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political control of independent administrative agencies

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STUDY PAPER

POLITICAL CONTROL
OF INDEPENDENT ADMINISTRATIVE AGENCIES

A Study Paper

Prepared for the

Law Reform Commission of Canada

by

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PREFACE

This study paper has been prepared on contract for the Administrative Law Project of the Law Reform Commission of Canada. Work on it commenced in the Fall of 1978 on a part-time basis. During the Fall and Winter of 1978 research was conducted and interviews were held with a variety of participants in the regulatory process, agency and government department and ministerial officials, their policy advisors and counsel, and representatives and counsel of the Privy Council Office, as well as clients of regulatory boards. Without the generous assistance of these persons the paper could not have been written.

The paper was written in March, 1979 and takes account of the relevant events and decisions by regulators and the courts up until mid-March, 1979. The final draft was prepared in May and June, 1979. The author alone is responsible for the opinions expressed in the paper and, of course, for any errors or misrepresentations that it may contain.

INTRODUCTION

This introduction sets forth the structure and objectives of the study paper. The paper consists of three main parts:

1. A description of the legislative schemes presently in use which provide for executive review and appeal powers and a detailed review of the exercise of these powers in the last ten years;

2. An assessment of the performance and impact of these powers on the administrative law process; and

3. The proposal of new models for the generation, interpretation, implementation, review and enforcement of regulatory policy.

In the first part the development of independent regulatory bodies in Canada is sketched with reference to the Canadian Transport Commission, the Canadian Radio-Television and Telecommunications Commission, the National Energy Board, the Foreign Investment Review Agency, and administrative and review bodies created by the Anti-Inflation Act. The aims or goals sought to be realized by government through the creation of independent bodies for the purposes of regulation are also outlined. Legislative schemes presently in use in Canada providing for executive review and appeal powers in the administrative law area are described in Chapter II. Reference to the material in Appendix A, clarifying how the statutory powers discussed and made the basis of the classification proposed for the purposes of this paper were selected, will assist the reader in understanding this Chapter.

Here, as throughout the paper, it was necessary to take into account executive powers other than those merely of review and appeal over the decisions of statutory

decision makers. If one purpose of a study paper on ministerial review powers and petitions to the Governor in Council from decisions of federal boards, commissions and tribunals is to ascertain the extent of executive control over the substance of decisions of these bodies, then clearly directive powers, enabling the executive to interpret policy or define the parameters within which the statutory decision-maker is to exercise original discretion, are as significant as review and appeal powers. Similarly the locus of regulation-making powers is significant. Effective control over the implementation of a legislative policy mandate may be exercised through regulation making powers. In regulations the policy aims of the legislation are interpreted for the purpose of application in future regulatory decisions. Regulations may be drafted to leave a greater or lesser scope for discretion to the statutory decision-maker in the course of adjudication. At present most regulations are made by the executive rather than by regulatory bodies or Parliament and subject only to the review as to form but not substance provided for by the Statutory Instruments Act.

Chapter III focuses in some detail on the Canadian Transport Commission, the Canadian Radio-Television and Telecommunications Commission, the National Energy Board, the Foreign Investment Review Act, and the Anti-Inflation Act. The statutory provisions for review and appeal by the executive of decisions under these mandates are described and the recent exercise of these powers is examined. The procedures, formal and informal, used in ministerial review and on petitions to the Governor in Council are then described insofar as it has been possible to obtain reliable information about them. Other matters pertaining to the disposition of petitions by the Governor in Council are then discussed, such as, the parties, costs, nature of the issues, dispositions, reasons or absence thereof, typical impact on the regulator and the incidence of court actions in the same matter. Finally, the Case Studies in Chapter VI have been provided as a conclusion to the first part of the paper because they give concrete exemplification of issues and problems associated with the executive review and appeal schemes currently in use. Familiarity with recent cases will assist the non-specialist reader in grasping and evaluating both the significance of the issues discussed in the second part (Chapter VII) of the paper and the adequacy of the models proposed in the third part (Chapter VIII) to deal with these issues and with the problems I perceive to exist with current executive review and appeal

powers, procedures and their impact on the administrative law process.

The second part assesses current performance in the exercise of statutory executive review and appeal powers and their impact on the administrative law process. First, however, the values with reference to which this assessment is to be performed are explicitly identified. The governmental function commonly ascribed to executive review and appeal powers is then examined and the extent to which it is desirable to have policies subject to control by the executive is itself placed in question. Thirdly, recent judicial decisions in administrative law concerning directives, fettering of the discretion of statutory decision-makers, delegation of ministerial powers, bias on the part of the administrators and administrative boards and review tribunals, the concept of ultra vires, and the duty of fairness, are examined for the purpose of extracting an indication of current tendencies in Canadian administrative law with a view to applying emergent legal principles in the following assessment of current powers and practices in the area of executive review.

Only when the standards or measures to be relied on have been clearly identified is the assessment itself made. The use of different standards than those relied on here might result in the identification of other problems with executive review than those I perceive to exist or the proposal of a distinct set of recommendations. I have merely argued that insofar as priority is placed, as it is in this paper, on the enhancement of specific and clearly identified values and principles in government, current executive review and appeal powers and practices are, on examination, revealed to be problematic and in need of change. The recommendations I put forward to resolve the problems identified are grounded on this same set of values and principles.

The third part of the paper, proposing alternative models for the generation, interpretation, implementation, review and enforcement of regulatory policy, bases itself squarely on the conclusions of the second part and attempts both to incorporate the administrative law principles identified as emergent and to avoid the flaws identified in current review and appeal provisions. In addition, in the course of parts one and two of the paper certain questions were identified, explicitly or implicitly, as being key to a resolution of existing problems

in the area of executive review over decisions of regulatory bodies. Among these were: 1. What do we mean by "accountability"? 2. What meaning and role does "rule of law" have in the regulatory area? 3. What is policy, after all? 4. Who should have authority to enact policy as "law" and by what process should secondary legislation stating policy in the regulatory area be enacted? 5. To what extent is it inevitable that adjudication will often have as its by-product the generation of policy? 6. Are the governmental mechanisms which would be required to render policy generating adjudication impossible or unnecessary themselves desirable? 7. What, in fact, is the current effective distribution of legislative power in Canada and does this arrangement serve the "public interest"? 8. Is there any effective process for determining what constitutes the "public interest"? 9. Do the policy preferences of the federal Cabinet necessarily give due weight to the "public interest"? 10. How can the "public interest", once identified, best be protected against other competing legitimate interests in the regulatory process? It is clear that my responses to these questions and my evaluation of the merits of alternative mechanisms for the generation of secondary legislation interpreting and implementing policy have influenced the proposals for reform I put forward in the third part of the paper.

In the course of the third part, two models for dealing with policy from its generation to its enforcement are proposed. The first and more comprehensive model envisions fundamental changes in the regulatory area and places emphasis on the importance of a conscious choice by Parliament of a regulatory mechanism for each regulated sector overtly designed to provide the degree, type and combination of political control and insulation desired in that sector, for policy generation, interpretation, application, enforcement, review and appeal. The other model is designed to improve treatment of policy in the regulatory area by means of relatively minor but significant adjustments to remove major flaws and the most obvious sources of potential abuse of power. Relevant portions of the Final Report of the Royal Commission on Financial Management and Accountability (Lambert Commission), March 1979, are referred to insofar as their approach, conclusions and recommendations are in conflict with my own. I hope this will serve to enrich debate[1] surrounding reform of government in the regulatory area by highlighting some of the fundamental political choices to be made with regard to allocation of power over the

generation and implementation of policy. Only when these choices are consciously made is it possible to evaluate the merits of one regulatory mechanism over another as a means both to achieve the desired locus or distribution of power and perform the regulatory task.

Chapter IX, not an integral part of the study paper, briefly reviews outstanding problems in the regulation of energy, transport and communication which require for their adequate resolution a large measure of federal and provincial cooperation and indicate the need for an on-going examination of how federal and provincial priorities and jurisdictions can be most workably coordinated in the regulatory area. It is argued that while a directive power in the Minister or Governor in Council would appear to provide a mechanism for ensuring that federal regulatory bodies adhered to policy contained in federal-provincial agreements (as interpreted by the Minister or federal cabinet) or regarded by the federal cabinet as necessary for the implementation of such agreements, a directive power is by no means the only nor necessarily the most effective mechanism that can be used to achieve this effect. In addition, directive powers for use in co-ordinating federal and provincial regulation are subject to the same general criticisms made in the earlier chapters of directive powers and of the proposals made by the Lambert Commission with regard to directive powers. In and of itself, moreover, the existence of a directive power obviously does nothing to ensure that federal-provincial agreement will come about in the first place. It is disingenuous to treat the independence of federal regulatory bodies from Cabinet as a scapegoat for federal-provincial conflict.

The information in the Appendices is provided for reference purposes in conjunction with the first and second parts of the paper.

Chapter I

SKETCH OF THE DEVELOPMENT OF INDEPENDENT REGULATORY BODIES IN CANADA

There is no unanimity in Canada today either over the proper governmental function of independent regulatory bodies or the adequacy of their performance of day-to-day governmental functions. This situation seems to stem in large part from the fact that independent regulatory bodies in Canada have grown up in ad hoc fashion as they were perceived to be a politically expedient or otherwise desirable means to solve the problems of government in a period of rapid economic and technological growth and development. Expertise, insulation from partisan political considerations in the development of policy, and the adoption of a court-like model in adjudication over specialized subject-matter, have all been seen as benefits to be gained from their creation. It would appear, however, that the political theory underlying the adoption of an independent regulatory model was never fully thought through, or, when it was thoroughly examined the political implications of its adoption were either not given a uniform interpretation or not unanimously accepted. Lack of unanimity on the political significance of use of a vehicle institutionally separate from Parliament and government departments for purposes of regulation is, moreover, not a surprising result where effective power over political decisions has not been clearly and unmistakably reallocated as a result of changes in the institutional framework or has been reallocated in a manner effectively different from that intended by Parliament and enacted by statute.

In this matter as in other areas Canada has found itself in a cross current between the British Parliamentary tradition and the American Congressional model more closely at hand. The two currents are in certain major

respects contradictory, the British system retaining the notion of ministerial responsibility for each sector of government whereas the American system in its preference for a division of power has created the independent regulatory agency as a fourth head of power in government without an apparent master other than the law and its own conscience. As yet these contradictory influences have not been integrated in Canada in a coherent basic theory of regulation. The practice of regulation in Canada is seen to suffer as a result.

The lack of unanimity on the nature and function of the independent regulatory body in Canada is reflected in the fact that it is possible at present to obtain as many diverse definitions of a regulatory body and its role as there are spokesmen. At the same time it is quickly realized that the institutional and administrative ties of any person of whom a tentative assessment is requested appear to strongly colour the answer given. The theoretical model chosen frequently, and not surprisingly, is that which will most neatly accord with the speaker's preferences as to the practical distribution of power in the regulatory area in Canada. Most government officials with close ties to a Minister's office or the Privy Council tend to espouse a ministerial model cast in the British tradition. At the same time they recognize that in Canada ministerial responsibility is often collective rather than individual by virtue of the sweeping powers of approval vested in the Governor in Council and exercised on the basis of ministerial recommendations. Associates of the more independent of the regulatory bodies tend to emphasize that the source of their mandate and powers is statutory. Within the four corners of that mandate they perceive themselves to be under a positive duty to exercise the powers conferred by or pursuant to statute as interpreted from time to time by the courts.

In the context of such distinct points of emphasis it is easy for self-righteous confrontations to develop between the Cabinet and individual Ministers on the one hand and a federal regulatory body on the other. This is seen in the area not only of policy generation but also those of policy implementation and adjudication. It is clear that somewhere in government there resides power over each of these areas. What is terribly unclear at present, however, is not only where in both theory and practice these powers do primarily reside, for the effective independence of an institutionally separate regulatory body from other loci of political power may be illusory, but also where they should reside.

The preliminary stage to resolving this contest over allocation of power in the regulatory area is to clarify the facts and to identify sources of confusion lying in the diverse conceptual frameworks to which the protagonists refer and the allocations of power that are theoretically associated with these conceptual frameworks. It is hoped, for example, that the concepts of "accountability" and "policy" will be clarified somewhat during the course of this study paper and that a direct consequence of greater conceptual clarity will be less obfuscation in debate about distribution of power in the regulatory area.

A. THE CANADIAN TRANSPORT COMMISSION

The predecessor of the Canadian Transport Commission, the Railway Committee of the Privy Council established under the Railway Act of 1851, was the first regulatory body established in Canada. Jurisdiction over regulation of the railways was transferred in 1903 from the Railway Committee of the Privy Council to the newly established Board of Railway Commissioners. The McLean reports tabled in 1899 and 1902 had suggested the transfer of responsibility for regulation of the railways from the part-time Cabinet committee to full-time, expert, non-elected commissioners. The statutory review and appeal provisions, now seen in section 64 of the National Transportation Act,[2] were enacted at this time to provide for judicial appeal from the board on questions of law or jurisdiction and for variance or rescission of board decisions by the Governor in Council either on petition or by his own motion.

The period from 1903 until 1967, when the current regulatory entity for transportation, the Canadian Transport Commission (CTC), was created to assume the regulatory functions of the Air Transport Board, the Board of Transport Commissioners for Canada, and the Canadian Maritime Commission, saw a massive expansion of the transportation industry in Canada. The most rapid growth, both in the industry itself and in the regulatory mechanisms, occurred in the period subsequent to World War II. At present the Canadian Transport Commission, like its sister the Ministry of Transport (MOT), is a very large and intricate part of the Canadian government exercising great power with sweeping economic and

therefore political implications. The two significant qualifications to the autonomy of the Commission under the National Transportation Act are the availability of variance or rescission of final Commission decisions by the Governor in Council on petition or by his own motion under section 64, as mentioned above, and the Ministerial appeal under section 25. The former is applicable to all final adjudicative decisions; the latter is applicable only to decisions pertaining to air, water or motor vehicle licences or certificates of public convenience and necessity with regard to commodity pipelines.

Tension between the Ministry of Transport and the Canadian Transport Commission developed rapidly in the period after the passage of the National Transportation Act in 1967. In large part this was a product of the different interpretations of the respective functions and powers of the executive and the Commission referred to in the first section of this chapter. This tension, associated both with generation of policy and adjudication, has not found any creative outlet.

In the area of adjudication supporters of the view that the Commission was in essence a judicial body, and in any event not a branch or extension of the department but rather independent, resisted all inferences that the Commission was required in the exercise of its adjudicatory powers to have reference to interim ministry policy statements in addition to the policy content of the legislation itself. From this stance the Commission was viewed as an independent regulatory body in the strong sense and any attempt to influence its interpretation of the existing legislation by means of interim ministerial policy statements were viewed as attempts at ministerial interference and improper. At the same time and for the same reasons exercise of ministerial review powers and action by the Governor in Council on petitions were seen as potentially abusive of Commission jurisdiction. Were these forms of review to be available in response only to the most broadly couched political questions or were they to be available in any instance where the Commission was seen to have interpreted transportation policy as set forth in the National Transportation Act in a manner different or to a different effect than that preferred by Cabinet?

Section 22 of the National Transportation Act gives extensive advisory powers to the Commission with regard to on-going policy development. The section is clearly

open to either a strong or weak interpretation. In the early 1970's the Ministry of Transport took strong initiatives in the area of policy development with the establishment of the Task Force on Transportation whose Reports appeared in June of 1975.[3] The personnel of the Canadian Transport Commission had little involvement with the work of this task force and, in some cases, felt actually excluded from consultation. This was not beneficial to relations between the Ministry and the Commission. Simultaneous with the tabling of the Reports by the Task Force, the Minister of Transport affirmed the view that it was the Minister who was the primary source of policy on transportation matters and that the National Transportation Act should be amended to make explicit provision for a directive power in the Minister.[4]

This position seems to have had at least four main motivations. The first was that the CTC had not aggressively exercised the mandate given to it in the National Transportation Act to engage in policy planning and development. The only mechanisms for policy interpretation and application or implementation available to it were, in fact, adjudication and limited regulation-making powers. Policy development by the CTC thus tended to reach public attention only as a by-product of individual adjudicatory decisions. Policy statements to inform the public of the general outlines of Commission policy as it evolved were not issued. The second was that the Minister of Transport either did not perceive the political value of insulating the executive government from political responsibility for the routine decisions in the area of transport regulation or preferred a larger measure of executive control and responsibility. The ministerial appeal under section 25 had been used as a vehicle by the Minister to implement his own policy where no other formal mechanism whereby he might influence CTC policy existed. The third was that the administrators in the Ministry of Transport found themselves without a clear legislative mandate to engage in the type of policy analysis and development which would justify their existence; and fourthly, there was considerable pressure from the transportation industry for a clear and coherent transportation policy which would allow them to engage in advanced planning. From the point of view of the client of a regulatory board it is clearly preferable to be able to make business decisions based upon a reliable anticipation of board policy rather than being placed in the position of having to adjust expectations in response to policy decisions made primarily as a by-product of

individual adjudicative decisions. Although this request from industry could have been met by the CTC within its mandate under the Act, it is understandable that the MOT would have relied on industry dissatisfaction with CTC policy planning to support the position that the Minister was the only appropriate source for policy.

Bill C-33, introduced in 1977, in fact contained a provision for a directive power in the executive. This draft provision was criticized as one which would enable the government to engage in political rate-making. Bill C-20, introduced November 16, 1978, did not contain such a directive power. Proponents of a strong Commission are relieved for they saw Bill C-33 as in effect an attempt to reallocate significant power over policy interpretation from the Commission to the Ministry. The net result, however, is that the tensions mentioned above between the Ministry and the Commission still exist in an unresolved form. The primary legislation is still sufficiently ambiguous to be open to diverse interpretation, the future outlines of transportation policy to be enacted in secondary legislation have not been agreed upon, and Commission clients remain dissatisfied because of the existence of what they perceive to be a policy vacuum.

B. THE CANADIAN RADIO-TELEVISION AND TELECOMMUNICATIONS COMMISSION

From 1932 until 1958 broadcasting in Canada was regulated by the Canadian Broadcasting Corporation (CBC) as an adjunct to its own broadcasting activities. In 1958 the Canadian Radio-Television Commission (CRTC) was created and in 1976 jurisdiction over telecommunications was transferred from the Canadian Transport Commission to the newly created Canadian Radio-Television and Telecommunications Commission.[5] Today regulation of broadcasting and regulation of telecommunications are carried on as distinct functions of the Commission.

The dominant motivation in the establishment of a strong independent regulatory body for broadcasting and telecommunications has been the widely held desire to protect against the potential abuses of political control over national communication and information dispersal systems. The principle that regulation of communications

media in Canada must ensure freedom of expression and respect the existing diversity of cultural, social and political values and viewpoints has not been placed in question.

Controversy has arisen, however, over how this principle is to be implemented. Technological development and a rebirth of strong regionalism after the temporary mellow federalism of the late 1960's have both added to the intensity of these controversies. As a consequence, communications policy in Canada in the 1970's has been marked by a series of federal-provincial confrontations characterized by allegations of centralism on the one hand and parochialism on the other. The role in these confrontations of the significance of the communications industry within the national economy cannot be overlooked while at the same time recognizing that practical implementation of protections for freedom of expression and access to communications media have come to be seen by the provinces as requiring that more authority over the media be placed at the local level.

The last piece of draft communications legislation, Bill C-16, tabled November 9th, 1978, provided in section 9 for a power of direction in the Governor in Council whereby the Governor in Council, subject to certain restrictions, could "issue directions to the Commission, respecting the implementation of telecommunications policy for Canada enunciated in section 3". The section was drafted to prohibit the Governor in Council from issuing directives with regard to particular licence applications, rates for carriers, program content or standards or "the restriction of freedom of expression".[6] Passage of a section like this would transfer significant power over policy interpretation and development from the CRTC to the federal Cabinet and indirectly to the Ministry of Communications.

In considering the appropriateness of a given allocation of power over policy generation and interpretation, it must be realized, firstly, that neither the Commission nor the Ministry alone can resolve the variety of federal-provincial controversies mentioned above (precisely because resolution of these problems will require a major redrafting of enabling legislation, both federal and provincial, to provide for clearer definition of problematic terms and greater inter-delegation of regulatory powers). Secondly, the Ministry often is apprehended to be by its nature more subject than the

Commission to pressure from vested economic interests and partisan political forces. In its interpretation of the "public interest", the Ministry may be apprehended as prone to give far greater weight against other considerations than does the Commission to the long term economic interests of the communications carriers. It is commonly recognized that when there is a strong free enterprise sector in the national economy, government will necessarily pay heed to the requirements of business, especially those of large corporations, as the well-being of the national economy depends to an extent on the continuing reinvestment of capital by private sector enterprises. Thus although it is recognized that there is some truth in the statement that "what's good for Bell Canada is good for Canada," the Commission, because of its apparent insulation from political forces, is often thought to be in a better position than the Ministry to both perceive and pursue other truths as well and thus define the "public interest" with reference to the breadth of the mandate for Canadian communication policy as expressed in section 3 of the Broadcasting Act. In fact this conclusion may be based on false premises. Commission members and staff, by virtue of a combination of informal contacts with Ministry officials and staff, political allegiances forged during assignments within the public service or other government positions and their own personal political ideologies, may in fact be subject not only to informal partisan political pressures but also to institutional biases previously acquired and unexamined personal assumptions or opinions.

Certain of these flaws in the independence of the Commission may be reduced by measures proposed in Chapter VIII such as increased public participation in the regulatory process, an absolute prohibition on off-the-record ex parte consultations by Commission members and staff with officials and staff of government or industry, and by a re-examination of the process by which members of the Commission are selected for appointment. An alternate approach to the problem would be an open recognition of the highly political nature of the regulatory process, recognition that the regulatory process involves choices between fundamentally distinct views as to how national resources should be allocated as well as the resolution of technical or instrumental issues. As will be seen in Chapter VIII, these alternatives are not mutually exclusive.

Moreover, repoliticization, which it should be recognized would be one result of granting the executive a directive power over "independent" regulatory bodies, can be achieved by other means ensuring political input into policy interpretation and development more representative of the multiple facets of the "public interest" than can be reflected in the, at times narrow partisan, orientation of the executive. In the following chapters I argue that involvement of Crown enterprises in the communications sector only increases the need for insulation of the regulatory function from informal executive influence and formal executive dictation of policy such as would occur with the ministerial or Governor in Council directive.

C. THE NATIONAL ENERGY BOARD

The National Energy Board[7] (NEB) was created in 1959 as a result of the Pipeline Debate in 1956. The Gordon Royal Commission[8], appointed by the Liberal Government, and the Borden Royal Commission[9], appointed in 1957 by the Conservative Government, both suggested the formation of a national energy authority to advise the government on energy policy and exercise control over exports of gas, oil and power. With the passage of the National Energy Board Act, the Pipe Lines Act and the Exportation of Power and Fluids and Importation of Gas Act were repealed. Gas and oil were to be regulated by the new Board, as was electrical power insofar as it was exported. Thus, despite its name, the NEB was not conceived as a general umbrella regulatory body for all types of energy but had regulatory functions restricted to a limited aspect of the energy field. The Board's mandate under the Act to advise the government on energy policy is very broad, extending to all aspects of energy policy in Canada relevant to the public interest. At the same time its regulations and many of its major decisions are subject to Cabinet approval. In recent years it has come under increasing public attention and pressure, both to adhere to the procedures of natural justice in the conduct of its hearings and to define the public interest in broad and comprehensive terms rather than in reliance solely on the traditional touch stones of rate-making such as markets, supply, economic viability and the financial competence of industry applicants.

D. THE FOREIGN INVESTMENT REVIEW AGENCY

The Foreign Investment Review Agency[10] (FIRA) was established in 1974 to provide a mechanism whereby the federal government could maintain control over the investment of foreign capital in Canada. Whether that investment is to take the form of an acquisition of existing firms, the creation of new businesses, or the importation of the subsidiary of a foreign corporation, it is the agency, itself a purely advisory body, which performs the administrative work involved in reviewing the application. Each application, together with the agency recommendation as to its disposition, is laid before the Governor in Council for a final determination. A high percentage of the applications made since the creation of the review process have been approved.[11]

E. UNDER THE ANTI-INFLATION ACT

The Anti-Inflation Act,[12] a piece of legislation designed to provide temporary controls over inflation in Canada, created three new administrative bodies: the Office of the Administrator, the Anti-Inflation Board, and the Anti-Inflation Tribunal. Each was designed to perform distinct functions in the process of containing inflation. The Board itself was designed primarily as a conciliatory body whose function was to serve as a mediator between management and employees in an attempt to keep wage settlements within the Guidelines as established from time to time by the Governor in Council. Its only discretionary power was an option to refer any matter to the Administrator. The Administrator was without discretionary powers and could only make a finding of adherence or non-adherence to the Guidelines and an Order when this was required. The Tribunal, in turn, was a purely adjudicative body whose sole function was to hear appeals from Orders of the Administrator. Cabinet, perhaps in response to the delicate political climate surrounding the anti-inflation measures, never chose to use the power vested in the Governor in Council under section 24 to vary or rescind Orders of the Administrator[13]. It may also be the case that no matter came before the Governor in Council in which there were sufficient inequities as a result of imposition of the Guidelines to warrant use of the extraordinary power to grant

relief vested in the Governor in Council by virtue of section 24 of the Act.[14]

F. JUSTIFICATIONS FOR THE CREATION OF INDEPENDENT BOARDS, COMMISSIONS AND TRIBUNALS

It can be seen from the few boards, commissions and tribunals discussed above, only a handful compared with the vast array of such administrative bodies in various sectors of the federal government, that the nature of the mandate and powers given an individual regulatory body may differ greatly depending upon the nature of the job to be performed and the political considerations conceived to be relevant at the time. The Foreign Investment Review Agency, and the Anti-Inflation Board, the Tribunal and the Administrator under the Anti-Inflation Act, are examples of bodies created to perform a new administrative function. The same functions might, as well, have been performed within an existing government department were it not for the additional considerations of providing for impartiality and insulating the executive from both the lobbying tactics of applicants and political pressures resulting from the application of the guidelines.

Concern over insulating the political from the regulatory area was also seen in the example of the Canadian Radio-Television and Telecommunications Commission. There the emphasis was on protecting the regulator and its decision rather than the Cabinet. It is fair to say, however, that the aim of "depoliticization" is a common theme throughout the regulatory area. Few people pretend that the matters to be regulated are free from content that is highly political. Recognition that the priorities of a given Minister or of the Cabinet of the day may not necessarily coincide with the long-term public interest of Canada as a whole lends strength to the view that the "public interest" is safer when left to be interpreted by an independent body who can weigh all legitimate conflicting interests including those of the executive from a less partisan perspective than would be taken either by Cabinet or Parliament as we know it. At the same time Cabinet and Parliament are freed to direct their attention to broader issues. I have suggested above that the "depoliticization" actually achieved by existing regulatory practices and procedures may be illusory.

Of late it has been argued that the public service is now sufficiently professional and responsible as a group that departmental officials can be entrusted with the performance of all non-adjudicatory regulatory functions without the danger that their decisions will be influenced by partisan political considerations. It is difficult to decide precisely how naïve this view is. It certainly overlooks the fact that part of the ordinary duty, if you will, of a public servant is to exercise his skills and experience in support of the political and policy preferences of his Minister. Skill in identifying politically relevant aspects of a problem and using these effectively to advance ministerial policy is his job. If the lawyer may be caricatured as a "hired gun", then the professional public servant might be depicted as first mate responsible for keeping the sail trimmed to the wind for maximum speed in whichever direction the helmsman steers the vessel. To ask a public servant within a government department to approach regulatory matters in an entirely different fashion from that in which he usually functions may not be realistic. Concern over the influence of overtly partisan matters aside, however, it is still the case that persons associated with a particular hierarchy over a period of time adopt or are perceived to adopt the values, priorities, perspective and preferred solutions with reference to which that hierarchy functions. The closer a person is to the source of power within a hierarchy, the greater will be the real or apparent opportunity to influence decisions as to how that power is to be used. Control over use of power, even if only partial or illusory, increases the tendency of the individual to view the goals of the hierarchy as his/her own. Insofar as he/she identifies with these goals and the values on which they are grounded, over time the individual gradually acquires a vested interest in justifying the validity of certain key assumptions and the appropriateness of the attitudes flowing from these assumptions.[15]

In theory, policy in the regulatory area will therefore be more apt to be innovative and be seen to reflect the "public interest" if the views of the executive must compete in an open forum on a merit basis with alternative views. An example of such an open forum would be an issue hearing held by a regulatory body in public in which representations were entertained from all interested parties including government departments. Open competition between conflicting interests and viewpoints and a dispassionate and impartial weighing of

their merits will not necessarily occur with the absorption of regulatory functions into federal departmental structures unless procedures designed with precisely this aim in view are adopted.

Another common justification for the creation of regulatory bodies independent from government departments has been the perception of a need for an efficient adjudicative mechanism independent from the Minister and the department (if only for "high profile" appellate tasks) together with the recognition that it is inappropriate to burden the already established courts with a glut of highly specialized cases dealing with the interpretation of regulatory provisions. This justification is, of course, as valid now as it was twenty-five years ago.

Chapter II

A CLASSIFICATION OF CURRENT LEGISLATIVE SCHEMES FOR DISTRIBUTING EXECUTIVE REVIEW AND APPEAL POWERS

There is no uniform structure for the regulatory board, commission or tribunal in use in Canada at present. Many administrative functions are performed within government departments, with appellate adjudicative functions being handled by a review committee and ultimately or perhaps in the first instance by a tribunal. In other cases, complementary or mirror capabilities or functions exist in the regulatory body and the government ministry or department with a high degree of inter-consultation, as between Energy, Mines and Resources and the National Energy Board, or occasional confrontation and a certain measure of hostility, as has come to exist between the Ministry of Transport and the Canadian Transport Commission, or the Ministry of Communications and the Canadian Radio-Television and Telecommunication Commission. In the case of the CTC the hostility has arisen primarily because of an inherently unworkable division of responsibility between the executive and the Commission for exercise of the policy generation and implementation function, and in the case of the CRTC because of Ministry dissatisfaction with its own lack of power over policy interpretation and implementation. Some government departments receive advice from advisory councils, with or without legislative status, made up either of experts in the field -- as occurs in the social planning area -- or of regulatory clients as has occurred in transportation and agriculture. The recent integration of the Unemployment Insurance Commission with the Department of Manpower and Immigration has created yet a new hybrid creature -- the Department/Commission. This is not at all to suggest that the diverse organizational structures are inappropriate, but rather to emphasize that if one is interested in understanding the scope of executive

control over diverse aspects of the administration of statutory decision-making powers in Canada today, it is necessary to cast the net rather widely.[16]

As was explained above in the Introduction, I regard executive regulation-making powers and powers of direction to be as significant in determining the extent of executive control over the substance of the decisions of regulatory bodies as are executive review and appeal powers. Even Crown corporations must be considered, for some of them are not only subject to mechanisms to ensure executive control like those associated with regulatory bodies but in a few instances also actually perform regulatory functions.

Certain Crown corporations, such as Air Canada and Petro-Canada, are subject to the direction and control of the Governor in Council. By section 8 of the Air Canada Act, the corporation is required to comply with "directions of a general nature" given by the Governor in Council. Some corporations are explicitly said to be agents of the federal Crown. Financial re-organization, the acquisition of subsidiaries or shares in other corporations, incurring debts, appointment of directors and alteration of by-laws commonly require the approval of the Governor in Council. A certain number of Crown corporations have corporate objects that require them to engage in both business or the provision of a service and regulation, as was the case with the CBC before the creation of the CRTC to handle the regulatory functions originally assigned to the CBC, and is now the case with many marketing boards.

Many boards and commissions have a purely advisory function or, like the Office of the Administrator under the Anti-Inflation Act, have no discretionary powers and simply apply a set of rules to the matters coming before them. A large number of boards, tribunals, and commissions with solely regulatory functions, though organizationally established as "independent" entities, are in fact either agents of the federal Crown or are under the "control and direction" of a minister or the Governor in Council. At the other end of the spectrum are the CTC and the CRTC where the independence of the regulatory body is one of its key characteristics and is only formally qualified by the provision for executive intervention in a limited number of clearly defined circumstances.

Given the vast array of institutional arrangements presently in existence it is useful to characterize and classify them. To do this I have made particular reference to the features relevant to the extent of executive control over the substance of the decisions of regulatory bodies (see Appendix A). Other studies focusing on different issues probably would find it useful to use other systems of classification structured to emphasize quite different features.[17] The legislative schemes or models identified here for the sake of discussion are as follows:

1. agency.

2. effective agency.

3. advisory function only.

4. regulations made or approved by executive, adjudicative decisions (with varying scope for discretion) made by the regulatory body subject to review and appeal to the executive, perhaps to a tribunal, and to the courts, but not to approval prior to their publication.

5. regulations by the Minister or Governor in Council, original decisions made within the department by delegation of ministerial powers, with or without review by the Minister, with or without reference to the report of an independent advisory body, appeal to a tribunal and/or the courts, but with no further executive involvement after ministerial review.

6. regulations not subject to approval, adjudicative decisions by an independent regulator subject to review or appeal to the executive and the courts but not approval prior to their publication.

The essential characteristics differentiating these models are the extent of control retained in the executive over policy generation, implementation, enforcement and review. The individual institutional arrangements are secondary characteristics. Description and classification necessarily has reference to these secondary characteristics. It can easily be the case, however, that two institutional arrangements with distinct secondary characteristics share the same essential characteristics of one common power model. The models identified

are not to be regarded as anything more than a tool to assist conceptualization of the implications of a given institutional arrangement for the distribution of power over policy generation and implementation. It must be remembered that this task of classification, because of the diversity of regulatory bodies in existence, is almost as artificial as it would be to designate types of snowflakes. Devising a meaningful classification is rendered yet more difficult by the fact that what is provided for by statute is often transformed in practice as, for example, where the high profile of an advisory body renders its "recommendations" tantamount to final decisions in all but the most exceptional cases. This is seen in the case of the Restrictive Trade Practices Commission and the Canadian Human Rights Commission, for example. The classification below is based on statutory provisions and thus does not in all cases reflect the effective powers of regulatory bodies, and most certainly does not reflect the common impression of the powers of many regulatory bodies.

