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FEDERAL REGULATION OF TELECOMMUNICATIONS:
The Demise of the Pursuit of Provincial Public Policy by Provincial Crown Corporations

by

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A Thesis
Submitted to the College of Graduate Studies and Research through the Department of History, Philosophy, and Political Science in Partial Fulfillment of the Requirements for the Degree of Master of Arts at the University of Windsor

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ABSTRACT

The thesis analyzes the impact of federal regulation of telecommunications on the pursuit of provincial public policy objectives by a provincially-owned telecommunications corporation. The Manitoba Telephone System (MTS) is used as a single case study to examine the effect of federal regulation on provincial public policy, in particular Service for the Future.

The literature is analyzed to show how technological change resulted in the transformation of the Canadian telecommunications industry from a monopoly to a competitive environment. The thesis examines the subsequent effects of the technological changes to the legal and regulatory structure of Canadian telecommunications. The federal-provincial jurisdictional conflict in telecommunications is reviewed with a reflection as to how technology influenced the decision-making. Technology also is explored as the basis for the current federal regulatory direction of telecommunications competition.

The history and public policy surrounding the creation of MTS, as a Crown corporation, is reviewed. MTS' accountability to provincial public policy objectives is seen as part of its foundation as a provincially-owned telecommunications corporation. Finally, the achievement of provincial public policy, outlined in Service for the Future, is examined to delineate the conflict between its success and federally-regulated competition under the CRTC.
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CHAPTER I
INTRODUCTION

On June 4, 1996, the Honourable Glen Findlay, Minister Responsible for the Manitoba Telephone System (MTS), introduced Bill 67 - The Manitoba Telephone System Reorganization and Consequential Amendments Act - to enable the Province of Manitoba to sell its Crown corporation. According to the Minister, the legislation to privatize MTS “…positions the telephone company for a strong future, able to meet the competitive marketplace…”⁵ MTS, as a Crown corporation, had come full circle. It had begun as a private company but, on January 15, 1908, Premier Rodmond Roblin announced the purchase of Bell Telephone Company (Bell) assets in Manitoba to create a provincially-owned telephone system:

… for the purpose of avoiding the necessity of having a dual telephone system in the province, and in that way preventing the waste of several millions of dollars of capital as well as the extra cost to the telephone user. I believe, also that it is a good commercial proposition and whatever profit there is in the operation of the telephone system from this time on will belong to the people of Manitoba rather than to a private company…”⁶

A cursory examination of these statements leads one to wonder what had happened for the government to abandon what had been a “good commercial proposition” which had as its basis the pursuit of a public policy which would prevent “the waste of several millions of dollars of capital as well as the extra cost to the telephone user”. An explanation may lie in the altered nature of telecommunications and its regulation in Canada.

Telecommunications technology is now changing faster, and in more different directions, than at any time in its history. Such technological change has invalidated the conventional wisdom about how the industry can or should operate. In the past, the structure of the telecommunications industry was determined by the thinking that telecommunications was a rare commodity, expensive and difficult to produce, so that a monopoly naturally flowed. This is no longer the case. Bandwidth is cheap to provide and getting cheaper. Fibre

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² Manitoba, People of Service: A Brief History of MTS (Winnipeg: The Manitoba Telephone System, 1970)
optic technology raises the capacity of telecommunications lines to a virtually unlimited potential. The arrival of advanced network control technologies means that a wide variety of intelligent network features may be provided quickly and cheaper.

Changing technology has made the former telecommunications monopoly unsustainable. Changing technology has driven the legal and regulatory changes that ended the monopoly control of the traditional telephone companies. And, if regulators attempt to slow down the use of the new technology or limit its use for traditional purposes, they will find themselves bypassed. In the same manner as conventional thinking classified telecommunications as a natural monopoly, it also saw regulation as a substitute for competition. It was thought appropriate in two situations: when competition does not or cannot exist; and, when competition alone is not an effective means to achieve socially desirable goals.

Both of these situations existed in the telecommunications industry for many years. In the past, the telecommunications monopoly resulted from technological imperatives, real competition was impractical. In addition, it is difficult to see how a purely competitive market could have achieved the socially desirable goal of universal telephone service at affordable prices. Canada has the highest penetration of telephones among the G7 nations, despite the fact that it has been impossible to serve many parts of the country cost-effectively. Cross-subsidization of urban to rural and business to residential subscribers made it possible.

The creation of provincially-owned public telephone companies reflected public policy in the creation of a universal affordable telephone service in the prairie provinces. The problem facing these governments in the early part of this century has been described as:

A widely scattered, highly intelligent population demanded immediately the installation of telephones on a large scale. Private enterprise in the telephone industry, accustomed to the demands chiefly of industrial areas, proved inadequate to the demands of rural areas requiring immediate expansion.3

Although the desired expansion might have been achieved by regulation of Bell, the major private telephone company, Bell was under federal jurisdiction and the provincial governments, the Manitoba government in particular, held the widespread belief that the

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eastern-based company would exploit the province and earn excess profits. Such concerns provided the impetus towards public ownership in the prairie provinces.⁴

However, within the past 20 years, technological changes made public ownership and its telecommunications monopoly on the prairies⁵ less desirable. While the original argument of a natural monopoly in telecommunications may be questioned, it was of no great importance with the former standard and unsophisticated equipment. Now, the advent of computers has added to the competitive impetus and has affected both the demand for telecommunications and the nature of the systems used. The telecommunications monopoly prospered in a mature and settled industry with predictable growth rates and steady levels of customer demand. Now, customer demand is insatiable with an ever-expanding appetite for telecommunications that is fundamental to the change in the industry. Today’s conventional thinking sees a competitive telecommunications environment as being the most responsive to customer needs and demands. In addition, conventional thinking concludes that public ownership of telecommunications will not succeed as well as the private companies in terms of efficiency and the scope of services provided.⁶ The difference in which publicly-owned and privately-owned telecommunications companies have embraced competition may reflect the desire of the provincial governments to protect such companies in their pursuit of social and public policies.

The rise and fall of MTS and its pursuit of public policy illustrates the transformation of the telecommunications industry and its regulatory environment resulting from such technological change. On September 29, 1988, the Honourable Glen Findlay, Minister responsible for MTS, made an historic announcement. He outlined a policy for basic telephone service in the Province of Manitoba which he said would establish “a mandate for … MTS to bring the highest standards of reliable and efficient telephone service to all Manitobans”⁷. Based on that policy, MTS developed a multi-year plan which it submitted to

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⁵ SaskTel remains the lone exception and, interestingly enough, it is still not federally regulated.
its regulator of the day, the Public Utilities Board of Manitoba. The plan was adopted and included the following:

An upgrade of MTS' exchanges to digital technology;
The establishment of universal single line service and the elimination of multi-party service for 47,000 Manitobans;
The elimination of long distance charges for as many as 143,000 customers by reducing then then-existing 160 toll free calling areas in Manitoba to about 60 areas;
A program for customers in exchanges next to Winnipeg and Brandon to provide attractive optional toll discounts on calls adjacent to these urban centres;
The creation of a Special Needs Centre to provide hands-on display and consultation for persons with physical disabilities requiring special telecommunications services and products.

This major undertaking, which eventually cost $620 million, was called "Service for the Future". Because of that investment, not only were Manitobans in all areas of the province able to enjoy obvious benefits through single-line service and lower in-province toll costs, but also they were provided with the opportunities afforded by a modernized telecommunications platform that would make new and expanded services possible. The Government of Manitoba received widespread support for a far-sighted initiative that it had done the right thing.

In 1998, the CRTC asked for comments as to how to achieve the public policy objective of rendering reliable and affordable telecommunications services of high quality accessible to Canadians in both urban and rural areas in all regions of Canada - in particular high-cost service areas - in the advent of competition in all telecommunications market. In response, the Manitoba Government said that,

... cross-subsidization is what made service affordable in high-cost areas. The Government of Manitoba, to be sure, has great confidence in the ability of competition to produce benefits of restrained costs and increased choice for consumers, but we recognize that markets are not perfect, and that they certainly do not operate perfectly in all of the remote and rural areas of Canada... it would seem to go without saying that it is unlikely that market forces will allow consumers in high-cost areas to reap the benefits of competition anytime soon...

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8 Ibid.
9 Ibid.
Looking to the future, it is incumbent upon the Commission... to ensure that rural Manitobans will not be denied the benefits of any rural and remote service support mechanism... The Government of Manitoba believes, therefore, that it is imperative for the Commission to employ a methodology or policy that includes an obligation to serve... 

To date, there has been no decision by the CRTC as to how to ensure reliable, affordable and high-quality telecommunications services to all regions of Canada in light of a fully competitive telecommunications market. However, within 10 years, the Government of Manitoba had gone from being able to pursue, and achieve, its public policy objective of universal affordable service for the entire Province to being one of a number participants in a proceeding and urging the federal regulator to consider the needs of all Manitobans. Such public policy issues were the precise concerns (that is, lack of provincial control, service and eastern bias) that forced the creation of MTS.

Research Design

The overall aim of this research project is to examine the transformation of telecommunications in Canada and the regulatory structure that has reinforced its transformation. Since a study of all the factors that have contributed to this transformation is well beyond the scope of this research project, the thesis will focus on the impact of the transformation in terms of the competence of a provincial Crown telecommunications corporation to fulfill provincial public policy objectives.

Consequently, the context of the study is critical to understanding the meaning behind the events and relies on qualitative research. An interpretive approach has been used, involving the analysis of specific events and the literature, to draw conclusions and link the particular case of MTS to the larger context of Canadian telecommunications. The effect or outcome of what should be provincial public policy objectives is the dependent variable. The independent variable or condition that impacts provincial public policy is federal regulation.

MTS is used as a single case analysis which meets the criteria to test the hypothesis. MTS was a provincially-owned telecommunications corporation with public policy objectives. It was provincially regulated until December 31, 1993, when it came under the jurisdiction of

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10 Ibid.
the federal telecommunications regulator. This is a unique case which allows for the examination of the effect of federal regulation on provincial public policy. Although two other provincial Crown telecommunications corporations existed, AGT and SaskTel, AGT was privatized very soon following its being federally regulated and SaskTel has not come under federal regulation to date.

The question is to what extent and how did federal regulation of Canadian telecommunications impact provincial public policy directed by a provincially-owned telecommunications company (MTS)?

Outline

The first part of the thesis examines the context of the transformation of Canadian telecommunications in terms of the industry, Crown corporations as public policy instruments, telecommunications regulation; and, the federal-provincial jurisdictional conflict. Then, MTS is analyzed to determine the effect of the transformation together with the resulting regulatory changes to the Crown corporation’s competence to achieve provincial public policy.

More specifically, Chapter III details the changing Canadian telecommunications industry. It examines the technology that is the impetus behind the transformation and discusses the terminology and what is meant by telecommunications. The development of the Canadian telecommunications network is explored as well as its importance to the Canadian economy to appreciate the circumstances surrounding the expansion of federal regulation.

Chapter IV analyzes the reasoning behind the creation of Crown corporations, with a focus on telecommunications. It evaluates Crown corporations as public policy instruments and their proficiency in achieving public policy objectives by examining their structure and accountability. The chapter goes on to analyze the effect of the change towards public policy favouring competition rather than monopoly regulation competition on a Crown corporation’s viability.

Chapter V explores regulatory theory and regulation as a public policy instrument. It outlines the beginnings of telecommunications regulation in Canada with a particular look at the CRTC, the federal telecommunications regulator.
Chapter VI analyzes the expansion of federal jurisdiction in telecommunications regulation. It examines the history of the federal-provincial jurisdictional conflict from the Constitution Act, 1867 throughout the case law and ends with the Telecommunications Act.

Finally, Chapter VII presents the case of MTS. The chapter analyzes the creation of MTS as a Crown corporation used to promote provincial public policy. Specifically, the chapter examines the public policy of Service for the Future and its continued viability in a federal regulatory setting. The chapter concludes by interpreting the demise of MTS as a Crown corporation.
CHAPTER II
REVIEW OF THE LITERATURE

The revolution of Canadian telecommunications is a relatively recent phenomenon and it is ongoing. Consequently, the literature written on the subject has not been overly abundant but, as the dynamic changes occur and continue to occur the literature increases. Robert Babe’s *Telecommunications in Canada: Technology, Industry and Government* has been considered the most authoritative source; however, it was published in 1990 at the onset of the changes to regulatory jurisdiction. Robert Crandall’s and Leonard Waverman’s more recent *Talk is Cheap The Promise of Regulatory Reform in North American Telecommunications* is an excellent comparison of the American and Canadian telecommunications regulatory scene but, again the scene has continued to change so that their analytic foresight is helpful although not conclusive in some aspects and Richard Schultz has written several high-quality articles on the transformation of federal telecommunications regulation. Bruce Doern’s, Leslie Pal’s and Brian Tomlin’s *Border Crossing The Internationalization of Canadian Public Policy* provides insight into the dynamic changes in telecommunications and their effect on public policy. Finally, Michael Ryan’s *Canadian Telecommunications Law and Regulation* has served as an excellent guide and the only recent source into the practice of Canadian telecommunications law. Thus, an opportunity existed to look at what was happening in Canadian telecommunications and its regulation from an aspect that had not been reviewed in the literature - the effect of this metamorphosis on provincial public policy.

The literature sets the basis for the analysis, that is changing technology has forced dynamic changes in the Canadian telecommunications industry from monopoly utilities to global competitive alliances. The term ‘telecommunications’ has evolved along with the changing technology so that we rely on the most recent definition of telecommunications which is set forth in the *Telecommunications Act* as:

- the emission, transmission, or reception of intelligence by any wire, cable, radio, optical or other electromagnetic system, or by any other similar technical system;

Changing technology has brought about an increase in the speed and capacity of telecommunications transmission at lower cost. The introduction of microwave technology
dramatically lowered the cost of long-distance service and resulted in its rapid growth. New technologies are reducing the cost of transmission speed, switching and network control. As fibre replaces copper transmission lines, transmission speeds are increasing. Coaxial cable and advances in digital compression techniques allow for an expansion of the amount of information that can be squeezed through any transmission medium. Thus, new technologies have brought forth new telecommunications services and the demand for these new services has forced changes to the telecommunications industry structure as each new service is subject to competition from alternate suppliers to the traditional telephone.

A cozy league of regional monopolies used to dominate the telecommunications industry in Canada, but now it's a new game... A series of blockbuster deals has rocked the Canadian telecommunications industry in recent months... Old monopolies and alliances have broken up while new ones have formed... Rival companies are now racing to roll out new national networks...  

Prior to the introduction of long-distance competition in 1993, the Canadian telecommunications industry was composed of sixty-carriers, including investor-owned corporations, Crown corporations, municipal telephone systems and co-operatives. These carriers were linked through two major coast-to-coast public telecommunications networks. By the end of 1994, there were more than three hundred long-distance companies, including resellers, registered in Canada and these new competitors had captured 18-per-cent of the national long-distance market and at least 22-per-cent of the hotly contested long-distance market in Ontario and Quebec.  

Crown corporations and regulation both act as instruments of public policy. However, Crown corporations are required to act within public institutional control and accountability and yet perform as a corporation within an industry. If the commercial or business environment of a Crown corporation changes, does their legal and institutional environment have to change as well?

While the regulation generally leaves private ownership intact, the regulatory process is long and involved compared to the potential for direct control inherent in Crown

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12 Cote-O’Hara, Jocelyne. President of Stentor Telecom Policy Inc. “An Address to the Canadian Club” (Ottawa: January 16, 19660 [www.stentor.ca]
corporations. Thomas and Zajciew examine Crown corporations established to fulfill public policy objectives. Choosing the corporate form has been seen as a way to combine public ownership with public accountability and business expertise. "The objective has been to permit crown corporations a measure of political direction and control over policies and performance of crown corporations while still allowing sufficient freedom for their managers to operate in a business-like fashion."14

Kirsch's Discussion Paper, Crown Corporations as Instruments of Public Policy: A Legal and Institutional Perspective, is used extensively to examine two main public policy objectives in connection with setting-up provincially-owned telecommunications corporations:

The goal of developing and integrating the country or some region thereof, when market signals are such that private investors are unwilling to make certain kinds of investments or take certain risks (development); and

The desire to develop a national or provincial identity or to preserve Canadian or provincial control over certain sectors of the economy in the face of pending foreign investment (nationalism).

Douglas Stevens argues that the issue of how Crown corporations can achieve some sort of balance between the amount of autonomy they require to achieve their objectives as instruments of public policy and the amount of institutional control required by government is related to the design of the decision-making relationship between government and Crown corporations.15 This balance between the autonomy that a Crown corporation requires to perform within an industry and the government’s need to control and direct the corporation is fundamental to the examination of Crown corporations as instruments of public policy. The Economic Council of Canada has described it as, "the fundamental challenge in structuring a control regime is to establish an appropriate balance between the competing requirements for managerial autonomy and public control".16

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16 Ibid.
Public control necessitates the assurance of the Crown corporation’s accountability, but for what and to whom? According to Pawley, “Usually the Crown corporation’s management structure strives to achieve traditional private sector goals. As such, the profit motive is not absent from the statement of aims, and is often central to the corporate mandate. However, in Manitoba, social or economic aims temper the profit motive”. Thus, in Manitoba, Crown corporations and, in this case, MTS, are held accountable for achieving public policy goals as well as their performance within an industry. The purposes or public policy objectives which established a Crown corporation are the reasons for its existence; and, if these public policy objectives are compromised, the existence of the Crown corporation is threatened.

The regulation of the telecommunications industry in Canada has permitted properly-constituted jurisdictional authority to subject the industry to certain governing principles. As the telecommunications industry changes, the original purpose of its regulation has become subject to scrutiny. Robert Babe says, “Today, it is particularly important to recognize the constants or patterns in the historical development of Canadian telecommunications. Much of the current thinking of our all-too-often ahistorically minded policy-makers is shrouded in misconception, even myth”. The traditional perception was that the telecommunications industry formed a natural monopoly. Thus, the fundamental argument for having government regulate a particular industry, such as telecommunications, was that the industry would develop a natural monopoly because the economies of scale, production or distribution were so pronounced that a single seller would dominate. Upon achieving such a dominant position, the company would charge whatever the market would bear. Babe disclaims the theory of natural monopoly and claims that the industry took shape rather through the struggle for power. He says, “It is a myth in keeping with technological determinism that efficient and existing industrial structures

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hinge on the doctrine of natural monopoly".\textsuperscript{21} Babe argues that it was not a natural monopoly in Canadian telephones, but rather the patterns of control and restrictive industrial practices, conceived with the birth of the telephone, that explained the emergence and sustenance of a monopoly.\textsuperscript{22} Moreover, Babe contends that regulatory agencies, "far from protecting the public from the ravages of a monopoly, invariably become captured by the very industries they regulate".\textsuperscript{23}

Baldwin puts forth the theory that the regulator is a bargaining agent for consumers in a long-term contract with producers but that Canada had to abandon this early form of franchise contract because the constitutional and judicial prerequisites for its success were not present in Canada as in the United States. He says regulation took a different form in Canada with the adoption of regulatory tribunals and, frequently, the adoption of public enterprise.\textsuperscript{24}

As with the creation of Crown corporations, regulatory activity was clearly influenced by the perceived economic and social problems of the day. While the prairies opted for public ownership in telecommunications as the means to direct its public policies, Ottawa chose regulation as the mechanism to implement its public objectives. The Board of Railway Commissioners was succeed by the Board of Transport Commissioners, which was succeeded by the Canadian Transport Commission and its present-day successor, the Canadian Broadcasting and Telecommunications Commission (CRTC). The CRTC, as the federal government's public policy instrument, not only implements public policy but also has come to develop public policy in response to changing telecommunications technology.

However, telecommunications and its regulation was a source of conflict and dispute because jurisdiction over telecommunications was not assigned to either the federal Parliament or the provincial Legislatures in the 	extit{Constitution Act, 1867}. Changing technology necessitated the delineation of constitutional jurisdiction. Case law developed in those areas where there was litigation. 	extit{Toronto v. Bell Telephone Co.}\textsuperscript{25} brought Bell firmly under federal jurisdiction in a dispute over municipal and provincial control of telephone lines. The ability

\textsuperscript{22} Ibid., 15.
\textsuperscript{23} Ibid., 19.
\textsuperscript{24} Economic Council of Canada. 	extit{Regulatory Failure and Renewal The Evolution of the Natural Monopoly Contract} by John R. Baldwin (Ottawa: Minister of Supply and Services, 1989) 2.
to regulate the then new technology of radio resulted in *Regulation and Control of Radio Communication in Canada*. Federal jurisdiction over broadcasting was sustained in *Capital Cities Inc. v. Canada* and *Dionne v. Quebec*. Finally, *CNCP Telecommunications v. Alberta Government Telephones* extended federal jurisdiction over telecommunications to all companies except those that enjoyed Crown immunity. *Telephone Guevremont Inc. v. Quebec* confirmed that independent telephone companies were also subject to federal jurisdiction. Finally, the *Telecommunications Act* set forth the first comprehensive legislative scheme for all Canadian telecommunications carriers and defined the powers of the federal regulatory jurisdiction.

MTS is displayed as a single case study for analyzing the impact of federal regulation upon a provincially-owned telecommunications company’s competence to achieve provincial public policy objectives. On January 15, 1908, the Province of Manitoba purchased Bell’s assets to create a Crown corporation, MTS, “... for the purpose of avoiding the necessity of having a dual telephone system in the province, and in that way preventing the waste of several millions of dollars of capital as well as the cost to the telephone user”. On June 4, 1996, the Province of Manitoba brought forth legislation to sell MTS to position “the telephone company for a strong future, able to meet the competitive marketplace”. Mavor and Babe describe the circumstances surrounding the creation of MTS, as a Crown corporation. The annual reports of MTS as well as the Public Utilities Board of Manitoba are relied upon to describe the development, cost and implementation of the Government of Manitoba’s last major public policy initiative, Service for the Future, that was achieved through MTS. Service for the Future, completed in 1996, brought “equal [telecommunications] service to citizens of Manitoba charging equal rates to everyone”.

23 *Toronto (City) v. Bell Telephone Co.*, [1905] A.C. 541 (P.C.)
However, it is doubtful whether such a public policy initiative, achieved at an almost prohibitive cost ($620 million), would have been approved by the federal regulator, the CRTC. Finally, the Debates and Proceedings of the Manitoba Legislative Assembly and the Memorandum of Understanding are used to evaluate MTS' ability to pursue provincial public policy initiatives within a federal regulatory environment.

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CHAPTER III
CANADIAN TELECOMMUNICATIONS INDUSTRY

The telephone industry is not what it used to be. The Canadian telecommunications industry has changed from a stable preserve of monopoly utilities into competitive alliances of global proportions. Such dynamic changes to the industry structure appear to have stimulated, and in turn been stimulated by, changes to the nature of telecommunications regulation. In coming to terms with how such transformation came about, it may be best to look at the background of the telecommunications industry, in particular its technology. For it is the changing technology that is the root cause of the consequent changes to the telecommunications industry and its regulation.

Consequently, this chapter will review telecommunications technology, take a particular look at its changing terms such as "telephone" and "telecommunications"; and, advance certain definitions to assist in explaining the technology. It will illustrate the development of the telecommunications network in Canada. In addition, the chapter will describe briefly the telecommunications industry, its importance to Canada and the changes taking place.

Terminology and Technology

There no longer is just THE phone company to provide telephone service. Until recently in Canada, if you wanted to subscribe to a telephone, you applied to the one and only telephone company in the province and requested an appointment for a telephone installer to come to your home or business to install telephone wiring to attach the telephone. Moreover, one could only rent, not buy, the telephone from that same telephone company. Today, not only do a number of different telecommunication providers repeatedly call and ask to provide your long-distance telephone service, but also cable companies together with telecommunications providers may compete to provide your local phone service[37] as well as your Internet service. Furthermore, you do not have to rent your telephone from a telephone

[37] Regulatory approval for local telephone service competition was given in Telecom Decision CRTC 97-8. Local Competition. 1 May 1997.
company but, you may buy your telephone from almost any store and plug it in yourself. Different companies may install the wire inside your home and you, not the telephone company, now own this wire and are responsible for paying for any repairs. Finally, you also may (and, in Canada, you probably do) have a fax machine or computer connected to this same telecommunications network.

