THE ROLE OF THE INDEPENDENT REGULATORY AGENCY IN CANADA

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> To complain of the age we live in, to murmur at the present possessors of power, to lament the past, to conceive extravagant hopes for the future, are the common disposition of the greatest part of mankind.
>
> *Edmund Burke*

I. INTRODUCTION

As the focus of this paper will be pragmatic rather than theoretical, it would be well, right at the outset, to identify some current issues illustrative of the confused state of our thinking on the role of the independent regulatory agency in Canada.

The Canadian Radio-Television and Telecommunications Commission has provided a number of such issues and five - commercial deletion, Manitoba cable television, pay television, and the inquiry into the C.B.C. - have been selected for examination.

In an attempt to mitigate the economic impact of U.S. television signals received in Canada via cable, the Commission made the random deletion of commercial messages from such signals a condition of licence for some cable television operators. This policy was strongly opposed by American border stations and it became a major irritant in Canada-U.S. relations. Despite a great deal of criticism, and a legal challenge which by the end of last year was headed into the Supreme Court of Canada, the Commission held firm. In the meantime, as part of broader negotiations, Ottawa agreed to suspend commercial deletion. [1] The problem then was how this political accommodation was to be implemented in view of the Commission's independent status.

As Geoffrey Stevens wrote on January 14, 1977:

> Important as the principle of commercial deletion is to the C.R.T.C. it may agree to accept the moratorium negotiated between Canada and the United States. The Commission is already challenging an agreement between the federal Government and Manitoba which gives the province the right to own the hardware used to distribute television programs. The C.R.T.C. may decide that discretion is the better part of valor - that one fight with the Government at a time is quite enough. [2]

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1 See "Will Canada propose a quid pro quo? Hot signals at U.S. T.V. border", Financial Post, October 2, 1976.

2 "They call it piracy", Globe and Mail, January 14, 1977. And see "Don't tell the Court", *ibid.*, January 13, 1977.

A week later the Commission announced that it was indeed suspending its commercial deletion policy.

As Stevens indicated the Commission was also embroiled in a dispute with the Department of Communications over an agreement entered into between the Department and the Province of Manitoba which would undermine a long established Commission policy on the ownership of cable hardware. That policy has been firmly resisted by both Manitoba and Saskatchewan which have government owned telephone systems capable of providing a province-wide infrastructure if only the Commission would relax its ownership requirements. Commission Chairman Harry Boyle was soon to make it clear that he was not convinced that the agreement was in any way binding on the Commission. [3]

The Commission's position was made public at the end of 1976, and it showed that it was prepared to take a tougher stand here than with regard to commercial deletion.

> While the Commission was not a party to the Agreement *and is not legally bound by it*, the Commission would find it helpful in its deliberations on future applications for cable television licences in Manitoba, to receive comments on the terms and scope of the Agreement from applicants and other interested parties, *including the parties to the agreement.* In particular the Commission would appreciate a fuller understanding of the agreement as it relates to the Commission's concern that licensees exercise effective control over their cable television undertakings .... [4]

Another major point of conflict between the Commission and the Department has been over pay television. In June, 1975 the Commission held hearings on pay television and its Public Announcement of December 16, 1975, concluded that "... it is premature to introduce a comprehensive pay television service into Canada at this time".

In a speech to the Canadian Cable Television Association on June 2, 1976 the Honourable Jeanne Sauvé, Minister of Communications, stated:

> The establishment of pay television service on a large scale is inevitable ... As a result, and in order to encourage you and other interest groups to update the submissions you placed before the C.R.T.C. last June - and to comment on what I have said today - I have asked the C.R.T.C. to call for and receive submissions from the public until September first of this year on the structural development of pay T.V.

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3 "C.R.T.C. seeking legal opinion on status of Ottawa-Manitoba cable accord", Globe and Mail, November 23, 1976. The Canadian Cable Television Association was strongly critical of the agreement which it condemned as political interference in the regulatory process. The protest was dismissed as "... an exaggerated reaction to a normal function of a minister done within the limits of authority". "Sauvé attacks C.C.T.A.'s criticism", *ibid.*, December 22, 1976.

4 C.R.T.C. Public Notice, December 30, 1976, pp. 2-3 (Emphasis added).

The Consumers' Association of Canada, for one, was amazed how the Minister could seek, without any new evidence, to reverse "... the considered policy position of the C.R.T.C., an independent and expert regulatory tribunal, in the remarkably short time of some 5 months." It went on to invite the Minister to appear personally before the Commission "... to explain why you consider that the C.R.T.C. should change its policy on pay television."[5]

Prime Minister Trudeau's request to the C.R.T.C. to inquire into allegations of pro-separatist bias in the C.B.C.[6] has raised a number of most profound questions as to the role of the Commission and its relationship to government. As the inquiry is still under way, it would be premature to make more than a preliminary, tentative assessment. However, it is possible to consider one decision which has already been made - the decision to go ahead with the inquiry at all. Certainly, it was under no specific legal obligation to do so, although its regulatory mandate does speak of a broadcasting system one of whose purposes is to "safeguard, enrich and strengthen the cultural, political, social and economic fabric of Canada."

Geoffrey Stevens, for example, was initially convinced that the Commission should have refused to become involved in any inquiry at all, and he condemned its cooperation in no uncertain terms.

> In the view of the Liberal Government, the C.R.T.C. failed to police the French network adequately. Otherwise, the Prime Minister would not have told Mr. Boyle to launch the special inquiry. If Mr. Boyle felt the Government was wrong (either about the failure of the C.R.T.C. or about separatist infiltration of Radio-Canada), he had two alternatives. He could have rejected the Government's "request" for an inquiry; the C.R.T.C. has that power. Or he could have resigned. That he did neither is either an admission of C.R.T.C. failure or a collapse in the face of political pressure.[7]
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> Yet, after listening to Mr. Boyle handle close questioning at a long press conference yesterday, one came away feeling a good deal better. The

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5 Letter from T. Gregory Kane, General Counsel, September 29, 1976. The C.A.C. was only one among many concerned at the Minister's proposal. "Pay-T.V. dangerous says Faulkner," Globe and Mail, August 11, 1976; Geoffrey Stevens, "Why? Why? Why?" *ibid.*, August 12, 1976; "Just hold on - we shouldn't be stampeded into pay-T.V.", Financial Post, August 21, 1976, "Does anyone really like pay-T.V.", *ibid.*, September 25, 1976; "Pay T.V. the 'inevitable' cultural disaster", Globe and Mail, October 4, 1976. The Commission, in a Notice of Public Hearing dated February 3, 1977, rejected most submissions made to it as "inadequate" which brought a sharp response from the Canadian Broadcasting League, "Pay-T.V.: 'briefs to heedless C.R.T.C. unwanted not inadequate'," Globe and Mail, February 21, 1977.

6 "Trudeau calls on C.R.T.C. for a report by July 1 on separatists in C.B.C.", Globe and Mail, March 5, 1977.

7 "Astounding", Globe and Mail, March 11, 1977. And see "Bias in Quebec: C.R.T.C. used as a political tool?", *ibid.*, March 7, 1977.

> Government may have left the C.R.T.C. no practical alternative except to hold the inquiry, but the politicians are not going to be able to dictate the findings. . . .
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> Another reason for feeling better is the spirit in which the C.R.T.C. decided to conduct the inquiry. It could have rejected the Prime Minister's "invitation", but that as Mr. Boyle put it, would have been tantamount to hiding in the bushes. Besides, the Government would probably have turned to a parliamentary committee or some other potentially more divisive form of investigation. Asked whether it would be reasonable to assume the Commission had agreed to do the inquiry because it would be the least of various evils, Mr. Boyle replied: "I think, yes . . ."
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> Finally one feels better because the inquiry will be presided over by Harry Boyle himself. He's his own man. "They (Government) named me Commissioner," he said yesterday. "They didn't buy me, I remain who I am." We are going to need him.[8]

It remains to be seen what the long term effects of the inquiry will be on the Commission, and particularly its credibility as an independent body.

While most of the more prominent recent examples concerning the role of independent regulatory agencies are to be found at the federal level, reaction to the Ontario Highway Transport Board's decision in December, 1976 to allow Greyhound to compete with Gray Coach is a classic example of the uncertainty as to how much policy making discretion should be delegated to regulatory boards.[9]

Norman Webster, in a column on the appearance of Dr. Smith, Ontario's Liberal Party Leader, before the Highway Traffic Board at the re-hearing of the Greyhound application, succinctly described the ramifications of the issue raised in the case.

> The Liberal leader's point is that the decision seems to reverse the previous policy of exclusive rights to major inter-urban routes. Such policy decisions, he contends, should be made by the elected representatives of the people, rather than by an appointed tribunal. Surely he is right.
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> This is not to say there is no place for regulatory agencies. The Highway Transport Board, for example, keeps the politicians' hands out of individual licencing decisions, and that is just as it should be. But this should be done within a policy framework laid down by Government or Legislature.
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> The broad decisions affecting our society are much too important to leave to such agencies (which, in practice, can mean to the particular prejudices of one strong member).
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> When the Ontario Municipal Board approved the Spadina Expressway, the ramifications went far beyond the construction of a road; William

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8 "Reasons for feeling better", Globe and Mail, March 15, 1977.

9 "Opposition parties to press for debate over Gray Coach" Globe and Mail, December 8, 1976; "Gray Coach to lose $756,000 in competition, hearing told", *ibid.*, January 25, 1977; "Smith says Gray Coach decision should have been left to the House", *ibid.*, January 28, 1977; "Lewis wants special attention to Gray Coach as public firm", *ibid.*, February 12, 1977.

Davis recognized this and reversed the decision. When the O.M.B. produced its offensive verdict on Toronto's 45-foot by-law, the Davis Government again intervened.

Similarly, fundamental decisions affecting transportation in the province should not be made by a licencing agency. They should be made by people who are publicly accountable.