1. Agency

Those regulatory bodies that are designated agents of the federal Crown by statute or made subject to the direction and control of the Minister or the Governor in Council have no effective independence from the executive unless it is obtained through delegation or through failure by the executive to exercise powers of direction. The Atomic Energy Control Board, the Canadian Wheat Board, The Employment and Immigration Commission, the Fisheries Prices Support Board, the National Film Board, the National Harbours Board, the Northern Pipeline Agency, the Royal Canadian Mounted Police Commissioner, the Crown Assets Disposal Corporation and the Royal Canadian Mint all may be classified under Agency.

2. Effective agency

A regulatory body may make decisions based on public hearings and yet still be an "effective agent". This will occur, for example, when all the regulations which it is responsible for applying and enforcing and all or most of its major "adjudicative" decisions are subject to approval by the Governor in Council. A board of this type, while perhaps because of its expertise in technical matters a valuable source of a perspective on

the issues relevant to regulation not in fact available within the department or Cabinet, cannot be said to be an "independent decision-maker" save in those aspects of its work not subject to approval by Cabinet. The National Energy Board (in regard to the approval of licences and certificates), the Superintendent under the Loan Companies Act, the Investment Companies Act, the Canadian and British Insurance Companies Act, the Foreign Insurance Companies Act and the Trust Companies Act, the Canadian Dairy Commission, the Canadian Grain Commission, the Commissioner of Patents, the Northern Canada Power Commission, the Commissioner of Corrections, a Special Advisory Board under the Immigration Act, and the Statute Revision Commission may be classified under Effective Agency.

3. Advisory function only

Boards falling under the previous category, effective agency, will often in fact exercise a function that is in practice purely advisory because they lack genuine independent decision-making power. Where the explicit mandate of a board consists solely of an advisory or an inquiry and advisory function subject only to a general direction as to the subject matter of their hearings, research and reports, its advice may provide a perspective more independent, however, from that generated by an "effective agency" arrangement. Publication of an advisory report prior to the approval of its content by the Minister or Governor in Council, requires the executive to respond publicly to the recommendation and the facts on which it is based. Confidential reports do not place the executive under the same onus. Within the effective agency arrangement (the National Energy Board, for example, insofar as it falls into this category, as it does precisely in respect of those of its decisions subject to Cabinet approval), decisions are not released until after they receive the approval of the Governor in Council and reports to the Minister in fulfilment of general advisory duties are not necessarily released to the public or even made available to the appropriate Standing Parliamentary Committee.[18] Other boards, commissions or tribunals with a similar advisory function are the Anti-dumping Tribunal, the Anti-Inflation Board, the Canadian Human Rights Commission, a person appointed to conduct an inquiry under section 18 of the Clean Air Act, the Restrictive Trade Practices Commission, the Canada Employment and Immigration Advisory Council, the Environmental

Contaminants Review Board, the Hazardous Products Board of Review, the Law Reform Commission, the Industrial Inquiry Committee under the Canada Labour Code, a Commissioner appointed under the Canada Land Surveys Act, a Board of Review under the Ocean Dumping Act, a Board of Review under Part II of the Royal Canadian Mounted Police Act, and the Canadian Transport Commission under subsection 141(8) and section 190 of the Railway Act.

4. Executive policy, board adjudication, executive review

In the fourth legislative scheme, policy is generated or implemented by means of regulations made by the Minister or Governor in Council. Adjudicative decisions involve varying amounts of scope for the exercise of discretion and thus for policy interpretation. They are subject to review by the executive and the courts, and in certain instances, to review by a special tribunal as well, but not to executive approval prior to their publication. The Anti-Inflation Act is an example of a statute establishing a scheme of this type. Under the Act the Guidelines were established, from time to time, by the Governor in Council and enforcement was performed by the Office of the Administrator. The Administrator was an adjudicator without discretion whose sole function was to interpret the Act and the Guidelines for the purposes of their application to cases referred by the Board or parties. Appeals to the Governor in Council, the Anti-Inflation Tribunal and the courts were available.

5. Executive policy, ministerial or departmental adjudication, either no further executive involvement or severely restricted review powers, review by an independent specialized tribunal and appeal to the courts

A key distinction between models 4 and 5 is the absence in the latter of a general executive review power. Where executive review is provided for in a class 5 legislative scheme, it is strictly limited in its scope. In both models basic policy is generated by, or subject to approval of, the executive. The original decision-making function in class 5 is either retained in the Minister or exercised by delegation of ministerial power. In model 4 it is performed outside a departmental structure, often with reference to a highly codified set

of rules or guidelines. Use of specialized review tribunals, whose role is to provide a forum for appeals without overburdening the ordinary courts, is common in model 5 and optional in model 4. I conclude from this pattern that where the existence of a high degree of departmental control over policy interpretation is ensured, by retaining the original decision-making power in the Minister and his delegatees, general executive review powers have not been seen to be required. The National Energy Board falls within neither model 4 or 5 or 6 in respect of those of its decisions not requiring Cabinet approval. It is not within model 4 because there is no executive review. Adjudication by the Board rather than the department places it outside model 5, and executive control over regulation-making excludes the NEB from membership alongside the CTC and the CRTC in model 6. This deviation from the pattern may confirm the conclusion of Lucas and Bell in their study of the NEB that the regulatory function of the Board is seriously compromised by their advisory function.[19] A high level of departmental and board interconsultation may serve to produce sufficient unanimity as to what is appropriate policy that political review is superfluous.

The Income Tax Act, the Immigration Act, the Canada Pension Plan Act, the Unemployment Insurance Act, 1971, the Customs Act, the Excise Act, and the Anti-dumping Act are all examples of statutes creating decision-making and review mechanisms that are properly grouped under model 5. Bodies with purely advisory functions as under model 3 are often also created to fulfill special limited duties within the parameters of model 5.

6. Commission policy, adjudicative decisions subject to review or appeal to the executive and the courts but not to approval prior to their publication

The Canadian Transport Commission (with certain qualifications) and the Canadian Radio-Television and Telecommunications Commission are the only two examples in existence at present of model 6. Regulations applied by the CRTC are made by the Commission rather than by the executive and are not subject to executive approval as to substance. Regulations applied by the CTC may be made by the Commission or by the Minister as, for example, under section 6 of the Aeronautics Act. Powers of direction in the executive are not broad, as they are in connection with models 1 and 2 above, for example, but rather are

restricted to a particular subject matter (as, for example, under the Broadcasting Act -- see sections 18, 22, 27 and 39(3)). Adjudicative decisions are not subject to approval by Cabinet prior to their publication but are subject to review by the courts on a point of law or jurisdiction and to review by the executive.

It is seen from these legislative schemes that there are at present three key points for possible executive control over policy generation, interpretation, implementation, and enforcement: (1) the translation of a general policy as set forth by statute into rules and regulations, (2) adjudication requiring interpretation of those rules and regulations within the framework of the statute, and (3) review of decisions by the courts to establish whether the decision is legal and by the executive to ensure political relief. Political relief may involve the mitigation of an unconscionable situation resulting from strict application of the statute and the regulations or the substitution of a ministerial or departmental interpretation of policy in response to pressure from the public or a specific interest.

In models 1 and 2, above, all of these functions, save review of legality by the courts, are under executive control. Control by the executive over the first and third functions effectively restricts the independence of the regulatory body to adjudication. The actual scope for the exercise by the regulator of independent interpretation of policy through adjudication may be severely truncated where executive review powers are used as a vehicle to implement policy and in effect deliver policy directives to the regulator. The existence of many model 5 bodies makes it clear that where statutory policy is either itself detailed or has been translated with executive oversight into a detailed body of rules and regulations which are then themselves interpreted within a departmental structure under Ministerial supervision, general executive review of adjudicatory decisions has been seen to be unnecessary. Where executive review is provided, it is designed to provide relief on humanitarian or compassionate grounds (see Immigration Act, 1976, s. 115) or applies only to a narrow class of cases (see Trust Companies Act, T-16, s. 71(a) and Small Loans Act, s. 11, s. 5 making identical statutory provision for appeal to the Governor in Council against denial of licences).

It is arguable that the ultimate justification for inclusion of an executive review power in model 6, where

policy interpretation and implementation are not firmly under executive control, is to provide a mechanism for executive review not merely in the sense described above wherein political relief against the interpretation of the secondary legislation is granted, but also to provide effective executive review of the first function, translation of statutory policy into rules, regulations and guidelines. Supervision of the independent commission's regulation-making function, if required, could as well be supplied by making regulations subject to a negative or positive resolution of Parliament. Periodic up-dating of the policy content of the primary legislation could be provided by means of amendments to the policy provisions of the Act itself. This mechanism could be supplemented, in those instances where there is adequate justification, by statutory provisions for executive directive powers with regard to specific, narrowly defined subjects. Executive review powers would thus no longer be needed for the purpose of general policy review and therefore could be eliminated on the grounds that the other function of executive review -- generally described as "political relief" -- is not only equivalent to second-guessing the adjudicator on issues of public interest and is therefore destructive of the regulatory process, but is also undesirable because of the scope it is perceived to offer for abuse of power.

With the elimination of ultimate executive review powers from bodies grouped here under model 6 one may query whether it is appropriate for the executive, rather than the regulator, to have control over the translation of statutory policy into regulations as it does in all the other legislative schemes classified. I would argue that, wherever a statutory policy mandate is broadly couched and not subject to an obvious and unambiguous translation into concrete rules for implementation in the form of regulations, the original decision-making body, whether it be a regulatory body structurally separate from the department or the department itself, will tend to be the most appropriate interpreter of the "public interest" and should be responsible for policy development and interpretation. Clarity as to the locus of delegated legislative power will eliminate non-productive power struggles between regulators and government departments. Placing policy planning and implementation powers in one body should be conducive to more coherent policy development than is possible when these powers are split between a commission and a department.[20] The Cabinet will at the same time be freed of the burden of approving

regulations, a task too time-consuming to be adequately dealt with at the Cabinet level in any event. As mentioned above, regulations and other secondary legislation should be subject to the negative or positive resolution of Parliament. Limited powers of direction may be vested in the executive as this is deemed appropriate by Parliament.

Chapter III

SELECTED STATUTORY PROVISIONS FOR EXECUTIVE POWERS OF REVIEW AND APPEAL AND THEIR RECENT EXERCISE

Chapter II concerned itself with analyzing over-all patterns of executive control in the regulatory area. This Chapter, by contrast, focuses directly on the variety of statutory executive review and appeal powers from the decisions of statutory decision-makers. There are numerous statutory provisions for executive review and appeal. As may be seen from the table below in Appendix A, these powers take many different forms -- the appeal to the Minister, review by the Minister or the Governor in Council of a recommendation on the basis of which he comes to a final determination, approval of a decision by the Governor in Council, or review by the Governor in Council on petition or by his own motion. The review and appeal provisions affecting five regulatory bodies, or combinations of related bodies each serving a regulatory function, will be considered.

A. FROM DECISIONS OF THE CANADIAN TRANSPORT COMMISSION

There are two statutory provisions for executive review of decisions of the Canadian Transport Commission, an appeal to the Minister under Section 25 of the National Transportation Act and a petition to the Governor in Council under section 64 of that Act. The Governor in Council may also act on his own motion under section 64. The sections are set out below:

> 25.(1) An applicant, or an intervener on an application to the Commission, for
>
> (a) a licence under the Aeronautics Act to operate a commercial air service,

(b) a licence under this Act to operate a motor vehicle undertaking,

(c) a licence under the Transport Act to engage in transport by water, or

(d) a certificate of public convenience and necessity under this Act in respect of a commodity pipeline,

may appeal to the Minister from a final decision of the Commission with respect to the application, and the Minister shall thereupon certify his opinion to the Commission and the Commission shall comply therewith.

(2) Where pursuant to any power vested in the Commission by this or any other Act of the Parliament of Canada the Commission suspends, cancels or amends any licence to operate any transportation service or any certificate of public convenience and necessity in respect of a transportation service, the carrier whose licence or certificate has been suspended, cancelled or amended may appeal to the Minister, and the Minister shall thereupon certify his opinion to the Commission and the Commission shall comply therewith.

(3) An appeal to the Minister under this section shall be brought within thirty days of the date of the decision, ruling or order appealed from or within such longer period as the Minister may allow.

(4) The Commission may make rules prescribing the manner in which appeals to the Minister may be made. 1966-67, c. 69, s. 18.

64.(1) The Governor in Council may at any time, in his discretion, either upon petition of any party, person or company interested, or of his own motion, and without any petition or application, vary or rescind any order, decision, rule or regulation of the Commission, whether such order or decision is made inter partes or otherwise, and whether such regulation is general or limited in its scope and application; and any order that the Governor in Council may make with respect thereto is binding upon the Commission and upon all parties.

There is no appeal to the Minister from CTC decisions in rail matters. Procedure on ministerial appeals is prescribed not by the Minister but by the Commission.[21] An examination of judgments made by the Minister of Transport from 1975 to 1978, inclusive, on appeals under this section indicates that the ministerial appeal provision was not used to excess during this period, although the absolute number of appeals has approximately doubled since 1972.[21a] A small proportion of the decisions reviewed by the Minister were actually modified, with the exception of 1975 and 1978. In 1975 slightly more than fifty percent of the decisions challenged on appeal were modified and only twenty-five percent were actually affirmed; in 1978 almost fifty percent were modified.[22] These figures mark 1975 and 1978 as periods when MOT took an activist stance with regard to policy and attempted to use the ministerial appeal as a vehicle to transmit policy to the Commission.

Occasionally appeals seem to have been granted rather than referred back to the CTC for review simply because the nature of the relief sought required such a speedy decision that reference back in the circumstances would have only rendered the question moot. The Ministers rendering judgment were consistent in refusing to entertain appeals where there had been no error of principle nor additional submissions with regard to the facts which would warrant a different decision. New facts, moreover, were commonly treated as the possible basis for a new application but not as matters which it was appropriate for the Minister to entertain on appeal. The Ministers were consistent, by and large, in their refusal to attempt to second-guess the CTC on the issue of demand. In borderline cases where the issue of whether existing demand was being met was at issue, Ministers commonly referred the matter back to the Commission for review.[23]

In a handful of cases Ministers recommended or directed, on the grounds of public convenience, a reduction of the time during which a licence was to be suspended as a penalty for violation of Air Carrier Regulations. In only three appeals, those of Air West Airlines Limited (October 13, 1976), Bradley Air Services Limited (December 15, 1976) and Arctic Transportation Limited (May 30, 1978), were procedural flaws and a denial of natural justice alleged. In each of these cases the appeal was dismissed. The judgments in the first two cases stated that procedural errors were not grounds for

granting an appeal from a decision of the Air Transport Committee (ATC) or the Water Transport Committee (WTC). The Minister did take note of the fact, however, that since the filing of the appeal to the Minister, the Commission had in effect modified its own decision in these two cases, to remove the practical effect of the alleged procedural defect.

In the third case the Commission was directed to modify its decision on a ground other than the alleged procedural flaw. Thus, whereas denial of natural justice when it takes the form of the denial of a hearing, a matter within the discretion of the Commission, does not constitute grounds for granting a ministerial appeal under section 25, in practice it appears that the Minister of Transport will take the general issue of fairness into account. A well-argued allegation of the denial of natural justice may thus have the side effect of ensuring that an appeal receives due consideration on the facts.

In summary exercise of the review power vested in the Minister under section 25 of the National Transportation Act, for the most part, appears to have been exercised with the same reasoned constraint that one would expect from any appellate body. The principal difficulty with the section 25 appeal provision has arisen insofar as MOT has used it as a vehicle for transmitting policy to the CTC.[24] In those instances where the CTC has showed independence by failing to implement ministry policy (the legal status of which is merely informal as the National Transportation Act provided for no effective policy development outside the Commission) MOT has used the ministerial appeal as an opportunity to assert the relevance of ministry policy. The ministerial appeal can thus be as much a vehicle for political interference with the regulator as is the petition to Cabinet provided for by section 64 and discussed below. It is anomolous to place the task of regulation in a body relatively independent from the ministry and then provide for political appeals.

It would be more straightforward, if a high level of ministry influence is desired, to absorb regulation into the Ministry. An appeal to the Minister from a Ministry decision would then enhance the already institutionalized responsibility of the Minister for all policy interpretation. If regulation of transport independent from the Ministry is still desired however, then those current functions of the section 25 appeal which are

legitimate can be assumed by the CTC Review Committee and new mechanisms devised to ensure that there are formal channels by which the Ministry and Parliament can transmit their preferences on policy to the CTC. A variety of options to achieve this end are available and are discussed in later chapters.

There has been only a limited use of the power to vary and rescind orders of the Canadian Transport Commission that is vested in the Governor in Council under subsection 64(1) of the National Transportation Act. In the last seven years five orders have been varied and only two of these were varied in response to petitions, eleven of which have been brought to the Governor in Council since 1972.[25] The statistics in Appendix C below show the number of petitions to the Governor in Council under subsection 64(1) to have been on the increase -- there were two in 1976, three in 1977 and four in 1978 -- despite the fact that the success rate on petitions in the same period went from fifty percent in 1976 to thirty-three and a third percent in 1977 and down to nil in 1978.

Examination of the cases brought before the Governor in Council under section 64 (see Appendix B, section 2 below) reveals that the action taken in 1976 on each matter was administrative in nature. Order in Council P.C. 1976-894 merely directed the CTC to arrive at "minimum compensatory levels" for rates for the transport of rapeseed, oil and meal. The CTC was not told what principles to use in arriving at these levels.

Order in Council P.C. 1976-2066 was in effect an injunction against the movement of the Pacific Western Airlines (PWA) head office pending disposition of the action by the CTC against PWA for the latter's alleged violation of the notice of acquisition requirements in the Air Carrier Regulations. Order in Council P.C. 1976-3320 not only denied the petition of Canadian Pacific Limited against the CTC Order requiring reconstruction of two bridges within twelve months, but also "varied" the CTC Order to require that construction begin "forthwith".

P.C. 1977-362 and 1977-717 dealt further with the rapeseed and the PWA issues, again to a purely administrative effect. The McCord Helicopter case is quite different, however, as the Governor in Council there apparently addressed himself to the issue of whether

existing demand for service was in fact being met or being met by the appropriate carrier. If so, this is then a case involving a review of the merits or use of the power under section 64 as if the Governor in Council were functioning as an appellate body in the full sense rather than with a merely supervisory power to be exercised on the basis of facts as found by the body from whose decision the petition is brought. Policy with regard to criteria for the issuance of licences for helicopters and light planes as opposed to those for heavy commercial planes may have been at issue here as well. The McCord Helicopter case is examined in greater detail in the case studies in Chapter VI, below. In Order in Council P.C. 1977-2353, the Governor in Council declined to second-guess the CTC on the issue of an abandoned rail-line.

The only Order in Council in 1978 varying a decision of the CTC was made with reference to ABC domestic flights in general. It directed the Commission to temporarily liberalize its Order on ABCs to allow a longer period for experimentation to discover the impact of the new fares, and to entertain the possibility of revising the Air Carrier Regulations so as to facilitate a permanent expansion of the use of ABCs. Trunkline carriers were barred from any primary rights over these expanded operations.

By contrast all of the petitions denied in 1978 concerned particular decisions of the CTC. It is arguably the case, however, that broad issues were at stake in some of these cases, as in NordAir for example, and that by declining to grant any variation of the CTC decision, the Governor in Council has also effectively confirmed the general policy applied by the CTC in the particular case. In the absence of support from the Minister of Transport for a change in CTC policy, would-be petitioners would be best advised to seek a full hearing of the general issue before the CTC, even if the hearing must occur within the context of a particular case, and to generate media interest in the issue. Even if the party is unsuccessful before the CTC, the ground may have been laid through public debate for a more sympathetic hearing on a subsequent petition to the Governor in Council. On petitions to the Governor in Council lobbying is a standard practice. Parties without established lobbying mechanisms and power must learn to use the media effectively if they are to have any significant impact on the decisions of the Governor in Council.

B. FROM DECISIONS OF THE CANADIAN RADIO-TELEVISION AND TELECOMMUNICATIONS COMMISSION

Section 23 of the Broadcasting Act and section 64 of the National Transportation Act provide for petitions to the Governor in Council from decisions of the CRTC with regard to broadcasting and telecommunications respectively. The provision from the Broadcasting Act[26] is as follows:

> 23.(1) The issue, amendment or renewal by the Commission of any broadcasting licence may be set aside, or may be referred back to the Commission for reconsideration and hearing by the Commission, by order of the Governor in Council made within sixty days after such issue, amendment or renewal, and subsection 19(4) shall not apply in respect of any such hearing.
>
> (2) An order of the Governor in Council made under subsection (1) that refers back to the Commission for reconsideration and hearing by it the issue, amendment or renewal of a licence shall set forth the details of any matter that, in the opinion of the Governor in Council, is material to the application and that, in his opinion, the Commission failed to consider or to consider adequately.
>
> (3) Where the issue, amendment or renewal of a broadcasting licence is referred back to the Commission under this section, the Commission shall reconsider the matter so referred back to it and, after a hearing as provided for by subsection (1), may
>
> (a) rescind the issue of the licence;
>
> (b) rescind the issue of the licence and issue a licence on the same or different conditions to any other person;
>
> (c) rescind the amendment or renewal; or
>
> (d) confirm, either with or without change, variation or alteration, the issue, amendment or renewal.
>
> (4) The issue, amendment or renewal by the Commission of any broadcasting licence that has been

referred back to the Commission pursuant to subsection (1) and confirmed pursuant to paragraph (3)(d) may be set aside by order of the Governor in Council made within sixty days after such confirmation. 1967-68, c. 25, s. 23.

Section 64 of the National Transportation Act, quoted in section A above, is now familiar from discussion of it there. Section 23 is the more restricted of the two review provisions in that it does not allow the Governor in Council to substitute a different decision for that of the Commission and bind the Commission by the new decision (as Section 64 of the National Transportation Act has been held to allow).[27] Nor, and more significantly, (and again unlike Section 64), can section 23 be used to launch an appeal against the refusal of a licence (except indirectly where a licence has been granted to a competitor). Under section 23 the Governor in Council is limited to setting aside a decision or referring it back to the Commission for reconsideration. The restricted nature of the power vested in the Governor in Council under section 23 renders it most properly classified not as a "Cabinet appeal" but rather as a "specific directive power".[28] Section 23 is thus to be preferred to section 64 as a review provision insofar as it is more protective of the integrity of the decision-making process of the Commission, but less desirable insofar as interminable delays could result from irreconcilable positions being taken and maintained by Cabinet and the Commission. In practice this has not occurred implying that whenever the Commission and the Cabinet have been confronted with this possibility one or the other or both have revised their positions.

During the period from 1968 to 1972 there were no Orders in Council with regard to either broadcasting or telecommunications.[29] The three Orders in Council in 1973 all pertained to review by Cabinet of the Bell Canada rate increase allowed by the CTC in early 1973. All three of these Orders in Council were on the recommendation of the Minister of Communications. No orders were issued with regard to broadcasting or telecommunications in 1974 or 1975.

On April 1, 1976, jurisdiction over telecommunications passed from the CTC to the newly constituted Canadian Radio-Television and Telecommunications Commission. The one Order in Council in 1976 regarding a decision by the CRTC was made under section 23 of the

Broadcasting Act setting aside the issuance of licences for cablevision service in Manitoba. The licences had been authorized in Decisions 76-650 and 76-651 on the 16th of September 1976. On the 10th of November, 1976, the Government of Canada and the Government of Manitoba entered into an Agreement with regard to aspects of regulation of communications in Manitoba incorporating an approach to ownership of cable facilities distinct from CRTC policy. The cable licences in question had been issued subject to conditions requiring the licensee to own the local head-end, amplifiers, and drops which form part of the cable television distribution system.

The Order in Council setting aside these licences was made November 10, 1976, the same day as the federal-provincial Agreement was concluded. The Commission took the position that it was not legally bound by the Agreement and proceeded to entertain further cable licence applications on that basis.[30] In the public notice calling for new applications the Commission indicated that, while it affirmed the value of its policy on cable hardware ownership, in future applications the Commission would appreciate receiving comments on the terms and scope of the Agreement, particularly as those related to the Commission's underlying concerns with regard to control over cable television undertakings. The lines of confrontation over policy between the Minister of Communications and the expanded CRTC were thus already fully drawn in 1976. Allocations of control over policy which function acceptably in the absence of controversy clearly are not necessarily ones which can continue to function smoothly in the midst of fundamental discord.[31]

Five Orders in Council disposing of petitions to the Governor in Council were issued in 1977. The one brought under section 23 by the Capital Cable Co-operative against Decision CRTC 77-193 renewing the licences of Victoria Cablevision Limited was denied.[32] Capital Cable had intervened at the public hearing with regard to CRTC licence renewal procedures. Two petitions were brought by interveners before the CRTC with regard to the rate increase granted Bell Canada by the CRTC in Telecom Decision 77-7 dated January 1, 1977. Both of these petitions were denied,[33] as was the petition of Canadian National from the CRTC denial in Telecom Decision 77-3 of its application for rate increases.

The final Order in Council with regard to telecommunications in 1977 in effect reversed Telecom Decision

CRTC 77-10 and approved the Telesat Canada Proposed Agreement made as of December 31, 1976, with the Trans-Canada Telephone System. This case is reviewed at length in the case studies in Chapter VI below. It provides an excellent example of the extent to which telecommunications decisions of the CRTC are, because of the breadth of the review powers under subsection 64(1) of the National Transportation Act, subject in effect to a full review and reconsideration on the basis of Cabinet or ministerial policy rather than Commission policy, without an actual rehearing of the issues, with no procedural safeguards, and without the issuance of clear or specific reasons.

Cases of this sort are destructive of the credibility and integrity of the regulatory process and, because of the secrecy surrounding the handling of Cabinet "appeals", are widely suspected to involve an abusive use of statutory power. Possible procedural inadequacies in conjunction with petitions to Cabinet, of serious concern to petitioners under section 64 for some time, have finally come to the attention of the courts in Inuit Tapirasat of Canada v. His Excellency the Right Honourable Jules Léger.[34] The case arose from one of the two petitions, mentioned above, to the Governor in Council in 1977 against Telecom Decision CRTC 77-7 granting Bell Canada's application for certain rate increases.

Only one Order in Council was made in 1978 with regard to decisions of the CRTC. Order in Council P.C. 1978-3577 denied a group of petitions under section 23 of the Broadcasting Act against the issuance of cable licences. The petitioners were persons whose competing applications had been denied by the CRTC.

Thus far in 1979 one Order in Council has been made under section 23 of the Broadcasting Act not to set aside Decision CRTC 78-724 granting approval for a new licence and transfer of effective control of the proposed cablevision company. The case involved a preliminary motion by the Association of Public Broadcasting in British Columbia (A.P.B.B.C.) for time to prepare a competing application for the licence on the grounds that the Commission did not have the authority to effectively confine or restrict the class of those applying for new licences to the party nominated by the present licensee. Cabinet is apparently not interested in using the powers under section 23 to encourage the CRTC to re-examine its procedures on either licence renewals or transfer applications.

One petition, of considerable interest, is now pending before the Governor in Council -- Bell Canada's petition against Telecom Decision CRTC 78-7 with respect to the inclusion, for the purpose of regulation of telephone rates in Canada, of the profits from a contract with Saudi Arabia. The contract is for a period of five years with anticipated revenues of 168 million dollars, less costs and losses. The case does not appear to involve the issues of ministerial interference with the independence of the regulatory process seen in the Manitoba Cable case, the Telesat case, and the NordAir Affair (see Chapter VI, Case Studies). It does, however, in the light of the decision of the Federal Court of Appeal in the Inuit case, again raise the question of fair procedure. In addition the pending petition raises the spectre of economic power being used to pressure Cabinet into granting relief to Bell shareholders. Bell has suggested that denial of their request by Cabinet will result in a reallocation of company resources into alternative business activities (this possibility was bluntly posed by Bell Canada in its petition). It remains to be seen whether this threat, regarded by opponents of the Bell petition as an obvious bluff, will cause Cabinet to choose to override regulatory policy carefully developed by the CRTC over the last few years in conjunction with the Cost Inquiry and a series of rate applications. Cross-subsidization has recently been the subject of widespread debate and extensive economic analysis. Cabinet does not possess the expertise in this area to presume to grant Bell Canada's application on technical grounds. Should the petition be granted the Cabinet will be perceived by parties opposing the petition to have in effect responded to a combination of the threats and inducements of Bell Canada and to the view that the issue of cross-subsidization is not properly within CRTC jurisdiction and should be handled instead by the Ministry of Communications and the Department of Corporate and Consumer Affairs.

C. FROM DECISIONS OF THE NATIONAL ENERGY BOARD

The independence of the National Energy Board (NEB) is severely circumscribed by the requirement that most of its major decisions be approved by Cabinet. All certificates of public convenience and necessity and amendments of certificates are subject to approval by Cabinet as are

suspensions and revocations of certificates for non-compliance with their terms and conditions. Oil, gas, and hydro-electric power, can be neither exported nor imported without a licence issued by the Board. Licences authorizing the export of gas or hydro-electric power, the export of oil for a period exceeding one year, or the import of gas, all require Cabinet approval under the Part VI Regulations made pursuant to the National Energy Board Act. Oil and petroleum products and propane and butane may be exported under a short-term licence not requiring Cabinet approval. Like certificates, licences may be either suspended or revoked with Cabinet approval. Board powers with regard to rate applications and facilities applications are exercised without the requirement of Cabinet approval. Export prices are now established by Cabinet.

The procedure used by the National Energy Board in processing those applications where the decision is subject to approval by Cabinet is illustrative of the extent to which energy policy in Canada today is determined jointly by the Department of Energy, Mines and Resources, the Cabinet and the National Energy Board functioning in its dual capacity as regulator and advisor to the Minister. In practice decisions requiring Cabinet approval are not released until Cabinet approval is actually received.

The 1974 application by Interprovincial Pipe Lines Limited for a certificate of public convenience and necessity to build a pipeline extension from Sarnia to Montréal provides a good example of the extent to which the National Energy Board's adjudicatory function is prejudiced by its advisory and regulatory functions. In that case Cabinet had approved the application in principle before it was even laid before the NEB. A Task Force, drawn from a number of government departments and the NEB, was constituted to study various problems that would require solution if the application was to be "facilitated". The result was that at the subsequent public hearing the basic issues of whether the pipeline was in the public interest and whether the Sarnia-Montreal route was indeed to be preferred were already decided and the NEB was left, in effect, only to work out the details.

Prior to the hearing, members of the National Energy Board and staff had been involved in meetings between the Minister of Energy, Mines and Resources and

officials of Interprovincial Pipe Line Limited, as well as with the Inter-departmental Task Force itself.[35] Within this context it would not be reasonable to regard the public hearing on the Interprovincial Pipeline application and the Board decision issued in consequence of this hearing as constituting the exercise of an independent adjudicatory function. If there is a place in Canada today for independent regulation in the energy sector, independence here implying a significant measure of insulation of the adjudicatory process, at minimum, from political influence, then it is clear that a different statutory model must be adopted than is currently seen in the National Energy Board Act.

Similar problems exist with regard to regulation by the Atomic Energy Control Board. By virtue of section 3 of the Atomic Energy Control Act the Board is the agent of the Federal Crown and is subject to any general or specific directions by the Minister under section 7. Here there is clearly no mechanism at all for insulation of the regulatory process from political influence. It would indeed appear to be the case that there is a serious need for re-examination of regulatory schemes in the entire energy area which, of course, has vastly expanded since the early 1960s and the early years of the National Energy Board. At that time energy was commonly thought of as being concerned primarily with oil, gas and hydroelectric power. Recent growth of the Department of Energy, Mines and Resources is indicative of the manner in which the problem of energy policy has expanded since the original conception and enactment of the National Energy Board Act.[36]

D. UNDER THE FOREIGN INVESTMENT REVIEW ACT

The Foreign Investment Review Act is an interesting piece of legislation for the purposes of comparison with other statutory provisions constituting bodies whose primary function is to prepare a recommendation and report for executive approval. In this instance the Foreign Investment Review Agency (FIRA) prepares a report to the Minister, who in turn presents this report together with his recommendations to the Governor in Council. A striking, and somewhat ironic, feature of this Act is the number of provisions it contains to protect the applicant foreign investor against the joint hazards

of executive delay and arbitrariness. Applicants for UIC benefits should only be so well protected.

The policy underlying the Act is laid out in more specific detail than in the average statute constituting a regulatory body. The Governor in Council is empowered to make regulations while the Minister is authorized to issue guidelines from time to time for the application and administration of both the Act and any regulations made pursuant to it. The definition sections of the Act appear to have been drafted with care.

Under section 8 any person who is not eligible to acquire control of a Canadian business enterprise without approval by the Governor in Council must give notice in writing to the Foreign Investment Review Agency of his/her proposal, containing full details as prescribed in the regulations. Following receipt by the Agency of the notice provided for by section 8 the Minister is to review the information contained in the notice together with any other relevant information submitted to him by any party or any province or party in Canada with regard to the proposed investment for the purpose of assessing whether or not, in his opinion, "the investment is or is likely to be of significant benefit to Canada."[37]

In those cases where the Minister, having completed the assessment provided for in section 9, is of the opinion that the investment should be allowed, the Minister is to recommend to the Governor in Council that the investment be allowed and to submit in support of this recommendation a summary of the information and written undertakings on the basis of which the recommendation is made. In those cases where the Minister is unable to recommend approval of the investment to the Governor in Council, the Minister is to notify the Agency of this fact. The Agency in turn is to advise the parties to the application of their right to make such further representations in connection with the matter as they see fit. Where no such representations have been received within 30 days after the notice was sent or within such longer period as is provided for in the notice or is agreed in writing by the Minister and each person concerned, the Minister is to proceed to submit the matter to the Governor in Council together with his recommendation and a summary of the available information. Where further written representations and consultations are held, the Minister is to suspend his consideration of the matter until they are concluded. At that point he is to

reconsider the proposed investment and on the basis of the further submissions come to a recommendation to the Governor in Council as to whether or not the investment shall be allowed or disallowed. As in the former case the recommendation by the Minister to the Governor in Council is to be accompanied by a summary of all information and proceedings taken by the Agency with respect to the investment in question.