These services have evolved from "plain old telephone service" (POTS) to a rapidly expanding network which provides numerous telecommunications services ranging from caller name and number display to computer and wireless services. And, just as the technology is evolving and converging so, too, are the terms. The words "telephone" and "communications" have been squeezed together to form "telecommunications". The term "communications"38 is described as "the exchange of ideas, messages or information, as by speech, signals or writing". Such an 'exchange' of information has been a constant since human beings began to live together. As technology has evolved, different mechanisms have been used for communication stemming from speech and the written word. However, modern technology has accelerated the timing of this communication 'exchange'. The modern technology of telephones and telecommunications involves the process of communication or the exchange of ideas, messages or information by "electromagnetic" signals. More specifically, a definition of "telecommunications" may be taken from the Telecommunications Act:

the emission, transmission, or reception of intelligence by any wire, cable, radio, optical or other electromagnetic system, or by any other technical system;

One notes that in grappling with the new technology, the more particular term of "intelligence" is used in the definition rather than "information" such that the Act goes on to define "intelligence" as:

signs, signals, writing, images, sounds or intelligence of any nature;39

Consequently, telecommunications may be thought of as the exchange of intelligence using electromagnetic signals. As the technology has expanded, the term telephone has become

38 Webster's University Dictionary
much more limited and now represents a terminal instrument used in the transmission of signals.\footnote{Bones, R.A. Dictionary of Telecommunications (London: Butterworths, 1970), 1054.}

Telecommunications services or the exchange of intelligence by electromagnetic signals is effected by the connection of users to the telecommunications network. Plain old telephone service (POTS) provides switched voice services through a combination of fibre optics and paired copper wires. A subscriber picks-up a telephone, which is connected to the telephone company's central office which houses the switch, speaks into the telephone and her or his voice travels over the telephone lines (fibre optics and paired copper wires) to the central office where it is switched to the telephone line connected to the person she or he is calling. Because the person called can talk back to the person calling over those same telephone lines, it is interactive or two-way communication. As described above, at one time the entire telephone network from the telephone itself, through the central office switch to the telephone wire inside the subscriber's home was owned and controlled by a monopoly telephone company. Furthermore, at one time plain old telephone services (POTS) was synonymous with basic service; however, now the demands of subscribers are so diverse that a POTS infrastructure would be woefully inadequate to serve the needs of most.\footnote{Canada, Canadian Radio-television and Telecommunications Commission. Telecom Decision CRTC 94-19. (Ottawa, September 16, 1994), 11.}

It was the building of this telecommunications infrastructure to provide universal access, which is now a reality, that provided the justification for granting telephone companies in Canada a regulated monopoly. A telephone company demanded a monopoly in its operations because of the tremendous capital requirements in extending its service coverage. As the size of local access exchange area increased, the number of switches required increased so that a company had to interconnect these various switching centres. Such terrestrial telephone networks required expensive rights-of-way and extensive capital costs in telephone poles, conduits, wires, switches and other equipment. Such expense precluded the building of two or more parallel telephone networks because the debt sustained by a telephone company necessitated assured revenues in order to obtain capital financing. However, other technologies now exist for providing telephone access.
The introduction of microwave technology dramatically lowered the cost of long-distance service and resulted in its rapid growth. The development of switching and transmission capabilities together with the convergence of telecommunications and computer technologies has enabled non-telephone companies to provide services traditionally available only through telephone companies. The digitalization of information and networks not only has spawned new telecommunication services but also new alternative service providers. Wireless access may be provided through a cellular architecture or personal communications services (PCS). The possibilities of using radio-based communications are expanding as regulators open up more electromagnetic spectrum for such uses and as digital compression techniques allow for more information to be transmitted over a limited bandwidth. Some of these new PCS networks may be built as complements to cable networks or long-distance networks, combining wire or satellite interconnection of distance users with local radio-based connections. These devices may be designed to extend existing wire-line service or to provide a new stand-alone service with total number portability.\(^{42}\)

At present, these connections of users to the telecommunications network are by pairs of copper wires whose capacity is limited to voice and low-speed data applications. Cable networks have a much greater capacity because they deliver scores of video signals over coaxial-cable, but with the current network architecture they cannot provide switched two-way communications. Thus, the former thinking that telecommunications access is subject to large economies of scale and is thus a natural monopoly is being challenged because of the advances in technology. Furthermore, the distinction between local and long distance service is arbitrary and nowadays it is primarily based on regulatory practices. Connecting a subscriber by wire, radio, coaxial cable or fibre optics to the nearest telephone switch is merely an access service.

New technology has resulted in sophisticated stored-program-control digital switches so that customers are now provided with much more than switched voice and data services. Customers are now offered an array of central office or enhanced services such as call waiting, call answering, call forwarding and caller and name number identification. At the same time,

\(^{42}\) The convention of assigning numbers to location maybe replaced by assigning numbers to individuals no matter where they are.
customers are able to buy “smart” terminals that can switch and transform voice and data. Consequently, intelligence now resides in both the telephone central office and the customers’ own premises.

New technologies are reducing the cost of transmission speed, switching and network control. The original telephone network transmitted analog voice signals at very low speeds. When users began to demand the capability to transmit data, telephone systems either shunted these services onto dedicated digital lines or required the use of modems to convert the digital bit streams into signals that could be transmitted over analog voice channels. This latter solution was unsatisfactory because of slow transmission rates over voice channels and the potential for error. As more and more business users demanded digital services at higher speeds, the telephone industry developed a new integrated services digital network (ISDN) capacity. These digital services can accommodate a mix of voice, data and even video services over the same line if used in conjunction with the appropriate terminal equipment.

As fibre replaces copper transmission lines, transmission speeds are increasing. The development of fibre optics and advanced digital compression techniques which allow an expansion of the amount of information that can be squeezed through any transmission medium has provided a new service that may be offered by the telephone industry - cable television. Telephone companies could offer full video service by connecting their fibre-optics networks to customers through higher-speed access lines. Telephone companies in Canada may now compete with cable companies, provided they do not control the programming. Quid pro quo, cable companies may now compete with telephone companies to become alternate access providers and offer local telephone service.43

The increasing capacity of fiber-optic systems and the possible expansion of telephone company subscriber lines through coaxial cable or through asynchronous digital subscriber loop (ADSL) has opened up new switched broadband services capable of delivering two-way video for telephony or video conferencing, video games, or information-intensive scientific or medical applications. Such prospective networks are the centre of policy discussions involving the development of the information superhighway and technological convergence. All types of information - voice, data and video - will be reduced to small digital packets and

moved at the speed of light over the same fiber-optics network. As digital signal compression improves, the capacity of these networks will grow dramatically. Therefore, there could be more such networks potentially interconnecting literally everyone.

Each new service is subject to competition from alternate suppliers to the traditional telephone company. Access to the telephone network to enable competition is subject to regulation. As long as access to the telephone network is tightly regulated, new service providers will be constrained in their ability to compete in these new markets as regulators attempt to regulate competition.

Technology has changed the telecommunications industry in Canada. Telecommunications services are much more than voice interexchange but, may involve multimedia (voice, data, video) transmission. This transmission is effected by access to the telecommunications network and access to the telecommunications network need no longer be effected only through plain old telephone service so that a proliferation of telecommunication providers now are competing for such access. In response to the changing technology, the monopoly Canadian telecommunications industry has fragmented to realign itself through global interconnections.

The Development of the Telecommunications Network in Canada

The telecommunications age began with the development of the telegraph. In Canada today, there are two major coast-to-coast terrestrial public telecommunication systems, the origins of which have evolved out of the telephone and telegraph systems established in Canada before the turn of the century. It began, as most school children recant, with Alexander Graham Bell and Guglielmo Marconi.

Bell invented the telephone near Brantford, Ontario in 1874 and, two years later, the world’s first long-distance call was made from Brantford to Paris, Ontario over 16 kilometers of telegraph company lines. In 1901, Marconi received the first transatlantic radio signal, which was transmitted from England to Signal Hill in St. John’s, Newfoundland.

The first Canadian telegram was sent from the mayor of Toronto to the mayor of Hamilton in December 1846 and during the next fifty years a number of small telegraph companies designed to serve small geographical areas sprung-up in Canada. Since many of
these smaller companies were controlled by American parent interests, the federal government decided to grant commercial telegraph franchises to the Canadian railways. By 1915, three major telegraph companies still were operating in Canada: Canadian Northern, Grand Trunk Pacific, and Canadian Pacific (which had provided the first all-Canadian continental telegraph service in 1886). In 1920, the Canadian government took over the Canadian Northern and Grand Trunk railways and created Canadian National Telegraphs to provide service to the new Canadian National railway as well as to the public. By the 1930s, only two telegraph companies, Canadian National and Canadian Pacific, served the country. These two began joint operations in 1947 but, the partnership was not formally sealed until January 1, 1980, when the new corporation became known as CNCP Telecommunications.44

In 1984 CNCP began to install a nationwide fibre-optic system transmission system. On November 30, 1988, Canadian Pacific Limited purchased Canadian National's share in CNCP; in September 1989, Rogers Communications acquired 40% of CNCP; and, on May 9, 1990, CNCP Telecommunications changed its name to Unitel Communications Inc. On June 12, 1992, Unitel broke the 112-year monopoly in public long-distance voice communications and in November Unitel launched its first residential long-distance telephone services. In January 1993, AT&T bought a 20-per-cent interest in Unitel such that Canadian Pacific held 48-per-cent and Rogers held 32-per-cent. In 1995 Unitel restructured its debt and AT&T invested additional capital in Unitel45 with the result that Unitel’s new owners were AT&T Canada, The Bank of Nova Scotia, The Toronto Dominion Bank and The Royal Bank of Canada. On September 9, 1996, Unitel changed its name to AT&T Canada.46 AT&T Canada is presently in the process of merging with Metronet to form a new AT&T Canada.47 U.S. AT&T Corp., will maintain its 33-per-cent interest in AT&T Canada. Metronet is a

45 Under the Telecommunications Act, the CRTC is bound to examine a merger with a Canadian telecommunications carrier, if it receives a third-party application. While the CRTC received a third-party request and reviewed the merger, it offered no objection even though foreign ownership is supposedly limited to 20-per-cent by the Telecommunications Act.
provider of broadband telecommunications services to business and has been one of the early leaders in the race to bring competitive services to local markets. In 1998, it purchased the telecommunications assets of Toronto-based Rogers Communications Inc. for $1 billion. The company will be able to provide international services to business through AT&T's World Partners alliance. AT&T also has a marketing alliance with Rogers' wireless arm, Rogers' Cantel, which offers nation-wide mobile phone services under the Cantel AT&T brand name.

The other telecommunications system in Canada began with the telephone when on August 21, 1877, for remuneration of one dollar, Alexander Graham Bell turned over a three-quarter interest in the telephone patent for Canada to his father, Melville Bell, who then founded the Bell Telephone Company of Canada (Bell) in 1880. During the next few years, telephone exchanges and competing telephone companies also sprung-up in various parts of the country. For a time Bell followed construction of the CPR moving west, so that generally non-Bell telephone companies on the Prairies were few prior to 1892.48 Bell was in Winnipeg by 1881 and began to "compete" with itself in 1885 in an effort to ward off any real competition. It set-up the People's Telephone Company to undercut both its own prices and those of its true rival so that when the rival collapsed in 1886, the People's Telephone Company also "packed it in, leaving Bell Telephone in full command of the situation at the old rates"49.

In 1899 the Manitoba government began intervening in telephone matters by enacting an amendment to the Municipal Act which, despite Bell's presence in Winnipeg, Portage la Prairies and Brandon would permit municipal ownership of local exchanges. Neepawa was first, in 1990, and followed soon thereafter by other communities. However, Bell refused to connect any of these new rivals to its long distance lines. For example, in Neepawa Bell retained only twelve subscribers compared with the municipal system's two hundred, but it was Bell's twelve who had long distance access.50 The municipal movement surged ahead in Manitoba until 1905, at which point the provincial government announced it would henceforth deny all future applications for incorporation. It also announced that it was initiating studies

49 Ibid.
50 Ibid., 87.
into the feasibility and desirability of a provincial take-over of all telephone in the Province. Eventually, this would result in the establishment of Manitoba Government Telephones in 1908 as a department of the provincial government.

Interconnection of the various independent telephone systems was difficult in Canada for the same reasons many other enterprises were difficult in Canada - harsh climate, small scattered population, vast distance and difficult terrain. In 1921 the Telephone Association of Canada was organized and its technical committees began to explore the development of a national telephone system. At that time, because of the lack of trans-Canadian long-distance circuits, many long-distance calls between Canadian cities were routed through the more advanced American telephone systems at various border crossing points. An all-Canadian line linking Montreal and Winnipeg was completed in 1928 and in 1931 the Trans Canada Telephone System (TCTS) was formed to develop and maintain a Canadian transcontinental long-distance telephone network. The network was inaugurated in January 1932. TCTS was renamed Telecom Canada in 1983 and renamed Stentor in 1992. Stentor was a consortium of Canadian telephone companies, each of whose territory was co-extensive with a province. This more formal consolidation replaced the more informal Telecom Canada and was a reflection of the change in telecommunication services. Stentor's focus was on global competitiveness. Even now, the former telephone company members of Stentor are the dominant force in Canadian interexchange markets, the principal providers of local exchange service in Canada and account for 93-per-cent of total Canadian network access service lines. Stentor broke apart in 1998 with a merger between its second and third largest members, BC Tel and Telus.

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51 Ibid.
53 Ibid.
54 Ryan, Michael H. *Canadian Telecommunications Law and Regulation* (Toronto: Carswell, 1993), 201.
The Canadian Telecommunications Industry

In Canada, telecommunication providers account for almost 70-per-cent of the information technology market and 3.6-per-cent of Canada's real gross domestic product in 1995 with revenues of over $22.5-billion (Canadian) in 1996, compared to global revenues of more than $650-billion (US). However, this economic activity, on its own, is not the main reason why the telecommunications industry is so important. The key reason is that it is the enabling infrastructure for other sectors throughout the entire economy. It has become an aggressively competitive powerhouse required to facilitate global trade. The Canadian telecommunications network reaches over 98-per-cent of the households and almost four-fifths of the households subscribe to cable television. It is this telecommunications infrastructure that will allow Canada to effectively compete in a global arena, in spite of its harsh climate, small scattered population and vast distances.

The main regional players and former members of Stentor include:
Bell, the largest Canadian telecommunications provider, serves Ontario and Quebec. After its incorporation in 1880, Bell eventually established operations in British Columbia, Alberta, Saskatchewan, Manitoba, New Brunswick, Prince Edward Island, Nova Scotia and the eastern Arctic but, by 1909 Bell had divested itself of all assets outside of its present operating territory, with the exception of the eastern Arctic, which were sold to Northwestel in 1991. In 1982, the company was reorganized under a scheme that resulted in the creation of a parent company (BCE Inc.) owning 100-per-cent of Bell's shares. BCE has 58,000 employees worldwide, revenue of $27.5 billion and assets of more than $32 billion. The operations of the company are governed by the *Bell Canada Act*. Bell controls over 36-per-cent of the Canadian

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telecommunications market. In March 1999, Bell announced a $5.1 billion plan to sell 20-per-cent to U.S. Ameritech Corp. BCE’s new subsidiary, Bell Nexxia, is building a high-speed fibre network as a platform for offering advanced telecommunications services to businesses nationwide. Bell Mobility and other BCE mobility companies provide wireless services, while BCE also offers satellite television services through another subsidiary, ExpressVu.

BCT.Telus Communications Inc. was formed in 1998 from the former BC Tel and Telus and serves British Columbia and Alberta. It is Canada’s second largest telecommunications company. U.S.-based GTE owns nearly 27-per-cent of the company. The former BC TEL served British Columbia. BC TEL was originally incorporated in 1916 as the Western Canada Telephone Company and changed its name to British Columbia Telephone Company in 1919 after its acquisition of the British Columbia Telephone Company Limited. The company adopted its the name BC Tel in 1993 when it ceased to be a public company and became a wholly-owned subsidiary of BC TELECOM Inc. A majority of the shares of BC TELECOM Inc. were owned by Anglo-Canadian Telephone Company, a wholly-owned subsidiary of GTE Corporation. The former TELUS Communications Inc. (Telus) served Alberta. It was the successor to AGT, which was the successor to The Alberta Government Telephones Commission, which was established in 1958 to operate, as an agent of the Crown in right of Alberta, the telephone system owned by the province. The province privatized its telephone system in 1990 and the assets of The Alberta Government Telephones Commission were transferred to AGT Limited on October 4, 1990. While it expressly provided that Telus was not an agent of the Crown in right of Alberta, several measures were enacted at the time of privatization which were aimed at preserving local control of Telus and that it continued to carry on a telephone business.

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64 BC Tel was grandfathered under the Telecommunications Act for exceeding foreign-ownership rules. To date, no third party has come forward to contest the foreign ownership levels.
65 British Columbia Telephone Company Special Act, S.C. 1916, c. 66, s. 15.
MTS Telecom Services Inc. (MTS) serves Manitoba. MTS (a private company) is the successor of The Manitoba Telephone System (a Crown corporation). Manitoba Government Telephones, was established as a department of the provincial government in 1908. The name Manitoba Telephone System was adopted in 1921 and MTS was incorporated in 1933. Effective January 1, 1996, MTS was reorganized into a holding company with three wholly-owned subsidiaries: MTS NetCom Inc. (local and network services); MTS Com (competitive services); MTS Advanced Inc. (enhanced services); and, MTS Mobility Inc. (wireless services).

Maritime Tel & Tel Limited (MT&T) serves Nova Scotia. The Maritime Telegraph & Telephone Company was incorporated in 1910 and acquired the Nova Scotia Telephone Company which had purchased Bell's assets in the province in 1888. On June 1, 1994, MT&T was reorganized such that its traditional telecommunications services business in Nova Scotia was transferred to Maritime Tel & Tel, MT&T's directories business and its investments in Island Tel and MT&T Mobility Incorporated were transferred to MT&T Holdings Incorporated. As of January 1, 1996, BCE Inc. owned 36.1-per-cent of the common shares of MT&T.

Island Tel serves Prince Edward Island. MT&T has owned a majority of the shares of Island Tel and its predecessors since 1910 and, as of December 31, 1994, that interest stood at 52-per-cent.

NB Tel serves New Brunswick. In 1889, NB Tel acquired Bell's assets in a transaction that also gave Bell an equity position in the company. NB Tel is a wholly-owned subsidiary of Bruncor Inc., of which 45-per-cent of the common stock is owned by BCE Inc. as at January 1, 1996.

NewTel, formerly Newfoundland Telephone Company Limited, serves Newfoundland. The present company is a corporation resulting from an amalgamation of Newfoundland Telephone Company Limited and Terra Nova Telecommunications Inc.

68 MTS. *About MTS*. Internet: http://www.mts.mb.ca
69 *The Manitoba Telephone Act*, S.M. 1933, c. 46, s. 14(1).
70 MTS. *About MTS*. Internet: http://www.mts.mb.ca
73 Ibid.
In 1989. It is a wholly-owned subsidiary of NewTel Enterprises Limited, of which 55% of the common stock is owned by BCE Inc. 74

In 1999, a Bell-directed merger involving all of Canada’s regional phone companies in the Atlantic region was announced.

SaskTel, a provincial Crown corporation, serves Saskatchewan. SaskTel was established in 1947 to operate the telecommunications system formerly administered by the Department of Railways, Telegraphs and Telephones. 75 In 1909, Saskatchewan acquired Bell’s telecommunications plant in the province. As a result of the restructuring that took place in 1993, the company is a wholly-owned subsidiary of Saskatchewan Telecommunications Holding Corporation (which also owns all assets deemed non-integral to telephone operations) 76.

While at the turn of the century there was movement towards more provincially pertinent telephone companies, today a series of mergers have meant national and global alliances. BCE Inc. owns or controls the telecommunications companies in six provinces and has alliances to provide national service with SaskTel and MTS. Two of the three provincial Crown corporations have privatized. Prior to the initiation of long-distance competition in 1993, the Stentor members controlled the telecommunications industry in Canada. Now there also are more than 300 long-distance companies, including resellers, registered in Canada. Furthermore, there are cross-border alliances which mirror at the global level the same sort of private initiatives found in Canadian domestic reorganizations. Although BC TEL had been American-owned for some time, in recent years mammoth U.S. companies have honed in on the Canadian market with multi-billion dollar mergers. Government “deregulation” and the opening up of a competitive telecommunications market have broken up the cozy fraternity of regional monopolies that used to dominate the Canadian telecommunications industry. Consumers are seeking lower prices and more services, while big businesses want access to higher speed networks that will serve their interests all over the world. But, the big beneficiary resulting from these changes is business and, particularly, big corporations that will be able to use one telecommunications network for all their telecommunications needs.

74 NewTel. Company Profile. Internet: http://www.newtel.com
75 See The Railway and Telephone Department Act, S.S. 1980, c. 5.
CHAPTER IV
CROWN CORPORATIONS

Crown corporations and regulation, as instruments of public policy, differ substantially in the pursuit of public policy objectives. Regulation generally leaves private ownership intact, but Crown corporations often are required to act as a public institutional control and yet perform as a corporation within the same industry. Thus, Crown corporations continuously must look both ways in making decisions to achieve some sort of balance so that the challenge and effort, for Crown corporations, is to achieve an appropriate balance between the managerial autonomy necessary within the industry and public control. In seeking to answer the effect of federal regulation on provincial Crown corporations, the approach used to achieve public policy objectives through Crown corporations will be reviewed in preparation for a comparison to the process used in regulation. In this chapter the reasons for the creation of provincial Crown corporations will be explored with special emphasis on the reasons for creating what is often-termed "commercial" Crown corporations. In particular, the structure and accountability requirements of Crown corporations, with a specific look at Manitoba, will be analyzed to evaluate their ability to pursue the public policy objectives of their owners. Finally, although Crown corporations operate in the same commercial world as private enterprise, they face a significantly different legal and institutional environment. If their commercial or business environment changes, that is if the industry in which they operate changes, does their legal and institutional environment have to change as well?

Crown Corporations: Reasons for their Creation

Crown corporations, as opposed to shareholder-owned corporations, are rarely created strictly to generate profits. Often the reasons for the creation of a Crown corporation are obscure because "the government has acted in response to the needs of the moment rather than on the basis of long-range plans or considerations of organizational symmetry". In fact, Tupper and Doern conclude that, "neither grand ‘ideology’ nor its antithesis ‘pragmatism’

explains the creation of most of the major public enterprises. These firms were created, however, in the context of deeply held beliefs and concerns about normative purposes important to Canadians, including nationalism/provincialism, the need to save jobs and create them, and to take advantage of opportunities provided by new technologies”.\textsuperscript{78}

It may be said that most often Crown corporations are established to fulfill policy objectives. “That is, Crown corporations are simply instruments of public policy (like subsidies, tariffs, and tax incentives), clothed in corporate trappings and, consequently, susceptible to being confused with them by people wearing what we shall call “Private Sector Glasses”.”\textsuperscript{79} Choosing the corporate form has been seen as a way to combine public ownership with public accountability and business expertise. “The objective has been to permit crown corporations a measure of political direction and control over policies and performance of crown corporations while still allowing sufficient freedom for their managers to operate in a business-like fashion.”\textsuperscript{80}

Since Crown corporations are created for their own peculiar reasons, several institutional differences arise so that a definition of Crown corporations in terms of their common characteristics may prove helpful. For our purposes of examining Crown corporations which act within a commercial field such as telecommunications, the definition of Crown corporations by Trebilcock and Prichard will be used to restrict our discussion to “corporations in which the government has a de-facto controlling interest and which, provide goods or services directly to the public on a commercial or quasi-commercial basis”.\textsuperscript{81} More particularly, this examination will focus on those Crown corporations that are owned by provincial governments.

Unfortunately, provinces have developed a variegated array of agencies, commissions, authorities and corporations so that even the “corporate” label itself can be deceptive. Other


terms used to describe such organizations are public corporations, public enterprises, state enterprises and public firms. Consequently, there is no clear definition between provincial entities which appear to be obviously corporate both in content and form and other provincial entities which are departmental in nature. Vinning and Botterell see three requirements to classifying provincial Crown corporations. The first is that it is assumed that if a province has a 50-per-cent or greater interest in a corporation it is under control of the province; the second is that it screen out those agencies or corporations which are not treated as being outwardly controlled by the provinces; and, the third requirement is that provincial Crown corporations are differentiated from other government organizations. The theme to determining if a public institution is, then, a Crown corporation is if it is owned or controlled by the province; and, whatever it calls itself, it is treated as a “corporation”. Moreover, commercial Crown corporations may be defined as publicly-owned enterprises producing generally marketable goods and services.

Although it may be obscure at times, the commonality is that there is some public policy objective which underlies the existence of Crown corporations and such an objective must be seen as valid from a social, political or economic point of view. Together with some public policy objective, another common characteristic of a Crown corporation also emerges, that is public scrutiny. This perception by the public that a Crown corporation is theirs, that they own it, that it belongs to the taxpayer so that, somehow, the corporation is answerable or accountable to them. This may be even more prevalent in a provincial, as opposed to a national, Crown corporation because of its local nature. When the public views a corporation as “its own”, the complaints go most often directly to the President’s office and, as such, this office is open to the taxpayer. Consequently, corporate officers provide estimates of between 20-per-cent to 80-per-cent of their time being spent on what could be called “public relations” work and, moreover, provincial Crown corporations often designate high-level staff to handle any legislative inquiries.

