BRIEF ON THE TELECOMMUNICATIONS BILL

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INTRODUCTION

In general, the Telecommunications Bill is directed to the regulation of the telecommunications services industry. But the telecommunications services industry in Canada, as in most technologically developed countries, is not structurally uniform; rather it is pluralistic in nature. Its basic components are:

(i) the broadcasting segment, which is partly publicly and partly privately owned;

(ii) the public telephone segment, which is also partly publicly and partly privately owned, and is characterized by geographic monopolies;

(iii) the cable television segment which is generally privately owned, and is also characterized by geographic monopolies but on a smaller scale than the public telephone monopoly segment; and

(iv) the private line voice services and data communications segment which is again partly publicly and partly privately owned, by the telephone companies and CNCP Telecommunications (cable television companies are commencing to branch out into this segment, also).

In those four segments of the telecommunications services industry, competition prevails only in the broadcasting and in the private line voice services and data communications segments.

The Bill recognizes that the telecommunications services industry in Canada is pluralistic and that the regulatory requirements applying to one segment are not the same as those in relation to other segments. Thus, the Bill differentiates between "broadcasting undertakings" (which include the broadcasting and the cable TV segments) and "telecommunication undertakings" (which include the public telephone and the private line voice services and data communications segments). Parts III and IV of the Bill deal with the former, and Part V with the latter.

The Bill does not, however, take into account all material distinctions in the plurality which constitutes the telecommunications services industry, and to the extent that it attempts to impose a more or less uniform regulatory regime on the industry, it is prejudicial to the proper and desirable development of telecommunications in Canada.

One of the most significant aspects of the telecommunications industry is that, apart from broadcasting, the public telephone service at present constitutes 85-90% of the market. This is clearly a portion of the telecommunications services industry which, being a monopoly, requires close regulation in the public interest, and the Bill, insofar as it is not directed to broadcasting, must therefore be largely concerned with regulation of the public telephone monopolies.

On the other hand, the other 10-15% of the market has not been characterized by monopoly but by vigorous and effective competition. That is the market for private line voice services and

data communications. The market for such services is expanding at a rapid rate, in part due to technological development, and in part due to the forces of competition which stimulate innovation in the attempt to better satisfy the requirements of users of such telecommunications services. As a result of this competition, Canadians have available to them one of the best private line and data communications systems in the world. In a recent submission to the Canadian Radio-television and Telecommunications Commission, the Bell Telephone Company of Canada said:

> "Out of that mix of monopoly, competition and cooperation between the two competitors, has evolved for Canada a telecommunication service which has been recognized to be one of the finest in the world by this Commission, by CNCP and by many interveners."

In a recent proceeding before the CRTC, numerous briefs were submitted to the Commission favouring competition in Canada in the provision of data communications services, including briefs by Calgary Chamber of Commerce, Canadian Airlines Telecommunications Assocation, Canadian Association of Broadcasters, Canadian Association of Data Processing Service Organizations, Canadian Business Equipment Manufacturers Association, Canadian Industrial Communications Assembly, Canadian Information Processing Society, The Canadian Manufacturers Association, Canadian Petroleum Association, the Canadian Press, Coopérative Fédérée de Québec, Fédération des Caisses d'Entraide Economique du Québec, The Business Intervenors Society of Alberta and Pharmaceutical Manufacturers Association of Canada.

It is this competitive private line voice service and data communications segment of the telecommunications services industry in Canada which will be responsible for the development of the much heralded "information society".

The regulatory requirements of a competitive environment are quite different from those of the monopolistic public telephone service. The forces of competition themselves tend to promote quality of service, innovation, efficiency, low cost and prices, and other public benefits, the achievement of which is the object of regulation in the case of monopolies.

The Bill should, therefore, have treated the rapidly expanding competitive segment of the industry quite differently from the monopolistic public telephone service - but it does not. It is as if the framers of the legislation saw only the 85-90% of the industry, that is, the public telephone segment, and overlooked the rapidly expanding competitive market which stands to contribute so much to Canada, provided it is not shackled by unnecessary regulation, that is, by regulation for regulation's sake.

It is this aspect of the Bill which most concerns CNCP Telecommunications, because the competitive private line voice services and data communications market is the market which CNCP serves.

It is the position of CNCP that neither the statement of telecommunications policy for Canada (Clause 3 of the Bill) nor the regulatory provisions embodied in the Bill are designed to promote the public interest in the development of this market.