Each recommendation by the Minister is disposed of by an Order in Council either allowing the investment or refusing to allow the investment. In cases where the Governor in Council does not accept a recommendation by the Minister to allow an investment and less than 60 days have elapsed since the original receipt by the Agency of the notice of intent to acquire, to which the recommendation relates, the Governor in Council may direct the Minister to notify the applicant of his/her right to make further representations under section 11, rather than denying the investment forthwith.

Investors are protected against a delay by either the Minister or the Governor in Council by section 13 which provides that where 60 days have elapsed since the original notice of intent to acquire a Canadian business enterprise, no Order in Council has been made by the Governor in Council under subsection 12(1), and no notice of the right to make further representations has been sent by the Agency under subsection 11(1) to the parties concerned, the Governor in Council shall be "deemed to have allowed the investment to which the original notice under subsection 8(1), (2) or (3) relates". This section has been successfully relied on by applicants under the Act.[38]

Statistics on the disposition of cases under the Foreign Investment Review Act since its implementation in April of 1974 to July of 1978 are available at the Law Reform Commission. Many of the applications withdrawn reflect recognition of failure by a competing applicant. The legislation has been successful in ensuring somewhat greater Canadian control in certain sectors of the economy such as oil and gas, for example, than would probably otherwise exist. The review process does not extend to reinvestment of profits in an on-going concern by foreign controlled firms already in existence. It goes without saying, of course, that the statutory model used for FIRA was never intended to provide any means of insulating review of proposed acquisitions of business

enterprises in Canada from political influences. The relative degree of rigour or lack thereof in the use of the review powers provided by the Act is itself a political decision. The extent to which undertakings made in conjunction with applications have been rigourously enforced is not clear. This also is a political decision. It is my understanding that, despite the significant statutory protections against delay and against the possibility that decisions will be made on the basis of incomplete information, the procedures used by FIRA have been subject to criticism and consequential review by the Agency itself and the Department of Justice during 1978.

E. UNDER THE ANTI-INFLATION ACT

The Anti-Inflation Act[39] is also of interest for comparative purposes because of the innovative combination of statutory provisions it utilizes to provide for policy generation, adjudication, enforcement, and executive review. The policy function is clearly and unequivocably left to the Governor in Council who is to issue Guidelines, from time to time, by way of regulations which constitute directions to the Anti-Inflation Board (AIB). The Board itself, established under section 6 of the Act, is both to advise the Governor in Council with regard to the Guidelines, their workability and effectiveness, and to attempt to act as a conciliatory force by engaging in consultations and negotiations with relevant parties with the aim of keeping proposed changes in private prices, profits, compensation and dividends within the margins allowed by the Guidelines in effect from time to time. The discretionary power of the Board itself is limited to deciding whether there are reasonable grounds for belief that the Guidelines had been contravened, were being contravened, or likely to be contravened, as to warrant a reference to the Administrator appointed by the Governor in Council pursuant to Section 15 of the Act.

Under section 17 the Administrator is empowered to make investigations, as required, to enable him to determine whether in fact a contravention of the Guidelines has, is, or is likely to occur. By section 20 of the Act, the Administrator is empowered to make Orders, as he deems appropriate, to prohibit contravention of the Guidelines.

The Act provides appeals from Orders of the Administrator under the Act to the Governor in Council and the Anti-Inflation Tribunal. The relevant sections from the Act are as follows:

> 24.(1) The Governor in Council may, on petition of any person affected by an order of the Administrator or of his own motion, by order, rescind the order of the Administrator or instruct the Administrator to vary his order pursuant to the authority vested in him by section 22 in a manner specified in the order of the Governor in Council, and an order made by the Governor in Council under this section is binding on the Administrator on a copy thereof, certified by the Clerk of the Privy Council, being sent to the Administrator and each person against whom the order of the Administrator was made by or on behalf of the Clerk of the Privy Council, by registered mail or in such other manner as is prescribed by the regulations.
>
> (2) An order of the Governor in Council under this section in relation to an order of the Administrator may only be made
>
> (a) where the Governor in Council acts on the petition of any person affected by the order of the Administrator, within thirty days of receipt by the Clerk of the Privy Council of the petition where the petition was received by him within thirty days of receipt by him of a copy of the Administrator's order; and
>
> (b) where the Governor in Council acts of his own motion, within thirty days of receipt by the Clerk of the Privy Council of a copy of the Administrator's order.
>
> 30.(1) Any person or body that
>
> (a) is affected by an order made by the Administrator pursuant to section 20 or 21, or by an order made by the Administrator pursuant to section 22 without his or its consent, and
>
> (b) is a person or body that was entitled pursuant to paragraph 12(1)(d.1), to require the Anti-Inflation Board to refer to the Administrator for consideration by him the matter that

is the subject of the order or would have been such a person or body if that paragraph had been in force at the time the matter was referred to the Administrator,

may appeal against the order to the Appeal Tribunal, but no appeal under this section may be instituted after the expiration of sixty days from the day the order pursuant to section 20, 21 or 22, as the case may be, was made.

(2) The Appeal Tribunal may dispose of an appeal by

(a) dismissing it; or

(b) allowing it and
(i) vacating the order appealed against,
(ii) varying the order appealed against, or
(iii) referring the matter back to the Administrator for reconsideration and variation of the order.

(3) Subject to subsection (4), the Appeal Tribunal shall dispose of an appeal by dismissing it unless the appellant establishes to the satisfaction of the Tribunal that a disposition referred to in paragraph (2)(b) is warranted.

(4) Where, on an appeal to the Appeal Tribunal, an order made pursuant to subsection 20(7) directing payment of a penalty amount is in issue, the burden of establishing the facts justifying the making of an order under that subsection is on the Administrator.

(5) Where, after an appeal is taken to the Appeal Tribunal against an order made pursuant to section 20 or 21, that order is varied pursuant to section 22, the appeal is not affected by the variation and, except where the variation was made with the consent of the appellant, an appeal against the variation may be joined with the appeal against the order made pursuant to section 20 or 21.

Section 24 closely resembles section 64 of the National Transportation Act in the powers that it bestows on the Governor in Council, i.e. the Order may be either

rescinded or, in effect, varied. The powers of the Appeal Tribunal under section 30 are equally broad although differently worded. There is no indication in the Act as to the order in which appeals are to be launched. However, if a petition is to be laid before the Governor in Council it must be received by the Clerk of the Privy Council within 30 days of receipt by him of a copy of the Administrator's order, whereas on an appeal to the Appeal Tribunal the period allowed is 60 days from the day the order was made. As is clear from Reports of the Office of the Administrator and the enumeration of dispositions on petitions to the Governor in Council under section 24 in Appendix B, a very small proportion of Orders made by the Administrator were made the subject of petitions to the Governor in Council and of those which were taken on petition to the Governor in Council relatively few were also appealed to the Tribunal. For the most part only one appeal route was chosen with reference to the nature of the grounds upon which the party relied.

All petitions to the Governor in Council under the Act were disallowed. One may only speculate to what extent this was due to the delicate political nature of the Anti-Inflation Act itself, or to the accurate interpretation and enforcement by the Administrator of the policy contained in the Guidelines together with the fact that no case during the period in question arose where the effect of application of the Guidelines was such as to arouse the conscience of the Governor in Council thus justifying political relief on what one might call equitable grounds or extenuating circumstances.[40]

Appeals brought before the Appeal Tribunal relied on the following grounds:

1. historical relationships as provided for in paragraph 44(1)(a),
2. calculations under the Guidelines,
3. jurisdictional issues, and
4. in one instance a procedural matter.

Executive control over policy was possible through issuance of amendments to the Guidelines by way of Regulations. These amendments provided a mechanism for ongoing adjustment of the anti-inflation program in response to political considerations, and permitted the executive to gradually implement de-control and thus phase out the anti-inflation measures. Administrative problems identified by the Appeal Tribunal and the Federal Court were also dealt with by way of Regulations pursuant to the Act.[41]

The exercise or, more accurately, non-exercise of the executive review power provided for under section 24 of the Anti-Inflation Act confirms the view, put forward in Chapter II, that where there is on-going control by the executive over implementation of policy and a narrow scope for interpretation and policy generation by way of adjudication, there is little or no need to provide (save perhaps by way of extraordinary relief)[42] for an executive review power. Where the rules and regulations applied by an adjudicator are detailed, the scope for confrontation between the executive and the adjudicatory body is minimized.

Chapter IV

FORMAL AND INFORMAL REVIEW AND APPEAL PROCEDURES

It is difficult to obtain reliable information about informal procedures and practices used on executive review and appeal. This is in large part the product of a tradition of secrecy surrounding the mechanics of performance of Crown duties and functions. Habit and tradition, combined with the Official Secrets Act, render it impossible to obtain precise comments from government officials with regard to procedure. And from one point of view it is arguably the case that obtaining precise information about informal appeal and review procedures is of little value so long as those procedures remain informal and flexible. Informal and flexible procedures are subject to adjustment at any time to fit the requirements of an individual case, as perceived by government officials responsible for processing appeals. This aspect of informal procedures is regarded as a positive feature by Privy Council officials. Political considerations combined with bureaucratic considerations will clearly continue to dictate the informal procedures followed in any given case as long as no constraints or requirements are imposed by statute, regulation or any other statutory instrument recognized as having the status of "positive law",[43] or by the courts on the basis of a general "duty of fairness".

Recent case law in Canada[44] has shown a tendency to require that statutory review and appeal powers be exercised, not necessarily with the full regalia of the requirements of natural justice, but by means of procedures which provide sufficient safeguards to ensure "fairness". The case law leaves no doubt that this principle applies to the executive, insofar as statutory powers are exercised, as it would to any other statutory decision-maker. Only in those cases where procedure is spelled

out in positive law are the decision-maker and the courts, insofar as the issue is laid before them, relieved of the task of determining what would constitute fair procedures in the context of a given case, forum, and statutory framework. If the Supreme Court of Canada upholds the decision of the Federal Court of Appeal in the Inuit[45] case, adding further support to the precedent established in Re Nicholson,[46] there could well be several cases in the area of administrative law from decisions of less august statutory decision-makers than Cabinet brought for the purpose of clarifying the procedural requirements imposed by the "duty of fairness" in various types of circumstances with reference to the framework of distinct statutes.

With regard to executive review powers three alternatives to detailed development of the "fairness" principle by the courts are available: (1) the adoption of procedural requirements by way of regulations pursuant to individual statutes tailored to the perceived requirements of the types of matters reviewed and the weightiness of the issues involved (such regulations would in turn be open to attack on the grounds that they were ultra vires given the statutory framework and the issues or rights at stake); or (2) the generation of a general code of procedure for the conduct of executive review and appeal functions to be adopted by statute; or (3) partial or total elimination of executive review functions. In practice a combination of these three approaches would probably be most workable.

At present the principal flaws in executive review procedures are a lack of openness and a high degree of flexibility. It should go without saying that it is most "difficult" to evaluate performance in the face of secrecy surrounding a moving target. In principle at least, openness with regard to procedure would appear to be the first step towards fairness and consistency the second.

A. MINISTERIAL REVIEW

Procedure for the performance of the ministerial appeal and review function is set forth by statute in some cases, by regulation in other cases, by rules in yet others, and by a combination of habit, practice and

fortuity in the remainder. The Foreign Investment Review Act is exceptional among statutes, as was noted in Chapter III, for the procedural protections it contains for the interests of the applicant against delay, failure by the Minister or Governor in Council to dispose of the matter, or a negative decision on the basis of written representations alone (providing no opportunity for questioning and consequential clarification) without notification of the opportunity to make further submissions.

The executive review and appeal function does not usually involve hearings save insofar as a board, commission, tribunal or department may, either at the request of the Minister or as a condition precedent to the matter being placed before the Minister, hold hearings and prepare a report and recommendation.[47] The courts may impose standards on procedure used at such hearings by virtue of the fact that the report based on the hearings is a critical factor in the decision taken by the Minister and therefore its status as a mere "recommendation" cannot be used to justify lack of fairness in the hearings on the basis of which it was prepared.[48]

Ministers, almost without exception, assess a matter under review or appeal on the basis of written representations, the record or file, and any recommendations prepared by department and agency officials. The extent of delegation of Ministerial discretion in the handling of review and appeal matters is unknown. Effective delegation is, moreover, fully compatible with the technical non-delegation of decision-making power and thus the issue is one necessarily left to the conscience of the individual Minister. Strictly speaking actual delegation must be authorized by statute or by a valid regulation to be legal. The validity of regulations is, of course, subject to interpretation by the courts.[49]

Procedure on appeals to the Minister of Transport under section 25 of the National Transportation Act is governed by General Rules 800-890 made by the Commission pursuant to subsection 25(4) of the Act.

GENERAL RULES 800-890: Appeals to the Minister

800 An appeal to the Minister shall be instituted by serving the Minister, the Secretary and, where

applicable, the applicant, respondent and interveners by registered mail with a notice of appeal.

810 A notice of appeal to the Minister shall set out
(a) the matter appealed against;
(b) the grounds of appeal; and
(c) the relief sought.

820 Concurrently with the institution of an appeal, an appellant may apply ex parte to the Commission for an order staying the Commission's decision, ruling or order pending the outcome of the appeal.

830 The Commission shall not make an order staying the Commission's decision, ruling or order pending the outcome of an appeal unless the appellant files with the Secretary an undertaking, under seal, to save harmless all other parties from damages resulting from the operation of such an order.

840 Within fifteen days from completion of the service of the notice of appeal the appellant shall serve by registered mail the Minister, the Secretary and, where applicable, the applicant, respondent and interveners with complete documentary evidence supported by a declaration that sets out the reasons for which and the grounds upon which relief is sought.

850 Within fourteen days from receipt of the documentary evidence required, any party who intends to oppose the appeal shall file with the Minister and serve by registered mail the appellant, the Secretary and any other party with an answer setting out full particulars of the grounds upon which the appeal is opposed.

860 Where an appellant desires to reply to an answer, he shall, within seven days of receipt, serve with a reply by registered mail the Minister, the Secretary, the person who served the notice and any other party.

870 The Commission may provide the Minister with a statement of
(a) its reasons or additional reasons for the decision, ruling or order appealed from; and
(b) any reasons for opposing the relief sought in the appeal.

Such statement shall be served upon all parties.

880 There shall be no oral argument on an appeal to the Minister unless he otherwise directs.

890 The decision of the Minister shall be communicated by mail to the appellant, to the Secretary and other parties, if any.[50]

A minimum of thirty-six days in the case of a contested appeal, and of twenty-nine days in an uncontested appeal, are required from the time of delivery of the notice until the decision. This is superior to a scheme whereby the Minister may curtail the pleadings stage by the release of a decision. There is no provision for a reply by the parties to the statement from the Commission nor for further rejoinder to the appellant's reply under Rule 860. Oral argument is held at the option of the Minister.

In practice, on those occasions when an appeal is launched to the Minister and the Review Committee simultaneously, the Minister reserves his judgment on the matter until after it has been disposed of by the Review Committee. On very rare occasions an issue will come before the Minister on appeal, be referred to the Review Committee for consideration with regard to a particular point of policy, and then again be made the subject of an appeal to the Minister. The reasons provided by the Minister are written and fully adequate. Matters before the Minister on appeal under section 25 have not been made the subject of court action on procedural or other grounds. Effective delegation of ministerial powers on section 25 appeals is described later in this chapter.

Canadian Grain Commission Orders, with regard to licences under the Canada Grain Act[51], and under sections 8 and 10 of the Grain Futures Act,[52] are subject to review and appeal by the Minister of Agriculture under section 78 and section 11 of these Acts, respectively. These review and appeal provisions have never been used and no formal procedures exist to govern their exercise in any event. Any complaints with regard to decisions of the Commission are in practice dealt with informally or in any event without reference to section 78 or section 11.

By contrast, procedures for appeals to the Minister of National Revenue, under the Unemployment Insurance

Act, with regard to reassessment of premiums under section 75 of the Act, and under the Canada Pension Plan Act, with regard to liability to contribute under subsection 28(2) of the Act, are specified with reasonable detail in the Acts themselves. The procedures under the two Acts are quite similar, that provided for in section 28 having been modelled on those in section 75. Appeals under both sections are processed by the Appeals Branch of Revenue Canada.

On a section 75 appeal the appellant initiates the appeal by writing a letter to the Minister, which is forwarded to the Appeals Branch of Revenue Canada. The Appeals Branch conducts an investigation to collect the facts from all parties concerned and, on the basis of these facts, makes a recommendation to the Minister. The Minister in fact has no personal involvement in the case. The Appeals Branch itself issues its decision under the signature of the Director of Legal Services to whom authority is delegated by the Minister pursuant to section 5 of the "Delegation of Powers" (Part IV, U.I.C. Act) Regulations.[53] Copies of the decision are sent to all parties -- the payor or employer as the case may be, the employee and the Unemployment Insurance Commission. In the event that employees other than one who was a party to the appeal may be affected by the decision, they are sent copies of the decision as well.

Appeals regarding liability to contribute under subsection 28(2) of the Canada Pension Plan Act are handled in a fashion almost identical to that just described and disposed of by decisions signed by the Director of Legal Services acting with power delegated to him by the Minister as authorized under section 5 of "Delegation of Powers" (Part I, Canadian Pension Plan Act) Regulations.[54]

Appeals to the Minister of Health and Welfare under subsection 83(1), to reconsider a decision made under section 59 of the Canada Pension Plan Act with regard to benefits, are processed by the Office of the Administrator of Appeals, Canada Pension Plan. Other than the provision in subsection 83(2) that the Minister shall notify the applicant or beneficiary of his decision in writing with reasons, there are no statutory provisions setting out procedures for the handling of these appeals, nor is there any statutory provision, either in the Act or by way of regulation pursuant to the Act, for delegation of the decision-making power vested in the Minister

under section 83. The informal procedures used are as follows. The appeal branch receives notification by way of letter from the applicant of the applicant's wish to launch an appeal under section 83. This letter is acknowledged by the Appeals Office. The facts are reviewed by departmental officials and further information, as required, is sought from the applicant. Cases involving medical issues, as 97% of the appeals brought under section 83 do, are then referred to physicians retained on staff by Canada Pension Plan who assess the medical information contained in reports supplied by the applicant and his physicians and arrange any further consultations deemed necessary. A staff physician then prepares a statement which, in practice, is decisive for the outcome of the appeal.

Appeals brought on non-medical grounds concern such matters as eligibility for retroactive benefits where benefits were not applied for until some time after the effective date of retirement, eligibility of orphans who have left school, and competing claims by common law and legal spouses. When the Appeals Office has completed its reassessment based on the facts gathered and the relevant law, a letter is prepared explaining the decision and the rights to further appeal under section 84. The letter is signed by the Administrator of Appeals on behalf of the Director-General. The Minister has no personal involvement in the handling of appeals under section 83. The legality of this informal delegation of decision-making power is currently under review by Canada Pension Plan legal officers.

This sampling[55] of the actual exercise of ministerial review powers confirms what common sense would expect to be the case, that is, these powers are exercised by way of delegation to departmental officials in almost all cases, either as authorized by a statutory instrument or by informal arrangements born out of considerations of expediency. One might anticipate degrees of personal ministerial involvement in appeals based on such factors as the volume of appeals, whether technical or non-technical issues were involved, the extent to which policy is subject to interpretation on appeal, the extent to which individual as opposed to public interests will be affected by the outcome of the appeal, and the individual style of a Minister in overseeing the work of his/her department. Even in transport, however, where the appeals are relatively few in number, the practice in recent years has been for judgments on appeals to be

prepared by MOT Legal Services and approved by the Policy Branch. In practice the final draft was simply signed by the Minister who had no other personal involvement unless the case was potentially politically sensitive, involved interests in the Minister's riding or in some other respect captured the Minister's attention as, for example, it might as a vehicle to influence the CTC on a particularly contentious issue.[56]

It is, of course, desirable that appeals be handled by decision-makers with sufficient expertise and time to give just attention to the issues raised in the appeal, rather than by blind and uniform application of one ideal appeal model to each and every area of governmental decision-making activity or by a Minister who is too overburdened with work to direct his mind fully to issues raised on each and every appeal. At the same time it is desirable that appeals, insofar as they are allowed, are conducted according to law. It is rather artificial to empower a Minister to conduct appeals and then by way of regulation or in another section of the statute to empower the Minister to delegate his decision-making power in recognition of the demands of expediency. It ought not to be overlooked that the present practice of delegating ministerial decision-making power by way of regulations pursuant to an Act may in fact be ultra vires.[57]

B. PETITIONS TO THE GOVERNOR IN COUNCIL

The procedure used in handling petitions to Cabinet must be seen within the context of the overall organization of Cabinet. In 1964 under Prime Minister Pearson the Cabinet underwent a major reorganization. There had been Cabinet Committees since 1939. Under Pearson, however, each of the Committees, of which there were nine, was to be responsible for a portion of the work before Cabinet. Basic procedures were therefore changed. In the past matters coming before Cabinet had gone before the Cabinet first and only been referred to Committee when further information and special consideration was required. With the reorganization in 1964 Cabinet business was first brought before the appropriate Standing Committee and only when it was ready to be disposed of was it placed on the Cabinet agenda.

In January, 1968, a tenth committee called the Committee on Priorities and Planning was added. Further

changes in the Cabinet committee system were introduced by Prime Minister Trudeau in April of 1968. At that time he said:

> "this system has worked well for the past five years and greatly improved the efficiency of government. It has, however, become apparent that further changes are now required to permit a greater centralization of functions and the delegation of certain powers of decision to the committees.
>
> To meet these difficulties, I have revised the system of Cabinet Committees to reduce the number of Committees and to provide for a regularity in their meetings."[58]

A second major change in Cabinet procedure occurred in 1968. Cabinet Committees were given the power not merely to recommend a decision to Cabinet but, in effect, to take decisions in the areas under their jurisdiction. This change was qualified by the provision that each Minister, whether or not he/she served on a particular committee, would receive copies of documents and agendas of all committees, could attend any committee he/she wished with the exception of the limited-attendance Cabinet Committee on Priorities and Planning, and could request that a particular Committee decision placed on the agenda be discussed in Cabinet. In practice at present there is, in effect, an active and a passive agenda for each Cabinet meeting. The Prime Minister reads off the items on the passive list. Any member of Cabinet wishing to object to a particular committee decision has an opportunity to do so at this time. In the absence of any objection, matters on the passive agenda receive approval and become the decisions of Cabinet.[59]

The limited-attendance Cabinet Committee on Priorities and Planning directs itself to problems of long-term policy and broad government objectives. It is in this Committee that government priorities are hammered out with regard to long-term goals and allocation of resources. It is clear that despite the fact that the Committee has no official decision-making function as such with regard to specific matters, policies arrived at in this forum may well have a significant impact on the deliberations of other committees and the full Cabinet.[60]

Within this context it is possible to discuss more detailed matters of procedure and the handling of petitions to Cabinet. Reference in the following paragraphs is to procedures used prior to the change of government in May, 1979. The extent to which they will be changed under the new government remains to be seen. The process is initiated when the Clerk of the Privy Council receives a "petition". The petition is sent to Operations where a decision is taken as to whether or not the matter is in fact petitionable. The Privy Council Office receives a broad range of formal and informal requests and complaints. Any individual matter may or may not fall under the petition provisions of a particular statute. Where a matter does not fall under a statutory review provision it is dealt with as seems best in the circumstances, which is often by way of referral to a Minister or government department for acknowledgment and consideration.[61]

Petitionable matters are forwarded to the appropriate Privy Council Office Secretariat. The Secretariat performs the function of co-ordinating correspondence between the parties and the Minister. On receipt of the petition by the Secretariat it is referred to the appropriate Minister. The Minister (or his/her office) in turn prepares a recommendation for the members of the relevant Cabinet Committee and returns it together with the file to the Secretariat. The Secretariat forwards the recommendation together with any original documents to the appropriate Cabinet Committee. A channelling procedure is used. Petitions from decisions of the CTC go to Government Operations, from NEB decisions they go either to Government Operations or Economic Policy, from AIB decisions they go to the Committee on Economic Policy, and from CRTC decisions they go to the Committee on Cultural and Native Affairs.[62]

A Cabinet Committee consists of nine Ministers, four of whom constitute a quorum. The Cabinet Committee makes a recommendation to Cabinet and may or may not follow the ministerial recommendation received by it from the Secretariat. The Cabinet Committee has before it all the original materials and refers to them to a greater or lesser extent as it chooses. Its choices in this matter are clearly influenced by the individual political interests of the Ministers on the Cabinet Committee. For example, in a matter such as the recent petition regarding NordAir, Ontario Ministers were far more apt to take a strong interest in the matter than were Ministers from

British Columbia. The Cabinet Committee may or may not ask for clarification of the matter from parties concerned. The Cabinet Committee recommendation then goes to Cabinet which functions by way of consensus rather than vote; as indicated earlier, "controversial" matters are placed on the main agenda, "non-controversial" matters being placed on a list for simple ratification.[63] At least twice a petition has been disposed of by Cabinet apparently without the knowledge of a Minister who indicated his interest in the matter to one of the parties.[64]

The key characteristic of the procedure used in taking a decision on a petition to Cabinet is its flexibility. Officials in the Privy Council Office emphasize that the law in fact provides no procedures for processing petitions and that it is in their view preferable to keep procedure informal as it is only in this way that each petition can receive the attention it requires without at the same time constituting an undue burden on the resources of Cabinet. At present the Privy Council Office finds itself under considerable pressure from parties to petitions to introduce a measure of formality into its handling of petitions. In particular, parties seek a universal exchange of pleadings, the opportunity to reply, and assurances that the pleadings stage will not be curtailed by an early decision being taken by Cabinet. At present the Privy Council Office is facilitating the process of exchange of pleadings although it is not required to do so. Privy Council officials regard this as a good example of flexible procedure adjusting itself to the circumstances including the expectations of the parties.

The regulatory bodies from whose decisions petitions are brought are allegedly not involved in the petition process. Privy Council officials suggest that it would not be appropriate for a board, commission or tribunal to defend its decision, that once a decision has been made the regulatory body is finished with the matter. Practice is evidently flexible in this area as well, however, for the CRTC was asked to provide the Cabinet with a submission with regard to the Inuit Tapirisat petition. The submission was in fact, however, never placed before Cabinet because the Cabinet decision was taken while the submission was still under preparation and in draft form.[65]

An alternate explanation offered by Privy Council officials for the non-involvement of regulatory boards,

commissions and tribunals in the information-gathering stage of processing a Cabinet petition is that the Cabinet prefers not to be seen to place pressure on the regulatory body. This explanation was accompanied by the comment that controversial matters are, in any event, widely discussed in the press and that as Ministers are politicians, they will take due note of this public discussion. In summary, there appears to be little interest in the Privy Council Office in gaining a first-hand presentation of the regulator's point of view with regard to an individual case.

No comment was obtained as to whether or not the Minister or Deputy Minister might discuss matters made the subject of a petition with the staff of a regulatory board, tribunal or commission. The view is that what a Minister does to inform himself prior to making a recommendation is not only not a matter of formal procedure but also not the proper subject of knowledge to Privy Council officials nor properly a matter of public information. The personal recommendation of the Minister to his colleagues takes the form of a Memorandum. Unless copies of a petition and any other pleadings have been sent directly to individual Ministers by the parties, most Ministers will only see the Memorandum.[66] A Discussion Paper may or may not be prepared with regard to any given petition and is released to the public in either its original or re-written form only in the discretion of the Minister. Discussion Papers are produced by the department under the supervision of the Deputy Minister.[67] Replies to either of these documents by the parties to a petition clearly cannot be made when they are kept confidential. Any inaccuracies or debatable opinions contained in these materials, so crucial for the "decision" by Cabinet, are thus apt to pass unchallenged in Cabinet.

Once a Cabinet decision on a petition is taken, it is published in the form of an Order in Council. The Clerk writes the parties to the petition indicating that the matter is concluded and encloses a copy of the Order in Council. There are no reasons given, either orally or in writing, other than those appearing on the face of the Order in Council. The official view is that the Order in Council need not be defended by reasons. As a matter of practice, release of a decision on a controversial petition is frequently accompanied by a ministerial press release with regard to the subject.[68]

Privy Council officials state that the most appropriate subject for petitions to Cabinet from the decisions of regulatory bodies is policy of a non-technical nature. Issues of procedure before regulatory tribunals are properly the subject of legal recourse by way of judicial review as are points of legal interpretation. Faced with a technical policy issue, Cabinet and the Cabinet Committee have little choice but to accept the weight of technical evidence as it has been assembled by the specialist regulatory body. The only exceptions to this would be cases where there was a confrontation between a department and a regulatory body over policy involving highly technical issues. In these instances, Cabinet finds itself required to act as umpire between two groups of "experts". Placed in such a dilemma, the odds are quite good, assuming the Minister concerned is not strong enough in Cabinet to simply successfully demand support for the position of his department or ministry, that Cabinet will be swayed one way or the other by non-technical policy and political considerations. The consequence in either case, of course, may be interference with the orderly development of a highly technical aspect of regulatory policy.

Non-technical policy issues are clearly a more suitable subject for petitions to the Governor in Council than technical ones but I would argue that insofar as policy interpretation independent from narrow partisan political influences is desired, neither one should be the subject of political appeals. For example, the series of conflicts between the Ministry of Communications and the CRTC over commercial deletion, the Telesat-TCTS Agreement, cable hardware ownership, and pay-TV, all matters involving fundamental issues going to the root of the Commission's mandate to regulate in the public interest, make it clear that a coherent communications policy can only be developed if the Ministry is prevented from inappropriate forms of interference such as initiating action by the Governor in Council under section 23 of the Broadcasting Act or section 64 of the National Transportation Act.

It was observed above that the officials of the Privy Council Office see the informality of procedures on petitions to the Governor in Council as being of positive value. Persons and groups who have been parties to petitions to the Governor in Council are somewhat less convinced of the value of procedural flexibility. Petitioner dissatisfaction with flexibility goes to all aspects of

procedure used in handling petitions but in recent years has focused primarily on the need for uniform treatment of the pleadings stage including the incorporation of an assured period of time for the exchange of pleadings which cannot be curtailed by Cabinet at its own option by the issuance of a decision. Pressure from the parties to regularize the matter of pleadings and time limits, combined with the decision of the Federal Court of Appeal in the Inuit Tapirisat case, and simple considerations of internal expediency in the face of mounting correspondence with the parties precisely with regard to the matter of an orderly exchange of pleadings and time limitations, may in fact in the very near future induce the Privy Council Office to inaugurate the the use of rules to govern these two matters; that is, if political appeals are not abandoned entirely.

A good example of why expediency, pure and simple, may dictate the adoption of rules regarding the order and timing of pleadings is seen in the actual exchange of pleadings in a 1975 petition to Cabinet by the CAC from a decision of the Canadian Transport Commission made on May 26, 1975 by way of oral reasons. The Consumers' Association of Canada, Regulated Industries Board, prior to submitting its petition to the Privy Council, wrote to the Secretary of the Privy Council noting the lack of any directions with regard to procedure. Prior to the issuance of written reasons by the CTC, the CAC, the Province of Manitoba and the Province of Saskatchewan filed petitions to the Governor in Council.

Pleadings were then exchanged between the parties in the following order. "Replies" were submitted by Air Canada on July 17, 1975 and by CP Air on July 21, 1975. CAC filed its "Reply" to the "Replies" by CP Air and Air Canada on July 25, 1975. On July 26, 1975 the "Replies" of Eastern, PWA, NordAir, Transair Ltd. and Quebecair were filed. The Answer by Air Canada to CAC's Reply was filed August 20, 1975. On the 22nd of August, CP Air filed a "Further Submission" and Eastern, PWA, NordAir, Transair and Quebecair filed their "Answers" to the July 25, 1975 "Reply" by CAC. The final pleading exchanged was filed by CAC et al on the 16th of September, 1975, addressed to the further representations by Air Canada and the regionals. This sequence verges on chaos and is largely the co-product of the total absence of procedural direction and the lack of assurance that the pleadings stage would not be cut off without notice by the issuance of a decision. Ironically, in view of the effort expended by the parties, no disposition of the petitions

was ever made in this case and therefore no Order in Council was issued. The case was concluded by a letter to the parties from the Privy Council Office at the time of the 1976 air rate case stating that the matters at issue were now moot in view of the fact that air fares were again under consideration by the CTC.

The manner in which this case was disposed of highlights the fact that the non-issuance of any Orders in Council disposing of petitions or on his own motion merely indicates that the Governor in Council has not chosen to exercise his powers under section 64, but not necessarily that no petitions were submitted. There is no public record of petitions submitted but only of Orders in Council issued. I know of only a few petitions submitted on which no action was taken but this should not be taken to imply that there were not others of which I have no knowledge. The records kept by the Privy Council Office would probably provide no reliable picture of the number and nature of the petitions submitted to the Governor in Council. This statement is based on the fact that this Spring the Privy Council Office found itself dependent on the Office of the Administrator under the Anti-Inflation Act to compile a list of petitions submitted under that Act. The absence of a public record of petitions merely serves to intensify the gravity of another problem; Privy Council Office control over whether a petition is placed before Cabinet. The current arrangement renders it possible for the Privy Council Office to, in essence, suppress a petition without leaving any public record of its existence. Only those parties with major political clout or strong media ties are in a position to protect themselves against the possibility that their petitions will achieve oblivion with the flick of a Privy Council Officer's pen.