Crown Corporations and Public Policy Objectives

To understand the pursuit of public policy objectives by Crown corporations, we need to delineate the policies that would underpin and justify a corporation as being within the public sphere. While there is a broad range of public policy objectives that are often cited as justification for the creation of a Crown corporation, we will concern ourselves with those objectives more directed to the public ownership of utilities. Probably the most-often cited rationale for public enterprise in the Canadian context is that of either national or regional development and the unification of either the nation or a province. Such public policy objectives are the main reasons behind the creation of provincial Crown corporations in telecommunications. As often noted:

Government ownership in Canada is, fundamentally a phenomenon peculiar to a new country, and an effective weapon by which the government has been able to bring together the retarded development and the possession of vast natural resources... and a market favourable to the purchasing of raw materials. It was essentially a clumsy, awkward means of attaining investment of tremendous sums of capital, but it was also the only means of accomplishing the risk and retaining a substantial share of the returns from virgin natural resources.

This rationale comprises the two main public policy objectives that we wish to examine in connection setting-up provincially-owned telecommunication corporations:

1. the goal of developing and integrating the country, or some region thereof, when market signals are such that private investors are unwilling to make certain kinds of investments or take certain kinds of risks (development); and

MTS in addition to a customer ombudsman and complaints handled directly by the president's office, complaints that went to the CRTC were handled by the Director of Regulation.


At MTS, considerable time and effort was required by senior staff for its annual review by the Public Utilities Committee of the Legislative Assembly.

2. the desire to develop a national or provincial identify or to preserve Canadian or provincial control over certain sectors of the economy in the face of pending foreign investment (nationalism).

While provincially-owned telecommunications corporations in Alberta, Saskatchewan and Manitoba may have started out by virtue of the former, the last remaining provincially-owned telecommunications corporation (SaskTel) is trying to defend the latter.

In looking at the first aspect of the rationale behind the public policy objectives, provincial governments have a long-standing interest in promoting the development of their economies. Public enterprises designed to foster economic development are not challenges to the private sector.⁶⁶ In the case of telecommunications, the Crown corporation was originally set-up in a monopoly utility environment because the private sector was unwilling to make such an investment. In fact, business is one of the main beneficiaries from government investment in building a provincial telecommunication network that ties into a national and international communication system. Consequently, the use of public resources for telecommunications may be seen as a supplement and support to the private sector. The business community very much benefits from this particular form of public activity, with little loss of autonomy, which achieves what is described as profit at public expense.⁶⁷ Thus, public utilities such as telecommunications are a facilitative type of Crown corporation, even when the province is taking on some function usually performed by private firms. The supportive relationship between private and public sectors and the nature of the interests that derive the benefits influence the politics of such facilitative corporations.

There are other numerous examples in the Canadian context of situations where commercial-type public ownership was pursued to fulfill the "development" policy objective. An example would be where the government has concluded for social rather than economic reasons that certain uneconomic activity (providing low-cost electricity to rural areas or universal affordable telephone service) is warranted. In general, in addition to telecommunications, the provincial hydro-electric utilities were brought into the public sector both to encourage development of other industries in the province and to ensure, as a matter

⁶⁷ Ibid.
of policy, that all residents of the province received low-cost (cross-subsidized) reliable service, no matter how remote their homes. Similarly, the Western public sector insurance companies had as at least one original motivation the provision of coverage for otherwise uninsurable risks.

Such was the nature of the relationship for the first 100 years in the telecommunications industry. There was little sign of conflict during the development of the telecommunications infrastructure because these provincial Crown corporations were not seen as intrusive until the late 1980s with the completion of the telecommunications network, when business determined that telecommunications costs were an inhibitor rather than a facilitator of trade and the underlying public policy objective of facilitating economic development was questioned. What business began to object to was the public policy objective of redistribution that supported a universal telecommunication network.

Redistribution refers to public policies intended to change the distribution of economic benefits. The underpinning of a universal affordable telecommunications network is the policy of pricing telephone rates higher than costs for long distance and business users to support or offset lower rates than costs for local and residential users. Consequently, as the telecommunications network developed and the focus of the public policy changed from facilitation to redistribution, the provincial Crown corporate institution became more threatening to the private sector. Significantly, in redistribute enterprise, those who stand to lose are aware of the potential threat and voice their opposition. Such conflict may tend to correspond “… to the basic ideological cleavage that divides the right from the left, so that even those who do not stand to directly lose or gain, may because of their ideology, be involved in the conflict…”

The second aspect of the rationale behind the two main public policy objectives for setting-up provincially-owned telecommunications corporations had to do with national or provincial identity. In this case, public ownership is used to enhance provincial interests at the expense of those interests outside the province. Such nationalistic or provincial corporations combine elements of both the facilitative and redistributive functions. Such public

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88 Ibid., 211.
89 Ibid., 212.
90 Ibid.
enterprises are facilitative because they were established to assist indigenous economic interests, but providing special assistance to local firms rather than the private sector in general gives rise to the redistribute element. But, the defining characteristic of such a Crown corporation is the importance of regional or territorial distinctions. The power of the Crown corporation is used to increase local or provincial control at the expense of external, and often private, interests. This aspect has become especially important in Saskatchewan as SaskTel seeks to control the threat of competition from private telecommunications companies because of government distrust of a market economy under outside control. Prairie nationalism was seen as the main impetus behind the creation of provincial Crown corporations in telecommunications in Alberta, Saskatchewan and Manitoba. The traditional feeling was that the Western economy had been exploited for the benefit of the East. Such provincial corporations reflect some of the impact of federalism on policy-making. “Crown corporations are decidedly influenced and conditioned by the politics of federalism, intergovernmental conflict, and regional economic discord.”

In the first instance, Canadian federalism can be seen to exert an influence on the scope of Canadian public enterprise... As well, Crown corporations may be employed as instruments of ‘defensive expansionism’ and a means of counter-attacking the policies of other governments. And under certain circumstances, Crown corporations may be used to escape the rigidities of a formal division of constitutional power.”

Thus, such corporations are used by provincial governments in their conflicts with Ottawa, as will be seen in Chapter VII MTS: A Case Study when the provincial Crown corporations of AGT, SaskTel and MTS joined in opposition to the federal government and formed the Prairie Telco Alliance.

Finally, public ownership is seen as an attractive way of symbolizing and dramatizing a government’s commitment to a particular cause or set of values. In some situations, even if it were possible for a government to regulate the private sector activity to achieve its

\[91\] Ibid.
objectives, it may be too difficult to generate public confidence in, and an understanding of, this reality and an assertion of public ownership may be the only way to communicate sufficiently clearly the government’s commitment to a particular objective.93 Moreover, as the literature points out, the cost of monitoring or regulating private sector activity is a major factor favouring the utilization of public ownership, although there are costs associated with a Crown corporation structure as well.

The choice of Crown corporations as a public policy instrument has been popular. All provincial governments have used Crown corporations. Manitoba ranks seventh in its utilization of Crown corporations, while the four Western provinces have the largest number of Crown corporations or 40-per-cent of the total.96 Vinning and Botterell also rank the functional areas that the provinces have entered. In looking at the functional area of “Telephones and Communications”, Alberta, British Columbia, Manitoba, Quebec and Saskatchewan had Crown corporations of this type. In their study, which looked at the historical growth of provincial Crown corporations, Alberta controlled 56.6-per-cent of the assets followed by Manitoba and Saskatchewan with 22.0-per-cent and 20.3-per-cent in the functional area of “Telephones and Communications”. In Alberta, Saskatchewan and Manitoba, telephone corporations ranked second in importance, holding between 4.1-per-cent and 23.4-per-cent of total provincial assets.97 Chandler has pointed out that parties of the left are likely to turn to state ownership more frequently than other governments. “However, even more crucial than distinctive partisan propensities to establish Crown corporations are the differences in the purposes for which Crown corporations have been employed.”98 In Manitoba the NDP has been responsible for 46.2-per-cent of the Crown corporations,

96 Ibid.
followed by the Conservatives with 38.2-per-cent\textsuperscript{99} However, it is also important to remember that provincial Crown telephone corporations in Alberta, Saskatchewan and Manitoba were founded within a few years of each other prior to 1910 and for similar reasons\textsuperscript{100}. The alternative was a private monopoly operated by Bell. In particular, there was apprehension that Bell would earn excessive profits at the expense of the subscribers and that it would not be prepared to extend service to thinly populated areas at affordable, perhaps unprofitable rates. This latter issue assumed particular importance in the Prairies, given the dispersed settlements and the distances involved. However, the need or purpose in establishing a provincial telecommunications network has dissipated over time.

**Crown Corporations and Accountability**

Choosing public ownership as a public policy instrument necessitates the assurance of accountability to its owners. While such accountability is essential to the nature of a Crown corporation, it results in much discomfort for the Crown corporation in determining for what and to whom its actions are held accountable. The cause of this discomfort is hardly surprising, it results from the propensity to measure Crown corporations - particularly "commercial type" Crown corporations, such as MTS - on the same familiar well-defined basis, that is profitability, as we judge other corporations, such as Bell Canada.

According to Howard Pawley, "Usually the Crown corporation's management structure strives to achieve traditional private sector goals. As such, the profit motive is not absent from the statement of aims, and is often central to the corporate mandate. However, in Manitoba, social or economic aims temper the profit motive."\textsuperscript{101} While a major aim of the Manitoba government and, indeed, other federal and provincial governments, has been to further the role of the state in economic development, a second aim has been to provide essential public services. "These corporations have performed a vital function for the province


\textsuperscript{100} Economic Council of Canada. *Minding the Public's Business*. (Ottawa: Minister of Supply and Services, 1986) 38.

and have as a result, contributed positively to the life of Manitobans.\textsuperscript{102} The management and administration of Crown corporations are thus held accountable for achieving an economic performance that proves the effective investment of public capital.

In devising an acceptable form of control, an earlier faith in the autonomy of Crown corporations has given way to a balance between corporate flexibility and responsibility. The roots of effective control of Crown corporations in parliamentary systems is the tradition of full ministerial and parliamentary responsibility. An understanding of the way in which the question of corporate accountability has been posed in Canada has been highlighted by Lloyd Musolf and his examination of the pioneering debates in the House of Commons on the relationship of Canadian National Railways (CNR) to ministers and to Parliament. Although the CNR was not the first public corporation established by the Canadian government, it was the first to be charged with the operation of a giant business enterprise. Musolf says that a striking feature of the debates was “the tendency of participants to rely on the language of business in visualizing the relation of the corporation to ministers, Parliament and the people of Canada.”\textsuperscript{103} In this way, accountability is seen as a matter of assuring that the people or the electorate, as shareholders in the public enterprise retain ultimate control of their property. This shareholder approach lead to the following questions: (1) who were the shareholders’ representatives; (2) to what information were shareholders entitled; and (3) how could control of the shareholders be assured? The answers that were devised to these questions illustrate the preoccupation of governments with business concepts. Consequently, the shareholders’ representatives became a board of directors, information to be disclosed publicly should not impair managerial autonomy or competitive position and control was assured through various mechanisms that were usually designed to shield the government from the political consequences of failures in the Crown corporations’ operation\textsuperscript{104}.

A worthy example in designing new mechanisms of accountability in response to the “dismal economic performance of Manitoba’s commercial Crown corporations and the history of ineptitude and corruption in their management and operation” is the NDP administration of

\textsuperscript{102} Ibid.


\textsuperscript{104} Ibid., 36.
One of the most infamous cases arose from the operations of MTX, a commercial subsidiary of the Manitoba Telephone System (MTS), which experienced serious financial losses while attempting to do business in Saudi Arabia in spite of "... at least on paper, one of the most well-developed frameworks for the direction, control and accountability of Crown corporations of any of the ten provinces".106

In reflecting business practices upon parliamentary tradition, the most obvious way to maintain accountability is hold the minister designated as responsible for the corporation accountable to the electorate for the Crown corporation in the same manner as the chairman of a board of directors is responsible to the shareholders of a company. In practice, however, the responsible minister may sit on the board or not, or meet with the board periodically, if at all. Corporate officials usually pay attention to the comments of ministers in question period, in speeches and in the legislature. They prepare briefing books for ministerial use and try to anticipate issues that may be politically sensitive. However, anything less than a close relationship of the minister and the Crown corporation necessitates elaborate measures to maintain and strengthen such accountability. The relationship must ensure accountability by the corporation to the minister for its actions and accountability by the minister to the Crown corporation to inform it as to public policy objectives.

This failure to ensure such a relationship and resulting two-way responsibility is reflected upon by Pawley, who states that,

"Governments have failed to install processes which would have promoted accountability by the Crown corporation to the Minister, to the Cabinet, to the Legislature, and to the public. Furthermore, policy decisions have sometimes reflected the vision of public administrators instead of politicians, and occasionally, the politicians have avoided responsibility when it was clearly theirs to assume. Unfortunately, for Manitobans, the results were sometimes in opposition to the public interest."

This relationship is unique to managing Crown corporations so that the leadership of Crown corporations must not only deal with external forces that can affect the performance of

106 Ibid., 88.
their companies, but also manage their relationship with the political system. It comes as no surprise, then, that from the late 1980s to the early 1990s the leadership of MTS changed no less than five times in as many years. In 1991, the Chief Executive Officer of MTS was accountable to no fewer than ten governmental sources. In addition, as one of the four monopoly Crowns in the province, MTS was required by law to hold annual accountability meetings with its customers and to maintain a log of customer complaints to be filed quarterly with a Crown Corporation review Council.

However, these accountability processes were supplemental to the primary mechanics of corporate accountability. A Crown corporation, like any corporation, is held accountable to its board of directors. While it is difficult to describe a typical board of a Crown corporation, directors are usually appointed by Cabinet on the recommendation of the premier, who may receive advice from the responsible minister. In the case of MTS, commissioners were appointed by the Lieutenant Governor in Council and the Lieutenant Governor in Council also designated the chair and vice-chair. The composition and functioning of the boards vary widely among provinces and even within corporations within the same province. In British Columbia and Saskatchewan, Ministers serve on the boards of corporations for which they are responsible. In many provinces, civil servants are also appointed to boards. For many years, Manitoba followed the practice of placing government members of the legislative assembly on boards. At the same time, the legal duties that apply to directors of corporations also apply to directors of Crown corporations. Therefore, directors are legally liable to act “in the best interest of the corporation” and “to exercise the care, diligence and skill of a reasonably prudent person”. As a result, in discharging their responsibilities, directors face the same conflict that is inherent in the nature of a Crown corporation - are they agents of the Crown or trustees of the longer-term interests of the corporation? The theory in Manitoba was that decision-making would be maintained within

the boards of directors, but the boards would be linked to the centre by way of ministerial accountability.\textsuperscript{110}

Ministers in Manitoba, however, virtually never sit on the boards of directors. The minister designated with the responsibility for a Crown corporation is the prime contact for individual boards of directors. "The relationship customarily developed with the Minister was one that was direct and personalized."\textsuperscript{111} Board composition usually involved strict separation between the positions of chief executive officer and the chair of the board, a practice thought to have led to the domination of boards of directors by corporate management in earlier years. However, such ministerial-board links may not be sufficient to ensure political accountability.

An example of this insufficiency can be found in the case of MTX Telecom Services, the commercial subsidiary of the Manitoba Telephone System (MTS) that lost $28 million. The government initiated an RCMP investigation of the criminal allegations and commissioned a major consulting firm to investigate the non-criminal aspects of the case. The consulting study concluded that "senior executives responsible for MTS and MTX must accept ultimate responsibility for exposing the corporation to significant business risks and financial losses", but the consulting study had no mandate to investigate the responsibility of the minister designated as responsible for MTS/MTX.\textsuperscript{112}

The government determined that the structure had to be redesigned to more precisely define the relative responsibilities in the process. Crown corporation decision-making in Manitoba was linked to the centre, providing a different perspective on accountability and control. The boards of directors were delegated the decision-making capacity except where the matter involved non-commercial or social activity.\textsuperscript{113} The key to such a system of direction and control of Manitoba Crown corporations was the Cabinet and its Economic Resources Investment Committee (ERIC). This committee was one of two policy subcommittees of Cabinet. The role of ERIC was to take on "a group ministerial overview role on a range of major economic development thrusts and to ensure that individual projects


\textsuperscript{111} Ibid.

proceed in a manner consistent with the government’s economic policies.”

An important subset of this role was responsibility for determining policies related to the Crown corporation sector in such areas as economic development strategy as well as approval of budgets and refinancing proposals of Crown corporations. However, although ERIC provided a collective, ministerial decision forum for the deliberation of Crown corporation strategic planning and investment issues, it was not set up to deal exclusively with Crown corporation issues and had many other responsibilities.

Another process on the road to accountability in Manitoba was setting up a new Department of Crown Investments (DCI) to “oversee and coordinate capital spending and investments of all provincially-owned corporations.” The government news release stated that it is important to ensure that the investments of Crown corporations are coordinated and the process of investment fit in with an economic strategy that the government of the province might have in mind. However, DCI had no statutory authority to handle Crown corporation finances or to perform any capital resource allocation function, although it did undertake both policy and secretarial assessment duties on behalf for ERIC; provide advice to Crown corporations on plans and budgets; and, analyze Crown corporation budgets on behalf of ERIC ministers. Thus, ERIC and DCI were an experiment in the application of conventions of collective ministerial responsibility and central agency machinery to Manitoba Crown corporations.

The Crown Corporation Accountability Act was later enacted to improve the lines of authority between the Legislature, cabinet ministers, boards of directors and the management of Crown corporations. It established a holding company, the Public Investment Corporation of Manitoba, to deal with the mandate, long-range plans and capital expenditures of Crown corporations. It applied policies relevant to all Crown corporations and provided


115 Ibid., 90.

116 Ibid., 88.

assistance to the Crown corporations, as needed, and reported to Cabinet. This ministerial board was chosen to ensure there would be a cogent focus for the Crown corporate sector.

... especially in those areas that required long-term strategic policy and planning development. Rather than being diverted from a longer-term government agenda, as happened with MTX and the Saudi Arabian fiasco, a parent Board would analyze longer-term proposals to ensure consistency with government policy. Detailed analysis and measurement of the operating management would also be undertaken. Several dismissals of senior executives from the Manitoba Telephone System and the Manitoba Public Insurance Corporation provided strong evidence that critical changes were essential to scrutinize performance... The operating management of subordinate Crown corporations would be free to concentrate on day-to-day business while ministers could spend more time on their major portfolio responsibilities.119

In 1988, the new government, headed by Gary Filmon, replaced The Crown Corporation Accountability Act with The Crown Corporations Public Review and Accountability Act.120 It substituted the Crown corporations Council for the Public Investment Corporation of Manitoba and declared its duties to be to:

(a) facilitate, in co-operation with each corporation, the development of a clearly defined mandate and a clear statement of purpose for the corporation;
(b) facilitate, in co-operation with each corporation, the development of consistent and effective criteria for measuring the corporation's performance;
(c) review long term corporate plans and capital expenditure proposals of corporations, ensure consistent practices among two or more corporations where appropriate and provide any advice to the Lieutenant Governor in Council on those plans, proposals and practices or any other matter of policy affecting corporations that may be requested by the Lieutenant Governor in Council;
(d) receive and hear submissions from any person who, in the opinion of the council, has knowledge respecting any aspect of a corporation’s activities regarding alleged failures by the corporation to comply with any Act or any policy of the council.121

118 Ibid.
119 Ibid., 311.
120 S.M. 1988-89, c. 23.
However, the Crown Corporation Council, as opposed to the Public Investment Corporation, was not a council of ministers but rather a council of members appointed by the Lieutenant Governor in Council. Consequently, the line of ministerial accountability was blurred rather than being more clearly defined. Government objectives were then communicated to Crown corporations through a number of channels. The Crown Corporations Public Review and Accountability Act also provided that Manitoba Hydro and the Manitoba Public Insurance Corporation would be subject to regulation by the Public Utilities Board of Manitoba (PUB). MTS had always been subject to rate regulation by the PUB. This aspect of MTS’ regulation will be discussed in greater detail in Chapter V. Thus, an elaborate framework of accountability was constructed to bring about what could occur with a “good one-on-one relationship between a designated Minister and a senior Crown corporation executive”\(^{122}\).

More importantly, these sorts of mechanisms may result in tipping the balance maintained by Crown corporations towards a public policy environment rather than commercial performance. Thus, it is often alleged that public sector enterprises achieve inferior performances in terms of profits and the efficient use of resources. Such managerial complexity may be overwhelming in a competitive environment.

**Crown Corporations and Competition**

The introduction of competition into telecommunications in the 1990s brought with it the conundrum that, if prices are driven toward cost, the public policy principle of cross-subsidizing lower local rates with higher long distance rates to support universal affordable telecommunications may be unsustainable. While this system of cross-subsidization is sustainable in a monopoly environment, in a competitive market a corporation that charges rates significantly above costs will lose its customers to a competitor.

Thus, the structure and nature of the industry will affect the desirability of public ownership. In particular, the absence or presence of a competitive market structure is very influential. When the telecommunications industry was a natural monopoly, public ownership was a valid alternative response to regulation. The Crown corporation structure had a

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superior ability to co-ordinate multiple objectives by internalizing them and having the
decision-making take place within the Crown corporation. Moreover, the Crown corporation
structure provided flexibility and reversibility. The link between telecommunications and the
development of the province needed not only co-ordination but also continual adjustment to
policy objectives. The public ownership of telephone companies in Alberta, Saskatchewan
and Manitoba contrasted with the privately-owned companies enjoying statutorily protected
natural monopolies in the other provinces. The choice of the Crown corporate structure as
the public policy instrument lay in the desire to provide low cost funds to meet substantial
capital expenditures involved in extending the telephone network to the thinly spread
populations in the Prairie provinces. However, an alternative explanation also may lie in the
functional and legal limitation of the available substitute instruments. The telephone
companies were originally largely owned by Bell Canada which was based in the East and
difficult for the provincial governments to regulate. At the same time, these private firms
were alleged to be deriving excess profits through an abuse of their monopoly position and
were not investing funds in further expanding the provincial systems. This conflicted with the
government’s desire to expand substantially the degree of cross-subsidization of telephone
rates. This objective of providing services to all at reasonable cost points to the ability of the
firms to cross-subsidize, thus creating a further incentive for public ownership.123

Thus, the original inadequacy and inaccessibility of competition policy and the short
comings of direct regulation are explanatory factors in the decisions by Alberta, Saskatchewan
and Manitoba to create provincially-owned telecommunications corporations with statutorily
monopolies. However, the continued choice of the Crown corporate structure in light of
federally encouraged competition policy changes its underpinnings.

(Toronto: Butterworths, 1983), 51.
CHAPTER V

TELECOMMUNICATIONS REGULATION

Simplistically, we may choose to think of regulation as a mechanism of control, as a means for government to direct and adjust various outcomes. The regulation of the telecommunications industry in Canada has permitted properly-constituted jurisdictional authority to subject the industry to certain governing principles. But, why and how has the Canadian telecommunications industry been regulated and what have been the effects? In this chapter, the purpose and theory of regulation will be carefully thought about as it pertains to telecommunications in Canada. The effect of regulation on federalism and the choice of public policy instrument, particularly Crown corporations, will be examined as well as exploring the effect of technological and economic change on regulation. Finally, this chapter will look at the Canadian Radio-television and Telecommunications Commission (CRTC), the federal telecommunications regulator, its regulatory evolution and reform.

Regulatory Theory

In a series of decisions issued on May 1, 1997, the CRTC launched what it described as "a fully competitive telecommunications marketplace in Canada." 124 The transformation of the telecommunications industry into a more competitive enterprise did not occur overnight. It was the result of more than a decade of incremental regulatory change orchestrated primarily by the CRTC. How did such a change come about in view of the purpose and nature of regulatory tradition and to what extent are current theories of regulation able to account for such a radical shift?

The basic traditional economic justification for the regulation of an economic activity, such as telecommunications, is to control and prevent the improper allocation of resources that may be caused by either destructive natural monopoly or by competition. The fundamental argument for having the government regulate a particular industry is that it, e.g. a telephone company, will develop a natural monopoly because the economies of scale, production or distribution are so pronounced that a single seller will dominate the industry. In

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achieving such a dominant position, the company could charge whatever the market would bear.\textsuperscript{125} The common perception is that the telecommunications industry, before recent technological change, formed a natural monopoly. Consequently, the conventional view held that regulation should enhance the public interest and that regulation was required to protect consumers from monopolistic exploitation. Robert Babe describes this common contention as a ‘myth’ and illustrates another suggestion which contends that regulatory agencies, “far from protecting the public from the ravages of a monopoly, invariably become captured by the very industries that they regulate.”\textsuperscript{126} Such a political approach emphasizes the role of the regulator in resolving disputes between producers and consumers.