If the Government wants to change policy, it should do so. And then, if we wish, we can change the Government.[10]

II. WHAT IS MEANT BY AN "INDEPENDENT" REGULATORY AGENCY?

Canada never completely adopted the American model of an independent regulatory agency, although it has, on occasion, gone far in that direction. This hesitation is of central importance for an understanding of current regulatory issues in this country. Indeed, the history of regulation in Canada has been largely a constant process of working out the tensions inherent to our commitment to parliamentary responsibility and the need for regulatory tribunals which fall to some degree outside the sphere of immediate political control.

It would, as a result, be instructive to take a brief look at some representative topics in the history of regulation in Canada with an emphasis on the question of the relationship at any particular period of the regulatory tribunal to government and parliament. Before doing so, however, it would be well to establish at the outset just what is meant by the American model of an independent regulatory agency.

An independent regulatory agency is to be contrasted with a department. A department is an integral part of the executive hierarchy with the President at its head possessing 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 views. An independent regulatory agency is not part of the executive hierarchy and is not subject to Presidential direction. It is subject to Congressional "overview", but Congress does not have the power to reverse its decisions except by legislation.

The key to independent status lies in the security of tenure for the commissioners who head the agencies. The classic affirmation of this security was provided in the well-known case of *Humphrey's Executors* v. *United States.*[11] President Roosevelt discharged Humphrey as a Federal Trade Commissioner on the ground that "I

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10 Globe and Mail, January 31, 1977.

11 295 U.S. 602 (1935).

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 question was whether the statute limiting the President's removal power to "ineffeciency, neglect of duty, or malfeasance in office" was constitutional. The Supreme Court held that it was.

The rationale for this independence has recently been re-stated by a Congressional committee in choosing to place the enforcement of the *Consumer Protection Safety Act* in the hands of an agency rather than a department.

> This decision reflects the committee's belief that an independent agency can better carry out the legislative and judicial functions contained in this bill with the cold neutrality that the public has a right to expect of regulatory agencies formed for its protection. Independent status, and bipartisan commissioners with staggered and fixed terms, will tend to provide greater insulation than is possible or likely in a cabinet-level department. The Commission's decisions under this legislation will necessarily involve a careful meld of safety and economic considerations. This delicate balance, the committee believes, should be struck in a setting as far removed as possible from partisan influence.[12]

In reality, "independence" must, of course, be relative. After all, agencies 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 may well influence the direction of an agency. Indeed, as will be discussed later in this paper, there are currently in the United States strong moves to modify the independence of regulatory agencies. Be that as it may, in its classical form, an independent regulatory agency is to a very considerable extent free from *direct* intervention in the manner in which it carries out its mandate. 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 Davis notes, this is the practical equivalent of instructing the agency " 'Here is the problem. Deal with it'."[13] This leaves a regulatory agency very wide scope for the formulation and implementation of policy independent of both Congress and President. Hence fears of the "headless fourth branch of government".

At its inception, regulation in Canada consciously rejected the American model. In 1886 a Royal Commission was appointed with

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12 Quoted in K.C. Davis, *Administrative Law of the Seventies*, Rochester, The Lawyers Co-operative Publishing Co., 1976, p. 13.

13 Davis, *Administrative Law Treatise*, St. Paul, West Publishing Co., 1958, Vol. 1, p. 82.

instructions to examine the entire matter of railway rate regulation and the proposals for an Interstate Commerce Commission which were at that time under study in the United States in order to determine whether a similar body was needed in Canada. After consideration of the arguments for and against an independent regulatory body, the Royal Commission recommended that control of railway rates be assigned directly to the Railway Committee of the Privy Council, a sub-committee of the Cabinet.[14] This was provided for in the *Railway Act* of that year.[15]

It soon became apparent that this was not an ideal solution.

> In the first place, the members of the committee were not particularly familiar with railway problems and were politically vulnerable to outside influences. Secondly, the membership of the committee changed constantly making it impossible to obtain continuity in the interests represented or the views presented. Finally, the Committee sat only in Ottawa and made no specific provisions to ensure that all parties with an interest in a particular question had an opportunity to present their views.[16]

As a result the further comparative study of railway regulation in the United States and England, a new *Railway Act* was passed in 1903 designed to set up a separate regulatory authority. It established the Board of Railway Commissioners for Canada, consisting of three commissioners appointed by the Governor in Council. Each commissioner was to hold office during good behaviour for a period of ten years "... but may be removed at any time by the Governor in Council for cause."

The Board was given broad regulatory authority over the railways both by way of specific orders as well as by more general regulations. It was empowered to make its own rules of procedure. Findings of fact made by the Board within its jurisdiction were declared to be conclusive. Provision was made for a stated case on a question of law to the Supreme Court of Canada. Appeal, by leave of a judge, lay on a question of jurisdiction to that Court and on a question of law by leave of the Board.

As may be seen from section 44 of the Act the break with the past was by no means complete.

> Subject to the provisions of this section, every decision or order of the Board shall be final.
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> 2. 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

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14 Arthur R. Wright, "An Examination of the Role of the Board of Transport Commissioners for Canada as a Regulatory Agency", 1963 Can. Pub. Admn. 349 at 350.

15 R.S.C. 1886, c.109.

16 Wright, *supra*, note 14, p. 351.

> motion and without any petition or application therefor, vary, change or rescind any order, decision, rule or regulation of the Board, whether such order or decision be made *inter partes* or otherwise, and whether such regulation be general or limited in its scope and application; and any order which the Governor in Council may make with respect thereto shall be binding on the Board and all parties.

Despite this massive reserve clause which could ensure ultimate political accountability, it would appear that the 1903 *Railway Act* was designed to "judicialize" railway rate regulation. The Board was designated a "Court of Record";[17] was granted the "powers, rights and privileges" of a Superior Court for "... all matters necessary and proper for the due exercise of its jurisdiction under this Act or otherwise for carrying this Act into effect"; and, in a small but revealing section it was provided that the Board was not bound by the decisions of "any other court".[18] As the Minister of Railways and Canals in introducing the new act had bluntly put it "... all orders and regulations of the Board are judicial determinations".[19]

It is difficult, in principle, to reconcile the Minister's characterization of the Board's decisions with the open-ended provision for political intervention. It would appear that in a typically pragmatic Canadian way, it was hoped that we could have our cake and eat it too! Experience had shown that day-to-day regulation of the railways required full-time, detached professionalism which could most readily be attained through a separate body such as the Board of Railway Commissioners. At the same time, unlike the United States, the government was not prepared to surrender control entirely. It may be further supposed that this compromise was possible because in a parliamentary system of government the legislature would be quite agreeable to seeing ultimate responsibility retained by the executive, because it would feel that it had some measure of direct control over the executive. In the United States, by contrast,

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17 Over the years there has been considerable controversy as to the meaning to be given to the designation "Court of Record" first mentioned in section 8 of the 1903 Act. Rod Kerr contended that the expression shielded the Board from criticism in Parliament and he cited rulings of the Speaker to the effect that it could not be attacked except by way of impeachment. See his, "The Board of Transport Commissioners for Canada", 1 Can. Bar Jour. (Feb. 1958) 46 at 48-9. J.W. Pickersgill greatly antagonized members of the House of Commons Standing Committee on Transportation when he refused to answer questions critical of the decisions of the successor regulatory board, the C.T.C. See H.N. Janisch, *The Regulatory Process of the Canadian Transport Commission, An Agency Study for the Law Reform Commission of Canada* pp. 105-106 (hereinafter "Agency Study"). This report was submitted to the Law Reform Commission in August 1975 and a final revised version was accepted by the Commission in December, 1975.

18 *Railway Act*, S.C. 1903, c.58, ss.23(b), 42.

19 Wright, *supra*, note 14, p. 352.

the President would be unwilling to see Congressional control and Congress would be equally averse to Presidential control. Thus political accommodation in the United States favoured independence, while in Canada it favoured a "best of both worlds" solution in which it was to be hoped that the benefits of ultimate political responsibility would not cancel out the benefits of at least some degree of independence.

To work, this compromise requires that careful limits be placed on the scope of the authority left to the regulatory body, and there must only a limited expectation of the regulatory process. As will be seen in the next section of this paper, where more recently too broad a policy role was assigned to the successor of the Board of Railway Transport Commissioners, the Canadian Transport Commission, and more ambitious, positive expectations were entertained of the regulatory process, great strains were placed on this compromise between independence and responsibility.

An appreciation of perceptions rather than realities is of the greatest importance to an understanding of the regulatory process, as of the judicial process. In much the same way as common law judges have for centuries denied that they "made" new law but simply "discovered" existing law, so regulatory authorities and their creators always denied that they had anything to do with the making of policy. The policy to be applied was not that of the Board of Railway Commissioners, but that contained in the *Railway Act.* [20]

Yet a reading of the *Railway Act* of 1903 reveals broad grants of discretion which would allow ample scope for the development of policy. Yet the crucial factor is not the reality of hindsight, but contemporary perceptions. Thus as long as it was *felt* that the Board was not making policy decision, there would not be awkward questions about the legitimacy of a non-elected body's making such decisions. Should the perception change and it be realized that regulatory agencies are not simply "judicial" bodies mechanically applying a clearcut policy mandate given them by parliament then the issue of political irresponsibility has to be confronted.

The broad, open-ended nature of section 44 of the *Railway Act* of 1903, now carried over into section 64(1) of the *National Transportation Act,* [21] has not, in practice, prevented the development of a

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20 Almost fifty years later, the same perception prevailed. The Board of Transport Commissioners was not a policy making body for "... the function of laying down policy is that of the government and parliament and not that of the Board of Transport Commissioners". "The Board ... is set up to administer government policy not to make it." Wright, *supra*, note 14 at pp. 362-3.

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

high degree of regulatory independence. This has been so because, if political considerations favoured the retention of ultimate control, those same considerations meant that it would be sparingly used. In many regulatory situations, especially those involving rates, it is politically advantageous to insist that a contentious matter was really a technical one best left to the specialist regulator. Indeed, over the years a series of "precedents" were established which greatly restricted the circumstances in which a regulatory decision would be overturned.[22]

As may be seen from the figures, the success rate of appeals to the Governor in Council was hardly encouraging.