TELECOMMUNICATIONS POLICY FOR CANADA

The fundamental flaw in the telcommunications policy formulated in Clause 3 of the Bill is revealed in the following language:

> "It is hereby declared that ... the telecommunication policy for Canada enunciated in this section can best be achieved by providing ... for the regulation of telecommunication undertakings over which the Parliament of Canada has legislative authority, by a single independent public body."

While CNCP agrees with the notion of regulation by a single independent public body, it is concerned that the entire telecommunications policy for Canada is to be achieved solely by regulation. Not a single word is said of the forces of competition in achieving that policy, notwithstanding that they have contributed to the production of one of the finest telecommunications systems in the world!

Compare that view of the means of achieving public policy with the view expressed in the Bill to enact the Competition Act:

> "Whereas a central purpose of Canadian public policy is to promote the national interest and the interest of individual Canadians by providing an economic environment that is conducive to the efficient allocation and utilization of society's resources, stimulates innovation in technology and organization, expands opportunities relating to both domestic and export markets and encourages the transmission of those benefits to society in an equitable manner;
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> And Whereas one of the basic conditions requisite to the achievement of that purpose is the creation and maintenance of flexible, adaptable and dynamic Canadian economy that will facilitate the movement of talents and resources in response to market incentives, that will reduce or remove barriers to such mobility, except where such barriers may be inherent in economies of scale or in the achievement of other savings of resources, and that will protect freedom of economic opportunity and choice by discouraging unnecessary concentration and the predatory exercise of economic power and by reducing the need for detailed public regulation of economic activity;

> And Whereas the effective functioning of such a market economy may only be ensured through the recognition and encouragement of the role of competition in the Canadian economy as a matter of national policy by means of the enactment of general laws of general application throughout Canada and by the administration of such laws in a consistent and uniform manner;"

The above statement of economic philosophy favours the reduction of "detailed public regulation of economic activity" and the "encouragement of the role of competition in the Canadian economy as a matter of national policy", whereas the Telecommunications Bill favours regulation and says nothing about competition, except in Clause 56 which is designed to restrict competition.

The difference can be explained only by the fact that the framers of the Telecommunications Bill have confined their attention to the public telephone monopoly and broadcasting segments, and have failed to address themselves to the requirements of the competitive and dynamic data communications sector where the main potential for future development lies. This is a fundamental error in the basic philosophy of the Bill and it does not portend well for the future of telecommunications in Canada.

COMPETITION IN THE PROVISION OF TELECOMMUNICATIONS SERVICES

In a statement issued upon the decision of the Governor in Council not to interfere with the CNCP/Bell system interconnection order of the CRTC, the present Minister of Communications said:

> "We were satisfied ... that the effect of opening up the telephone system to greater competition in business services ... would create significant benefits for the economy in general."

and further that:

> "The Government continues to believe that the public interest is well served by an element of competition in the provision of certain business telecommunications facilities and services that clearly fall outside the family of monopoly telephone services, and supports the existence of CNCP Telecommunications as an alternative national supplier of such services."

and further that:

> "Competition in the provision of these services has in the past proved beneficial in spurring innovation and responsiveness to business needs."

Since competition in the provision of data communications and private line voice services is part of overall public policy for telecommunications in Canada, it is suggested that this element of public policy should be declared along with the nineteen or so other elements outlined in Clause 3 of the Bill.

Public policy regarding competition in this part of the telecommunications services industry needs to be refined in respect of new entrants and value-added carriers, and these matters should be specifically dealt with in the Bill. For example, the issuance of a certificate of authorization to a new entrant should follow a public hearing and be subject to Canadian ownership, public interest and uniform regulatory criteria.

COMPETITION IN DOMESTIC MANUFACTURING

A further flaw in the basically anti-competitive thrust of the Bill relates to the manufacturing of telecommunications equipment. Clause 3 (a) declares that "production resources should be developed and administered so as to ... strengthen ... the economic fabric of Canada." Clause 3 (p) declares that "innovation and research ... should be promoted in order to ... strengthen the Canadian industries engaged in the ... manufacture of telecommunications systems and equipment."

However, it appears to be public policy in Canada that these commendable goals should be achieved by providing for the regulation of telecommunication undertakings, as declared in the concluding portion of Clause 3.

It is to be noted that Clause 2 so defines various expressions employed in the Bill that the expression "telecommunication undertaking" probably includes manufacturers of telecommunications equipment, and that the only provision expressly mentioning competition is designed to restrict competition between telecommunication undertakings. See Clause 56.