Privy Council Office officials decide whether to place or not to place any given petition before Cabinet. A decision not to place a matter before Cabinet implies either a decision that the petition has no merit at all or that it is not within the jurisdiction of the Governor in Council. The question is whether it is open to Cabinet to delegate such extensive control over its business to officials of the Privy Council Office or even to individual ministers.

The problem is illustrated by the recent example of the decision by the Minister of Communications, taken on advice, that the petition submitted to the Governor in

Council February 6, 1979, by the Canadian Broadcasting League pursuant to Section 23 of the Broadcasting Act against CRTC Decision 79-9, approving the indirect transfer of effective control of Canadian Cablesystems Limited to Rogers Telecommunications Limited, could not be appropriately weighed or considered by the Governor in Council because the decision in question technically did not involve the issue, amendment or renewal of a broadcasting licence and therefore did not fall under Section 23. Madame Sauvé was of the view that there was no purpose to be served by referring the petition to Cabinet since the Governor in Council, in her view, had no jurisdiction to grant it.[69] In a further exchange Madame Sauvé reiterated the above position and added that she had no intention of referring the jurisdictional issue to the Supreme Court.[70]

The parties to petitions to Cabinet have a range of other concerns more global than those mentioned so far, and for the most part these concerns are grounded not simply on suspicion of abuse of power resulting from the high level of secrecy and the flexibility of Cabinet procedures but are grounded in their perception of the whole history of the treatment of individual matters which eventually became the subject of petitions to Cabinet. Ministerial interference with the regulatory process from the stage prior to an actual application to the regulatory body for a licence, ruling, or other decision, to the stage of the Cabinet petition itself, is one such area of concern. Delegation of executive decision-making powers is another. Issues of this sort are highlighted in the case studies in Chapter VI and subjected to further comment in Chapter VII in conjunction with an overall assessment of the exercise of executive review powers and their impact on the administrative law area.

The perspective on petitions obtained from staff and members of regulatory bodies is yet a third one. Being somewhat removed from the hurly-burly of the petition process itself Commissioners focus less on problems of expediency than do officials of the Privy Council Office and are less personally involved or committed to the outcome of a particular decision than are the parties to the petition itself.

The members of boards, commissions and tribunals appear to be quite aware that they have power only as it has been delegated to them from Parliament, although some of these powers may be very broad discretionary powers.

The principal concerns voiced by Commissioners with regard to procedures on Cabinet petitions arise from the view that a decision arrived at with care and in accordance with the law ought not to be, nor be seen to be, casually or arbitrarily over-turned on a petition to the Governor in Council.[71] The role of the Governor in Council is perceived as a supervisory rather than appellate one, and sparing use of the review and appeal power is regarded as being key to its value. Allegiance to what some regulatory body members and staff refer to as the "rule of law" tends to make them feel strongly that the flexibility of procedure so valued by Privy Council officials is in fact highly inappropriate. Regulatory board staff cite recent cases which have been intentionally rushed through Cabinet to preclude even the possibility of representations being made by the parties concerned, as examples of the handling of petitions in an unjust manner. The impression given was that staff were concerned that the net result amounted to a mockery of the regulatory process. A procedure incorporating the main elements of "natural justice" would allay some of this concern. Use in the past of an actual hearing procedure on petitions to the Governor in Council is commonly referred to by commission members and staff to illustrate the feasibility of some degree of formality in procedure.[72]

Relief on petition to the Governor in Council, even where it is provided for by statute and therefore must be justified on grounds within the four corners of the statute in question, remains highly political. In part, but only in part, this can be explained by a combination of tradition, the lack of procedural safeguards, which may make it easier for Cabinet to lose sight of the need to limit their decision however "political" to considerations relevant to the statute rather than on any and all other considerations with which they may be preoccupied, and the absence of any requirement that "reasons" be provided to justify their disposition. It is arguably the case that formal procedures and the provision of reasons would only cause the underlying political motivations for finding a particular disposition "reasonable" to become veiled. In the end therefore the fundamental choice is that of whether a continuation of political appeals from the decisions of statutory decision-makers is desirable or not. If not, petitions to the Governor in Council from the decisions of regulatory bodies should be abolished. The present lack of popularity of such political appeals is reflected in the

reluctance of some, but by no means all, Privy Council Office and other government officials to squarely acknowledge the basic political nature of all petitions to the Governor in Council.

An alternate explanation of the function of petitions I have been offered is their use to alleviate unfairness arising out of a strict application of regulatory policy. The McCord Helicopter case is an example to which this explanation would appear to apply. As well, however, I have heard the corollary of this view -- the absence of sufficiently discriminatory or harsh effects as a result of application of a regulatory policy -- used as an explanation for failure by the Governor in Council to interfere with the decision of a regulatory body. Clearly, however, even insofar as relief on petitions to the Governor in Council is plausibly construed as justifiable on what may be called "equitable" grounds, this relief too must be subsumed under the general category of political relief. This flows from the nature of the forum.

While there may be a need to provide a mechanism to review decisions in the light of equitable principles from time to time it could be supplied by limiting the power of Cabinet to that of setting aside and referring back matters for reconsideration and a final decision by the regulatory body. While this might be regarded as broadening the discretionary powers of regulatory bodies, it would provide a means to deliver "equitable" relief in policy matters and would at the same time eliminate the possibility that the power of the Governor in Council to vary or rescind decisions of regulatory bodies may be used in pursuit of other ends and to a total effect that is destructive of the credibility and integrity of the administrative law process. In any event the continued existence of petitions to Cabinet as we know them cannot be said to be necessitated by the simple need for occasional relief from harsh effects arising out of application of a regulatory policy.

Chapter V

PETITIONS TO THE GOVERNOR IN COUNCIL. THE PARTIES, COSTS, NATURE OF THE ISSUES, DISPOSITIONS, REASONS, IMPACT ON THE REGULATOR, AND INCIDENCE OF COURT ACTIONS

The parties to petitions to the Governor in Council tend to be drawn primarily from among the principal parties and interveners to the original hearing or application to the regulatory body. There are occasional exceptions to this general rule when members of the public, business associations, MPs, or provincial governments only become sufficiently interested in a case to become parties at the late stage of the Cabinet petition. Sometimes this belated interest is a result of publicity surrounding the petition stage and at other times a regulatory decision may, by its effects, generate a level of interest not present while the matter was actually before the regulatory body. The adoption of better procedures by regulators for publication of public notices of pending hearings and applications would help to alleviate this phenomenon. In any matter which was the subject of extended public hearings before the regulator the tendency is for all parties actively involved in these hearings with regard to the particular issue placed before the Governor in Council also to participate actively in the exchange of pleadings on the petition. Petitions are frequently filed by a number of these parties either in support of a similar position or directed to distinct matters of public interest to each party.

The costs of the petition process are very much in the control of the parties themselves. All submissions are in writing and it is within the discretion of a party to expend much or little time in preparation of these materials. A petition can easily be launched with the investment of three or four hours. However, in a complicated case, involving numerous parties and a lengthy

exchange of pleadings covering a number of issues, far more time is clearly required to pursue a petition in an aggressive fashion.[73]

The issues are initially identified by the parties although Cabinet may well find issues not adverted to by the parties to be decisive. From time to time submissions become a catalogue of all items of potential relevance and persuasive value regardless of whether, on a strict test, all of these matters would really fall under the scope of interpretation of policy, and thus within the parameters of the statutory review or appeal power uniquely given to the Governor in Council. Reference is often made to points of law and jurisdiction, even though these pertain only on review by the Courts, and to findings of fact with which a petitioner takes issue. Appeals from findings of facts are more properly directed to the regulatory body itself insofar as it has a residual power to reconsider its own decisions.

Reasons, in the commonly understood sense of the word, are never given in an Order in Council disposing of a petition.[74] Privy Council officials explain this practice by saying that it would be inappropriate for the Governor in Council to offer justification for his decision. This argument is grounded solely on traditional habits of thought now better laid to rest along with Crown immunity from tort liability. It is more forthright to recognize openly that political considerations may often prevent Privy Council from publishing full reasons. The argument in favour of the provision of reasons is analogous to that in favour of the establishment of fair procedures in handling petitions. In both cases the "unseemliness" of laying down rules for the conduct of the Governor in Council or limiting the scope for the use of executive power free from the requirement of justification is overwhelmingly offset by decisions by the judiciary that the Crown, insofar as it exercises statutory as opposed to prerogative powers, must use those powers in accordance with the purposes for which they were conferred by Parliament. Procedures fulfilling the requirements of fairness and reasons for decisions are necessary to ensure both that decisions taken under statutory powers are intra vires and that they are seen to be. Privy Council Office officials would appear to prefer, however, that Privy Council be stripped of its statutory powers rather than subjected to procedural strictures or required to give reasons.

The impact on the regulatory bodies themselves of decisions on petitions to the Governor in Council varies greatly depending on the issues at stake and the degree of independence typically exercised by the board, commission or tribunal. The Manitoba cable case is an example where, because the CRTC did not consider itself legally bound by the federal-provincial Agreement, Commission policy on ownership was not directly affected by the setting aside by the Governor in Council of its decisions granting cable licences. In the case of a regulator without control over the policy it applies in its adjudicatory function, the policy position taken by Cabinet in a particular issue brought on petition could have both a specific effect on the particular case and a general effect on policy as interpreted and applied in the future by the regulator. Petitions granted on so-called "equitable" grounds will have a very limited general effect on policy, although similar cases in the future may receive greater attention from the regulator before policy is applied to a harsh effect.

The incidence of court actions on matters brought before the Governor in Council by way of petition is largely a function of the determination and resources of the parties, including the Crown. Court actions typically are, of course, more costly than the petition procedure and costs always function as a deterrent, in the pursuit of any legal remedy provided. For this reason the presence or absence of court actions is not an accurate indicator of public satisfaction or lack of satisfaction with any stage of the administrative law process including petitions to the Governor in Council. For the simple reasons that in recent years:

(i) the number of petitions to Cabinet has increased;

(ii) there are more law firms and public and private groups with interest and expertise in the administrative law area;

(iii) standing has been liberalized;

(iv) class actions are now more than merely conceivable; and

(v) the case law has indicated that the courts will subject the executive acting with statutory decision-making powers to judicial review,

it is to be anticipated that there will be an increasing number of matters brought before the courts as well as the Governor in Council. In some cases this will reflect an attempt to fully utilize all forums for review of a given matter, and in other cases court action will be taken up only where there is perceived to have been a reviewable flaw in treatment of the matter by the executive in exercise of its review and appeal function.

Chapter VI

CASE STUDIES

These cases studies have been provided as a conclusion to the first part of the paper because they give concrete exemplification of the issues and problems associated with the executive review and appeal schemes currently in use. Familiarity with recent cases will assist the non-specialist reader in grasping and evaluating both the significance of the issues and problems discussed in Chapter VII and the adequacy of the models proposed in Chapter VIII to deal with them.

A. PETITIONS TO THE GOVERNOR IN COUNCIL FROM DECISIONS OF THE CANADIAN TRANSPORT COMMISSION

1. The ABCs Case

As late as 1976, it was not possible to operate a charter air flight entirely within Canada because the Air Carrier Regulations required a charter operation to commence within Canada and terminate at a point outside, or commence at a point outside and terminate at a point inside Canada. As a consequence, it was often less expensive to fly to a point outside the country than it was to fly a similar distance within Canada itself.

The advance booking charter (ABC) arrangement had been introduced for international charter flights in 1972. At that time the CTC had sent a letter to the industry and other potentially interested groups requesting their views on the possible application of ABC rules to charter travel within Canada. The 1976 Annual Report of the CTC reports that there was little interest

expressed from either the industry or tourist and travel groups at that time. A similar letter was sent out again in October of 1976 by the Air Transport Committee in response to indications that in the intervening years some interest had developed in domestic ABCs for vacation and travel. Numerous replies to this letter of inquiry were received, some supporting and some opposing, and as a consequence the Air Transport Committee had decided to consider the matter further in 1977.

A review of domestic fares and of the possibility of authorizing domestic advance booking charters (ABCs) commenced in 1976 and was concluded in 1977 with the holding of a public hearing in Ottawa in September of 1977. An article in the Financial Post (September 3, 1977) attributed the Air Transport Committee's decision to hold a public hearing to the persistent efforts of the CAC in attempting to obtain review of domestic air fares in Canada. In any event a formal public hearing did occur in September, 1977 with representations by the major airlines, the travel and tourist industry and CAC. An aspect of the context within which these hearings were held is revealed in the following quotation from the CAC Annual Report for 1977-1978:

> An interesting side light to the public hearings was in the fact that the Minister of Transport, Otto Lang, had tried to stop the Canadian Transport Commission from holding the public hearings at all. Mr. Lang wrote a confidential letter to the Chairman of the CTC, Mr. Benson (former Minister of Finance), suggesting that the CTC give Transport Canada officials access to submissions made on the introduction of domestic ABCs "on a confidential basis". Mr. Lang explained that he wanted his Department to be the one to determine the policy concerning domestic charters.
>
> To his considerable credit, Mr. Benson replied that since the Minister was so concerned, the hearings would be advanced, and he attached a copy of the Notice of Hearing. In answer to the suggestion made by Mr. Lang, that the Department of Transport consider the matter privately and on a confidential basis, Mr. Benson stated:
>
> > "The purpose of a hearing is to ensure that any person interested will be given an opportunity to make representations. Interested persons

include the general public, travel agents, tour operators, government officials, the Consumers' Association of Canada and the air carriers."

He concluded by stating that the Department of Transport could obtain copies of submissions made to the CTC just like any other party."[75]

In a decision dated December 16, 1977 the Air Transport Committee of the Canadian Transport Commission adopted the report of the hearing panel which had recommended approval both of intra-regional domestic ABCs for 1978. The Air Carrier Regulations were then amended to provide a means of implementing the Committee's decision. The restrictions on the introduction of the ABCs were so severe and the experimental period provided for so short that CAC believed that no accurate picture of the demand for domestic charters and their impact on services would be forthcoming from the experiment. CAC therefore brought a petition before the Governor in Council under subsection 64(1) of the National Transportation Act requesting that the restrictions be lifted and a longer experimental period provided.

The Order in Council disposing of this petition on the recommendation of the Minister of Transport, dated January 19, 1978, varied Canadian Transport Commission Decision No. 5369 and Part IV-A of the Air Carrier Regulations made by the Canadian Transport Commission General Order No. 1977-9 Air, dated December 19, 1977, to provide for: (1) a larger number of regional ABCs to provide scope for a full and fair test; (2) that other air carriers holding class 4 licences be allowed to apply for the right to participate in the additional inter-regional ABCs to be permitted as provided above, providing however that the two trunk line air carriers were to have no primary rights to the operation of these additional inter-regional flights; and (3) that the Commission undertake an on-going study to determine whether any other restrictions on domestic ABCs contained in Part IV of the Air Carrier Regulations should be relaxed. In particular the Commission was directed to consider whether mixing the ABC and ITC passengers was desirable or the mixing of originating and returning passengers on the same aircraft would be desirable, and whether the time requirements in respect of advance booking should be reduced. As well, the Commission was directed to amend the Air Carrier Regulations accordingly to implement its findings above. The Regulations in fact were amended throughout the year

of 1978 and the advanced booking period by the end of 1978 had been reduced from 45 to 30 days.

2. The McCord Helicopters Case

The Air Transport Committee in a Decision dated June 14, 1974 denied the application of McCord Helicopters Ltd., for a charter licence on the grounds that current demand for service was being met. This decision was appealed by McCord to the Minister of Transport under section 25 of the National Transportation Act. The Minister in his judgment dated February 11, 1976 directed the Commission to review McCord's application with regard to existing demands for service in view of the fact that no helicopter service was, at that time, actually based in Chetwynd, B.C. On review by the Commission the denial was confirmed.

Although warned by officials of the Minister's office that the chances for success were nil, McCord Helicopters then brought a petition before the Governor in Council, under section 64(1) of the National Transportation Act to vary Decision No. 3896 and Decision No. 4942 of the Canadian Transport Commission to provide for acceptance of McCord's application for authority to operate a Class 4, Group A-RW Charter Commercial Service to transport goods and persons between points within Canada from a base at Chetwynd, B.C. and the issuance of a licence accordingly. The petition was granted by way of Order in Council P.C. 1977-1372 dated May 12, 1977.

This is a curious case. The only explanation based on principle for the petition having been seriously entertained and granted is that a basic point of fairness and equity was involved. McCord alleged that it had discovered the demand for service in Chetwynd but been unable to meet that demand because it did not possess a licence. Its application for a licence was subsequently denied on the grounds that other carriers were now meeting the demand originally identified by McCord. The case is regarded by some legal counsel with experience in transportation matters as a good example of the sort of matter which should never be brought on petition before the Governor in Council as it does not involve broad policy issues, or have any serious implications for the general "public interest". The small businessman, however, may point to the McCord Case as indicating that maintenance of a system of petitions to Cabinet from the

decisions of regulatory boards is essential to protect individual and small business interests from being unfairly and arbitrarily dismissed by decision-makers practiced in regulation of large commercial air carriers where strict and uniform application of policy is more appropriate.

Both positions above are probably overstated for, although the case does, in contrast with other matters brought before the Governor in Council on petition, appear somewhat anomalous, it is probably best regarded simply as a fully legitimate use by a member of the public of a forum for review in which success was obtained by the applicant through the combination of a successful personal lobby and the absence of any overriding political considerations which would have made the Governor in Council reluctant to grant the requested relief. Not to be forgotten is the fact that the Minister of Transport, in his judgment in February of 1976 on the earlier appeal under section 25, had at least looked somewhat favourably on the appeal although he did not choose to grant it directly himself but rather referred the matter back to the Commission for review. The Memorandum to Cabinet prepared by MOT supported McCord's position.[76] In a case such as this, not involving issues of general interest to the public and thus without broad political implications, support from the Minister of Transport is apt to be critical for success.

3. The NordAir Affair

On the sixteenth of January, 1978, Air Canada published notice of its intent to acquire an interest in NordAir Limited by purchase of all of the outstanding shares of NordAir. Numerous formal objections, as provided for under section 27 of the National Transportation Act, were filed with the Canadian Transport Commission and a public hearing was held in Montreal in April of 1978.

The staff at the CTC welcomed the opportunity of a public hearing in the matter as they did not feel themselves to be informed about Air Canada's motives in making the acquisition nor other elements relating to the case. The matter must be seen against a background in which the Ministry of Transport appeared to be advocating a substantial change in the structure of the air industry. The plan originated in a Ministry of Transport

(MOT) planning group which had had meetings with the Air Transport Association of Canada (ATAC) in which members of the CTC were not involved. The product of these discussions was a paper entitled "Structure of the Domestic Air Carrier Industry". The CTC, probably in large part because of their own non-involvement, apparently found it difficult to take the work of this group very seriously and anticipated that the whole matter would die after a period of initial enthusiasm. The staff at CTC also found it difficult to take the findings and suggestions contained in the above mentioned paper seriously because they could not understand how the analysis was being made or what factors had been considered in giving weight to each of the components in each of the options. Because no one either from industry or the MOT was making any attempt to explain this process to them, the CTC felt they really had no option except simply to wait and see what happened. This situation of animosity was apparently aggravated by the CTC decision regarding advanced booking charters in late 1977 which had been embarrassing to the Minister of Transport because it was treated by the media as indicating that the CTC, often not clearly distinguished in the public eye from the Minister, was more firmly committed to the interests of mainline carriers than to the interests of consumers.

The parties of record at the public hearings in Montreal in April, 1978, included the Government of Manitoba, the Government of Quebec, the City of Windsor, the Grand Council of the Crees (Quebec), three M.P.'s, the Director of Investigation and Research under the Combines Investigation Act, the Alliance of Canadian Travel Associations, the Consumers Association of Canada, the Canadian Swimming Pool Design Associates, the University of Sherbrooke, Air Canada, NordAir, six regional airlines, and nine private persons. Both at the hearing and in the press the acquisition was strongly criticized. Among the arguments presented against the acquisition were the following:

1. That the takeover of a regional carrier by Canada's major airline was completely contrary to the Government's established policy of encouraging the growth of regional carriers;

2. That the acquisition was anti-competitive and would result in control by Air Canada over the Canadian charter market by means of its acquisition of NordAir's substantial charter business; and

3. The expenditure of twenty-five million dollars by a Crown Corporation was unwarranted, as there was no demonstrated need for Air Canada to expand into a regional operation and a buyer in the private sector, Great Lakes, was available.

The following excerpts from a letter sent by Robert J. Bertrand, Director of Investigation and Research under the Combines Investigation Act to the Acting Secretary of the Canadian Transport Commission on February 17, 1978 provides a good expression of concerns expressed by various parties at the hearing and pre-hearing stage:

> I am writing with reference to the notice of the proposed acquisition noted above. In this regard I am examining the matter to determine whether further action in accordance with my duties and responsibilities under the Combines Investigation Act is warranted.
>
> On the basis of the information assembled to date, I believe that the proposed acquisition may effect a significant lessening of competition in the air carrier industry and lead to excessive concentration therein. Further it has the potential to produce far-reaching consequences beyond the immediate scope of this proceeding with resulting prejudice to the public interest. Certainly to the extent that the proposed acquisition extends Air Canada's operation into unregulated sectors, it becomes more difficult to effectively regulate that part of its operation that remains in the regulated sector.
>
> Accordingly, I object to the proposed acquisition on the basis that it would be prejudicial to the public interest and I urge the Commission to hold public hearings as part of its investigation. I hope that this letter will serve as notice to the Commission, Air Canada and NordAir Ltée -- NordAir Ltd. of my intention to make representations to and to call evidence before the Commission in respect of the maintenance of competition in relation to the proposed acquisition pursuant to section 27.1 of the Combines Investigation Act.
>
> I have attached as Appendix I specific questions which I suggest should be directed to both parties to the acquisition. I believe the receipt of this

information is essential both to enable me to properly fulfill my role as an intervenor under the Combines Investigation Act as well as to enable the Commission to adequately evaluate the proposed acquisition. The Commission may wish to discuss with the companies the most economical way of providing such data well in advance of any further proceedings.

At this point in time, and in support of my suggested requests for information from Air Canada and NordAir (Appendix I), I view the following to be major areas of concern which should be resolved by further investigation.

1. To what extent will the proposed acquisition increase Air Canada's control of the domestic scheduled traffic? For instance, will Air Canada effectively eliminate CP Air as a factor in competing for traffic originating on NordAir's system and destined for a point outside NordAir's sytem to which both Air Canada and CP Air presently compete? (e.g. a Fort George-Vancouver O & D passenger)

2. Will the proposed acquisition be likely to lead to defensive merger/acquisition proposals by competing carriers thereby producing a further reduction in competition and/or excessive concentration in the hands of a few firms? For example, as a defensive reaction might CP Air seek to acquire Eastern Provincial Airlines, or any other air carrier in a move to maintain its domestic market shares?

3. Is the proposed acquisition consistent with the Government's regional air carrier policy? To what extent will services presently provided by NordAir be curtailed, downgraded (in terms of quality of service) or eliminated after the acquisition? If the acquisition should be approved, what, if any, conditions should be imposed upon Air Canada to assure a level of services consistent with the regional air carrier policy?

4. Will the proposed acquisition result in a significant reduction in the aircraft capacity available to charterers not presently owned or

controlled by an air carrier, and thereby discriminate amongst competing charterers? Would such a result thus produce a lessening of competition in the charter business?

5. Will the proposed acquisition create inherent conflicts of interest for Air Canada to the detriment of the travelling public and other competing enterprises? For instance will Air Canada reduce the aircraft capacity which is presently available through NordAir, for charters to Florida and the Caribbean where Air Canada currently provides scheduled air services? Also, will the domestic ABC experiment be impaired by virtue of Air Canada's competing C.C.C.F. program?

6. Will the proposed acquisition tend to increase the barriers to entry by new firms into the tour wholesaling and tour operating portions of the air industry?

7. Will the proposed acquisition result in overall diseconomies of scale, or other cost increases, such as to require higher average fares/rates or public subsidy, than would be required in the absence of said acquisition?

I have sent a copy of this letter and Appendix I to Air Canada and NordAir Ltée -- NordAir Ltd. at their respective head offices in Montreal, Quebec, by prepaid registered post and have attached hereto an affidavit of service in that regard.

The Director participated actively in the public hearings held in Montreal in April 1978 but did not file a petition to the Governor in Council in the Fall of 1978 with other principal interveners. Any representations made to Cabinet in the matter were presented by the Minister of Consumer and Corporate Affairs.[77]

An exchange of correspondence between the CAC and Otto Lang, the Minister of Transport, prior to the public hearing make it clear that the NordAir matter is an example of the problems posed when a particular case must be decided in a context of evolving policy. Many of the parties filing formal objections to the application had noted that the acquisition of NordAir by Air Canada would be in fact contrary to established Regional Air Carrier

policy. Mr. Lang in his response to such a query prior to the public hearing wrote the following statement:

> As you may know, I am already giving consideration to possible changes in the structure of domestic air carrier industry. These are described in a Transport Canada Discussion Paper that was sent to the Air Transport Association of Canada (ATAC) for comment in September, 1977. The process of consultation with ATAC has not yet been concluded, and may well culminate in substantial revision in the nature and assessment of the options considered. Subsequently, consultations are planned with the provinces and all other interested parties, to ensure that all relevant considerations are given due weight. I will expect the long-term relationship between Air Canada and NordAir to be consistent with this evolving policy framework.[78]

No reference is made here with regard to consultation with the CTC regarding the future of the Regional Air Carrier Policy.[79]

The following excerpt from the reasons of Commissioner Guy Roberge indicates some of the problems posed for the Air Transport Committee by the NordAir Case.

> I cannot but have some reservation, because of the past attitude of Air Canada, one which may be changing, when it is advanced that NordAir will be as free after the acquisition as it was before to carry out its charter business in the fashion deemed advisable on the basis of its sole interest. The situation warrants that one exercise caution and seek to resort to maximum precaution and guarantee.
>
> Later I shall deal with the special measures which I trust can prevent the undue restriction to materialize or can reduce it. I shall give the reasons why in spite of my finding I have not concluded to disallow on the basis of my analysis of the charter services involved.

Structures of commercial aviation in Canada

On behalf of the Attorney-General for Quebec our attention has been directed to the increasing share

of government ownership of the air carrier industry. To the acquisition of P.W.A., by the Government of Alberta and to that of Transair by P.W.A., will now be added, if the proposal is not disallowed, the acquisition of NordAir by Air Canada which is the property of the Government of Canada. The extent or degree of Government ownership as opposed to private ownership is not in itself a matter for the Commission to pass judgment upon. That matter involves a political decision. It involves what a proper allocation of resources on the part of one government or another may be, it involves other factors in respect of which it is also the prerogative of the State to make decisions. (For instance, one may point to the recent amendment contained in subsection 15(1) of the Aeronautics Act.) While it is far-reaching the language of section 27 (The Commission may disallow any such acquisition if in its opinion it will ... otherwise be prejudicial to the public interest) cannot be extended to cover the ground examined by Counsel for the Province of Quebec. Therefore, the argument raised escapes our jurisdiction.

Regarding the development of commercial aviation in Canada ... the changes in question are structural changes which go to the substance of the air policy. These features do not belong to ... the determination which we must make under section 27 of the National Transportation Act. They pertain to the realm of policy and are among the elements which may be considered in due course by the Minister.

* * *

Regarding the prejudice to the public interest ... a negative finding ... would have been linked to my own views of what the structure of commercial aviation in Canada should be and of the policies which should form its basis. It is recognized that policy formation may spin from adjudicative decisions. However, I do not see my way clear to use the adjudicative decision process to equate, in this particular instance, the public interest with my own views and preferences. ... Finally, I should say that section 27 imposes on an adjudicator the duty of exercising his discretion not to disallow if, in this considered opinion, such a solution can

lead to a better result, all told, than would disallowance.

My colleagues, Thomson, Carver and Laffery, have accepted the statement of the President of Air Canada "that it was Air Canada's intention that if the acquisition were completed NordAir would continue to operate as a separate subsidiary and as a regional air carrier within the guidelines of the Regional Air Carrier Policy". Some testimonies or parts thereof ... seem to have struck me in a different way than it is the case with my colleagues.

While I share their confidence and trust in the management of Air Canada, it has become apparent to me that their vision of the economic reality and their evaluation of the temptation which may be felt by Air Canada, do not correspond entirely to mine. To what extent will the demands of the economic reality, as perceived by the management of Air Canada, lead to pressures being exercised on a "separate" NordAir? Efficacious resistance to that temptation depends much on the degree of that separateness and on the mechanism which is set in place when the acquisition is completed. It is in that light that I have examined the precautions that could be taken in order to prevent, or to minimize at least, certain of the results which were outlined by the participants in the hearing or which have come to the fore in the course of our investigation and which, in the charter area, I consider as being conducive to an undue restriction of competition.

The present instance is not one of consolidation of regional carriers nor of common ownership of regional carriers within a larger region (for instance through the purchase of the shares of Transair by P.W.A.) but it is an instance of ownership of a regional carrier by a trunk carrier. The policy enunciated on behalf of the Government over the years has foreseen neither one nor the other situation. That policy has been directed to the assignment of spheres of influence and activities. It is silent in respect of ownership. Over the years the Commission has not disallowed the acquisition of local carriers by regional carriers presumably because what we must be concerned with is not ownership <u>per se</u>, but what happens as regards

the spheres of activities assigned to each category of carriers. What we must determine is whether the activities will be allowed to continue unimpaired after the acquisition within the parameters of the governing policy.

* * *

However, if a real separateness is maintained, in spite of the ownership situation, I am confident that, although constrained, the competition which is peculiar to commercial aviation in this country, the integrity of the services to be performed on all fronts and the public interest as well can be safeguarded.

Where does the power lie to achieve those safeguards? With the Commission in some measure, as I have indicated earlier. Tc a greater degree and in another context the means of establishing and maintaining real separateness between Air Canada and NordAir rest with the Minister of Transport.[80]

Decision No. 5539 of the Air Transport Committee was issued on July 28th, 1978. The Committee decided not to disallow the acquisition of NordAir Ltd. by Air Canada stating that they feared that to disallow the acquisition would result in instability in the air industry in Ontario and Quebec.

Petitions to the Governor in Council under subsection 64(1) of the National Transportation Act against the ATC decision were filed on August 25, 1978, by the Province of Ontario and on August 28, 1978, by the Alliance of Canadian Travel Association, the Consumers Association of Canada, Sun Tours, and Great Lakes. Ontario argued that if a restructuring of the air industry was to occur that it must come about deliberately as the result of carefully considered policy directions and not as the result of the ad hoc decisions of an administrative tribunal. Ontario also insisted on the need for greater consideration of provincial concerns in the construction of federal policy.

In its petition, Great Lakes argued that the significant policy issues at stake -- private versus public interest, competition versus monopoly and federal policy as opposed to strongly expressed local needs -- should not be dealt with lightly. Great Lakes found strong

support for its petition focusing on government policy in the remarks of Guy Roberge quoted above and in the remarks of Commissioner L. R. Talbot in his dissenting judgment. Although Roberge had indicated that the Air Transport Committee lacked jurisdiction to consider the question of government ownership under the heading of "public interest", Commissioner L. R. Talbot had stated that:

> The degree of ownership of the aviation industry in Canada by the public sector (either by federally-owned or provincially-owned corporations) versus the degree of ownership by the private sector is a matter of public interest and is a matter that should not be accelerated by the non-disallowance of this intended acquisition.[81]

There is no doubt that significant policy issues were and still are at stake in the NordAir case. The theme of concentration of corporate control and ownership and its impact on the public interest has arisen in a number of other cases before regulatory boards in the last two years. The weight given this consideration by individual regulators appears to depend heavily on their particular ideologies. It would therefore be appropriate for Parliament to review the policy content and effectiveness of present legislation designed to foster competition and perhaps to etch more clearly lines of statutory provisions on the subject.

Air Canada submitted its reply to the petitions on September 15, 1978 and replies by petitioners to the reply of Air Canada were submitted in late September.

Meanwhile Quebecair had applied to the Review Committee of the Canadian Transport Commission for review of the Air Transport Committee Decision. Their application, filed on August 29, 1978, emphasized the policy set forth in section 27 of the National Transportation Act. All interveners of record before the Air Transport Committee were informed by telex of Quebecair's application but unanimously chose not to participate in that review, many of them having just filed petitions to the Governor in Council. The Governor in Council disposed of the petitions against Decision 5539 by way of Order in Council P.C. 1978-3389, dated November 6, 1978, in which the Governor in Council declined to vary or rescind the decision. The Review Committee of the Transport Commission subsequently disposed of Quebecair's application for

review of the same decision by reference to the above-mentioned Order in Council. The matter was temporarily concluded by the following press release by Mr. Lang, the Minister of Transport, on November 7, 1978.

AIR CANADA/NORDAIR

OTTAWA -- Actions which will preserve the independent operations of NordAir from Air Canada were announced today by the federal government.

Transport Minister Otto Lang said the Cabinet, while technically approving the purchase by Air Canada of shares in NordAir -- as permitted by the Canadian Transport Commission -- had agreed that Air Canada should transfer such shares to the government directly. The operation of NordAir, which the CTC had insisted be kept independent of Air Canada, would therefore be clearly independent.

"It is our intention to give NordAir the opportunity to continue to develop as a regional carrier and at the same time the government will pursue discussions with the other principal non-mainline carriers in the eastern half of Canada towards the development of a smaller number of strong regional lines than are operating now", said Mr. Lang.

He said this could occur through mergers or other forms of joint action which would result in the eastern half of Canada being served by a carrier or carriers with a stronger economic base better able to offer efficient service at the most reasonable fares.

Mr. Lang acknowledged that the reorganization of the eastern regional carriers would be a complex undertaking involving many practical difficulties. He was confident, however, that such a change could create a much more rational pattern of services and operations that would benefit the public and carriers alike.

"The government's involvement is appropriate because of the large role which will be played by overall policy considerations in the route changes which may result. We will want good and efficient services at reasonable rates", said Mr. Lang.