Appeals to Governor in Council[23]
1904-1961

Dismissed	39
Allowed	6
Referred back to Board	15
Withdrawn, discontinued, etc.	12
Total	72

Perhaps a brief recapitulation might be in order before moving on to a look at the history of broadcast regulation. It would appear that in federal transport regulation no clearcut choice was made to adopt the American independent regulatory agency model. At the same time, however, there was need felt for full-time professional regulators and this could be attained most easily by setting up a separate board. This type of arrangement could only work when relatively little was expected of the regulatory process and the role of the board was seen as essentially judicial and not policy oriented. Changed expectations and perceptions of the 1960's and 70's have substantially undermined this arrangement.

The regulation of broadcasting in Canada has almost run the entire spectrum from departmental control to independent regulatory agency. Events leading up to the overthrow of departmental regulation in the 1920's were dramatic as well as instructive.

Originally many Canadian stations were owned by religious groups. One such station was controlled by a body known as the Universal Bible Students Association. The Minister of Marine and Fisheries, who was at the time responsible for broadcast licensing, received a number of complaints about attacks made by this station on other religious groups. The Minister decided to cancel the licences held by the Association.

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22 Kerr, *supra*, note 17 at pp. 52-3.

23 Wright, *supra*, note 14, p. 385.

This provoked a storm of protest and the government, following a deluge of 9,000 letters and a petition with over 450,000 names on it, announced its new policy in the following terms:

> We have made up our minds that a change must be made in the broadcasting situation in Canada. We have reached a point where it is impossible for a member of the government or for the government itself to exercise the discretionary power which it is given by law ... for the very reason that the moment the Minister in charge exercises his discretion, the matter becomes a political football and a political issue all over Canada.... We should change that situation and take broadcasting away from the influences of all sorts which are brought to bear by all shades of political parties. [24]

Some forty years later, in ushering in the Canadian Radio Television Commission, the then Secretary of State, Judy LaMarsh, stated:

> There is, I believe, generally widespread agreement that the regulation and supervision of the broadcasting system should be delegated to an independent regulatory authority, and that this body and its decisions should be as free as possible from partisan political influence and the pressures of vested interests. [25]

Political realism and political idealism thus, conveniently, both favour an independent regulatory authority for broadcasting. From a realistic point of view broadcasting simply throws up too many hot potatoes for the politicians, while from an idealistic viewpoint it can be said that broadcasting is too sensitive an area for direct government regulation. Yet it is important to note that even in this area, where strong arguments can be made for independence, the American model has not been fully adopted in Canada. This comes out clearly in an analysis of the *Broadcasting Act.* [26]

Section 3, the "Broadcasting Policy for Canada" concludes that "... the objectives of the broadcasting policy for Canada enunciated in this section can best be achieved by providing for the regulation and supervision of the Canadian broadcasting system by a single independent public authority". The Act then proceeds to set up a regulatory system involving neither a "single" nor an "independent" public authority!

In the first place, no broadcasting licence can be issued unless the applicant has obtained a "technical construction and operating certificate" under the *Radio Act* from the Department of Communications. [27] Should the Commission attach a condition to the licence of the C.B.C. "...the Corporation may refer the condition to the

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24 Frank W. Peers, *The Politics of Canadian Broadcasting: 1920-1951*, Toronto University of Toronto Press, 1969, p. 33.

25 Commons Debates, November 1, 1967, p. 3747.

26 R.S.C. 1970, c.B-11.

27 *Ibid.*, s.22(1) (b).

Minister for consideration and the Minister, after consultation with the Commission and the Corporation may give to the Executive Committee [of the Commission] a written directive with respect to the condition and the Executive Committee shall comply with that directive".[28] If the Commission should conclude that the Corporation has failed to comply with any condition of its licence, it "...shall forward a report to the Minister ... and a copy of the report shall be laid by the Minister before Parliament...."[29] Thus regulation, far from being conducted by a single public authority, involves the Commission, the Minister of Communications, and even Parliament itself.

What then of "independence"? Under section 23 of the Act, the Governor in Council may set aside the issue, amendment or renewal of any broadcasting licence. Alternatively, it may refer the matter back to the Commission for re-consideration and if the Commission reaffirms its previous decision that too may be set aside. Broad as it is, it should be noted that it is not as open-ended as section 64 of the *National Transportation Act* in that it refers only to the issue, amendment or renewal of broadcasting licences and does not, for example, refer to the refusal or revocation of a licence. Moreover, it does not provide any means for the reversal of Commission policy even when formally cast in the form of regulations.

The *Broadcasting Act* does contain, for the first time, a positive means for government to control a regulatory agency. In section 22 the Governor in Council is authorized to issue "directions" to the Commission with respect to certain specific matters. Most important of these topics is that which entitles the Governor in Council to designate the classes of applicants to whom broadcasting licences may not be issued. This power has been used to ensure Canadian ownership of broadcast undertakings.

Legal authority to give positive instructions to the regulatory authorities is a dominant characteristic of the 1977 proposals for the restructuring of the regulation of both transportation and telecommunications.

III. BACKGROUND TO THE 1977 PROPOSALS

In the 1967 *National Transportation Act*,[30] the newly created regulatory tribunal, the Canadian Transport Commission, was granted very extensive policy and advisory functions in addition to its strictly regulatory powers. Consider, for example, the breadth of the following sub-sections of section 22 of the Act.

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28 *Ibid.*, s.17(3).

29 *Ibid.*, s.24(3).

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

(a) inquire into and report to the Minister upon measures to assist in a sound economic development of the various modes of transport over which Parliament has jurisdiction;

(b) undertake studies and research into the economic aspects of all modes of transport within, into or from Canada;

(c) inquire into and report to the Minister on the relationship between the various modes of transport within, into and from Canada and upon the measures that should be adopted in order to achieve coordination in development, regulation and control of the various modes of transport;

(e) inquire into and report to the Minister upon possible financial measures required for direct assistance to any mode of transport and the method of administration of any measures that may be approved;

(g) establish general economic standards and criteria to be used in the determination of federal investment in equipment and facilities as between various modes of transport and within individual modes of transport and in the determination of desirable financial returns therefrom;

(h) inquire into and advise the government on the overall balance between expenditure programs of government departments or agencies for the provision of transport facilities and equipment in various modes of transport, and on measures to develop revenue from the use of transport facilities provided or operated by any government department or agency; and

(i) participate in the economic aspects of the work of intergovernmental, national or international organizations dealing with any form of transport under the jurisdiction of Parliament, and investigate, examine and report on the economic effects and requirements resulting from participation in or ratification of international agreements.

The granting of power is one thing, its exercise another. In practice the Commission did not discharge its responsibility for policy formulation placed upon it by the *National Transportation Act*. I cited a number of illustrative examples of the reticence of Mr. Pickersgill to give advice on just the sort of matters falling within section 22 of the *National Transportation Act* in my study for the Law Reform Commission of Canada and concluded: "In this matter Mr. Pickersgill was quite inconsistent. As Minister of Transport he had championed legislation designed to give wide policy initiatives to the regulatory commission while, subsequently, as head of that same regulatory commission he denied himself any major role in policy formulation".[31]

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31 Agency Study, pp. 107-108. In a letter to the Globe and Mail, Mr. Pickersgill has recently asserted that policy making was never committed to the C.T.C. and that no power was taken away from the Minister of Transport. "Pickersgill Warns of Costly Bureaucracy", Globe and Mail, March 10, 1977. It is submitted, with respect, that Mr. Pickersgill has missed the point. By specifically granting to the C.T.C. broad powers of inquiry, study, recommendation, report and advice as contained in section 22 of the *National Transportation Act* this placed the focal point of policy formulation in the Commission. It is thus not so much that nothing was taken away from the Department - the important thing is what was given to the Commission and by implication denied to the Department.

In a manner typical of many similar agencies, the Commission has tended to discharge its regulatory mandate almost exclusively on a case by case basis. As James Landis warned almost forty years ago: "The technical demands of administration are often so complex and absorbing that their solution tends to shorten vision. Administrative myopia that fails to see the woods because of the abundance of the trees, is not uncommon".[32] As Gresham's Law of Administration has it, "Daily routine drives out planning".

It is sometimes said that in its day-to-day work the Commission does not make policy. In fact the Commission does formulate secondary or regulatory policy as opposed to the primary policy determination which is contained in the statute itself. *What it does not do is to articulate this policy openly.* Even in those matters most conducive to case by case adjudication such as licensing, there exist, in practice, broad policies which govern the manner in which individual applications are dealt. For example, it is the policy of the Air Transport Committee of the Commission that in determining "public convenience and necessity" care will be taken to ensure that existing carriers are not adversely affected by a new licensee, full time operations are preferred over part time operations and interveners must look after their own interests or risk the consequences. Moreover, there are minimum debt /equity requirements established by the Committee. Class III applications for non-competitive route extensions using existing aircraft are granted virtually automatically and initial helicopter licences are tied to bases and the showing of need in one particular locality despite the migratory habits of the industry as a whole.

Not only is the formulation of this type of policy inevitable but it is also desirable. It is inevitable because any decision maker, although rightly concerned to retain a reasonable degree of flexibility, does not wish to have to decide absolutely everything all over again with each application. It is desirable because this practice leads to some measure of consistency and predictability, particularly, of course, where the policy is made publically available.[33]

The Commission has not, by and large, made as much use as it might of policy statements. These can greatly improve the quality of submissions and hence the whole decision making process. By frankly and openly giving interested parties as much information as

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32 James M. Landis, *The Administrative Process*, New Haven, Yale University Press, 1938, p. 68.

33 The classic statement of the need for administrative agencies themselves to clarify their mandates remains Henry J. Friendly, *The Federal Administrative Agencies*, Cambridge, Harvard University Press, 1962.

possible about the Commission's thinking, no matter how tentative, the issues will be brought more sharply into focus and this will avoid confusion and arguments at cross purposes. This can be done very informally by way of information circulars, policy guidelines and the like. This information does not have to be clean cut and definitive to be of great assistance to both the Commission and interested parties.

What a policy statement calls for essentially is a willingness to venture out and deal with problems before they arrive as concrete cases demanding immediate solution. It requires foresight, an ability to generalize and the courage to be willing to risk being wrong. In return, policy statements and guidelines can lead to more effective and considerate regulation in that it gives the parties some advance indication of what they should do by way of preparation.[34]

The failure of the Commission either to respond in a positive manner to its responsibilities under section 22 of the *National Transportation Act* or to develop any consistent regulatory policy, has meant that it has lost, largely by default, the leadership role assigned to it.

