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INDEPENDENCE OF ADMINISTRATIVE TRIBUNALS  
IN CANADA: IN PRAISE OF  
"STRUCTURAL HERETICS"

H. N. Janisch <sup>1/</sup>

In this article the relationship between government and independent regulatory agencies is analyzed in the context of current concerns for more political accountability in regulation. It concludes that not enough care is being taken to preserve the integrity of such agencies and makes a number of specific recommendations as to how both political accountability and independence may be achieved.

1. Introduction

"Independence" is a word replete with positive meaning. We would all like to be told that we display independence of thought and action. In our individualistic society, independence of spirit and way of living are much admired. This is carried over into our institutions -- particularly to those close to us here today. We all believe in the crucial importance to a free society of an independent legal profession and in the value of academic independence in our universities. Above all, we believe in the independence of the judiciary as a cornerstone of our liberties. In all these matters, we would enthusiastically echo Daniel Webster: "Independence now and Independence forever"! <sup>2/</sup>

The whole notion of independence carries with it very positive connotations and enhanced prestige and standing in the community. As lawyers, for example, we like the idea of belonging to an independent profession, at least partially because of the social

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<sup>1/</sup> Of the Faculty of Law, University of Toronto. This paper was originally presented at a conference of the Council of Canadian Administrative Tribunals/Conseil des Tribunaux Administratifs Canadiens held at Queen's University on May 5, 1987.

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<sup>2/</sup> Discourse in Commemoration of Adams and Jefferson, Boston, August 2, 1826.

status involved. I am sure that many of us here today would like to be able to assert the independence of administrative tribunals, because by doing so, we would be confirming their uniqueness and importance. We would prefer that they not be merely seen as part of government, but as distinct entities entitled to the sort of respect and deference society accords the judiciary.

But is the notion of independence at all applicable to administrative tribunals? Are they involved in detached, disinterested judgment, or with the implementation of government social and regulatory programs in a reasonably even-handed manner? As Bernard Schwartz observed, "[p]aradoxical though it may at first glance appear, the prime aim of administrative justice is not justice at all, but the execution of the legislative policy embodied in the relevant statute." <sup>3/</sup>

This requires us to confront, of course, the prime characteristic of administrative tribunals -- their extraordinary variety, which makes any generalization a perilous undertaking. It must surely be this chameleon-like quality of administrative tribunals, whose activities cause them to range from being more punctiliously court-like than the courts themselves to pure policy making through informal consultation, that makes them such a fascinating and challenging area in which to work or study. While it is fun, particularly for an academic, to revel in all this variety, we do need some classifications. One possible way of differentiating between tribunals is by focusing on what they do.

The products of these agencies vary as greatly as their subjects and structure. Here is a long list, which includes the major kinds of products, although probably not all of them: (1) adjudicating: that is, making individualized decisions, for example, about claims for workers' compensation, about the rates for telephone service or natural gas, about the construction of a nuclear power plant, and about granting and revoking licences. Some of these decisions are similar to decisions made by courts; for example, a decision about workers' compensation determines facts about individuals and applies general standards

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<sup>3/</sup> The Professor and the Commissions (New York: Alfred Knopf, 1959), p. 117. As James Landis put it: "[t]he ultimate test of the administrative agency is the policy that it formulates; not the fairness as between the parties of the disposition of a controversy on a record of their own making." The Administrative Process (New Haven: Yale University Press, 1938), p. 39.

about entitlement to these facts. In contrast, some of the decisions are greatly different from decisions made by courts; for example, a decision made by an environmental assessment board about a nuclear power plant will involve general facts about the economy and complex technology and a large element of choice about social values; (2) rule making: that is, rules made under statutory authority and having substantially the same effect as legislation, whether they are called regulations, by-laws, delegated legislation, or any other technical term; (3) policy making through informal statements; (4) prosecuting: for example, prosecuting for violation of environmental requirements; (5) spending money; (6) providing services; (7) investigating; (8) researching; (9) advising; (10) educating; (11) persuading; and (12) supervising. Some agencies, especially the major federal regulatory agencies, perform all or most of these functions; others perform only a few, although, because they overlap so much, it would be difficult to imagine an agency that performed only one. <sup>4/</sup>

From this it is possible to argue that where a tribunal is undertaking an essentially adjudicative task there needs to be the greatest concern for independence. Here, the analogy to the judiciary is most appropriate. This is not to say that the precise methods of the judiciary have to be adopted, but that structural measures, somewhat analogous to those applied to the judiciary, need to be adopted to ensure that, in actuality and in public perception, administrative tribunal adjudication is made on an independent basis. This requires a reconsideration of tenure, length of appointments, the process by which appointments are made, pension provisions, role of staff, use of ex parte contacts and the like. Important as these matters are, I think that it would be most useful if I were to look somewhat further into the relationship between the role of administrative tribunals and the need for independence.