"The government intends that NordAir will be restored to the private sector", said Mr. Lang. "It is my objective to accomplish this within 12 months."

The minister also stated that the government is considering the manner in which current restrictions on CP Air Limited should be eased and how CP Air and Air Canada along with the regional airlines and Wardair, a major charter operator, may continue to be strengthened as our major airline operators in Canada and abroad.

Mr. Lang announced that the government has no objection to CP Air applying to the Canadian Transport Commission to operate into the Atlantic Provinces in conformity with the CTC's regulatory requirements.

Information from sources within the Ministry of Transport indicates that the recommendations to the Governor in Council presented in Memorandum form by the Minister on this petition were prepared on the specific direction of the Minister overriding all objections by MOT staff involved in consideration of the merits of the petition. The future ownership of NordAir is undecided though in many circles it is doubted that the Minister of Transport actually planned to see it sold back to the private sector. Taken as a whole the case serves as a good argument both for advance planning in the policy area as a means to avoid situations such as this where major policy changes are effected only through decisions in particular cases and for a restructuring of control over policy in transportation to clarify the respective functions of the CTC and the Ministry of Transport.

B. PETITIONS TO THE GOVERNOR IN COUNCIL FROM DECISIONS OF THE CANADIAN RADIO-TELEVISION AND TELECOMMUNICATIONS COMMISSION

1. The Manitoba Cable Case

The outlines of this case are well set out in the CRTC Annual Report 1976-77.

The Commission published a public notice on 4 October 1976, "Request for applications for cable television service to certain areas of Manitoba".

The notice reviewed a previous Commission Decision 74-201 (5 July 1974) approving a head-end at Tolstoi, Man., setting out criteria for applications including ownership of headend, amplifiers, and drops. Applications were to be submitted by 20 December 1976, for a public hearing to be held at a later date.

However, on 30 December, the Commission issued a public notice saying that additional time had been requested by applicants, and the deadline accordingly was put forward to 31 March 1977. The notice then went on to summarize developments in the Manitoba cable television situation since the 4 October notice. The Governor General-in-Council, on the recommendation of the Minister of Communications as authorized by the Broadcasting Act, section 23, had issued an Orders in Council setting aside decisions authorizing the cable television licences issued for Selkirk and Portage la Prairie. (In Decision 76-650 and 76-651, 16 September 1976, the Commission issued Winnipeg Videon's licences at Selkirk and Portage la Prairie and Grand Valley Cablevision's licence at Brandon. Both decision said that "any contractual agreement entered by the licensees with the Manitoba Telephone System is subject to Commission approval." In renewing Winnipeg Videon's licence at Winnipeg in Decision 76-544, 18 August 1976, the Commission stipulated that the licensee was to own the local head-end, drops, and amplifiers, and any contractual arrangements with MTS were subject to CRTC approval.) Therefore the Commission said it was again prepared to receive applications for these areas. The notice included the Commission's original public announcement for these areas, issued 1 August 1975.

The 30 December announcement went on to say that one point in the August 1975 notice called for further comment: the Commission's policy had always been to require that a cable licensee own, as a minimum, the local head-end, amplifiers, and drops which form part of the cable television distribution system. But on 10 November 1976, an Agreement was concluded between the Governments of Canada and Manitoba on the regulation of certain communications services in the Province of Manitoba. This Agreement ... embodies an approach to the ownership of cable facilities which differs from Commission policy.

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 the licensee exercise effective control over their cable television undertakings in order:

a. to comply with the requirements of federal statutes and regulations relating to broadcasting undertakings
b. to respond fully to Commission policies and to be accountable directly to the Commission for the manner in which the cable television undertaking is carried on
c. to supply to subscribers all services authorized by the Commission
d. to be in a position to extend service areas as required
e. to be able to negotiate and conclude cost sharing arrangements with other licensees, if desirable or necessary, for the extension of services
f. to be directly accountable to the Commission for rates charged to subscribers and to be able to satisfy the Commission that the rates are attributable solely to the provision of the licensed cable television service
g. to be in position to identify and separate costs of the distribution facilities from those of the microwave facilities
h. to respond to and solve service complaints by subscribers and for this purpose to maintain primary contact with subscribers
i. to contribute to the design of the distribution system in order to ensure compliance with federal technical standards
j. to ensure that the cable television distribution facilities will not be used in a manner prejudicial to broadcasting services in Manitoba.

All proposals for cable television licences in Manitoba should deal with the above concerns which underlie the Commission's ownership policy.

The agreement between the Department of Communications ("Canada") and Manitoba was attached as Appendix B to the notice. The parts of the agreement concerning hardware ownership are (from the preamble):

> The Province has responsibility for regulating and supervising common carrier services provided through its agency, the Manitoba Telephone System, or other agencies of a similar character subject to the regulatory and supervisory authority of the Province (any such agency hereinafter referred to as the Agency): facilities and apparatus owned or under the control of the Agency that are or may also be used by broadcasting receiving undertakings in Manitoba.

Article V, "Cable-carrier hardware arrangements", reads as follows:

> For the purpose of providing authorized programming services to the public, a broadcasting receiving undertaking may lease from the Agency all necessary facilities and apparatus excluding signal modification and studio equipment, channel modulators, and the antenna and head-end of a broadcasting receiving undertaking, the terms and conditions under which the Agency provides such facilities and apparatus being agreed between the Agency and the undertaking in accordance with applicable statutory provisions.[82]

Since the above-described events in 1976, the CRTC, while continuing to affirm the general value of its own cable ownership policy, has approved cable licences for Manitoba with terms and conditions which take into account the cable ownership policy of the Manitoba government. Prior to 1976, the actual cable, representing one third of the capital investment in cable hardware, was already owned by the government owned phone company. The terms of licences approved in 1977 allow an additional one third of the capital investment to be owned by phone companies and leased to cable operators. This one third represents the amplifier component. CRTC policy still requires that cable licensees own the head-ends and drops. The phone company in Saskatchewan is also government-owned and therefore the provincial government in Saskatchewan wanted cable ownership policy to be applied in Saskatchewan with a result similar to that

obtained in Manitoba. The provincial government in Saskatchewan was perceived by CRTC to be in a position to seriously impede implementation of CRTC cable ownership policy, and accordingly the CRTC adjusted the terms and conditions of Saskatchewan cable licences to take into account the provincial government position. Throughout the rest of Canada, where provincial governments have wanted quite different results than those obtained in Manitoba and Saskatchewan, CRTC cable ownership policy has been applied without qualification. The outcome of the case is indicative of the ability of CRTC to respond realistically to the particular needs and preferences of individual provinces.

2. The Telesat Agreement

Following public hearings held during the period from April 25 to June 2, 1977, the CRTC decided that the Telesat Canada Proposed Agreement with Trans-Canada Telephone System (TCTS) would not be in the public interest.[83] The Commission considered that its basic jurisdiction under subsection 320(11) of the Railway Act was limited to that of approving or withholding approval of agreements submitted under that section, and that the criteria for approval is the public interest viewed in the broad sense. The Commission divided "public interest" into two broad categories, the first encompassing such basic regulatory issues as the effect of the Agreement on the requirement for effective regulation of rates and the prohibition against unjust discrimination or undue preference and the second including a number of questions of general public policy.

The Commission concluded with regard to the first category that approval of the Agreement would render it more difficult to identify the costs and economies of satellite services offered to the public, would create problems for effective intervention in Telesat rate cases, and would have the effect of significantly reducing incentives to efficiency which arise in rate proceedings. The Commission also found that approval of the Agreement would increase the likelihood of undue preference to TCTS and thus prejudice the ability of the Commission in the future to adjudicate on complaints of unjust discrimination under the Railway Act. Under the second head of issues raised, those of public policy, the Commission found that the effect of the Agreement on the power and autonomy of Telesat, on the availability and

expansion of satellite services in Canada, and on competition in the telecommunications service would be deleterious. In short, in Telecom Decision CRTC 77-10, dated August 24, 1977, the CRTC did not approve the Agreement.

Prior to the hearing the Commission had ordered that Bell Canada and B.C. Tel, both federally regulated parties to the Agreement, be added as applicants in addition to Telesat. Thirty-four submissions were received by way of intervention. The following interveners appeared at the public hearing: CN/CP, the Director of Investigation and Research, the CAC, the Minister of Transport and Communications for the Province of Ontario, the Minister of Communications for the Province of Quebec, the Canadian Arctic Gas Study Ltd., the Canadian Cable Television Association, Cablesat Ltd., the Attorney of British Columbia, the Inuit Tapirasat, the Canadian Association of Broadcasters, Saskatchewan Telecommunications, the Canadian Federation of Communications Workers and H. Edmunds.

Petitions against the decision of the CRTC were filed by Telesat Canada on September 15, 1977, by Bell Canada on September 23, 1977 and by B.C. Telephone Co. sometime prior to September 29, 1977. In its Reply, filed with the Governor in Council on October 31, 1977, the CAC adopted two positions in the alternative. The first was to suggest that the Governor in Council must decline jurisdiction in the matter because the Governor in Council had considered the very matter before it by way of petition prior to the application for approval to the CRTC by Telesat Canada. Attached to the CAC Reply as Appendix A, was a copy of the Memorandum to Cabinet entitled "Proposed Telesat Canada Membership in the Trans-Canada Telephone System". CAC argued that because it could be seen that the issues presented on petition were identical to or encompassed by the issues raised in the Memorandum to Cabinet, the Governor in Council was in effect being asked to entertain an appeal from its own previous decision in which it hadapproved the Telesat-TCTS Agreement in principle subject to the jurisdiction of the CRTC. In further support of this submission, the CAC appended as Appendix B, a letter dated December 14, 1976 and marked "confidential" from the Minister of Communications Jeanne Sauvé, to the Chairman of the CRTC, Harry Boyle, in which it was communicated that the government had "agreed that the Association of Telesat Canada with the Trans-Canada Telephone System as a member of TCTS was acceptable" subject to some conditions.

In the alternative the CAC submitted that the Governor in Council should undertake review of the decision of the CRTC only if it was shown that new evidence was available, new facts had arisen, or the decision of the CRTC contained a basic error of fact or law. Prior to filing the Reply counsel for CAC had engaged in a correspondence with Prime Minister Trudeau, in which the CAC objected to procedure used on petitions to the Governor in Council in the following terms:

> It must be emphasized that in any court, whether it be the lowest court in the land or the Supreme Court of Canada, the ability of a party to bring a matter before that particular court, without notice to any other party of record, is an extraordinary procedure which must be granted only in the most extreme circumstances.
>
> Consequently, we find it difficult if not impossible to understand the basis upon which the Governor in Council accepted the petition from Telesat Canada without being satisfied that all other parties of record in the proceedings before the Commission had been notified, served with the petition and given notice of a period in which to respond.
>
> To characterize the petition, as has been done by the Privy Council office, as a private matter between the petitioner and the Governor in Council is totally unacceptable, inconsistent with the notion of a statutory appeal and a fundamental violation of the notion of fairness or natural justice.[84]

At the same time CAC had argued that the petitioner Telesat Canada by filing a petition against the Decision by CRTC had placed the Governor in Council in the "embarrassing position" of sitting in an appellate capacity on a decision in a matter on which it itself had previously taken a position and made a recommendation to the CRTC. The CAC therefore requested that the Governor in Council decline to exercise jurisdiction. The Prime Minister in his response maintained that these petitions to the Governor in Council under subsection 64(1) were not strictly speaking requests for judicial appeal, but only requests for consideration of the matter on the grounds of public policy. In view of this distinction the government did not agree that the Governor in Council

should decline to entertain the petition by Telesat Canada. Whether this distinction is one with a difference is a matter of opinion.

On November 3, 1977 the Governor in Council issued his decision on the petitions from the CRTC Decision 77-10 by Orders in Council P.C. 1977-3152 in which the Governor in Council concluded that "the public interest will be better served if the Telesat Canada Proposed Agreement is approved". The Governor in Council, acting on his own motion, therefore varied Telecom Decision CRTC 77-10 dated August 24, 1977, so as to provide for the approval of the Agreement between Telesat Canada and the TCTS. A press release from the Minister of Communications, Jeanne Sauvé, also released November 3, 1977, explained that the government had "decided to vary this decision in such a way as to approve the proposed agreement" (i.e. reverse the decision), with due regard to broad issues of public policy which "lie beyond the reasonable purview of the CRTC". Madame Sauvé continued

> ... the range of factors affecting the policy issues is far wider than that which the CRTC could reasonably be expected to consider. Many of these issues lie well beyond the purview of the Commission. Because adequate statutory mechanisms through which the government could have provided clear policy guidance to the CRTC are not yet available, the Commission was unable to accord these policy matters due consideration. The government's conclusions have accordingly reflected its view of these broader issues while taking full account of the views of the CRTC and all interested parties who either participated in the hearing or have since made representations to the Governor in Council.

In view of the fact that the Minister of Communications had fully communicated her views in detail to the Chairman of the Commission in the letter referred to above and appended to the Reply of CAC to the petition of Telesat Canada, one can only assume that what she means here by "adequate statutory mechanisms" would be a power to issue binding directives to the Commission which would have rendered it impossible for the Commission to conclude that the Agreement in question was not in the public interest.

The CAC subsequently applied to the Federal Court Trial Division, under Section 18 of the Federal Court

Act, for a declaration that the Governor in Council had exceeded his jurisdiction by using the power to vary a decision bestowed on him under subsection 64(1) of the National Transportation Act to reverse a decision. The matter was heard by Gibson J. and judgment rendered on April 6, 1978, dismissing the action with costs. Gibson J. held that the word "vary" has a very wide connotation, and that he was, therefore, of the view that the Governor in Council in this case, "in reversing the decision of the CRTC by substituting his decision for that of the CRTC and thereby causing an entirely different result to obtain, was lawfully exercising his power to vary prescribed in subsection 64(1) of the National Transportation Act; and as a consequence, the Order in Council, P.C. 1977-3152, dated November 3rd, 1977, has no jurisdictional defects and is intra vires the powers of the Governor in Council."[85] The case was heard on appeal to the Federal Court of Appeal on January 25, 1979 by Jackett C.J.C., Le Dain and Pratte JJ. and dismissed without reasons.

3. The Bell-Saudi Arabia Contract

This case, now before the Governor in Council by way of a petition by Bell Canada from Telecom Decision CRTC 78-7 and Telecom Decision CRTC 79-1, like the Telesat case is an instance where Commission considerations with regard to rate regulation and the political and policy concerns of the Cabinet may not coincide. The matter in question arose as an aspect of Bell Canada's application for an increase in certain rates entertained in two months of public hearings in May and June of 1978. In consequence of these hearings, the CRTC released Telecom Decision CRTC 78-7 concluding among other things that:

> (a) "... the Commission considers the Saudi Arabia operations to be integrally related to Bell Canada's telephone business." (Decision 78-7 at page 65);
>
> (b) "As regards investor and managerial incentive, the Commission believes that in a regulated company like Bell Canada, it is normal, fair and appropriate for subscribers' rates to reflect the benefits arising from a project such as the present one, inasmuch as it is through the efforts to meet their telecommunications requirements that the

Company has been able to develop the expertise to compete successfully on an international basis to perform the project." (Decision 78-7 at page 66);

(c) "At this time, however, the Commission finds that there is no reasonable conclusion on the evidence in this case but that all the revenues from the Saudi Arabian contract be treated as part of the Company's ordinary revenues for regulatory purposes." (Decision 78-7 at page 66)

(d) "It is therefore ordered that the Company's estimated revenues for regulatory purposes be adjusted, for each of the years 1978 and 1979, to include the pre-tax revenues to be realized in each year under the agreement with the Government of the Kingdom of Saudi Arabia." (Decision 78-7 at pages 66 and 67).

On October 6th, 1978 Bell Canada applied to the CRTC requesting a review of the above excerpted portions of Telecom Decision CRTC 78-7. The Commission issued Telecom public notice 1978-27 on October 23, 1978, inviting submissions as to the criteria which it should use in deciding whether or not to exercise its discretion to review under section 63 of the National Transportation Act and, in effect, how those criteria should be applied in the present case. Numerous submissions were received. The Commission appointed a committee consisting of three members of the Executive Committee who did not participate in the original decision to constitute a Review Committee. The unanimous decision of the Review Committee was that the application for review should be denied. The criteria applied required the applicant to demonstrate on a prima facie basis that one or more of the following existed:

(1) an error in law or fact;

(2) a fundamental change in circumstances or fact since the decision;

(3) a failure to consider a basic principle which had been raised in the original proceeding; or

(4) a new principle which has arisen as the result of the decision.

In the case in question, none of these criteria were found to be met. The Decision of the Review Committee

was released February 2nd, 1979 as Telecom Decision CRTC 79-1.

Bell Canada in their petition under subsection 64(1) of the National Transportation Act dated March 2nd, 1979, asked the Governor in Council to vary or rescind the two Telecom decisions above-mentioned on the following grounds inter alia that:

(1) the Commission was in error in finding the Saudi Arabia project to be as a matter of fact integrally related to Bell Canada's telephone business; Bell neither admitted nor placed in dispute the underlying principle;

(2) its activities in Saudi Arabia are beyond the Commission's regulatory jurisdiction;

(3) the maintenance of separate accounts prevents the occurrence of any cross-subsidization;

(4) the "profit centre" concept is commonly used in Canadian regulation, for example, in the separation of CP Telecommunications from CP Rail;

(5) contributions by way of expertise and materials from Bell Canada would be fully compensated under service agreements included in the rate base for regulatory purposes;

(6) the Commission by virtue of its inclusion of the net profits of the Saudi Arabia contract for the purposes of regulation had unfairly deprived Bell Canada share holders of 132.3 million dollars (estimated) net income after tax over the five-year period from 1978 to 1982.

(7) the long-term effect of the CRTC Decision would be to "crush Bell Canada initiatives" to pursue and engage in international contracts and the absence of such initiatives would be detrimental to the Canadian economy.

As of early June, 1979, the petition apparently had not been disposed of. If it is granted it will be perceived by its principal opponents as an example of the use of executive review, in which political rather than regulatory considerations weigh heavily, to disrupt the orderly development of the policy of a regulatory board

attempting to deal with the intricate problems of cross-subsidization as these arise within its particular area of expertise. In other circles, among Bell Canada shareholders for example, it may be seen as an instance in which executive review has prevented harm to the "public interest" that might result from a uniform application of regulatory policy. It is my hope that the present discussion of executive review powers may be of some assistance in weighing the merits of such conflicting allegations.

Chapter VII

EVALUATION OF CURRENT PRACTICES AND PROCEDURES IN THE EXERCISE OF EXECUTIVE REVIEW POWERS

This chapter consists of four parts, the first three establishing the criteria with reference to which the evaluation of current practices and procedures in the exercise of executive review powers is performed in the fourth part and on which the recommendations in Chapter VIII are based. Use of such an explicit evaluation procedure is rare in a study paper. It is employed here in an experimental attempt to avoid the common flaw of intermingling conclusions, facts, opinions and silent premises to the point where the belaboured reader is either persuaded or repulsed but may not be able to pinpoint where he/she was won or lost. Constructive debate is more apt to occur when the parties are clear about the nature and extent of their disagreement. First, the "values" with reference to which the assessment is to be performed are identified. Second, the governmental function commonly ascribed to executive review and appeal powers is examined and the extent to which it is desirable to have regulatory policies subject to control by the executive is itself placed in question. Thirdly, recent judicial decisions in the area of administrative law concerning directives, fettering of the discretion of statutory decision-makers, delegation of ministerial powers, bias on the part of the administrators and administrative boards and review tribunals, the concept of ultra vires, and the duty of fairness, are examined for the purpose of extracting an indication of current tendencies in Canadian administrative law with a view to applying emergent legal principles in the following assessment of current powers and practices in the area of executive review.

Only when the standards or measures to be relied on have been clearly identified is the assessment itself

made. The use of different standards than those relied on here might result in the identification of other problems with executive review than those I perceive to exist or the proposal of a distinct set of recommendations. I have merely argued that insofar as priority is placed as it is in this paper on the enhancement of specific and clearly identified values and principles in government, current executive review and appeal powers and practices are, on examination, revealed to be problematic and in need of change. The recommendations I put forward to resolve the problems identified are grounded on this same set of values and principles.

A. VALUES USED IN THE ASSESSMENT

Any values chosen for use in conducting any assessment of anything, whether it be the topic under discussion here, the performance of a classical dance, the organization of a desk drawer, or the allocation of the resources available to a person or group of persons, can be justified either by reference to their alleged intrinsic worth or their instrumental role in achieving a goal where the intrinsic or instrumental value of this goal in turn is, rightly or wrongly, either assumed or in turn justified. Any choice of values thus has a context, a frame of reference. Particulars under assessment can be made the subject of meaningful value judgment as to their instrumentality in relation only to this frame of reference whose value is presumed or in turn justified. The process of rational justification always grounds itself ultimately on an assumption of value or the presumed truth of a value judgment which itself is not subject to justification save by way perhaps of circular argumentation. Conflicting judgments of value can easily arise even within a single frame of reference as a result of diverse projections of the instrumental value of particulars or distinct conceptions of the essential characteristics of the frame of reference.

The frame of reference used here as a goal whose inherent value is presumed for these purposes, is the actual and apparent exercise of statutory executive review and appeal powers according to law, that being as defined by positive law in Canada seen within the common law tradition and the Parliamentary system of representative government. Any changes in the positive law proposed

here are thus justified by an argument to the effect that they will serve to realize or to reassert principles traditionally regarded as essential to a parliamentary system of representative government with due reference to the expanded responsibilities of government and other new factors of contemporary relevance.[86]

The characteristics essential to this frame of reference, that is, those without which it would be something "other than" that which it is, are regarded as being of "value" and, for simplicity's sake, may be called "values" (although usually referring to something as a "value" in this fashion means -- "this is a quality in our frame of reference that we value") as may characteristics that are instrumental to the achievement or maintenance, as the case may be, of the frame of reference itself. Other discussions might use frameworks that were broader yet and evaluate the value of particular systems of government as instruments for the achievement of broader goals. This study paper merely presumes the Parliamentary system of representative government as given and asks how the values inherent in that system and its principles can be applied to meet new demands.

The values to be used in this assessment of executive review powers are very straightforward and were chosen as being those qualities essential to government in accordance with the law under a Parliamentary system of representative government. They are: (1) openness, (2) opportunity for informed public and Parliamentary debate regarding policy and legislation, (3) consistency in interpretation of law, including its policy content, (4) uniformity in application and enforcement, and (5) speed with accuracy. In addition, if the parliamentary system of representative government itself is to be strengthened, mechanisms must be designed to achieve the following goals: (1) legislation by representatives of the people, (2) parliamentary review of legislation made by delegated authority, (3) ministerial accountability to Parliament, (4) protections against conflict of interest and abuse of power, (5) judicial independence, and (6) judicial review.

B. THE FUNCTION OF EXECUTIVE REVIEW AND APPEAL

The function attributed to executive review and appeal powers is highly dependent on the view adopted of

the role of the executive within a parliamentary system. At one extreme it is possible to identify the government of Canada with the government of the day. If this view is adopted it is possible to regard the executive review and appeal function, like control by the executive over the machinery of legislation and over the content of delegated legislation where the regulation-making power is vested in the minister or the Governor in Council, as yet another fully legitimate means to ensure that the policy views of the government of the day are indeed given expression and proper interpretation in the decisions of statutory decision-makers as well as in primary and secondary legislation. It is within this view of the role of the executive that the bestowal of a general directive power in the hands of ministers in my opinion most naturally finds its place.

Supporters of increased ministerial directive powers in the regulatory area have argued that the net result will be increased accountability to Parliament, while the extension of ministerial power will be merely an instrumentality to that end. The idealism of this point of view is to be admired. A variety of pragmatic considerations make it preferable, however, to use other instruments to guarantee direct accountability to Parliament with regard to policy in those instances where Parliament has deemed independent regulation desirable. Allocation of control over policy interpretation and implementation to the executive, by contrast, would place complete reliance on the principle of ministerial responsibility to provide accountability to Parliament.

If on the other hand the principle of parliamentary supremacy is emphasized, then one could argue for a diminution of the scope for uncontrolled legislation by delegated authority or the creation of effective Parliamentary controls over the use of that authority, effective control or direction by Standing Committees of Parliament over at least aspects of the machinery of legislation and a redefinition of the role of the executive outside Parliament into that of head of state and chief administrator. Within this view the primary role of executive review and appeal powers, if any, would be to provide for extraordinary relief in instances where strict application of policy contained in primary or secondary legislation would have unduly harsh effects or to correct the most obvious errors of departmental or independent statutory decision-makers with regard to interpretation of policy as set out in primary or secondary

legislation, where these errors were not such as to render the administrative decisions subject to review in the courts on the grounds of error of law. This limited appellate role could be filled by the regulatory review committee in appeals from independent decision-makers without the hazard of executive political interference and, on appeals with leave, by the courts. The suggestion that the courts become involved with occasional appeals from regulatory decisions based on policy interpretation anticipates the development of articulate regulatory policy. The executive would have a central role in shaping policy but not uncontrolled powers of dictation.

Somewhere between these two extremes lies a view of the role of the executive within the parliamentary system which is most appropriate for each matter under federal jurisdiction given the priority placed on the qualities and goals listed above and the heavy demands placed on modern government by its multiple responsibilities. It is clear that appropriate models can be formulated for control over policy for each area of administrative law having to do with regulation only by asking by what mechanism political responsiveness is to be best achieved at each of the stages in the regulatory process, that is, those of policy generation, policy interpretation, policy implementation, policy enforcement and policy review and appeal. Each of the alternative models proposed in Section A of Chapter VIII, both designed to enhance the values and goals listed above, allocates control over policy quite differently. The first assigns the major role in policy development and interpretation to the executive, thus ensuring control by the government of the day. The second, designed for sectors in which independent regulation is desired, places responsibility for policy squarely in the hands of the regulatory body free from executive interference and subject in its use of delegated legislative power only to control by Parliament and the courts.

C. RECENT JUDICIAL DECISIONS AND EMERGENT LEGAL PRINCIPLES

Recent judicial decisions dealing either with the role of the executive or the function of and parameters to be placed on executive review and appeal powers are of

value in identifying emerging legal principles relevant to this assessment. These decisions clarify the law with regard to six key issues: the legal status of directives, fettering of discretionary decision-making power, delegation of ministerial powers, bias, ultra vires, and the duty of "fairness".

1. Directives

Recent case law with regard to "directives" has often been primarily concerned with the legal status of particular directives for the purpose of determining whether they were properly reviewable under sections 18 or 28 of the Federal Court Act. In the process, however, some clarity has been achieved. Most importantly it has become clear that the courts are prepared to make reference to the overall purpose of a statute and the nature of the rights it governs or creates in order to decide what procedural rights are implied and thus, in turn, when it is appropriate for the courts to intervene to protect these rights.

In a series of cases[87] dealing with inmate discipline the courts have come to the conclusion that, although directives issued pursuant to the regulations under the Penitentiary Act confer no "legal rights" on inmates, the nature of the potential impact on the inmate of a disciplinary decision in any given case may dictate that the procedures used in arriving at the decision must be "fair". The issues surrounding "directives", "guidelines", and "rules", i.e., documents issued either informally in the course of fulfilling administrative duties or pursuant to a provision in regulations, are thus as closely tied to the issue of vires as is the matter of delegation of statutory decision-making authority. Rules, directives, and guidelines, as well as decisions taken with delegated decision-making power, may be ultra vires the enabling act even if made and exercised pursuant to a statutory authority. The exercise of administrative discretionary powers are, as a consequence, all subject to review under section 18 of the Federal Court Act with regard to the issue of vires whether or not they are purportedly exercised pursuant to "law".

The legislative scheme used in any given statute will influence the court in its decision as to whether or not any particular directive is intra vires the statute. Where the legislation confers sweeping powers of "control

and direction" on a Minister over an agent of the Crown, it is difficult to argue that any particular "directive" is ultra vires the act or was established in the absence of an appropriate information gathering and decision-making process. The comments of Le Dain J. in Re A.G.I.P. S.P.A. and the Atomic Energy Control Board, May 24, 1978, bear this out. Le Dain stated:

> The decisions of the Atomic Energy Control Board in the exercise of its licensing functions are made subject to direct ministerial control by means of directions expressive of governmental policy. This shows the very special position of the board in this field: it is not exercising a truly independent adjudicative function on issues that viewed as a whole lend themselves to a judicial or quasi-judicial process. The reservation of the ministerial power to make directions upon the basis of recommendations of a review panel composed of representatives of the departments concerned as well as the board, indicates that the issues in the final analysis are seen to be complex ones of national policy, involving in some cases questions of security over which the government acting in its executive capacity must retain ultimate control.[88]

These comments may be usefully contrasted with those of Chief Justice Laskin in the reasons of the majority of the court in Capital Cities Communications Incorporated v. CRTC[89] with regard to the role of fair procedures in the adjudicative process in justifying the application of CRTC policy set out in the form of guidelines in a policy statement, rather than in regulations promulgated pursuant to statute. It is clear from comparing these cases, and those referred to above concerning inmate discipline, that each case or class of cases in which the legality of administrative guidelines, rules, or directives comes into question must be decided anew. The general scope and nature of the powers conferred by the statute on the administrator making the rule in question, the nature of the rights dealt with in the statute and the extent to which, in the light of these powers and rights, the court deems it appropriate that executive or administrative power to decide and establish policy be subject to procedural requirements must all be assessed.

2. Fettering of Discretionary Power

Fettering of discretionary decision-making power is an old issue of extreme relevance to problems central to the practices and procedures of independent regulatory bodies. In that context the issue is inextricably linked with the problem of defining "policy", for, odd as it may seem, there appears to be considerable uncertainty as to just what "policy" is. Policies establish goals and priorities to guide the allocation of resources in achieving those goals. Proclamation of a "policy" implies that there is some scope for choice and the power, or possibility of power, to implement those choices. In the absence of probable power or of choice theories may be constructed but policies are not.

The policy content of statutes tends to be cast in broad terms and power to implement this policy through regulations, rules and adjudication is delegated. The regulatory process, like the departmental administrative process, then uses a combination of regulation, rule-making and adjudication to give precise content to the often ambiguous policy goals of the statute. The statute may fail to clearly indicate a priority among multiple goals. The regulator may thus be left to balance goals which conflict in a particular fact situation. Policy only crystallizes in the face of the facts; in a vacuum it remains theoretical. Policy guidelines if they are articulate can be of real use, however, as an adjudicative and business planning guide rather than merely a device with which to demonstrate one's skills in sophistry. The techniques of policy development presently used by the CRTC, involving the use of issue and rule-making hearings and the issuance of general policy statements appear to be effective in providing the Commission with exposure to diverse views of the "public interest" and how it may best be enhanced.

There is no greater unanimity as to what "government policy" is. Is it to be found in ministerial press releases, the policy guidelines issued by regulatory bodies, or only in the policy statements contained in validly enacted statutory instruments? If the latter view is accepted, how are conflicts between the interpretations drawn from that legislative policy by ministers and regulatory bodies to be resolved? As is clear from the preceding chapters this is not a merely academic question.

The issue of fettering enters no matter which way one turns in the attempt to find firm ground for interpretations of broad policy statements contained in legislation. For example, when the CRTC indicated in 1976 in connection with its hearings on Procedures and Practices in Telecommunications Regulation that it would be "conscious of developing national telecommunications policy objectives",[90] both Bell Canada and the Canadian Telecommunications Carriers' Association objected strenuously, for in their view the CRTC, like all other statutory regulators, was required to look to the policy content of the legislation and not to the policy preferences of the executive. In the 1978 CRTC Telecom Decision 78-4 on practices and procedures[91] the Commission restated its position with regard to the weight to be given "government policy" to explain in effect that to "be conscious of" was "to take into consideration". And indeed this is the only position that the CRTC can take if it is to escape the allegation that it has fettered its discretion by either government policy or by its own policy guidelines.

The recent case law dealing with fettering and regulatory policy implies that the position of the CRTC in this regard is sound. CRTC development and use of its own policy guidelines was said to be "eminently proper" by Chief Justice Laskin, speaking for the majority, in the 1977 Supreme Court of Canada judgment in Capital Cities Communications Inc. v. CRTC.[92] Mr. Justice Laskin's opinion of the propriety of the practice of reference to policy guidelines on an individual application took into account the breadth of the statutory policy mandate, the hearing process which gave interested parties an opportunity to make submissions with regard to possible policy guidelines as such, the desirability of having overall regulatory policy guidelines known in advance (rather than only as a result of case by case adjudication), and the fact that parties to be affected by the implications of the policy guidelines in the particular case had the opportunity to argue that they should not apply.

Fettering had also been alleged in an earlier case,[93] where the CTC had referred to the general policy content of a regulation previously struck down as ultra vires the Commission. The Federal Court of Appeal held that, although the policy had been applied without exception in 400 cases, there was no fettering of Commission discretion, for in each case the Commission had been

willing to hear and consider reasons why the general policy should not apply. In summary, it is clear that regulatory bodies are free to develop policy guidelines and rules to cover issues not dealt with, or not dealt with in full detail in the primary legislation or regulations enacted pursuant thereto, as long as they do not then automatically apply these guidelines in a particular case. The holding of policy issue and rule-making hearings by regulatory bodies can be seen as a valuable tactic in defending the legitimacy of any resultant policy guidelines as well as an effective means to ensure some public participation in the development of such guidelines.

The implications of the principle that discretionary decision-making power is not to be fettered for references in adjudication by regulatory bodies to "government policy" have not been discussed in recent cases which are as obviously in point as were those discussed above concerning reference to policy guidelines generated by the regulatory body itself. Cases discussing the implications of giving weight to "extraneous considerations" are not of great assistance insofar as to apply them to this issue on either side of the argument is to beg the question of the status of "government policy". And to beg that question is to avoid the kernel of the problem underlying much of the recent discussion of ministerial directive powers as a mechanism for communicating the policy views of the government of the day to independent regulators. Conversely, as is shown in Chapter VIII, consideration of the implications of the principle of fettering goes a long way towards unravelling that same problem.