However, it was by no means entirely by default, for in the early 1970's a major change was made in the relationship between the new Ministry of Transport (which superceded the Department of Transport existing at the time of the enactment of the *National Transportation Act*) and the Commission. As John Langford has noted, this involved a crucial shift in attitudes.

> There was clearly little conviction on the part of senior D.O.T. officials that the department should have a strong policy role. The department was seen to be primarily concerned with operations, and the C.T.C., through its regulatory and research roles, was viewed as the predominant policy maker within the national transportation framework.
>
> This image of the department's neutral policy role and limited objectives was not shared by the new Deputy Minister who took over in early 1969...
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> According to this view, it was not possible to leave the policy-making role in the hands of the regulatory agency, the C.T.C. If the Minister of Transport was to exercise proper policy-making powers, the D.O.T. would have to revise its objectives and the Minister's portfolio would have to be strengthened organizationally to bring together, in a balanced manner, regulatory, developmental and operational considerations.[35]

As a result there was a major shift of policy and development-research roles from the Commission to the Policy, Planning and

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34 Agency Stud, pp. 109-112.

35 John W. Langford, "The Making of Transport Policies - A Case Study: The Ministry of Transport as a Policy Making Institution", Studnicki-Gizbert, ed., *Issues in Canadian Transport Policy*, Toronto, MacMillan, 1974, p. 410. See also Langford's *Transport in Transition, The Reorganization of the Federal Transport Portfolio*, Montreal, The Institute of Public Administration of Canada,

Major Projects Branch of the newly created Ministry of Transport. As well, the Transportation Development Agency was established and designed to become the new focal point of research and development. Much more important than any structural alteration was the new conviction that the Ministry was to be responsible for the formulation of primary or general policy. This shift in the locus of policy making was not, however, accompanied by any statutory reform and this has created serious difficulties.

One link, by way of appeal or review, was already in existence but it has proved to be an inherently unsatisfactory means of transmitting policy. First, there can be no guarantee that the regulatory tribunal will treat appeal decisions as precedents and be guided by them. This certainly appears to have been a problem when the Minister of Transport sought to liberalize the Commission's rulings on small charter operations and found it virtually impossible to do so by way of individual appeal decisions. [36] Second, appeals all too often involve the changing of the rules after the game has been played. This has a seriously debilitating effect on conscientious regulators, and if resorted to too often can undermine the whole rationale for regulatory tribunals. [37]

By way of contrast, in the regulation of broadcasting, differences between the Department of Communications and the Canadian Radio-Television Commission have centred on substantive disagreements with policies and decisions. This would appear largely to be because, unlike the C.T.C., the C.R.T.C. has been quite extroverted in its policy making and has, over the years, issued numerous

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McGill-Queen's University Press, 1976, especially chapter 2, "The Department of Transport in 1968".

The Deputy Minister to whom Langford refers was Gerald Stoner previously assistant secretary to the Cabinet in the Privy Council Office. "Stoner accepted the new position at Transport only after receiving a mandate from the Prime Minister and the Cabinet Committee on Priorities and Planning to conduct a wide-ranging inquiry into D.O.T.'s priorities and role problems". Langford, *Transport in Transition, op. cit.*, p. 45.

In evidence before the Standing Committee, Stoner described the relationship he considered should exist between the Commission and Ministry to be as follows: "The government has issued, from time to time, statements of policy ... It is within that policy framework, then, that the C.T.C. deals with individual applications". House of Commons, Standing Committee on Transportation and Communications, 29th Parl., 2nd Sess., 1974, p. 4:38.

36 Agency Study, pp. 119-120.

37 *Ibid.*, pp. 120-121.

policy statements [38] and made more clearly discernible decisions on contentious matters such as the ownership of cable hardware, pay television, commercial deletion and the like.

Even more important than the evident structural tensions between departments and commissions was the increased expectation of regulation in the early 1970's. This was to be particularly true of the transportation area where, notwithstanding some of the grand language of the *National Transportation Act*, the central thrust of reform had been in the direction of deregulation and in favour of competition. [39] J. W. Pickersgill, President of the Canadian Transport Commission during its vital formative years, had grown less and less confident in the legitimacy and efficacy of regulation. As he was to confide to the Standing Committee on Transport and Communications in 1972:

> I have been a regulator now for four and a half years and the longer I continue to be a regulator, the more I am in favour of having as few regulations as possible because, it seems to me that having people second-guessing somebody else in the business makes for inefficiency all around. You need regulations for safety, you need regulations to deal with monopolies, but beyond that, I would rather not have a lot of fellows who are not directly interested in the operation messing around with it. [40]

In government circles, in contrast, there was new enthusiasm for regulation — not traditional "economic" regulation but "social" regulation designed to take into account newly identified concerns relevant to transport regulation. These included the rapid rise in the price of bulk commodities; northern development; a demande for more resource-efficient and cleaner transportation; an increased awareness of the disparity of opportunity within Canada, and the need for a fully integrated approach to transportation problems. [41] As Transport Minister Marchand put it: "The present act sees transportation as primarily an economic service; I am proposing that it should be an instrument of public policy". [42] If, in Clemenceau's celebrated observation, "War is much too serious a matter to be entrusted to the military", so, it may be argued, is regulation likewise too important to be left to the regulatory agencies if it is to involve control of "an instrument of public policy".

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38 For a comparison of the regulatory styles of the C.T.C. and the C.R.T.C. see *ibid.*, pp. 111-112.

39 *Ibid.*, pp. 5-17.

40 House of Commons Standing Committee on Transport and Communications, 28th Parl., 4th Sess., 1972, p. 7:14.

41 Agency Study, pp. 17-19.

42 House of Commons, Standing Committee on Transportation and Communications, 30th Parl., 1st Sess., 1974-5, p. 21:6.

This change in the perception of regulation away from an essentially technical one is of vital importance to the participants in the regulatory process, particularly to the provinces which appear before federal regulatory tribunals. Their concern has always been that they should be able to participate effectively, and, as it has now been recognized that the process has a major policy component, their interest has shifted to some degree away from the formal hearing procedures.[43] The federal response has been to offer the provinces a political forum outside of the public regulatory arena. This new understanding was well summed up in Ontario's brief to the C.R.T.C. Telecommunications Regulation Procedures and Practices hearing in October, 1976.

> In this context, however, one longstanding and basic feature of the Government of Ontario's position on communications policy should be reiterated. While the Commission must inevitably be involved with matters of policy and make decisions of a policy nature, it is Ontario's firm belief that policy decisions on major communications issues should be made by elected representatives and reflect government-to-government discussions. To this end, Ontario has already indicated to the Federal Minister of Communications, its agreement with the Grey Paper proposal, "... that the Governor in Council should be authorized to give formal directions to the Commission on the interpretation of statutory objectives and the means for their implementation."[44]

IV. THE 1977 PROPOSALS

The immediate goal of the amendments to the *National Transportation Act* and related legislation contained in Bill C-33[45] introduced in January, 1977, is to consolidate, in statutory form, the shift to the Ministry of Transport of the research and policy-making responsibilities assigned to the Canadian Transport Commission by section 22 of the Act. Important as this might be, the real significance of the Bill is that it is not confined to this task alone, but seeks to establish an entirely new relationship between Ministry and Commission. Simply put, our concern should be to assess whether the pendulum has again swung too far.

After setting out the new objective of the transportation policy in section 3(1) and the principles applicable to implementation of the policy in section 3(2), the Bill categorically asserts the preeminence of the Ministry in section 3(3) which provides: "It is the responsibility

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43 For a valuable analysis, see Richard Schultz, "Intergovernmental Cooperation, regulatory agencies and transportation regulation in Canada: the case of Part III of the National Transportation Act", 19 Can. Pub. Adm. 184, especially 200-205 (1976).

44 Submission of the Minister of Transport and Communications for the Province of Ontario, p. 4.

45 *An Act to Amend the National Transportation Act* ..., Bill C-33, 30th Parl., 2nd Sess., 1976-77, 1st Reading, January 27, 1977.

of the Minister to undertake the necessary measures to achieve the objective of the transportation policy . . ." By contrast, section 22(1) is much less expansive:

> The Commission shall exercise such powers and perform such duties and functions as are conferred or imposed on it by law with respect to licensing, authorizing or requiring the operation of, and controlling the rates and tariffs for, any mode of transport.

In case there was any doubt left as to the completeness of the shift of all responsibility, aside from licensing and rate regulation, to the Ministry, an extraordinarily broad "afterthought" power is reserved to the Governor-in-Council in section 3.1. [46]

> For the purpose of achieving the objective of the transportation policy referred to in subsection 3(1), the Governor in Council may, by order, transfer to the Minister any powers, duties or functions conferred or imposed on the Commission by this Act or any other Act, but this section does not authorize the transfer of any power, duty or function mentioned in subsection 22(1).

Finally, and most significantly, is the provision, in section 3.2 for "directions" to the Commission.

> The Governor in Council may, by order, on the recommendation of the Minister, issue such directions to the Commission as he considers necessary to achieve the objective of the transportation policy referred to in subsection 3(1) having due regard to the principles described in subsection 3(2), but each such direction shall be without specific reference to any particular matter before the Commission.

It is then provided in section 21(1)(b) that it shall be the duty of the Commission to comply with all directions issued by the Governor in Council pursuant to section 3.2".

The proposed *Telecommunications Act*, Bill C-43, [47] introduced in March, 1977, is a much more comprehensive piece of legislation than Bill C-33. The transportation amendments, aside from re-casting the transportation policy and the structural arrangements for regulation, leave all the existing legislation such as the *Aeronautics*

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46 This will entitle the Governor in Council to amend the principal act and other legislation by regulation. H.W.R. Wade has concluded that ". . . as the intricacy of legislation grows steadily more formidable, some power to adjust or reconcile statutory provisions has to be tolerated." *Administrative Law*, Oxford, Clarendon Press, 1971, p. 319. McRuer was of the opinion that this practice ". . . should not be adopted in Ontario where statutes are not as complicated and do not go so far back in time as they do in the United Kingdom." *Royal Commission Inquiry into Civil Rights*, Ontario, 1968, p. 345. The best stance would appear to be that of the Donoughmore Committee which recommended that this power should only be used when justified before Parliament on compelling grounds. Cmd. 4060 (1932), p. 61.