Let me start by reiterating that it is only some adjudication, let alone all the other eleven activities just identified, that is similar to what is done by courts. While it is, of course, true, particularly in our "brave new Charter world," that courts do much more than apply known rules to facts, administrative tribunals all too often are faced with "a large element of choice about social values". While the difference between typical judicial adjudication

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<sup>4/</sup> J. M. Evans, H. N. Janisch, D. J. Mullan & R. C. B. Risk, Administrative Law: Cases, Text and Materials, 2d ed. (Toronto: Edmond Montgomery, 1984), pp. 6-7.

and typical administrative adjudication must now be recognized as one of degree only, it remains a difference of importance. On this matter, I take my advice from Oliver Wendall Holmes, who observed:

I have heard it suggested that the difference is one of degree. I am the last man in the world to quarrel with a distinction simply because it is one of degree. Most distinctions, in my opinion, are of that sort, and are none the worse for it. <sup>5/</sup>

## 2. Independent Regulatory Agencies

One front on which there continues to be considerable difference of opinion concerns the relationship that should exist between what are popularly called "independent regulatory agencies" and the rest of government. These include tribunals such as provincial public utility boards, and, at the federal level, bodies such as the Canadian Radio-television and Telecommunications Commission. As well, two additional major independent regulatory agencies are soon

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<sup>5/</sup> Haddock v. Haddock, 201 U.S. 562 at 631 (1906).

to be established -- one in Ontario to regulate insurance rates <sup>6/</sup>  
and a federal agency to regulate postal rates. <sup>7/</sup>

Of course, here, "independence" can in no sense be absolute. As George Bernard Shaw once remarked: "Independence? That's middle class blasphemy. We are all dependent on each other, every soul of

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6/ Regina Hickl-Szabo & Angela Barnes, "Ontario to Curb Car Insurance Rates, Industry Profits will be Regulated," Globe Mail, April 24, 1987, p. A1; "Insurers Cite \$100 million Loss, Offer to Open Books," "Don't expect Premium Rollbacks or Big Rebates, Public Cautioned," id., April 25, 1987, p. A5; Stanley Oziewicz, "Car Insurance Body to Control Increases in Other Premiums," id., May 7, 1987, p. A1.

The Minister of Consumer and Commercial Relations described the proposed new independent regulatory agency for insurance rates in these terms:

We will establish a permanent independent Rate Review Board. It will be led by a full-time chairperson and a panel of part-time members. The Board will be supported by a secretariat which will maintain public information on rates and administer the public hearing process.

In making its rulings, the Rate Review Board will take into account public policy guidelines issued by the government.

Decisions of the Board may be reviewed by the courts.

Monte Kwinter, "Need Rate Review Board for Insurance Industry," The Lawyers Weekly, May 15, 1987, p. 4.

Subsequently, when the Minister was asked whether Cabinet would be able to overturn abnormally large increases in rates, he indicated "the Government will accept the review board's judgment, whatever it is. Mr. Kwinter said the only way to reverse a decision of the review board would be to take it to the courts". "Won't Overrule Review Board on Auto Rates, Kwinter Insists," Globe & Mail, May 12, 1987, p. A8.

7/ "Postal Study to Consider Rate Setting," Globe & Mail, April 2, 1987, p. A3.

us on earth." <sup>8/</sup> Thus, an independent regulatory agency is created and empowered by the Legislature, and as a creature of Parliament it can always be abolished (witness the demise of the Canadian Transport Commission), restructured or given a different mandate. It will usually be directly dependent on the Legislature, <sup>9/</sup> or more realistically the government of the day, for its budget. <sup>10/</sup> I say "usually" because some regulatory agencies are self-financing, and, under very recent federal legislation, the C.R.T.C. has been empowered to levy its costs against those who appear before it. <sup>11/</sup> As well, the government has the power of appointment and control over staff size and composition. Nevertheless, even though its independence must of necessity be limited, an independent regulatory agency remains quite distinct from an hierarchically organized government department in that it is not directly answerable to any Minister, has commissioners who have fixed terms and some degree of tenure, and, through its processes for public participation, has the means of legitimating its activities and carving out a separate existence for itself.

The greatest faith in regulation by independent agencies was to be expressed in the United States during the New Deal. <sup>12/</sup> The objective then was to get regulation out of politics into the

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8/ Pygmalion, Act II.

9/ As Landis was to observe, "[i]t must be remembered that whether or not the administrative [agency] is organized along independent lines, its dependence upon other departments of government is very great. The executive and legislative [branches] control both the means of supply and the extent of the agency's powers. Supply is the lifeblood of efficient administration and access to the means of supply is a closely confined process in our government": Administrative Process, note 2, above, at p. 60.

10/ For example, Nova Scotia, Public Utilities Act, R.S.N.S. 1967, c. 258, ss. 13-16.

11/ An Act to Amend the Railway Act, S.C. 1986, c. 49.