In this context the term "dictation" can be used almost interchangeably with the term "fettering". To "dictate" is to "fetter" successfully. To permit oneself to be "fettered" by the policy statements of another is to acquiesce in "dictation". The landmark Canadian case on the point is still Roncarelli v. Duplessis,[94] in which the Supreme Court of Canada held that the Premier's advice to the licence commissioner was equivalent to an order to revoke Roncarelli's liquor licence. Rand J., in the conclusion of his reasons for judgment, stated with reference to the issue of whether the Premier had acted in the matter within the scope of his official function that:

> It would be only through an assumption of a general overriding power of executive direction in statutory administrative matters that any colour of propriety in the act could be found. But such an assumption would be in direct conflict with fundamental postulates of our Provincial as well as Dominion Government; and in the actual circumstances there is not a shadow of justification for it in the statutory language.

Among Justice Abbott's very brief comments in his reasons for judgment in the case was the statement that "The Commission here was not a department of government in the ordinary sense and the defendant had no statutory power to interfere in its administration".

With this perspective, on-going policy conflicts between the minister and the regulatory bodies in transport and communications take on new nuances. The problem is not simply one of finding effective means of ensuring that independent regulators give due effect to "government" policy as that is expressed by the executive, but of finding legal means of doing so, and that would require legislative action by Parliament. Powers of direction or dictation provided by regulation and made by the Governor in Council purportedly pursuant to statute would be subject to the vires test according to the same broad criteria discussed with regard to directives above, and delegation, below.

Informal ministerial interference, as arguably occurred in the ATC decision not to disallow the acquisition of NordAir by Air Canada, would appear to be open to the same analysis as that of Duplessis' in the Roncarelli case were it not for the apparently sincere, however dubious, belief perpetuated in MOT and other sectors of the executive branch of government that policy statements by the Minister of Transport have a legal status and bind the discretion of the CTC. Unlike the CRTC, however, the CTC appears to regard itself as legally bound to abide by ministerial policy and thus should perhaps be described as acquiescing in dictation. In the NordAir matter, because the Regional Airlines Policy was recognized to be in a state of evolution by MOT and the industry without consultation with CTC itself, reliance by ATC on that policy was tantamount to abdicating, or permanently delegating, CTC decision-making power in the case to the Minister. The policy itself was in flux, the Minister had indicated he expected treatment of NordAir to be in

accord with evolving policy, but no immediate consultation with CTC was contemplated. In the circumstances one way the CTC could have dealt more adequately with the case would have been to declare themselves free of any obligation to be bound by or give undue consideration to ministerial policy statements and then to hold two hearings, the first a general policy hearing, the second the actual acquisition hearing. Given the combination of the views of the Minister and the existing appeal provisions in section 64 of the National Transportation Act it is not really surprising that the majority of the ATC chose to ignore all broad policy issues. Even Roberge averted to critical ones only to indicate that they were not, in his opinion, within the jurisdiction of the Commission under section 27 and would require the attention of the Minister or Parliament.

It must be asked whether statutory ministerial directive powers over independent regulators would be in such basic conflict with the principle that discretionary decision-making powers are not to be fettered as to create as anomolous a situation as presently exists with the provision for statutory appeals from "independent" regulatory decisions to Cabinet. The latter, despite LeDain's comments affirming their statutory nature, are in effect highly "political" or "politicized" appeals because of the nature of the forum and its procedure. Only if directive powers were quite narrowly circumscribed would the possibility that the regulators will be overridden on fundamental regulatory issues, going to the core of the regulatory mandate, be avoided; yet if directive powers were limited to that extent they would be powerless to achieve the purposes for which they have been proposed -- the articulation of coherent regulatory policy which gives a central place to the priorities of the government of the day and is subject to control by Parliament through the mechanism of ministerial responsibility.

3. Delegation

Themes similar to those discussed with regard to directives and fettering run through the cases on delegation of powers. The comments of Pratte J., in Ramawad v. Minister of Manpower and Immigration, confirm that the essential points of reference used by the courts are the nature of the rights in question, the nature and scope of the powers conferred, and the overall legislative scheme employed.

In the Immigration Act, Parliament has recognized the existence of different levels of authority, namely, the Governor in Council, the Minister, the Director, immigration officer in charge, the Special Inquiry Officer and the immigration officer. The authority granted by Parliament to each of such levels is clearly specified in the Act. In some cases, the Act allows for a sharing of authority as between some of these levels. For instance, under s. 12, a peace officer is obligated to carry out any warrant issued under the Act for the arrest, detention or deportation of any person if "so directed by the Minister, Director, Special Inquiry Officer or an immigration officer". Also, s. 36(2) authorizes "the Minister, Director, a Special Inquiry Officer or an immigration officer" to give certain instructions with respect to the deportation of a person against whom a deportation order has been made.

Similarly, the Regulations issued under the Act make a clear distinction between the authority conferred on the Minister on the one hand and on his officials on the other hand.

Indeed, in the Act and in the Regulations, the most important functions have been reserved for the Minister's discretion while authority in other areas have been delegated directly to specified officials.

The general framework of the Act and of the Regulations is clear evidence of the intent of Parliament and of the Governor in Council that the discretionary power entrusted to the Minister be exercised by him rather than by his officials acting under the authority of an implied delegation, subject of course to any statutory provision to the contrary. To put it differently, the legislation here in question, because of the way it is framed and also possibly because of its subject-matter, makes it impossible to say, as was the situation in Harrison (R. v. Harrison (1976), 66 D.L.R. (3d) 660 28 C.C.C. (2d) 279, [1977] 1 S.C.R. 238), that the power of the Minister to delegate is implicit; quite the contrary.

I am reinforced in my opinion on this point by s. 67 of the Act which reads as follows:

"67. The Minister may authorize the Deputy-Minister or the Director to perform and exercise any of the duties powers and functions that may be or are required to be performed or exercised by the Minister under this Act or the regulations and any such duty, power or function performed or exercised by the Deputy-Minister or the Director under the authority of the Minister shall be deemed to have been performed or exercised by the Minister."

The effect of this section is, by necessary implication, to deny the Minister the right to delegate powers vested in him to persons not mentioned therein.

I therefore come to the conclusion that the discretion entrusted to the Minister under para. 3G(d) of the Regulations must be exercised by him, or if properly authorized to do so under s. 67, by one of the persons therein mentioned which do not include the Special Inquiry Officer who issued the deportation order here in question.

It follows that the decision made by the Special Inquiry Officer in this case to the effect that "there are no special circumstances in existence at the present time in order to apply Paragraph 3G(d) of the Immigration Regulations as requested by Counsel", is not and cannot be considered as a decision of the Minister; it is therefore invalid.[95]

The reasons of Pratte J. in Ramawad were followed by Decary J., in Re Laneau and Minister of Immigration[96] a case in which it was held that the Immigration Act does not authorize a minister to delegate his powers under section 8 to a Special Inquiry Officer.

A narrower approach to the problem of delegation was taken by the Ontario High Court in Re Clark et al v. A.G. of Canada in which the court held:

> The power to make Regulations given to the Atomic Energy Control Board by s. 9 of the Atomic Energy Control Act, R.S.C. 1970, c. A-19, is wide enough to authorize the Uranium Information Security Regulations, SOR/76-644, which provide for the secrecy

> of information relating to certain uranium transactions. However, s. 2(a)(ii) of the Regulations, which prohibits a person from releasing information concerning uranium except if "he does so with the consent of the Minister of Energy, Mines and Resources", is ultra vires the Atomic Energy Control Board. It offends the maxim delegatus non potest delegare. The real effect of the exemption is to vest the Regulation-making power of the Board in the Minister. The Minister could give exemptions to everyone and could effectively nullify the application of the Regulations. There is nothing in the Atomic Energy Control Act which justifies the conclusion that the Board is entitled to delegate the powers granted to it by the Act. The fact that s. 2(a)(ii) is ultra vires does not invalidate the entire Regulations. The appropriate approach is simply to strike out s. 2(a)(ii). Therefore, apart from s. 2(a)(ii), the Regulations are intra vires the Atomic Energy Control Board.[97]

A very different result might have followed had the court adopted the broader approach of considering the legislative scheme as a whole, for it is arguably the case that a board which is by statute subject to the "control and direction" of the Minister can "delegate" all its powers to the Minister without violating the principle of vires.

Cases dealing with the standards of procedure to be required in the conduct of inquiries on the basis of which a report or recommendation is prepared for a minister or the Governor in Council are relevant to the issue of delegation. The view that principles of natural justice will not apply to an administrative officer or board whose only function is the collection of information and preparation of a report, applied in Guay v. LaFleur[98] by the Supreme Court of Canada in 1964, has now been generally replaced by the less certain but more satisfactory view that procedures used in inquiries (like those used in the generation of any "administrative" decision) must be appropriate to the matter ultimately at stake and the legislative scheme. Thus it was observed in André Desjardins v. The A.G. of Canada, National Parole Board et al.:

> Here, the Board's decision was not a final determination, but it can be argued that its recommendation would undoubtedly be accepted by the Governor

> in Council, and it is perhaps sophistry to suggest that since the Board was merely investigating, and not deciding, it was not obliged to act judicially or quasi-judicially.[99]

Partial delegation of executive powers thus no longer clearly forestalls imposition of the same standards of fairness on the delegatee as would be required of the Minister. With regard to this point Lord Denning in 1976 in his reasons for judgment in Selvarajan v. Race Relations Board, stated:

> The fundamental rule is that, if a person may be subjected to pains or penalties, or be exposed to prosecution or proceedings, or deprived of remedies or redress, or in some way adversely affected by the investigation and report, then he should be told the case made against him and be afforded a fair opportunity of answering it.[100]

4. Bias

The decisions[101] with regard to allegations of bias against boards with investigatory or decision-making powers must be read in the light of one very real problem; would it be possible to find persons with sufficient expertise to perform the regulatory task required who could not be alleged to be biased, or reasonably apprehended as biased, by some of the parties concerned. This is not a new problem. Judge-shopping is an old pastime. Moreover, it is probably ill-founded to argue, for example, that an environmental group is at a greater disadvantage when appearing before the NEB than a labour union in an appearance before the average judge of some 50 years ago. The influence of socio-economic and political ties on judicial decision-making is inevitable and will continue to be so even in the absence of what might amount to technical "conflict of interest". The traditional protections against the impact of these factors on decision-making: judicial independence, public hearings, full reasons, rights of appeal, and freedom of expression and of the press, must be fully implemented with regard to any decision for which a measure of insulation from political and personal bias is required.

5. Ultra Vires

Executive acts not authorized by the statutory instruments relied on, and decisions based on considerations irrelevant to the legislative scheme conferring the power to decide, will be declared ultra vires by the courts.[102] As above, the legislative scheme, the nature of the power conferred, the matter at stake, and explicit or implied procedural requirements are decisive.

6. Fairness

The "duty of fairness" doctrine, frequently touched on above, is the keystone around which judicial treatment of administrative law appears to be being rebuilt. The old division into "administrative" as opposed to "quasi-judicial" or "judicial" is now generally recognized to be non-essential and, as a consequence, the appropriateness of procedure used in decision-making by all statutory decision-makers must be defended and attacked with reference to what would be "fair" in the whole circumstances. This phenomenon is but another reflection or aspect of the more global, less technical approach to administrative law already seen above.

The "fairness" doctrine has been emerging for some time in Canada and recently received clear confirmation from the Supreme Court of Canada in Re Nicholson and Haldimand-Norfolk Regional Board of Commissioners of Police, October 3, 1978, in a 5-4 decision.[103] Martland, Pigeon, Beetz, and Pratte, in a dissenting judgment held that the decision of the Board to dismiss a constable during an 18 month probationary period was "purely administrative" and therefore the Board was subject to constraints of courtesy but not law in the procedures adopted to obtain his dismissal. The majority opinion, delivered by Laskin C.J.C., held that though the Board acting with executive or administrative powers was not required to act in accordance with the rules of natural justice, it was under a general duty of fairness which would have been fulfilled had the constable been informed of the reasons for his dismissal and given an opportunity to reply.

In Inuit Tapirisat of Canada et al v. His Excellency The Right Honourable Jules Léger, et al. (on appeal to the Federal Court of Appeal from the dismissal by the Federal Court Trial Division of the Inuit Tapirisat

application for a declaration under section 18 of the Federal Court Act that they were denied a fair hearing on their petition to the Governor in Council under subsection 64(1) of the National Transportation Act), the court held, in reasons by Le Dain J., as follows:

> While the authority conferred by s. 64(1) cannot for the reason indicated, be characterized as judicial or quasi-judicial, I cannot see why the duty to act fairly which was affirmed in the Nicholson case should not in principle be applicable to the Governor in Council when dealing with an interested party who exercises the right of petition or appeal. The authority is not the general political power of the Cabinet but a specific statutory authority, which, because it contemplates a right of petition or appeal, is clearly conferred at least in part for the benefit of persons whose interests may be affected by a decision of the Commission. It is reasonable I think, to ascribe to Parliament an intention that such persons should within certain limits be dealt with fairly from a procedural point of view. The question is what those limits must be, having regard to the nature of the Governor in Council or the formal Executive, and the manner in which it acts by long-established constitutional convention and practice.

The court went on to state that, although allegations with regard to non-disclosure of intra-governmental submissions did not give rise to grounds for relief because there was no clear intention in Parliament to qualify traditional Privy Council secrecy:

> [T]he question whether the appellants were denied a fair opportunity to reply to the submissions of Bell Canada raises in my opinion an issue of a different order. Here Bell Canada, as one of the parties to the dispute, had been given an opportunity to answer the petition of the appellants. Was the nature of this answer and the issues raised by it such that fairness required that the appellants be given a reasonable opportunity to reply? If so, was the delay of some two weeks before the decision of the Governor in Council was released a reasonable one in the circumstances? These are obviously questions of fact. Natural justice has not recognized a right of reply as a general principle. It has been treated as depending on what fairness

required in the particular circumstances of each case, having regard to the necessary right of an administrative authority to determine when it has heard sufficiently from interested parties to give it a basis for decision. See Forest Industrial Relations Limited and International Woodworkers of America and the Labour Relations Board of the Province of British Columbia v. International Union of Operating Engineers Local 882, [1962] S.C.R. 80; Komo Construction Inc. et al v. Commission des Relations de Travail du Québec et al, 1968 S.C.R. 172; Wiseman v. Borneman, [1971] A.C. 297; Re Cypress Disposal Ltd. and Service Employees International Union, Local 244, 50 D.L.R. 150. The same approach would appear to be appropriate in the case of the duty to act fairly. Since the question is essentially one of fact, one cannot say before the issue has been tried that the Statement of Claim does not disclose a reasonable cause of action.[104]

Here, as was seen with respect to delegation and vires, a broad approach is being taken by the courts whereby the legislative intent and the nature of the issues in question must be weighed to determine procedural requirements and the consequential validity or invalidity of acts purportedly performed by the exercise of statutory decision-making powers.

D. IDENTIFICATION OF PROBLEMS ASSOCIATED WITH CURRENT EXECUTIVE REVIEW AND APPEAL SCHEMES

This section applies the criteria established in the earlier parts of the chapter to assess current performance in the exercise of statutory executive review and appeal powers and their impact on the administrative law process. The assessment reveals a number of critical problems.

In 1971 J. R. Mallory observed that:

> The major problem in modern constitutional government is to retain an effective control, by public opinion and by legal restraints, of the apparatus of the state which constantly expands with the increased public demand for more social welfare services and with the growing burden of national

> defence in a world of increasing peril. Liberty in such a world can be nourished only by the full and effective functioning of the political and legal restraints on abuse of power.[105]

The same basic considerations apply with regard to the parameters to be placed around executive control over the generation, interpretation, implementation, review and enforcement of policy by "independent" regulatory bodies and departmental administrators. To avoid undue repetition, problems with regard to executive control over policy that have been discussed at some length in the previous chapters will not be dwelt on here. Certain additional areas not yet discussed will be highlighted. This section has been designed to be read only in conjunction with the preceding chapters, not in isolation, as familiarity with the material presented there is presumed here.

1. Political Insulation v. Political Control

Much confusion in the regulatory/administrative law areas will be eliminated if statutory mechanisms are chosen with a conscious view to the degree to which they will achieve a desired measure of either independence from the executive or political control by the executive. Once this basic choice with regard to allocation of power over policy in the key economic sectors has been made, the practical mechanisms adopted to provide for interpretation and implementation of policy must be ones whose effects are consistent with rather than in conflict with that basic choice.

2. Advisory/Regulatory Function

A regulatory body such as the NEB, which performs a dual function as both government advisor with regard to the formation of policy and regulator of the oil and gas industry, is arguably strongly prejudiced in its performance of the regulatory function by its involvement in the formulation of government policy in the energy area. Use of the NEB regulatory model is not appropriate where any degree of insulation from executive influence is desired, any residual independence that the NEB might retain in performance of its adjudicatory function as regulator being, of course, destroyed by the subjugation of many of its major decisions to approval by Cabinet.

3. Rule-Making/Adjudication

An increased use of rule-making or issue hearings by the major regulatory bodies as a function independent from adjudication on particular cases would be desirable. Such policy hearings would provide a forum for advanced planning at which it would be possible for diverse and conflicting viewpoints from the public, industry, and various sectors within government to be presented, challenged, and weighed. It would not be inappropriate for Standing Committees in the House to present a brief to such an issue or rule-making hearing. Similarly if old habits, such as ministerial distaste for departing from a consensus position, could be overcome, one can conceive of conflicting positions being advocated by the representatives of several interested government departments all of whose spheres of activity pertain to the matters at issue but give them diverse perspectives on the "public interest".

4. Insufficient Insulation of the Regulatory Process from Political Interference

This problem, touched on numerous times before, arises primarily from the very real gulf that exists between the theory and practice in the administrative law area. One view of regulation in Canada is well expressed by quoting from the comments of John Turner in the House at the time the Federal Court Bill was introduced in March of 1970. He said:

> Parliament sets up these statutory tribunals such as the Canadian Transport Commission, the Canadian Radio-Television Commission, the National Energy Board and other Boards. We deliberately delegate to all those boards and commissions a certain range of policy decisions that have to be made falling within a general area of competence. We do this because we want a certain independence in those decisions, because we want to withdraw the decision-making power to a certain degree from the political arena, and because ministers and departments do not have the necessary opportunity and time in certain cases to deal with and address their minds to those problems.[106]

And somewhat further down he continued:

> Where an administrative tribunal -- I am now talking within the federal sphere -- exercises a judicial function, or that grey area between the judicial function and the administrative function which is known as quasi-judicial, where there is a dispute or contest between parties by way of an application for a licence or the determination of a rate structure, or where two or more parties have to be heard and a decision rendered by the administrative tribunal, that judicial or quasi-judicial function should be exercised according to certain principles, principles of natural justice. The members of the board should have no conflict of interest. Every party should have an opportunity for a hearing. Each party should have the opportunity to hear the other party's case, cross-examine, obtain production of documents and have before him the evidence upon which the board or tribunal makes its decision.[107]

This sets out an ideal of regulation in Canada to which the realities do not correspond any more than they did in 1970. This gulf between theory and practice is enhanced by the lack of protections against conflict of interest, the lack of protections against ministerial interference with the regulatory process both in policy formation and adjudication, the general absence of formal procedures in the performance of executive review functions both by ministers and on petitions to Cabinet, and the lack of written reasons in disposing of petitions to Cabinet. Each of these four problems renders the regulatory process in Canada subject to potential abusive use of executive power. A reasonable apprehension of scope for abuse of power by the executive in the regulatory area may be as deleterious to the credibility and integrity of the regulatory process as actual abuse of that power.

5. Lack of Informed Representation of Diverse Interests

Regulation in Canada cannot occur with due regard to diverse aspects of the "public interest" until there is fuller access by the public to relevant information and greater monetary support for independent groups engaging in research, debate, and advocacy of alternative positions.

6. Ministerial Interference

Interference, here taken to imply informality and a high degree of confidentiality, must be distinguished from open public forms of political activity. Where a regulatory model is consciously chosen which favours insulation of the regulatory process from political interference, mechanisms must be established for preventing a minister from engaging in private discussions with members and staff of regulatory boards with regard to either policy generation or particular matters before the regulator in its adjudicatory capacity. Overt attempts by a minister or his department to influence the outlines of developing policy would, by contrast, be desirable as, for example, where they took the form of presentation of a brief or argument in the context of an issue or rule-making hearing.

It is inappropriate where true insulation from political interference is desired to make a regulatory decision subject to appeal to the executive. The establishment of procedures for executive appeals will not alter their highly political nature but only encourage the real reasons for certain sensitive decisions to be veiled. As hypocrisy in government should not be encouraged there is no better solution than the abolition of Cabinet appeals. One should, of course, distinguish strongly between an "appeal" provision, such as is seen in subsection 64(1) of the National Transportation Act, whereby the executive is empowered to substitute a completely new and perhaps opposing decision for that of the regulatory body (on the grounds of a different view of the "public interest" or any other such term which is subject to diverse definitions on the grounds of broad executive policy), and a review provision drafted along the lines of section 23 of the Broadcasting Act allowing the Cabinet to return a matter to the Commission for reconsideration in the light of certain submissions by Cabinet. There should be added, however, a proviso that the decision of the Commission on reconsideration is to be final. This type of review provision could be used to fulfill both the function of providing so-called "equitable" relief in policy matters, where strict application of existing policy would have unconscionably harsh consequences, and the other type of "political" review in which the Cabinet, cognizant of broader policy issues than are strictly the responsibility of the regulatory body, finds that these broader matters must be taken into consideration.

7. Conflict of Interest

The problems of conflict of interest in the regulatory area are somewhat more complex than the traditional one of personal financial interest in a venture over which one has some control by virtue of public office. At least three other types of conflict of interest can be identified. The second arises in the situation where the government by virtue of its relation to Crown Corporations must appear as a client before federal regulatory bodies. The third, touched on before, arises through the perhaps inevitable and necessary use of experts in a field, who have a personal commitment to certain methods of doing business and to a long-term plan of development within an industry, as regulators. The fourth, also touched on before, arises insofar as government desires to encourage business investment as one means to promote a healthy economy, and indirectly continue to finance the government. Conflict may arise between broad social and political goals and the goals pursued by business.[108]

To take a very current example of the fourth type of conflict one can point to the problems of conflict of interest in the regulation of nuclear energy with a view to both safety and production. An alliance with business interests and the consensus model of executive decision-making in government make it quite difficult for government departments to actively pursue the "public interest" in its global sense. Either government Ministers must overcome their general reluctance to adopt publicly conflicting points of view or more effective means of supporting independent groups to engage in research, debate, and advocacy of positions alternative to those of vested economic pressure groups must be found.

There has been discussion with respect to conflict of interest in the House of Commons at various times over the last six years, usually surrounding the introduction of guidelines or a bill designed to address the problem of conflict of interest couched in its traditional form. On December 18, 1973 Guidelines were issued by way of Order in Council to govern the conduct of public servants and appointees of the Governor in Council with regard to potential conflict of interest situations. These were discussed on the same day in the House and subjected to criticism on two principal grounds, first that the Guidelines failed to take account of potential conflicts of interest with family or corporate interests not strictly personal to the individual public servant and second that

the Guidelines relied on the judgment and integrity of the individual public servant to both interpret and enforce the Guidelines in his own case.

In July of 1973 the President of the Privy Council, Allan MacEachen had tabled a "Green Paper" entitled "Members of Parliament and Conflict of Interest". The paper was referred to the Standing Committee on Privileges and Elections which completed its study of the paper in 1975. The report of the Senate Committee on Legal and Constitutional Affairs chaired by Senator Carl Goldenberg presented its report on the Green Paper on the 29th of June, 1976. At this time there was speculation that perhaps an Act to govern conflict of interest with regard to members of Parliament might be in effect by mid-1977.

On June 26, 1978 the government introduced Bill C-62, a proposed Independence of Parliament Act. Criticism in the House focused on the fact that the Bill would not have any application to members of regulatory bodies such as the NEB. Not surprisingly, the dual function performed by the NEB as advisor and regulator was relied on by the Prime Minister and the leader of the N.D.P. to different effects, the former arguing that the guidelines in the Bill did not cover judges or quasi-judges because it was inappropriate for the federal government to interfere in this manner with the independence of the judiciary, and the latter arguing that the National Energy Board because of its role in framing major policy decisions, often resulting in substantial government expenditures, certainly should be included under conflict of interest guidelines.

The new Independence of Parliament Bill, C-6, was tabled October 16, 1978. It merely passed first reading. The net effect is that despite six years of study and debate there is still no legislation as such governing conflict of interest in the federal government, and such Guidelines as do exist are wholly inadequate to meet the problem.

The second aspect of conflict of interest, arising from the dual role of government as client and regulator, was raised in the oral question period in the House on November 22, 1978. The questions directed themselves to whether any guidelines existed in relation to the role of Deputy Ministers serving on Crown Corporations and expressed concern that their presence might confer some

special advantage on Crown Corporations not available to their competitors. Although this line of questioning was apparently motivated by a certain discomfort within the Conservative party over the acquisition by Petro Canada of Pacific Petroleums, the concerns may well have validity and must be taken into account in any consideration of the appropriateness of significant Cabinet influence over the generation and implementation of policy in regulatory areas directly affecting Crown Corporations.

The Petro Canada matter is a good example to focus on precisely because the legislative mechanism used in the case of the NEB, unlike that of the CTC and the CRTC, clearly provides a channel for political influence over each and every stage of the regulatory process from policy generation to approval of the adjudicatory decision in a particular case. It is understandable that competitors of Petro Canada are apprehensive about the long-term consequences of being subject to indirect regulation by Cabinet, which is also the indirect owner and regulator of Petro Canada. Clearly the issue here is not at all the "nationalization" of Petro Canada as such or the value of the use of Crown enterprises to pursue federal policy goals and ensure Canadian participation in key sectors of the economy, but rather one of how the regulatory mechanisms used in the energy area and other related sectors can be overhauled to insure insulation from executive interference and the generation and application of energy policy in a forum whose members are independent of vested ownership interests presently perceived to exist in Cabinet as a result of Crown Corporations. If the regulatory process remains as it is at present regulators will inevitably find themselves under pressure, however subtle, to overlook warnings that projects contemplated by Crown enterprises are economically unsound, technologically risky or potentially damaging to the environment. Should subtlety be wasted, Cabinet appeals are a most effective means of ensuring executive control.

8. Lack of Parliamentary Control Over the Exercise of Delegated Legislative Powers

This is a long-standing problem recognized ten years ago by the Special Committee of the House of Commons on Statutory Instruments (The MacGuigan Committee). In its Third Report the Committee recommended that Parliament be empowered to review questionable regulations

by way of resolutions referring them to the government or appropriate minister for reconsideration.[109] The Special Committee also recommended that Standing Orders be established whereby a group of ten members of the House would have the right to initiate debate on particular regulations. It was also suggested that where regulations concern matters of major significance to the public, a provision for a negative or positive resolution would be appropriate.

As yet none of these measures have been adopted. Moreover it is arguably the case that the measures proposed by the Special Committee are insufficient. If negative or positive resolutions are used they should be used for all regulations, rather than only those of "major consequence", to avoid the problem of line-drawing. Directives, rules and guidelines issued pursuant to statutes or regulation should also be tabled even if they are not subject to ratification,[110] and a mechanism should be established whereby the House can disallow them even if occasional regulatory delays and inconvenience result. At present once Parliament has delegated its legislative power, it has no means of exercising control over use of that power save by the passage of further legislation. Meanwhile, control of the legislative machinery is in the hands of the government of the day, as are most of the regulation making powers, and it surely would be rather naïve to expect the government of the day voluntarily to subject its own regulations, fresh from the office of a Cabinet Minister, to defeat in the House of Commons by a special Act. It is arguably the case that responsible parliamentary government cannot be said to exist in any meaningful sense if Parliament does not retain some real control over the use of power it has delegated.

9. Myth of Ministerial Accountability

Similar issues arise around the problem of ministerial accountability. Ministerial accountability has been used recently as an argument in favour of the bestowal on Ministers of a power to give policy directions to regulatory bodies. It is argued that Ministers will be accountable for these directions to Parliament, the representatives of the people, as the regulatory bodies themselves are not. Widespread assertions that the Minister is accountable for his actions and those of his subordinates do not become true simply through repetition. To the contrary, reliance on the principle to show

the existence of accountability to Parliament for the performance of a myriad of government functions only underscores its mythical qualities by overburdening the principle beyond all credibility. The fact that Parliament has no effective sanction to use in the case of a Minister whose own, or whose department's, overall interpretation of the policy content of legislation differs from their own is not mentioned. In practice it is unrealistic to expect a non-confidence motion to be even seriously contemplated to deal with such a situation unless the government of the day is already in trouble with the opposition. Nor is the fact mentioned that the government of the day has sufficient control over the legislative machinery to gain legislative foundation for any particular policy, unless it fails to muster sufficient support for that policy in Parliament, and thus have no legitimate need for a directive power. Periodic amendment of the key policy sections of principal statutes would not be an onerous burden on the government of the day or on Parliament. With Ministerial directive powers, actual accountability would be assured only if the exercise of these powers were subject to ratification by Parliament. A power of ratification, in turn, can only be responsibly exercised by a Parliament with access to relevant information as is, of course, not the case at present.

In Gouriet v. Union of Post Office Workers,[111] a recent case before the English Court of Appeal, the court failed to be persuaded by an argument based on accountability to Parliament. The case, involving a mail boycott, turned on the question of whether the plaintiff, a private individual, had standing to bring an action without the consent of the Attorney General. The Attorney General argued that the decision as to whether to request an injunction against the boycott should be his alone. The Court of Appeal decided that the plaintiff could request an injunction even though the Attorney General failed to join in this request. The Attorney General had supported his position by arguing that if he were incorrect in failing to seek an injunction against the boycott the matter could be raised in Parliament and his position criticized. Lord Denning found this justification to border on the fictional because he thought it highly probable that the Attorney General would be supported by his own government party regardless of his position or his reasons for this position.

Only in a Parliament where the government of the day is a minority government does the theory of ministerial accountability have much relevance for the day-to-day adjustment of government policy. Surely it is time for legislative schemes, such as increased Ministerial powers of direction, proposed in Canada for the purported purpose of making government more responsive both to the practical requirements of government and to the elected representatives of the people, to be grounded on something more substantial than fantasy. Genuine pluralism can only be created by a conscious reallocation of political power which recognizes the existence of fundamental conflict between various interests and provides multiple protections against abusive use of power. Representative government can be strengthened to provide for greater "political accountability" but reliance must be placed on public participation in policy generation, open exchange of views, public access to information, institutional protections to assure impartiality in decision-making, control by Parliament over primary and secondary legislation, as well as on the principle of ministerial accountability.

Chapter VIII

RECOMMENDATIONS: MODELS FOR THE GENERATION, IMPLEMENTATION, REVIEW AND ENFORCEMENT OF REGULATORY POLICY

These recommendations, set out in the form of two alternative models, have been generated with reference to the criteria set out in Chapter VII. The over-all aim is to design legislative schemes for use in the regulatory/administrative law area incorporating the values and principles identified above and avoiding the flaws identified in current review and appeal provisions.

A. MODEL A: GUIDELINES FOR FUNDAMENTAL CHANGE

In the future, regulatory and administrative law schemes in general must be carefully and consciously chosen with a view to how political control is to be allocated over each stage of the regulatory process; as was indicated in the preceding chapters this has often not been done in the past. The result has been a great gulf between theory and practice in regulation and the perpetuation, as a consequence, of many illusions about how, by whom, and on what grounds, regulatory decisions are taken. As noted by the Lambert Commission Report[112] the Foreign Investment Review Agency (FIRA) is a good example of a body commonly and mistakenly thought to have independent decision-making powers whereas in fact it is a solely advisory body. Confusions of this sort can and should be eliminated by the adoption of regulatory mechanisms and terminology accurately reflecting the allocation of political control.

FIRA is a relatively innocent example of the illusions created by the current approach to regulation. Innocent, because once it is realized that Cabinet is the decision-maker there is no question of where political control and thus political responsibility lie. Whether as a citizen or a member in the House one is satisfied to allow decisions over foreign investment to remain with the Cabinet where they are vulnerable to interference by vested economic interests is another matter and separate issue. More serious are the illusions created by the establishment of allegedly "independent" regulatory bodies whose decisions may be subject both to ministerial interference and variation, rescission or reversal by Cabinet. Insofar as independent regulation is genuinely desired the present statutory schemes are a failure. The illusion of independence some of them perpetuate combined with the difficulty of pin-pointing the locus of political control for any given decision makes such schemes, at least in a few instances, a cruel joke on principle of representative government according to law.

To eliminate these problems in the regulatory and administrative law areas clear choices as to where political control is to lie must be accompanied by institutional mechanisms designed to unambiguously implement those choices. To use the most obvious example, if variation and reversal of regulatory decisions on broad political grounds by the executive is not desired then petitions to the Governor in Council, as we now know them, must be abolished. Similar decisions must be made about each aspect of the administrative law and regulatory process with regard to each subject-matter under federal jurisdiction.

In some instances a high degree of executive control may be desired. This effect can be achieved without violating the basic principles and values identified in Chapter VII by means of the following scheme:

1. Scheme giving a high degree of control to the executive.

    a. Secondary legislation (of all types including rules, guidelines, and directions) should, insofar as this is feasible, be circulated by the department for public comment in draft form. General issue hearings may be appropriate from time to time to increase the level of public participation in debate over policy development.

Rules, guidelines and directions should be subject to approval by the responsible Minister and to ratification or negative resolution by Parliament and to publication.

This approach to the creation of secondary legislation will broaden the range of viewpoints available to be taken into account in formulating policy, retain the principle of ministerial responsibility for policy enacted with delegated authority, ensure control by Parliament over the content of all secondary legislation, and prevent the promulgation of "secret law". Primary responsibility for the formulation of secondary legislation would lie with the body -- in this case a government department -- which has the expertise with the subject matter garnered through the adjudicative process in its role as original decision-maker. Approval of secondary legislation by the Minister, subject to ratification or negative resolution by Parliament, would affirm the principle of ministerial responsibility and yet provide Parliament with a concrete means of exercising control over the use of legislative power delegated to the department.

