individual licensing decisions should only be made by an independent body. Yet when all is said and done, it must be recognized that the underlying reason for independence rests on the peculiarly American version of the notion of separation of powers and Congress's reluctance to allow regulation to become subject to presidential control.

This must, of necessity, lead to the critical question: Is American experience of regulation by independent agencies relevant to Canada in view of the fact that it has been spawned by a doctrine of separation of powers which is so very different from Canadian notions of ministerial responsibility? A forceful negative answer has been provided by James Baillie, now Chairman of the Ontario Securities Commission.

There are fundamental differences between the relationships among the regulatory authorities in the United States and those which ought to exist in the Canadian provinces under our constitutional structure. The differences between Legislature and Cabinet, on the one hand, and Congress and President, on the other, require no elaboration here. The separation of powers which characterizes the relationship between the President and Congress resulted in the creation of independent regulatory agencies, of which the S.E.C. is one. There is no equivalent in the Canadian constitutional structure to the separation of powers in the United States and therefore the considerations which led to the creation of independent regulatory agencies in the United States are not applicable here.³⁵

It might have been necessary to adopt this position had there not, in recent years, been a distinct move in the United States towards greater political accountability for the activities of regulatory agencies. Canadians must continue to be conscious of the differing constitutional contexts in which regulatory agencies must operate, but in view of the current common concern for greater political accountability, it is now apparent that each country has much to learn from the other's experience.

While the American independent regulatory agency has survived the onslaughts of its most virulent critics, it is not as independent in policy making as it once was. It is this move towards greater accountability and the various innovative techniques that have been designed to bring this about which should be of such interest to Canadians. A brief excursion into recent history will reveal the background to the current American proposals for reform and should be of particular interest to those involved in the proposed "politicization" of the regulatory process in Canada.

³⁴ Davis, 1 *Administrative Law Treatise* (St. Paul: West Publishing Co., 1958) at 82.

³⁵ Baillie, "Securities Regulation in the 'Seventies," in Ziegel, ed., 2 *Studies in Canadian Company Law* (Toronto: Butterworths, 1973) 341 at 351.

President Franklin Roosevelt made the reorganization of the executive branch of government a major item in the agenda for his second term. In January, 1937, he submitted to Congress the report of the Brownlow Committee on Administrative Management.³⁶ The Committee proposed to integrate all programs and agencies (including all the independent regulatory commissions) into twelve departments. The Committee denounced the commissions as constituting a "headless fourth branch of the Government, a haphazard deposit of irresponsible agencies and uncoordinated powers. They do violence to the basic theory of the American Constitution that there should be three major branches of the Government and only three. The Congress has found no effective way of supervising them, they cannot be controlled by the President, and they are answerable to the courts only in respect to the legality of their activities."³⁷

The Committee further stated:

Power without responsibility has no place in a government based on the theory of democratic control, for responsibility is the people's only weapon, their only insurance against abuse of power.

But though the commissions enjoy power without responsibility, they also leave the President with responsibility without power. Placed by the Constitution at the head of a unified and centralized Executive Branch, and charged with the duty to see that the laws are faithfully executed, he must detour around powerful administrative agencies which are in no way subject to his authority and which are therefore both actual and potential obstructions to his effective overall management of national administration. The commissions produce confusion, conflict and incoherence in the formulation and execution of the President's policies.³⁸

The Committee recommended that the commissions become agencies within the executive departments. Only the "judicial section" of the agency would be independent of presidential direction and control. It was suggested that this proposal would create effective responsibility for the policy-determining aspects of the regulatory job while at the same time guaranteeing complete independence and neutrality for the "judicial" work of the agency.

The *Executive Reorganization Bill of 1938*,³⁹ which contained many of the recommendations of the Brownlow Committee, was defeated in Congress, partly because of concern that it would give too much power to the President. One key change was adopted. Prior to 1939, the budgets of regulatory agencies were submitted directly to Congress. In 1939, the *Budget and Accounting Act*⁴⁰ was amended at the President's urging, and thereafter the President's Budget Office was given the power to review and modify the budgets of all executive branch agencies, including the regulatory agencies.⁴¹

³⁶ U.S., *Report of the President's Committee on Administrative Management in the Federal Government* (Washington: U.S. Gov't Printing Office, 1937).

³⁷ *Id.* at 40.

³⁸ *Id.*

³⁹ Senate Bill 3331, 75th Cong., 3d Sess. (1938).

⁴⁰ 31 U.S.C. § 2.

⁴¹ For a particularly useful overview of this period, see United States Senate Committee on Governmental Affairs, *Study on Federal Regulation*, Vol. V, *Regulatory Organization*, 95th Cong., 1st Sess. (Washington: U.S. Gov't Printing Office, 1977) at 68-71. [Hereinafter Senate Study].

While many today still criticize the whole notion of independence for regulatory bodies, the fact is that drastic proposals such as those of the Brownlow Committee have not been adopted, and Congress continues to place great faith in this type of government agency.⁴² Indeed, in the last five years, Congress has created four new independent commissions—the Commodity Futures Trading Commission, the Consumer Product Safety Commission, the Federal Energy Regulatory Commission and the Nuclear Regulatory Commission. Most recently it has set up an independent regulatory agency *within* the Department of Energy, a development that shows the continuing relevance of some of the recommendations of the Brownlow Committee.⁴³ This development should also be of particular interest to Canadians, because it suggests one possible way in which independence may be reconciled with the need for a consistent national policy.

The 1977 volume on “Regulatory Organization” of the *Study of Federal Regulations* undertaken by the Senate Committee on Governmental Affairs, listed eight possible techniques for increasing agency political accountability.⁴⁴ These techniques will only be listed here—they will be discussed in greater detail in the last section of this article in a Canadian context. An exception will be made, however, for developments in the field of energy regulation which deserves special, early attention.

1. *Across-the-board legislative veto power of regulatory agency rules*

Bernard Schwartz, in a recent article sympathetic to this development, points out that “the recent congressional trend is towards expanding the legislative veto from a sporadically used device in specific statutes to a general instrument of congressional oversight.” His conclusion is that the legislative veto “enables American legislatures to assume their rightful place as effective supervisors of delegated powers.”⁴⁵ The Senate Committee, however, was of the view that this technique would increase regulatory delays and uncertainty for regulated industries, decrease rule making and “it is also likely that Congress’s workload would be substantially increased by use of the veto on regulatory agency rules and it would involve Congress unnecessarily in the day-to-day activities of the agencies.”⁴⁶

⁴² For further details, see *The Role of the Independent Regulatory Agency in Canada*, *supra* note 1 at 104-08.

The latest development in the on-going concern for greater political accountability in regulation in the United States has been the publication in August, 1978 of an “exposure draft” by the Commission on Law and the Economy of the American Bar Association, *Federal Regulation: Roads to Reform*. In it the majority suggests that legislation be enacted authorizing the President to direct certain regulatory agencies to take up, decide or reconsider critical regulatory issues within a specified period of time and thereafter to modify or reverse certain agency actions relating to such issues. See “Regulatory Bodies Are Too Independent, Law Panel Says; It Proposes Overseeing,” *Wall Street Journal*, Aug. 9, 1978.

⁴³ Senate Study, *supra* note 41, at 75-78.

⁴⁴ *Id.* at 12-14, 78, 301-04.

⁴⁵ Schwartz, *The Legislative Veto and the Constitution—A Re-examination* (1978), 46 *Geo. Wash. L. Rev.* 351 at 375. For a much more critical study of the whole notion of congressional control of administrative rule making, see Bolton, *The Legislative Veto: Unseparating the Powers* (Washington: American Enterprise Institute, 1977).

⁴⁶ Senate Study, *supra* note 41, at 12.

2. *Combined legislative-presidential veto*

In order to bring the decisions and policies of the independent agencies within the continuing control of both elected branches of government, and to require Congress to assume continuing responsibility for the work of the agencies, Cutler and Johnson suggest a statute that would authorize the President to modify or reverse certain agency actions and to set priorities among competing statutory goals subject to a one-house congressional veto.⁴⁷ "This process," the Senate Committee concluded, "does not cure the problems inherent in the legislative veto, and presents the risk of unfair intervention by the President for reasons unrelated to an issue before an agency. Insulating the regulatory bodies from political influence is one of the most significant benefits of independence. This insulation would be threatened by this proposal, which might operate counter to the values of open and public debate and visible decision making."⁴⁸

3. *Tighter control over appointments*

The Senate Committee had already made a number of recommendations in this regard, including one for a clear statutory requirement that members of agencies should be qualified by reason of training, education or experience. It viewed this as a useful approach to greater accountability. "It has been consistently demonstrated that the key to many regulatory improvements is improving the quality of leadership by improving the quality of commission membership."⁴⁹

4. *Narrower, more precise delegations of authority to agencies*

"While political compromise," the Senate Committee was quick to concede, "often requires murky statutory language, Congress could probably draft many statutes more specifically than it has in the past. Rather than pass vague statutes, which require the regulatory agencies to take the political 'heat,' Congress should draft its regulatory statutes as narrowly as possible. Passage of more specific statutes will give Congress better standards with which to evaluate agency performance as well as provide greater guidance to the agencies."⁵⁰

5. *Early notice of agency agendas and plans*

Agencies should be required to publish a semi-annual "regulation agenda" which should describe in general terms the subject areas in which significant regulatory action is being considered.⁵¹

⁴⁷ Cutler and Johnson, *Regulation and the Political Process* (1975), 84 Yale L.J. 1395. And see, *The Role of the Independent Regulatory Agency in Canada*, *supra* note 1, at 106-08.

⁴⁸ Senate Study, *supra* note 41, at 12.

⁴⁹ *Id.*

⁵⁰ *Id.* at 13.

⁵¹ *Id.*

6. *Sunset legislation*

The Senate Committee had already recommended that Congress enact a "sunset law" requiring periodic authorization of regulatory agencies and programs. "In-depth scrutiny of the agencies would be assured by requiring a thorough review of an agency's activities before it may be reauthorized."⁵²

7. *Improved congressional oversight of agency operations*

"The fundamental purpose of legislative oversight," the Senate Committee noted, "is political accountability, and one method of achieving this accountability is more pervasive, consistent and thorough oversight by Congress."⁵³

8. *Provision for the executive branch to initiate regulatory rule making in some circumstances*

Under section 403 of the *Department of Energy Organization Act*,⁵⁴ the Secretary of Energy is empowered to propose rule making to the Federal Energy Regulatory Commission and to set time deadlines for Commission action. "This," the Senate Committee concluded, "is a useful approach for allowing an executive department head to have policy input in independent agency proceedings, and we recommend that it be tried elsewhere."⁵⁵

Because of the need for coordination between the Secretary and the Commission, there is provision in the *Energy Act* designed to ensure the Secretary an opportunity to participate actively in the Commission's decision-making process and to ensure expeditious Commission consideration of important regulatory matters. Thus, the Secretary may initiate rule-making proceedings before the Commission and intervene in any Commission proceedings, whether adjudicatory or rule-making in nature. Further, the Secretary is authorized to set reasonable time limits for the completion of any rule-making proceeding that he proposes before the Commission.⁵⁶

The Senate Committee was of the view that the relations between the Federal Energy Regulatory Commission and the Department of Energy could serve as a new modified model of an independent regulatory agency.

The benefits of that model could be achieved without wholesale absorption of the commissions into executive departments. For example, if Congress were to adopt a national policy on transportation, it would make sense to allow the President the ability to coordinate the implementation of that policy insofar as those regulatory commissions involved in such matters. The President could be empowered to submit proposed rulemakings to those agencies, set and enforce deadlines for action, and then participate fully in subsequent proceedings concerning that proposal. All that could be accomplished without undue infringement on agency independence.⁵⁷

⁵² *Id.* at 13-14.

⁵³ *Id.* at 14.

⁵⁴ *Department of Energy Organization Act of 1977*, 42 U.S.C. § 7101 (1977).

⁵⁵ Senate Study, *supra* note 41, at 13.

⁵⁶ *Id.* at 301-04.

⁵⁷ *Id.* at 78.

V. THE CANADIAN MUDDLE

It would be unrealistic to expect to find perfect logical symmetry in the organizational structures of government. It is to a considerable extent necessary to reconcile oneself to Topsy-like architectural vagaries. Yet there must always be at least that degree of order which allows for effective decision making. It would appear that a failure to clarify the role of the independent regulatory agency in Canada has meant that we have passed over the threshold which divides acceptable organizational accidents and compromises from unacceptable organizational chaos.

It must be emphasized that this conclusion is not the result of the application of an idealistic standard of perfection. It is not suggested that either the English or the American model is perfect and that because a similar Canadian model cannot be constructed this, in itself, indicates failure. As has already been indicated, these models are by no means the rigid product of an inflexible political order and are themselves being constantly adjusted to changing circumstances. Yet even if they lack unattainable perfect symmetry, they do constitute fairly well-known entities whose place in the universe of government, if not fixed with complete precision, is at least fairly well understood.

There is a danger of being excessively self-critical in this regard because Canada is faced with a uniquely difficult organizational challenge, with neither model being fully appropriate here. What we have to do is to create a design that is appropriate to our particular circumstances. There are no quick imported solutions available. It is not a matter of simply choosing to subscribe to political accountability through ministerial responsibility on the one hand or the integrity of impartial, independent decision making on the other. Of course, we must seek to learn from American or English experience (to do otherwise would be to adopt an ostrich-like posture)—but what we have to create is a fully indigenous status for our independent regulatory agencies.

Before moving on to this constructive task, it is necessary to point out the hopeless muddle in the present statutory framework of regulation and how this has led to a massive waste of time, money and energy, and has diverted attention away from the critical issues which should be dealt with in the regulatory process.

As Richard Schultz has pointed out, there are two distinct forms of review granted to the Cabinet (technically, the Governor in Council) of the decisions of federal regulatory bodies.⁵⁸ There can be an "active" power of review where the Cabinet can act on its own initiative without a petition being presented to it, or a "passive" power of review where the Cabinet can only act when it receives a petition from one of the parties. A significant distinction exists as well between statutory authority to reverse a decision and substitute a new one (designated by Schultz as a "positive" power) and authority merely to refer the matter back to the agency for reconsideration

⁵⁸ Schultz, "Regulatory Agencies and the Canadian Political System," *supra* note 1, at 338-39.

(a "negative" power). The following matrix suggests the possible combinations:

	ACTIVE	PASSIVE
POSITIVE		
NEGATIVE		

For instance, the Cabinet could be authorized to reverse a decision on its own initiative and substitute its own, "active-positive"; await a petition and return it for reconsideration, "passive-negative," and so on. The critical question is: Have these possible permutations of power over regulatory decisions been granted on any logical or consistent basis?

The Governor in Council under the *Broadcasting Act* has an "active-negative" review power over CRTC licensing decisions, but no control at all where the Commission refuses outright to grant a licence.⁵⁹ Over telecommunications decisions made by the same commission, the Cabinet has "active-positive" control. The CTC is subject to "active-positive" control,⁶⁰ while in air licensing matters, the Minister of Transport has "passive-positive" review powers.⁶¹ There is no provision for any control of NEB tariff decisions and crude petroleum export licensing decisions, while the Board can only make recommendations with respect to pipeline and power line certificates and gas export licences subject to "negative" review by the Governor in Council.⁶²

No underlying rationale can be found for this allocation of review power. Why, for instance, should the Cabinet have the power to completely reverse a telephone rate determination of the CRTC, but have no power at all over a gas rate set by the NEB? Why has the government only a limited power to review a decision of the CRTC to grant a licence, but an apparently unlimited power to "vary or rescind" any decision of the CTC? Why should the Minister of Transport, who could be in a position to ensure that air licensing decisions are made consistent with government policy, have his appeal power dependent on the initiative of the parties involved?

Similar inconsistencies may be seen in the resolution of the question whether to grant initial decision-making authority to the regulatory agency subject to subsequent review or provide that the agency only make a recommendation subject to "negative" or "positive" power of final decision. For example, the NEB is given only a recommendatory power with respect to gas

⁵⁹ R.S.C. 1970, c. B-11, s. 23.

⁶⁰ *National Transportation Act*, R.S.C. 1970, c. N-17, s. 64(1).

⁶¹ *Id.*, s. 25(1).

⁶² *National Energy Board Act*, R.S.C. 1970, c. N-6, ss. 44, 50.

pipeline certificates,⁶³ while the CTC is empowered to make such decisions with respect to commodity pipelines itself.⁶⁴ Similarly, gas export licences are only recommended by the NEB, but licences to provide air services and broadcasting licences are decided by the CTC and the CRTC subject to review by the Governor in Council and appeal to the Minister of Transport respectively.⁶⁵

A survey which is currently being made of many of the provincial statutes which set up independent regulatory agencies shows many similar inconsistencies.⁶⁶ Electricity rates are set by an independent public utilities board in Nova Scotia whose decisions are final and not subject to any review by Cabinet; similar rates when set by the Ontario Energy Board constitute recommendations to Cabinet. Trucking licences under federal legislation are granted by the same public utilities board in Nova Scotia, while the Ontario Highway Transport Board decisions amount only to recommendations to Cabinet. Telephone companies are privately owned and subject to provincial independent agency regulation in Atlantic Canada; in Ontario, Québec and British Columbia the major companies are privately owned and subject to federal independent agency regulation; in Manitoba and Alberta the companies are publicly owned and subject to provincial independent agency regulation, and in Saskatchewan there is public ownership and no regulation. It would be nice to think that these differences reflected conscious policy choices, but in reality they would appear to be as much historical accidents as anything else.