12/ As Landis wrote in the late 1930's, "[t]he administration process is, in essence, our generation's answer to the inadequacy of the judicial and the legislative processes": Administrative Process, note 2, above, at p. 46.

hands of independent experts. Joseph Eastman, himself a longtime regulator, did not pull any punches when he said:

To be successful, they [independent regulatory agencies] must be masters of their own souls, and known to be such. It is the duty of the President to determine their personnel through the power of appointment, and it is the duty of Congress to determine by statute the policies which they are to administer; but in the administration of those policies, these tribunals must not be under the domination or influence of either the President or Congress or of anything else than their own independent judgment of the facts and the law. They must also be in position and ready to give free and untrammelled advice to both the President and Congress at any time upon request. Political domination will ruin such a tribunal. <sup>13/</sup>

But what, it may well be asked, of responsibility? Who would guard the guardians? For James Landis, the greatest of the New Deal regulators, <sup>14/</sup> responsibility was not to be attained through the fragmented political process but by concentrating responsibility in a regulatory commission. As he explained:

Placing responsibility directly upon a specific group means that a finger can be publicly pointed at a particular man or men who are charged with the solution of a particular question. This localization of responsibility gives, in turn, to these positions a real attraction for men whose sole urge for public service is the opportunity it affords for the satisfaction of achievement. <sup>15/</sup>

While I find these ideas greatly overstated, <sup>16/</sup> I wish to return to them at the conclusion of this paper. This is because it seems that

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<sup>13/</sup> G. Lloyd Wilson, ed., Selected Papers and Addresses of Joseph B. Eastman, 1942-44 (N.Y.: Simmons-Boardman, 1948) p. 375.

<sup>14/</sup> For an excellent biographical study, see Thomas K. McCraw, Prophets of Regulation (Cambridge, Mass.: Harvard University Press, 1984), ch. 5, "Landis and the Statecraft of the SEC," pp. 153-209.

<sup>15/</sup> Administrative Process, note 2, above, at p. 28.

<sup>16/</sup> The classic assessment of the strengths and weaknesses of  
(Footnote Continued)



we have moved so far from what now appears to have been a somewhat naive faith in independent regulation and belief in the self discipline of "localized responsibility", "public service" and the "satisfactions of achievement" toward the complete politicization of regulation, that something of abiding value may have been lost in the process. That to one side for a moment, I should point out that the concept of independence for regulatory agencies fitted, initially at least, somewhat comfortably into the American congressional system of government.

The notion of independent bodies whose decisions could only be reversed by Act of Congress and not by the President or Congressional Committee rests on the peculiarly American version of the separation of powers doctrine and Congress's reluctance to see regulation become subject exclusively to presidential control. <sup>17/</sup> Despite this hospitable climate of widely diffused political authority there has been persistent concern over the lack of effective political accountability ever since independent regulatory agencies were denounced in 1937 as constituting a "headless fourth branch of government, a haphazard deposit of irresponsible agencies and uncoordinated powers". <sup>18/</sup> In 1971, the Ash Council emphasized that

[a]ccountability 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

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(Footnote Continued)

independent regulation remains Marver H. Bernstein, Regulating Business by Independent Commission (Princeton: Princeton University Press, 1955).

<sup>17/</sup> It is interesting to note that of all the democratic institutions imposed on Japan at the end of World War II, independent regulatory commissions were the most quickly rejected. See Youichi Ito, "Telecommunications and Industrial Policies in Japan" in Marcellus Snow, ed., Market Place for Telecommunications Regulation and Deregulation in Industrialized Democracies (New York: Longman, 1986), p. 201 at pp. 210-211. They appear not to have suffered from this decision!

<sup>18/</sup> U.S., Report of the President's Committee on Administrative Management in the Federal Government (The Brownlow Committee) (Washington: U.S. Government Printing Office, 1937), p. 40.

be responsive and responsible to Congress, to the Executive, and through them, ultimately, to the public. <sup>19/</sup>

By the late 1970's, proposals for reform included: across-the-board legislative veto power of agency rules; combined legislative-presidential veto; tighter control over appointments; narrower, more precise delegation of authority to agencies; sunset legislation; and improved congressional oversight. <sup>20/</sup> In the 1980's, there have been concerted efforts to bring the agencies under closer White House supervision, <sup>21/</sup> and thwarted efforts by Congress to assert a legislative veto. <sup>22/</sup> It now appears that regulatory agency autonomy is coming back into fashion. <sup>23/</sup> Continuing disillusionment with politics, from Watergate to the Iran-Contra affair, brings with it

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<sup>19/</sup> U.S., The President's Advisory Council on Executive Organization, A New Regulatory Framework, Report on Selected Independent Regulatory Agencies (Washington: U.S. Government Printing Office, 1981), p. 40.

<sup>20/</sup> See H. N. Janisch, "Policy Making in Regulation: Towards a New Definition of the Status of Independent Regulatory Agencies in Canada" (1979), 17 Osgoode Hall L.J. 46 at 59-61.

<sup>21/</sup> For an assessment, see Christopher C. de Muth, "Constraining Regulatory Costs - The White House Programs," Jan/Feb 1980 Regulation, p. 13; George Eads, "Harnessing Regulation: The Evolving Role of White House Oversight," id., May/June 1981, p. 19.