No doubt the requirement for ratification or the use of a negative resolution by Parliament where either of these powers had been deemed appropriate and provided for in the primary legislation would from time to time result in some inconvenience and delay. Professor Janisch appears to regard the potential for delay that would be created by any such provision as serious enough that he does not recommend it and relies instead solely on consultation with strengthened Parliamentary committees.[113] My view, by contrast, is that if the consultation process is properly conducted and the department (or regulatory body, as the case may be, see 2(b) below), responsible for formulation of secondary legislation makes appropriate use of various techniques of soliciting a broad range of views, any veto or approval power in Parliament will rarely be used to oppose secondary legislation recommended to it. Clearly I assume that Parliament will use its powers responsibly and I would regard responsible use to include occasional obstruction of secondary legislation to allow for further public and Parliamentary debate over fundamental issues. Without such a residue of control in Parliament there is no practical restraint on the use of delegated legislative power. The mere existence of residual Parliamentary control in the concrete form of a veto or approval power,

rather than merely the general principles of Parliamentary supremacy and ministerial responsibility to Parliament should at the same time motivate the department or other body formulating the secondary legislation to regard Parliament as at least a silent partner in the project of policy development whose concerns and interests cannot be simply ignored.

b. Original adjudicatory decision-making should be performed within the government department under the "direction and control" of the Minister. If there is a Ministerial appeal it should be the appeal of first resort only.

This arrangement gives clear expression to the principle of Ministerial responsibility for policy interpretation and yet by specifying that ministerial appeals, if any, are the appeal of first resort, prevents executive interference with the policy interpretations of appeal tribunals. As became clear in the preceding chapters this prohibition is necessary to avoid selective and sometimes arbitrary executive intervention in the over-all approach to policy interpretation taken by independent appellate tribunals which defeats the purposes for which they are allegedly created.

c. The burden of conducting appeals, if any, from original adjudicative decisions and, insofar as they exist, Ministerial appeals, may be given to an independent tribunal whose decisions should be either final or subject only to an appeal to the courts on a point of law or jurisdiction.

It is clear that a point of "policy" interpretation is more easily construed as a point of law rather than a matter of "expert opinion" where policy has been given a detailed articulation in secondary legislation. Moreover, if as provided in (a.) above, all secondary legislation is promulgated in the manner proposed there, the distinction between secondary legislation as such and mere rules issued for administrative convenience, discussed in Chapter VII with regard to the legal status of "directives", should vanish. The courts would then be able to decide whether or not they had jurisdiction to entertain any given appeal insofar as it was grounded on statutory interpretation with reference to whether the point to be interpreted had <u>in fact</u> been given a clear legal meaning or whether instead its interpretation had either been left to the discretion of the original

adjudicator or was otherwise subject to being displaced in its significance for the regulatory decision by "expert opinion".

It is clear that a decision by Parliament to allow no appeals to an independent tribunal or to the courts would leave ultimate responsibility for policy interpretation in the hands of the minister. Accountability for policy interpretation in the general course of the adjudicatory process, as opposed to the use of delegated legislative power, under any Act not making provision for appeals to a tribunal or to the courts would thus rest wholly on the principle of ministerial responsibility.

d. Periodic review of recent cases, including any before the Minister or the tribunal where the Act provides for either or both forms of review, should be routinely performed by departmental officials in charge of formulation of secondary legislation with a view to its improvement by revision.

This suggestion merely reaffirms the point, underlying (a.) above, that primary legislative responsibility for the drafting of secondary legislation is best given to the body with that familarity with the subject matter which is gained through the adjudicative process.

e. Consultation with the public, provincial governments, other government departments and appropriate Committees of the House of Commons is to occur by way of hearings, where appropriate, and in other cases at least by way of public solicitation of views with regard to proposed secondary legislation made available to the public in published form.

This suggestion also amplifies on (a.) above, emphasizing that departmental and ministerial control over the formulation of secondary legislation is not to be taken to preclude taking into account a broad range of views in the process of formulating and revising regulations, rules and directives.

f. Procedures used in adjudication are to be formal and themselves subject to periodic review and revision to protect the interests of the parties as these are apprehended.

Procedures need not be complex but they are of little value to the parties when they are subject to change without notice. Appropriate procedures will be those attuned to the nature and complexity of the subject matter and the skills and resources of the parties. Achieving procedural fairness must be recognized to be an on-going process.

g. Written reasons are to be provided on each decision by any decision-maker.

Written reasons are essential for the purposes of appeal and encourage the development of consistent and principled decision-making. They are also of significant value to the draftsman charged with periodic revision of primary and secondary legislation insofar as they reveal points of ambiguity and apprehended unfairness in existing legislation.

h. The policy provisions of primary legislation should be subject to periodic review and amendment by Parliament.

In order to enable Parliament to participate in a meaningful way in this review process Standing Committees of the House of Commons must be reduced in number to allow members to specialize and thus focus their time and attention on policy in only one or two areas. Standing Committees must also be assured full access to relevant information from government departments, provided with more adequate research staff, and come to be perceived as bearing significant on-going responsibility for policy review and development. House committees can, as is remarked on in the Lambert Commission Final Report,[114] function very effectively when charged with responsibility for program review. This has been demonstrated by the performance of the sub-committee of the House Committee on Justice and Legal Affairs which in 1976-77 studied the penitentiary system.

i. Control over the legislative machinery of Parliament must be shared by the government of the day with those Standing Committees of the House which have been charged with responsibility for policy review and development.

This reallocation of control is necessary to prevent the government of the day from simply refusing to place draft legislation implementing policy reforms

proposed by Committees before Parliament even though those reforms are the result of extensive public hearings and careful study. Such refusals have been a problem recently. The fate of many of the recommendations of the Sub-committee studying the penitentiary system, mentioned above, demonstrates this. A similar problem has been experienced in the failure of the Liberal government to introduce legislation implementing the recommendations of the Special Committee of the House of Commons on Statutory Instruments.[115] Placing some control over the legislative machinery in the hands of Parliament is required to strengthen the principle of representative government.

In those areas where maximum independence in all aspects of the regulatory/administrative law process from control by the executive is desired it can be achieved with adherence to the basic principles and values identified in Chapter VII by means of the following scheme:

2. Scheme providing maximum independence from executive control.

   a. A regulatory body independent from the executive government and government departments should be created by statute and given all the powers and duties necessary to administer the statute(s) in question.

The body created in this manner with full powers would be responsible to Parliament directly. Its independence could not be curtailed by the executive for it would be in no way dependent on the executive. Parliament might reserve to itself, the executive or the courts, specific powers of oversight and review.

   b. The regulatory body would formulate and approve all secondary legislation, subject to ratification or negative resolution by Parliament and to publication.

A premium would be placed on advanced planning and broad consultation in the policy area, qualified by the realization that on-going modification of policy is also essential. Public issue and rule-making hearings would be held in the policy planning stage at which all those members of the public, representatives of interested government departments, provincial governments, clients, and even Standing Committees of Parliament, if they so

desired, who presented evidence would have standing to cross-examine other witnesses. All proposed secondary legislation, that is, rules, directives and regulations, would be published in draft form for the purpose of seeking further public criticism and comment before it was put in final form and laid before Parliament for ratification. This approach to the enactment of secondary legislation is the same as that proposed under scheme (1) above. In both schemes primary responsibility for formulation of secondary legislation is placed in the body with original adjudicatory responsibility. Dissatisfaction in Parliament with the use made of delegated legislative power by the regulator may be expressed through the negative resolution and the enactment of amendments to the key policy sections of the appropriate statutes.

This differs from the Lambert Commission proposal, made with reference to independent regulation-making powers of the CRTC and CTC, that all regulations be approved by the Governor in Council in accordance with "the principle that the Governor in Council is the principal regulation-making authority".[116] In my opinion there is no such principle though it is the case that most regulation-making powers are at present in the Governor in Council save in those two instances where Parliament has conferred them, by statute, on a regulatory body. If, as the Lambert Commission Report suggests, the real reason for placing this power in the Governor in Council is to ensure responsibility to Parliament then it should be done directly by provision in the primary legislation that secondary legislation be subject to either approval or veto as is deemed appropriate in view of the subject matter of the Act in question.

The Governor in Council is patently dependent on departmental recommendations in exercise of the regulation-making function. This fact can be recognized by requiring ministerial approval rather than approval by the Governor in Council for secondary legislation formulated by a government department. This was suggested in section 1(a), above. Where a regulatory body bears primary responsibility for formulation of secondary legislation a different treatment is appropriate for the Minister is dependent on the advice of public servants. In my opinion, it is inappropriate to rely on public servants rather than members of Parliament to approve regulations formulated by an "independent" regulator if the goal is enhancement of responsibility to Parliament.

If control by the government of the day rather than, or without, direct accountability to Parliament is desired then, of course, the Lambert Commission recommendation is to be preferred.

Conflict between a minister and a regulatory body over policy interpretation can be resolved along the lines preferred by the minister by passage of appropriate clarifying legislation, unless, of course, Parliament does not support the amendments proposed by the Minister. This approach would render ministerial directive powers proposed by H. N. Janisch[117] and by the Lambert Commission superfluous and avoid the very real hazard of these directive powers being used, even when combined with the broad consultation and publication proposed by the Lambert Commission and Janisch, to engage in political interference with the interpretation and implementation of policy by independent regulators.[118] Throughout the present study it has been observed that failure to adopt concrete mechanisms specifically designed to achieve a given allocation of power often results in a great gulf between theory and practice, or between the ideal and the actual result. Ministers, placed as they are under political pressures, would necessarily be tempted to use directive powers to, in effect, intervene in specific cases under the guise of clarifying broad policy matters.

To create broad ministerial directive powers would also be in basic conflict with the principle that the discretion of decision-makers is not to be fettered. Yet if directions given under such powers were not said to impose obligations per se on the regulator, thus avoiding fettering, the problems for which directive powers are regarded by Janisch and the Lambert Commission as being an answer would remain unresolved. In those instances where Parliament decides provision for ministerial directive powers is mandatory, in response to pressing practical considerations overriding the concerns expressed above with regard to ministerial interference, they may be specifically authorized in the statute itself provided that their scope is precisely defined. Exercise of such directive powers may or may not, as is deemed appropriate, be specified to be subject to negative resolution by Parliament.

c. Original adjudicatory decision-making should be performed by the regulatory body.

If the regulatory body performed its policy-making function well it would not be placed in the position of having to direct its attention to general policy decisions for the very first time in the course of adjudication on an individual case. Moreover, the adjudicator should have the option, subject to veto by the client, of waiting to hear and consider any particular application until relevant policy guidelines are clarified and up-dated. Where the client wished to proceed instead of waiting, the new policy should clarify how that particular client is to be dealt with in the future (whether or not the same treatment will be given the same client in the future when a new policy is generally in effect, and for what period of time). The periodic issuance of general policy guidelines reflecting the tentative lines along which the regulator anticipated its policy would develop in the future would enable parties to the adjudicatory process to include in their applications representations on aspects of evolving policy with special relevance to their particular case.

d. In order to involve diverse segments of the public in the policy planning and adjudicatory process, the following measures must be taken by the regulatory body:

   i. Maximum disclosure to the public of the information pertinent to regulatory decisions.

   ii. Full disclosure of ex parte consultations.

   iii. Costs to actively participating interveners on a solicitor-client basis plus disbursements for expert witnesses, save for instances where the intervention was frivolous.

e. Adjudicatory decisions should be subject to review if at all only by a review committee of the regulatory body itself and in the courts on the grounds of error of law and excess of jurisdiction.

No executive review or appeal should be available from the decisions of an independent regulatory body. It is by now clear that I regard abolition of "appeals" to Cabinet as essential to protect the integrity of the regulatory process. In any event, with the implementation

of the numerous proposals above with regard to policy development there should no longer be a need for executive review of general board policy, a key function in effect presently served by Cabinet appeals from individual decisions.

f. Enforcement mechanisms, generally inadequate under present regulatory schemes, must be created to deal with non-adherence to terms and conditions placed on licences, certificates, etc.

It is inappropriate for an independent regulatory body to be dependent on the Attorney General to prosecute enforcement matters. The large number of Crown enterprises in existence and the recognition, discussed earlier, that vested economic interests have significant informal influence at the executive level could create a serious loss of public trust in the exercise by the Federal Crown of prosecutorial discretion. Current examples of public distrust abound with regard to enforcement of health, safety and pollution guidelines in industry and the energy field.

Proposals 1(e-i) above should also be fully implemented here under scheme 2, for they are of equal value whether the primary responsibility for policy development lies in a department or with a regulatory body.

3. In addition to the two models outlined above, the one maximizing executive control and the other maximizing the independence of the regulatory body, a variety of hybrid models clearly could be designed. This should be done with care, however, or lines of political control will become as blurred as they often are now. Executive review, though it probably would not be apprehended as needed even by the executive where secondary legislation was current and detailed, should be prohibited in all cases other than as provided for in scheme 1 above. A request for extraordinary relief could be put to a review committee established within the adjudicatory body as well as it could to a Minister's office, and request for review on the ground of misinterpretation of policy would place the Minister in a position to disrupt orderly development of jurisprudence in the regulatory or administrative area in question and is therefore not desirable.

B. MODEL B: GUIDELINES TO AMELIORATE PRESENT PRACTICE AND PROCEDURE

If no fundamental changes are made in the regulatory/administrative law areas, the following modifications would still be useful to strengthen representative government within the framework of the parliamentary system.

1. Eliminate all power in the Governor in Council to vary, rescind or reverse decisions of independent statutory decision-makers. The Governor in Council on review should be limited to a power to remit the decision back to the regulatory board or administrator for reconsideration and final determination. There should be public notice of matters made the subject of requests for review. Time limits should be established within which requests for review must be made and decisions rendered by the Governor in Council. Time limits and procedures to ensure an orderly exchange of pleadings on review by the Governor in Council will not prejudice Privy Council control over the decision-making process or intra-governmental consultation process and should be established. Urgent matters could be decided more quickly on notice to the parties of intent to decide by a given day. All referrals back to the regulatory board should be accompanied by written reasons, copies of which are sent to the parties. Extraordinary provision could be made for the provision of confidential written reasons to the regulatory body. Exercise of the provision for confidential reasons could in turn be subject to review and confirmation or rejection by a Federal Court judge.

2. Explicitly authorize or prohibit by statute the delegation of existing Ministerial review, appeal and approval powers, and provide formal procedures to govern their exercise.

3. Require the publication of all secondary legislation, including rules, directives, and guidelines, to prevent the effective promulgation of "secret" law and provide an opportunity for routine scrutiny of all secondary legislation to ensure that it is intra vires the enabling legislation in its substance as well as its form.

4. Implement the measures in A(2)(d) above which are designed to foster effective public participation in the regulatory process and eliminate lobbying tactics and executive interference, both characterized by confidentiality, with independent regulatory bodies.

5. Subject the problem of conflict of interest in its various forms, discussed above in Chapter VII, Section D, to further study to determine how protections against its effects can be best established in the regulatory area. Special attention must be given to the scope for conflict of interest arising from the dual involvement of the federal government as regulator and regulatee.

Chapter IX

PROBLEMS OF FEDERAL-PROVINCIAL REGULATION

In recent years there have been a series of serious confrontations between federal and provincial authorities with regard to regulation. Some conflict has arisen from overlapping regulatory responsibilities as, for example, in the regulation of energy production and distribution where the National Energy Board is responsible for inter-Provincial pipelines and the provincial regulator is responsible for intra-Provincial distribution. In the transportation field similar problems potentially exist in the area of motor vehicle licences, where federal regulatory responsibility by statute (not implemented) covers inter-provincial carriers while provincial regulators are responsible for the issuance of licences for carriers within the province. Jurisdictional disputes with roots in the division of powers in the BNA Act where an obvious geographical test is not available are another inexhaustible source of confrontation, the recent cable and pay-T.V. disputes being good examples. In addition, the decisions of a federal regulatory body may have important practical impact on the production, availability, rates or tariffs, nature of services, and distribution, of an energy, communications, or transportation product or service within an individual province. Where federal and provincial policy finds itself at logger-heads, the carrier or producer who is subject to regulation by both bodies finds it difficult to engage in coherent business planning.

Existing mechanisms for federal-provincial consultation in the policy planning area have proved somewhat less than fully satisfactory. Provincial governments do represent regional interests and can provide a perspective on energy, transportation and communications policy that is unique and a valuable contribution to the policy

planning area. Because of their special status as elected representatives, provincial governments have from time to time expressed considerable discomfort in appearing on a merely equal basis with other interveners at federal regulatory hearings. Examples of federal-provincial conflict of the types discussed above were seen in the case-studies in Chapter VI, especially the NordAir Affair and the Manitoba Cable case.

There have been diverse proposals to alleviate some of the sources of federal-provincial conflict in the regulatory area. One standard solution proposed and in use to some extent is legislation providing for an inter-delegation of authority between the federal and provincial spheres. The policy planning area is thorny, however, and it is often difficult to achieve federal-provincial agreement.

The federal executive has perceived itself as being placed at a disadvantage in negotiation with the provinces by the independent regulation-making powers of the CTC and the CRTC. The solution which appeared to be most favoured by some members of the Liberal cabinet was to provide the federal Minister with power to issue "directives" to the federal regulatory agency to ensure the implementation on the federal level of relevant federal-provincial agreements. This idea has been debated for the areas of transport and communications since at least the summer of 1975. As of March of 1979 it remained the favoured solution, not only as an aid to resolving many federal-provincial disputes of the types mentioned above, but also as a means for the federal cabinet to exercise a general ongoing control over policy generated or implemented by the independent federal regulatory bodies. Members of the Liberal cabinet justified pulling increased power to the centre in this fashion by arguing that it was necessary if the Cabinet was to have the tools required for resolution of federal-provincial conflict.

The proposal was explained by the Minister of Communications in April of 1975 in the following manner:

> The purpose of this provision would be to ensure that the development of policy would be, and would be clearly seen to be, under the control of elected representatives of the people. It would also afford opportunity, from time to time, for the views of the governments of the provinces to be made

applicable to the decisions of the Federal Commission.[119]

The expectation was that policy planning could be conducted by way of federal-provincial conferences culminating in agreements which then would be implemented on the federal side by the issuance of policy directives to the federal regulatory bodies in question. The closely related idea which has been proposed is to place the regulation making power of all independent agencies under Cabinet control and restrict the regulatory bodies themselves to the simple enforcement of the regulations and the policy contained in the regulations.[120]

Proponents of ministerial directive powers are certainly correct in anticipating that the most efficient way to deal with both sets of problems, that is, generation and implementation of policy in the federal regulatory area as such, and generation and implementation of policy insofar as it requires cooperation between provincial and federal governments, will be best achieved by a mechanism of common design. I do not believe it is wise, however, for the reasons outlined in the preceding chapters, to use broad directive powers as they have been envisioned for this purpose. Other better solutions are available. All the negative aspects seen above to be associated with creation of broad directive powers need not be reiterated here. The principal objection, in my view, is the excessively heavy dependence on the principle of ministerial responsibility for the purposes of political accountability they require. However viable reliance on ministerial responsibility to assure that ultimate political control resides in Parliament may or may not be, both in general and in particular circumstances, there is really no need to place undue burdens on the principle.

One problem in particular, however, that of conflict of interest, should perhaps be underlined at this point. The federal government is not only responsible for regulation in the federal jurisdiction but also has occasion through its agents, the Crown corporations, to appear as clients before federal regulatory bodies. The scope for conflict of interest here is clear and while it may well be that the federal cabinet has no active malicious intent to issue directives of a type which would be equivalent to the dictation to the regulators of policy placing federal Crown corporations in a favoured position, it nevertheless remains true that the perspective

brought to bear by Cabinet on problems of broad public policy must inevitably be influenced by considerations arising from the increasing direct involvement of the federal government in business by way of the Crown corporation as well as by the well-established pressures on Cabinet to placate major business interests.

The interests both of the provinces and of non-state operated enterprises as well as of the public in general would be rather better protected if federal-provincial agreements -- assuming that such agreements can in fact be achieved -- were subject to ratification or negative resolution by Parliament and the provincial legislatures concerned. Reference could then be made to the agreements themselves by the regulatory agencies concerned and it would be unnecessary to interpose the mechanism of the directive, to be issued or not as was seen to be desirable by the federal Cabinet and worded in the form that was deemed most appropriate by the federal Cabinet or minister involved. The onus would thus be placed on the federal and provincial governments to engage in any negotiations required to arrive at clear agreements and to obtain legislative approval for these agreements. Agreements of this type might as well be achieved by federal-provincial committees of regulators; regulators in theory should be more efficient in performing this task as they have a familiarity with the subject matter rarely possessed by ministers. The capacity to focus on technical issues when these are relevant would make it possible to blend consideration of technical and political questions. At once, four objectives would be achieved: (1) federal and provincial regulators would be provided with a clear mandate to implement a precise policy as set forth in the agreement, (2) the new policy would be clearly intra vires, (3) the federal-provincial dispute would presumably have been resolved, and (4) federal and provincial regulators would interpret a common agreement, a single document, rendering the interposition of federal and provincial executive interpretations, issued to them in the form of regulations or "directives", superfluous.

The aftermath of the Manitoba cable case, moreover, indicates that a federal regulatory body can respond realistically to special circumstances created by federal-provincial agreements and is willing to take provincial policy into account when applying its own policy for the purposes of issuing broadcasting licences

within an individual province. This experience may indicate that the ratification scheme proposed above, involving a high degree of formality, is quite unnecessary. Success of the informal approach, however, requires a strong-minded and persuasive federal commission if a degree or type of fragmentation in federal regulatory policy that would defeat its very purpose is to be avoided.

Statutory Powers of Direction, Review and Appeal in the Minister and the Governor in Council over Decisions of Federal Boards, Tribunals and Commissions

The statutory provisions classified were selected from the November 1, 1978, Office Consolidation of the Revised Statutes of Canada prepared by the Department of Justice. The method of selection used was the following. First, computer searches were conducted using two key word combinations: (1) Governor Minister Minister's Ministerial and Appeal* Directive Directives Rescind* Reverse Reversed Revoke* Review Reviewed Reviews Varied Varies Vary, and (2) Governor Minister Minister's Ministerial and Direct Directed Directing Direction Directions Directs but not Appeal* Directive Directives Rescind* Reverse Reversed Revoke* Review Reviewed Reviews Varied Varies Vary. The sections included in that sampling were then screened by hand to eliminate those where no prior exercise of statutory decision-making power was under review or appeal.

Subsection 2(g) of the Federal Court Act defines the terms "federal board, Commission or other tribunal" to mean ...

> "any body or any person or persons having, exercising or purporting to exercise jurisdiction or powers conferred by or under an Act of the Parliament of Canada, other than any such body constituted or established by or under a law of the province or any such person or persons appointed under or in accordance with a law of the province or under section 96 of the British North America Act, 1867;"

The breadth of this definition implies that virtually all federal statutory decision-making powers, not merely those exercised by a federal "board, commission or tribunal" so-called and subject by statute to executive review, are technically within the purview of this study insofar as all departmental administrators report to a Minister and their decisions may thus be subject to review. Further criteria clearly had to be imposed to select the sections to be studied. Explicit provisions for executive review or appeal of the decisions of federal boards, tribunals and commissions so-called have

all been included. Decisions by single persons exercising statutory decision-making powers specified as belonging to the holder of a particular office such as "Director" or "Administrator" or "Superintendent" have only been included insofar as the legislation appears to have been cast in an attempt to give the original decision-maker so-named a functional independence, rather like that of a board or tribunal, from the Minister. Provisions for appeals to an adjudicator or appeal board rather than to the Minister or from a decision by the Minister have been partially included in this classification to obtain a more balanced and adequate view of the scope and significance of ministerial review powers within the legislative scheme as a whole.

The statutory provisions included in the final list cannot be regarded as totally exhaustive of all provisions in the Revised Statutes of Canada for review or appeal by the Minister or the Governor in Council of the decisions of federal boards, commissions and tribunals. The Revised Statutes of Canada do not use a uniform terminology and as a result, in all probability, there are a few statutory provisions in the Revised Statutes of Canada that provide for the effective equivalent of a review or appeal power and yet would not be selected by the key word combinations used. In addition, certain Acts give effect to review and appeal powers under other Acts or sections of the same Act by the use of a phrase such as "the provisions of section 64 of the National Transportation Act apply mutatis mutandis to all decisions of the board made pursuant to this section". No section worded in this manner would have been included in the basic group from which this classification has been prepared. Such provisions have been included in the material classified insofar as they have come to my attention but the list does not purport to include each and everyone of these provisions. At the same time it is fair to say that the material classified is sufficiently complete to give a fully representative view of the various legislative schemes in use at the present time to provide for executive review and appeal powers over federal administrative decisions.

Directive powers have been included in this table to indicate the extent to which the executive holds a discretionary or mandatory power to define the parameters within which the independent statutory decision-maker exercises original discretion. If the aim is to ascertain the extent of executive control over the substance

of decisions of federal boards, tribunals and commissions, then clearly directive powers are as significant as review and appeal powers. Regulations have, in this regard, a role and significance similar to directives. For simplicity's sake the distribution of regulation-making powers has not been included in this table. However it is to be noted that most regulations are made either by the Governor in Council with or without the recommendation of the appropriate Minister, by the Minister with the approval of the Governor in Council, or, on occasion, by a regulatory body with or without the approval of the Minister. Effective control over the content of regulations, by which legislation is implemented and in which the policy aims of legislation are interpreted and given substance, is thus in the hands of the executive, not Parliament nor, save rarely, independent regulatory bodies. In examining the table below the significance of those regulation-making powers must not be forgotten.

K E Y

The following abbreviations are used in the following table:

a -- directive power (unspecified) in Minister

b -- general directive power in Minister

c -- specific directive power in Minister

d -- jurisdictional directive power in Minister

e -- board or company under management and control of Minister

f -- directive power (unspecified) in Governor in Council

g -- general directive power in Governor in Council

h -- specific directive power in Governor in Council

i -- jurisdictional directive power in Governor in Council

j -- board or company agent of federal Crown

k -- agency or board of review with solely inquiry and advisory or reporting function

l -- Minister to review recommendation and decide

m -- appeal to Minister

n -- Minister to review recommendation and advise Governor in Council

o -- Governor in Council to decide

p -- Governor in Council to approve

q -- appeal to Governor in Council

r -- appeal to board or adjudicator from decision of Minister

s -- appeal to adjudicator rather than to Minister

		a	b	c	d	e	f	g	h	i	j	k	l	m	n	o	p	q	r	s
Anti-Dumping Act, A-15	s. 17												l							
	s. 18(3), (4)													m						
	s. 19																		r	
Anti-Inflation Act, (S.C. 1974-75-76, c. 75)	s. 12											k								
	s. 24																	q		
Atlantic Provinces Power Development Act, A-17	s. 4				d															
Atomic Energy Control Act, A-19	s. 7		b	c																
	s. 10(4)										j									
	s. 15								h											
Broadcasting Act, B-11	s. 17(4)			c																
	s. 18								h											
	s. 22								h											
	s. 23																	q		
	s. 27								h											
	s. 39(3)			c					h											

		a	b	c	d	e	f	g	h	i	j	k	l	m	n	o	p	q	r	s
Canada Pension Plan, C-5	s. 28(2)													m						
	s. 29																		r	
	s. 83(1)													m						
	s. 84																		r	
Canadian Dairy Commission Act, C-7	s. 11	a					f													
Canadian Wheat Board Act, C-12	s. 4(2)										j									
	s. 11						f													
	s. 35.11														n					
	s. 35.15																p			
Canada Grain Act (S.C., 1970-71-72, c.7)	s. 11	a					f													
	s. 15											k								
	s. 78													m						
	s. 97							g	h											
Canadian Human Rights Act (S.C., 1976-77, c. 33)	s. 55												l							

		a	b	c	d	e	f	g	h	i	j	k	l	m	n	o	p	q	r	s
Copyright Act, C-30	s. 30		b																	
Citizenship Act (S.C., 1974-75-76, c. 108)	s. 18								h											
Clean Air Act (S.C., 1970-71-72, c. 47)	s. 18												l							
Combines Investigation Act, C-23	s. 27.1			c																
	s. 28															o				
	s. 47			c								k								
Customs Act, C-40	s. 45													m						
	s. 46(3)													m						
	s. 47																		r	
Employment and Immigration Reorganization Act (S.C., 1976-77, c. 54)	s. 9(2)	a																		
	s. 10										j									
	s. 17, 21											k								

		a	b	c	d	e	f	g	h	i	j	k	l	m	n	o	p	q	r	s
Environmental Contaminants Act (S.C., 1974-75-76, c. 72)	s. 6											k								
Fish Inspection Act, F-12	s. 5													m						
	s. 68													m						
Fisheries Prices Support Act, F-23	s. 3										j									
Foreign Investment Review Act, (S.C., 1973-74-75, c. 46)	s. 7											k								
	s. 9, 10														n					
	s. 11														n					
	s. 12															o				
	s. 13																p			
Hazardous Products Act, H-3	s. 8														n	o				
	s. 9											k							r	
Grain Futures Act, G-17	s. 8(6)																p			
	s. 11													m						

		a	b	c	d	e	f	g	h	i	j	k	l	m	n	o	p	q	r	s
Immigration Act, 1976 (S.C., 1976-77, c. 52)	s. 40											k				o				
	s. 70																		r	
	s. 73																			s
	s. 79																			s
	s. 83												l							
	s. 97(3)			c																
	s. 115																	q		
	s. 117													m						
Law Reform Commission Act, (R.S.C., c. 23 (1st Suppl.))	s. 12(2)			c																
Canada Labour Code, L-1	s. 6											k	l							
	s. 61.5																			s
	s. 65			c																
	s. 171.1				d															
Canada Land Surveys Act, L-5	s. 55													m						
National Film Act, N-7	s. 10					e														

		a	b	c	d	e	f	g	h	i	j	k	l	m	n	o	p	q	r	s
National Harbours Board Act, N-8	s. 3										j									
	s. 13																p			
	s. 14																p			
National Energy Board Act, N-6	s. 17																p			
	s. 47																p			
	s. 84																p			
National Transportation Act, N-17	s. 25													m						
	s. 34																p			
	s. 64																	q		
Northern Canada Power Commission Act, N-21	s. 3(9)	a					f													
Northern Inland Waters Act, R.S.C., c. 28 (1st Suppl.)	s. 10																p			
	s. 27								h											

		a	b	c	d	e	f	g	h	i	j	k	l	m	n	o	p	q	r	s
Northern Pipelines Act, N-21.7	s. 4					e					j									
	s. 19							g												
	s. 20(4)																p			
	s. 20(6)																p			
	s. 26(5)													m						
	s. 27																		r	
Ocean Dumping Control Act, (S.C., 1974-75, c. 55)	s. 12											k								
Oil and Gas Production and Conservation Act, O-4	s. 22																			s
	s. 40																p			
	s. 41(5)																p			
Patent Act, P-4	s. 4	a																		
Penitentiary Act, P-6	s. 4	a																		
	s. 4.1	a																		
Pesticide Residue Compensation Act, P-11	s. 11, 13																		r	
Petroleum Administration Act, (S.C., 1974-75, c. 47)	s. 38								h											
	s. 70	a																		

		a	b	c	d	e	f	g	h	i	j	k	l	m	n	o	p	q	r	s
(Petroleum Adm. Act cont'd)																				
	s. 72(4)								h											
	s. 81								h						n					
	s. 89											k								
Pilotage Act, (S.C., 1970-71-72, c. 52)	s. 18													m						
Quarantine Act, (R.S.C., c. 33 (1st Suppl.))	s. 8(3)													m						
Railway Act, R-2	s. 141(8)												l						r	
	s. 189																p			
	s. 190											k				o				
	s. 411																	q		
Royal Canadian Mint Act, R-8	s. 6						f													
Royal Canadian Mounted Police Act, R-9	s. 5					e														
	s. 43											k								

		a	b	c	d	e	f	g	h	i	j	k	l	m	n	o	p	q	r	s
Small Loans Act, S-11	s. 5																	q		
Statute Revision Act, (S.C., 1974-75-76, c. 20)	s. 4	a																		
Surplus Crown Assets Act, S-20	s. 6					e					j									
Territorial Lands Act, T-6	s. 5			c																
Trust Companies Act, T-16	s. 71(a)																	q		
Unemployment Insurance Act, 1971, (S.C., 1970-71-72, c. 48)	s. 35(3)																p			
	s. 37(1)																p			
	s. 37(4)																p			
	s. 38(10)																p			
	s. 70, 75													m						
	s. 84																		r	

Orders in Council from January 1968 to February 1979 disposing of petitions to the Governor in Council pursuant to Statute from the Decisions of Statutory Regulators

1. Between August 27, 1976, and August 24, 1978, 15 petitions or groups of petitions against Orders of the Administrator were submitted to the Governor in Council pursuant to section 24 of the Anti-Inflation Act. All of these petitions were dismissed.

Petition submitted July 29, 1976, by Aircraft Operations Group. No Order in Council issued.

Petitions submitted in August, 1976, re Atlantic Sugar. No Order in Council issued.

Petitions submitted September 3, 7, and 8, 1976 re City Motors and Hickman Motors. No Order in Council issued.

P.C. 1976-2418, September 29, 1976, on the petition of the Manitoba Liquor Control Commission

P.C. 1976-3278, December 23, 1976, on the petition of the Essex County Board of Education

P.C. 1978-725, March 9, 1978, on the petition of the Niagara South Board of Education

P.C. 1978-726, March 9, 1978, on the petition of Eastern Provincial Airways (1963) Limited

P.C. 1978-808, March 16, 1978, on the petition of the City of Winnipeg

P.C. 1978-809, March 16, 1978, on the petition of the Treasury Board of Canada re the Aircraft Operations Group

P.C. 1978-810, March 16, 1978, on the petition of the City of Winnipeg

P.C. 1978-811, March 16, 1978, on the petition of St. Boniface School Division No. 4

P.C. 1978-1626, May 11, 1978, on the petition of Essex Group Inc.