Another, less favourable, portrait than the public interest approach to regulation now suggests that multiproduct firms may need protection from entrants. The argument is that regulation is a trade-off between public and private interests. Such an economic approach contends that regulation is designed to protect the interests of a producer, or a group of producers. This supply-demand model predicts that regulation will develop in response to the greatest demand. A producer, or group of producers, may represent a small constituency; however, the benefits they may reap from the constraints on competition may be enormous. These producers will have a very high incentive to lobby politicians. Consumers will be disadvantaged by the removal of competition, but their economic loss will be small compared to the disproportionate economic gains that will pass to the producer group. Under these circumstances, regulation will follow demand (in favour of the producers) even though the larger, potentially more powerful group is disadvantaged.

The contract approach views the regulator as a bargaining agency for consumers in a long-term contract with producers. Baldwin puts forward this theory, but contends that Canada had to abandon this early form of franchise contract because the constitutional and judicial prerequisites for its success were not present in Canada as in the United States. “The suitability of the regulatory agency depended upon there being constitutional restraints on the exercise of coercive power by the state in contract renegotiations that were part and parcel of


the regulatory process." Since these constitutional restraints were weaker in Canada than in the United States, regulation sometimes took a different form. In particular, when the early form of such franchise contract failed, Canada frequently turned to public enterprise because of the inherent defects in the protection offered private capital in its constitutional environment. "The adoption of public enterprise was associated not so much with rational choice but with contract failure - occasions when governments exercised coercive power of the state and confiscated or threatened to confiscate the capital that had been invested in several of the early utilities." Prior to the liberalization of telecommunications regulation, it could be said that monopoly status favoured the producers, but it also favoured to a considerable degree a class of corporate users. This was the case until the early 1970s when the balance shifted in favour of the class of residential users, while still favouring the monopoly providers. When this occurred, pressure mounted for a new structure that would better reflect the potential of new technology to favour corporate interests. Although consumer groups may stand to benefit from competition in terms of lower long distance charges, it was the class of corporate users that stood to reap a proportionally greater benefit. One can speculate on the extent to which their lobbying efforts were key in the CRTC's decision to opt for competition. However, such an economic approach may aid us in understanding regulatory dynamics.

The Beginnings of Telecommunications Regulation

While certain groups may have been a factor in many policy decisions, the major consideration that influenced regulatory activity was clearly the perceived economic and social problems of the day. In the early years of Canada's history the role of government was not so much to restrain economic activities, but to support initiatives that would help open up the country and develop its industrial potential.

Governments since Confederation have been concerned with the need to preserve Canadian identity and use communications as a nation-building tool and as a facilitator of economic development. The Bell Telephone Company of Canada (Bell) received a federal


128 Ibid.
charter in 1880 that was revised in 1882 with a declaration that the company was “a work for the general advantage of Canada.” At the same time, Bell obtained the rights from Ontario and Quebec to string wires and erect poles because, even with a federal charter, regulatory jurisdiction was not clear at that time. In Chapter VI, the jurisdictional conflict between the federal and provincial governments with respect to telecommunications will be discussed.

Divided jurisdiction existed in Canada over telecommunications. Under the Constitution Act, 1867, telegraph lines were specifically placed under federal jurisdiction. The development of new forms of telecommunications, however, were not automatically under federal control. Initially, Bell faced competition from existing companies and potential entrants. It gradually eliminated both. Bell grew by purchasing local telephone companies that had been operating with equipment provided by Bell’s forerunner, telegraph companies. It also moved to block the expansion of these powerful rivals. As in the United States, the telegraph companies offered potential competition both because they operated with alternative technology and because they already had entered or were potential entrants to the telephone companies. In the United States, this was resolved when Western Union and Bell reached a patent agreement that essentially left the telephone business to Bell. In Canada, Bell simply bought out the plants of the telegraph companies. It acquired Maritime telephone exchanges from Western Union. The fledgling telephone plant of the Montreal Telegraph Company also was purchased. Companies that were not purchased were attacked for patent infringements. The policy quickly eliminated most of the competition. By 1881, Bell’s general manager claimed: “we now have the entire field in Canada.” A bit of an exaggeration, but very close to being the truth.

Competition was severely restrained, but not eliminated by these strategies. The Toronto Telephone Manufacturing Company continued to manufacture telephones and in 1885 successfully challenged Bell’s Canadian patents so that Bell was forced to embark on a strategy of consolidation, more intense price competition and pre-emptive investment in the construction of long lines. By 1886, the Toronto Telephone Manufacturing Company was acquired by Bell.

\footnote{Ibid., 69.}
\footnote{Ibid.}
As it grew, Bell was forced to develop a sense of local politics. It had local interests represented in its regional subsidiaries. This was thought to make the subsidiaries more responsive to local concerns and lessened the perception that the subsidiaries were tools of central Canada. British Columbia was “organized from the start by autonomous though friendly interests, the New Westminster and Burrard Inlet Telephone Company.” The Nova Scotia Telephone Company was organized in 1886 with 33-per-cent Bell ownership. By 1887, a similar situation evolved in New Brunswick with the creation of the New Brunswick Telephone Company. Control over both maritime companies was maintained through large minority stock position and equipment supply contracts.

Bell also turned its attention to eliminating another potential source of competition - the railways, with their rights-of-way that could potentially link non-Bell local exchanges. In 1885, Bell began the process of contracting with the railways to use their rights-of-way and for the exclusive right to put telephones in train stations. Bell also purchased, at a substantial premium, the CPR-backed Federal Telephone Company out of Montreal.

In order to protect itself further from potential entrants, Bell devised a blocking strategy of negotiating exclusive franchises with local governments. Bell negotiated an exclusive franchise with the City of Toronto in 1891 and agreed to pay 5-per-cent of its gross revenue for five years to the City; to charge, at maximum, rates of $50 for business and $25 for dwellings; and, to place wires underground in downtown areas. By 1905, it had negotiated exclusive franchises with 36 municipalities in Ontario and Quebec.

Thus, any significant competition to Bell had been meaningfully eliminated by the mid-to late 1890s. The first attempt by the federal government to assume a measure of regulatory control over Bell occurred in 1892 with an amendment to the Bell charter that provided, “existing rates shall not be increased without the consent of the Governor-in-Council.” However, this provision was deem nugatory by the Minister of Justice in 1897 since it was his opinion that the amended clause pertained only to contracts existing prior to the Act’s passage which meant that Bell could raise prices indiscriminately, certainly to new subscribers, but also to existing ones upon changes to equipment rented. Rate increases ensued and Parliament

131 Ibid.
received petitions from 140 municipalities in 1901 and from another 98 in 1902, demanding control over Bell's prices. In response, the company's Act of Incorporation was amended again in 1902 and provided: "The rates for telephone service in any municipality may be increased or diminished by the Governor-in-Council upon the application of the Company or any interested municipality, and thereafter the rates so ordered shall be the rates under this Act until again similarly adjusted by the Governor-in-Council."\[133\]

However, pressure continued to mount from the municipalities for a more effective scheme of regulation of Bell. Toronto tried another approach and attempted to assert control over Bell's placement of poles. The matter went to court in 1901 and was resolved in Bell's favour by the Judicial Committee of the privy Council in 1905. While this case will be reviewed more extensively in Chapter VI, the Privy Council's ruling meant that the company's federal charter superseded municipal and provincial government regulation so that Bell was almost completely freed from local control.

The West reacted with a bias to local or provincial control in the face of Bell's attempts to eliminate real and potential competition. Bell had followed construction of the CPR, "pre-empting in large measure independent lines on the prairies".\[134\] Bell started competing with itself in Winnipeg in 1881 "to ward off real competition"\[135\] and set-up the People's Telephone Company to undercut both its own prices and those of its true rival. When the real competition went under in 1986, the People's Telephone Company also ceased to operate leaving Bell as the only telephone company.\[136\] Bell began telephone service in Brandon and Portage la Prairie in 1882, Regina in 1884 and Calgary in 1887; and, generally, non-Bell telephones on the prairies were few and far between prior to 1892.\[137\]

In 1899 the Manitoba government enacted an amendment to the Municipal Act to permit municipal ownership of local exchanges. Bell refused to connect any of these municipally-owned exchanges to its long distance lines.\[138\] Between 1906 and 1908 several bills were enacted empowering the government to construct long-distance lines and install and

\[133\] Ibid.
\[134\] Ibid., 79.
\[135\] Ibid.
\[136\] Ibid.
\[137\] Ibid.
\[138\] Ibid., 87.
manage local exchanges. Negotiations were instituted with Bell to acquire the latter's provincial facilities. The government started constructing an exchange in Winnipeg in 1907 to pressure Bell to sell. On January 15, 1908, the provincial assets of the Bell Telephone Company were acquired for $3.3 million. At that time Bell had been serving 17,000 of the province's 25,000 subscribers.\textsuperscript{139}

Ottawa choose a different route when dealing with Bell. With the Privy Council ruling establishing federal control over Bell, the federal government was persuaded in 1905 to begin an investigation of the telephone industry. A Select Committee of the House of Commons was created to examine the alternative for regulating the telephone industry.\textsuperscript{140} Most of Bell's opponents argued for some measure of local control or public ownership. Bell tried to focus on the type of regulatory authority that may have resulted from the hearing. Bell was not without influence. The Chief Commissioner of the Board of Railway Commissioners had previously been president of the Bell-controlled New Brunswick Telephone Company. The Leader of the Opposition had been Bell's counsel in the Maritimes. The Chair of the Select Committee was replaced by the lawyer who had been representing Bell in the hearings. Moreover the Prime Minister, Laurier, was not disposed to nationalization. In the end, the Railway Act was amended to bring the federally chartered telephone companies under the Act. Rates were made subject to the approval of the Board of Railway Commissioners. Municipalities could supervise most of the placement of wires and poles. While the Board of Railway Commissioners could order interconnections, this was subject to compensation and constrained to not create "undue or unreasonable injury to or interference with the telephone business of such a company."\textsuperscript{141} Such a regulatory system did not threaten Bell's dominant position.

The Board of Railway Commissioners explicitly stated their distrust of competition. It showed no inclination to adopt the more rigorous standard of regulation as seen in the United States at the time, that is rate base/rate of return regulation. The implicit standard that emerged was based on an incremental revenue and, in effect, the Board adopted what came to

\textsuperscript{139} Ibid., 103.
\textsuperscript{141} \textit{Railway Act}, 1905.
be called the “prudent investment” standard - revenue should cover operating costs, maintenance, provision for depreciation and a just and reasonable return on investment. In fact, far from constraining its corporate goals, Babe suggests that Bell successfully used regulation to achieve its expansion into a corporate empire spanning the globe. Regulation seemed more designed to serve corporate development goals than to be a policing operation.

Baldwin argues that the choice between a regulatory tribunal and public ownership is affected by their relative costs. The regulatory process leaves the organization of production in private hands so that it has an efficiency advantage. However, the regulatory process is long and involved compared to the potential for direct control inherent in public enterprise. It might be argued that public enterprise best meets specific policy objectives. If certain public policy goals are more important, public enterprise may be chosen because it is the superior instrument at that moment. Baldwin goes so far as to state that, “Regulation is a viable alternative to public enterprise only if the state is bound to a fair contract that regulators as agents are bound to negotiate.”

Baldwin suggests that only when some constraints are imposed upon the state can the relative desirability of regulation, as opposed to public enterprise, be considered on the basis of monitoring costs and the ease by which government policy can be implemented. For our purposes, I would suggest that one of these constraints is federalism. Moreover, the federal influence in the telecommunications industry may have been an underlying influence for Manitoba to choose public enterprise in an effort to exert meaningful local control.

As noted above, Manitoba reacted in a different manner to Bell’s attempt to eliminate competition. It amended its Municipal Act to permit municipal ownership of local exchanges. Local companies were created, in competition with Bell and prohibited by Bell from connecting to its long-distance lines. In an effort to resolve this situation, Sir Redmond Roblin announced in 1905 that the government would study the feasibility and desirability of a compete provincial take-over - to give “a telephone system to all classes at cost.”

The premier sought permission from the federal government to expropriate Bell’s provincial

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operations, a request that was rejected a year later. A Commission was set-up headed by Attorney-General Colin Campbell, composed of Members of both sides of the House and including the Leader of the Opposition, to study provincialization. Reporting in February 1906, Campbell’s committee recommended unanimously in favour of government ownership. The Assembly gave the report its unanimous endorsement.

The loss of Bell’s Manitoba assets to the provincial government may be said to be partially the result of Bell’s strategy to avoid local control in central Canada.\textsuperscript{144} Manitoba may have been compelled, therefore, to exert local control only through public ownership of its own telephone company. Moreover, after the 1904 Privy Council ruling that confirmed federal jurisdiction over Bell, the difference may have been the result of western sentiments that a regulatory board based in Ottawa might not be able to appreciate the local concerns on the Prairies.\textsuperscript{145}

The Province sought legal advice as to whether it could expropriate Bell’s Manitoba properties, but was informed by counsel that Bell’s federal charter protected it. The federal government took the same position and the Province was turned down when it approached Ottawa for the power to expropriate.\textsuperscript{146} However, the provincial government was given legal advice that it could impose a discriminatory tax on Bell’s business. The legislation that was introduced in March provided for both a discriminatory tax and for a joint-provincial-municipal system. Although the discriminatory tax was later withdrawn, there was no doubt that the provincial government possessed the power to have its own way.

At first, political support for the province’s policy was not forthcoming. In municipal plebiscites of 1906, many municipalities voted against building locally-owned exchanges to link with provincial long lines. But, a provincial election in 1907 was fought and won with a major campaign of publicly-owned telephones. Much was also made of the possibility of


\textsuperscript{145} In 1989, this argument resulted in the expansion of the CRTC’s regional offices in Halifax and Winnipeg.

providing lower telephone rates both for farmers and users in smaller towns.\textsuperscript{147} Telephones and politics in Manitoba were intermingled.

In 1907, Bell conceded and sold its plant to the provincial government for $3.5 million in 4-per-cent Provincial Bonds, or for about $3 million taking into account the discount then existing on such bonds.\textsuperscript{148} The face value consisted of about $3.2 million depreciated plant value plus 10-per-cent for forced sale. However, Bell’s General Manager best summed up the reasons for the sale:

If we are sure of losing money in Manitoba through competition with Government. I think that with $4,000,000 or whatever price we might receive, in our pockets, we would be better off than conducting ruinous competition without the $4,000,000.\textsuperscript{149}

In the end, the provincially government found itself in a situation where it was advisable to have both public ownership and regulation. Deficits mounted in the provincially-owned telephone company. Mavor has calculated that the deficit on government telephone operations rose from $12,000 in 1908, to $15,593 in 1909, to $16,000 in 1910 and to $220,000 by 1911. The subsidy per subscriber provided by public funds increased from about 85 cents to $7.40 over this period. A Royal Commission was appointed in early 1912 to investigate the Telephone Commission, but not to examine the extent to which the deficits that had arisen were the result of government directives and policy.\textsuperscript{150} On June 14, 1912, the Commission’s report was released and was understated in its criticism:

The system has generally been administered extravagantly and... a very large saving could be made by economic management... [Furthermore] there [has] not been a proper system of accounting and of keeping records in various departments.\textsuperscript{151}


\textsuperscript{150} Ibid., 75.

The Telephone Commissioners resigned and the government, faced with not only an embarrassing situation but also the requirement of a substantial increase in telephone rates, created the Public Utilities Commission (PUC) and delegated to it the responsibility for prices charged by the provincial telephone company. The public telephone system thereafter was run by a single Telephone Commissioner under the supervision of an advisory board (one of whom was the Public Utilities Commissioner).

The new PUC granted rate increases that removed most of the deficit by 1913 and reduced the subsidy per subscriber to about $1.15. Under the PUC, accounting systems were adopted that more closely reflected costs. Regulation became an instrument used by government to control itself in implementing the public policy goals of the provincially-owned telephone system. While the government never forgot entirely the major reason for acquiring the system - the provisioning of rural service - such expansion was slowed down to become more in keeping with the resources of the publicly-owned telephone system.

Consequently, the provincial public policy setting in which the provincially-owned telephone system and its provincial regulator initially found themselves was not antagonistic. The forces that caused the Crown corporation and the PUC into being required them to fulfill similar provincial policy mandates. Accordingly, the combination of Crown corporations and regulatory agencies as instruments to pursue policy objectives needs to be looked at within the context of federalism.

Federalism has imposed its reflection upon the telecommunications regulatory environment. While the constitutional jurisdiction of telecommunications will be discussed in Chapter VI, federalism, in dividing such jurisdiction, sanctioned the independence of the provinces and the federal government to pursue independent and different priorities. However, at the same time the “national” pressures imposed upon them by their interdependence had to be taken into account. Because the telecommunications jurisdiction

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153 Approval of the Public Utilities Board (PUB) became an important mechanism in allowing public scrutiny to modify the provincial government's ambitions. 'Service for the Future', the provision of individual line service to all Manitobans, was announced in 1988 by the government, but was not completed until 1996, as approved by the PUB, in order to better manage the costs incurred by MTS.
was blurred, political trade-offs could be made in the areas to be regulated and in the enforcement of the regulation. Schultz discusses the growing interdependencies that federalism imposed on the telecommunications regulatory process. Regulatory conflicts appeared not only because of constitutional concerns but also because of overlapping regulatory responsibilities, the actual decisions of the appointed regulatory authorities (that is, the CRTC and the provincial public utilities boards) and the procedures of the CRTC before which the provincial governments were increasingly forced to appear.

Sleeping dogs were let lie in the area of constitutional jurisdiction for almost 100 years, but increasing conflict in the regulatory process became manifest in the 1980s. "The problem of the federal government regulating "federal" carriers who were, in some instances, in direct competition with provincially regulated or, even more significantly, provincially owned, carriers as in the three Prairie provinces."\(^{155}\) In a study in communications the problem of regulatory "spillovers" was identified in 1971 by the federal government which stated that:

... since the operating areas of telecommunications undertakings do not always coincide with political or regulatory divisions, there is a danger that the new system might be authorized by one regulatory authority, which by taking traffic from the public network of another undertaking, could increase the price paid for other services by the general public.\(^{156}\)

What appeared to be happening, particularly after the creation of the CRTC in 1976, was an increasing tendency for such an independent regulatory body to develop policy as opposed to implementing the policies enunciated by politically accountable authorities.\(^{157}\) This practice of a regulatory authority augmenting its power by developing policy in its role of being a public policy instrument lead to increasing intergovernmental disputes.

One of the factors that lay behind the need to advance public policy at a national level was the rapidly changing technology. The introduction of microwave and satellite technology called into question the natural monopoly of terrestrial telephone networks. Microprocessing


technology is enhancing the capacity of smaller switching machines so that they can accomplish switching operations that formerly required large and expensive pieces of capital equipment. At the same time, the gradual replacement of conventional copper wire pair is, by itself, enhancing economies of scale in the local loop. Thus, the technological change process itself markedly shifted the prevailing theories of natural monopoly by modifying economies of scale so that earlier uneconomic entry by competitors not only became economic but also had the potential to ensure a technologically progressive Canadian telecommunications industry.

Consequently, the technological and economic forces which once pointed to natural monopoly in telecommunication services, and hence government regulation, have moved in the opposite direction. They now make it possible to support a competitive market. The high rate of technological change also is pushing the convergence of telephone, cable and computer industries which creates even more competition. Government enthusiasm for competition has made it the objective or "holy grail" of public policy. However, the furtherance of competition as a public policy can be inconsistent with certain other social policy objectives.

When competition is introduced into a long-established regulatory regime, the regulators have a systematic tendency either to suppress it or to orchestrate it and control the result it produces. Regulators tend to focus on and complicity attempt to protect competitors rather than focusing on competition as a social process designed to produce a certain set of outcomes designed to benefit consumers. There is a tendency to protect authorized entrants and fledgling competitors.  

While it is often said that regulation is an attempt to obtain many of the performance results that would occur if competition is feasible, it may be more the case that regulation constrains competition to achieve a variety of public policy objectives. In telecommunications regulation the public policy objective of cross-subsidization (using long-distance revenues to support universal affordable local service) conflicts with the result that would prevail under competition (lower long-distance costs to the consumer). Therefore, regulators need to constrain competition in various ways to ensure the viability of certain public policy

158 Fibre optics cable can transmit 10,000 times more information than conventional wire pair. 
objectives. These conflicting public policy objectives may be just as detrimental to the viability of a provincial Crown corporation as a public policy instruments as any conflicting federal-provincial jurisdictional dispute.

The Evolution of the Federal Telecommunications Regulator

Regulation, also hitherto Canada’s primary policy instrument (together with public ownership), is likely to be of secondary importance in the future.\textsuperscript{160}

These conflicting public policy objectives became readily apparent as the Canadian Radio-television and Telecommunications Commission (CRTC) tried to fulfill its role as the federal government’s prime policy instrument in telecommunications. It turned itself inside-out to accommodate a turnaround of telecommunications public policy such that its original regulatory purpose has been obliterated.

The CRTC has become the leading advocate of “regulated competition” in telecommunications. In an address by Francoise Bertrand, Chairperson of the CRTC, she said:

Our intention was to set-up an infrastructure needed to foster technological innovation in order to offer consumers a broader choice of services and access to technologies, at reasonable prices. By relying more on market forces, we want to stimulate research and development and provide industry with the means to respond to the social and economic needs of all Canadians.\textsuperscript{161}

David Colville, Vice-Chairman of the CRTC added:

The intention here is to provide for less micro-regulation by the Commission.\textsuperscript{162}

And accordingly, the CRTC’s new Mission statement reads: “To ensure that Canadian communications contribute fairly and equitably to Canada’s economic, social and cultural prosperity through regulation, supervision and public dialogue” and its new Vision is “World-

\textsuperscript{160} Schultz, Richard J. and Mark R. Brawley, “Telecommunications Policy” in Border Crossings The Internationalization of Canadian Public Policy (Toronto: Oxford University Press, 1996), 82.


\textsuperscript{162} Address before the House of Commons Standing Committee on Industry by David Colville, Vice-Chairman Telecommunications, Canadian Radio-television and Telecommunications Commission. Ottawa: December 4, 1997.
class quality communications, with a distinct Canadian presence, in the public interest”. Moreover, in September 1998 the CRTC was awarded an international prize for its “innovation and responsibility in the information society”. Specifically, the CRTC was recognized worldwide for its expertise in dissolving the classical boundaries between telecommunications and broadcasting, thus giving a convincing answer to the challenges posed by technical development. Such praise is balanced against criticism from the old line telephone companies:

A rigorously competitive marketplace suggests that any regulation is counter-intuitive. Why not take those oversight responsibilities and place them where they properly belong within the jurisdiction of the Director of Competition Policy and Research…  

However, the CRTC shows no signs of responding to such criticism by lessening its regulatory mandate and continues its public policy objective of “regulated competition”.

The Commission is the successor to the Canadian Transport Commission (CTC), which was established in 1967. While the CRTC is the successor to the CTC, the CTC was itself the successor to the Board of Transport Commissioners, formerly called the Board of Railway Commissioners (BRC) for Canada. The BRC was established in 1903 and first assumed jurisdiction over telephone rates for Bell in 1908. Under the CTC and its predecessors, the regulation of telecommunications was carried out within the regulatory framework created for the regulation of transportation undertakings. The CTC was responsible for the regulation of all carriers within federal legislative jurisdiction which were engaged in transport by railway, air, water, commodity pipeline or motor vehicle. Its governing statute, the National Transportation Act, 1967, made no express reference to telecommunications. Telecommunications regulation was incidental to the agency’s regulatory responsibilities under the Railway Act which at that time contained the principle statutory provisions relating to telecommunications.  