<sup>22/</sup> In INS v. Chadha, 424 U.S. 919 (1983), the U.S. Supreme Court struck down all forms of the legislative veto (under which Congress conditioned delegations of statutory authority by authorizing one or both of its houses to invalidate executive implementation by passing a resolution) as inconsistent with the requirements of Article 1 of the Constitution that all legislation be passed by both houses of Congress and presented to the President for his signature or veto. For a particularly valuable analysis of Chadha, see Peter L. Strauss, "Was There A Baby in the Bathwater? A Comment on the Supreme Court's Legislative Veto Decision" (1983), Duke L.J. 789.

<sup>23/</sup> See, for example, A. Michael Froomkin, "In Defence of Administrative Agency Autonomy" (1987), 96 Yale L.J. 787. For a comprehensive review of the still unsettled place of independent regulatory agencies in the U.S. system of government, see "A Symposium on Administrative Law: 'The Uneasy Constitutional Status of the Administrative Agencies'" (1987), 36 American University L.Rev. 277-601.

nostalgia for Eastman, Landis and the "independent judgment" of those whose "sole urge" is for "public service".

### 3. Canada and "Structural Heretics"

Despite all these high-sounding proposals for reform in the United States, there has, in reality, been no fundamental move away from reliance on independent regulatory agencies except, of course, where deregulation, as in the case of the Civil Aviation Board, has allowed for abolition. However, in a typically quiet Canadian approach, we have moved, especially at the federal level, quite far from the American model. <sup>24/</sup>

Impetus for this shift has come from our continuing inability to reconcile our parliamentary system of government, in which there is no separation between the Executive and the Legislature, with independent agencies that are not accountable through a Minister to Parliament. In a strict constitutional sense, as J. E. Hodgetts insists, independent regulatory agencies are "structural heretics". <sup>25</sup> However, notwithstanding the views of purists, these agencies have been made to serve a useful purpose, and it has only been quite recently that their legitimacy has been seriously called into question. This is because regulation is now seen, not as an arcane technical exercise best left to experts, but as an inherently political activity fraught with opportunities for redistributing wealth. Once it is recognized that there will be winners and losers in the regulatory game, <sup>26/</sup> the need arises for political involvement in the regulatory process itself.

Historically, the necessary political involvement has been achieved by way of appeals to Cabinet -- something, you will recall, that is simply impossible in the American model. A particularly attractive feature for politicians of Cabinet appeals is that it

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<sup>24/</sup> For details on the differences between the U.S. and Canadian models, see "Policy Making in Regulation," note 19, above, at pp. 56-88.

<sup>25/</sup> J. E. Hodgetts, The Canadian Public Service (Toronto: U. of T. Press, 1973), pp. 143-147.

<sup>26/</sup> See, for example, H. N. Janisch, "Winners and Losers in Telecommunications Competition" in W. T. Stanbury, ed., Telecommunications Policy and Regulation: The Impact of Competition and Technological Change (Montreal: I.R.P.P., 1986), pp. 307-400.

allows them to hold back, leaving regulators to make unpopular decisions. Should it become apparent that any decision is too politically unpopular, the politicians can intervene and save the day. Should a decision be unpopular, but not decisively so, it will be declared to be a technical issue best left to experts. This allows for what Douglas Hartle has insightfully called "selective accountability". <sup>27/</sup>

Despite this, by the mid-1970's it was becoming apparent that this type of limited ex post intervention was not in itself adequate and that an ex ante power was called for. Rather than an after-the-event negative power to vary and rescind, what was now envisaged was some form of positive policy direction power. This was justified on the ground that it was inappropriate in a parliamentary system of government for a regulatory agency to be making major policy decisions. As Marcel Masse explained with respect to recently proposed legislation governing telecommunications,

[t]he purpose of the provisions concerning the government's power of direction is to establish clearly and unequivocally that only the government, which is accountable to parliament for its actions, is empowered to develop major telecommunications policies. This responsibility should not be borne by the C.R.T.C. since it is a quasi-judicial organization that does <sup>28/</sup>not have to answer to the public for its actions.

However, as Pierre Juneau has forcefully pointed out, regulatory agencies, even though admittedly not elected bodies, can act as unique forums for direct political participation:

I believe that agencies of this kind are remarkable instruments for public participation. There has been and there still is a fair amount of criticism about such agencies. They are said to have too much power, that their members are not elected officials and so on. While I'm sure that in some respects this may be true, the question I think we should ask ourselves is, compared to what. There are few public bodies who spend much time hearing what the public

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<sup>27/</sup> See Douglas G. Hartle, Public Policy Decision Making and Regulation (Montreal: I.R.P.P., 1979).

<sup>28/</sup> Canada, Minutes of Proceedings and Evidence of the Standing Committee on Communications and Culture, Issue 10, May 6, 1985, 10:4.

has to say and actually debating matters with the members of the public that affect their interests. One can consider more conventional government departments, for instance, where much less debate takes place with interested parties. Even parliamentary committees which sometimes meet with the public unfortunately have so many things to deal with that they can't afford very much time for this activity. The Royal Commissions do spend a lot of time dealing with the public but they have limited lives and purposes and do not make decisions. Our experience at the C.R.T.C. was that if the proper hearing measures are adopted, they provide an extraordinary way of establishing a dialogue with the public. <sup>29/</sup>

The working out of these seemingly irreconcilable demands of representational and participatory democracy provides the essential context in which to assess current developments.