Perhaps the most startling inconsistency is that the government has been granted a power of review over individual decisions of an adjudicative nature where the need for impartial, independent decision making is most apparent, but often has no control over legislative enactments of a general policy nature where the need for political accountability is greatest. In the present topsy-turvy world of regulation in Canada, the government may well have no control over a regulation made by a regulatory agency, but may be able to reverse an individual decision that applies that regulation.⁶⁷

For example, under the *Aeronautics Act*, the CTC may make regulations which establish the classification and form of licences for commercial air services and the terms and conditions of such licences, provide for the exclusion from the Act or the regulations of any air carrier or group of carriers, prescribe fees to be paid, set minimum insurance requirements, prohibit the merger of commercial air services, provide for tariffs and tolls, and prescribe penalties of up to six months or \$5,000 fine for contravention of any

⁶³ *Id.*, s. 44.

⁶⁴ *National Transportation Act*, R.S.C. 1970, c. N-17, s. 32.

⁶⁵ *National Energy Board Act*, R.S.C. 1970, c. N-6, s. 44; *National Transportation Act*, R.S.C. 1970, c. N-17, ss. 25(1), 64(1); *Broadcasting Act*, R.S.C. 1970, c. B-11, s. 23.

⁶⁶ In connection with the author's research for the Institute for Research on Public Policy, *supra* note 1. The full results of this survey along with appropriate citation will be included in that report.

⁶⁷ See *The Role of the Independent Regulatory Agency in Canada*, *supra* note 1, at 116-17.

regulation, direction or order of the Commission.⁶⁸ The CRTC is authorized by the *Broadcasting Act* to make regulations respecting classes of broadcasting licences, standards of programing, the character of advertising, partisan political broadcasting, conditions of network affiliation and "respecting such other matters as it deems necessary for the furtherance of its objects."⁶⁹ By way of contrast, it should be noted that all regulations made by the NEB are subject to the approval of the Governor in Council.⁷⁰

At this stage, one might ask: "Does all this really matter? Isn't the important thing that regulation works out here in the real world? So what if the statutes are inconsistent or even contradictory?" The answer, bluntly put, is that there is ample evidence to suggest that a failure to clarify the role of the independent regulatory agency in Canada has gone far to destroy the credibility of the whole regulatory process. I have described elsewhere the recent "series of unedifying and destructive rows flowing in large measure from a lack of any clear understanding of the role of administrative tribunals in a parliamentary system of government."⁷¹ However, since the basic thesis of this article is that we have crossed a critical threshold into regulatory chaos, it will be necessary to recall, albeit it briefly, these brouhahas and, where appropriate, indicate recent developments.

There has for quite some time been considerable tension between the CTC and the Ministry of Transport (MOT) amounting to a textbook illustration of the inevitability of conflict where there is no real agreement as to the allocation of policy-making responsibility between a department and a regulatory agency.⁷² While some of the heat has gone out of the resulting disagreements, it remains evident that relations are, at the very least, strained. Take, for instance, the issue of whether domestic Advance Booking Charters (ABC's) should be available. Although the Ministry of Transport had just released two major policy study papers on the air carrier industry, there was to be no official discussion of these papers at the hearings held by the CTC, in spite of their obvious relevance to the question of the introduction of ABC's within Canada. Indeed, senior ministry officials sat at the back of the hearing room as "observers"—a somewhat unsettling experience for the tribunal when it is remembered that the Cabinet has open-ended review power over any decision of the CTC and the Minister of Transport is given a pre-eminent role in that process. As it turned out, of course, the decision of the CTC was varied substantially by Cabinet.⁷³

Yet there was to be more than silent "observation," as Gregory Kane has noted.

But still waters run deep. The Minister of Transport, Otto Lang, in fact tried to stop the CTC from holding public hearings on this issue. Mr. Lang wrote a

⁶⁸ R.S.C. 1970, c. A-3, s. 14(1), as am. by S.C. 1976-77, c. 26, s. 2. But note that s. 14(2) applies s. 64 of the *National Transportation Act* which will, presumably, allow for *ex post facto* rescission.

⁶⁹ R.S.C. 1970, c. B-11, s. 16(1).

⁷⁰ *National Energy Board Act*, R.S.C. 1970, c. N-6, s. 88.

⁷¹ "Political Accountability for Administrative Tribunals," *supra* note 1, at 6.

⁷² CTC Study, *supra* note 1, at 114-24.

⁷³ Order-in-Council No. P.C. 1978-168 (Jan. 19, 1978).

confidential letter to the Chairman of the CTC (Mr. Benson) suggesting that the CTC give Transport Canada officials access to submissions made on the introduction of domestic ABCs "on a confidential basis". Mr. Lang explained that he wanted his Department to be the one to determine the policy concerning domestic charters.

To his considerable credit, Mr. Benson replied that since the Minister was so concerned, the hearings would be advanced, and he attached a copy of the notice of hearing. In answer to the suggestion made by Mr. Lang that the Department of Transport consider the matter privately and on a confidential basis, Mr. Benson stated: "The purpose of a hearing is to ensure that any person interested will be given an opportunity to make representations. Interested persons include the general public, travel agents, tour operators, government officials, the Consumers' Association of Canada and the air carriers." He concluded by stating that the Department of Transport could obtain copies of submissions made to the CTC just like any other party.⁷⁴

This has not been, as we shall see, the only recent instance in which the Minister of Transport has sought to subvert the independence of the CTC and the openness of its decision-making processes.

There have been a number of publicly observable instances of conflict between the CRTC and the Cabinet. One such occasion concerned the Commission's commercial deletion policy. Although its legal authority to require the deletion of commercials in programs coming from the United States (thereby discouraging Canadian advertisers from sending much needed commercial revenues south of the border) has been upheld by the Supreme Court of Canada,⁷⁵ the Commission has been persuaded by the Cabinet to back away from its policy on account of the resentment it has engendered in influential American border stations. There is now supposed to be a "moratorium" in effect while it is seen whether an alternative policy of denying tax deductions to Canadian companies will be effective. Yet, as an embarrassed Minister of Communications recently discovered at a joint meeting of the American National Association of Broadcasters and the Canadian Association of Broadcasters after she had firmly announced that the commercial deletion policy was no longer in effect, it is one thing for a department to say that a policy has been suspended and quite another to have that come to pass when the effective decision maker is not the department, but the regulatory agency. As the American journal, *Broadcasting*, stated in an article entitled, "It could be worse; this could be Canada," after the Minister had told the broadcasters that a "moratorium" was in effect, it was pointed out that some deletion was still authorized by the CRTC, and she had to assure them that she would sort things out with the Commission.⁷⁶

⁷⁴ Kane, "Canadian Consumers Learn Their ABCs," in *Perspectives on Canadian Airline Regulation*, *supra* note 1.

⁷⁵ *Capital Cities Communications Inc. v. Canadian Radio-television Comm.*, [1978] 2 S.C.R. 141, 81 D.L.R. (3d) 609.

⁷⁶ *Broadcasting*, July 3, 1978 at 26. The issue remains a vexed one, and American border stations appear to be as much upset by the tax approach as by commercial deletion. See, for example, Martin, "U.S. TV stations to file case against Canadian tax rule," *Globe and Mail*, Aug. 26, 1978; Kirby, "Tax crippling, border stations want tariff," *Globe and Mail*, Aug. 31, 1978; Solomon, "U.S. bill tries to incite fight over border TV," *Financial Post*, Oct. 7, 1978; Martin, "U.S. border stations fight hard to regain Canadian TV business," *Globe and Mail*, Nov. 30, 1978; Laws, "Stalemate over border TV advertisement issue," *Financial Post*, Dec. 9, 1978.

It has been a longstanding policy of the CRTC that cable companies actually own a substantial part of their cable hardware rather than act simply as programmers on a cable system leased from a telephone company. It is felt that as the *Broadcasting Act* requires that cable television be treated as an integral part of the broadcasting system as such and not simply as a delivery technique, it is essential that the cable companies own enough of their systems to ensure their ability to respond independently to the obligations of a broadcasting licence.

This policy has worked out quite well in those provinces with investor-owned telephone companies. Where the telephone service is provincially owned, as in Manitoba, it has been argued that to ensure comprehensive province-wide cable coverage, it is essential to provide for active participation by the telephone company, and this could only be assured by allowing the public utility rather than the cable companies to own virtually all the hardware. When in September, 1976, the Commission licensed areas in Manitoba according to its established policies, the government of that province succeeded in persuading the Cabinet to set aside those licences two months later.⁷⁷ Coincidentally with this move, the governments of Manitoba and Canada announced an Agreement which was aimed, in admittedly general terms, at overriding the Commission's policy. There was no specific legal authority for this, and so from a strictly legal point of view, the Commission could have gone ahead and ignored the Agreement. But a political nod is as good as a legal wink, especially in a situation in which the other fellow can have the final say. As the Cabinet had already demonstrated, it could always set aside any licence not issued in accordance with the political accommodation it had arrived at. While making it quite clear that it felt that it was not bound by the Agreement, the Commission felt obliged to call for new applications for cable licences in Manitoba; in assessing these, the implications of the Agreement would be considered. Subsequently, licences were issued on conditions which went some way to meet the position of the Manitoba government. While it cannot be said that the Commission capitulated, it at least had to make a strategic withdrawal. That this compromise had been arrived at only with considerable reluctance can be seen in the testy quality of language and defiant tone of the decision.

It is the Commission's specific obligation, as determined by Parliament, that the Commission should regulate and supervise all these aspects of the Canadian broadcasting system with a view "to implementing the broadcasting policy enunciated in Section 3 of this Act," including cable television undertakings which form an integral part of the single system. . . .

The Commission is not entitled to discharge its statutory responsibilities in a permissive or selective way. The Commission is under a legal obligation to ensure that cable television licensees are in a position to respond to the requirements of the *Broadcasting Act* including any directions from the Governor-in-Council.

The Commission cannot subject its authority to limitations imposed from any other source unless in conformity with the *Broadcasting Act*. It is not free to accept a cable television operator's argument of being frustrated from comply-

⁷⁷ Order-in-Council No. P.C. 1976-2761 (Nov. 10, 1976).

ing with Commission regulatory policy or regulations because of conditions imposed by other municipal, provincial, or federal authority.⁷⁸

As was to be expected after an experience of this nature, the proposed new *Telecommunications Act* makes very specific provision for the enforcement of agreements with the provinces.⁷⁹

The most dramatic instance of an attempt by the Minister of Communications to overturn a policy position of the Commission has been with respect to pay television. In December, 1975, the regulatory agency concluded that it would be premature to allow any extensive development of pay television in Canada aside from limited experiments such as hotel pay television. Early in 1976, the cable television industry renewed demands for its introduction, and on June 2, 1976, the Minister of Communications, in a speech to the Canadian Cable Television Association, stated that the development of pay television was "inevitable" and called on the CRTC to devise a structure that would maximize pay television's potential benefits for the broadcasting system and viewer choice. This ministerial initiative was vigorously criticized by those who felt that the CRTC had just had a hearing on the subject of pay television and that that body's expert independent judgment should be respected.⁸⁰ The Commission did undertake the kind of study urged on them by the Minister, and again concluded that "it would be premature and impossible to endorse the introduction of a national pay-television system at this time."⁸¹ This has resulted in another unfortunate policy deadlock between a department and an independent regulatory agency.⁸²

⁷⁸ CRTC Public Announcement, Aug. 8, 1977, at 3. The matter spluttered on, "Cable firms ask exemption from CRTC rules," *Globe and Mail*, Aug. 17, 1978, but now appears to be resolved, "Residents victors as cable television dispute ends," *Financial Post*, Oct. 7, 1978.

⁷⁹ Bill C-24, 1977-78 (30th Parl., 3d Sess.) (First reading, Jan. 26, 1978) s. 7.

⁸⁰ *The Role of the Independent Regulatory Agency in Canada*, *supra* note 1, at 84-85.

⁸¹ CRTC, *Report on Pay-Television*, March, 1978, at 54.

⁸² For a comprehensive overview of the rapid development of pay television in the United States, see "The rise of American pay-TV," *The Economist*, July 29, 1978, at 62-63.

Even more recently, bad relations between the department and the regulatory commission have been further exacerbated by the appointment of the Consultative Committee on the Implications of Telecommunications for Canadian Sovereignty by the Department of Communications. The purpose and even existence of the Committee, which will delve into matters already being dealt with by the CRTC, was never communicated to the Commission in advance of the public announcement of its creation. It will hear no evidence and deliberate entirely in private. It has every appearance of being part of a power play designed to further departmental and provincial interests at the expense of the federal regulatory agency; Sheppard, "New committee will help reform communications," *Globe and Mail*, Dec. 1, 1978; "Ostry hopes to ward off CRTC anger," *id.*, Dec. 5, 1978; Stevens, "The stakes are too high," *id.*, Dec. 15, 1978. For the view that current political maneuverings and its own ineptitude have greatly weakened the CRTC, see Dryden, "Hindrance rather than help," *Financial Post*, Dec. 2, 1978.

For two valuable overviews—one by a former Chairman of the CRTC and the other by the new Deputy Minister of Communications, see Boyle, "The jockeying to decide the TV set's future," *Globe and Mail*, Dec. 8, 1978; Ostry, "The wiring of Canada: a danger, a challenge, a certainty," *id.*, Dec. 9, 1978.

If the Department has not been able to get its way on pay television, it certainly has managed to do so with respect to the membership of Telesat in the Trans-Canada Telephone System (TCTS). Here, a specific decision of the Commission was at stake, and thus the Department, through the Cabinet, had authority to "vary" any decision of the CRTC. When the Telesat application for regulatory approval was turned down as not being in the public interest, the Commission's decision was promptly "varied" by the Cabinet to read that it was in the public interest to allow Telesat to join TCTS.⁸³ The actual merits of the decision were lost in the storm of protest following so pre-emptory a reversal of a carefully reasoned Canadian policy determination. As I have argued elsewhere, this abrupt use of the "political appeal" is not conducive to credible decision making.⁸⁴

The Telesat affair should serve as an object lesson in how not to make regulatory policy decisions. In justifying the reversal of the Commission's decision, the Minister stated that the decision involved broad policy issues over and above those considered by the CRTC. The Commission had considered the powers and autonomy of Telesat, the availability and expansion of satellite service and impact on competition. "But the range of factors affecting these policy issues is far wider than that which the CRTC could reasonably have been expected to consider. Many of these factors lie beyond the purview of the Commission."⁸⁵ Yet there would appear to be no reason why these concerns could not have been called to the attention of the Commission *before* it made its decision.⁸⁶ As in the 1973 Bell Canada case,⁸⁷ we have here an example of a destructive process involving a drastic change in the rules of the game after the game has been played. Not only will this rapidly disillusion those involved in the regulatory process (who will, quite naturally, expect regulatory decisions to be based on the merits as developed at an open hearing), but it will also go far to subvert any self-respecting agency by undermining its self-confidence and capacity for independent judgment. This does not mean that there should simply be no political account-

⁸³ "Political Accountability for Administrative Tribunals," *supra* note 1, at 7. CAC unsuccessfully sought a declaration from Gibson J. of the Federal Court of Canada, Trial Division, that a power to "vary" did not include a power to totally reverse the initial decision and replace it with a new one. *Consumers' Assoc. of Canada v. A.G. Can.*, April 6, 1978. (Now on appeal).

In the latest version of the new *Telecommunications Act*, Bill C-16, 1978 (30th Parl., 4th Sess.) (First reading Nov. 9, 1978) it is provided in s. 12(3): "For greater certainty, the power of the Governor in Council to vary a decision of the Commission . . . includes the power to substitute, in whole or in part, his own decision for that of the Commission."

⁸⁴ "Political Accountability for Administrative Tribunals," *supra* note 1, at 13-17.

⁸⁵ *Statement by the Minister of Communications, Jeanne Sauvé in respect of an Order in Council to vary CRTC Decision 77-10 and to approve a proposed agreement for membership by Telesat Canada in the Trans-Canada Telephone System* (Ottawa: Department of Communications, Information Services, Nov. 3, 1977) at 2.

⁸⁶ For example, at the hearing into the introduction of ABC's within Canada, see text *supra* at 65, representatives of the federal Department of Trade and Commerce voiced the concern of the government that expensive intra-Canadian air travel was encouraging Canadians to vacation abroad and discouraging foreign tourists.