47 *An Act Respecting Telecommunications in Canada*, Bill C-43, 30th Parl., 2nd Sess., 1976-77, 1st Reading, March 22, 1977.

Act,[48] *Railway Act*,[49] and most of the *National Transportation Act*[50] in place. By contrast, Bill C-43, proposes new legislation dealing for the first time with the whole of the field of telecommunications and makes special provision for participation by the provinces. In so doing, however, it also proposes significant changes in the relationship between the Department of Communications and the regulatory agency, the Canadian Radio-television and Telecommunications Commission.

At the outset it should be noted that Bill C-43 does not employ quite the same strident tone as Bill C-33. Rather than provide that the Minister is responsible for achieving the objectives of the telecommunications policy, section 6 is much more modest and merely lists the relatively limited specific powers granted to the Minister. Interestingly, it is not provided in section 9, the direction power, that the Governor in Council act only on the recommendation of the Minister as in section 3.2 of Bill C-33. As well, the evocative reference to independence, which originally appeared in the *Broadcasting Act*, is carried over into section 3 of the telecommunications bill in the exhortationary provision that "... the telecommunications policy for Canada . . can best be achieved by providing for the regulation and supervision of the Canadian broadcasting system and of telecommunications ... by a single independent public body."

Notwithstanding its quieter tone, Bill C-43 does propose two important changes in the relationship between the Department of Communications and the Commission. Both are designed to shift power away from the Commission. First, is the broadened provision for the Governor-in-Council to set aside or refer back.

> 11. (1) The Governor in Council may, notwithstanding anything in this Act, either on his own motion or on a request made in writing within thirty days after the publication of any decision of the Commission, by order made within sixty days after such publication or within such further period as is determined by order of the Governor in Council made within sixty days after such publication, set aside the decision or any portion of the decision or refer the decision back to the Commission for reconsideration.
>
> (2) An order of the Governor in Council made under subsection (1) shall set forth the details of any matter that, in his opinion, the Commission failed to consider adequately.
>
> 12. (1) Where a decision or any portion thereof is referred back to the Commission under subsection 11(1), the Commission shall reconsider the matter and may, with or without a public hearing under Part II,

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48 R.S.C., 1970, c.A-3.

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

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

rescind the decision or that portion thereof or confirm it, either with or without change.

(2) A decision or any portion thereof confirmed pursuant to subsection (1) may be set aside by order of the Governor in Council made within sixty days after such confirmation.

When compared with section 23 of the *Broadcasting Act*, these sections: (i) provide for the setting aside or reference back of "any decision" which, in broadcasting, will include the revocation or refusal to issue and not, as at present, merely the issue, amendment or renewal of a licence; (ii) make it clear that the setting aside or reference back may be on the Governor in Council's own motion or in response to a request in writing (apparently from anyone); (iii) provide that a portion only of a decision may be set aside or referred back, (iv) allow for the setting aside or reference back to be extended indefinitely beyond the sixty day period; (v) indicate that in a reference back a public hearing is discretionary, unlike under the present *Broadcasting Act*.

Second, Bill C-43 gives a power of direction to the Governor-in-Council, although, because of the sensitivities involved in broadcasting, it is somewhat more circumspect than the equivalent provision in Bill C-33.

9. (1) Subject to subsection (2), the Governor in Council may, by order, issue directions to the Commission from time to time respecting the implementation of the telecommunication policy for Canada enunciated in Section 3.

(2) Nothing in this Act authorizes the Governor in Council to issue directions to the Commission with respect to

(a) the issue of a broadcasting licence to a particular applicant or the amendment or renewal thereof,

(b) the content of broadcasting programming;

(c) the application of qualitative standards to broadcasting programming,

(d) the restriction of freedom of expression, or

(e) the charges to be levied for particular telecommunication services or facilities,

but nothing in paragraphs (a) to (e) prevents the Governor in Council from issuing directions to the Commission respecting

(f) the maximum number of channels or frequencies for the use of which broadcasting licences may be issued within a geographical area designated in the directions,

(g) the reservation of channels or frequencies for the use of the Corporation or for any special purpose designated in the directions, or

(h) the classes of applicants to whom broadcasting licences may not be issued or to whom amendments or renewals thereof may not be granted.

V. INDEPENDENCE AND ACCOUNTABILITY

Before dealing specifically with the implications of Bills C-33 and C-43 and their impact on the role of the independent regulatory agency in Canada, it would be well to take into account some of the criticism which has been levelled against the American independent regulatory agency model. The main thrust of this criticism, in its concern for greater political accountability, is similar to that now current in Canada, although it dates back to the mid-1950's and is the product of much more sophisticated reflection than has yet emerged in this country.

More than twenty years ago, a leading critic of the regulatory process, Marver Bernstein, highlighted the role of the Progressive Reform Movement in consolidating and expanding the role of independent regulatory agencies at the start of this century. Their prime concern, to put it in the vernacular, had always been to "get regulation out of politics". "The Progressives had an abiding faith in regulation, expertness and the capacity of American government to make rational decisions provided experts in the administrative agencies could remain free from partisan political considerations..."[51]

Good intentions notwithstanding, regulation remained, as Bernstein emphasized, an intensely political process. As the popular jingle would have it, "You can get the regulation out of politics, but you cannot get the politics out of regulation". To hand major policy-making over to politically irresponsible bodies was to subscribe to a dangerously naive concept of democracy as a scheme of government to which political responsibility has no necessary relevance.[52]

Without direct political support and involvement, Bernstein argued, the regulatory process will never be effective. In practice agencies have not found strength through independence, but merely weakness in isolation.

> Strong political leadership is basic to regulatory success. Without the backing of political leaders in the legislative and executive branches of government, a regulatory agency will be unable to make significant headway against the opposition of the regulated interests. The failure of political leaders to formulate regulatory goals and give support to regulatory policies paves the way for acceptance by the agency of the philosophy and values as well as specific regulatory proposals of affected groups.[53]

While Bernstein's analysis successfully challenged much of the mythology which has grown up around independent regulatory

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51 Marver Bernstein, *Regulating Business by Independent Commission*, Princeton, Princeton University Press, 1955, p. 36.

52 *Ibid.*, p. 146.

53 *Ibid.*, pp. 284-5.

agencies, he stopped short of advocating specific reforms. In a few years this omission was to be supplied, in dramatic fashion, by Louis J. Hector in his memorandum to President Eisenhower on his resignation from the Civil Aeronautics Board. He concluded that independent regulatory commissions were inherently flawed and that it was impossible to expect the development of coherent policy, or the necessary coordination with other government agencies, from such bodies. He proposed radical surgery as the only solution.

> The problems of the C.A.B. are not transitory or superficial. They are basic. In my opinion they are born of the very concept of an independent administrative commission. In view of what seems to be these organic faults, I would recommend the following:
>
> 1. Transfer policy-making, planning and administration from the C.A.B. to an executive agency, such as the Department of Commerce, the Federal Aviation Agency, or a new Department of Transportation.
>
> 2. Transfer the judicial and appellate duties of the C.A.B. to a true administrative court.
>
> 3. Transfer the duties of investigation and prosecution to an executive agency such as the Department of Justice. [54]

More recently, the Ash Council proposed that independent regulatory agencies be abolished in favour of commissions headed by single administrators who would be members of the President's administration. "Accountability is an essential element of democratic government. Congress and the President are accountable to the people for the performance of government. In turn, agencies of government headed by appointed officials should be responsive and responsible to Congress, to the Executive, and through them, ultimately to the people." [55]

Along with the realization that regulatory policy decisions are essentially political, has been a growing awareness that the "commission movement" involved a naive faith in experts and expertness. As James Landis, a great proponent of regulation by independent agencies, facilely put it in 1938, "With the rise of regulation, the need for expertness became dominant, for the art of regulating an

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54 Louis J. Hector, "Problems of the C.A.B. and the Independent Regulatory Commissions", 69 Yale L.J. 931 at 932 (1960). Immediately following the "Hector Memorandum" is a reply from Earl W. Kintner, Chairman, Federal Trade Commission, "The Current Ordeal of the Administrative Process: In Reply to Mr. Hector", *ibid.*, 965.

55 The President's Advisory Council on Executive Organization, *A New Regulatory Framework, Report on Selected Independent Regulatory Agencies*, Washington, Government Printing Officer, 1971. The report is popularly known after its chairman, Roy L. Ash. For an excellent critique, see Roger G. Noll, *Reforming Regulation, An Evaluation of the Ash Council Proposals*, Washington, The Brookings Institute, 1971.

industry requires knowledge of the details of its operation ..." [56] Yet as Louis Jaffe was to admit thirty years later, "The notion so sedulously cultivated by many of us during the New Deal days that agencies, because they were expert, could go on spinning out of their own guts a continuing series of miraculous solutions was an absurd and a-historical illusion. The stuff of great public policy controversies is basically political and can only be solved in the political arena". [57]

In recent years radical proposals of the Hector-Ash variety have given way to more moderate suggestions. The independent regulatory agency has been able to survive its critics in large measure because the case against them has been overstated and little thought was given to concrete proposals for alternate decision-making processes. [58] Yet thinking about the agencies will never be quite the same after Bernstein and the persistence of concern to establish some degree of accountability makes the independent model postulated at the outset of this paper somewhat dated. Debate has shifted from whether to how political accountability is to be attained. While no specific plan has yet been adopted, there would appear to have been an irreversible change in the nature of the relationship between independent regulatory agencies and the rest of government.

The leading proponents of the movement towards greater accountability are Lloyd N. Cutler and David R. Johnson whose 1975 article "Regulation and the Political Process" has been frequently cited in the present plethora of Congressional committee reports on regulatory reform. Their approach is essentially neo-Bersteinian in their insistence that regulation be recognized as part of the mainstream of politics.