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29/ Speakers' Remarks, Seminar for Members of Federal Administrative Tribunals, Ottawa: Law Reform Commission of Canada, 1978, p. 64. For an anguished account by a former Minister of Transport of the inability of government to impose a new policy direction on independent regulatory agencies, see Lloyd Axworthy, "Control of Policy," Policy Options, April 1985, p. 17. He concluded at p. 20:

Under existing practice and legislation, the government has little opportunity to make the CTC [Canadian Transport Commission] do things it is not interested in doing. Previous studies have clearly shown the limitations of a government's appointment powers. While the Governor in Council has sweeping powers to review any decision of the C.R.T.C., this authority is constrained by the simple inability of limited resources to monitor the agency. We should clearly redefine the relationship between the CTC and the government so that elected representatives have the ability to make policy. This could be achieved by amendments to the NTA [National Transportation Act] or, at the very least, a regular, systematic review of CTC decisions followed by government policy statements.

In the National Transportation Act 1987 (Bill C-18, 1st Reading November 4, 1986, 2d Reading February 4, 1987) the Governor in Council will be authorized by Sections 23-26 to issue policy directions to the new National Transportation Agency.

In the second half of the 1970's, a flurry of studies of the regulatory process included those by the Lambert Commission, <sup>30/</sup> the Economic Council of Canada, <sup>31/</sup> the Law Reform Commission of Canada <sup>32/</sup> and the Peterson Parliamentary Committee. <sup>33/</sup> These were accompanied, and to some extent influenced, by the writing of concerned academics. <sup>34/</sup> The common theme throughout was that it would be appropriate to provide for a power of policy direction, but that great care should be taken to protect the integrity of the regulatory process, especially its long tradition of open, participatory decision making. <sup>35/</sup>

Policy directions were proposed in four pieces of legislation: first, in 1977 and 1978 in the new telecommunications Act; <sup>36/</sup>

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<sup>30/</sup> Final Report of the Royal Commission on Financial Management & Accountability (Ottawa: Min. Supply and Services Canada, 1979), pp. 317-319.

<sup>31/</sup> Responsible Regulation (Ottawa: E.C.C., 1979), pp. 53-68.

<sup>32/</sup> Independent Administrative Agencies (Ottawa: Min. Supply and Services Canada, 1980 (Working Paper 25)), pp. 84-93.

<sup>33/</sup> Report of House of Commons Special Committee on Regulatory Reform (Ottawa, 1980), pp. 14-21.

<sup>34/</sup> See, for example, Richard Schultz, Federalism and the Regulatory Process (Montreal: I.R.P.P., 1979); Lucinda Vandervort, Political Control of Independent Administrative Agencies (Ottawa: Law Reform Commission of Canada, 1979); H. N. Janisch, The Regulatory Process of the Canadian Transport Commission (Ottawa: Min. Supply and Services Canada, 1978); "The Role of the Independent Regulatory Agency in Canada," (1978) 27 U.N.B.L.J. 83 and "Policy Making in Regulation," note 19, above.

<sup>35/</sup> As Richard Shultz put it, "[i]n general, regulatory agencies provide an excellent and valuable opportunity for much public input and discussion of regulatory matters. It would be most regrettable of, as a consequence of the desire to effect greater political control over policy matters, such open participation was lost": Federalism and the Regulatory Process, note 33, above, at p. 73.

<sup>36/</sup> Bill C-16, An Act Respecting Telecommunications in Canada, 1st reading, November 9, 1978, Section 9.

second, in the first version of Bill C-20 (less comprehensive telecommunications legislation) in 1984; <sup>37/</sup> third, in a second version of Bill C-20 in 1985; <sup>38/</sup> and fourth, in the amended version of Bill C-20, which cleared the Standing Committee on Communications and Culture in November, 1985. <sup>39/</sup> When asked to offer an assessment of the latest iteration of Bill C-20 at the Law Society of Upper Canada's Conference on Communications Law and Policy in April, 1986, it was possible to be quite upbeat about the way the legislation was evolving

In the original telecommunications legislation, the direction power was granted in the crudest form and resembled a czarist ukase. It simply provided that the Governor in Council could issue directions respecting the implementation of the proposed new telecommunications policy for Canada. The only limits to this draconian power were with respect to broadcasting licences.

In February, 1984, when the first version of Bill C-20 was introduced, this power was somewhat softened. In the first place, it was provided that the Commission could request a direction. More importantly, it was provided that no direction would take effect until a notice of the proposed direction or the nature and subject matter of the proposed direction had been laid before parliament for thirty days. It was also provided that the thirty-day delay would not apply to directions which only required the Commission to hold hearings or make a report on any matter. This seemed to be an indication that it was now recognized that the regulator and its open hearing processes were still relevant in policy making.