⁸⁷ CTC Study, *supra* note 1, at 120.

tability for the major policy determinations of independent regulatory agencies. The critical issue remains not *whether*, but *how* provision is to be made for political accountability.⁸⁸

Potentially the most serious threat to public confidence that the CRTC is above partisan, party politics came with the Prime Minister's insistence that it inquire into the "doubts" being expressed during that hectic period immediately following the election of a separatist government in Québec "as to whether the English and French television networks of the Corporation generally, and particularly their public affairs, information and news programming, are fulfilling the mandate of the Corporation." Apparently, the Commission was only prepared to undertake this task because of its concern that it would otherwise be done by some other body (such as a parliamentary committee) with less sensitivity for the legitimate concerns of the broadcasting system in freedom of expression. The Commission's carefully measured inquiry succeeded to a remarkable extent in calming feelings on this issue, and its Report has further contributed to a lessening in partisan acrimony. The Commission did find evidence to suggest that the two language services, because of the geographically limited coverage of their news programming did little to break down the "two solitudes," and to that extent they did not make that degree of contribution to national understanding which might be expected of them. For instance, in an examination of English and French national evening radio news, it was found that only 3 percent of the CBC French newscasts dealt with any part of Canada other than Québec. The CBC English newscasts devoted 18 percent of their coverage to parts of Canada other than Québec and 9 percent to Québec stories at a time when a general election campaign was taking place in that province.⁸⁹ The inquiry concluded:

We have bias whenever anyone attempts to cut off essential information or balance from someone else and so tries to force the listener's opinions into line with his or her own interests. . . .

If this definition of bias seems reasonable, the damning statistics . . . indicate that the electronic news media in Canada, English as well as French, are biased to the point of subversiveness. They are biased because, so far as they are able, they prevent Canadians from getting enough balanced information about Canada to make informed decisions regarding the country's future.⁹⁰

Thus the Commission, although placed in a potentially embarrassing position by the Prime Minister, managed to finesse its way out of its difficulties by shifting emphasis away from alleged incidents of pro-separatist bias in Radio-Canada to the broader issue of "bias" as a form of assumption about what is newsworthy. What could have been a witch-hunt was thereby converted into a high-level discussion of journalistic ethics and professionalism, and, while it was hardly likely that this would be satisfactory to the political partisans whose "doubts" had led to the inquiry in the first place, it did at least preserve the integrity and independent stature of the Commission.

While the most easily documented instances of misunderstanding of the

⁸⁸ This is dealt with in the last two sections of the article.

⁸⁹ *Can. C.R.T.C. Committee of Inquiry into the National Broadcasting Service (Boyle Report)* (Ottawa, 1977) at 18.

⁹⁰ *Id.* at 30.

role of the independent regulatory agency have occurred in recent years at the federal level, just the same type of issue can, and indeed does, arise at a provincial level. Take, for instance, the Ontario Workmen's Compensation Board, which was directly and heavily involved in the 1977 provincial elections.⁹¹ In all that political furor, little attempt was made to distinguish between those matters truly within the Board's discretion and the major areas of policy which have not been delegated to it. In recent months at least some attention has shifted away from the Board itself and onto the Minister of Labour with the recognition that the general levels of compensation are set at the political level, not by the Board.⁹² At the same time, the procedures of the Board have remained very much in the public eye, and the Ombudsman has urged that claimants have greater access to the internal decision-making processes of the Board.⁹³

A most revealing incident concerned the decision of the Ontario Highway Transport Board (OHTB) to grant routes to the Greyhound Bus Company in competition with Gray Coach Lines. As the latter is a subsidiary of the Toronto Transit Commission (TTC), it was strenuously argued that it should not have to compete with a privately-owned company. This was quite rightly seen as involving a basic question of provincial transportation policy, and this precipitated a full-scale political row as to whether the Board, as a nonelected body, had the right to determine such policy.⁹⁴ In the end, the Cabinet was persuaded to the Board's point of view, and it is now reported that Gray Coach Lines is to be run as an independent operation on business lines and not simply as a source of subsidy for the TTC.⁹⁵ The OHTB was involved in a somewhat similar controversy shortly thereafter when it had to decide whether to license United Parcel Service as a parcel delivery service. This was strongly opposed by the Post Office and the established carriers. In denying United Parcel Service a licence, the Board held that the Post Office deserved "another chance" to provide an adequately expeditious and reliable parcel delivery service. As might be expected, this sentiment was not one shared by all, and the whole matter is now before the Cabinet.⁹⁶

⁹¹ "Political Accountability for Administrative Tribunals," *supra* note 1, at 7.

⁹² See, for example, "Study delaying decision on WCB benefits rise, Stephenson says," *Globe and Mail*, Jan. 12, 1978.

⁹³ In his fourth report the Ombudsman urged that the Board should make public its policies and claims manual and start publishing appeal decisions. The Chairman of the Board responded that the claims manual was a highly technical document which could not be understood by an average claimant, to which the Ombudsman rejoined that there was no reason why Board policies and the manual could not be translated into "readable, ordinary, layman's English." Oziewicz, "Public WCB claims manual urged in Maloney's report," *Globe and Mail*, July 25, 1978.

⁹⁴ *The Role of the Independent Regulatory Agency in Canada*, *supra* note 1, at 86-87.

⁹⁵ Jefferson, "Gray Coach cuts umbilical cord with TTC in bid to raise profits," *Globe and Mail*, July 3, 1978.

⁹⁶ See, for example, "The public loses again," *Globe and Mail*, July 11, 1978. The merits of the decision have been completely overshadowed by the revelation that the Board Chairman invited the lawyer for the major companies opposing UPS to help him write the decision. Moon and Strauss, "Board gets lawyer to dress up ruling against

As a result of these rather unsettling experiences, the Government of Ontario on March 2, 1978, introduced Bill 20, *An Act to Amend the Public Vehicles Act*. It provides, in part:

- (1) The Lieutenant Governor in Council may by order from time to time issue policy statements setting out matters to be considered by the Board when determining questions of public necessity and convenience and the Board shall take such matters into consideration together with such other matters as the Board considers appropriate where the application or reference is made after the policy statement is gazetted.
- (2) An order made under subsection 1 shall be published in *The Ontario Gazette*.

The Bill received unanimous support in the Legislature and was passed on May 16 and given Royal Assent on June 10, 1978. From the very brief debate in the Legislature, it was apparent that such a power to transmit government policy was seen as long overdue.⁹⁷

Perhaps the most interesting provincial development has been with respect to the regulation of electrical rates in Nova Scotia. There had been two major electrical generating undertakings in that province—one was investor-owned and regulated by the Nova Scotia Board of Commissioners of Public Utilities, the other was government-owned and not regulated by the Board. Recently the government purchased all the shares of the investor-owned utility and amalgamated it with the government-owned company to create a new provincially-owned corporation. This body was not subject to the regulation of the Board, presumably on the ground that as a government-owned corporation no such regulation was required.

Nova Scotia is largely dependent on oil for the generation of electricity,

opponent," *Globe and Mail*, Aug. 30, 1978; "Report was in error in linking Wardrop to 'dress-up' request," *Globe and Mail*, Aug. 31, 1978. The *Globe and Mail* in an editorial entitled, "Not acceptable," concluded, "The report itself isn't worth the paper it has been written on." Sept. 5, 1978.

⁹⁷ *Ont. Legislative Assembly Deb.*, May 16, 1978, at 2579-81.

In evidence before a committee of the Ontario Legislature in November, 1978, Bruce Alexander, the new chairman of the Ontario Highway Transport Board, stated: "I would like also to welcome Bill 20 as an addition to the PV Act giving the ministry the ability to direct the board to consider policy statements when determining questions of public necessity and convenience. We are already beginning to operate with respect to that. We endorse the concept of policy direction to the board and we look forward to more of it." *Ont. Legislative Assembly Deb.*, Resources Development Committee, Nov. 14, 1978, R1160 at R1163. Chairman Alexander spent a good deal of his time before the Committee dealing with the issue of policy formulation and transmittal and demonstrated considerable concern for the exact nature of the relationship which has to exist between a regulatory agency and government. See *Ont. Legislative Assembly Deb.*, Resources Development Committee, Nov. 14, 16, 1978 at R1160-R1180.

There has been, as well, in Ontario a particularly interesting development with respect to the Telephone Service Commission. There, following a misunderstanding as to the role of the Commission with respect to government policy, a formal "Memorandum of Understanding" was entered into between the Ministry of Transportation and Communications and the Commission. It provides, *inter alia*, in s. 4 that "The Commission shall be guided in the exercise of its powers by the written policy directives of the Minister expressing the communications objectives of the Province of Ontario." The necessary implication is that the Commission will not be guided by less formal expressions of policy objectives. Ontario Telephone Service Commission, *1977 Annual Report*, Appendix III, p. 2.

and with the rapid rise in the price of oil, the government found that it had a political hot potato on its hands. Thus, in 1976 the Board was given authority over corporation rates. It must be noted that the regulatory decisions of the Board are final and not subject to any political appeal. In its first decision a year later, the Board approved very substantial rate increases. By taking electricity rates "out of politics," the government had extracted itself with considerable dexterity from a political minefield. However, this was not to be the end of the matter. During 1977, amidst rumours of an impending election, the Premier let it be known that he might be prepared to revise certain politically sensitive aspects of the Board's decision (the high costs faced by community hockey rinks and social and community clubs was mentioned). This was criticized as an attempt on the part of the government to have its cake and eat it too—to avoid responsibility for generally higher rates by pointing to the Board's application of the principles of public utility rate making (of which no undue discrimination is a cardinal feature) and then turning around at election time and selectively discriminating in favour of politically deserving groups.⁹⁸ Be that as it may, this possibility was to be overtaken by the coincidence of the approval of a second substantial rate increase by the Board and the decision to have the election on September 19, 1978. The Premier announced that the two most important issues of the election were unemployment and the electricity rates and that an extensive subsidy system would be brought in immediately after the election.⁹⁹ It is interesting to note that more than seventy years ago in Nova Scotia this type of political intervention back-fired, and it was reported that the Cabinet had suffered "politically disastrous consequences" when it was unable to satisfy either industry or consumers with respect to the rates to be charged. "It was its failures in this field of regulation that led the government to search for a method that would 'depoliticize' the regulatory process while, at the same time, maintaining the authority of the state to regulate."¹⁰⁰

A further example of the extent of the confusion as to the independent policy-making role of regulatory agencies can be seen in the attempts being made in Ontario to ensure that the individual decisions of the Ontario Muni-

⁹⁸ "Political Accountability for Administrative Tribunals," *supra* note 1, at 7-8.

⁹⁹ Gray, "Power costs spell trouble for Regan," *Globe and Mail*, Aug. 4, 1978; "Power, jobs main issues in N.S., Regan says," *Globe and Mail*, Aug. 14, 1978; "Power play by Regan," *Financial Post*, Aug. 19, 1978.

Following the election win by the opposition party, the new government declared that it would undertake a "special audit" of the Nova Scotia Power Corporation (NSPC). This drew a response which shows a continuing concern that regulation should not become too politicized. "The government's full intent in ordering these moves is not entirely clear. A spokesman for the Ecology Action Centre in Halifax—a public interest watchdog group—said she couldn't see what an investigation into the NSPC could possibly turn up that hadn't already been found in lengthy hearings before the regulatory Public Utilities Board (PUB). Also, the trend over the last couple of years had been for government to leave the NSPC alone to evolve under the direction of the PUB. Now she feared that politics might again be brought into the NSPC thereby 'muddling the decision-making process'." Surette, "Audits for power, steel promise controversy," *Globe and Mail*, Oct. 28, 1978.

¹⁰⁰ Windsor and Aucoin, "The Regulation of Telephone Service in Nova Scotia," in *The Regulatory Process in Canada*, *supra* note 1, 237 at 239.

cial Board (OMB) adequately take into account general government policy. As B. S. Onyschuk has pointed out, there have been a number of recent decisions of the OMB in which the Board has made use of government policy statements. A typical instance was in *Re Richmond Hill Proposed Plan of Subdivision*, a decision of the OMB in February, 1978.¹⁰¹ Here the Board had to determine whether single family development should be permitted on "good farm land." In April, 1976, the government had tabled a series of documents on growth in the province and one, from the Ministry of Agriculture entitled, "A Strategy for Ontario Farm Land," sought to establish the principle that certain classes of more agriculturally valuable farm land should be preserved as far as possible. In February, 1977, the Ministry produced a "Green Paper on Planning for Agriculture, Food Land Guidelines." This document indicated that it was the government's policy goal to minimize the impact of urban growth on agricultural areas. The OMB stated that it accepted the Green Paper as an indication of government policy and applied the principles it contained to defeat the application for a plan of subdivision. "This case is another example of the Ontario Municipal Board's increasing use of policy statements by the government in its various decisions, a use which is a direct result of the fact that the Government of Ontario is beginning to play a much larger role in land use planning and is promulgating specific policies affecting land use in virtually all parts of Ontario."¹⁰²

It is easy to state that, as a matter of general principle, an independent regulatory agency should take government policy into account in making its decisions, but the practical application of this generality raises many difficult issues. To just what extent should the agency take government policy into account: should it be determinative of the issue or merely persuasive, and if the latter, how persuasive? What is "government policy" and where is it to be found: should an agency look to the speeches of ministers on the hustings or only to formal statements in the legislature? What of that cloud of reports, studies, position papers, evaluations, strategies, and the like which are generated by a plethora of agencies within government: are such documents to be taken into account, and if they are, which ones, how, and to what extent? How is government policy to be communicated to the agency: should it simply be read into the record or does it call for a ministerial witness or the Minister himself, in which case will he be subject, as any other witness, to cross-examination? How should a regulatory agency treat a broad statement of general government policy: should a general statement in favour, let us say, of fiscal restraint, be implemented by an agency, and if it considers doing so, should it warn the parties of its intention in advance?

So far only one of these challenging issues has been dealt with in the courts, and they have made very heavy weather of it. Indeed, to the moment of writing, it may be said that the courts have only so far succeeded in further confusing the issue of whether or not the OMB should consider itself bound by a government policy statement.

¹⁰¹ *Re Richmond Hill Proposed Plan of Subdivision* (1978), 3 M.P.L.R. 257 (O.M.B.).

¹⁰² *Id.* Annotation to report.

In April, 1976, the Corporation of the City of Barrie passed a by-law authorizing application to the OMB to annex extensive areas of the lands surrounding it sufficient to provide for a population of 125,000. A principle document before the Board at the resultant hearing of the annexation application was a comprehensive study authorized and supported by the Government of Ontario entitled "Simcoe-Georgian Area Task Force Development Strategy." This report recommended that the population of Barrie should rise to 125,000 by the year 2011. As might be expected, the government's position with respect to this population projection was a central issue in the hearing, and in December, 1976, after the hearing had been underway for some time, the Minister wrote a letter to the Board indicating that the government "accepts in principle" the report in question. The Board then indicated that it was bound by this government policy determination as to future population. The objectors to the annexation (the adjoining municipalities who saw their own futures as being adversely affected by Barrie's "expansionism") were strongly of the view that this rendered the whole of the annexation proceeding virtually meaningless in that the critical policy determination as to population growth was not being decided independently by the Board. Rather than wait for the result of the hearing (which for them was now almost a foregone conclusion), the objectors sought prohibition from the Divisional Court. The thrust of their argument was that by adopting the report, the Board had fettered its discretion and thereby lost jurisdiction.

The Divisional Court, composed of Morand, Morden and Robins JJ., rejected this application.¹⁰³ In giving the judgment of the Court, Robins J. emphasized that the OMB, in dealing with annexation applications, was involved in what was essentially a legislative process, and thus considerations which might be appropriate to the exercise of a judicial discretion were inappropriate to what was, at heart, a broad ranging policy-making process. Moreover, an annexation application should not be determined in an "intellectual vacuum" and the decision maker, to be realistic, should know and be influenced by the applicable government policies of all levels of government.

The very limited degree to which the Divisional Court had agreed that the OMB could be bound by government policy was soon to be revealed. Following the prohibition decision, and no doubt encouraged by it, the OMB stated even more specifically that it was indeed bound by the population figure, that further evidence and argument were unnecessary, and it refused to allow cross-examination of government witnesses as to government policy. As was to be expected from this stance, the annexation was approved. The objectors then appealed that decision to a Divisional Court composed of Lerner, Henry, and Craig JJ. Their argument now was that the Board had committed an error of law when it held that it was bound by the government policy statement. This time they were successful. In a lengthy, sharply divided decision, Lerner and Henry JJ. decided in favour of the objector appellants and Craig J. in favour of the respondent.¹⁰⁴

¹⁰³ *Re Township of Innisfil and City of Barrie* (1978), 17 O.R. (2d) 277, 80 D.L.R. (3d) 85, 3 M.P.L.R. 47 (Div. Ct.).

¹⁰⁴ *Re City of Barrie Annexation* (1978), 4 M.P.L.R. 83 (Div. Ct.).

The first thing to note is the majority's rejection of the earlier classification of the Board's work as legislative and policy-making and on the traditional "administrative"/"judicial" scale as being "plainly administrative." The OMB was now held to be discharging a "quasi-judicial" function.¹⁰⁵ This change in classification signalled a significantly different perception of the role of the OMB and its relations with the rest of government. It might be perfectly proper for a free-wheeling policy-making surrogate of the legislature to decide to adopt a government policy. Not so a judicial body, which must be isolated from outside influences other than evidence and argument properly adduced before it. Lerner and Henry JJ. were of the opinion that government policy statements should simply be treated as evidence and, as such, be tested by cross-examination. By contrast, Craig J., in his dissent, was of the view that the Minister's letter must be taken as an accurate and authentic statement of government policy because that would inevitably involve going behind the policy and questioning its wisdom. The wisdom of the policy should not be a matter dealt with before the Board—that was a matter only of concern to the legislature and the electorate.