When the CRTC was established by the Canadian Radio-television and Telecommunications Act, the decision to separate the regulation of telecommunications from

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164 The Railway Act, S.C. 1903, c. 58.
the regulation of transportation and transfer responsibility to an agency that would also
exercise jurisdiction in relation to broadcasting reflected what the Commission described at
the time as, "a widening perception of how our communications systems related to each
other."166 The Commission expressed the view that:

Bringing these diverse sectors of the federally regulated communications industry
under the jurisdiction of a single agency permits an integrated approach to regulatory
decision-making which can take full account of the problems and concerns of each part
of the industry.167

Although the CRTC has a combined jurisdiction in relation to telecommunications and
broadcasting, at the ministerial level the Minister of Canadian Heritage has responsibility for
the carrying out of duties under the Broadcasting Act168 and it is to the Minister of Canadian
Heritage that the CRTC submits its annual report. It is the Minister of Industry, however,
who has jurisdiction in respect of telecommunications and the development and utilization
generally of communications undertakings, facilities systems and services and it is the Minister
of Industry who carries out the ministerial duties under the Telecommunications Act. Where,
as increasingly is the case, telecommunications and broadcasting issues converge the CRTC
may have a dual reporting function.169

In carrying out its role as a public policy instrument, the CRTC is an unusually
powerful regulator. The Commission is invested with a broad array of legislative,
administrative, quasi-judicial, investigative and consultative functions. Even more unusual,
the CRTC possesses the authority to enforce its own decisions.170 In discharging its functions
the Commission enjoys a large degree of autonomy. Under the CRTC Act, it is master of its
own procedure; its own staff (section 8); its members are appointed for fixed terms (section
3(2)); their remuneration is guaranteed by statute (sections 7(1) and 9(1)) and their removal
from office may be obtained only for cause (section 3(2)). Members of the CRTC are

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165 A separate telecommunications committee was established by the CTC on February 2, 1972. Prior to that
date, the agency's powers in relation to telecommunications were exercised by its railway transport committee.
166 Ryan, Michael H. Canadian Telecommunications Law and Regulation. (Toronto: Carswell, 1993 (biennial
update to 1998-2)), 5-2.
168 S.C. 1991, c. 11.
169 The Order-in-Council asking the CRTC to prepare a report on the "information highway" was a
recommendation of both ministers.
appointed by Governor-in-Council. No person is eligible to be appointed or reappointed or to continue as a member of the Commission if the person is not a Canadian citizen ordinarily resident in Canada or if, directly or indirectly, as owner, shareholder, director, officer, partner or otherwise the person is engaged in a telecommunications undertaking or has a pecuniary or proprietary interest in a telecommunications undertaking or the manufacture or distribution of telecommunications apparatus, except where the distribution is incidental to the merchandising of goods by wholesale or retail (section 5(1)).

The jurisdiction and general powers of the CRTC stem from the *Telecommunications Act* and section 47(a) specifies that the Commission shall exercise its powers with a view, inter alia, “to implementing the Canadian telecommunications policy objectives”. In addition to the specific powers conferred upon the CRTC in relation to rates, interconnection and related matters, the Commission is given certain general powers:

to make declaratory orders,

to issue mandatory and restraining orders,

to make a monetary award where the award is designed to remedy a situation of unjustness or unreasonableness in rates or to alleviate unjust discrimination,

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to compel the production of information that the Commission considers necessary for the administration of the *Telecommunication Act* which may be directed not only to Canadian carriers, but to persons other than Canadian carriers in cases where the Commission believes that person has such information,

to require any telecommunications facilities to be provided constructed, installed, altered, moved, operated, used, repaired or maintained or any property to be acquired or any system or method to be adopted as it determines to be “just and expedient”\textsuperscript{172},

to appoint any qualified person as an inspector to verify compliance,

\textsuperscript{171} In the *Bell Rebate* case, the Supreme Court of Canada upheld the Commission’s jurisdiction to make what it described as a “remedial order” directing Bell to rebate to its subscribers, in the form of a one time credit on their monthly bills, an amount which the Commission determined was in excess of what had been necessary to generate a fair return to the carrier during an earlier period.

\textsuperscript{172} In Decision 92-12, *Public Long Distance Telephone Service Competition*, the Commission ordered the telephone companies to modify their switches and to implement other changes to their networks, systems and procedures necessary to provide competing carriers with interconnection. The Commission’s jurisdiction of the order was subsequently affirmed by the Federal Court of Appeal.
to appoint inquiry officers to inquire into and report to the Commission on any matter within the Commission's jurisdiction\textsuperscript{173}; and,

to issue guidelines and statements.

In the discharge of its duties the Commission inevitably reviews management decisions. This is a responsibility to which the Commission has adopted a somewhat different attitude than its predecessors. The decisions of the Board of Railway Commissioners, Board of Transport Commissioners and the Canadian Transport Commission often exhibited a degree of deference to management decisions which is characteristically not found in decisions of the CRTC.\textsuperscript{174}

Two examples follow of the Commission's use of its powers. In what is believed to be the first case of its kind under the \textit{Telecommunications Act} or its predecessors, Unitel applied to the Commission in 1994 for consent to prosecute MT&T in respect of a contract between MT&T and the Province of Nova Scotia for telecommunications services pursuant to which MT&T had allegedly agreed to provide a rebate on rates for certain tariffed services and to bundle terminal equipment and network services contrary to conditions imposed in an earlier Commission decision. The Commission gave Unitel consent to commence a private prosecution. The Commission also used other measures short of prosecution to deal with the violation of the Act.\textsuperscript{175} It required MT&T to prepare a report detailing the company's internal procedures for identifying and preventing instances of non-compliance with regulatory requirements and identifying the officer responsible for ensuring compliance and to provide a sworn affidavit from the officer affirming that those procedures had been implemented and that relevant personnel had been informed of them. It also prohibited MT&T from providing service under the contract with the Province. If MT&T decided to proceed with any of the initiatives under the contract the Commission stipulated that it must file a description of the new arrangements and not implement them until the Commission confirmed that they had complied with regulatory requirements.

In a case where Unitel had acknowledged, in response to a complaint by BC TEL, that it had failed to report accurately the number of cross-border circuits subject to contribution

\textsuperscript{173} The Commission has made frequent use of this power.

\textsuperscript{174} The Federal Court of Appeal in \textit{Challenge Communications Ltd.} explicitly endorsed this approach.
charges, the Commission ordered the conduct of independent technical and financial audits "to restore the integrity of Unitel's contribution reporting practices". 176

Public policies, which had served Canada well, also were transformed by the same technological and economic forces that have forced enormous changes in Canada's telecommunication's system. The changing technology brought about a change in the public policy objectives of the federal government. In particular, the importance of telecommunications today to economic development, international competitiveness and social well-being makes it a significant lever for national policy-makers. As economists such as Stanbury, point out, "Technological and economic forces which once pointed to natural monopoly in telecommunications have shifted a long way in the opposite direction". 177

Regulation reflected these changing public policies by a revised regulatory structure. The rapid onslaught of new technology forced changes within the traditional scheme of federal regulation. While the jurisdictional disputes will be discussed in Chapter VI, when the courts held that the previously divided jurisdiction for telecommunications was fully in the federal arena the path was clear for the CRTC to implement its public policy direction as defined by the federal government. When it was established, the CRTC's commitment was:

... to preserve and enhance communications systems in Canada in the interests of the Canadian public ... the CRTC will foster an environment characterized by a wide diversity and availability of Canadian services and facilities offered by adequately resourced entities. 178

In Canada, as in the United States, public policy rested on five principles:

(1) monopoly provision;
(2) public regulation;
(3) end-to-end service, from transmission to reception;
(4) universal service; and
(5) affordability. 179

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175 Section 73(3) of the Telecommunications Act makes it an offence punishable on summary conviction to contravene a decision of the Commission, or fail to do anything required, or to do anything prohibited by a decision of the Commission.


These principles were built upon a regulatory approach in which consumers tolerated a telecommunications monopoly in exchange for stringent regulations on pricing and services. With these guiding principles, telecommunication companies, governments and regulatory authorities built a universal telephone service in Canada, often said to be the best in the world. It serves 98 per cent of the population and has relatively inexpensive local service.

In 1986, the federal government introduced its Regulatory Reform Strategy aimed at 'smarter' regulation with "greater efficiency, greater accountability, and greater sensitivity". It specifically targeted regulatory reform and the development of a telecommunications policy which recognized new technologies and encouraged more competition and the provision of new services. It resulted in the new Telecommunications Act, which was proclaimed in force as of October 25, 1993. Section 7 outlines the Canadian telecommunications policy objectives:

(a) to facilitate the orderly development throughout Canada of a telecommunications system that serves to safeguard, enrich and strengthen the social and economic fabric of Canada and its regions;
(b) to render reliable and affordable telecommunications services of high quality accessible to Canadians in both urban and rural areas in all regions of Canada;
(c) to enhance the efficiency and competitiveness, at the national and international levels, of Canadian telecommunications;
(d) to promote ownership and control of Canadian carriers by Canadians;
(e) to promote the use of Canadian transmission facilities for telecommunications within Canada and between Canada and points outside Canada;
(f) to foster increased reliance on market forces for the provision of telecommunications services and ensure that regulation, where required, is efficient and effective;
(g) to stimulate research and development in Canadian the field of telecommunications and to encourage innovation in the provision of telecommunications services;
(h) to respond to the economic and social requirements of users of telecommunications services; and,
(i) to contribute to the protection of the privacy of persons.

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180 Canada, Office of Privatization and Regulatory Affairs, Regulatory Reform: Making It Work (Ottawa: Communications Division, Office of Privatization and Regulatory Affairs, 1988) at 1.
In 1995, David Colville, Vice-Chairman, Telecommunications, CRTC, spoke with the Standing Senate Committee on Transport and Communications in connection with an inquiry concerning policy measures related to ensuring that Canadian telecommunications companies remain competitively internationally. He said:

... A key factor underlying the Commission’s 1992 decision to introduce competition in the long distance market was the need to reduce long distance rates to ensure international competitiveness ... Having opened the long distance market to competition, the Commission then initiated a number of major public processes to change the regulatory framework governing the former monopoly telephone companies... Last fall [1994], the Commission released its Review of Regulatory Framework decision in which it set out the regulatory principles which will apply in the competitive environment... In closing, I note that Canada has one of the most open telecommunications regimes in the world. Moreover, our telecommunications markets were open to competitive entry before those of our major competitor countries... The transition from a closely regulated monopoly environment to a competitive one is not easy...  182

The CRTC developed a new ‘Vision’ in response to the changing telecommunications landscape and now states its mission as “To ensure that Canadian communications contribute fairly and equitably to Canada’s economic, social and cultural prosperity through regulation, supervision and public dialogue”183. It’s Vision Thrusts, as opposed to its prior objectives, outlined above are:

- promote an environment in which existing and new communications services are available to Canadians;
- ensure a strong Canadian presence in content that fosters creative talent and reflects Canadian society, including linguistic duality and cultural diversity;
- promote choice and diversity of high quality communications services; and,
- foster strong, competitive and socially-responsive communications industries184

Consequently, the original public policy objectives of promoting universal affordable service have been altered significantly to promote competition. Moreover, the CRTC’s new approach to implement its Vision is to move: from protection to promotion; from constraint to

182 Canada, Canadian Radio-television and Telecommunications Commission, Address to the Standing Senate Committee on Transport and Communications by David Colville (Ottawa: December 5, 1995) [Internet, www.crtc.gc.ca]
183 Canada, Canadian Radio-television and Telecommunications Commission, From Vision to Results at the CRTC [Internet, www.crtc.gc.ca]
competition; from detailed regulation to broad parameters; and, from judicial process to a more collaborative process.\textsuperscript{185}

Regulated competition is an oxymoron. However, the CRTC appears to see regulation “not as a traditional device but as fundamentally co-existing with competition”.\textsuperscript{186} Guarding against the possibility that telephone prices would be too high in the absence of telecommunications rivals was the major reason for inaugurating regulation. In the early period of telecommunications regulation, it was the obligation of the government, both federal and provincial, to ensure that telephone rates were just, reasonable and non-discriminatory. The pricing system applied to the telecommunications industry was fostered by a monopoly environment which required that a telephone company’s total costs of services were covered in the aggregate. Rates for individual services were not necessarily set to cover the costs of each service, but were generally averaged over all the services. The two basic principles adopted in rate-making were company-wide averaging and value-of-service pricing. Company-wide rate averaging means that rates for services with the same features are the same or non-discriminatory for all customers. The value-of-service principle recognizes that telephone services are more valuable to some classes of customers than to others. This principle accounts for the differences in rates between residential and local service. Such a rate structure allowed for the development of a universal affordable telecommunications service in Canada. Prior to the CRTC’s introduction of competition, the federal government noted, that to the extent that specific public policy objectives are effected through the rate structure, there is a need to carefully balance these goals against potentially competing objectives such as the development of a highly dynamic and efficient telecommunications industry.\textsuperscript{187} In 1979, the CRTC peeked through the door of competition to expand the limited competition in private line services to include interconnected private line services; and, in 1982 competition in terminal services was included followed in the late 1980s by enhanced and resale services. In 1992, the door to competition was opened by allowing long distance

\textsuperscript{184} Ibid.

\textsuperscript{185} Ibid.

competition. Then, in the historic review of Regulatory Framework, Decision 94-19, the CRTC set out its new regulatory policy. It would split the regulated telephone companies’ rate base into utility and competitive services to focus regulation on the monopoly utility service and to significantly reduce competition on the competitive side (primarily long-distance services). It implemented a program of rate rebalancing designed to reduce the subsidy from long distance to local service to avoid uneconomic entry by new telecommunications companies and bypass for long distance service. Price cap regulation for utility services (primarily, local services) was introduced on January 1, 1998 to replace earnings regulation with price regulation and to provide greater incentives for the regulated telephone companies to be more efficient and innovative. Finally, all markets were opened to competition: local markets on January 1, 1998 and international telecommunications markets on January 1, 1999. The Commission also has forborne from regulating rates for almost all other services such as terminal devices, cellular and other wireless services and long-distance.

Consequently, since all Canadian telecommunications markets are competitive, many question the need for a regulator. However, the Commission still sees many regulatory issues which must be addressed by an expert body such as itself even though the Commission views the policy section (section 7) of the Telecommunications Act as pro-competition policy.\textsuperscript{188} The Commission believes that competition in telecommunications will ultimately best service the interests of service providers and users and this broad policy now guides the Commission so that it has,

moved away from a fairly formulaic approach to regulation as competition has grown... We now spend more time making decisions on deficiency and confidentiality requests... We are conscious of the fact that the regulatory system is open to abuse by competitors who may use it to try to get access to important sensitive market information or to slow a regulated competitors ability to offer a new services.\textsuperscript{189}

\textsuperscript{188} Address at Insight Conference on The Changing Role of the CRTC by David Colville, Vice-Chairman Telecommunications, Canadian Radio-television and Telecommunications Commission. Toronto: January 1996.
\textsuperscript{189} Ibid.
The process of regulatory change in Canada was unlike that in the United States where competition emerged as the result of a court decisions; nor did it result from explicit government policy to liberalize the industry as was the case in the United Kingdom. The initial decision to liberalize long-distance markets was consistent with an emerging policy trend. However, the CRTC’s decision in 1992 to permit virtually unlimited competition in public voice telecommunications services caught all participants and observers by surprise.\textsuperscript{190} While it may be argued that the federal government set forth its policy objectives in the *Telecommunications Act*, at no point did the government specifically mandate the CRTC to liberalize telecommunications services. The market in Canada was liberalized by its regulator following an extensive public hearing process that culminated in over a decade of incremental change. As Schultz states, “It is ironic, of course, to suggest that government is a powerful player in the regulatory regime because to date it has largely been irrelevant and at best a supporting actor in the architectural configuration of the telecommunications regime”.\textsuperscript{191}


\textsuperscript{191} Ibid., 26.
CHAPTER VI
JURISDICTION

The problem was that the telephone was not invented when the Constitution Act, 1867, was being written. As a result, jurisdiction over telecommunications was not assigned to either the federal parliament or the provincial legislatures. Moreover, just as technological forces brought forth change in the telecommunications industry, these same technological and economic forces brought forth a change in the constitutional jurisdiction of telecommunications which facilitated the public policy and regulatory changes that were to follow. This chapter will examine the history of the jurisdictional conflicts in telecommunications as well as some aspects of the resulting regulatory conflicts ending with the introduction of the Telecommunications Act.

Divided Jurisdiction: Constitution Act, 1867

Although the Constitution does not assign jurisdiction over telecommunications to either the federal parliament or the provincial legislatures, the Constitution Act, 1867, has a general scheme for the division of legislative authority in relation to communications as part of works and undertakings. Telecommunications' works and undertakings that are local in character are subject to provincial legislative jurisdiction, while those that are interprovincial or international in character are subject to the legislative jurisdiction of the federal parliament. Section 92(10), part of the list of provincial powers, confers the power for the provinces to make laws in relation to:

Local Works and Undertakings other than such as are of the following classes:
(a) Lines of Steam or other Ships, Railways, Canals, Telegraphs, and other Works and Undertakings connecting the Province with any other or others of the Provinces, or extending beyond the limits of the Province;
(b) Lines of Steam Ships between the Province and any British or Foreign Country;
(c) Such Works as, although wholly situate within the Province, are before or after their Execution declared by the Parliament of Canada to be for the general Advantage of Canada or for the advantage of Two or more of the Provinces.

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Thus, the *Constitution Act, 1867*, is reflective of its time when it cites particular examples of communication as being "Lines of ... Telegraphs". The essence of section 92(10) divides legislative authority over transportation and communication on a territorial basis so that when we examine section 92(10) in further detail, section 92(10)(a) is confined to works and undertakings involved in transportation or communication. The specific examples or references must be read in the context of the later references or * ejusdem generis*. The general phrase "other works or undertakings connecting the Province with any other" such that where general words follow an enumeration of persons or things, by words of a particular and specific meaning, such general words are not to be construed to their widest extent, but are to be held as applying only to persons or things of the same general class as those specifically mentioned.

Section 92(10)(c) is somewhat of an exception and enables the federal Parliament to assume jurisdiction over a purely local work by the unilateral device of declaring the work to be "for the general advantage of Canada or for the advantage of two or more provinces". Such declaratory power is general and available to any "local works", not only communication.\(^{192}\) Moreover, Section 92(10) is to be read with section 91, which declares that Parliament has authority to make laws "for Peace, Order and good Government of Canada, in relation to Matters not coming within the Class of Subjects... assigned exclusively to the Legislatures of the Provinces". Section 91 goes on to state that, notwithstanding any other provision of that Act, the exclusive authority of Parliament

extends to all Matters coming within the Class of Subjects herein-after enumerated; that is to say, -

29. Such Classes of Subjects as are expressly excepted in the enumeration of the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces.

The combined effect of these provisions, the Privy Council has said, is to read the matters excepted from section 92(10) into the "preferential place enjoyed by the enumerated subjects

of section 91.  Although section 92(10)(a) makes reference only to telegraphy among the various forms of modern telecommunication, by judicial construction the word “telegraph” is to be read as embracing “telephones” as well as all forms of wireless radio communication with the result that these sections have been said to establish the division of federal provincial legislative jurisdiction in relation to telecommunications generally.

The courts have interpreted the Constitution Act, 1867 so that their decisions now act as precedents for later cases. Consequently, a body of “judge-made” or case law has developed in those areas where there has been litigation and such interpretations have formed an important elaboration of the original text. In telecommunications, in particular, the provisions of the Constitution Act, 1867 that distribute power between the federal parliament and the provincial legislatures is overlaid by case law so that one can no longer interpret the rules by the Constitution alone.

Toronto v. Bell Telephone Co.

The initial interpretation of the Act respecting jurisdiction over telecommunication fell to the Privy Council in Toronto v. Bell Telephone Co. The question to be resolved was, in essence, did Bell, a company incorporated by an Act of Parliament with power to extend its communication facilities across Canada, require the consent of the City of Toronto, a municipal corporation and a creature of the Province, to establish its lines along city streets. Lord MacNaghten, after summarizing the facts said:

The British North America Act, 1867, in the distribution of legislative powers between the Dominion Parliament and provincial legislatures, expressly excepts from the class of “local works and undertakings” assigned to provincial legislatures “lines of steam or other ships, railways, canals, telegraphs, and other works and undertakings connecting the province with any other or others of the provinces or extending beyond the limits of the province”: Section 92, sub-section 10(a). Section 91 confers on the Parliament of Canada exclusive legislative authority over all classes of subjects so expressly excepted. It can hardly be disputed that a telephone company the objects of which as defined by

its Act of incorporation contemplate extension beyond the limits of one province is just as much within the express exception as a telegraph company with like powers of extension. It would seem to follow that the Bell Telephone Company acquired from the Legislature of Canada all that was necessary to enable it to carry on its business in every province of the Dominion, and that no provincial legislature was or is competent to interfere with its operations, as authorized by the Parliament of Canada.\textsuperscript{197}

His Lordship went on to find that the fact of the company having as yet made no physical interprovincial connections in its system did not alter the fact that its act of incorporation authorized such undertaking. Quoting from the judgment of Moss C.J.O.,

\ldots the question of the legislative jurisdiction must be judged of by the terms of its enactment (i.e. Bell's Act), and not what may or may not be thereafter done under it. The failure or neglect to put into effect all the powers given by the legislative authority affords no ground for questioning the original jurisdiction.\textsuperscript{198}

Still, a further issue resolved by the Board concerned the proposition that the business of the Company could be divided into two distinct parts, a long distance business falling under federal jurisdiction, and a local business falling under provincial jurisdiction. To this proposition, his Lordship replied:

The undertaking, authorized by the Act of 1880 was one single undertaking, though for certain purposes its business may be regarded as falling under different branches or heads. The undertaking of the Bell Telephone Company was no more than a collection of separate and distinct businesses than the undertaking of a telegraph company which has a long-distance line combined with local business, or the undertaking of a railway company which may have a large suburban traffic and miles of railway communicating with distant places.\textsuperscript{199}

Thus, in the first of what may be called the telecommunication cases, we have:

(a) a company authorized by the Parliament of Canada to carry on an interprovincial undertaking,

(b) of a type by analogy similar to a telegraph, as,
(c) contemplated in section 92(10)(a), that is "connecting the province with any other or others of the provinces or extending beyond the limits of the province"; and,
(d) indivisible into parts so as to divide jurisdiction and potentially frustrate the total undertaking.

In regard to the last point, their Lordships did not embark on an inquiry as to which aspect of the company's undertakings was dominant: the local or the long-distance. As noted above, at the time of the litigation the company had not actually established any connections outside Ontario, and so the interprovincial connection, far from being the dominant feature of the business, was no more than a paper connection. But their Lordships held that the mere fact that the company's objects "contemplate extension beyond the limits of one province" sufficed to stamp the entire undertaking with an interprovincial character.

Whether the interprovincial and local aspects of a business constitute one undertaking or two is a question of fact to be determined with reference to how the business is actually carried on. In making that determination, the corporate form an undertaking assumes is irrelevant. The Bell Telephone case established an important rule that a communication undertaking is subject to the regulation of only one level of government. Once an undertaking is classified as interprovincial, all of its services, intraprovincial as well as interprovincial, are subject to federal jurisdiction.

Bell Telephone shows that an interprovincial connection need not be the major part of the undertaking's activity in order to bring the undertaking within section 92(10)(a). It is not required that the federal component of the undertaking be the predominant part before federal jurisdiction will attach; all that is required is that the undertaking be engaged in "continuous and regular" interprovincial activity. So long as the interprovincial services are a "continuous and regular" part of the undertaking's operations, the undertaking will be classified as interprovincial. Thus, the jurisdictional dispute in Canada was settled much differently from that which evolved in the United States. In the United States interstate rates are controlled by the Federal Communications Commission (FCC) and intrastate and local rates by the states.

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200 Ibid.
By virtue of the *Bell Telephone* decision, Bell has always been federally regulated. In British Columbia, the British Columbia Telephone Company was brought under federal jurisdiction in 1916 by a declaration under section 92(10)(c) that it was a work for the general advantage of Canada.\(^{202}\) Since that time, BC TEL (now BCTel.Telus) has been federally regulated. In addition, CNCP Telecommunications (now AT&T Canada), Northwestel, Telesat and Teleglobe were among those companies whose facilities were considered interprovincial or international in nature and, thus, federally regulated. However, outside of Ontario, Quebec and British Columbia, each province had a separate telephone company whose operations did not extend beyond the boundaries of the province. Until the *AGT* case, it was assumed that the three prairie companies and the four Atlantic companies were local undertakings within provincial jurisdiction under section 92(10). All of these seven companies were, in fact, regulated provincially.

**Regulation and Control of Radio Communication in Canada**

The common thread running through arguments for provincial regulatory jurisdiction was the idea that physical facilities ("works") and enterprises ("undertakings") are locally situated and their operations and impact are primarily of a local nature. Earlier jurisprudence suggested that some functional integration between a local work and federal work might be required before the federal jurisdiction would attach to the former.\(^{203}\) This distinction between "works" and "undertakings" was premised on the *Constitution Act, 1867*. In *Regulation and Control of Radio Communication in Canada*\(^{204}\), the "Radio Reference" case, the Privy Council noted that, while works are "physical things", an undertaking "is not a physical thing but an arrangement under which... physical things are used"\(^{205}\). "Undertaking" in this sense has been equated with "organization or enterprise".

In 1927, Canada along with some eight other countries, entered into the International Radio Telegraph Convention to ensure the orderly use and development of this new mode of

\(^{202}\) S.C. 1916, c.66.