Further changes were contained in the second version of Bill C-20 introduced by the present government in December, 1984. It was now provided that before a direction was issued or notice laid before parliament, the Minister of

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<sup>37/</sup> Bill C-20, An Act Respecting Bell Canada, etc., 1st Reading, February 8, 1984, Section 15.

<sup>38/</sup> Bill C-20, An Act to Amend the Canadian Radio-television and Telecommunications Act, etc., 1st Reading, December 20, 1984.

<sup>39/</sup> Canada, Minutes of Proceedings and Evidence of the Standing Committee on Communications and Culture, Second Report to the House on Bill C-20, Issue 30, Nov. 21, 1985, p. 30:3.

Communications had to consult with the Executive Committee of the C.R.T.C. with respect to the nature and subject matter of the direction or notice.

Yet further significant changes were adopted by the Standing Committee. First, directions were now specifically referred to as "policy directions", second, it was required that the actual draft direction be laid before parliament and thirty days were defined as thirty sitting days, and third, in a provision which I believe will be employed quite extensively, it was provided that the cabinet could call on the C.R.T.C. to hold hearings or make 40/ reports on any matter coming within its jurisdiction.

While these amendments did not go as far as the studies and academics had recommended, it seemed at the time that they reflected a growing sensitivity to the need to reconcile a direction power with the strengths of an open regulatory process. A year later, there is less room for optimism.

The cause for pessimism may be found in the Teleglobes Canada Reorganization and Divestiture Act, 41/ which received Royal Assent on April 1, 1987. It contains a direction power in the form of a throwback to earlier versions of Bill C-20. 42/ As André Bureau, Chairman of the C.R.T.C., had pointed out in a spirited appearance before the legislative committee, Bill C-38 was deficient in a number of respects:

First, because of the difficulty involved in defining what a policy direction is, it should be qualified as a policy direction of general orientation.

Second, it is of great importance that before the issue of any direction, there should be consultation with the public through C.R.T.C. process . . .

Third, no direction should be carrier specific . . .

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40/ H. N. Janisch, "Policy Making in Telecommunication Regulation: An Assessment of Bill C-20" (1986), 7 C.R.R. 5-11 at 5-13.

41/ S.C. 1987, c. 12 (Bill C-38).

42/ See Section 15.



Fourth, no direction should be proposed between the expiration of any prescribed time for the filing of interventions and the time of making a decision . . .

Fifth, . . . the government should consult fully with the executive committee of the commission, not only with regard to the nature and subject of the direction but also with regard to all the particulars of the proposed direction. <sup>43/</sup>

As well, he expressed the Commission's view that it should not be subject to both directions and Cabinet appeals (government intervention should be "at one end or the other" <sup>44/</sup>) and if Cabinet appeals were retained, they should be fairer to all parties concerned. "At present", he noted "the right <sup>45/</sup> to vary or rescind decisions is exercised in a secret manner."

Mr. Bureau was not to find a sympathetic audience because the government was operating under a very tight privatization schedule. Conservative members insisted that Bill C-38 was not the right occasion on which to deal with the whole issue of the appropriate relationship that should exist between the C.R.T.C. and the rest of government. It was intimated that a new version of Bill C-20 would provide a suitable forum for that debate, and that the Teleglobe direction power should not be regarded as a precedent or as having disposed of the matter of principle. Most regrettably, a Liberal amendment, which proposed to take Conservative reassurances at their face value and limit the open-ended direction power by way of a sunset provision so as to allow <sup>46/</sup> it to be replaced by a new version of Bill C-20, was not accepted.

While I am not particularly persuaded by the "wrong forum too little time" excuses for refileing on the significant improvements that had been adopted by the Standing Committee in November 1985, as a legal academic, I am required to be eternally optimistic, so I will, at the conclusion of this paper, list some specific recommendations should a new Bill C-20 ever materialize. But before doing so, I should call your attention to a full scale contemporary brouhahah in Saskatchewan that shows dramatically that the question of the

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43/ Canada, Minutes of Proceedings and Evidence of the Legislative Committee on Bill C-38, Issue No. 3, March 17, 1987, pp. 3:27-28.

44/ Ibid., 3:27.

45/ Ibid., 3:28.

46/ Ibid, Issue 4, March 18, 1987, p. 4:69.

relationship between governments and independent regulatory agencies is not confined to the complex world of Ottawa.

Saskatchewan has not had a history of independent regulation, preferring government ownership and direct accountability to the Legislature instead. <sup>47/</sup> In 1982, the Conservatives, who had long complained of N.D.P. manipulation of Crown corporations, were elected on a promise of independent public utility review. <sup>48/</sup> The Public Utilities Review Commission (P.U.R.C.) set up that year <sup>49/</sup> was soon to be disowned by its creators once the downside political risks of agency independence became apparent. <sup>50/</sup> P.U.R.C. has taken its independence seriously, and when the government sought to override its decisions in legally questionable ways, it took the matter to the Court of Appeal by way of two stated cases. There, it won strong endorsements of its stand.