> Regulatory agencies are deeply involved in the making of "political" decisions in the highest sense of that term - choices between competing social and economic values and competing alternatives for government action - decisions delegated to them by politically accountable officials. [59]

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56 James M. Landis, *The Administrative Process, supra*, note 32, p. 23.

57 Committee on Government Operations, United States Senate, *Study on Federal Regulation*, Volume 2, "Congressional Oversight of Regulatory Agencies", 95th Cong., 1st Sess., February, 1977, p. 6, note 13.

A broader approach to regulation which seeks to take into account the polycentric nature of regulatory decisions and the growing need for cooperation between specialized agencies, tends to favour "generalists" rather than "experts" as regulators and to downplay dedicated professionalism in pursuit of a single objective. See Cutler & Johnson, "Regulation and the Political Process", 84 Yale L.J. 1395 at 1405-6 (1975).

58 See K.C. Davis, *Administrative Law Treatise*, 1970 Supplement, St. Paul, West Publishing Co., 1971, pp. 11-15; *Administrative Law of the Seventies*, Rochester, The Lawyers Co-operative Publishing Co., 1976, pp. 11-19.

59 Cutler & Johnson, "Regulation and the Political Process", 84 Yale L.J. 1395 at 1399 (1975).

It is a basic paradox of the American regulatory philosophy (and of the Canadian, as well) that respect is expressed for the non-political independence of the regulatory process until such time as an unpopular decision is made, and then the political process is invoked to change it. Rather than rely on one shot statutory intervention, "We need also to consider whether and how to create a system for *continuous* political monitoring of all government regulation, to ensure its responsiveness to the changing economic and social needs that the political process reflects."[60]

Cutler and Johnson readily concede that it is unrealistic to expect that regulation will not involve a high degree of delegation, but they insist that a distinction has to be maintained between delegation and abdication.

> We cannot fault our elected leaders for delegating responsibility when that is the only way to do the job. But perhaps we should fault them - rather than praise their commitment to agency "independence" and "expertise" - when they delegate authority and refrain from reviewing and correcting the acts of their delegates in order to avoid responsibility for how the job is done.[61]

They propose that the President be given a power somewhat similar to the "direction" power contained in Bill C-33 and C-43 although he would be required to make a full statement of his feelings and reasons for intervention as well as to allow for public participation. A Presidential Order to a regulatory agency would be subject to veto by either House of Congress.[62]

It is very important to notice that the purpose of these proposals is to ensure accountability in two complementary senses. First, it gives the President and Congress a say in the determination of major regulatory policy. Second, it ensures that everything is done openly and in such manner as to maximize political accountability.

> Many voters will oppose any further concentration of governmental decision making power, especially in "political" hands. For their part, many elected politicians would prefer not to be held so clearly responsible for regulatory actions. Moreover, there is always a danger that the power to intervene could be abused.
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> Nevertheless, since presidential intervention to favor special friends or interests would be highly visible and therefore involve high political risks, the dangers of abuse in our proposal do not appear overwhelming. Moreover, the President's actions will rarely if ever be directed at a particular agency proceeding. Most instances of regulatory failure stem from the inability of independent and expert bodies with separate missions to set national policy priorities and execute them in a balanced and politically

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60 *Ibid.*, 1397. Emphasis in original.

61 *Ibid.*, pp. 1401-2.

62 *Ibid.*, pp. 1414-17.

acceptable fashion. Under our proposal the President, if he persuades Congress not to block his action, would have the power to set and execute such priorities when he believes that an agency has failed to do so or that the policies set by two or more agencies are in conflict. That is precisely the power that no one possesses under the existing regulatory structure. It is nothing more nor less than the power to govern effectively and accountably in the present age. [63]

VI. AN ASSESSMENT OF THE 1977 PROPOSALS

The central issue in this section of the paper must be the new power of positive intervention in the regulatory process by way of directions from the Governor in Council. By way of introductory background, two broad concerns should first be discussed - the fear that the proposals will "emasculate" the regulatory agencies, [64] and that they will lead to an undesirable "politicization" of regulation. [65] Both coalesce in the further concern for continuity and stability in policy making.

Fear of emasculation is expressed particularly in regard to the C.T.C. where, as pointed out above, only its "judicial" powers with respect to licensing and rate making are to be guaranteed to it. While the Minister is authorized to delegate his powers to the Com-

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63 *Ibid.*, pp. 1417-8. In the post-Watergate period most of the initiative to establish greater accountability over the regulatory agencies has come from Congress. See, for example, *Congressional Review of Administrative Rulemaking*, Hearings before Subcommittee on Administrative Law of the Judiciary Committee of the House of Reps., October-November, 1975, S.N. 30; *Federal Communications Commission Oversight*, Hearings before the Subcommittee on Communications of the Committee on Interstate and Foreign Commerce of the House of Reps., March 2, 3, 1976, S.N. 94-89; *Improving Congressional Oversight of Federal Regulatory Agencies*, Hearings before the Committee on Government Operations, United States Senate, May, 1976; *Study on Federal Regulation*, Volume 2, "Congressional Oversight of Regulatory Agencies", Committee on Government Operations, United States Senate, February, 1977. For a useful overview which expresses concern that many of these proposals go too far, see John R. Bolton, *The Legislative Veto, Unseparating the Powers*, Washington, American Enterprise Institute, 1977.

64 "Rules for the rule-makers", Financial Times of Canada, February 14, 1977; Mr. Nowland, Commons Debates, March 7, 1977, p. 3712, "C.T.C. role 'castrated' Nowlan says", Globe and Mail, March 8, 1977.

The initial discussion in the newspapers has been of an encouragingly high calibre and has included the critical view of Chairman Boyle of the C.R.T.C. and, more recently, those of Marshall Crowe, chairman of the N.E.B. See, particularly, Gordon D. Hutchison, "Ottawa dials for power", Financial Post, April 2, 1977; Barabra Keddy, "Boyle, Government bristling on telecommunications issues", Globe and Mail, April 6, 1977; Stephen Duncan, " 'Neutral' rule of agencies seems doomed", Financial Post, April 2, 1977, "Boards growl at Cabinet's political plan", *ibid.*, April 23, 1977.

65 Ken Romain, "Radical bill on transport shifts power", Globe and Mail, February 10, 1977, "Political overtones of transportation bill disturbing to members of traffic league", Globe and Mail, March 12, 1977.

mission, there is at the moment little indication that the Ministry is in any mood to do so. The Commission may participate in the work of intergovernmental, national or international organizations in relation to the regulation of transportation but only with the approval and in consultation with the Minister.[66] It is also authorized to sponsor research considered necessary "... for the purpose of exercising any of its powers or performing any of its duties or functions."[67] This would seem to limit it to research touching immediately on its licensing or rate making powers, although this might include its rulemaking responsibilities under other statutes, such as the *Aeronautics Act*.

While there is much need for this type of detailed analysis, the overriding issue concerns the cumulative impact on the Commission of open-ended appeals to, and general directions from, the Governor in Council. If these powers were to be broadly exercised, there is reason to believe that they would have a demoralizing effect on the Commission and would go far to undermine the integrity and credibility of the regulatory process.

Much can be learned from an American example. One major exception to the finality, aside from judicial review, accorded the decisions of the independent regulatory agencies in the United States, is that awards to U.S. air carriers of overseas or foreign air routes under section 801 of the *Federal Aviation Act* take the form of recommendations to the President. The rationale for this departure from normal administrative process was, apparently, concern that, as foreign relations and security considerations are involved in these route awards, the final say should be with the President. In practice, particularly in recent years, immediate party political considerations have predominated with little actual concern for foreign relations or security.[68]

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66 s.22(3).

67 s.22(3.2).

68 In Canada, international routes are similarly decided by the executive with the International Transport Policy Committee of the C.T.C. playing a somewhat similar advisory role to that of the C.A.B. The 1974 renegotiation of the Canada-U.S. bilateral air agreement brought out some of the tensions involved in this procedure. "As an international route matter it was solely a Cabinet decision that awarded twelve trans-border routes to Air Canada, one to C.P. Air and two to the regionals. There was a bitter reaction to this decision from C.P. Air and the regionals implying that their intra-Canada development, as guided by the Commission, had been proceeding in a different direction and away from the restrictions on competition with Air Canada which were imposed by this Cabinet decision. Indeed, Quebecair's purchase of a Boeing 727 had been in anticipation of receiving the Quebec City-New York route. After coming up empty-handed, Quebecair president Lionel Chevrier stated that "... the current favouritism of Air Canada at the expense of the regional airlines is a calamity." Agency Study, pp. 39.

In a carefully documented submission to the Subcommittee on Aviation of the Senate Commerce Committee on June 15, 1976, the Subcommittee on Aviation of the Administrative Law Section of the American Bar Association pointed out four major adverse effects of an attempt to blend together a rational administrative process and crass party politics. [69]

1. ***Staff people within the Executive Branch freely superimpose their views of the facts and policy issues for the findings and conclusions of the Board.***

> Staff people within the Executive Branch have been encouraged to second guess the Board and render the very time-consuming process a nullity. The 801 process, which was intended only to allow the President and his key advisers to bring to bear significant foreign policy and national defence considerations, has in fact become a *de novo* review. Individuals ... perceive the review process as an opportunity to express their individual judgments on all aspects of the decision - need for competition, the route to be created and the carrier to be selected. Nothing that the Board has done by way of findings is given any particular weight.... The staff people reviewing the decision are imbued with a sense of considerable personal power which transcends what should flow from the proper exercise of their responsibility. ... To them it is a grand game. [70]

2. ***Air Carriers spend time and money on political activity, consultants, and involvement of their own officials in an effort to manipulate or protect themselves during the Presidential review process.***

> It seems to us that in a public service business the regulatory process should be carefully molded to encourage the regulated to do a better job. They should be rewarded for performance which serves the public interest. For the airlines that means achieving the highest level of efficiency and providing the best service at the lowest fares. Instead the system ... appears to reward those who are best able to manipulate the government process. [71]

3. ***The present process is destructive to the morale of the Board.***

> Route cases, and particularly those involving major international routes require a substantial undertaking at all levels within the C.A.B. The individual effort by those engaged in this process is bound to be affected by the degree of integrity in the decisional process, and by the degree of respect accorded to its results. If the staff people ... and the Board members recognize that the end product will be a fair reflection of the results of their individual efforts, they will be encouraged to perform well. If, on the other hand, the decision is unlikely to be related to those efforts, the level of performance is bound to deteriorate. [72]

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69 Hearings before the Subcommittee on Aviation of the Committee on Commerce of the United States Senate, 94th Cong. 2nd Sess., 1976, S.N. 94-104.