\(^{205}\) Ibid.
communication. Still a further treaty followed in 1929, as did the Radio-Telegraph Act. The question before the Privy Council was, simply, had the Parliament of Canada exclusive power to control and regulate radio communication. Lord Sankey answered in the affirmative and observed how difficult the task of determining such questions was:

Great care must therefore be taken to consider each decision in the light of the circumstances of the case in view of which it was pronounced, especially in the interpretation of an Act such as the British North America Act, which was a great constitutional character, and not to allow general phrases to obscure the underlying object of the Act, which was to establish a system of government upon essentially federal principles. Useful as decided cases are, it is always advisable to get back to the words of the Act itself and to remember the object with which it was passed... But while the Courts should be jealous in upholding the charter of the Provinces as enacted in section 92 it must no less be borne in mind that the real object of the Act was to give the central Government those high functions and almost sovereign powers by which uniformity of legislation might be secured on all questions which were of common concern to all the Provinces as members of the constituent whole... But great caution must be observed in distinguishing between that which is local and provincial, and therefore, within jurisdiction of the provincial legislatures, and that which has ceased to be merely local or provincial, and has become a matter of national concern in such sense as to bring it within the jurisdiction of the Parliament of Canada... There may also be cases where the Dominion is entitled to speak for the whole, and this is not because of any judicial interpretation of section 91 and 92, but by reason of the plain terms of section 132, where Canada, as a whole, having undertaken an obligation, is given the power necessary and proper for performing that obligation.

Thus, exclusive federal control was extended into an area totally beyond the contemplation of the Constitution Act, 1867, and rested on a broad interpretation of the living nature of a constitutional statute and the responsibility of the central government in matters affecting Canada, as a whole.

Radio was information, entertainment and communication; its potential influence extended by technology. Judgment for the Committee was delivered by Viscount Dunedin, holding that only Canada as a Dominion could on behalf of its citizens enter into such a convention and having done so said:

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206 R.S.C. 1927, c. 195
It is Canada as a whole which is amenable to the other powers for the proper carrying out of the convention and to prevent individuals in Canada infringing the stipulations of the convention it is necessary that the Dominion should pass legislation which should apply to all the dwellers in Canada. 208

His Lordship further held that the scope of the matters considered by the radio convention was so broad as to leave nothing upon which the provinces might legislate. Then, dealing with the argument of the provinces that the substance of radio broadcasting could be divided into two parts: transmitting (under federal jurisdiction) and receiving (under provincial jurisdiction); the provinces having conceded from the outset that certain subjects dealt with by the convention were matters falling within the enumerated heads of section 91, Viscount Dunedin said:

The argument for the Provinces really depends on a complete difference being established between the operations of the transmitting and the receiving instruments. The Province admits that an improper use of the transmitting instrument could by invasion of a wave-length not assigned by international agreement to Canada bring into effect a breach of a clause of the convention. But it says this view does not apply to the operation of a receiving instrument. Now it is true that a dislocation of a receiving instrument could be so manipulated as to make its area of disturbance much larger than what is usually thought of.

The argument of the Province really depends on making, as already said, a sharp distinction between the transmitting and receiving instrument. In their Lordship’s opinion this cannot be done. Once it is conceded, as it must be, keeping in view the duties under the convention, that the transmitting instrument must be so to speak under the control of the Dominion, it follows in their Lordships’ opinion that the receiving instrument must share its fate. Broadcasting as a system cannot exist without both a transmitter and a receiver. The receiver is indeed useless without a transmitter and can be reduced to a nonentity if the transmitter closes. The system cannot be divided into two parts, each independent of the other. 209

The decision of the Privy Council in the Radio Reference case established that the jurisdiction of Parliament over radio communications is complete. The decision stands as good authority for the proposition that Parliament has exclusive jurisdiction in the field of international and interprovincial radio communication by virtue of section 92(10)(a). 210

208 Ibid., 326.
209 Ibid., 327.
Capital Cities Communications Inc. v. Canada and Dionne v. Quebec

Federal jurisdiction over broadcasting services has been consistently sustained in the courts from the 1932 Reference in Re Regulation and Control of Radio Communications through to the 1977 Capital Cities211 and Dionne212 decisions. In Capital Cities Communications Inc. v. Canada, the majority of the Supreme Court of Canada, invoking the distinction between works and undertakings held that a cable television company whose facilities were located entirely within the province of Quebec was subject to federal legislative jurisdiction. That decision and the decision in a companion case, Dionne v. Quebec, released at the same time were influential in shaping the reasoning that led to the decision in the AGT and Guevremont cases and merit some examination here.

Capital Cities arose out of a challenge to the CRTC’s jurisdiction to authorize Rogers Cable TV and other Canadian cable companies to delete commercial messages carried as part of broadcasts emanating from the United States before distributing the signals through their cable networks, and to substitute public service announcements for the commercials. The jurisdiction of the CRTC over cable companies was attacked by certain television broadcasters based in Buffalo, New York, who stressed that the physical apparatus employed by cable television companies concerned and all of their subscribers were located within a single province.

The Chief Justice, speaking for the majority, dealt with the issue of federal jurisdiction over cable undertakings in the following fashion:

I am unable to accept the submission of the appellants and of the Attorney-General supporting them that a demarcation can be made for legislative purposes at the point where the cable distribution systems receive the Hertzian waves [originating with the Buffalo-based broadcasters]. The [cable] systems are clearly undertakings which reach out beyond the Province in which their physical apparatus is located; and, even more than in the Winner case, they each continue a single undertaking which deals with the very signals which come to each of them from across the border and transmit those signals, albeit through a conversion process, through its cable system to subscribers. The common sense of which the Privy Council spoke in the Radio case seems to me

even more applicable here to prevent a situation of a divided jurisdiction in respect to the same signals or programmes according to whether they reach home television sets and the ultimate viewers through Hertzian waves or through coaxial cable.

... The system depends upon a telecast for its operations, and is no more than a conduit signals from the telecasts, interposing itself through a different technology to bring the telecast to cable subscribers.

... The contention appears to be that since there is a local character to the cable distribution system in its physical aspect, and it may be receiving signals intraprovincially, it does not fall under total federal legislative authority. I understood, however, that it was conceded that federal jurisdiction was exclusive in respect of the receipt of signals at the antenna of the cable distribution system, wherever be their point of emanation. If that be the case, I do not see how legislative competence ceases in respect of those signals merely because the undertaking which receives them and sends them on to its local subscribers does so through a different technology.\(^{213}\)

A similar point was at issue in *Dionne v. Quebec*. In that case, the Quebec Public Service Board had authorized the establishment and operation of certain cable distribution undertakings. The cable systems were located exclusively within the Province of Quebec. The broadcasts they picked up from the air emanated from locations both inside and outside the province. The issue the Supreme Court was required to decide was whether the Board had the competence to grant authority to operate cable systems in these circumstances.

As formulated by the Chief Justice, the “two central strands” of the submissions supporting the jurisdiction of the Board were the following:

(1) two enterprises, having no necessary connection with each other, where involved in television operations and in cablevision operations and (2) the fact that different controlling entities were involved in those operations emphasized the separateness of the enterprises, and since the cable distribution operation was locally situate and limited in its subscriber relations to persons in Quebec it was essentially a local work or undertaking within provincial competence under s.92(10) of the British North America Act.\(^{214}\)

The Chief Justice then said:

The fundamental question is not whether the service involved cable distribution is limited to intraprovincial subscribers or that it is operated by a local concern


but rather what the service consists of. This is the very question that faced the Privy Council in the Radio case... There is another element that must be noticed, and that is where television broadcasting and receiving is concerned there can no more be a separation for constitutional purposes between the carrier system than there can be between railway tracks and the transportation service provided over or between the roads and transport vehicles and the transportation service that they provide. In all these cases, the inquiry must be as to the service that is provided and not simply as to the means through which it is carried on. Divided constitutional control of what is functionally and interrelated system of transmitting and receiving television signal, whether directly through air waves or through intermediate cable line operations, not only invites confusion but is alien to the principle of exclusiveness of legislative authority, a principle which is as much fed by a sense of the constitution as a working and workable instrument as by a literal reading of its words. In the present case, both the relevant words and the view of the constitution as a pragmatic instrument come together to support the decision of the Quebec Court of Appeal.\footnote{Ibid., 197.}

In a foreboding passage, Laskin C.J. continues:

The suggested analogy with a local telephone system fails on the facts because the very technology employed by the cable distribution enterprises in the present case establishes clearly their reliance on television signals and on their ability to receive and transmit such signals to their subscribers.\footnote{Ibid., 198. In the dissenting decision, Pigeon J., at pp. 203-204 remarks: I think it is of the utmost importance in this matter, to consider the tremendous extent to which communications transmitted by hertzian waves at one point or another are used by undertakings under provincial jurisdiction or conveyed by such undertakings. With the exception of the Bell Telephone Co. system... telephone companies generally come under provincial jurisdiction. It is a well-known fact... that they carry on their wires or cable not only telephone conversations but communications of all kinds, including radio network programs. No one has ever contended that, on that account, they have become undertakings subject to federal jurisdiction.}

**Jurisdictional Conflict**

Supporters of provincial regulation of telecommunications would counter that telecommunications was within a category such as language or culture which, if recognized solely as a matter of national concern, would serve to undermine provincial authority over matters of a local nature or involving the regulation of business activity within the province. Consequently, the distribution of powers between the federal and provincial governments with respect to communications and its public and political dimension became an area of concern, contention and constitutional discussions starting in 1978.
In the early 1970s overlap between federal and provincial jurisdiction became a major issue, particularly for Quebec, Manitoba, Saskatchewan and Alberta. These provinces became concerned that the federal government was attempting to establish domestic communications policy without any provincial involvement. Crandall says the beginning of such conflict was in 1966 with the federal government outlining its policy for Telesat Canada as a monopoly carrier for satellite communications.\textsuperscript{217} The Government of Quebec, in particular, sought to expand provincial jurisdiction and provincial powers of regulation because it thought that the implications of broadcasting and telecommunications generally were vital to the French language and culture of the Province. Provincial governments became increasingly concerned about their jurisdictional control over telecommunications because of the changing and merging of technology.

In April 1973 the federal government proposed its communications policy for Canada with a national mandate and an expansion of the federal jurisdiction and regulatory authority. In 1975, the provinces issued a joint provincial statement which rejected federal control and suggested a devolution of regulatory authority, except for the international aspects, to the provinces. Consequently, by the late 1970s the conflict was fundamental; the federal government wanted supremacy and the provinces wanting full devolution except for interprovincial rates and issues of national concern. The unique role of Quebec and its views on the role of communications within its culture was a driving force.

Complicating the policy concerns were regulatory decisions made by the CRTC. The CRTC began to show an interest in regulating interprovincial rates in 1978 in response to applications for interprovincial rate increases by Bell and BC Tel. This led the CRTC into the process of controlling interprovincial rates, but only insofar as the rates for Bell or BC Tel could be judged excessive.\textsuperscript{218} Schultz and Brawley suggest that the decision in 1979 by the CRTC to approve interconnection by CNCP Telecommunications (now AT&T Canada) to interconnect its private voice and data lines to Bell's switched system represented "a rejection of some aspects of the traditional telecommunications model and appeared to herald a radical


\textsuperscript{218} Ibid., 60.
restructuring that was destined to copy the new American approach". Competition in telecommunications gradually was adopted as the federal policy. However, the introduction of competition was, indeed, gradual. In 1985 the CRTC denied CNCP’s application for public voice long distance competition. This may have been the result of concerns raised, after watching the American example, about the dramatic increase caused to local rates by long distance competition.

In February 1986, a committee of federal and provincial ministers was established to provide a framework for a new telecommunications policy. It took two years to agree on six principles:

- a uniquely Canadian approach;
- universal access;
- international competitiveness of Canadian industry;
- technological progress;
- fair and balanced regional development; and,
- the role of government

In 1987, the federal Minister of Communications, Marcel Masse, and his provincial counterparts endorsed these principles that were premised on the rejection of the American model declaring that "the future development of the industry presents uniquely Canadian challenges required uniquely Canadian answers." Consequently by the late 1980s, the American competitive telecommunication model appeared stalled.

However, it came to pass that by the mid-1990s the competitive model was well-entrenched in Canada such that Canada is now the world leader in embracing telecommunications competition. The renewed commitment to competition was the result of a series of governmental and regulatory decisions. The push for competition was lead by corporate telecommunications users who emphasized the role of telecommunications in making Canada more competitive both domestically and internationally. In 1988 this pro-competition alliance succeeded in persuading the federal Minister of Finance to vote against a proposed federal-provincial telecommunications agreement. Finally, the 1992 CRTC decision


\[220\] Ibid., 100.
to allow public voice long distance competition showed the strength of this push for competition which managed to overwhelm the opposition of the telephone carriers and their supporters: the unions and the consumer groups.

**CNCP Telecommunications v. Alberta Government Telephones**

It took the Supreme Court of Canada to provide the federal government with the might to propel its competitive telecommunications policy throughout Canada. Until the AGT case only when a company's works extended beyond the limits of a particular province, did the company fall within federal jurisdiction under section 92(10)(a) of the Constitution Act, 1867. As noted above, several large Canadian telecommunications carriers, including AGT, SaskTel, MTS, NB Tel, MT&T, Island Tel and NewTel, whose facilities were confined to a single province, were regulated by provincial authorities. The matter was resolved in 1989 by the AGT case which arose out of an application by CNCP Telecommunications to the CRTC in 1983.

CNCP requested that the CRTC order AGT to allow CNCP to interconnect its private line telecommunications network with AGT's local telephone exchanges in the province of Alberta. CNCP's application was brought under provisions of the federal Railway Act and therefore raised a threshold issue concerning the applicability of provisions of that Act to AGT, which had historically been regulated by the Alberta Public Utilities Board under provincial legislation. AGT responded to the CNCP application by seeking an order in the Federal Court Trial Division prohibiting the CRTC from hearing the CNCP application on the grounds that AGT was a local work or undertaking within the meaning of section 92(10)(a) of the Constitution Act, 1867 and therefore within provincial legislative jurisdiction. AGT raised a supplementary argument: it claimed to be an agent of the Crown in right of Alberta and therefore immune from CRTC jurisdiction because the applicable federal legislation did not

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bind the Crown in right of a province. The Attorneys General for all the provinces with provincial telephone companies, including Quebec, intervened in support of AGT.

On the first constitutional question: Is Alberta Government Telephones a work or undertaking within the legislative authority of the Parliament of Canada by virtue of section 92(10)(a) or otherwise of the *Constitution Act, 1867*? The Federal Court Trial Division, the Federal Court of Appeal and the Supreme Court all agreed that AGT was a work or undertaking within the authority of Parliament.

In looking at why the courts decided in favour of Parliamentary jurisdiction, one should not overlook the human element. For example, Reed, J. of the Federal Court Trial Division, notes her disdain for the effectiveness of the [provincial] board as a regulator of AGT and commented:

One can speculate that the board’s approval of AGT’s activities is likely to be no more the pro forma in many instances. I would underline that there is no evidence respecting such lack of control, it is merely a conclusion one seems inescapably driven to make.

Madam Justice Reed’s decision is greatly relied upon by the Supreme Court in its final decision. In fact, her decision is exemplary in its understanding of the technology and the nature of the telecommunications industry. In looking at the nature of AGT’s enterprise, the Supreme Court notes Reed J.’s description of AGT’s structure and facilities:

A local central office switches both local and long-distance or toll calls. The exchanges are connected by trunks to the toll centres which are connected by buried cable or microwave to provide inter-city long-distance service.

And the physical interconnection between AGT’s system to companies operating outside of Alberta:

The AGT microwave network is linked to that of [BC Tel and SaskTel] by the sending and receiving of signals between towers located at [various points in the province]. There may also be cable links between the Alberta-British

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223 Madam Justice Reed, the judge deciding the AGT case in the first instance at the Federal Court Trial Division, was married to a director in the telecommunications division of the CRTC.
225 Ibid.
Columbia and the Alberta-Saskatchewan systems by the main method of transmission is the microwave network.

In addition the physical facilities of AGT are connected by cable to three earth stations... This linkage allows AGT access to a satellite transmission system for the provision of telecommunication services.

AGT's physical telecommunications facilities not only connect at the borders, there is also more pervasive integration. The same telephone sets, lines, exchanges and microwave networks are used for the provision of local and interprovincial services as well as international ones. 226

The Supreme Court CC also describes AGT's reliance on the contractual and organizational mechanisms through which AGT provides its telecommunications services, in particular Telecom Canada.

The names and nature of the committees, the role played by AGT employees and the terms of the Connecting Agreement demonstrate that TCTS is the coordinating, planning and organizational heart of the integrated telecommunications system of which each member's facilities form a part. 227

The Supreme Court notes that Reed J. also pointed out that Telecom Canada does not have any independent physical network facilities and in her summary she described AGT "as playing an integral part in the Telecom Canada organization both at the managerial and apparently at the staff level" 228.

The Supreme Court rejects AGT's argument that it is a local undertaking because all of the physical facilities and all of its subscribers are located solely in the province of Alberta.

The primary concern is not the physical structures or their geographical location, but rather the service which is provided by the undertaking through the use of its physical equipment.

The involvement of AGT in the transmission and reception of electronic signals at the borders of Alberta indicate that AGT is operating an interprovincial undertaking.

226 Ibid., 204.
227 Ibid., 206.
228 Ibid., 211.
It is through the organizational mechanisms described earlier [TCTS] that AGT is able to provide to its local subscribers services of an interprovincial and international nature.

The facts are unequivocal that AGT is the mechanism through which the residents of Alberta send and receive interprovincial and international telecommunications services. The service are provided through both corporate and physical arrangements which are marked by a high degree of cooperation.229

In addition, the Supreme Court of Canada rejected AGT’s argument that it could not, on its own, provide the extraprovincial services and it was necessary to enter into co-operative arrangements for that purpose, but said that AGT and Telecom Canada act together and “to ignore the interdependence of the various members of Telecom Canada because of separate corporate structures involved would be a sacrifice of substance to form and would advance no constitutional value”230.

To the second constitutional question: that AGT enjoyed Crown immunity from the Railway Act by virtue of its status as an agent of the Crown in right of Alberta, the Federal Court Trial Division concluded that AGT enjoyed Crown immunity, the Federal Court of Appeal concluded that it did not and the Supreme Court of Canada concluded that it did with Wilson, J. dissenting on this point saying that AGT had waived its immunity by participation in a national network of telecommunications under the regulatory supervision of the CRTC. The Supreme Court said:

... the general reference to Her Majesty embraces the Crown in right of a province as well as the Crown in right of Canada.

... the federal legislation [Railway Act] does not mention or refer to the Crown as being bound thereto.

The fact that the granting immunity will produce a regulatory vacuum with respect to AGT is insufficient and does not amount to a frustration of the Railway Act as a whole. While granting immunity unless and until Parliament chooses to amend the legislation will produce a gap in potential coverage of

229 Ibid., 221.
230 Ibid.
the Railway Act, the Act can continue to function just as it did prior to this court’s finding that AGT is a federal undertaking as a whole in my view.231

Had AGT lost its immunity by virtue of the doctrine of waiver? The Supreme Court said no.

As stated above at common law the Crown can gain advantages from a statute without necessarily waiving its immunity therefrom. Waiver only occurs where the Crown takes the benefit of a statute divorced from its enumerated restrictions.

There is no evidence that AGT relies now, or has relied in the past, on particular benefits of the Railway Act or of CRTC regulation to which interconnection with CNCP is an attendant burden.

Therefore I agree with the view of Reed J. that the advantages obtained by AGT under the Railway Act are insufficient to link it to CRTC jurisdiction under the theory of waiver of Crown immunity.232

Moreover, AGT did not lose its immunity by exceeding its statuary mandate or Crown purposes:

Where AGT has not exceeded its legislative mandate or the Crown purposes for which it was created, but rather merely entered into a federally-regulated field by virtue of its daily operations of providing telecommunication services, it cannot be said to lose its Crown immunity... Rather as a provincial Crown agent its statutory purposes and ever-evolving technology advances eventually required it to operate as a federal undertaking in order to service its customers, thus attracting federal regulation.233

Nor did AGT lose its immunity by virtue of being a commercial enterprise. The Supreme Court concluded:

There is no question, however, that had the Railway Act been expressly made to bind the Crown, AGT would be subject to its provisions as a constitutional matter. Equally it is apparent that Parliament and the provinces have the constitutional competence to reverse the common law and the current statutory

231 Ibid., 223 - 229.
232 Ibid., 235.
233 Ibid.
presumption of immunity in favour of a statutory rule of interpretation binding the Crown. 234

The door was open. In the fall of 1989, the federal government introduced an amendment to the Railway Act to expressly bind the Crown in right of Canada and the Provinces. The Provincial Ministers of Communications for Alberta, Saskatchewan and Manitoba (with Quebec's tacit support) formed the Prairie Telco Alliance vowing to fight such a federal takeover.

Telephone Guevremont Inc. v. Quebec

The decision in the AGT case still left unresolved the status of the so-called independents, which were not members of Stentor and which have no direct cross-border connections. The position of these companies was settled by the Supreme Court of Canada in a case 235 which concerned Telephone Guevremont, a Quebec independent serving several small communities in the Eastern Townships.

Telephone Guevremont applied to Quebec Superior Court for a judicial review on constitutional grounds of a decision of the Quebec Regie des telecommunications which had refused to approve its development plan. The Superior Court followed the reasoning in the AGT case and held that the company was subject to exclusive federal legislative jurisdiction. The decision was subsequently affirmed by the Quebec Court of Appeal, which held that there was a sufficient operational link between Telephone Guevremont and the national telecommunications network to which it is connected through interconnection with Bell to render it a federal undertaking, despite the absence of either a direct cross-border connection of its own or membership in Stentor and said:

In order to provide a telephone service to its subscribers, Telephone Guevremont must be able to receive and transmit [digital] signals to them. To do this, it depends on the services provided by Bell Canada and, via Bell Canada, by other interprovincial telephone companies. It is merely one of the links in a chain that reaches its subscribers or that links its subscribers to other provinces ad to the rest of the world.

234 Ibid., 249.
... The regular and continuous collaboration between Telephone Guevremont and Bell Canada is also shown in the many specific services offered to Telephone Guevremont’s subscribers such as the validation of credit cards, the transmission of data between companies...

The Supreme Court of Canada granted the Attorney General of Quebec leave to appeal that decision. Judgment was rendered orally from the bench on April 26, 1994, the respondent not having been called on. The Supreme Court said:

We are all of the view that Telephone Guevremont Inc., is an interprovincial work and undertaking within the legislative authority of the Parliament of Canada by virtue of ss. 92(10)(a) and 91(29) of the Constitution Act, 1867 by reason of the nature of the services provided and the mode of operation of the undertaking which provides a telecommunication signal carrier service whereby its subscribers send and receive interprovincial and international communications as set out in the reasons of [the Quebec Court of Appeal]. The constitutional question is answered as follows:

Question 1: Is Telephone Guevremont Inc. A work or undertaking within the legislative authority of the Parliament of Canada by virtue of ss. 92(10)(A) and 91(29), of the opening words of s. 91 or other wise of the Constitution Act, 1867?

Answer: Yes

The combined effect of the decisions in AGT and Guevremont cases was to confer legislative jurisdiction over all telecommunications carriers on Parliament.

**Telecommunications Act**

Many key provisions of earlier legislation are carried forward, in modified form, into the *Telecommunications Act* so that it is useful to an understanding of the *Telecommunications Act* to trace briefly the relevant provisions of the *Railway Act*. In 1906, amendments to the *Railway Act* were enacted which gave the Board of Railway Commissioners, which had been established in 1903 to regulate railway companies, the additional task of regulating telephone companies such that telephone rates required the prior

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approval of the Board; telephone companies were required to file tariffs with the Board; and, the Board had the power to order the interconnection of telephone systems and to establish the terms and conditions of interconnection. Interestingly enough, it was not until 1908 that Parliament extended the Board’s authority to regulate telegraph companies.

The provisions of the *Railway Act* relating to telegraph and telephone companies remained largely unaltered until the enactment of the *National Transportation Act, 1967*. This *Act* dissolved the Board of Railway Commissioners (which had been renamed the Board of Transport Commissioners in 1938) and established the Canadian Transport Commission (C.T.C.) as the new regulatory authority for railways, telecommunications carriers and other modes of transport. Telegraph and telephone rates became subject to an express statutory requirement that they be “just and reasonable”. Under the *Act*, the C.T.C. was given the general power to make orders with respect to “all matters relating to traffic, tolls, and tariffs”. In 1970, new amendments brought rates for the leasing of telegraph instruments, telephone and telegraph private lines and services incidental to telegraph and telephone companies under regulatory scrutiny and extended the scope of the prohibition against unjust discrimination (which had until then only applied to rates) to services and facilities provided by a carrier as a telegraph and telephone company.