The majority position in the second *Barrie* case displays an unselective enthusiasm for the value of cross-examination and may well constitute an example of what a distinguished judge once called lawyers' "intractable and emotional faith in the technique of cross-examination as the ultimate touchstone in most legal disputes."¹⁰⁶ Recent Canadian case law makes it clear that cross-examination is only essential where adjudicative facts are in issue, but not where legislative facts are at stake.¹⁰⁷ As Robins J. observed, the type of facts in issue before the OMB in an annexation application are of a legislative variety, i.e., "facts needed to assist it in the exercise of its judgment, its discretion, in deciding upon a course of action to be taken within the mandate delegated to it as the agency invested with the power to draw municipal boundaries," and not adjudicative facts "akin to those involved in adjudicative proceedings—who did what, where, when, how and why to the property, business, person or activities of parties to an action or like proceedings."¹⁰⁸ As Craig J. pointed out, once the authenticity and accuracy of a government policy is established, there is no need for cross-examination which could never be confined, as the majority hoped, to its finality, limits,

¹⁰⁵ Anyone considering using a qualifying "quasi" would do well to read C. K. Allen's section on "The Ghost-Land of the 'Quasi'" in his *Law and Orders* (3d ed. London: Stevens and Sons, 1965) at 351-56. One is also reminded of that penetrating observation of Justice Jackson: "The mere retreat to the qualifying 'quasi' is implicit with confession that all recognized classifications have broken down, and 'quasi' is a smooth cover which we draw over our confusion as we might use a counterpane to conceal a disordered bed." *F.T.C. v. Ruberoid Co.*, 343 U.S. 470 at 487-88, 72 S. Ct. 800 at 810 (1951).

¹⁰⁶ Else-Mitchell, "The Place of the Administrative Tribunal," *Papers of the Third Commonwealth and Empire Law Conference*, 1965, 65 at 74.

It is, as well, redolent of Lord Hewart's dogmatic assertion that "[e]vidence not tested by cross-examination is nearly always misleading and practically valueless." *The New Despotism* (London: E. Benn, 1929) at 47.

¹⁰⁷ For a good statement, see the judgment of Johnson J.A. in *Re County of Strathcona and MacLab Enterprises* (1971), 20 D.L.R. (3d) 200, [1971] 3 W.W.R. 461 (Alta. C.A.).

¹⁰⁸ *Supra* note 103, at 286 (O.R.), 94 (D.L.R.), 60 (M.P.L.R.).

flexibility and implications of departure from it. There obviously must be an opportunity to argue as to the meaning and weight to be given to a government policy, but does this necessitate cross-examination?

The second *Barrie* annexation case is now before the Ontario Court of Appeal. Whatever the outcome of that appeal, the limits of the traditional fettering of discretion doctrine have already become apparent.¹⁰⁹ The whole notion of fettering is based on a judicial model of an administrative tribunal in which it is imperative to shield it from outside influences. Yet an agency such as the OMB, especially when it deals with a matter such as an annexation application, can hardly be classified as a judicial body "adjudicating" a municipal boundary. Thus the strict rules on fettering should not apply, provided, of course, that the government policy is openly and clearly enunciated. The inadequacy of conventional analysis is apparent in that in order to avoid a finding of fettering, the agency has to be given a complete discretion to ignore all government policy and in that it may be necessary to treat government policy merely as another piece of evidence.

This may be too high a price to pay. What is needed is some degree of balance between the need for independent judgment and the need to reconcile the exercise of that judgment with government policy, especially in an area of such pervasive government involvement as land use planning. It would appear that the traditional fettering analysis is inadequate for this task and, as with the OHTB, it may be necessary to grant the Cabinet authority to issue directions to the OMB requiring it to take certain government policies into account in its decision making. This, in turn, will require far greater precision in the formulation of government policy than prevails at present, because government policy that is not covered by a direction would not be binding on the OMB. This would, of course, still leave plenty of room for argument as to whether the Board, in its discretion, ought to adopt a parti-

¹⁰⁹ Note: On December 20, 1978, after the text of the article had gone to the printers, the Ontario Court of Appeal released its decision in *Township of Innisfil v. City of Barrie*. However, this decision does not clarify matters to any significant extent and thus supports the article's arguments in favour of statutory reform.

The majority judgment of Lacourcière J.A. strives for a compromise solution in which government policy will be able to have a major impact on OMB decision making without denying parties before the Board an opportunity to have their say. Government policy is to be treated as evidence, but as it is based on "legislative facts," it is not to be subject to cross-examination. Yet, as Blair J.A. points out in his dissent, since this type of government policy statement is really no different in kind from the bulk of evidence heard before the Board, this rationale for denying cross-examination is so broad as to severely limit the role of cross-examination throughout the entire regulatory process. The alternate ground for denying cross-examination, that it will inevitably involve an attack on the merits of government policy, is equally suspect in view of the majority's insistence that parties be entitled to bring evidence designed to prove that there are conflicting government policies to be considered and that actual implementation of the population policy is not possible. Surely, as had been foreseen by Robins J. in the first *Barrie* case in which he had been consistent in denying both any right to cross-examine and to call evidence, this opportunity to call evidence will be just as likely to lead to an attack on the government policy itself as would cross-examination. This, however, appears to be the price which has to be paid for a compromise solution. What really is needed is the means for specific policy directives, and as Blair J.A. points out, this can only be accomplished by statutory reform.

cular government policy, but at least it would be settled that the Board is only bound to implement those policies which have been the subject of a direction. It is to be expected that confusion would be reduced by this means to that manageable level of argument and dispute which is endemic to modern complex government.

We now turn to five new major areas of tension and misunderstanding which have emerged in recent months at the federal level. These are first, evidence of ministerial propensity to interfere with the independence of regulatory agencies; second, the practice of simultaneously criticizing a regulatory agency for exercising too great a degree of independent policy making and then leaving it to deal with a fundamental policy issue without giving any adequate hint of government policy preferences, thereby placing the agency in the predicament of having to make a decision, knowing all the while that it could be promptly reversed for failing to take into account considerations never communicated to it; third, the counteroffensive by the CRTC with respect to "developing national telecommunications policy objectives"; fourth, the total lack of any procedural regularity in "political appeals" to the Cabinet; and fifth, the acquisition of Nordair by Air Canada and the collapse of the Regional Airline Policy.

Over the last several years, the Consumers' Association of Canada, through its Regulated Industries Policy Board, has discovered and revealed a number of instances of confidential correspondence between ministers and regulatory agencies. These communications were designed to influence the work of these agencies either at a preliminary stage prior to a hearing or at the actual decision level itself. The attempts by the Minister of Transport to influence the CTC in its deliberations on the introduction of ABC's within Canada and by the Minister of Communications to stampede the CRTC into abandoning its policy on pay television have already been noted. To this should be added the confidential correspondence between the Minister of Communications and the Chairman of the CRTC, in which it was made clear that the Cabinet favoured Telesat's application to join TCTS (even though it had not yet been subject to any detailed examination, and had still to be passed on by the Commission), and the occasion on which the Minister of Transport set in motion an ostensibly independent investigation into trans-Canada passenger rail policy and then attempted to influence that investigation behind the scenes.¹¹⁰

These incidents were forcefully brought to the attention of the Prime Minister by CAC with the reminder that his own guidelines of March 12, 1976, following the so-called "Judges Affair," had indicated that there should be no confidential contact between ministers and members of "quasi-judicial bodies" constituted as "courts of record" "concerning any matter which they have before them in their judicial capacities." As the Prime Minister quite correctly pointed out, a number of these incidents were not technically matters before the agencies in their "judicial capacity." Yet as Gregory Kane, at that time the the General Counsel of CAC, noted in his reply, while perhaps technically true, this narrow approach could lead to little but confusion

¹¹⁰ "Political Accountability for Administrative Tribunals," *supra* note 1, at 7.

because, as the Prime Minister had himself acknowledged in his letter, "even lawyers trained in administrative law may have difficulty in determining in specific cases whether or not a given body is acting quasi-judicially and hence whether direct ministerial communications may or may not be proper." Quite clearly, this question remains far from settled, at least until the results of the Prime Minister's request in January, 1978, to his officials, in consultation with the Department of Justice, "to attempt to develop means of clarifying the application of the guidelines with regard to these matters," are made publicly available.¹¹¹

By far the most important issue facing the regulators of telecommunications in Canada today concerns the role to be assigned to competition in the provision of telecommunications services. How far should the "natural monopoly" of the telephone companies extend outside of the provision of local exchange voice service? Competition can take two basic forms—the attachment of nontelephone company equipment to the network, and, more importantly, the provision of selected telecommunications services in direct competition with the telephone companies. At the heart of the latter lies the intractable question whether a competitor should be entitled to interconnect his service with the local exchange facilities provided by the telephone company. This might mean that the competitor could have the best of both worlds—freedom to choose profitable high density intercity routes and then have access to telephone exchanges for local distribution, while the telephone company would lose its ability to include profitable routes in a system-wide pricing system which makes it possible to provide high quality service in all areas of its operating territory. On the other hand, it is equally strongly urged that efficient provision of telecommunications services does not require a ubiquitous telephone company monopoly and that outside the provision of local exchange voice service there are no inherent advantages of scale such as to justify what amounts to an effective prohibition on competition.¹¹²

Such are the fundamental issues raised by the application of CN/CP Telecommunications to interconnect with Bell Canada's local exchanges.¹¹³ Yet despite the overwhelming importance of these issues to the future development of telecommunications in Canada, the Commission is virtually unable to find any guidance from its legislative mandate, and the Department of Communications has given no indication of any government policy preferences.¹¹⁴ Moreover, a decision has to be made in the immediate aftermath of

¹¹¹ *C.A.C. Action: Interference and Independence*, Canadian Consumer, Feb., 1978 at 18-20; *C.A.C. Action: The P.M. Replies*, Canadian Consumer, June, 1978 at 37-38.

¹¹² For a review of these issues, see *Telecommunications Regulation at the Crossroads*, *supra* note 1, at 95-128.

¹¹³ For the developments in this application, see *CRTC Telecommunications Bulletin*, Vol. 2, No. 8, Aug. 15, 1978 at 11-13.

¹¹⁴ As the Manitoba Telephone System was to put it: "representatives of the people in the form of governments, and not regulators, should have full responsibility for such a fundamental policy decision." *Memorandum of Argument* at 2. The Government of Ontario stated that it was "inclined to agree with those who have contended that governments, and not regulators, should have responsibility for fundamental policy decisions." *Memorandum of Argument* at 12. British Columbia Telephone was of the view that,

the Telesat affair, in which it will be recalled the Commission had its decision so precipitously reversed by the Cabinet. It is difficult to envisage a more unsatisfactory situation than the one in which a regulatory agency is placed in the predicament of having to make a decision while knowing that it could be promptly reversed for failing to take into account considerations never communicated to it.

The CRTC has not been entirely passive in its relations with the rest of government as may be seen from its May, 1978, statement, *Procedures and Practices in Telecommunications Regulation*. This statement grew out of hearings held by the Commission in October, 1976. At that time the Commission had stated in its initial proposals that "in discharging its regulatory responsibility it must be conscious of developing national telecommunications policy objectives."¹¹⁵ This provoked a strong response from a number of participants at the hearing, including the Canadian Telecommunications Carriers' Association which stated:

If, by the statement, the Commission is suggesting that it intends to render its decisions on policies not yet legislated upon by Parliament, the Association respectfully submits that the Commission must base its decisions on existing laws and not on Government policies which may never be crystallized in the form of legislation.¹¹⁶

A similar concern was expressed on behalf of Bell Canada by Ernest Saunders¹¹⁷ who holds to the view that the only policy to be followed in regulatory matters is the one found in the governing legislation. As he put it on another occasion:

I may be very old-fashioned in this view but it's always been my view that the regulatory agency is set up, it is backed up by a statute and it is in that statute that the policy should be stated and thereafter the agency acts within that policy. Now the *Broadcasting Act* has a long section on what government policy in broadcasting is. The *National Transportation Act* has a long section on what policy is and it seems to me that the day to day wishes of the politicians are not government policy that the regulatory agencies should take into account at all, unless it goes through parliament and appears in the statutes.¹¹⁸

The Vice Chairman of the Commission, Charles Dalfen, who presided at the hearing, pointed out that the Commission had carefully included the limit-

"[t]he general public of Canada has a right to express opinions either directly or through elected representatives on a matter of such great and increasing importance to Canada as a whole." *Memorandum of Argument* at 51.

A similar complaint has been made in the United States. See, for example, Loeb, *The Communications Act Policy Toward Competition: A Failure to Communicate* (1977), 30 Fed. Comm. L.J. 1. There have at least been extensive legislative hearings on the issue designed to educate the legislators. See, for example, U.S. House of Representatives, Committee on Interstate and Foreign Commerce, Sub-Committee on Communications, *Exploring the Subject of Competition in the Domestic Communications Common Carrier Industry*, 94th Cong., 2d Sess., Sept. 1976, S.N. 94-129.

¹¹⁵ *Telecommunications Regulation—Procedures and Practices*, July 20, 1976, at 3.

¹¹⁶ *Canadian Telecommunications Carriers Association: Submission in Response to CRTC Statement re Telecommunications Regulation*, at 4.

¹¹⁷ *Submission by Bell Canada*, Oct. 1976, at 14-16.

¹¹⁸ *The Conduct of Hearings by Federal Administrative Agencies*, edited proceedings from the program held in Ottawa June 23, 1976 (Toronto: Law Society of Upper Canada).

ing phrase "conscious of" to indicate that it was not planning to fetter its discretion. There was to be, however, no response to British Columbia Telephone's somewhat different concern, which focused on the word "developing."¹¹⁹ This is the real problem here because Saunders's position is too mechanistic and fails to take into account that Parliament cannot be expected to include more than very general policy considerations in its legislation and that statutory standards such as "just and reasonable" and "public interest" are so broad that it is impossible to say what *the* policy of the act really is. This contemporary reality was fully recognized by the Government of Ontario when it stated that "the Commission must inevitably be involved with matters of policy and make decisions of a policy nature," although it wanted major policy decisions to be made by elected representatives and then communicated to the regulatory agency by way of "formal directions."¹²⁰ As will be seen in the next section of this article, this provincial concern as to the location of policy-making capability finds considerable support in the proposals for reform currently before Parliament.

In its 1978 statement, the CRTC recognized that the reference to national policy objectives had possibly suggested "some source of authority other than the Commission's governing statutes and the possible compromise of the Commission's independence." In response, the CRTC strongly reaffirmed its independence along very much the same lines as urged on the OMB in the second *Barrie* annexation case.

The Commission's position with respect to government policy can be stated quite clearly. The Commission has a duty to take into consideration all evidence properly before it in reaching its decisions. It is to be expected that such evidence may, in the normal course, include statements of government policy affecting a given case. Such statements would not supersede the Commission's statutory jurisdiction but might, *subject to being tested by cross-examination and argument*, be helpful in assisting the Commission in exercising its authority. To that extent, "developing national telecommunications policy objectives" may be and are taken into account.¹²¹ [Emphasis added]

While an admirably frank statement of independence of spirit, this position has the same weaknesses already identified in connection with the OMB decision, i.e., should government policy statements be treated simply as evidence and is it appropriate to have government policy tested by cross-examination?

During the last year, consumer and public interest lawyers have focused new attention on the total lack of any procedural regularity in "political appeals" to the Cabinet. The issue has arisen especially in connection with section 64(1) of the *National Transportation Act*, which provides:

The Governor in Council may at any time, in his discretion, either upon petition of any party, person or company interested, or of his own motion, and without

¹¹⁹ *Submission of British Columbia Telephone Company Pursuant to the CRTC Statement, July 20, 1976, Oct. 1976, at 28.*

¹²⁰ *Submission of the Minister of Transport and Communications for the Province of Ontario, Oct. 1976, at 29.*

¹²¹ *CRTC Procedures and Practices in Telecommunications Regulation, Telecom. Decision CRTC 78-4, May 23, 1978 at 6.*

any petition or application, vary or rescind any order, decision, rule or regulation of the Commission, whether such order or decision is made *inter partes* or otherwise, and whether such regulation is general or limited in its scope and application; and any order that the Governor in Council may make with respect thereto is binding upon the Commission and upon all parties.¹²²

As Gregory Kane noted in a letter to the Prime Minister on September 23, 1977, CAC was not at all satisfied with the manner in which the Telesat review had been decided by the Cabinet. Indeed, he was of the view that the procedures adopted were "inherently unsatisfactory." He found it incredible that the whole process could be described by officials at the Privy Council Office as a confidential and private matter between the petitioner (Telesat) and the Governor in Council (Cabinet). This was damned as being entirely inconsistent with the whole notion of a statutory appeal and as being a fundamental violation of the most basic precepts of fairness and natural justice. In his reply, the Prime Minister correctly pointed out that the unique nature of section 64(1) rendered analogies to the traditional court system somewhat inappropriate:

It is the view of the Government that Section 64(1) of the National Transportation Act is designed to enable the Governor in Council to vary or rescind particular decisions of the regulatory agency in cases where he considers that matters of public policy justify or require him to do so. Section 64(1) does not constitute the Governor in Council as a court of law, and requests made to him in the form of petitions under that Section are not in the nature of appeals in the legal sense.