P.C. 1978-2271, July 13, 1978, on the petition of Abex Industries Limited

P.C. 1978-2612, August 16, 1978, on the petition of International Union of Operating Engineers Local #955

P.C. 1978-3226, October 19, 1978, on the petition of Communications Union Canada

2. Transport: Canadian Transport Commission and petitions pursuant to section 64 of the National Transportation Act. As was explained above the non-issuance of any Orders in Council disposing of petitions or on his own motion merely indicates that the Governor in Council has not exercised his powers under section 64 but not necessarily that no petitions were submitted.

1968 No Orders in Council.

1969 No Orders in Council.

1970 No Orders in Council.

1971 P.C. 1971-2167, October 14, 1971, denying the petition of NordAir Ltd. to vary or rescind Decision No. 2968 in which the C.T.C. authorized A. Fecteau Transport Aérien Ltée. to provide a Class 3 specific point commercial air service to the additional point Fort George under Licence No. ATB 1712/67(NS).

1972 No Orders in Council.

1973 P.C. 1973-822, March 29, 1973, denying the petition of Québecair to vary or rescind Decision No. 3075 in which the C.T.C. denied an application for a licence to operate a Class 8 International Schedule Commercial air service serving Montréal and points in the eastern United States.

1973 P.C. 1973-823, March 29, 1973, denying the petitions of A. Fecteau Transport Aérien Ltée. to vary or rescind Decision No. 3433 in which the C.T.C. authorized NordAir Ltée. to serve certain points from Montréal, and Nos. Decisions 3426, 3434 and

3438 in which the C.T.C. imposed certain weight limitations on aircraft to be used under licences held by the petitioner.

1974 P.C. 1974-715, March 26, 1974, denying the petition of Canadian Pacific Airlines Ltd. to vary or rescind Decision No. 3566 in which the C.T.C. found that the proposed acquisition by Air Canada of an interest in Wardair Canada Ltd. by the purchase of 1/3 of the issued shares of Wardair Canada Ltd. and later certain non-voting preferred shares (to be issued) would not unduly restrict competition or otherwise be prejudicial to the public interest.

1974 P.C. 1974-1605, July 16, 1974, denying the petitions of the provinces of Manitoba and Saskatchewan, the City of Yorkton and the Yorkton Chamber of Commerce to rescind or vary Decision No. 3729 of the Air Transport Committee of the Canadian Transport Commission approving an application by Mid-West Airlines Ltd. to suspend the commercial air services operating between Winnipeg and Brandon under licence No. ATC 1949/70 (NS) and between Winnipeg, Dauphin and Yorkton under licence No. 1950/70 (NS).

1975 No Orders in Council issued. No disposition of group of three petitions by the CAC and the Provinces of Manitoba and Saskatchewan against the CTC decision rendered May 26, 1975 in the 1975 air rate case.

1976 P.C. 1976-894, April 13, 1976, on the recommendation of the Minister of Transport varying the following orders and decisions of the Canadian Transport Commission:

(a) Order No. R-16824 dated June 27, 1973;

(b) Order No. R-17016 dated August 2, 1973; and

(c) any other order or decision of the Canadian Transport Commission that is inconsistent with paragraph (d) below;

(d) that the following rates or portions of rates for domestic and export movement of rapeseed meal and rapeseed oil from the four rapeseed crushing plants at Altona, Nipawin, Saskatoon and Leth-

bridge, be established annually at minimum compensatory levels:

(i) rates for rapeseed meal and rapeseed oil moving west;

(ii) rates for rapeseed oil moving east; and

(iii) the portions of rates pertaining to the movement of rapeseed meal east of Thunderbay or Armstrong, Ontario.

1976 P.C. 1976-2066, August 5, 1976, on the recommendation of the Minister of Transport varying Decision No. 4886 of the Canadian Transport Commission on the application by the Attorney General of British Columbia for an order to restrain or enjoin Pacific Western Airlines Ltd. from moving its executive head-office, headquarters or administration staff and/or repair and maintenance facilities and staff from British Columbia.

1976 P.C. 1976-3320, December 23, 1976, denying the petition of Canadian Pacific Ltd., opposed by the Government of the Province of British Columbia and a number of local businesses and associations, municipal councils and members of the British Columbia Legislature, to vary or rescind Order No. R-23304 of the Canadian Transport Commission requiring Canadian Pacific to reconstruct two bridges at French Creek and Tsable River within twelve months. (Canadian Pacific Ltd. had suspended all railway operations between Parksville and Courtenay on the Esquimalt and Nanaimo Railway in the Province of British Columbia on July 1, 1975, on the grounds that the two bridges in question were unsafe.) Order No. R-23304 of the Canadian Transport Commission is hereby varied to provide that Canadian Pacific Ltd. shall proceed forthwith with action to reconstruct the bridges at mileage 98.6 and 125.5 of its Victoria subdivision and that such reconstruction be completed and ready for train traffic within twelve months of the date of this Order in Council.

1977 P.C. 1977-362, February 18, 1977, on the recommendation of the Minister of Transport varying the following Orders and Decisions of the Canadian Transport Commission: a) Order No. R-16824 dated June 27, 1973, as varied by Order in Council P.C. 1976-894; and b) Order No. R-17016 dated August 2, 1973, as varied by Order in Council P.C. 1976-894,

only insofar as necessary to provide that Canadian Transport Commission Orders No. R-23976 dated November 26, 1976, and No. R-24045 dated December 16, 1976, purporting to be in conformity with the above-mentioned Order in Council, P.C. 1976-894, express the intention of the Governor in Council and are binding upon the Canadian Transport Commission and upon all parties.

1977 P.C. 1977-717, March 17, 1977, denying the petition of the Attorney General of British Columbia to vary Decision No. 4886 of the Canadian Transport Commission on the application by the Attorney General of British Columbia for an order to restrain or enjoin Pacific Western Airlines Ltd. from moving its executive head-office, headquarters or administrative staff and/or repair and maintenance facilities and staff from British Columbia as varied by Order in Council P.C. 1976-2066 of August 5, 1976.

1977 P.C. 1977-1372, May 12, 1977, granting the petition of McCord Helicopters Ltd. to vary Decision No. 3896 and Decision No. 4942 of the Canadian Transport Commission to provide for the acceptance of the application by McCord Helicopters Ltd. for authority to operate a Class 4, Group A-RW charter commercial service to transport goods and persons between points within Canada from a base at Chetwynd, B.C. and the issuance of a licence accordingly.

1977 P.C. 1977-2353, August 16, 1977, denying the petition of Mr. Ian Watson, M.P., to vary or rescind the Decision of the Canadian Transport Commission dated February 24, 1976, rejecting an application for the re-establishment of passenger train service between Valleyfield and Montréal in the Province of Québec.

1978 P.C. 1978-168, January 19, 1978, on the recommendation of the Minister of Transport varying Canadian Transport Commission Decision No. 5369 and Part IV-A of the Air Carrier Reguations made by the Canadian Transport Commission General Order No. 1977-9 Air dated December 19, 1977, only insofar as necessary to provide: a) that a larger number of inter-regional ABCs (domestic) be permitted in 1978 to give sufficient scope for the initiation of a full and fair test and determination of the demand

for low-priced domestic air travel and of the impact of inter-regional ABCs (domestic) on schedule services; b) that other air carriers holding Class-4 licences be allowed to apply for the right to participate in the additional inter-regional ABCs (domestic) to be permitted pursuant to (a) above, without giving the two trunkline air carriers any primary right to the operation of such additional inter-regional ABCs (domestic); and c) that the Commission consider and determine whether any other restrictions on the performance of ABCs (domestic) contained in Part IV-A of the Air Carrier Regulations may appropriately be eased, and in particular, whether it would be practical and desirable to permit the mixing of ABCs (domestic) and ITC passengers, and of originating and returning passengers, on the same aircraft, and to reduce the time requirements in respect of advance booking and if so, the Commission shall amend the Air Carrier Regulations accordingly.

1978 P.C. 1978-1993, June 15, 1978, denying the petitions of the Government of Saskatchewan and Mr. Don Mazankowski, M.P., to rescind or vary Order No. R-24504 of the Railway Transport Committee of the Canadian Transport Commission.

1978 P.C. 1978-2351, July 20, 1978, denying the petition of Mr. Don Mazankowski, M.P., seeking rescission of Order No. R-24502 of the Railway Transport Committee of the Canadian Transport Commission.

1978 P.C. 1978-3091, October 5, 1978, denying the petitions of the Government of Ontario, Great Lakes Airlines Ltd., SunTours Ltd. and the Government of Manitoba to vary or rescind one or both of Decisions Nos. 5537 and 5538 in which the Canadian Transport Commission altered the licences of Transair Ltd. and NordAir Ltd.

1978 P.C. 1978-3389, November 6, 1978, denying the petitions of the Government of Ontario, the Government of Québec, the Consumer's Association of Canada, the Alliance of Canadian Travel Associations, the Honourable Herb Gray, M.P., Great Lakes Airlines Ltd., Suntours Ltd., the Chamber of Commerce of Thunderbay and the Government of Manitoba, to vary or rescind Decision No. 5539 in which the Air Transport Committee of the Canadian Transport

Commission decided not to disallow the acquisition by Air Canada of NordAir.

1979 Pending. Petition submitted on January 18, 1979 by Canadian National Railway Company requesting that the Governor in Council vary Order No. R-26840 of the Railway Transport Committee and rescind Order No. R-28128 and the Decision of the Review Committee of the Canadian Transport Commission dated January 5, 1979, in the matter of the abandonment of certain operations in the Neepawa and Canberry subdivisions.

3. Broadcasting and Telecommunications: Canadian Radio-Television and Telecommunications Commission (or its predecessor Canadian Transport Commission) and Orders in Council disposing of petitions pursuant to section 64 of the National Transportation Act and section 23 of the Broadcasting Act. Non-issuance of an Order in Council does not necessarily imply that no petitions were submitted.

1968 No Orders in Council.

1969 No Orders in Council.

1970 No Orders in Council.

1971 No Orders in Council.

1972 No Orders in Council.

1973 P.C. 1973-871, April 9, 1973, on the recommendation of the Minister of Communications, pursuant to subsection 64(1) of the National Transportation Act, varying the Decision of the Canadian Transport Commission on application "A" of Bell Canada filed with the Commission on November 10, 1972, by postponing the date on which the new tariffs are to become effective for approximately three months or until the third day of July 1973 to allow sufficient time for a review of the decision.

1973 P.C. 1973-1765, June 21, 1973, on the recommendation of the Minister of Communications pursuant to subsection 64(1) of the National Transportation Act varying the Decision of the Canadian Transport Commission dated March 30, 1973 on application "A" of Bell Canada filed with the Commission on November

10, 1972 in which the C.T.C. approved certain rate increases requested, by revoking the 50% increase in service charges (tariff items 100 and 110) set out on pages 18 to 20 of schedule 1 of said application "A" and authorized by the Commission, the said revocation not to affect the introduction of a minimum visit service charge as set out on page 19 of the said schedule 1.

1973 P.C. 1973-1827, June 29, 1973, on the recommendation of the Minister of Communications pursuant to subsection 64(1) of the National Transportation Act, varying the Decision of the Canadian Transport Commission dated March 30, 1973, on application "A" of Bell Canada filed with the Commission on November 10, 1972 in which the C.T.C. approved certain rate increases requested in the application, by revoking the 50% increase in service charges authorized by the Commission, other than the increases already revoked by Order in Council P.C. 1973-1765 of June 21, 1973, the said revocation not to affect the introduction of a minimum visit service charge.

1974 No Orders in Council.

1975 No Orders in Council.

1976 P.C. 1976-2761, November 10, 1976, on the recommendation of the Minister of Communications pursuant to section 23 of the Broadcasting Act, setting aside the issue by the C.R.T.C. of the following broadcasting licences: a) the licences to service Selkirk and Portage La Prairie, Manitoba, which were issued to Winnipeg Videon Ltd. by C.R.T.C. Decision 76-650 of September 16, 1976; and b) the licence to serve Brandon, Manitoba which was issued by Grand Valley Cablevision Ltd. by C.R.T.C. Decision 76-651 of September 16, 1976.

1977 P.C. 1977-1508, May 26, 1977, denying the petition of Capital Cable Cooperative dated May 3, 1977, pursuant to section 23 of the Broadcasting Act to set aside Decision No. 77-193 of the Canadian Radio-Television and Telecommunications Commission or to refer it back to the Commission for reconsideration and hearing.

1977 P.C. 1977-2026, July 14, 1977, dismissing the petition submitted on June 1, 1977, by Mr. A. J. Roman

on behalf of the National Anti-poverty Organization pursuant to subsection 64(1) of the National Transportation Act to vary or rescind Telecom Decision No. 77-7 of the Canadian Radio-Television and Telecommunications Commission dated June 1, 1977, concerning the application of Bell Canada for certain rate increases.

1977 P.C. 1977-2027, July 14, 1977, dismissing the petition submitted June 9, 1977 by Mr. A. J. Roman on behalf of the Inuit Tapirisat of Canada, pursuant to subsection 64(1) of the National Transportation Act, to vary or rescind the Canadian Radio-Television and Telecommunications Commission Telecom Decision C.R.T.C. 77-7 dated June 1, 1977, concerning the application of Bell Canada for certain rate increases.

1977 P.C. 1977-2028, July 14, 1977, dismissing the petition submitted May 12, 1977 by Canadian National Railway Co., pursuant to subsection 64(1) of the National Transportation Act, to vary or rescind Canadian Radio-Television and Telecommunications Commission Telecom Decision C.R.T.C. 77-3 dated April 7, 1977, concerning the application of the Canadian National Railway Company for certain rate increases.

1977 P.C. 1977-3152, November 3, 1977, the Governor in Council pursuant to subsection 64(1) of the National Transportation Act, having given due consideration to petitions and views of interested parties and to the views of the Canadian Radio-Television and Telecommunications Commission as expressed in Telecom Decision C.R.T.C. 77-10 in which the Commission did not approve the Telesat Canada Proposed Agreement, made as of December 31, 1976, with the Trans-Canada Telephone System, by his own motion, varying the Telecom Decision C.R.T.C. 77-10 dated August 24, 1977, so as to provide for the approval of the Agreement between Telesat Canada and Trans-Canada Telephone System; that is to say, the decision is to be read as follows: "The Agreement between Telesat Canada and the Trans-Canada Telephone System, made as of December 31, 1976, is in the public interest and is hereby approved."

1978 P.C. 1978-3577, November 23, 1978, dismissing the petitions of C. K. Nelson and D. J. W. Robinson

dated October 3, 1978, the petition and supplementary petition of K. M. Greentree dated October 16, 1978 and November 21, 1978, and the petition of J. W. Gillespie, dated October 25, 1978, all pursuant to section 23 of the Broadcasting Act, to set aside or refer back to the Canadian Radio-Television and Telecommunications Commission for reconsideration and hearing Decisions C.R.T.C. 78-623/24, 78-629/30, 78-631/32 and 78-635/36 of the Canadian Radio-Television and Telecommunications Commission.

1979 P.C. 1979-191, January 25, 1979, on the recommendation of the Minister of Communications, pursuant to section 23 of the Broadcasting Act, not to set aside Decision 78-724 of the Canadian Radio-Television and Telecommunications Commission.

1979 Pending. Petition by Bell Canada submitted to the Governor in Council on March 2, 1978 pursuant to section 64(1) of the National Transportation Act for an order varying or rescinding two decisions of the Canadian Radio-Television and Telecommunications Commission dated August 10, 1978 (Telecom Decision C.R.T.C. 78-7) and February 2, 1979 (Telecom Decision C.R.T.C. 79-1) with respect to inclusion for the purpose of regulation of telephone rates in Ontario and Quebec of the income from a contract dated January 25, 1978 between Bell Canada and the Ministry of Post, Telegraph and Telephone of the Kingdom of Saudi Arabia providing for the extension, modernization, operation, and maintenance of the Saudi Arabian Telephone system for a period of five years.

4. Summary of Orders in Council Disposing of Petitions to the Governor in Council from Decisions of the Canadian Transport Commission and the Canadian Radio-Television and Telecommunications Commission, January 1968 to March 1979.

a. Transportation:

1968 No Orders in Council.

1969 No Orders in Council.

1970 No Orders in Council.

1971 Petitions Denied -- 1.

1972 No Orders in Council.

1973 Petitions Denied -- 2.

1974 Petitions Denied -- 2.

1975 No Orders in Council issued. No disposition on group of three petitions against CTC decision.

1976 Petitions Denied -- 1; Petitions Allowed -- 1; Order varied on the recommendation of the Minister -- 1.

1977 Petitions Denied -- 2; Petitions Allowed -- 1; Order varied on the recommendation of the Minister -- 1.

1978 Petitions Denied -- 4; Petitions Allowed -- 1.

1979 January to March: Pending -- 1.

b. Broadcasting and Telecommunications.*

1968 No Orders in Council.

1969 No Orders in Council.

1970 No Orders in Council.

1971 No Orders in Council.

1972 No Orders in Council.

1973 Order varied on the recommendation of the Minister -- 3.

1974 No Orders in Council.

1975 No Orders in Council.

1976 Order varied on the recommendation of the Minister -- 1.

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* Jurisdiction over regulation of telecommunications was transferred from C.T.C. to C.R.T.C. on April 1, 1976.

1977 Petitions Denied -- 4; Petitions Allowed -- 1.

1978 Petitions Denied -- 1.

1979 January to March: Petitions Denied -- 1; Petitions Pending -- 1.

APPENDIX C

Appeals from Decisions of the Canadian Transport Commission, 1972-1981[1]

	1972	1973	1974	1975	1976	1977	1978
Applications to the Review Committee under section 63 of the National Transportation Act							
withdrawn	2	5	1	--	1	2	3
no grounds for review	8	3	18	36	35	41	41
decision affirmed	15	10	14	7	14	21	6
decision varied	9	5	7	25	22	20	21
TOTAL	34	23	40	68	81	84	71
Appeals to the Minister under section 25 of the National Transportation Act re air, water (See Appendix D(2))							
decision modified	--	1	3	7	2	4	9
decision affirmed	7	6	5	3	12	16	7
Commission directed to review decision	3	2	3	2	4	1	3
TOTAL	10	9	11	12	18	21	19
Variation of Orders by the Governor in Council on the recommendation of the Minister under section 64 of the National Transportation Act[2]	0	0	0	0	1(rail)	1(rail)	1(air)
Petitions to the Governor in Council under section 64 of the National Transportation Act							
denied	0	2(air)	2(air)	0	1(rail)	2(1 air, 1 rail)	4(2 air, 2 rail)
allowed	0	0	0	0	1(air)	1(air)	0

[1] As reported in the Annual Reports, Canadian Transport Commission, 1972-1978.

[2] These Orders in Council make no reference to a specific petitioner although in some cases petitions regarding the matter had been submitted to the Governor in Council.

ENDNOTES

1. A brief bibliography of recent literature on regulation and the problem of political accountability in Canada is provided by H. N. Janisch, "Policy Making in Regulation: Towards a New Definition of the Status of Independent Regulatory Agencies in Canada" (1979), 17 O.H.L.J. 46, at endnote 2. Janisch's paper focuses on many of the issues discussed here and is recommended to the reader for its succinct analysis and engaging style although there are apparently subtle but I believe critical differences between our respective proposals for reform.

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

3. "Transportation Policy, A Framework for Transport in Canada, Summary Report"; "An Interim Report on Inter-City Passenger Movement in Canada"; and "An Interim Report on Freight Transportation in Canada".

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

5. S.C., 1974-75-76, c. 49.

6. Bill C-16, tabled November 9, 1978, section 9.

7. National Energy Board Act, S.C. 1959, c. 46, as amended; consolidated as R.S.C. 1970, c. N-6.

8. Canada Royal Commission on Canada's Economic Prospects, Final Report, November, 1957.

9. Canada Royal Commission on Energy, First Report, October, 1958; Second Report, July, 1959.

10. S.C., 1973-74, c. 46.

11. See Law Reform Commission Files.

12. S.C., 1974-75-76, c. 75.

13. See supra, Appendix B, section 1.

14. Both this explanation and that given in the preceding sentence are regarded as relevant by officials involved with administration of the Anti-Inflation Act.

15. Cf. John Kenneth Galbraith, The New Industrial State, 1967, Chapter 13, on the phenomena he labels "adaptation" and "identification" and finds to be enhanced as one approaches the inner circles of the technostructure.

16. See my comments above in Chapter II regarding Chapter IV.

17. Cf. the classification scheme used by the Lambert Commission, Final Report, Chapter 16.

18. A. R. Lucas and T. Bell, The National Energy Board, A Study Paper prepared for the Law Reform Commission of Canada, endnote 337.

19. Ibid., pp. 32-35.

20. See the CTC for example.

21. National Transportation Act, s. 25(4). This procedure is discussed below in Chapter VI.

21a. A Summary of Judgments of the Minister of Transport from 1975 to 1978 inclusive, on appeals under section 25 of the National Transportation Act, is available at the Law Reform Commission.

22. See supra, Appendix C.

23. Cf. discussion of use of section 25 appeal power and its use prior to 1975 in Le Contrôle Politique des Tribunaux Administratifs, by Patrick Kenniff et al., Les Presses de l'Université Laval, Québec, 1978.

24. Cf. discussion of the ministerial appeal by H. N. Janisch, The Regulatory Process of the Canadian Transport Commission, Law Reform Commission of Canada, Study Paper, 1978, at pp. 114 ff.

25. See supra, Appendix B, sections 2 and 4.

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

27. Consumers' Association of Canada v. Attorney-General of Canada (1978), 87 D.L.R. (3d) 33 (F.C.); appeal to the Federal Court of Appeal dismissed without reasons, January 25, 1979, unreported.

28. Section 23 is commonly seen, however, as a section providing for a "Cabinet appeal" and there is no better way to make a person involved with broadcasting do a double take than to suggest that there is no Cabinet appeal from broadcasting decisions of the CRTC.

29. See supra, Appendix B, sections 3 and 4.

30. Annual Report, Canadian Radio-Television and Telecommunications Commission, 1976-77, pp. 10-11. The problem here is essentially that seen above in conjunction with use of the section 25 ministerial appeal from decisions of the CTC to implement ministry policy in the absence of a formal mechanism for transmission of ministry policy to the Commission.

31. But see Chapter VI, section B(1) and Chapter IX. Further licences were granted on terms and conditions making certain concessions to the preferences of the Manitoba government. As Janisch, endnote 1 above, so aptly describes it in his most recent paper, the CRTC did not "capitulate" but rather made a "strategic withdrawal".

32. See supra, Appendix B, section 3.

33. See supra, Appendix B, section 3.

34. 87 D.L.R. (3d) 27 (F.C.) (March 9, 1978 per Marceau J.); reversed on appeal by the plaintiff to the F.C.A., November 17, 1978 per Pratte, Heald, Le Dain JJ.; reasons by Le Dain, unreported; leave to appeal to the S.C.C. granted February 5, 1979.

35. Lucas and Bell, op. cit., Case Study No. 2, p. 79 ff.

36. With regard to the pressing need for a revamping of regulatory schemes in the area of atomic energy, see G. Bruce Doern, The Atomic Energy Control Board, Law Reform Commission of Canada, Study Paper, 1977. In my view the proposed draft legislation seen in Bill C-14 (tabled November, 1977) did not adequately meet the problems of ministerial control and conflicts of interest arising from the significant involvement of the federal government through its Crown corporations in matters subject to regulation by the federal regulatory body.

37. Section 9.

38. Information based on interviews with government officials.

39. Supra, endnote 12.

40. I have argued below in Chapter IV that so-called "equitable relief", when granted on executive review, is simply a sub-category of "political relief".

41. Information based on interviews with government officials associated with the Board and the Administrator under the Act.

42. In the alternative, the original decision-maker or a review tribunal could be empowered to grant extraordinary relief.

43. See text below, Chapter VII, section C(1) with regard to whether directives are "law". Cf. H. N. Janisch "What is 'Law'? -- Directives of the Commissioner of Penitentiaries and Section 28 of the Federal Court Act -- The Tip of the Iceberg of 'Administrative Quasi-Legislation'", Comment, (1977), 55 Canadian Bar Review, 576-86.

44. See endnote 34 above and Re Nicholson and Haldimand-Norfork Regional Board of Commissioners of Police (1978), 88 D.L.R. (3d) 671 (S.C.C.).

45. See endnote 34 above.

46. See endnote 44 above.

47. Provisions of each type are in common use in the statutes.

48. See cases on File at Law Reform Commission.

49. Ibid.

50. Canadian Transport Commission General Rules under the National Transportation Act, General Order 1967-1, as amended by General Orders, Office Consolidation, 1978.

51. S.C., 1970-71-72, c. 7.

52. R.S.C., 1970, c. G-17.

53. S.O.R. 72-229 Gazetted July 12, 1972; as amended by S.O.R. 76-714 effective October 26, 1976, Gazetted November 10, 1976.

54. S.O.R. 69-391, Gazetted August 13, 1969; as amended by S.O.R. 71-636, Gazetted November 10, 1970 and S.O.R. 76-715, Gazetted October 26, 1976.

55. The information in the preceding paragraphs is based on interviews with officials associated with the offices and departments discussed.

56. This information is based on interviews with senior officials in MOT and the CTC.

57. See below, Chapter VII, section C(2).

58. Press release, Office of the Prime Minister, "Statement by the Prime Minister on Cabinet Committee Structure", April 30th, 1968.

59. Information based on interviews with Privy Council officials. Cf. also Gordon Robertson, "The Changing Role of the Privy Council Office", A Paper presented to the 23rd Annual Meeting of the Institute of Public Administration of Canada, Regina, September 8, 1971.

60. Ibid.

61. Based on interviews with Privy Council Office officials.

62. Ibid.

63. Ibid.

64. T. Gregory Kane, "Canadian Consumers Learn their ABCs", in Perspectives on Canadian Airline Regulation, ed. G. B. Reschenthaler and B. Roberts, Toronto, 1979. The second case was documented by an interview with counsel for the party concerned. It is possible as well for a petition against the decision of a regulatory body to be disposed of without notice even to the party who had been successful before that body, for petitions are regarded by the Privy Council as a private matter between the Governor in Council and the petitioner. Petitions are sent to interested parties solely as a matter of courtesy, often by counsel for the petitioner, though there is no legal obligation to do so.

65. Based on interviews with staff of CRTC.

66. In a recent unpublished paper dealing in part with Cabinet appeals, Greg Kane, Counsel for CRTC highlights the fact that the departmental memorandum is based on any material the department considers relevant for the purposes of disposing of a petition and thus may well include material not previously presented or referred to by any of the parties to the petition or even to the original hearing. Mr. Kane remarks that "this stands in distinct contrast to a judicial appeal where the judge considers the appeal on the basis of a record or case which contains all of the relevant information upon which the lower court based its decision".

67. Based on interviews with Privy Council officials and other government officials.

68. Ibid.

69. Letter from Jeanne Sauvé, Minister of Communications, to Andrew Roman of the Public Interest Advocacy Centre, Counsel for the Canadian Broadcasting League, March 16, 1979.

70. Letter from Jeanne Sauvé, Minister of Communications, to Andrew Roman of the Public Interest Advocacy Centre, Counsel for the Canadian Broadcasting League, May 8, 1979.

71. Counsel who frequently represent commercial business interests before regulatory boards share this concern as well.

72. In the past, appeals to the Governor in Council from the Railway Committee of the Privy Council at times involved a hearing procedure (see Governments of Alberta and Saskatchewan v. Railway Association of Canada, (1923) 23 C.R.C. 147 and Re Railway Freight Rates in Canada, (1933), 40 C.R.C. 97). In the 1960's Prime Minister Diefenbaker required all Cabinet Ministers to be present on appeals; oral arguments and replies were presented, questions were taken from all Ministers, and the Prime Minister presided.

73. The time required expands rapidly when the parties approach the petition process as a review of the merits of the case as a whole. Yet when they fail to do so it is with the knowledge that the Governor in Council may do so anyway without their comments.

74. The "reasons" given in P.C. 1977-3152, November 3, 1977, are in my opinion no exception.

75. CAC Annual Report. 1977-78. Pp. 42-43.

76. Information based on interview with person who was an MOT official at the time.

77. Information based on interviews with government officials.

78. Letter from Otto Lang, Minister of Transport to T. Gregory Kane, General Counsel, Consumer's Association of Canada, undated, received April 3, 1978.

79. Over the past fifteen years MOT has periodically released statements by the Minister of Transport on Air Policy. Although these statements are purportedly for the guidance of the industry and the CTC their legal status is questionable. The Regional Air Carrier Policy was first defined in 1966 and clarified in 1969. It forms the basis of present air carrier policy, insofar as one exists at all other than that implied by the content of adjudicatory decisions.

80. Air Transport Committee, Decision No. 5539, July 28, 1978, reasons by Guy Roberge, at pp. C 31-38.

81. Ibid., dissenting reasons by L. R. Talbot, at D-17.

82. CRTC Annual Report, 1976-77, pp. 10-11.

83. For an overview of the early history of Telesat Canada see Charles M. Dalfen, "The Telesat Canada Domestic Communications Satellite System", Stanford Journal of International Studies, Vol. 5, 1970.

84. Letter from T. Gregory Kane, General Counsel, Consumer's Association of Canada, to Prime Minister Trudeau, September 23, 1977, p. 2.

85. Consumer's Association of Canada v. A.G. of Canada (1978), 87 D.L.R. (3d) 33 (F.C.) at p. 39.

86. Thus the need for expediency will not be taken to justify illegality, but rather an excessive work load for any component of the system will be taken as indicative of a need to create a new and more appropriate distribution of the work burden.

87. Magrath v. The Queen, [1978] 2 F.C. 232; Martineau and Butters v. The Matsqui Institution, Inmate Disciplinary Board [1978] 1 S.C.R. 118 on appeal from F.C.A., [1976] 2 F.C. 198; In re the Penitentiary Act and in re Robert Thomas Martineau, S.C.C. decision to be released June 28, 1979, on appeal from [1978] 2 F.C. 637 (F.C.A.) on appeal from [1978] 1 F.C. 312; Regina v. Institutional Head of Beaver Creek Correctional Camp, ex parte MacCaud, [1969] 1 C.C.C. 371.

88. (1978), 87 D.L.R. (3d) 530 (F.C.A.) at 535-6.

89. (1977), 18 N.R. 181, 81 D.L.R. (3d) 609 (S.C.C.).

90. Telecommunications Regulation -- Procedures and Practices, July 20, 1976, p. 3.

91. CRTC Procedures and Practices in Telecommunications Regulation, May 23, 1978, p. 6.

92. Endnote 89 at 629.

93. In re North Coast Air Services Limited, [1972] F.C. 390 (FCA).

94. [1959] S.C.R. 121.

95. [1978] 2 S.C.R. 375 at 381-2.

96. (1977), 87 D.L.R. (3d) 474 (F.C.).

97. (1977), 81 D.L.R. (3d) 33 as summarized in the head-note.

98. [1965] S.C.R. 12.

99. [1976] 2 F.C. 539.

100. [1976] 1 All E.R. 12 at 19.

101. See cases on File at the Commission and Royal American Shows Inc. v. Laycraft, [1978] 2 W.W.R. 169.

102. Re Davisville Investment Co. and Toronto (1977), 15 O.R. (2d) 553; Re Doctors Hospital and Minister of Health (1976), 12 O.R. (2d) 164; Re Multi-Malls Inc. and Minister of Transportation (1976), 14 O.R. (2d) 49; Laker Airways Ltd. v. Department of Trade, [1977] Q.B. 643.

103. Supra, endnote 44.

104. Supra, endnote 34.

105. The Structure of Canadian Government, p. 116.

106. Commons Debates, March 25, 1970, p. 5471.

107. Ibid.

108. In the same vein, M. T. MacCrimmon and W. T. Stanbury comment that the new draft competition Bill-13, tabled November 15, 1977, by providing for an appeal to Cabinet from decisions of the proposed Competition Board may have laid the ground for business to construe "political accountability" to mean "direct accountability by the Minister and the government establishment generally, to their specific interests", in "The Reform of Canada's Merger Law and the Provisions of Bill C-13", in Competition Policy in Canada, Toronto, 1978, at 100-2.

109. Third Report of the Special Committee on Statutory Instruments (Ottawa, 1969).

110. Certain statutes such as the Northern Pipeline Act, S.C. 1977-78, c. 20, section 22, already require this with regard to particular directives.

111. [1977] 1 ALL E.R. 696 (C.A.), reversed on appeal to the House of Lords, [1978] A.C. 435.

112. Royal Commission on Financial Management and Accountability, Final Report, March 1979, at pp. 310-11.

113. Supra, endnote 1, Janisch text at endnotes 37, 38 and Part VIII.

114. Supra, endnote 112, at pp. 410-11.

115. Supra, Chapter VII, Part D, Section 8, at 127-128.

116. Supra, endnote 112, at p. 315.

117. Supra, endnote 1.

118. I regard these hazards as real because of the history of recent conflicts between CRTC and the Minister of Communications. The handling of the CRTC report on pay-TV is a good example of Ministry determination to over-ride the carefully formulated views of the Commission. The appointment of the Clyne Commission on November 30, 1978 (Final Report, March 1979) by the Minister without consultation with the CRTC, or even notice to the CRTC of intent to establish such a body, is further evidence of the potential scope for bad faith between government departments and regulators.

119. Minister of Communications, "Communications: Some Federal Proposals" (April 1975), p. 11. The proposal clearly presumed Ministerial posts would be filled by "elected representatives". This is not uniformly the case at present.

120. Richard Schultz, "The Regulatory Process and Federal-Provincial Relations", in The Regulatory Process in Canada, edited by G. Bruce Doern, Toronto, 1978, pp. 128-146 at page 144.