70 *Ibid.*, p. 814.

71 *Ibid.*, p. 815.

72 *Ibid.*

4. *Public respect for this process, and governmental processes in general, is diminished.*

> Major 801 cases have been well covered by the press. The results on many occasions are depicted as politically motivated. There has been good cause for suspicion as to the efforts by carriers to manipulate the process and often as to their success. This has become another area in which the way in which governmental functions are performed leads to public suspicion of the lack of integrity in the governmental process. It is one more element contributing to the deterioration of the public's image of government.[73]

There is little reason to believe that things would be very different in Canada (at best they might be a little more discreet) if the power it is proposed to grant the Governor-in-Council were to be more broadly exercised. However, as discussed above, we do have a history of considerable executive restraint in any involvement in the regulatory process, and it may be that fears of emasculation and politicization are based on a reading of the wording of the grants of power and not on a realistic assessment of the manner in which the power will be exercised in practice. Presumably the same inhibitions will continue to apply to any action, whether by way of a reversal of a decision of the Commission or by way of a policy direction to it. Action brings with it political responsibility and the danger of shifting criticism from commission to government.

Nevertheless, three new factors may upset the longstanding inhibitions on political intervention.

First, the changing perceptions as to the nature of regulation will make it much more difficult than in the past to pass it off as a highly technical business best left to experts. The more the government emphasizes the social side of regulation and its role in combatting regional disparities, and plays down its traditional economic focus, the more difficult it will be to keep from involvement and the more there is involvement the more political it is likely to be.

Second, the very grant of the powers encourages their use. For instance, the government will no doubt deny any ability to reverse individual decisions by directions, but then it still has broad appeal powers. Even if the particular decision is not reversed, a power of direction may be seen as a responsibility for future correction.

Third, and possibly most important, an impressive parallel regulatory bureaucracy has been built up in the Department of Communications and the Ministry of Transport with considerable second guess capability. No doubt, to some extent in the past, the plea of technicality was used to avoid involvement for political reasons. But, it appears equally true that, at least to a considerable

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73 *Ibid.*, p. 816.

extent, this plea was true on its face and that the government outside of the regulatory agencies simply lacked the resources to take a second look at a complex railway or telephone rate case or to develop regulatory policy. Moreover, it is not very likely that departmental employees are ever going to find much right about commission decisions, as to a considerable extent their jobs rest on the premise that the right policies and decisions will not be forthcoming from the regulatory agency. There also should be concern as to the dog and his tail. As has been discussed, the initiative for the shift of power from the C.T.C. to the Ministry seemed to come to a considerable extent from a determined reform minded Deputy Minister. It is thus possible that political sensitivities may be overshadowed by technical chauvinism and ministerial political caution overriden by the expertise of the ambitious Monday morning quarterback.

It would be well at this point to identify the central thesis of this paper, for without further explanation, it would seem to be headed into a basic internal contradiction. On the one hand the insistence of Bernstein and Cutler and Johnson that regulation be recognized as part of the political process has been adopted, while on the other misgivings have been expressed at this very process of politicization. Doesn't the political process have to be accepted warts and all? Wasn't an effete concern for "rationality" exactly the mistake of the Progressives when they sought to take regulation out of politics? Yet, surely, one is entitled to be optimistic about politics! As Cutler and Johnson put it, regulation is concerned with "... 'political' decisions in the highest sense of that term...." Therefore, in determining the role of the independent regulatory agency, every effort should be made to ensure that structural reform brings out the best in the political system, and that openness and accountability are employed in such manner as to ensure the highest quality of political involvement. This is particularly significant in relation to the direction power to be duscussed shortly.

Along with the fears of the politicizing of regulation there is a very real concern as to continuity and stability in policy-making. It is ironic to note that a forceful plea for stability in the regulatory process was one of the main points of the leading Conservative transportation critic in his comments on Bill C-33. Mr. Horner warned that billions of dollars will have to be spent on the transportation system. This requires long range planning "... but how can we have that and spend the money necessary without any certainty that the policy which exists today will exist tomorrow? That is how quickly changes could be implemented through this legislation. The Governor in Council can change that policy with a flick of the finger, and that is of concern to the industry." [74]

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74 Commons Debates, March 1, 1977, p. 3533.

This was, indeed, the concern of the president of the Canadian Trucking Association in his assessment of the Bill.

> Whether there will be instability and uncertainty in transport policy in future will depend on how "political" transportation policy is in future and also on the stability and continuity in the Transport Canada bureaucracy. In this regard, there is not much reason to be optimistic based on recent performance. Not only do we now have ministers playing musical chairs with portfolios every couple of years, but it would seem that senior officials and particularly those involved in policy planning, have taken up the same sport. This means that every two or three years there is likely to be a whole new wave of personalities involved in transportation planning, who for the most part, have little direct background in transportation. It will be these officials who are called on to respond to the political pressures that are exerted. Instead of cranking-up a royal commission or task force every ten years or so to review transportation policy, followed by an exhaustive legislative overhaul where all interested parties can be heard to the point of exhaustion, we will in future have an ultra-streamlined approach to transportation policy evolution so that whatever views on transport happen to be in the ascendancy can be implemented at a flick of an order-in-council. That may be progress.... [75]

In moving to an assessment of the proposed power to issue directions to the regulatory agencies, it is important to recall that this is to be an entirely unilateral power requiring no participation or consultation whatsoever. As Mr. Horner put it "The governor in council can change the policy with a flick of a switch ..." As a matter of practice, there may well be participation and consultation but this will be entirely at the discretion of the Minister and Governor in Council. Even should there be such unstructured input, it will not constitute an adequate substitute for the requisite statutory guarantees, for this is too important a matter to be left out of the legislation itself.

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. Moreover, as K.C. Davis has noted, "... the least difficult method for overall policy-making is through focusing on one particular facet at a time." [76]

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75 *Ibid.*, p. 3531. Mr. Nowlan pointed out that there had been five ministers of transport since 1968. Mr. Hellyer to April, 1969; Mr. Richardson as acting-minister until May, 1969; Mr. Jamieson from May, 1969 to November, 1972; Mr. Marchand from 1972 to 1975 and Mr. Lang from September, 1975. "On the other side of the coin", there had only been two chairmen of the C.T.C., Mr. Pickersgill and the present incumbent, Mr. Benson. "This shows that by its very make-up the C.T.C. will in an apolitical, non-perjorative way bring a little more continuity to policy making than the ever-changing revolving musical chairs necessitated by cabinet appointments." *Ibid.*, p. 3712.

76 Davis, *Administrative Law Treatise, 1970 Supplement, supra,* note 58, p. 12.

William L. Cary, drawing on his experience of three and a half years as Chairman of the Securities and Exchange Commission, has warned that it would be most unwise to withdraw the responsibility for the development of policy through rule-making entirely from a regulatory agency.

> Further, in my opinion, the interaction of informal administrative decisions, formal cases and rule making is both fruitful and necessary. The vast bulk of S.E.C. work . . . consists of processing registration statements, periodic reports, proxy solicitation material, applications for exemptions, and requests for advisory letters under the various acts it administers. These activities are administrative in nature [and] enriches our experience perhaps as much as litigated cases. Without concrete examples, policy formulation might become more sterile and unrealistic. It is not easy to make policy in a vacuum. In the words of Mark S. Massel of the Brookings Institution: "Policy formulation is a never-ending process. It calls for feedback of ideas and information coming from the administration of existing policies. New problems arise which cannot be foreseen when rules are developed. As conditions change they may require changes in policy." [77]

The need for such front line regulatory experience in the formulation of policy has been borne out in the only sustained experience of the use of a direction power in Canada. As authorized under section 22(1) (iii) of the *Broadcasting Act*, the Governor-in-Council issued a direction on foreign ownership of Canadian broadcasting undertakings. A series of amendments had then to be adopted because it was found that ownership practices did not fall into the preconceived notions put into the original direction. This might well not have been necessary had the directions themselves grown out of the regulatory experience and not been imposed from above.

It would be useful to consider one practical example drawn from the C.T.C. study. [78] Over the last several years there has been substantial discussion as to the need for a policy on "third level carriers" similar in nature to the present Regional Airline Policy. But who is going to formulate this policy? The C.T.C.'s Air Transport Committee has a good deal of practical experience with the actual workings of the third level carriers and has already started to develop such a policy, although the Committee Chairman, in an interview, expressed grave reservations as to the practicability at the present time of a general policy statement, in view of the extraordinarily wide discrepancies of geography and carrier capability. Moreover, as he pointed out, there isn't any agreed upon definition of "third level" carrier (or "primary" carrier, as some prefer to be called). It seems obvious that any policy, if it is going to be at all realistic, will have to draw heavily on the Committee's practical

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77 Cary, *Politics and the Regulatory Agencies*, New York, McGraw-Hill Book Company, 1967, p. 128.

78 Agency Study, pp. 122-123.

experience. It will also have to draw on the sense of urgency and desire to break away from *ad hoc* case by case adjudication which characterizes the Ministry. To formulate the policy in the abstract and then to seek to force the Committee to implement it will not work because those with practical experience in enforcement and administration must have confidence in the practicability of the policy they are called on to implement.

Considerations such as these might be seen as favouring a complete rejection of any power to formulate policy outside of the regulatory agency itself. However, experience of regulation in Canada does not support this extreme solution because, as already noted, independence must remain only a relative concept particularly in a parliamentary system of government and our regulatory agencies have all too often failed to articulate policy preferring case by case adjudication to policy statements and rulemaking. The challenge is to devise a technique which will require the regulatory agency to formulate policy, not simply to impose it from above as presently proposed.