To this Gregory Kane replied on November 9, 1977, reiterating the Association's concern for at least some degree of procedural regularity. At present, he pointed out, petitions are treated on a confidential basis without any requirement for the petitioner to notify other parties to the regulatory proceedings; no time limit is set within which petitions must be filed, and there is no time limit for the responses when parties happen to know of a petition. "In short, there is a total absence of prescribed procedures, concomitantly the potential for unfairness and uneven treatment of parties."¹²³

When Andrew Roman, the Public Interest Advocacy Centre's General Counsel, sought to have this matter tested in the courts, he was to be met by a very similar analysis to that employed by the Prime Minister. In March, 1978, Nadeau J., of the Federal Court of Canada, Trial Division, granted an order striking out Roman's statement of claim in which he had, *inter alia*, sought a declaration that the Cabinet had to observe the dictates of natural justice when acting under section 64(1). Natural justice was held only to apply to those decisions made by way of a "judicial" or "quasi-judicial" process and section 64(1) involved a "political" process.¹²⁴ As I have argued

¹²² R.S.C. 1970, c. N-17.

¹²³ This correspondence is set out more fully in n. 33 to "Political Accountability for Administrative Tribunals," *supra* note 1.

¹²⁴ *Inuit Tapiramat of Canada v. Léger* (1978), 87 D.L.R. (3d) 26 (F.C.T.D.).

NOTE: Since the text of this article went to the printers, the Supreme Court of Canada has brought about a major change in administrative law which has had an immediate impact on "political appeals" to Cabinet. This development is entirely in keeping with the general tenor of the argument developed in the text and it provides the

elsewhere, the use of such overbroad conceptual classification as "judicial" or "administrative" (or "political") remains "the curse of Canadian administrative law," because it leads to such rigid, all-or-nothing decisions.¹²⁵ Surely it is possible to envisage a flexible compromise in which it is recognized that section 64(1) cannot possibly involve a trial-type oral hearing, but, nevertheless, as a legal procedure specifically authorized under statute, there must be at least some of the very limited procedural decencies suggested by Gregory Kane.

It is probable that there will have to be some substantial improvement in the manner in which "political appeals" are dealt with by the Cabinet even if this is not to come about from the courts. As the Prime Minister himself observed in connection with the propriety of confidential contacts between ministers and regulatory agencies, even lawyers trained in administrative law have difficulty in recognizing when a body is acting in a "quasi-judicial" capacity. The general public is even less capable, or prepared, to deal with this matter by way of legalistic terminological sleight of hand. If it is true that even a dog can appreciate the difference between a kick and a stumble, so can the man in the street recognize unfairness when he sees it. All that is needed are a few more amusing and revealing insights such as that of Gregory Kane in connection with CAC's appeal to the Cabinet of the CTC's restrictive ABC decision.

Without digressing too far afield, it is fascinating to look at how the Governor in Council administers a petition. The matter is commenced by preparing the appeal documents in an acceptable form (and here there is wide latitude, with everything from a letter to a legal format having been adopted at some time) which is then mailed or delivered to the Clerk of the Privy Council. Since appeals to the Cabinet are permitted in a wide number of subject areas, the practice has developed that the appeal is transmitted to the Minister who is directly responsible for the subject area. Therefore, in CAC's case, the Clerk of the Privy Council transmitted the matter to the Minister of Transport "for his consideration and recommendation".

practical means by which the desired goal of greater procedural regularity may be attained.

On October 3, 1978, after *Inuit Tapirasat* had been argued on appeal but before judgment had been rendered, the Supreme Court of Canada held in *Nicholson v. Haldimand-Norfolk Regional Board of Commissioners of Police* that even where a government action was classified as "administrative" some degree of procedural "fairness" short of "natural justice" had to be provided. In a bold move, the Federal Court of Appeal in *Inuit Tapirasat of Canada v. Léger* (November 17, 1978), in a judgment by Le Dain J., held that this fairness doctrine applied to appeals to Cabinet. This means that where an appellant makes a submission to Cabinet, it must be made available to the intervenors who must then be given an opportunity to reply. However, respect for the nature of Cabinet means that a submission made by a minister, or even one made by the regulatory agency involved, need not be disclosed.

This decision may so undermine the nature of cabinet appeals as a free-wheeling political process as to destroy their utility as presently perceived. This is entirely in keeping with the article's thesis and makes the proposal for the abolition of such "political appeals" that much more attractive.

Geoffrey Stevens, in two excellent before and after columns, again made a useful contribution to the all too slowly emerging debate on regulatory reform in Canada; "Appeal for Justice," *Globe and Mail*, Sept. 28, 1978; "A Duty to be Fair," *id.*, Nov. 24, 1978.

¹²⁵ Janisch, K. C. *Davis, Administrative Law of the Seventies*, and Bernard Schwartz, *Administrative Law* (1978), 4 Dal. L.J. 824 at 843.

When CAC was informed of this procedure it objected on the grounds that if it had wished to appeal to the Minister of Transport personally, it would have done so (there being provision for appeals to the Minister of Transport from decisions of the CTC). What CAC was interested in was the consideration and recommendations of all the members of the Federal Cabinet.

But the Privy Council Office was adamant that it would be impractical to copy and circulate the Petition to all members of the Cabinet. Undaunted, CAC itself sent a copy of the Petition to every member of the Federal Cabinet. Receipt of the Petitions was acknowledged either by the Minister personally or by an Executive Assistant. This was not without incident, however; the Minister of Labour (John Munro) wrote a letter to CAC dated January 25, 1978 thanking the Association for the Petition and stating, "It is my understanding that the matter will come before Cabinet very shortly. You can expect to hear from the Government in due course." In fact, the Cabinet had dealt with the matter on January 19, 1978 and CAC had been advised of the Cabinet's decision on January 20, 1978!¹²⁶

Amidst all the confusion which has been so characteristic of Canadian regulation, it had always been possible to point to the Regional Airlines Policy as an example of how a policy position could be established by government and put into effect by a regulatory agency. Indeed, Gerald Stoner, who as Deputy Minister of Transport had been largely responsible for the reorganization of the Ministry of Transport in the early 1970's, stated in evidence before the House of Commons Standing Committee on Transportation that it constituted a model for the relationship which should exist between government and regulatory agency.

The government has issued, from time to time, statements of policy, for example, respecting . . . regional air policy. . . . It is within that policy framework, then, that the CTC deals with individual applications.¹²⁷

The statutory mandate under which the CTC has to decide on allocation of air routes is so vague as to be in itself of little practical guidance. The *Aeronautics Act* simply provides that licences to provide air services are to be granted on grounds of "public convenience and necessity." There was thus no clear statutory indication as to the role to be assigned to Air Canada, CP Air or the smaller regional airlines which emerged in the postwar period. This policy vacuum was largely filled by the Regional Airlines Policy which was made up of a series of ministerial announcements commencing in 1964 and culminating in a document tabled in Parliament in 1966 by the then Minister of Transport, J. W. Pickersgill, entitled "Statement of the Principles for Regional Air Carriers." This provided in part:

1. Regional carriers will provide regular route operations in the north and will operate local or regional routes to supplement the domestic mainline operations of Air Canada and CPA; they will be limited to a regional role.
2. Greater scope will be allowed regional carriers in the development of routes and services by the following means:
 - (a) Where appropriate, limited competition on mainline route segments of Air Canada or CPA may be permitted to regional carriers if this is consistent with their local route development.
 - (b) In a few cases, secondary routes presently operated by Air Canada and CPA may become eligible for transfer to regional carriers.

¹²⁶ "Canadian Consumers Learn Their ABCs," *supra* note 74.

¹²⁷ CTC Study, *supra* note 1, at 121.

- (c) A larger role will be allotted to regional carriers in connection with the development of domestic and international charter services, inclusive tours and new types of services.

In 1969 these principles for the allocation of routes between the mainline carriers (Air Canada and CP Air) and the regional carriers (Pacific Western, Transair, Québecair, Nordair, Eastern Provincial) was specifically reaffirmed by the Minister of Transport, Don Jamieson.

As defined by the government on October 20, 1966 the role of regional air carriers is to operate local or regional routes, to supplement the domestic mainline operations of Air Canada and CPA and to provide regular and scheduled service to the north.¹²⁸

Although nowhere stated specifically in the Regional Airlines Policy, it is quite obvious from its historical context that the regional airlines were to be independent companies and there was to be a limited degree of competition on some routes and considerably more opportunities for competition in the charter field. Despite possible problems of fettering, the CTC consistently maintained that it was obliged to implement the Regional Airlines Policy in its decisions allocating routes between the mainline and regional carriers. Yet not only has the Policy never been updated since 1969 to keep abreast of developments in the industry, but the acquisition of Pacific Western Airlines (PWA) by the Government of Alberta in 1974 and the decisions of the CTC not to disallow the subsequent acquisition of Transair by PWA and now the acquisition of Nordair by Air Canada have led to the total collapse of the Regional Airlines Policy. Although it was held not to have any authority over the acquisition of PWA by a provincial government,¹²⁹ the CTC under section 27 of the *National Transportation Act* did have authority to disallow the Transair and Nordair acquisitions should they, in its opinion, "unduly restrict competition or otherwise be prejudicial to the public interest."

Ministers of Transport subsequent to Don Jamieson have proved to be entirely incapable either of simply reaffirming the continuing validity of the principles of the Policy as established in 1966 or, as would have been preferable, of developing new policies to cope with the rapid economic and technological changes which were taking place in the airline business. This was particularly obvious with respect to the Nordair acquisition by Air Canada. Quite obviously, this acquisition could not be reconciled with the Regional Airlines Policy as it stood in 1969. As can be seen in the following extracts from the summary of evidence and argument at the CTC's inquiry into the Nordair acquisition, the Ministry had allowed, perhaps even encouraged, a state of total policy confusion.

Mr. Hamilton [for CP Air] was particularly interested in the Nordair application to add the point Yellowknife to its northern network. Mr. Hamilton explained that his concern in these matters related to the Minister of Transport's reference,

¹²⁸ The Regional Airlines Policy is set out in the dissenting judgment of Commissioner Talbot in Air Transport Committee Decision No. 5539, July 28, 1978, *In the Matter of the Proposed Acquisition of Interest in the Business or Undertaking of Nordair Ltée—Nordair Ltd. by Air Canada*, at D 4-14.

¹²⁹ *The Queen in Right of Alberta v. CTC*, [1978] 1 S.C.R. 61, (1978) 75 D.L.R. (3d) 257.

in a letter to the CAC, to the document entitled "Discussion Paper: Structure of the Domestic Air Carrier Industry," which had been circulated by the Ministry to the industry for comment in the fall of 1977. In his letter to Mr. Kane, the Minister had said, "I will expect the long-term relationship of Air Canada and Nordair to be consistent with this evolving policy framework." Mr. Hamilton pointed out that the discussion paper had divided routes into long, medium and short haul categories as well as in terms of density. Mr. Hamilton suggested that a combination of Nordair routes, both existing and proposed, with Air Canada's routes would encompass all these definitions. Mr. Tooley [Chief Executive Officer of Nordair] responded that both Air Canada's and CP Air's services spanned the definitions now.

...
 Mr. Hamilton pointed out that in the Transport Canada "Discussion Paper," northern Canada was indicated as being reserved for regional or "lower level" carriers. He asked whether Mr. Taylor [President of Air Canada] was aware of any official change in government policy dealing with the various roles of carriers in Canada to which Mr. Taylor replied that he was not, but he was aware "as the industry is, that the Minister has made known his views that there should perhaps be a restructuring of the policy." Challenged by Mr. Hamilton as to whether Air Canada's acquisition of Nordair would not offend the current policy as to the role of the various carriers in Canada, Mr. Taylor said that given the indications about both present policy and the evolving policy he did not see the acquisition as being contrary to this. Mr. Hamilton was not satisfied that Mr. Taylor had answered the question as to offending published policy, and suggested to the Chairman that "this tribunal has no knowledge, I don't think, of what this evolution is. If it has, I would be delighted to know about it too."

...
 The Regional Air Carrier Policy as expressed in the statements of 1966 and 1969 does not, argued Mr. Kane [for CAC] "accommodate the proposition of a main-line carrier acquiring the routes of a regional airline." Furthermore, in the discussions of evolving policy, Mr. Kane noted that the Minister has foreseen no major shift from the position now occupied by Air Canada in the domestic and international fields

Mr. Kane predicted that if the acquisition were not disallowed, Nordair before long would become a fully integrated part of Air Canada's operation which in CAC's submission would not be in the public interest and would not be in compliance with either present policy or the evolving policy as indicated by the Minister of Transport.¹³⁰

Given this state of policy confusion, it was surely incumbent upon the CTC to do something. For instance, it could have applied the Regional Airlines Policy as originally stated in 1966 (which would, almost certainly, have led to a disallowance of the Nordair application), or it could have drawn on its regulatory experience with the Policy and articulated a new and updated version. Regrettably, it did neither. Far from dealing with any general principles of policy, the majority judgment of the CTC, which allowed the acquisition, was narrow and cursory. Commissioner Thomson started from a position of nihilistic parochialism ("It is meaningless to compare the Canadian air industry with that of any other country in the world, including the United States"), and then moved on to an entirely personal and impressionistic premise that was to form the basis of the majority's position:

I am of the opinion that if the Canadian industry had been subject to the full forces of competition, that we would not have the air industry we have today with the sophisticated equipment and service that is provided to the Canadian public. It has only been as a result of the limitation of competition that the regionals

¹³⁰ Air Transport Committee Decision No. 5539, *supra* note 128, at A 23-24, 25, 53.

have grown and extended their routes and acquired the pure jet equipment which now serves most areas of Canada.¹³¹

So narrow was the majority's focus that it provoked Vice President Guy Roberge to write an agonized lengthy concurring judgment (in the form of 45 pages of "notes"), in which he pointed out that his colleagues had never really come to grips with many of the basic questions raised by the acquisition and had not been willing to consider the probable implications of their decision for the future. For example, what concrete structural provisions would be made to ensure that Air Canada does in fact treat Nordair as an independent entity, aside from a naive reliance on the personal reassurances of Mr. Taylor? Or again, what effective measures would be taken to ensure that Air Canada does not limit Nordair charters where they compete with its scheduled services, aside from personal conviction? Although he eschewed any general policy role in the restructuring of the air industry, Vice President Roberge did point out that the Transport Minister Otto Lang had made it clear in correspondence with CAC (which was placed on record at the CTC hearing) that he expected a good deal more from the CTC than was to be found in the majority judgment. As he had stated:

As you may know, I am already giving consideration to possible changes in the structure of the domestic air carrier industry. I do not wish to comment on this matter while it is under consideration by the CTC. Indeed, I expect that my views on the subject will be influenced considerably by the evidence to be presented before the CTC on the likely implications of Air Canada's proposal, and by the CTC's assessment of that evidence. I shall be keenly interested, in particular, in estimates of the effects of the proposal on the services provided by the two airlines in question.¹³²

In brief, the decision in the Nordair case has indicated: 1) an overly broad statutory standard; 2) a ministerial initiative to give more precise meaning to that statute; 3) a willingness on the part of the regulatory agency to implement the ministerial policy initiative; 4) a subsequent ministerial inability to keep the policy abreast of rapidly changing economic and technological conditions in the air industry; 5) a request to the regulatory agency for a thorough assessment on which a new policy could be based; 6) an unwillingness by the regulatory agency to provide anything more than a narrow impressionistic judgment; and 7) the inevitable "political appeal" to Cabinet in which a policy determination will be made of fundamental importance to the future of the entire Canadian air industry on a totally inadequate evi-

¹³¹ *Id.* at B5.

¹³² *Id.* at C 41. Roberge's concern was borne out very shortly after the CTC decision when Air Canada pilots went on strike to demand that their seniority list be merged with that of Nordair. Air Canada has agreed to this demand, "Strike by Air Canada pilots is averted," *Globe and Mail*, Aug. 24, 1978. This would appear to be contrary to the commitments of continuing total separate operation given by Air Canada at the time of the CTC hearing. See, for example, "How long is an arm?", *Globe and Mail*, Sept. 4, 1978.