The *Telecommunications Act*, which was proclaimed in force as of October 25, 1993, set out the scheme for the regulation of telecommunications carriers that fell within federal legislative jurisdiction and defined the powers of the federal regulatory agency, the Canadian Radio-television and Telecommunications Commission (CRTC). The *Telecommunications Act* represents the first comprehensive reform of Canadian telecommunications law since the inception of federal regulation of the industry in 1906.

The *Telecommunication Act* is divided into seven parts. Part I (“General”) contains definitions of key terms, many of which were new or substantially different than the definitions of the corresponding terms contained in previous legislation. Part I also contains a provision making the *Telecommunications Act* binding on the Crown so that SaskTel and MTS (then the remaining provincial Crown corporations) came under federal jurisdiction. Under section 132, MTS became subject to the *Act* on December 31, 1993. According to section 133, SaskTel was to become subject to the new Act on a date to be fixed by the Governor in
Council on or after the 5th anniversary of the Act’s entry into force (that is, October 25, 1998) or on such earlier date as may be fixed by the Governor in Council at the request of the Government of Saskatchewan. The Saskatchewan government has since negotiated an extension with the federal government so that SaskTel is now due to come under federal regulation as of June 30, 2000\textsuperscript{239}.

Part II’s "Eligibility to Operate" primary focus is the ownership and control of telecommunications carriers. Part III "Rates, Facilities and Services" sets out the basic regulatory requirements governing the provision of telecommunications services and facilities and defines the jurisdiction and powers of the CRTC. Part IV "Administration" contains general provisions relating to the exercise of the Commission's powers. Part V "Investigation and Enforcement" confers on the Commission and the Minister the power to institute inquiries, under the direction of persons designated by them, concerning the duties of the Commission and the Minister and matters relating to the performance of the Act. Part VI contains certain transitional provisions relating to the implementation of federal jurisdiction over carriers that come under federal jurisdiction after the entry into force of the Act. Section 75 allows the Governor in Council to issue special directives to the CRTC pertaining to the regulation of those carriers for a period of up to five years after they come within CRTC jurisdiction\textsuperscript{240} This section was never used.

Section 7 contains the first statutory statement of the objectives of Canadian telecommunications policy which serve as the basis of the direction powers of the Minister and exemption orders of the CRTC. Section 7(a) reads:

to facilitate the orderly development throughout Canada of a telecommunications system that serves to safeguard, enrich and strengthen the social and economic fabric of Canada and its regions;\textsuperscript{241}

\textsuperscript{239} In an interview with Saskatchewan's CBK Radio on October 14, 1998, federal Industry Minister, John Manley, said: "We must have a common regulatory structure across Canada in due course. And we can't allow this to go indefinitely, that one province is out and everybody else is in. You can't be an island when it comes to telecommunications".

\textsuperscript{240} At the introduction of the bill, the Minister of Communications stated in his explanatory notes that section 13 was "viewed by all parties as a useful and appropriate means of ensuring fully informed and regionally-sensitive decision-making".

\textsuperscript{241} The words "political" and "cultural" were included in section 7(a) for the first and second readings of the Bill. The Minister removed these words in the final revisions arguing that he did not want to create any misunderstanding that this is an attempt to encircle a traditional provincial responsibility and that cultural safeguards exist in parallel legislation. As the Minister explained: "I heard some fairly fantastic constructions put upon the bill, for example, that the goal was to use the regulation of federally regulated
Section 7(a) was much maligned at Parliamentary committee hearings because it was argued that any policy decision could be equally characterized as supporting or being at odds with such sweeping objectives. Moreover, it does not provide any practical or objective guidance to the regulation of the telecommunications industry. However, section 7 does represent the culmination of a legislated direction for Canadian telecommunications policy.

The federal government had won, the provinces no longer had a say in telecommunications policy. More importantly, the one province remaining that still owned a telephone company, which it had used as its provincial public policy instrument, and which instrument was now under federal regulation, had difficult choices to make.
CHAPTER VII
MTS: A CASE STUDY

On January 15, 1908, the Premier of Manitoba, Redmond Roblin, announced the purchase of the Bell telephone system in Manitoba:

... for the purpose of avoiding the necessity of having a dual telephone system in the province, and in that way preventing the waste of several millions of dollars of capital as well as the cost to the telephone user. I believe, also, that it is a good commercial proposition and whatever profit there is in the operation of the telephone system from this time on will belong to the people of Manitoba rather than to a private company… 242

Almost 90 years later, on June 4, 1996, the Honourable Glen Findlay, Minister Responsible for the Manitoba Telephone System (MTS), introduced Bill 67 - The Manitoba Telephone System and Reorganization Consequential Amendments Act - to enable the Province of Manitoba to sell its Crown corporation. According to the Minister, the legislation to privatize MTS “positions the telephone company for a strong future, able to meet the competitive marketplace…” 243

Apparently, what had made sense to the government of 1908 no longer made sense to the government of 1996. This chapter will analyze the single case of MTS, its evolution and demise as a Crown corporation. While many factors have contributed to the transformation of the telecommunications industry, the case of MTS may assist in explaining the larger phenomenon of the altered Canadian telecommunications environment. Consequently, the reasons for and public policy surrounding the creation and development of MTS, as a Crown corporation, will be assessed. In looking at its demise, the chapter will evaluate MTS’ ability to pursue provincial public policy commitments by exploring a specific Manitoba policy initiative - “Service for the Future”. In addition, the chapter will review the efforts on the part of the provincial government to maintain the viability of MTS’ corporate structure as a Crown corporation in light of the changing telecommunications environment.

The Creation of MTS: a Crown Corporation

In Chapter V Telecommunications Regulation, the impetus behind the creation of MTS is seen as Manitoba’s reaction to Bell’s attempt to eliminate competition. The *Toronto v. Bell Telephone Co.* decision in 1905 settled the dispute between the municipalities and Bell in Bell’s favour such that Premier Roblin of Manitoba set-up a legislative committee to examine the feasibility of the provincialization of the telephone system. The eventual outcome was that the provincial assets of the Bell Telephone company were acquired by the Province on January 15, 1908, for $3.3 million. At the time, Bell had been serving 17,000 of the Province’s 25,000 subscribers.244

Chandler, as outlined in Chapter IV Crown Corporations, believes that in the case of telecommunications, the Crown corporation was originally established as a monopoly utility environment because the private sector was unwilling to make such an investment. Mavor states that “too great a stress is often laid upon the pecuniary factor alike by advocates and opponents of public ownership.”245 However, in the case of MTS, the public interest was affected not only by the balance sheet but also by those intangible assets such as the character of the population. It is no accident that it was in the Prairies that provincial Crown telephone systems were created.

When the Government announced its intentions in 1905 of “giving a telephone system to all classes at cost”,246 the reason advanced for the adoption of the new policy was that rates could be considerably reduced under public ownership since service would be given at cost.247 The legislative committee appointed to inquire into the telephone question recommended in its report on February 27, 1906 that:

(a) The telephone should be owned and operated as a Government and municipal undertaking;

(b) The existing rates in Manitoba were exorbitant and could be considerably reduced;


(c) The Government should build the long distance lines and the municipalities should supply the local systems.\textsuperscript{248}

In 1906 the question of public ownership of telephones, as opposed to the more volatile issue of education, appeared to be politically popular given the belief that telephone service could be readily offered to everyone at cost. Both parties advocated public ownership.

Furthermore, telephones and politics intermingled with promises of rural service expansion in the 1910 provincial election such that it became the major reason for acquiring the system.\textsuperscript{249} The expenditure on telephones formed a very material proportion of the total Provincial budget.\textsuperscript{250} Manitoba experienced a brief boom in telephony and, in its first year 6,000 subscribers were added and 1,500 additional pole miles built. In 1909, a further 5,300 subscribers were connected and the government reduced rural telephone rates by up to 30-per-cent. In 1910, 8,146 subscribers were added. Thus, in less than three years both the value of the plant and the number of subscribers increased by about 80-per-cent.\textsuperscript{251}

However, the boom ended in 1914 when public rates had to be increased to cover losses of $153,000 created by financial mismanagement. Premier Roblin initiated a public inquiry in 1912 to appraise the system’s management and finances.\textsuperscript{252} As outlined in Chapter IV, the result was a the delegation by the government of responsibility for telephone rates to a newly constituted Public Utilities Board. Furthermore, the government enacted amendments to the \textit{Manitoba Telephone Act}, giving increased autonomy to the Commissioner of Telephones respecting “the keeping of accounts, application of funds, control of employees and other matters involved in carrying out the purposes for which... he is appointed.”\textsuperscript{253}

Thereafter the system began running its own affairs in accordance with the policies of a publicly-owned utility, subject to review by the Public Utilities Board. After 1912, in line with its revise structure, the expansion of the telephone system was slowed down in keeping with

\textsuperscript{248} Legislative Assembly of Manitoba, \textit{Journals} (Session 1906) 35.
\textsuperscript{250} Mayor, James. \textit{Government Telephones The Experience of Manitoba, Canada.} (Toronto: The Maclean Publishing Co., 1917) 9.
\textsuperscript{252} Ibid., 104.
\textsuperscript{253} Ibid., 105.
the resources at the system’s disposal. Since those early years, MTS’ rates consistently have been the lowest,\textsuperscript{254} or among the lowest, in Canada.

**Provincial Public Policy: “Service for the Future”**

On September 29, 1988, the Honourable Glen Findlay, Minister responsible for the administration of the Manitoba Telephone System, informed the Legislative Assembly of Manitoba of a new policy that set higher standards for basic telephone service in the Province of Manitoba. The policy established four new requirements for basic telephone service:

- First, the policy required all telephone exchanges in Manitoba to be converted to modern digital equipment;
- Second, the policy recognized the need for all subscribers to have full-time access to the telephone network;
- Third, the policy recognized the need for subscribers in small rural exchanges to be able to reach medical, educational, municipal or business services without calling long distance; and,
- Fourth, the policy addressed the needs of subscribers with physical disabilities for improved access to basic telecommunications services.

The policy established a program called “Service for the Future”. Service for the Future was particularly in keeping with the original goals behind the establishment of MTS as a Crown corporation – it would provide the same level of service to rural and urban subscribers alike. The Honourable Mr. Findlay explained the reasoning by the government in developing its new policy:

> The telecommunications industry is going through major changes... The needs of telecommunications users have also been changing. Businesses, small and large, are becoming increasingly dependent on modern and reliable telecommunications services such as automated bank tellers, instant credit card verification and computerized inventory control, all of which require sophisticated communications network... At present some 46,000 subscribers in rural areas receive “party line” service... As a result, they only have access to the telephone network when someone else is not using the line. Furthermore, when the line is available, there is no means of

\textsuperscript{254} Ibid.
assuring privacy... We believe that this standard of service is no longer acceptable...
We have the opportunity to harness new technological developments to meet their [Manitobans with physical disabilities] communication needs...
In summary, Mr. Speaker this policy will give Manitobans a higher standard of communications and will grant access to those who have less than adequate service in the past... This policy and the programs offered by MTS will set a new standard of service which will respond to the telecommunications needs of Manitobans in the 1990s.255

By the time of its completion in 1996, Manitoba was one of only four provinces in Canada to have individual line service throughout the province. Moreover, when considering the standard of service to be brought about by the other components of Service for the Future (that is, “equal service to citizens across Manitoba charging equal rates to everyone”256), the bar may have, indeed, been at its highest. Service for the Future was a “bold, ambitious, multi-year program which would eliminate party lines in Manitoba; expand the size of toll-free calling areas throughout the province; and, provide universal digital switching technology in all Manitoba exchanges to improve reliability, offer a broad selection of customer conveniences and extend the network’s data communications capability throughout the province”257.

But, it came at considerable cost. Findlay noted that the utility was heavily in debt compared to other publicly owned telephone companies in Canada. “It means telephone users could face higher rates in the future.”258 Accordingly, MTS filed with the Public Utilities Board (PUB) for its consideration at public hearings a multi-year plan which entailed a request for rate increases needed to pay for the individual line service and the expansion of toll-free calling in rural areas such that the average Winnipeg phone bill would go up by 2.5-per-cent. In its application to the PUB, MTS requested rates increases to generate an additional $13.9 million in 1989 and $7.8 million in 1990259. The program became the focal point for operational and customer service at MTS. MTS’ construction program for 1989-1991 estimated capital expenditures of $201 million. The PUB, however, did not approve the

256 Ibid., 1705.
program outright, particularly after examining the costs involved and the anticipated rate increases. While approving Service for the Future in principle, the PUB asked MTS to review the matter and return to the PUB with a plan to expand rural toll-free calling areas and, at the same time, provide alternative methods of generating revenue\textsuperscript{260}. In 1989, Service for the Future was projected to be a five-year, nearly $800-million service improvement program to bring state-of-the-art telecommunications to all Manitobans.\textsuperscript{261} In June 1989, MTS Special Needs Centre officially opened, which was the fourth component of Service for the Future, and the company filed an application with the PUB, which was later approved, to provide customers with disabilities telephone sets and accessories at the basic monthly rate.\textsuperscript{262}

In 1989, net earnings for MTS rose. The major factor was improved performance in long distance revenues which contributed 54.6-per-cent of the total revenues.\textsuperscript{263} This year proved to be the last year of an unimpeded monopoly position for MTS because competition was about to be introduced to various telecommunications services in Canada. By August of 1989, the Supreme Court of Canada had ruled that telecommunications was a federal jurisdiction and the Chairman of MTS, Paul Thomas was predicting that the court ruling paved the way for competition in long distance rates with the result that local phone rates would rise. He said that, “when the dust settles Manitobans and all Canadians could face dramatic increases in local rates if the telephone industry across the country becomes federally regulated because of this decision.”\textsuperscript{264} The article continued:

\hspace{1cm} ... the 1987 federal task force headed by former Manitoba Conservative cabinet minister Bud Sherman concluded that deregulation and competition could mean increased telephone costs for 90-per-cent of Canadians... When it comes to rural service there’s no way the CRTC is going to have the same understanding sand empathy... However, Findlay said the government would oppose competition in the telephone network.\textsuperscript{265}

It came to pass that the provincial government would chose to eat its words.

\textsuperscript{260} Manitoba. Public Utilities Board. \textit{Annual Report 1989}.
\textsuperscript{261} Manitoba Telephone System. \textit{Annual Report 1989}.
\textsuperscript{262} Interestingly the CRTC, almost two years later, had to request a proposal from Bell to provide similar service to persons with disabilities at a reduced cost.
\textsuperscript{263} Manitoba Telephone System. \textit{Annual Report 1989}.
\textsuperscript{264} \textit{Winnipeg Free Press} (Winnipeg) 16 August 1989.
\textsuperscript{265} Ibid.
In October 1989, MTS filed with the PUB a revised plan for “Service for the Future”. The Board approved the System’s enhanced program. It pointed out, however, that if its financial objectives did not materialize, the System may have to review its development plans or subscribers may have to bear larger annual rate increases. The System had proposed rates for the expanded toll-free calling areas to recover 60-per-cent of the costs as a monthly charge with the balance to be derived from the System’s general revenues.

In 1990, largely because of continuing strong demand in long distance calling services, MTS was able to report a modest increase in net earnings. However, MTS’ long-term debt increased by $35 million from 1989. In response to demands from business groups, MTS continued to reduce its long-distance rates as did other monopoly telecommunications providers such as Bell. Because of increasing demands by business and in an effort to stem the demand for an end to MTS’ monopoly position, the Government of Manitoba announced a new policy in 1990 to permit Manitobans to connect their own business terminal equipment to MTS’ network. Large business customers were given additional choices by permitting alternate suppliers to attach private lines to MTS’ facilities. Former CEO, Reg Bird, said at the time that “technological changes and competition will force the government to look at its options...” Findlay admitted that a strong business lobby’s threat to move jobs out of Winnipeg was a factor in the province’s move to end MTS’ monopoly in business equipment. Although it fought for its monopoly position behind the closed doors of its boardroom, MTS in its 1990 Annual Report dutifully chimed that it:

welcomed these announcements... The corporation, which has competed in the delivery of several services in the past, recognizes the degree to which competition is desired by its customers. MTS looks forward to participating in this emerging competitive environment and the MTS Board has been giving special attention to what the corporation must do to meet the challenge.

To meet the challenge, MTS had to strengthen its finances and the financial control over its assets by reducing its debt. This was to prove a difficult task in the face of the onslaught of competition. By 1991, long distance rates had fallen by 47-per-cent since 1987

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268 Winnipeg Free Press (Winnipeg) 16 October 1990.
269 Winnipeg Free Press (Winnipeg) 7 November 1990.
and MTS saw a reduction in its net income as a result of more competitive pricing. In addition to decreasing revenues from lower rates, MTS' share of the revenue pool in which MTS participated with other then Telecom Canada companies also declined so that long distance revenues decreased by 6-per-cent because of the loss of long distance business to telecommunications resellers in British Columbia, Ontario and Quebec. Moreover, MTS' long-term debt increased in 1991 by $38.8 million to finance its construction program of new installation and upgrading its equipment. Net construction expenditures were $193.2 million which reflected MTS' continued commitment to Service for the Future and bringing the benefits of modern telecommunications technology to all Manitobans.

In late fall of 1992, the provincial government announced that it would join other Canadian provinces by opening the long distance telephone service market to competition. MTS' 1992 net earning fell again, primarily because of reduced long distance revenues. In addition, MTS' long-term debt increased by $55.2 million to finance its construction program. That year represented a major turning point for both MTS and the Canadian telecommunications industry. In June, the CRTC announced that it was opening the doors to competition in the long distance market to those provinces where telecommunications was federally regulated. While moving ahead with Service for the Future, MTS' network modernization program, MTS was forced to adopt strategies to meet the challenges of an increasingly competitive environment. The corporation took measures to streamline its operations and cut costs MTS also was forced to apply to the PUB for increases to its basic rates. In its application, MTS provided evidence of competition in the long distance telecommunications market, an area that traditionally provided high returns that were used to subsidize local rates. Evidence of competition from resellers in other jurisdictions taking revenue from associated companies showed a reduction in funds available for settlement among all the companies, including MTS. Resale activity was estimated to cost $5 million in 1992 and long distance revenues were expected to be $0.2 million less such that MTS

271 Ibid.
273 Eventually, MTS employees would be reduced by 2,000 individuals; from approximately 5,000 employees in 1992 to 3,000 employees by the time of its privatization in 1996.
estimated the total effect to be a loss of $12.9 million by 1994.\textsuperscript{275} The PUB acknowledged the risks facing the System from competition. It stated its concern that the basic service subscribers were the most vulnerable and that the consequences of under-estimating the impact of competition could have significant effect on basic telephone rates. The Board stated that these issues influenced its decision. The rate adjustment assisted MTS with its ongoing funding requirement for network modernization for Service for the Future.\textsuperscript{276} Adding its voice the Crown Corporation Council reported it had:

serious reservations regarding the adequacy of current operating plans and longer term strategies adopted by MTS... MTS' $800-million debt load has left it in a very weak financial position to deal with challenges such as competition and breathtaking technological changes."\textsuperscript{277}

MTS basic rates remained amongst the lowest in Canada, with Winnipeg rating fourth lowest after similar cities such as Calgary, Victoria and Edmonton.

On December 31, 1993, MTS came under the regulatory jurisdiction of the CRTC. At the end of 1993, MTS' debt ratio stood at 80.9-per-cent. Cost cutting had resulted in an increase in net earnings but, long-term debt increased $9.2 million to finance MTS' construction program, Service for the Future.\textsuperscript{278} In 1993, MTS sought and received a general rate increase for the last time before the PUB as well as the Board's endorsement of further reductions in its debt ratio. The PUB endorsed MTS' debt ratio targets and stated that it was "critical for the System to position itself, from a financial and business perspective, to be able to compete effectively in order to mitigate adverse effects of competition on local subscribers".\textsuperscript{279} With these parting words, the eighty year reign of MTS' provincial regulator ended.

In 1994, "through careful management and dedication to sound business principles"\textsuperscript{280} MTS was able to earn positive net earnings and reduce its debt ratio to 79.3-per-cent.

\begin{flushleft}
\textsuperscript{274} Effective November 1, 1992, MTS received PUB approval for an increase of 1-per-cent on the average customer bill.
\textsuperscript{275} Manitoba. Public Utilities Board. \textit{Annual Report 1992}.
\textsuperscript{276} Ibid.
\textsuperscript{277} \textit{Winnipeg Free Press} (Winnipeg) 4 January 1993.
\textsuperscript{278} Manitoba Telephone System. \textit{Annual Report 1993}.
\textsuperscript{279} Ibid.
\textsuperscript{280} Manitoba. Public Utilities Board. \textit{Annual Report 1994}. Skeptics could see this as a euphemistic phrase for cost cutting and local rate increases.
\end{flushleft}
Revenues from long distance in that year decreased by $23.8 million or 8.7-per-cent. It was clear that MTS had sadly underestimated the effect of long distance competition before the PUB in 1992. Net construction expenditures of $151.2 million reflected the continued expansion and modernization of the network from Service for the Future.

In 1995, MTS was reorganized into a parent holding company and four operating entities effective January 1, 1996. To explain why the reorganization was needed, the Chairman of MTS responded:

The simple answer is that the ongoing transformation of our industry has been so relentless that we believe the best way forward for MTS is to embrace change - to lead change - to ensure our continued role as the leading communications and information services provider in Manitoba. In so doing, we recognize our obligation as a provincial Crown corporation. We are the caretaker of a major provincial asset - its communications infrastructure - which is strategic to the economic and social development of all Manitobans. It's my view that a definition of the public interest will evolve as the relationship between our networking capabilities and our social well-being in Manitoba becomes much more apparent. Serving the public interest will invariably encompass more than basic telephone service at affordable cost. There are issues Manitobans must address together about the public interest. One priority is the need to create an in-province online infrastructure, providing businesses and consumers with an electronic marketplace to distribute and purchase goods and services. This is critical to generating new wealth in Manitoba for Manitobans along our stretch of the global information highway. In this respect, we must work as partners in government, business, and the community to develop a new vision of the public interest...”

In 1995, long distance revenues decreased by $12.5 million or 5-per-cent from 1994. Net construction expenditures of $155.9 million increased in 1995 to meet the demands of the construction modernization program (Service for the Future) and long-term debt increased $5.6 million. The writing was quite literally on the wall as to the continued viability of MTS as Crown corporation in an competitive federally regulated environment. Political factors had brought about a competitive environment that threatened the continued viability of MTS as a Crown corporation.

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282 Ibid.
The Demise of MTS: a Crown Corporation

The Supreme Court of Canada ruled on the AGT case in August 1989. In October 1989, the federal government introduced a bill to amend the Railway Act. It was short and to the point, the amendment would remove provincial immunity from federal telecommunications regulation. Prior to its introduction, on October 18, 1989, Premier Filmon of Manitoba made a brief statement to the Assembly:

There are reports today that federal Communications Minister Marcel Masse plans to introduce legislation tomorrow that will give the federal Government regulatory control over provincially owned telephone utilities. Such a move would take away local control and autonomy from the Manitoba Telephone System and its ratepayers.

Mr. Speaker, this is an unprecedented federal intrusion into provincial jurisdiction. It is a direct assault on the Prairies and a direct assault on our rural communities.

Regional sensitivity is essential in regulating any publicly-owned body such as Manitoba Telephone System, which is mandated to serve all Manitobans regardless of where they choose to live in this province. As such, provincial responsibility to telecommunications is essential to protect consumers and to ensure telephone rates are sensitive to the needs of smaller rural communities.

It is our understanding that under the federal government’s plan, the Public Utilities Board of Manitoba will lose all of its rights to regulate a Manitoba Crown Corporation and as such, remove the opportunity for Manitobans to be involved in managing the company which they rightfully own.

As Premier of Manitoba I am shocked and disappointed that the federal Government apparently has deemed it appropriate to exercise its regulatory muscle at the expense of Manitoba Telephone customers.

Mr. Speaker that flies in the face of a recent Supreme Court of Canada decision involving Alberta Government Telephones. The Supreme Court ruled that telephone companies owned by the three prairies provinces enjoy Crown immunity from federal jurisdiction. The federal Government has now deemed it appropriate to override the paramountcy of Crown immunity and take over regulatory control of Manitoba Telephone System.

Mr. Speaker, the federal Minister gave his word to this Government that there would be consultation before such action would be considered. No such consultation took place... There has been no consultation to address the concerns of ordinary Manitobans who depend on our provincial telephone system and who now through careful management of the Crown corporation enjoy among the lowest telephone rates in the country. Under the federal plan, as we understand it, these rates will be jeopardized with rate set by a regulatory body far removed from the realities and sensitivities of Manitoba.