Not only is no provision made in Bills C-33 and C-43 for involvement of the regulatory agencies in devising directions, but there is, as well, no provision for industry or public involvement. The rationale would seem to be that accountability and not participation is what counts. Directions will be the clear product of the Governor in Council and the government will be immediately answerable to parliament and in the long run to the electorate. Representative or indirect democracy has been favoured over participatory or direct democracy.

While the resultant clarity of responsibility should be welcomed, and is certainly to be preferred to the present system which can lead to indirect, under the table influence without political accountability, it does not suffice by itself. How effective, in practice, will this accountability be in helping to create sensible regulation? Its inherent weakness is that it can only provide an ex post facto check at which stage there will be a natural tendency for the government to defend its position to the hilt and to see criticism as being directed against it and not against a particular policy. Moreover any change in policy will be seen as an admission of a mistake to be firmly resisted. In other words, ultimate accountability, important as it is, is no substitute for openess in policy making which allows fro the interplay of competing ideas *before* any final position is adopted.

Policy direction which are not the product of an open system will inevitably be damned as favouring those who have the ear of the government. "Might not trial by agency with all its blemishes," K.C. Davis has warned, "take on a new beauty in the eyes of those who

have gazed upon the ugly countenance of trial by lobbyists?" [79] Before rejecting this as an example of American hyperbole, consider again the pay television example at the start of this paper. For a minister to announce a new policy, which would replace the policy position of the regulatory agency arrived at after detailed public hearings, at the trade convention of the industry most likely to benefit from such change, is hardly calculated to reassure one of even handed regulation.

As well, as John Langford noted in his study of the creation of the Ministry of Transport, the ministry planning and policy making process has apparently been insulated from inputs which do not emanate from organized traditional interest groups.

> 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. There are indications that the centralization of policy making, coordination and control within the portfolio has facilitated the access of industry to the process.... The prevailing definition of responsiveness lays no emphasis whatsoever on its relevance to the direct demands of the general public served by the national transportation system, unless these demands are filtered through Cabinet and the minister and then aggregated into ministerial priorities. [80]

Lack of any opportunity for participation is all the more striking in the Telecommunications Bill, C-43. In Canada we have not adopted a general requirement for an opportunity to participate in regulation making as in the *Administrative Procedure Act* in the United States. However, the *Broadcasting Act* provides that the C.R.T.C. is not to adopt a regulation without publishing it in the Canada Gazette and providing a reasonable opportunity for licensees and other interested persons "... to make representations with respect thereto." [81] This approach has been continued in the *Telecommunications Bill*, and it calls attention sharply to the lack of any similar provision with respect to directions.

Despite an avowed commitment to greater accountability in the regulatory process, no attempt has been made in either Bill C-33 or Bill C-43 to require that regulations made by the C.T.C. or the C.R.T.C. be subject to the approval of the Governor in Council. Both the McRuer Commission, [82] and the MacGuigan Report, [83] urged

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79 Davis, *Administrative Law Treatise, 1970 Supplement, supra*, note 58, p. 12.

80 Langford, *Transport in Transition, supra*, note 35, pp. 208-9.

81 s.16(2).

82 *Royal Commission Inquiry into Civil Rights*, Toronto, Queen's Printer, Volume 1, pp. 359-60.

83 *Third Report of the Special Committee on Statutory Instruments*, Ottawa, Queen's Printer for Canada, 1969, pp. 34-5.

that all regulations of a substantial policy nature should always be subject to government approval in the interests of political responsibility. It is particularly difficult to understand why regulations have not been made subject to approval when the breadth of the regulation making power is recalled. For example, under the *Aeronautics Act*,[84] the C.T.C. has very wide powers to make regulations covering many facets of air transportation. Indeed, Ernest Saunders, a very experienced participant in regulatory matters, has singled out the *Aeronautics Act* as an example of an overly broad grant of delegated power.[85]

This omission would appear to mean that all the government wants is an opportunity to second guess the regulatory agencies rather than to take any real, continuing responsibility for the working of the regulatory process as a whole. If it is genuinely concerned about accountability, it should be prepared to stand behind the widespread regulation making power of regulatory agencies by requiring that all such regulations have its approval. Not only would such a step be correct from the point of view of principle, but as a matter of practical politics it would seem extremely unwise to seek to knock out a regulation made after a public hearing with a direction which can so easily be ridiculed as a Czarist ukase. However, as regulations will not require approval, although they often deal with major policy matters, such a spectacle would appear inevitable.

Much has been made of the fact that the Governor in Council will not be entitled to issue directions to the C.T.C. or C.R.T.C. with respect to any matter already before them. It is difficult to understand this concern that there be no interference in the "judicial" aspects of commission work in view of the open-ended power of the Governor in Council not only to reverse decisons but also to substitute its own decisons for those of the commission. It may well be that a party would be less ill-treated if, at the outset of his application, the rules of the game are changed by a direction rather than, after going through a commission hearing, he has a favourable decision reversed by the Governor in Council on the basis of new policy considerations not argued before the regulatory agency.[86]

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84 R.S.C. 1970, c.A-3, s.14.

85 *Telecommunications Regulation at the Crossroads*, Dalhousie Continuing Legal Education Series No. 13, H.N. Janisch (ed.), Halifax, 1976, pp. 76-7.

86 A classic example of changing the rules after a decision has already been made by the regulatory agency is to be found in the Bell case in 1973. "In its initial determination in the 1973 Bell rate application the Telecommunications Committee [of the C.T.C.] applied the wellknown rate base rate of return regulatory tests. However, on review, it was told that social factors should have been used in addition to the traditional tests.... If the government had wished the Committee

It is often very difficult to see the important issues clearly enough to lay down policy until concrete cases arise. The Edwards Committee in the United Kingdom made a useful proposal in this regard. "If, for example, the department wished to change policy radically in the light of a particular case, this might be done by empowering the Minister by statute to issue a direction suspending the Authority's [the regulatory agency] decision for a specific (but not unduly long) period on the grounds of major public interest. Within that period the department would have to table, and if necessary defend to Parliament, a change in the statutory instrument setting out the civil aviation policy."[87]

Finally, it might be well to clarify the exact legal status of directions as there is at the moment considerable confusion at the federal level as to what exactly is meant by a "statutory instrument" and a "regulation", let alone a "direction".[88]

VII. CONCLUSION

The time has now come for the critic to pay his price of admission and put forward his own positive proposals. If this paper has done nothing else, it will at least have shown the need for a much more extensive public debate on the role of independent regulatory agencies in Canada than there has been up to this point. In order to further that debate, this paper will conclude with a number of specific proposals which contrast sharply with those contained in Bills C-33 and C-43. Overstatement and lack of precision should be excused in the interests of getting a clear set of alternatives out into the open.

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to take such factors into account, it could have instructed counsel to appear and raise these issues. Its concern could have been formally communicated to the Committee at the hearing in order to ensure that the hearing be conducted on the right basis." Agency Study, pp. 117-121. For a more general discussion of the undesirability of reversing decisions on grounds not developed before the regulatory agency, see, *ibid.*, pp. 116-117.

87 *British Air Transport in the Seventies*, Report of the Committee of Inquiry into Civil Air Transport, 1969, Cmnd. 4018, pp. 253-4. For an interesting analysis of events leading up to the establishment of the Civil Aviation Authority see Ganz, "Allocation of Decision-Making Functions", 1972 P.L. 215 at 224-9. For an important decision on the legal status of "guidance" issued to the C.A.A., see *Laker Airways* v. *Department of Trade*, [1977] 2 W.L.R. 234 (C.A.).

88 See the Second Report of the Standing Joint Committee of the Senate and of the House of Commons on Regulations and Other Statutory Instruments, 30th Parl., 3rd Sess., 1976-77. For a recent most unsatisfactory decision on the legal status of the "directives" of the Commissioner of Penitentiaries by the Supreme Court of Canada, see *Martineau and Butters v. Matsqui Institution Inmate Disciplinary Board*, 1977 55 D.L.R. (3d) 1. And see H.N. Janisch, case comment 55 C.B.R. 576.

The following are the premises on which the proposals are based:

1. Regulation must be recognized as political in the sense that it involves choices between competing social and economic values.

2. To be effective regulation has to be credible and this requires open procedures.

3. The basic policy framework of regulation should be contained in the statute.

4. In practice this still leaves considerable scope for on-going policy making.

5. A major responsibility for policy making rests with the regulatory agencies which should make full use of their rulemaking powers.

6. Ultimate responsibility for policy rests with the elected officials whose views must prevail but in such a way as not to compromise the credibility of the regulatory process.

Specific proposals are as follows:

1. Before a direction is issued to a regulatory agency, that agency should be given an opportunity to participate in policy formulation.

2. Provision should be made for public participation in direction making.

3. Proposals 1 and 2 can be most readily met as follows: Prior to the issuance of a direction, the matter involved shall be referred to the commission which shall hold public hearings on the matter and make a report to be laid before Parliament within sixty days of its receipt.

4. The Governor in Council will not be bound by the report and will be entitled to make an entirely independent decision although it will not be able to ignore the report as it will be made public. This procedure would blend together the three crucial elements - regulatory experience, public participation and political accountability.

5. Provision should be made for a "stop order" on any application which raises substantial unresolved policy issues.

6. Regulations of the regulatory agencies should be subject to the approval of the Governor in Council.

7. Since the government will now have the means at its disposal to take the initiative in policy making, there will be no need for appeals to, or review by, the Governor in Council.

This proposal will not be pleasing to the provinces who appear to want a government to government policy making mechanism. Nor will it be welcomed by the federal departments which would have to appear at commission public hearings to explain their policy preferences and even, possibly, be subject to cross-examination. The ear of the minister is always to be preferred to a public hearing. Yet deals made behind closed doors and announced by preemptory directions hardly seem likely to inspire confidence in the regulatory process. Indeed, one probable result of the inherently Draconian nature of the direction power will be that it will be very sparingly employed and the present policy vacuums which exist in so many areas of regulation will continue indefinitely. Alternatively, it will be held in reserve as a club over the regulatory agencies, and this will lead to all sorts of indirect influences with the agencies being tempted to guess at ministerial policy preferences. In the final analysis, in a democratic society, if a policy is to be credible, it must be the product of a credible process.