Geoffrey Stevens in his perceptive column in the *Globe and Mail* exposed the extraordinarily incompetent way in which the whole matter had been handled. "Civil aviation policy," Aug. 2; "Begetting a giant," Aug. 3; "Does the government know?," Aug. 4; "An embarrassment of riches," Sept. 6; "Separate? Independent?," Sept. 7, 1978.

dentiary basis and almost certainly dominated by considerations of short-term political expediency.^{132a}

^{132a} Since the text of this article went to the printers developments with respect to the proposed acquisition of Nordair by Air Canada have more than borne out these doleful predictions and provide yet further evidence to support the thesis that "we have passed over the threshold which divides acceptable organizational accidents and compromises from unacceptable organizational chaos." (See text, *supra* p. 62)

The Air Transport Committee's decision not to disallow the proposed acquisition was immediately appealed to Cabinet by way of s. 64(1) of the *National Transportation Act*. Those appealing included the provinces of Manitoba, Ontario and Québec, the Consumers' Association of Canada (CAC), Suntours Limited and Great Lakes Airlines Limited. There was inevitably confusion as to the procedure to be adopted in such a "political appeal" and CAC's request to see the submission made to the Cabinet by the Minister of Transport was denied on the ground that such a document "is considered to be a confidence of the Queen's Privy Council and is not publicly available for the purposes of consideration or rebuttal." However, it was agreed that Air Canada and Nordair would be asked to furnish CAC with a copy of any submission they might make in reply to CAC's submission. "Should you wish to make any reply to such submission, you should do so as promptly as possible after the receipt of the submission in order to enable such reply to be taken into account." Letter of James R. Midwinter, Senior Assistant Secretary to the Cabinet to H. G. Intven, General Counsel, Consumers' Association of Canada, Sept. 18, 1978. And see Stevens, "A Rotten System," *Globe and Mail*, Sept. 27, 1978. (Here is evidence of the beginnings of a concern for procedural regularity which has now been confirmed by the Federal Court of Appeal in *Inuit Tapirast v. Léger*, *supra* note 124).

Further confusion was added by Québecair's decision to seek review of the Air Transport Committee's decision by the Canadian Transport Commission under s. 63 of the *National Transportation Act*; "Québecair appealing Nordair sale to CTC," *Globe and Mail*, Sept. 27, 1978. This, in turn, raised difficult questions as to the criteria to be applied in determining whether a review should be granted. For a discussion of that issue, see CTC Study, *supra* note 1 at 87-97. The question then arose as to which proceeding was to take precedence. After some vacillation it was agreed that the CTC should proceed with its review; "CTC processing Québecair brief," *Globe and Mail*, Sept. 28, 1978; "Same appeal, different routes," *Financial Post*, Oct. 14, 1978. Soon after this order of things was agreed upon, the Cabinet announced its decision, thereby completely undermining the CTC review proceeding. That decision, in turn, was a convoluted one in which those appealing the decision ostensibly lost but actually won. The ATC's decision not to disallow the proposed acquisition was not changed in any way but it was announced that as soon as the acquisition was completed, Air Canada would be required to hand Nordair over to the government which, in turn, would sell it back to the private sector; "Ottawa will be interim owner of Nordair," *Globe and Mail*, Nov. 8, 1978. It was for Geoffrey Stevens "the weirdest decision to come out of the Government of Canada in many, many moons"; "A Weird Decision," *Globe and Mail*, Nov. 8, 1978. A final decision on a sale back to the private sector has still to be made in what is now a virtually complete policy vacuum. As Anderson Charters noted:

Who will buy Nordair back from the government? Peter Wallace, executive assistant to Transport Minister Otto Lang, says the minister is wide open to proposals. But as the guessing game proceeds, Canada's air-carrier industry remains puzzled by the complex roundabout Lang has devised. "We usually understand these things, but not this time," says one industry spokesman who had thought Cabinet would accept or reject cleanly the Canadian Transport Commission's approval of Air Canada's Nordair purchase. By his decision Lang has indicated he knows what he wants the end result to be—a rationalization of the regional airline business in Eastern Canada through merger and route restructuring. But it seems clear that he has no firm idea of how this going to happen.

"Integrated Eastern air service key to Nordair 'roundabout' decision," *Financial Post*, Nov. 18, 1978. And see Romain, "Lang, Québecair officials meet," *Globe and Mail*, Nov. 9, 1978; Carruthers, "Price tag set at \$28.4 million for Nordair," *Globe and Mail*, Nov. 23, 1978.

VI. THE INADEQUACIES OF THE CURRENT PROPOSALS FOR REFORM

The two most prominent features of the proposals for reform made in 1977-78 are, first, the granting of specific statutory authority to the Governor in Council (Cabinet) to issue such "directions" to the CTC and the CRTC as are considered necessary to achieve the policy objectives set out in the new *National Transportation Act* and the *Telecommunications Act*, and, second, particularly with respect to transportation regulation, a shift of policy-making responsibility from the regulatory agency to the Minister.¹³³

These proposals appear to be part of a general trend towards the "politicization" of regulation, in which it is envisioned that regulatory agencies will be held on much tighter political reins than they have been in the past. The establishment of the Foreign Investment Review Agency (FIRA)¹³⁴ as a purely advisory body designated to operate very much within the political process constitutes an early manifestation of this trend away from reliance on independent bodies to make important policy decisions even where, as in the review of the desirability of foreign investments, the specific decisions have a direct impact on individual corporations. This is in spite of a strong argument in favour of an independent adjudicatory body, which would make its decisions on the evidence presented to it at an open hearing, give reasons for its decisions, and then follow them in an open and consistent manner.

Examples of this trend towards greater political control are to be found in the status of the Northern Pipeline Agency and the decision to cut back very substantially on the independence of the proposed new Competition Board.

The Alaska Highway Pipeline Inquiry (the Lysyk Inquiry) had recommended that pipeline development be regulated by a single, independent agency. It was recognized that there had to be some provision for the review of agency decisions to maintain public and political accountability and to provide the means of infusing national and international interests into regu-

¹³³ For a general analysis of these proposals, see *The Role of the Independent Regulatory Agency in Canada*, *supra* note 1, at 100-20; "Political Accountability for Administrative Tribunals," *supra* note 1, at 17-28.

This legislation has been reintroduced in the current session of Parliament. The new version of the *Telecommunications Act*, Bill C-16, 1978 (30th Parl. 4th Sess.) (First reading Nov. 9, 1978) is very similar to its predecessors. However, the new version of the *Act to Amend the National Transportation Act*, Bill C-20, 1978 (30th Parl. 4th Sess.) (First reading Nov. 16, 1978), omits any reference to a specific direction power and merely provides in a proposed new s. 3(2)(a) that "the Government of Canada should establish national policies respecting the various constituent parts of the transportation system, and it is the responsibility of the Commission, within its statutory jurisdiction, to ensure adherence to such policies." No provision whatsoever is made as to who is to formulate the "national policies," what legal form they are to take or the means by which they are to be transmitted to the CTC. This piece of simplistic aspirational draftsmanship should add to the concern already expressed by spokesmen for telecommunications and transportation interests as to the dangerously arbitrary nature of the powers being claimed by government; French, "Cabinet is accused of usurping transport powers from Commons," *Globe and Mail*, Sept. 20, 1978; Laws, "Industry concern over cabinet powers contained in telecommunications bill," *Financial Post*, Nov. 25, 1978.

¹³⁴ *Foreign Investment Review Act*, S.C. 1973-74, c. 46.

latory decisions. Yet this was to be only a limited form of review, to be conducted in such a way as to provide for a maximum degree of protection for agency independence.¹³⁵ The *Northern Pipeline Act*¹³⁶ reflected a completely different philosophy, in that it created the Northern Pipeline Agency as a department of government. There was to be no debate on the value of an independent decision maker; the only concern was whether Parliament would be capable, in practice, of exercising any effective control over the Agency.¹³⁷ In the end, opposition proposals to improve parliamentary control, such as a requirement that the Agency report quarterly on specific matters and that the standing committee be given adequate resources to "monitor" the Agency, were defeated and control was to be the same as for any other department of government.

The latest proposal for the reform of Canadian competition law, Bill C-13 introduced on November 18, 1977, contained a very significant shift away from a previous commitment to the value of having the proposed new Competition Board act as a truly independent body. The earlier proposal, Bill C-42, had provided that the only appeal from the Board would be by way of an application under section 28 of the *Federal Court Act*. It was now proposed in section 31.91 of Bill C-13 that the Cabinet be given extensive powers to review the decisions of the Board. The business community had urged Cabinet appeal on three grounds. First, it was said that it was unwise to grant broad powers over mergers without allowing for a more substantive type of appeal than could be obtained in the Federal Court. Second, it was important that there be consistency in all facets of economic regulation, and this could only be brought about by the Cabinet. Third, it was strongly argued that there was a need for political accountability where private rights were going to be affected. The Board was "accountable to no one" for its decisions.¹³⁸

¹³⁵ Such review must be exercised openly and sparingly, if the regulatory process is to maintain its integrity and credibility. Any system of review that does not permit open representations and the articulation of reasons for decisions would fatally undermine the Agency's ability to maintain the confidence of the interested parties and of Yukoners generally.

Can., *Alaska Highway Pipeline Inquiry (Lysyk Report)* (Ottawa: Minister of Supply and Services, 1977) at 145.

¹³⁶ S.C. 1977-78, c. 20.

¹³⁷ This is illustrated by the following exchange in the House of Commons:

Mr. MacEachen: ... [H]on. members opposite have referred to the ability of parliament to oversee the operations of the pipeline agency.

Mr. Paproski: Monitor.

Mr. MacEachen: I have heard the word "monitor" being used, but I am not certain what it means. This agency will be subject to parliamentary control. Its annual reports will come before committee. Also it will be possible to examine this agency, to ask questions about it and to control it like any other department of the government.

Mr. Nielson: Once a year.

Mr. MacEachen: I realize the hon. member for Yukon has other ideas on the subject of parliamentary control. Those ideas will be listened to and looked at in committee. The government does not intend to create an overblown agency.

Can. H. of C. Deb., Feb. 23, 1978, at 3220.

¹³⁸ MacCrimmon and Stanbury, "The Reform of Canada's Merger Law and the Provisions of Bill C-13," in *Competition Policy in Canada*, supra note 1, at 100-02.

Yet, as MacCrimmon and Stanbury have pointed out, commendable as this concern for political accountability and consistency may be, it may serve only to mask the most immediate self-interests of the business community.

Sadly, what many businessmen mean by accountability in this context is direct accountability by the Minister, and the government establishment generally, to their specific interests. It is expected that the general electorate should wait until the next election to hold its representatives accountable, but business interests should be able to take the government to task immediately after an important decision has been rendered. Accountability of the type incorporated in Bill C-13, i.e., s. 31.91, will mean accountability to business, not to the public generally. It may well open the door to the crassest form of political pressure (and economic pressure through the threat of withholding campaign contributions) and the most opportunistic form of decision making by the Cabinet.¹³⁹

The major inadequacies of current reform proposals are their single-minded commitment to government control rather than broad political accountability, their naive faith in policy directions as a legislative cure-all for regulatory chaos, and their retention of "political appeals" to Cabinet.

In the final section of this article, it will be suggested that political accountability encompasses much more than the right of the government to issue directions to regulatory agencies and that other bodies, particularly the various parliamentary standing committees, should be involved in an on-going policy dialogue with the agencies. Here, attention will be focused only on the pre-emptory nature of the direction power.

The proposal that Cabinet be given authority to issue directions without any statutory requirement for any form of hearing or consultation is in sharp contrast with the potential for open policy making by regulatory agencies. As Pierre Juneau, a former chairman of the CRTC, has recently pointed out, regulatory agencies, even though admittedly not elected bodies, can act as unique forums for direct political participation.

I believe that agencies of this kind are remarkable instruments for public participation. There has been and there still is a fair amount of criticism about such agencies. They are said to have too much power, that their members are not elected officials and so on. While I'm sure that in some respects this may be true, the question I think we should ask ourselves is compared to what. There are few public bodies who spend much time hearing what the public has to say and actually debating matters with the members of the public that affect their interests. One can consider more conventional government departments, for instance, where much less debate takes place with interested parties. Even parliamentary committees which sometimes meet with the public unfortunately have so many things to deal with that they can't afford very much time for this activity. The Royal Commissions do spend a lot of time dealing with the public but they have limited lives and purposes and do not make decisions. Our experience in C.R.T.C. was that if the proper hearing measures are adopted, they provide an extraordinary way of establishing a dialogue with public.¹⁴⁰

Before dismissing Juneau's assessment as being merely self-serving, it would be well to keep in mind the conclusions of the 1977 British *Report of the Committee on the Future of Broadcasting* (the Annan Report).¹⁴¹ The

¹³⁹ *Id.* at 103.

¹⁴⁰ *Speakers' Remarks*, *supra* note 6, at 64.

¹⁴¹ *Report of the Committee on the Future of Broadcasting* (Cmnd. 6753, 1977).

Committee, which had been called on to reconsider the entire structure of broadcasting in Britain, used the CRTC as a model for a possible independent regulatory agency, the "Broadcasting Commission." However, such an approach was rejected on the grounds that those who actually did the broadcasting (the "Broadcasting Authorities") should be held directly responsible to Parliament, and there should not be an independent body, which did not itself do any broadcasting, second-guessing those who did. This is, of course, very much in keeping with a limited view of the role of administrative tribunals as discussed above.¹⁴² Its robust articulation of the magnitude of the risks seen to be inherent to any grant of policy-making powers to an independent body warrant quotation:

Those who look to the Canadian Radio and Television Commission as their model should remember that it combines some of the functions vested in our Home Office and IBA, and that its remit includes matters which in this country would be regarded as proper for decision by Government, Parliament and the Authorities. There is the danger that a Broadcasting Commission only one-third of whose members were the nominees of the Secretary of State, would spawn a substantial and power-hungry secretariat, all the more dangerous because not firmly under ministerial control, and all the more confusing because liable to usurp what are strictly speaking the functions of the Secretary of State and his civil servant advisers: what could the primal concern of such a free-standing bureaucracy be but to increase its territorial dominance within the ecology of broadcasting at the expense of those who are directly responsible to Parliament and the public? It would be all the more dangerous because, although theoretically responsible, it would, unlike the Broadcasting Authorities or the Government, be irresponsible in practice. The public can judge the performance of the Broadcasting Authorities daily by the programmes they see and hear on their television and radio sets. The activities of Government are scrutinised daily in Parliament and by the press, television and radio. Moreover, both Government and Broadcasting Authorities have to look to the public—either as an electorate or as an audience—and fear its displeasure expressed in election results or poor ratings. A Commission would not be directly and continuously responsible in this sense and its only way of being perceived by the public would be through the publicity it could get for itself. Its chief source of power and influence would be in exploiting every public anxiety about broadcasting. That would be the tactic for putting pressure on Government to allow the Commission a role in controlling and disciplining the broadcasters.¹⁴³

Yet despite this rejection of the CRTC as a model, the Committee expressed considerable admiration for the openness of its decision-making processes. It noted that extensive provision was made for public hearings, not only in licensing but also on specific issues of broadcasting policy. After describing CRTC licensing procedures at some length, the Commission added, "Similar procedures are followed for hearings on policy issues; policy documents, often prepared by the CRTC itself, form the basis for the hearing. Although the proceedings are formal and the Commission has the status of a superior court of record, it has adopted rules of procedure which encourage applicants and those who take part in public hearings to participate themselves."¹⁴⁴

¹⁴² See Section III, *supra*.

¹⁴³ *Supra* note 141, at 36.

¹⁴⁴ *Id.* at 64.

It is particularly ironic (and perhaps not accidental) that a pre-emptory power of direction has been proposed just at a time when a regulatory agency such as the CRTC is moving to even greater openness in its decision-making processes. In its July 25, 1978 announcement, *Proposed CRTC Procedures and Practices Relating to Broadcasting Matters*, the Commission stated:

While the statutory responsibility for the discharge of its mandate rests on the Commission alone, it is nevertheless the view of the Commission that no single person or group embodies the public interest and that the assistance and active participation of significant numbers of the general public are indispensable to the decision-making process.¹⁴⁵

This welcome recognition that the Commission does not itself embody the public interest (which would render public participation unnecessary) and that widespread participation is indispensable should not be seen as mere window dressing, as the Commission has already given effect to its general views in a number of specific decisions or proposals, which will greatly increase opportunities for effective participation. Five of these developments should be very briefly noted. First, the Commission has firmly rejected any wide claim to confidentiality of information provided to it and placed the burden squarely on the party claiming confidentiality to show that it would suffer "specific direct harm" if the information were disclosed.¹⁴⁶ Second, it is going to require extensive regular financial and other reports from telecommunications and broadcasting companies such as will allow interested persons access to enough relevant information on a continuing basis without obliging them to intervene in any particular hearing in order to find out whether there were matters which should concern them.¹⁴⁷ Third, regulated companies will in future have to take greater steps to notify the public of licence renewal or rate increase applications.¹⁴⁸ Fourth, in telecommunications matters, at least, the Commission is now prepared to award costs to intervenors.¹⁴⁹ Fifth, in broadcasting matters, at least, certain background studies prepared by Commission staff will be made available to the parties.¹⁵⁰

To a considerable extent, the proposal for greater political control has come in response to the demand by the provinces that policy issues be discussed at a government to government level, and that policy be made only by persons holding elective office. It is the provinces' view that they should not be treated as "just another intervenor" before a federal regulatory agency.¹⁵¹ However, there would appear to be some belated recognition that

¹⁴⁵ CRTC Public Announcement, July 25, 1978, *Proposed CRTC Procedures and Practices Relating to Broadcasting Matters*, at 3.

¹⁴⁶ *Id.* at 16-19.

¹⁴⁷ *Id.* at 14-15; *CRTC Procedures and Practices in Telecommunications Regulation*, *supra* note 121, at 26-31.