As Premier, along with my Minister of Communications, the Honourable Glen Findlay, will not accept this unilateral action by the federal government. In
the interests of protecting all Manitobans, our Government - my Ministers and I - will fight this decision with whatever means we have at our disposal including legal action.\textsuperscript{283}

These were fighting words. However, the battle was already lost. The Leader of the Opposition, Liberal Sharon Carstairs, joined with the Premier in opposing the move by the federal government. She said, "Mr. Speaker, the Manitoba Telephone System and the Public Utilities Board must have the ability to continue with its mandate of serviced. Local service at lower rates will be severely impacted by this move of the federal Government. It is intolerable, and unacceptable and let us make sure that this ministerial statement by the Premier today is not the only action he takes."\textsuperscript{284} Leader of the Second Opposition, New Democrat Gary Doer, also was strongly opposed to the move by the federal government and said: "I believe it essential to fight this as much as we can, because the inevitable results will be that rates will go up 40 to 50 percent on the first step of the loss of our Telephone System with federal regulation and a deregulated free trade North American telecommunications environment."\textsuperscript{285} His words would prove prophetic.

Mr. Doer went on to urge the government to form a grass-roots movement with governments, municipalities, consumers and seniors; similar to that developed by the New Democratic provincial government in the early 1980s, to fight the possible takeover of MTS. The Premier declined his advice. The next day, upon questioning by Mr. Doer, Premier Filmon responded:

... I indicated our outrage and our determination to fight this matter in whatever way we could. Not only have I written to the Honourable Marcel Masse this morning indicating our absolute opposition to this an insisting that he withdraw his proposal at the present time, but I have been in touch this morning with Premier Devine [Saskatchewan] and we have agreed that together we will both be in touch with Premier Getty [Alberta]. We will pool all of our resources and we will act collectively to fight this in every way that we have at our disposal including whatever legal means.

I have indicated publicly and I will confirm to all members of the Legislature that we are investigating every possible means to stop the federal government, including opinions from our lawyers for the Crown, constitutional jurisdictional opinions and whatever we can get. We have also suggested that

\textsuperscript{284} Ibid., 1965.
\textsuperscript{285} Ibid.
together we can collectively share information and support each other's efforts with regard to Saskatchewan and Alberta to get all three prairies provinces to fight this particular issue, Mr. Speaker. We will do everything within our means. I have written to the Honourable Mr. Masse and indicated to him this is totally unacceptable, and we will fight this and oppose it with every means that we have available to us.\footnote{286 Legislative Assembly of Manitoba. Debates and Proceedings. October 19, 1989, 2004.}

Consequently, the Prairies Telco Alliance was formed among the three Ministers of Communications from Manitoba, Alberta and Saskatchewan to press the federal government to withdraw the bill to amend the Railway Act. The following day, Gary Doer, Leader of the New Democratic Party noted that there was very little opportunity to win in court against the federal government and once again pressed the provincial government to form a grass-roots campaign. Premier Filmon declared that his government was trying to get the bill "stopped in its tracks rather than have the long-term process of attempting to get people to sign petitions".\footnote{287 Ibid., 2054.}

The issue fell silent until February 1990, when Gary Doer referred to a speech by Marcel Masse in which it was stated that there was a federal-provincial agreement dealing with communications and asked the Premier to table any agreement. Premier Filmon responded as follows:

Mr. Speaker, I can tell the Member that the western Ministers of telecommunications of Saskatchewan, Alberta and Manitoba met with Mr. Masse in December. We had an agreement at that time that officials would consult over a period of time to work out some parameters and deal with the draft Bill that he proposed and that Mr. Masse would get back with these Ministers at some point in early February, and we would deal with it.

At this point in time that consultation process is still going on and Mr. Masse still has to get back to us with regard to meeting with us with regard to the questions of further jurisdiction on the telephone companies in western Canada.\footnote{288 Legislative Assembly of Manitoba. Debates and Proceedings. February 16, 1990, 5342.}

AGT was privatized and fell under federal jurisdiction. Then on January 22, 1991, Glen Findlay, Minister responsible for Telecommunications, Government of Manitoba, and Marcel Masse, federal Minister of Communications, reached an agreement, a Memorandum of Understanding respecting Telecommunications. In its preamble the Memorandum stated:
The Minister of Communications for Canada and the Minister responsible for Telecommunications in Manitoba agree that it is in the public interest that Canadian telecommunications policy provide for the orderly development of telecommunications in Canada, and foster the continued development of reliable, efficient and diverse telecommunications systems and services. In pursuing these objectives Canadian telecommunications policy must be sensitive and recognize regional social, economic and geographic circumstances, while helping to forge effective links between various regions of the country and ensuring that telecommunications systems and services support the Canadian economy in a globalized, information-based economic environment.289

With the advantage of hindsight and reading most carefully between the lines, these motherhood phrases could be interpreted to suggest that the Province was adopting a more competitive outlook as being in the public interest. As Mr. Doer pointed out,

... lately we see the provincial government slowly but surely moving in the competitive area. Its brief before the CRTC committee meetings in Winnipeg stated that they, in fact, endorsed the principle of competition and saw no reason to prevent the introduction of long-distance service, which is really the unscrambling of the telecommunications omelet in this province.290

This was the crux of the matter. A monopoly environment allowed a telecommunications policy that supported universal affordable service to flourish by using the long-distance revenues, priced above cost, to support local service, priced below cost. As the monopoly environment was eaten away by competition, “rate rebalancing” (that is, decreasing long-distance rates to cost and increasing local rates to their actual cost) took its place. The resulting collateral damage was residential and rural subscribers. Business customers came to the forefront of public interest “in a globalized, information-based, economic environment”.

In the Memorandum, both Ministers agreed to a “single Canadian telecommunications policy as the basis for support, enhancement and growth of telecommunications throughout Canada” but, “such a policy must be sensitive to regional needs and be developed through consultation with provincial governments”. More importantly, both Ministers agreed that “regulation will be the responsibility of a single regulator for those companies falling under federal jurisdiction”. What did Manitoba get in return for agreeing to federal jurisdiction

besides polite phraseology of sensitivity to regional interests? The Ministers agreed to the following mechanisms by which these principles were to be implemented:

(a) A Conference of Ministers will be established, to meet annually, composed of the Ministers of Communications and Ministers authorized by provincial and territorial governments to consult with the Minister of Communications on telecommunications policy.

(b) After consultation with the Minister responsible for Telecommunications in Manitoba, the Minister of Communications will recommend to the Governor-in-Council the appointment to the Canadian Radio-television Commission (CRTC) of a full time Commissioner to be resident in Manitoba, and the continuation of the CRTC office in the province.

(c) The commissioner resident in Manitoba and the regional office should have access to sufficient resources to contribute effectively to the capacity of the CRTC to analyze and reflect the circumstances and concerns of Manitobans in the regulatory process.

(d) The Minister responsible for Telecommunications in Manitoba may at any time request the Minister of Communications to establish a panel of experts to conduct an inquiry into any matter of particular interest to Manitoba. The membership of such panels, which shall include a majority of Manitobans, will be decided in consultation with the Minister responsible for Telecommunications in Manitoba. In addition, the federal legislation will provide the CRTC with the authority to establish inquiry panels consisting of a majority of Manitoba residents, which may include the Commissioner resident in Manitoba, to conduct inquiries on any matter which affects the Manitoba Telephone System (MTS).

(e) When the exercise of authority by the Minister of Communications or by the Governor-in-Council will have a substantial impact the Manitoba Telephone System, there will be consultation with Manitoba, and such consultation will take place prior to the exercise of such authority. This covers the following instances:

- when the Minister of Communications exercises his authority to grant, amend or renew a license for a facilities-based carrier, and
- when the Governor-in-Council exercises its authority to affect policies or decisions of the CRTC through direction, response to a petition for review of a CRTC decision, or variance of a decision.

Furthermore, processes relating to licensing, issuance of directions to the CRTC and review of CRTC decision will be subject to adequate advance notification, so that the Government of Manitoba will be aware of and may comment on such processes as they relate to any carrier.

The annual Conference of Ministers never took place but, Manitoba did receive its own Commissioner to ensure that the federal regulatory authority would be sensitive to its regional interests. However, in MTS first appearance before the CRTC, the resident Manitoba
Commissioner was not a part of the panel deciding the matter and one of the issues to be decided in Decision 5-21\textsuperscript{291} was a consideration of the appropriate regulatory framework for MTS.

The Memorandum also set down arrangements for a transitional period, beginning on the date on which federal regulatory authority comes into effect [December 31, 1993] and ending on March 31, 1995. The transitional arrangements were as follows:

(a) Prior to the commencement of the transitional period, a Group of Experts will be established by the Minister of Communications to consider options for economic regulation of MTS during the transition period. The Minister of Communications will accept nominations to the Group from the Minister responsible for Telecommunications in Manitoba. The Chairman must be acceptable to both parties. The Group of Experts will, within six months of its appointment, bring forward to the Minister of Communications recommendations regarding an appropriate form of economic regulation to be applied to MTS for the transitional period to 31 March 1995. The Minister of Communications, after consultation with the Manitoba Minister responsible for Telecommunications in Manitoba, will take all appropriate actions regarding the implementation of the recommendations of the Group of Experts.

(b) During this transitional period, steps will be taken as necessary to ensure a smooth transition to federal regulation for MTS. The Minister will, in the application of powers available to him, respect the interests of Manitoba. Transitional arrangements, while not compromising the ability of the CRTC to regulate effectively, shall ensure that all decisions, including decisions regarding rates, tariffs, service areas and levels of service, applied by MTS up to the date when federal regulatory becomes effective, will be deemed to have been made by the CRTC, and such decisions shall not be altered except through an appropriate public process.

(c) At the end of the transition period, the regulation of MTS will be evaluated by the CRTC through a public process, and the results of the evaluation will form the basis for the development of future regulatory methodology.\textsuperscript{292}

In accordance with the transitional arrangements a “Group of Experts”, known as the Federal Prairies Task Force on Telecommunications Regulation, was appointed with Jean-Pierre Mongeau, a former Commissioner with the CRTC, as its chair. In September 1991, MTS responded to the questions asked of it by the Task Force. While the Task Force reported

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back to the Minister of Communications and the Minister responsible for Telecommunications in Manitoba, the report was never made public.\textsuperscript{293} Certain transitional arrangements, seemingly based on the Memorandum, were included in the \textit{Telecommunications Act}, which included:

Section 13, which contained a provision that the federal minister would notify the provincial minister of any intention to vary or rescind a decision by the Commission; and,

Section 75, which allowed the federal cabinet, after consultation with the Commission, to issue a directive to the Commission regarding the regulation of MTS for up to five years after its coming into force (October 1998). No directive was ever issued in that five year period.

While provision had been made for a public hearing to consider the method of regulation for MTS, in response a formal question by the CRTC as to whether MTS could "show cause" as to why its landmark Decision 94-19 should not apply to it, MTS responded that it could show no reason why Decision 94-19 should not apply. However, the Consumers Association and the Manitoba Society of Seniors objected to not holding a public hearing to consider the matter and, subsequently, in the Split Rate Base proceeding\textsuperscript{294} before the CRTC, one of the issues to be decided was the appropriate mechanism for the regulation of MTS. MTS was directed to take into account its status as a Crown corporation in its evidence concerning the application of earnings regulation. MTS argued that it derived no competitive advantage from its status as a Crown corporation, and that in fact it was disadvantaged in the marketplace because of its capital structure. MTS submitted that during a transitional period, rate of return regulation should apply on the basis of a deemed capital structure and an imputed cost of capital with an allowed rate of return similar to other Stentor companies regulated by the Commission. MTS stated that, since it faced the same business risks as the privately owed telecommunications companies, it should have a similar capital structure, and should therefore increase its level of equity. MTS maintained that since its only source of equity was retained earnings, increasing its equity would take time. While the Commission agreed with MTS to being subject to rate of return regulation and endorsed the company's

\textsuperscript{293} During one of the final PUB hearings in 1993, the report was subpoenaed by the Consumers Association and the Manitoba Society of Seniors. MTS was compelled to produce the report but, it could not be used as evidence for any party. No reference to the Report was made by the PUB in its final decision.
goal of reducing the debt component of its capital structure over time, it denied MTS’ proposal that it be regulated using a deemed capital structure and noted that MTS could move towards a more conservative capital structure over time. Whether MTS had that time, in light of increasing competition, was a matter of debate.

MTS, the lone provincial Crown corporation, would be regulated as all other telecommunications companies in Canada were regulated. The federal regulation of the moment followed a policy of the aggressive introduction of competition. As the CRTC was later to discover in its proceeding to consider Service to High-Cost Serving Areas\textsuperscript{296}, a competitive telecommunications environment does not foster and, indeed, inhibits a policy of universal affordable service. The prerequisite to a viable provincial Crown telecommunications corporation was a monopoly environment conducive to such a public policy.

\textsuperscript{294} Telecom Decision CRTC 95-21 Implementation of Regulatory framework - Splitting the Rate Base and Related Issues. Ottawa: 31 October 1995.
\textsuperscript{295} Ibid.
\textsuperscript{296} Canadian Radio-television and Telecommunications Commission, Telecom Public Notice CRTC 97-42. To date, the CRTC has not issued its decision.
CHAPTER VIII
CONCLUSION

Did federal regulation of Canadian telecommunications affect provincial public policy directed by MTS? Yes. How and to what extent federal regulation effected the Crown corporation’s ability to pursue public policy is more difficult to answer.

Within twenty years, a number of technological changes placed in doubt the continued desirability of the telecommunications monopoly so that in less than ten years, the Canadian telecommunications industry went from a provincially and federally regulated monopoly to a federally regulated competitive marketplace. These technological changes have altered the structure of the telecommunications markets and have brought into question the role of governments in this industry.297

Changing technology dynamically increased the speed and capacity of the information exchange in telecommunications; moreover, the exchange now takes place at a lower cost. Plain old telephone service (POTS) has turned into a converging network of networks that provides numerous telecommunication services.

Originally, it was the building of the telecommunications infrastructure to provide universal service that provided the justification for granting telephone companies in Canada a regulated monopoly. With the achievement of universal telecommunications service in Canada in conjunction with technological change, came the demand for lower rates as well as new and enhanced telecommunications services, especially by corporate users. The opportunity for alternate telecommunications suppliers to provide specific services at lower rates than the traditional telephone companies was created by this technological change. Access to the telecommunications network was seen as the essential component to initiate competition in telecommunications. Such access was provided in Decision 92-12298 when the CRTC introduced regulated long-distance competition in Canada. This Decision brought forth momentous changes in the Canadian telecommunications industry, as a proliferation of

alternate telecommunications suppliers emerged to compete with the traditional telephone companies.

Access to the telecommunications network continues to be regulated by the CRTC to enable competition for new service providers in each telecommunications service. In response to the changing technology and resulting competitive marketplace, the former Canadian telecommunications monopoly fragmented only to realign itself through global interconnections. At the beginning of the twentieth century, there was a movement towards provincially pertinent and, on the prairies, provincially-owned telephone companies to develop a universal telecommunications network. At the end of the century, a series of mergers in telecommunications carriers have meant national and global alliances. Government "deregulation" and the opening of the competitive telecommunications market have broken up the regional monopolies that used to dominate Canadian telecommunications. While consumers have benefited with lower long-distance rates and more services, the main beneficiary has been business, as telecommunications was redefined from a purely domestic industry into an international trade issue.

Crown corporations and regulation both act as public policy instruments. In Canada, both instruments have been used to implement public policy objectives such as setting rates and cross-subsidization between different types of consumers. However in telecommunications, particularly on the prairies, the creation of provincially-owned telecommunications companies was the result of specific legal and historical circumstances. In the case of MTS, it also was created to fulfill a public policy objective, that is "... preventing the waste of several millions of dollars of capital as well as the extra cost to the telephone user".299 Thus, choosing the corporate form has been a way to combine public ownership with public accountability and business expertise. The objective has been to permit Crown corporations a measure of political direction and still allow sufficient freedom for their managers to operate in a business-like fashion. However, although it may be obscure at times, there is some public policy directive which underlies the existence of a Crown corporation.

The two main public policy objectives examined in the thesis are:

299 Manitoba, People of Service: A Brief History of MTS (Winnipeg,: The Manitoba Telephoan System, 1970)
1. the goal of developing and integrating the country, or some version thereof, when market signals are such that private investors are unwilling to make certain kinds of investments or take certain kinds of risks (development); and
2. the desire to develop a national or provincial identity or to preserve Canadian or provincial control over certain sectors of the economy in the face of pending foreign investment (nationalism).

First, the Crown corporation, as seen in the case of MTS, was set-up in a monopoly utility environment because the private sector (Bell) was unwilling to make such an investment and develop rural service throughout Manitoba. Second, MTS was used to enhance provincial identity by providing Manitobans the benefit of lower telephone costs.

However, choosing public ownership as a public policy instrument necessitates the assurance of accountability to the government, not only in terms of the corporation's performance, but also in terms of its achievement of public policy directives. The Manitoba governments enacted legislation to ensure public scrutiny and accountability of its Crown corporations. MTS traditionally was scrutinized by the Public Utilities Board of Manitoba. Since the same government was setting policy for both instruments, no conflict existed between the regulator and the Crown corporation in the pursuit of public policy objectives. More recently, Crown corporations were held accountable through such measures as the Public Investment Corporation of Manitoba and the Crown Corporations Council. Thus, in Manitoba at least, an elaborate framework of accountability was constructed that may have resulted in tipping the balance maintained by Crown corporations towards a public policy environment rather than commercial performance.

On the other hand, technological change evoked competitive forces in Canadian telecommunications that created strains within the traditional system of cross-subsidization. Following the competitive principle of driving prices toward cost makes the public policy principle of cross-subsidization to support universal affordable telecommunications service unsustainable. Thus, the ability of MTS, as a Crown corporation, to pursue public policy that had cross-subsidization as its basis, and for which it was publicly accountable, became dubious in the face of federally regulated telecommunications competition. Furthermore, the
continued appropriateness of the public objectives pursued by the provincially-owned Crown corporations was questioned.\textsuperscript{300}

While public ownership of telecommunications companies was the dominant public policy instrument on the prairies, regulation was the public policy instrument of choice elsewhere in Canada. In addition, regulatory authority was divided between federal and provincial governments with initially only Bell and BC Tel being federally regulated. The prevalent argument for the regulation of telecommunications was that telecommunications formed a natural monopoly because of economies of scale and that a single seller would dominate the industry. Regulatory theory of the time called out for regulation to act as a substitute for competition and protect consumers from exploitation by telecommunications monopolies. Regulation became a trade-off between public and private interests. However, the regulated monopoly provided telecommunications producers benefits such that, with the coming of technological changes, the benefits to producers seem to tip the scale to the disadvantage of consumers in terms of the range of services and their relative cost.

Federalism blurred the areas regulated and enforced in telecommunications. Regulatory conflicts appeared because of overlapping regulatory responsibilities and constitutional concerns. As long as the telecommunications industry was relatively static, the fragmentation of Canadian regulatory authority over telecommunications was tolerated. However, this became decreasingly the case with the development of new technologies and the demand for more services and lower prices. The business lobby determined that regional monopoly telephone companies, especially government-owned telephone companies, could not offer them a comparable range of equipment and services as cheaply as a competitive, and privately-owned, telecommunication providers. In Manitoba, business users eventually persuaded the government that the region could be at a substantial disadvantage if competitive restrictions were not relaxed. Slow at the outset, the CRTC became an enthusiastic promoter of regulated competition in Canadian telecommunications. However, its initial decision to liberalize long-distance markets was consistent with an emerging policy trend.

\textsuperscript{300} Economic Council of Canada. \textit{Minding the Public's Business}. (Ottawa: Minister of Supply and Services, 1986) 43.
Divided regulatory jurisdiction hindered the development of a competitive telecommunications environment. Technological and economic changes forced a change in constitutional jurisdiction. The Constitution did not assign jurisdiction over telecommunications to either the federal parliament or the provincial legislatures so that the courts came to interpret the *Constitution Act, 1867*, such that “judge-made” or case law elaborated on the constitutional jurisdiction to eventually assign authority to the federal government. A series of telecommunications cases incrementally gave jurisdiction to the federal parliament.

The *Bell Telephone* case held that Bell was under federal jurisdiction. Whether or not the company’s local or long-distance undertakings were dominant, a communication undertaking is subject to the regulation of only one level of government once an undertaking is engaged in “continuous and regular” interprovincial activity. In the *Radio Reference* case radio communication was held to be under exclusive federal control even though its new transmitting and receiving technology combined national and local aspects. The *Capital Cities* and *Dionne* decisions examined the new technology of cable television and sustained federal jurisdiction over broadcasting. The questions were determined according to the principle of exclusive legislative authority because they were functionally interrelated local, national and international systems.

The *AGT* case ended the jurisdictional conflict in the federal government’s favour. AGT was a federal communications undertaking because of its physical interconnection the Alberta companies to telecommunications companies operating outside of Alberta. AGT also formed an integral part, through contractual and organizational mechanisms, to a national telecommunications system, Telecom Canada. However, AGT and the two other provincial Crown corporations, SaskTel and MTS, enjoyed Crown immunity from federal regulation.

The *Telecommunications Act* brought all Canadian telecommunications carriers under federal jurisdiction. The *Act* contains provisions to address provincial concerns as to federal regulatory decision-making being regionally sensitive, but those provisions were never acted upon. Thus, by 1993 the provinces no longer had a say in telecommunications policy and MTS, a provincially-owned telecommunications corporation, was held accountable to both its owners and the federal regulator.
MTS had been set-up to build a telecommunications network throughout Manitoba at a lower cost to its users. Since its early years, MTS' rates consistently were the lowest, or among the lowest, in Canada. In 1988, the Manitoba government directed MTS to pursue a new policy called "Service for the Future" that was to set higher standards for basic telephone service in the Province of Manitoba and provide the same level of service, at similar rates, to rural and urban subscribers alike. Service for the Future came at considerable cost to MTS and was based upon subsidization of urban to rural subscribers. Such cross-subsidization can only be sustained in a monopoly telecommunications environment.

Even though it was extended over several years (1988 to 1996), Service for the Future eventually cost $620 million and forced MTS to continue an almost 90-per-cent debt ratio - the highest debt-to-equity ratio of all the regional telecommunications companies. Initially, MTS was able to meet its increasing construction costs through long-distance revenues. However, with the introduction of competition and the lowering of long-distance rates, MTS faced declining revenues.

The basis of MTS' public policy initiatives was a system of cross-subsidization of rural-to-urban and business-to-residential subscribers to ensure a telecommunications network throughout the province that would provide similar services to all its subscribers at similar prices. In Canadian telecommunications, especially after the introduction of microwave technology, the cost of providing long-distance service was less that its price so that, under a monopoly, telecommunications carriers made substantial profits on long-distance service. On the other hand, the cost of residential service was higher than its price, whereas the cost of business service was generally less than its price. Consequently, business users justifiably felt that their telecommunications costs, especially for long-distance, were much higher than the cost to the telecommunications companies of providing the service. In Manitoba, telecommunications public policy was also predicated on ensuring that rural areas were serviced in a similar manner to urban communities. Therefore, under Service for the Future, Winnipeg residents subsidized their rural counterparts by approximately 10 cents on their phone bills.

At the outset, all political parties in Manitoba recognized the threat federal jurisdiction posed to local service at lower rates. Following the Supreme Court's decision in the AGT
case, provincial governments on the prairies attempted to withstand the inevitable jurisdiction of the federal government on even provincially-owned Crown telecommunications corporations. With the privatization of AGT, Alberta’s opposition fell by the wayside. In the Memorandum of Understanding respecting Telecommunications, Manitoba recognized a single Canadian telecommunications policy. Although Canadian telecommunications policy was, and is, to be sensitive to regional needs, the federal regulator determines what is best for the region. The CRTC sees a competitive telecommunications environment as best for Canada. Of a more subtle nature is the difficulty of governments, either federal or provincial, to argue against competition. The conventional thinking of today sees competition as a means to increase consumer choice and lower costs. Telecommunications competition has been the forerunner of competition in other regulated utilities such as gas and electricity.

One could say it was the ‘domino effect’ that brought about the demise of the pursuit of provincial public policy through provincially-owned telecommunications corporations such as MTS. Technology changed the structure of the Canadian telecommunications industry which forced changes to the regulatory jurisdiction of telecommunications. MTS was unable to succeed at its provincial public policy objectives of ensuring similar service at lower cost throughout Manitoba, for which it was held accountable by its owners. Moreover, it was unable to succeed in a federal regulatory environment under the CRTC, which directed MTS to implement a competition policy, the success of which would result in the demise of its provincial policy objectives.
SOURCES CONSULTED


Address before the Standing Senate Committee on Transport and Communications by David Colville, Vice-Chairman Telecommunications, Canadian Radio-television and Telecommunications Commission. Ottawa: December 5, 1995.


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VITA AUCTORIS

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