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<sup>47/</sup> In this it differed from the approach adopted throughout North America. Even where government ownership was adopted, as in Manitoba and Alberta, for example, independent regulatory agencies were put in place as well. For an excellent new history of regulation in Canada that makes this point, see Christopher Armstrong and H. V. Nelles, Monopoly's Moment: The Organization and Regulation of Canadian Utilities, 1830-1930 (Philadelphia: Temple University Press, 1986).

ffrey York, "Politicians Snap at Saskatchewan Watchdog," ail, April 11, 1987, p. D2.

Public Utilities Review Commission Act, S.S. 1982,

<sup>50/</sup> In the debate in 1982 over the P.U.R.C.'s creation, Gary Lane told the Legislature: "For too long rate increases were made in secret, imposed on the people of Saskatchewan . . . who have waited long enough for an independent agency (to monitor rate hikes)". In October, 1986, as Minister responsible for the P.U.R.C., he said, "We need to ensure ultimately that the decision (on rates) that we had made is upheld, and we will probably have to do that by legislation": Gordon McIntyre, "Gov't Seems Sorry It Created P.U.R.C.," Leader Post, Jan. 24, 1987, p. C8. By April, 1987, he said that his government would probably amend the legislation to make sure that the Cabinet had the final say on utility rate setting. He was of the view that P.U.R.C. was never designed to take away Cabinet or government responsibility": Bruce Johnstone, Leader Post, April 4, 1987, p. C6.

In the first of these cases, the government sought to issue a direction to the Commission after it had rendered a decision. This, the Court held, amounted to an unauthorized Cabinet appeal as the legislation only envisaged directions prior to a decision being rendered. <sup>51/</sup> As well, the direction was held to be inconsistent with the Commission's empowering Act, and the Court, in a pointed rebuke, declared this to be ". . . an unauthorized encroachment by the executive branch of government on the powers and prerogatives of the Legislative Assembly for the Province of Saskatchewan." <sup>52/</sup>

Even more important than the specifics was the Court's sweeping vindication of regulatory independence, with its emphasis on expertise and detached judgment, in that it was said that the Legislature had sought to establish an educated and politically insulated commission. The Court's language was very similar to that employed by Eastman and Landis:

After examining the Act as a whole, I conclude that the Legislative Assembly for the Province of Saskatchewan sought to create an independent ratesetter -- a commission removed from the control of the Executive Council or individual Ministers of the Crown in charge of public corporations described in Section 3. Since the rates are usually set by the Commission only after conducting public hearings, the process is subject to public scrutiny in much the same way as court proceedings. If it were otherwise, the process would be subject to the influence of lobbyists. When the parties or interveners wish to make an application or submission, they now must do so before the Commission created for that purpose. In addition, the Legislative Assembly for the Province of Saskatchewan undoubtedly recognized that the increasing economic and accounting complexity of ratesetting requires a commission armed with sufficient professional staff to critically examine applications before it. With this background one can readily understand why the Legislative Assembly attempted to remove undue rate discrimination, potential political influence and activities on the part of lobbyists, by placing ratesetting in the hands of a commission, generally independent of the executive branch of Government and more particularly independent of individual Ministers of the Crown in charge

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<sup>51/</sup> Re Public Utilities Review Commission Act (1986) 52 Sask. R. 53 at 63 (Sask. C.A.).

<sup>52/</sup> Ibid., per Tallis J. A., at p. 64.

of public corporations. Although the Commission is subject to the broad policy guidelines set forth in Section 6, there is no suggestion in the legislative history that the Legislative Assembly for the Province of Saskatchewan sought to eliminate the ratesetters' discretion. On the contrary, the Legislative Assembly for Saskatchewan sought to create an educated and politically-insulated commission to carry out the ratesetting task. <sup>53/</sup>

Even more recently, the Court of Appeal has struck down another order-in-council with respect to rural telephone rates as conflicting with what the Commission is required to do under its statutory mandate. That order-in-council had sought to force the Commission to comply, within a month, with a government-designed rate schedule. <sup>54/</sup>

It now appears that the P.U.R.C. will be abolished, ostensibly on grounds of economy. <sup>55/</sup> This situation has been exacerbated by the P.U.R.C. granting the federal competition authorities standing to intervene in a major Sasktel hearing. This has been denounced as

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<sup>53/</sup> Ibid., per Tallis J.A. at p. 61.

<sup>54/</sup> See Bruce Johnstone, note 49, above. No formal written judgment was rendered, the matter being dealt with by way of a summary oral judgment from the bench. Note, however, that in a yet more recent decision, the Court of Appeal for the Yukon Territory refused to follow the Saskatchewan approach. See Re Ref. to Court of Appeal Pursuant to Section 74 of Public Utilities Act Relative to the Effect of Order-in-Council 1986/178, May 26, 1987. Seaton J.A., speaking on behalf of the Court, concluded that the Yukon Utilities Board had not been set up as fully an independent ratesetter as had the P.U.R.C. While it is possible to identify certain technical distinctions, what cannot be reconciled in the Court of Appeal decision is the difference in overall approach to the relationship that should exist between a regulatory agency and government. Here, the starting point for analysis is particularly crucial to the outcome. It is to be hoped that this issue will eventually be dealt with by the Supreme Court of Canada, although it seems unlikely that leave to appeal will be sought in these particular cases.