¹⁴⁸ *Proposed CRTC Procedures and Practices Relating to Broadcasting Matters*, *supra* note 145, at 6-12; *CRTC Procedures and Practices in Telecommunications Regulation*, *supra* note 121, at 12-22.

¹⁴⁹ *CRTC Procedures and Practices in Telecommunications Regulation*, *id.* at 37-41.

¹⁵⁰ *Proposed CRTC Procedures and Practices Relating to Broadcasting Matters*, *supra* note 145, at 18-19.

¹⁵¹ For a clear articulation of this concern for government-to-government negotiations on major policy matters, see *supra* note 120.

a price will have to be paid if regulatory policy is to be placed exclusively within the political process. Thus, while the *Study of the National Transportation Act, CTC Performance, Bill C-33, Western CTC* by the Management Advisory Institute of the University of Alberta is very much in favour of the "politicization" of transportation policy, it also recognizes that there will be losers as well as winners in the political process, and that open, independent decision making has its advantages.

One possible danger is that policy may become overly political. Compromise through the political process is central to a pluralistic society but there is always the danger that short term political gain is substituted for a sound long run strategy. A minister who acts on short range considerations only can create chaos. The costs to the west may be substantial simply because it does not enjoy a preponderant parliamentary weight.¹⁵²

At this stage, no doubt, the reader with an excessively practical disposition will ask: "Does all this concern for open policy making really make any sense when it is a notorious fact that regulatory agencies seldom openly announce any policy at all? And, in any event, will any government in its right mind use the direction power unilaterally to impose a new policy without extensive consultation with all concerned? We don't need formal requirements for participation. Didn't both McRuer and MacGuigan say that there was no need for preregulation-making hearings, and shouldn't we be satisfied with Wade's reassurance that 'Consultation before rule-making, even when not required by law, is in fact one of the major industries of government?'"¹⁵³ It might be best to deal with the second practical objection first.

Of course, it must be readily conceded that there may well be some form of consultation, possibly of an extensive variety, even in the absence of any specific statutory requirement. A current example may be seen in the proposals for consultation with respect to a discussion paper, *Structure of the Domestic Air Carrier Industry*, released by the Canadian Air Transport Administration of the Ministry of Transport on September 6, 1977. As the Minister of Transport has explained, it is intended that comments be invited from the air transport industry and that a joint review committee be established composed of industry representatives and senior officials from the Ministry and the CTC.

When this process of consultation has been completed, the Discussion Paper will be reviewed in the light of the comments of the air carrier industry. I hope that the comments received will permit us to be far more specific in defining the options under consideration, and to develop a more confident assessment of their probable implications.

¹⁵² *Study of the National Transportation Act, CTC Performance, Bill C-33, Western CTC* (Edmonton: Management Advisory Institute, University of Alberta, 1978) at 84.

As well, proponents of greater politicization may underestimate the adverse political consequences of making ministers potentially responsible for all regulatory decisions by depriving them of the shield of agency independence. Historically, independent regulatory agencies have grown from the political desire to avoid responsibility for what are all too often "no win" decisions. See *The Role of the Independent Regulatory Agency in Canada*, *supra* note 1, at 87-94.

¹⁵³ Ont., *Royal Commission Inquiry into Civil Rights (McRuer Report)* (Toronto: Queen's Printer, 1968) at 363-64; Can. *Third Report of the Special Committee on Statutory Instruments* (Ottawa: Queen's Printer, 1969) at 43-48; Wade, *Administrative Law*, *supra* note 13, at 730.

The plan is that the resulting redraft of the Discussion Paper should form the basis for consultations with the Provinces, with the Canadian Transport Commission, and with other interested parties. The results of this second stage of consultations will be considered in further reviews of the Department's proposals, which I ultimately expect to see embodied in a memorandum to Cabinet. No hearings by the CTC are contemplated.¹⁵⁴

While this process has much to commend it and constitutes a good example of one of Wade's "major industries," the lack of any statutory basis for this type of consultation has inevitably led to an excessive degree of deference to the interests of the established industry. Why, for instance, should the Air Transport Association of Canada (ATAC), which represents the major airlines, be given an exclusive role to play at the vital early stages of policy formulation?¹⁵⁵

Why should the basic question of options be determined by way of private consultations between big business and big government? Why is consultation with the provinces, the CTC and "other interested parties" to be left until *after* the discussion paper has been redrafted in light of the concerns of the air industry? By dividing the policy-making process into two sections, it would seem that later participants are to be presented with a *fait accompli* as worked out between government and industry, as there is no suggestion that the air industry will be participating at the second stage.

These proposals for consultation demonstrate the fundamental weakness of informal consultation, in that all too often no adequate early opportunity is given to other than established interests to influence the development of policy. It is misleadingly simplistic simply to ask: "Is there consultation?" The real questions are: "With whom will there be consultation?" "At what stage of policy development will this consultation take place?" and "What will be the effect of all this consultation?" Moreover, without at least some degree of formality or structure, there is a very real danger that consultation in an atmosphere of intimacy will drift into dictation by corporate interests. This is particularly important in transport regulation because, as John Langford has noted, "Transportation policy making at the federal level has always been characterized by an extremely close relationship between the transportation industry and its interest groups and the bureaucracies of the various agencies involved in the policy-making process." All in all, it would seem that it would be inadvisable to leave consultation and participation in policy making to a totally informal process.

In turning to the first practical objection—that regulatory agencies seldom openly announce any policy in any event—in a Canadian context one would have to reply: "It all depends." Certainly the CTC, despite its broad policy-making mandate, has largely failed to articulate the general policy considerations which underlie its individual decisions. By and large, it has chosen to confine itself to adjudicating cases as they come before it, and has

¹⁵⁴ Letter to the author from Otto Lang, Minister of Transport, Nov. 4, 1977.

¹⁵⁵ Significantly, the Canadian Association of Primary Air Carriers, a breakaway group which represents the smaller third level carriers who feel that they are being squeezed out by the combined actions of ATAC and the CTC, is to be given a much less important role in this process.

not attempted to set out the general principles it applies in any coherent and open manner.¹⁵⁶

By way of contrast, the CRTC has made extensive use of policy statements, guidelines and the like. The Commission constantly seeks to move from adjudication of new problems on an individual case by case basis through policy statements and guidelines as the issues become more familiar to it and it feels that it is possible to generalize, and finally, when the issues are well settled, to legislation and codification of its policies in regulations.¹⁵⁷

In the past, it has sometimes been thought that an administrative tribunal had to exercise its discretion *de novo* on each occasion, and that if it adopted a consistent policy, this would amount to an unlawful fettering of its discretion. As a result, there has been some reluctance by the legal advisors to regulatory agencies to advise what common sense and good administration would seem to dictate. If an agency is going to be confronted by a whole series of all but identical applications for licences, for example, it is surely fairer to the parties and administratively more convenient to announce in advance the policy which the agency intends to follow. This leads to both greater predictability which will assist applicants, and to a higher degree of consistency which is, after all, a hallmark of fairness.

In *Capital Cities Communications Inc. v. Canadian Radio-Television Commission*,¹⁵⁸ the Supreme Court of Canada has endorsed the use of policy guidelines by the CRTC, and has thereby cleared the way for far greater use of similarly imaginative techniques by other regulatory agencies. The CRTC had applied a guideline to permit a cable licensee to delete commercial messages. Rather than deal with the issue of the random deletion of commercials from American stations on a case by case basis, the Commission had stated its general approach in a lengthy policy document, *Canadian Broadcasting "A Single System" Policy Statement on Cable Television*.¹⁵⁹ In amending the licence of Rogers Cablevision to allow for deletion, it stated that it was doing so "in accordance with" its earlier policy statement. It was argued that the Commission had fettered its discretion by applying the policy statement as a guideline rather than by considering the licence amendment on a purely individual basis.

In rejecting this attack on CRTC procedures, Chief Justice Laskin and a majority of the Court not only said that they would not strike it down, but also endorsed the use of guidelines as a desirable regulatory technique.

In my opinion, having regard to the embrative objects committed to the Commission under s. 15 of the Act, objects which extend to the supervision of "all aspects of the Canadian broadcasting system with a view to implementing the broadcasting policy enunciated in section 3 of the Act", it was eminently proper that it lay down guidelines from time to time as it did in respect of cable television. The guidelines on this matter were arrived at after extensive hearings at which interested parties were present and made submissions. An overall policy is demanded in the interests of prospective licensees and of the public under such

¹⁵⁶ CTC Study, *supra* note 1, at 110.

¹⁵⁷ *Id.* at 112.

¹⁵⁸ *Supra* note 75.

¹⁵⁹ CRTC, July 16, 1971.

*a regulatory regime as is set up by the Broadcasting Act. Although one could mature as a result of a succession of applications, there is merit in having it known in advance.*¹⁶⁰ [Emphasis added]

However, it must be carefully noted that this endorsement of the use of policy guidelines was predicated on an opportunity being given to the affected station to argue against the policy of deletion in general and the merits of applying it at a Commission hearing. In other words, a "guideline" cannot become a rigid rule. An opportunity will always have to be given to an affected party to question the guidelines and their applicability to his case.

A distinction has thus to be maintained between a "guideline" and a "regulation," for with the latter, of course, there is no need to maintain a "reserve clause" willingness to depart from it in a deserving case. However, in practice, this requirement to maintain a reserve clause willingness to recognize the exceptional may not seriously affect a regulatory agency's desire for consistency. This was well illustrated in *Re North Coast Air Services Ltd.*¹⁶¹ Here, a regulation governing charter operations had been struck down as being *ultra vires* the Commission. The Commission then sought to "adopt" the invalid regulation, and this was struck down as well. It then announced that it had adopted the substance of the impugned regulation as a policy, and that it proposed to amend each and every charter licence to conform to that policy. At the same time, it indicated that it would be prepared to consider deviating from the policy in individual cases. In the end, no exceptions were made. Nevertheless, it was held that enough of a reserve clause willingness to recognize the exceptional had been maintained. As Chief Justice Jackett of the Federal Court of Appeal laconically noted: "I might add on this aspect of the matter that I do not find it too surprising that, of over 400 charter carriers affected, only some 58 filed representations and that none of them persuaded the Commission to change its policy. We must assume that the Commission had given care to working out a policy that met all problems."¹⁶²

The way is now clear for all Canadian regulatory agencies to articulate their policy through rule making as well as by way of less formal policy statements and guidelines. This will bring them into the mainstream of regulatory development, for as K. C. Davis has noted, "The United States is entering the age of rule making, and the rest of the world, in governments of all kinds, is likely to follow. The main tool of getting governmental jobs done will be rule making, authorized by legislative bodies and checked by courts."¹⁶³ Attention can now be focused on devising the most effective procedures for rule making and on techniques for prodding reluctant agencies into openly generalizing their experience through rule making.

In upholding the use of policy guidelines by the CRTC, Chief Justice Laskin emphasized the open procedures by which the guidelines themselves had been developed. Far from being pre-emptory directions from on high, the

¹⁶⁰ *Supra* note 75, at 171 (S.C.R.), 629 (D.L.R.).

¹⁶¹ *In re North Coast Air Services Ltd.*, [1972] F.C. 390 (C.A.).

¹⁶² *Id.* at 406-07.

¹⁶³ Davis, *Administrative Law of the Seventies* (Rochester, N.Y.: Lawyers Co-operative Publishing Co., 1976) at 167.

guidelines had grown out of a series of hearings at which ample opportunity had been given to all the parties to influence their content. Clearly, one of the long-term goals of Canadian administrative law must be to devise suitable procedures for the development of policy through draft statements, guidelines and the like. As well, it will be necessary to determine just what is meant by the reserve clause willingness to recognize the exceptional. Legislative intervention should only be necessary if the courts do not hold to their present course, which recognizes the benefits of consistency and predictability that may be obtained by way of policy guidelines. A reversion to a rigid position on fettering that does not take into account the need for policy articulation by the regulatory agency itself, in view of the broad and largely unstructured discretionary mandates granted modern regulatory agencies, would require legislative response.

The real question today is not whether, but how, regulatory agencies can be persuaded to articulate policy. The problem is that it is easier for a regulator to immerse himself in a mass of individual decisions rather than to go through the often agonizing process of stating the general criteria he proposes to apply in his decisions. As Gresham's Law of Administration has it, "Daily routine drives out planning." It is my contention in the final section of this article that regulatory agencies should be prodded into articulating policy. This might be done by a ministerial initiative calling for a preliminary hearing on policy, which will serve as a precursor to a policy statement. In the meantime, now that the Supreme Court of Canada has cleared away any residual doubts about the use of policy guidelines, it will be up to the parties themselves to insist on policy clarification and to encourage the regulatory agency to spell out its policy to the greatest possible extent. An example of the type of innovative thinking called for, and a technique which could possibly be adopted more widely, is the proposed use of "issue hearings" by the CRTC in telecommunications regulation. Certain continuing problems common to CRTC-regulated companies would be dealt with at a policy-oriented hearing, rather than at one dominated by an immediate need to arrive at a decision on rates.¹⁶⁴

Closely allied with policy formulation through the use of guidelines and rules is the use which could be made of open precedents as a means of articulating policy. By and large, the record of Canadian regulatory agencies with respect to the publication of decisions, and the quality of reasoning in those decisions, leaves much to be desired. As with policy guidelines, this reluctance to use open precedents as building blocks towards coherent policy formulation can be explained in part by the continuing influence of an old-fashioned view of precedent. It is often stated that administrative tribunals do not and should not follow precedent. This rejection of the "dead hand of precedent," which is sometimes specifically provided for in the empowering statute, is based on a rigid notion of precedent which calls for a mechanistic application of earlier decisions. Even the courts no longer subscribe to this view of precedent—witness the willingness of the House of Lords and perhaps even the Supreme Court of Canada to reverse their own earlier deci-

¹⁶⁴ *CRTC Procedures and Practices in Telecommunications Regulation*, *supra* note 121, at 24.

sions. In regulation there should be a whole range of possible use of a doctrine of precedent. The issue should not be whether or not an agency follows precedent, but rather the extent to which it seeks to reconcile its later decisions with those which have preceded them. There is room here for some flexibility. As K. C. Davis has pointed out, it is possible to distinguish at least five attitudes towards precedent. Earlier decisions may be "(1) almost always binding, (2) always considered and usually binding, (3) usually considered but seldom binding, (4) occasionally considered but never binding, and (5) almost never considered."¹⁶⁵ Thus, respect for precedent does not necessarily have to lead to rigidity and consistency for consistency's sake alone. As an English court has rightly warned, tribunals should not be tempted to "pursue consistency at the expense of the merits of individual cases."¹⁶⁶ But fear of excessive rigidity hardly justifies a violent swing of the pendulum to the other extreme of unbridled discretion. The need for a sensible use of precedent was recognized fifty years ago by W. A. Robson in the first edition of *Justice and Administrative Law*.

Robson was of the view that one of the weakest features of administrative law in England is the "disinclination of Administrative and Domestic tribunals to enunciate clearly for the benefit of the public the principles which they intend to follow." However, an answer was not to be found in any stifling doctrine of rigid precedent. "What is wanted is a reasonable degree of certainty as to the outlook of the tribunal *at any given time*; and certainty in this sense is not incompatible with growth and change."¹⁶⁷

While it is not possible to improve on Robson's statement, it is interesting to note that contemporary Canadian courts are showing signs of recognizing the role which precedent should play in the work of administrative tribunals. For instance, Freedman J.A. (as he then was) in the Manitoba Court of Appeal, when dealing with the argument that as the Public Utilities Board had made an earlier determination as to the "public interest" it should thereafter follow that decision, pointed out that where there were changed circumstances, the Board should not consider itself bound by its earlier decision.¹⁶⁸ This need to be able to change one's mind has been recognized by

¹⁶⁵ Davis, *Administrative Law Treatise, 1970 Supplement* (St. Paul, Minn.: West Publishing Co., 1971) at 220. For an excellent analysis of the use of precedent in administrative adjudication, see Getz, *The Corporate and Financial Services Commission—Reflections upon a Statutory Tribunal* (1977), 11 U.B.C. L. Rev. 1 at 5-7. And see Sutcliffe, *Precedent and Policy in Accident Compensation* (1976-77), 7 N.Z.U. L. Rev. 305.

¹⁶⁶ *Merchandise Transport Ltd. v. British Transport Commission*, [1962] 2 Q.B. 173 at 193, [1961] 3 All E.R. 495 at 507 *per* Devlin L.J. (C.A.). The case contains a very useful discussion of the role that precedent should play in regulation.

¹⁶⁷ Robson, *Justice and Administrative Law* (London: Macmillan, 1928) at 204-05. Commenting on Robson's criticism some fifty years later, J. A. G. Griffith noted, "The publication of the reasons for decisions is more frequently required today but the advance disclosure by departments of their criteria, which taken together is often all we have by way of policy, is no less difficult to extract." "Justice and Administrative Law Revisited," in Griffith, ed., *From Policy to Administration* (London: Allen and Unwin, 1976) at 203.

¹⁶⁸ *Re City of Portage la Prairie and Inter-City Gas Utilities Ltd.* (1970), 12 D.L.R. (3d) 388 at 397 (Man. C.A.).

Milvain C.J.T.D., when he dealt with a case in which the Labour Relations Board had reversed itself on the question of whether "irrigation workers" were "farm labourers" and thus ineligible to form a union under the *Labour Relations Act*.

In this instance the Board certainly "reversed its course." However, that of itself cannot be grounds for quashing its decision. I am sure the Board is not bound to follow its own previous conclusions as to the law. It may repent and recant.¹⁶⁹

What is needed is the recognition that some degree of consistency is desirable in regulation and that the optimum degree of consistency must vary with the agency and the subject matter involved and that where an agency considers departing from an established precedent, it should seek to warn the parties and give them an opportunity to argue the point, and then give reasons for the departure from its earlier decision. In this manner, it should be possible to get some degree of consistency, and thus allow greater insight into evolving policy without impairing "growth and change."

These two techniques for policy articulation—open precedents and rules and guidelines—must not, of course, be thought of as entirely separate. In the on-going dynamics of regulation, there should be a constant exchange between the two as issues move from case by case adjudication involving a maximum degree of flexibility and experimentation through a growing use of precedent as the regulatory agency becomes more confident of its policy and to guidelines and rules as that policy is crystallized in legislative form. An example of the dynamics of this process can be seen in the way in which the CRTC has developed its policy on the issue of the disclosure of documents claimed to be confidential. In the two years that the Commission has had jurisdiction over telecommunications, it has moved through a number of phases in the process of formulating its policy. First, it enunciated its general approach for discussion at its July, 1976, hearings on procedure for the regulation of telecommunications. Thereafter, it tested its general approach in a number of cases and sought in one of these to state its emerging position in relatively general terms.¹⁷⁰ Finally, in May, 1978, it felt confident enough to restate its general approach and to include provisions dealing with claims to confidentiality in its *Draft Telecommunications Rules of Procedure*.¹⁷¹ However, it did not find it possible to be absolutely definitive, for it was not prepared "at this stage to set out an exhaustive catalogue of the specific types of information which would warrant maintaining confidentiality." Thus, experience has allowed the issue to be moved at least partly into the realm of rules, and it may be possible in the future for the Commission to determine an "exhaustive catalogue," which would then complete the cycle from experimental adjudication with a new issue through clarification by way of open precedents and guidelines and finally to incorporation into rules.

¹⁶⁹*Re Board of Directors of Lethbridge Northern Irrigation District* (1973), 38 D.L.R. (3d) 121 at 125 (Alta. S.C.).

¹⁷⁰*Bell Canada, Confidentiality and Other Preliminary Matters Concerning Support Structures Tariff Proceedings*, Telecom. Decision CRTC 76-2, Dec. 31, 1976.

¹⁷¹*Draft CRTC Telecommunications Rules of Procedure*, May 1978, s. 21. And see *CRTC Procedures and Practices in Telecommunications Regulation*, *supra* note 121, at 26-29.

The whole notion of pre-emptory powers of direction runs counter to the realities of regulation. Once the main policy guidelines have been set down in the legislation, subsequent policy development has to grow out of day to day regulatory experience.¹⁷² All major policy determinations based on preexisting political ideology and commitments should be included in the legislation itself. What is left is room for policy that grows from the application of the legislative standards in practical situations. A leading American commentator, Emmette Redford, has brilliantly portrayed the nature of policy making in regulation to be as follows:

An important characteristic of policy development . . . is that it is incremental. Ordinarily, each policy decision is an addition to policies determined before. This is the meaning of what Simon has called the decision tree. Certain decisions build a trunk, others a major branch, and others smaller branches. If we vary the analogy, to blend with our previous model, we may say that choice and events create first the shore lines of the environmental sea in which the whirlpools of semi-separate universes of social action occur, then a policy stream moves out of the whirlpool, and subsequently a tributary system of minor policy develops as the stream moves onward. Lawyers would explain the phenomenon in terms of concepts and standards, then leading decisions, then refinements of these, and then applications of law.

The durability and the significance of policy may be determined by its place on the decision tree, as Simon puts it, or on the shore lines, as I put it. A small change in the current from the whirlpool may cause water down the stream to alter the boundaries of the tributary system; but only a major revolution in technology, interests and/or beliefs can change the shore lines of the environmental sea or agitate the whirlpool enough to create new shore lines on the main policy stream.¹⁷³

Policy issues in regulation are almost always inextricably intertwined with each other. Take, for example, the policy issues discussed in the previous section. The development of domestic ABC's within Canada is an intimate part of the whole question of route allocation between air carriers and the mix which has to be maintained between scheduled and charter service. To sever this issue from its context and deal with it on its own is to risk a complete rupture of what *should* be an integrated approach to regulation. Somewhat similarly, questions of commercial deletion, cable hardware ownership, and pay television lie close to the heart of broadcast regulation. To separate them out for a direction would quite possibly be to throw a whole regulatory scheme out of balance.

Moreover, a direction power, exercised from on high, does not take into account the manner in which regulatory policy must most often be formulated. Such policy seldom springs fully formed from the brow of Jove—it is most often the product of experience based on trial and error and an understanding of the front line realities of the regulatory process.¹⁷⁴ In addition, as K. C. Davis has pointed out, “the least difficult method for overall policy-

¹⁷² *The Role of the Independent Regulatory Agency in Canada*, *supra* note 1, at 113-15.

¹⁷³ Redford, *The Regulatory Process* (Austin: University of Texas Press, 1969) at 17-18.

¹⁷⁴ “Political Accountability for Administrative Tribunals,” *supra* note 1, at 23-26.

making is through focusing on one particular facet at a time."¹⁷⁵ As he has explained:

What happens over and over is that a legislative body sees a problem but does not know how to solve it; accordingly, it delegates the power to work on the problem, telling the delegate that what it wants is the true, the good, and the beautiful — or just and reasonable results, or furtherance of the public interest. Then the delegate, through case-to-case consideration, where the human mind is often at its best, nibbles at the problem and finds little solutions for each little bite of the big problem. Creativeness in the nibbling sometimes opens the way for perspective thinking about the whole big problem, and large solutions sometimes emerge.¹⁷⁶

It would appear, however, that the most serious problem with directions is that they will not be sufficiently employed in those areas of regulation in which there is a continuing lack of coherent policy. Take, for example, what will almost certainly happen in the area of transport regulation where it is proposed that all policy making be transferred to the Ministry, with the CTC narrowly confined to making individual licensing and rate decisions. The Commission will proceed to make even more narrow and particularistic decisions than at present, thereby placing an intolerable strain on the Ministry to evolve policy to meet changing circumstances. Should the Ministry call on the CTC to assist it, it is unlikely it would receive the type of assistance it would need, as has already been demonstrated in the majority decision in the Nordair acquisition case.¹⁷⁷ Moreover, even in those areas such as the regional airlines policy, where the legitimacy of ministerial policy-making is fully accepted, the record of ministerial policy initiative is not at all impressive. Policy making, I have suggested, calls for a willingness to venture out and deal with problems before they arise as concrete cases demanding immediate solution.¹⁷⁸ This is hardly compatible with the realities of politics, in which the minister will wish to keep his options open until the last possible moment. It is one thing for the minister to ask somebody else to formulate a policy decision and then review it in the light of political reaction, quite another for the minister to do so on his own.

The proposed reforms envisage that the power to issue directions will be superimposed on existing regulatory structures. This would mean that a regulatory agency would be subject both to directions as to how it should exercise its discretion in policy making and to very broad review of its decisions by way of "political appeals" to Cabinet. This has raised fears of "emas-culation" as a result of exposing regulatory agencies to the "double whammy" of directions and political appeals.¹⁷⁹ As has already been pointed out, appeals to Cabinet are incongruous because they allow the political reversal of individual decisions—the very aspect of the work of regulatory agencies which should be shielded from political intervention. As well, the present

¹⁷⁵ Davis, *Administrative Law Treatise, 1970 Supplement*, *supra* note 165, at 12.

¹⁷⁶ Davis, *Discretionary Justice: A Preliminary Inquiry* (Baton Rouge: Louisiana State University Press, 1969) at 20.

¹⁷⁷ See text, *supra* at p. 86.

¹⁷⁸ CTC Study, *supra* note 1, at 112.

¹⁷⁹ *The Role of the Independent Regulatory Agency in Canada*, *supra* note 1, at 108-11.

lack of any form of procedural regularity in such appeals superimposes on a system of decision making a somewhat arbitrary finale, which can go far to undermine confidence in the entire regulatory process.

As Gordon Smith, Senior Assistant Secretary, Privy Council Office, noted at a seminar for members of federal administrative tribunals held in April, 1978, a strong argument can be made that the granting of direction powers will render political appeals unnecessary.

If the government of the day has the power to issue policy directions to regulatory agencies, it seems to me that the other side of that coin will be that the government may not feel it needs to have the power to overturn specific decisions. In other words, this process indeed may enhance the independence of administrative agencies in decision making.¹⁸⁰

However, John Lawrence, Counsel, Privy Council Office, who is directly involved in the reconsideration of the role of independent regulatory agencies that is apparently taking place within government circles in Ottawa, was not as inclined to believe that the Cabinet would be willing to forego political appeals. As he put it at the same seminar:

The power of Governor in Council review has been around since the earliest days of tribunals in Canada. There is little likelihood it will be suppressed unless political pressure to do so is built up to an overwhelming pitch. Quite simply, it is just too much to ask Ministers who take flak from irate constituents who have lost train service or their favourite cable channel to give up a means to respond to political pressures where circumstances warrant. The amazing thing is how free of narrow political considerations such use has been — the opponents of the Governor in Council Telesat decision notwithstanding.¹⁸¹

VII. CONCLUSION

The necessary reforms must be considerably broader and more far-ranging than simply giving Cabinet the power to issue policy directions to the regulatory agencies. This short cut amounts, as we have seen, to a proposal for government control and not for what is needed—broad political accountability. Such an approach sees merit only in indirect political participation through the electoral process, no matter how far removed regulation is from the issues on which elections are fought, and it downgrades the value of direct political participation in an open and visible decision-making process. It is predicated upon a commitment to ministerial responsibility as the exclusive means of political control, and it fails to give any weight to that wider system of checks and balances that is essential in a complex, pluralistic and democratic society.

To be effective, reform will have to seek to define the role of the regulatory agencies in the political process as a whole, not merely in terms of their relations with Cabinet. The much ignored question in Canada of the relationship of Parliament and the agencies is a case in point. The various standing committees theoretically provide for a system of overseeing the activities of regulatory agencies. In practice, they provide little assessment or guidance, and their work falls far short of that which can reasonably be expected of

¹⁸⁰ *Speakers' Remarks*, *supra* note 6, at 178.

¹⁸¹ *Id.* at 246.

the legislative body which has, after all, delegated the wide powers to the regulatory agencies in the first place.¹⁸² Surely Parliament has a continuing obligation to oversee, at least in very general terms, the work of its delegates.

Recently a number of proposals have been made to greatly strengthen parliamentary committee systems.¹⁸³ Improvement need not await any full-blown reform of Parliament, because short-term practical steps can be taken to improve the quality of legislative oversight. It is essential that the standing committees not waste their time bickering over individual decisions of the regulatory agencies, but seek rather to review those broad policy considerations in light of which individual decisions are made. If the chairman of the agency in his opening statement to the committee is prepared to speak openly and frankly of his agency's policy objectives, it is likely that subsequent discussion will remain at the level of general policy, and this can lead to a constructive exchange of views between appointed officials and elected representatives.¹⁸⁴ There should be a genuine dialogue in which the agency seeks to explain its aspirations from a regulatory point of view and the committee assesses these aspirations from a political perspective.

As well, it might be useful to introduce at least some form of legislative veto of regulatory rules. Parliament has shied away from any substantive merit review of regulations, and the work of the Standing Joint Committee on Regulations and Other Statutory Instruments has been largely technical in nature.¹⁸⁵ Yet as Harry Arthurs perceptively pointed out in his evidence to the MacGuigan Committee, it is unrealistic to imagine that a review committee can assess whether any particular regulation is an "unusual or unexpected use" of the regulation-making power if it is not intimately aware of the context in which the regulation had been made.¹⁸⁶ Might it not be possible to have draft policy statements and rules discussed by the parliamentary committees, or even have them subject to a negative veto? As the Senate Committee warned, any such proposal risks regulatory delay and uncertainty and the danger that the legislature will become overwhelmed with detail. Yet a measured discussion of a regulatory policy statement would ensure that regulatory agencies do not go off on policy frolics of their own and would greatly reduce the present risks of a full-scale clash between a department and a regulatory agency which could only be resolved by resort to a draconian

¹⁸² CTC Study, *supra* note 1, at 103-06.

¹⁸³ See, for example, Select Committee on Procedure, *Report*, House of Commons Paper 588-1 (London: HMSO, 1978). For an assessment, see "Making Parliament Work," *The Economist*, Aug. 5, 1978, 15-16; Smith, "More power to the select committees," *The Times*, July 31, 1978. See, as well, a study by H. V. Kroeker for the C. D. Howe Research Institute, "Setup of House Committees makes progress difficult," *Globe and Mail*, Aug. 3, 1978.

¹⁸⁴ I am grateful to Richard Schultz, who has undertaken an extensive survey of the work of the parliamentary committees in Canada, for pointing this out to me.

¹⁸⁵ Apart, that is, from a long-standing row with the Department of Justice concerning the availability of "legal opinions" as to whether individual regulations are *intra vires*. See generally, Can. *Second Report of the Standing Joint Committee on Regulations and other Statutory Instruments* (Ottawa: Queen's Printer, 1977).

¹⁸⁶ Can. H. of C. Special Committee on Statutory Instruments, *Proceedings* No. 1 (28th Parl., 1st Sess., 1968-69) at 13-14, 25-26.

direction power. What are needed are bridges of understanding between the regulatory and the political process, and the active involvement of the parliamentary committees at the level of policy formulation could go far to reduce the present dangerous chasm.

What of appointments to the regulatory agencies? Aside from a preliminary study by Caroline Andrew and Réjean Pelletier,¹⁸⁷ virtually nothing is known of the persons appointed to the regulatory agencies or the processes by which they are appointed. It is sometimes said that many of the appointees are middle rank civil servants, unlikely to progress further in departmental positions, for whom regulatory agencies constitute a "bureaucratic senate." Is this true? Apart from occasional outcries at individual appointments, there is no public scrutiny of the qualifications and aptitude of those appointed to be commissioners. Furthermore, until very recently there was no provision for any form of training for those newly appointed, and that which is now being provided is hardly adequate.

Edmund Burke was of the view that we should venerate that which we do not understand of classical antiquity. A somewhat more sceptical view of classical regulation should incline us to abolish that which we do not understand or control. If we really are seriously concerned about controlling independent regulatory agencies, the answer might be to reduce the regulatory ambitions of government. Sunset laws are now being seriously debated in Canada, and the federal government has stated that it favours *selective* application of the principle that regulatory programs should automatically expire with the passage of time unless retained after a thorough examination in which the burden of proof is on the proponents of continued regulation.¹⁸⁸

Finally, how should the vexed question of ultimate responsibility for policy making be resolved? First, political appeals should be abolished. They involve the government in exactly the wrong part of the regulatory process (individual adjudication), whereas the proper place for government involvement is policy formulation (rule making). Second, following the example of the British government's consultation with the Civil Aviation Agency in the formulation of guidance, and the relationship of the U.S. Secretary of Energy to the Federal Energy Regulatory Commission, a system should be devised which provides: a) that the department can call on the agency to establish a policy through rule making or reconsider an existing policy; b) the department may participate actively in the resultant hearings and set time limits for completion of the rule making; and c) if there is a continued serious difference in policy position between department and agency, the department shall be empowered to request Cabinet to disallow the policy as formulated and to replace it with one favoured by the department. There would be no hearings at the Cabinet level, the policy being a purely partisan political statement for which the government would be responsible in Parliament and to the

¹⁸⁷ "The Regulators," in *The Regulatory Process in Canada*, *supra* note 1, at 146-64.

¹⁸⁸ *Can. H. of C. Deb.*, Feb. 2, 1978, at 2474-2506. For a confused venture in total deregulation of natural gas prices, see Foster, "Ottawa's gas 'policy' ignites explosions," *Financial Post*, Sept. 2, 1978; Carruthers, "Ottawa clarifies gas price goal; deal sought on 'flexible' basis," *Globe and Mail*, Aug. 31, 1978.

electorate. In view of the ample opportunity which will be provided to the department to call its policy concerns to the attention of the regulatory agency, it is likely that resort will only have to be made to the failsafe political power in the most exceptional situations. On the other hand, the regulatory agency need not feel intimidated by the department's having the last say, because the department will have to be prepared to speak out at the hearing as to its policy, and the agency's decision will have a sufficient degree of legitimacy as a product of an open decision-making process to discourage casual reversal by Cabinet. In a parliamentary system of government, it is essential that Cabinet have the last word on major policy issues and then face up to its political responsibilities. But Cabinet intervention should only come after an adequate opportunity has been granted to the independent regulatory agency to devise a policy position which reconciles regulatory concerns with prevailing political realities. Such a scheme will allow for successful blending of independent and open decision making with ultimate political accountability in such manner that one will not sacrifice the essence of either.