<sup>55/</sup> "Saskatchewan to Cut Consumer Watchdog," Globe & Mail, May 14, 1987, p. A3.

a "back-door attempt" by the federal authorities to get information about the provincially owned and regulated telephone company. <sup>56/</sup>

All this makes for great prime time political drama. However, we should not lose sight, in the confusion of battle, of the underlying cause of this ruckus; namely, the lack of understanding and agreement as to the appropriate role of an independent regulatory agency in a parliamentary system of government.

#### 4. Conclusion

As indicated earlier, I will conclude with a number of recommendations.

First, I agree with André Bureau that directions should not be specific or they will turn the regulators into mere implementers without independent judgment. If, in fact, all that is wanted are implementers of policy, we should give up on independent regulatory agencies in favour of departmental decision making. <sup>57/</sup> Therefore, directives should be confined to matters of "general policy".

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56/ Leader Post, April 3, 1987.

57/ Canadian legislators should bear in mind some sound observations from New Zealand, where the Public and Administrative Law Reform Committee recommended that directions should be restricted to considerations of "general policy". It went on to observe:

It is difficult to draw a line between specific and general policy directions. However, the Committee considers that although it may be acceptable for a policy direction to be given about a particular kind of situation in some instances, directions should not be given where they might interfere with:

- (a) the duty of independent tribunals to act judicially
- (b) the determination of individual applications, allegations or cases which relate to a particular person or organization.

The Committee endorses the formula used in the proviso to Section 68(1) of the Broadcasting Act 1976, which provides:

(Footnote Continued)

Second, there should be what André Bureau well described as a "no-hunting season"; <sup>58/</sup> that is to say, no direction should be given after the regulator is fully seized of a matter. <sup>59/</sup> It may be necessary to have a stop order procedure so that the government may put an application temporarily on hold to allow it time to formulate a policy directive. <sup>60/</sup>

Three, it is odd that there is, as yet, no formal provision for public participation in direction formulation. This is quite out of step with the federal government's general move towards advance consultation in rule making. <sup>61/</sup> As the regulators already have suitable mechanisms in place for consultation, provision should be made for their use.

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(Footnote Continued)

. . . nothing in this subsection shall be construed as authorizing the Minister to give any direction in respect of any particular allegation or any particular complaint or that would derogate from the duty of the Tribunal to act judicially.

Public and Administrative Law Reform Committee, Nineteenth Report, Government Directions to Statutory Bodies (Wellington, N.Z.: Queen's Printer, 1986), pp. 10-11.

<sup>58/</sup> Minutes of Proceedings, note 42, above, Issue No. 3, March 17, 1987, p. 3:36.

<sup>59/</sup> Note that Bill C-18, National Transportation Act 1987, note 28, above, provides in Section 23(2) that a direction "shall not affect a matter that is before the Agency on the date of the direction and that relates to a particular person".

<sup>60/</sup> Consider the "refrain directive" proposed by Louise Martin and Ken Wyman in their advice to the Nielson Task Force, Regulatory Agencies, A Study Team Report to the Task Force on Program Review, 1985, p. 20.

<sup>61/</sup> While it is true that there still is no general statutory requirement for advance consultation, political commitment and practice provide extensive opportunities for such participation in rule making. See H. N. Janisch, "Changing Attitudes Towards Rule Making" in Administrative Law, note 3, above, 1986/87 Supplemental Materials, pp. 50-57.

Fourth, and finally, what I have long called the "double whammy" effect of directions and Cabinet appeals will likely undermine self-confidence and sense of purpose. <sup>62/</sup> I would prefer to see directions only, with the courts playing backup. The double whammy effect is simply too destabilizing. Not only will it undermine the regulators' willingness to get on with difficult policy decisions, but it will create a public perception of the regulatory agency as being only a stepping stone in a political-lobbying process.

Let me end by reminding you of what lies behind the immediate details of the appropriate form of directions or appeals. As both Eastman and Landis recognized, if you wish to have independence of judgment, you have to create conditions in which independence of thought will thrive. You cannot have one without the other. You cannot turn regulators into the jam in the political sandwich and then expect them to act in an independent and responsible manner. This is not to say that I favour unalloyed independence, but that, in bringing regulation more into line with parliamentary accountability, great care must be taken to insure that the cure is not worse than the disease. Most importantly it must always be borne in mind that, as Louis Brandeis astutely observed <sup>63/</sup> of human nature, "[r]esponsibility is the great developer of men".

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<sup>62/</sup> "The Role of the Independent Regulatory Agency in Canada," note 33, above, at pp. 108-111.

<sup>63/</sup> St. Joseph's Stockyard Co. v. U.S., 298 U.S. 38 at 92 (1936).