DIRECTIVES BY THE GOVERNOR IN COUNCIL

Clause 9 would authorize the Governor in Council "to issue directions to the Commission respecting the implementation of the telecommunications policy for Canada enunciated in Section 3." It is the submission of CNCP that this is wrong in principle and should be deleted from the Bill. It is also

inconsistent with the telecommunications policy itself which (in the closing words of Clause 3) calls for an "independent public body" to regulate telecommunication undertakings. The regulatory body cannot at one and the same time be both independent and subject to directives from the Cabinet. This view seems to be shared by the Federal Minister who referred to the freedom of the regulatory agency in his discussion paper presented at the Federal/Provincial Ministers Conference.

The telecommunications services industry is an essential and growing part of the infrastructure of the Canadian economy. It is an enormously complicated and rapidly evolving industry. Ad hoc decisions as to public policy in relation to the industry based upon immediate goals (as in the Telesat/TCTS matter) should be avoided because of the potential prejudice to the industry in the long term. Public policy for the long term should be enunciated by Parliament and its implementation left to a specialized tribunal such as the Commission. This means that the Governor in Council should not be authorized to issue policy directives to the Commission or to vary or revoke a decision of the Commission. This is also in line with the overall principles stated by the Federal Minister in his discussion paper and with the recommendation of the Lambert Commission. Both the Minister and the Lambert Commission took the position that the Governor in Council no longer had the right to vary or revoke a decision.

The above views have particular reference to matters affecting telecommunications carriers. It is recognized that, for some time, Cabinet has had a very restricted authority under the Broadcasting Act to issue directives to the Commission relating to broadcasting matters, but it has not had such authority with regard to the carriers.

If the Governor in Council is to have extended authority to formulate public policy on certain aspects of telecommunications, then such authority should be with regard to only those aspects where for some reason it would be impractical for Parliament to formulate public policy. Presumably that is the raison d'être of the relevant provisions of the Broadcasting Act. Those areas of policy-making which are to be left to the Governor in Council should be clearly delineated in the Bill.

Moreover, if the Governor in Council is to have such extended power, no policy directives should have any application to matters before the Commission at the time the directive is issued. In short, the rules ought not to be changed in the middle of the game. That would be most unfair, and would introduce an undesirable element of uncertainty into the regulatory process.

Any policy directive to be given by the Governor in Council should come into effect only after it has been tabled in the Senate and House of Commons and publicly aired as per the suggestion made by the Federal Minister in the first recommendation of his discussion paper.

> "A Parliamentary Committee could probably examine a direction of this type and receive comments on it from the industry and interested groups."

DELEGATION OF POWERS

Clause 7 would confer upon the Minister, in the broadest terms, the authority to delegate, with the approval of the Governor in Council, any of the Minister's or the Commission's powers, duties or functions to provincial regulatory bodies. Having regard to the very extensive powers the Bill would give to the Minister and the Commission, any of which could be delegated to provincial regulatory bodies, it is evident that this clause would authorize, in effect, the balkanization of the Canadian telecommunications services industry.

The telecommunications services industry in Canada is, and must continue to be, national in scope. The Trans Canada Telephone System, comprising the major telephone companies, provides telecommunications services from coast to coast. The same is true of Telesat Canada and CNCP Telecommunications. Proposals that the cable companies link themselves together by means of satellite circuitry indicate that their operations also will be national in scope.

Regulation of such enterprises in the interests of a healthy and efficient telecommunications system must be uniform and take into account national as well as local interests. Delegation of regulatory powers to ten provinces can only mean disparate regulation and emphasis on local rather than national interests. It would be costly and inefficient, and would work against the development of the telecommunications system in the public interest.

TO HAVE EFFECTIVE REGULATION OF LOCAL AND INTERPROVINCIAL SERVICES BY SEPARATE REGULATORY BODIES WHERE BOTH TYPES OF SERVICE ARE PROVIDED BY A COMPANY AS ONE UNDERTAKING OR ENTERPRISE WILL REQUIRE A NEW SET OF REGULATORY CRITERIA NOT COVERED IN THE BILL.

If there is to be the delegation of any regulatory powers at all, the authority to do so should be confined to matters where delegation would not hamper the proper development of telecommunications, and these should be specifically referred to in the legislation. The unrestricted character of Clause 7 makes it a potentially dangerous provision.

Consideration of the desirable regulatory structure for the telecommunications services industry should commence with the constitutional position. Legislative jurisdiction is predominantly federal. In the case of the members of TCTS (other than Telesat Canada) they each operate as one undertaking, both as a local and as an interprovincial telecommunications system, which brings them all within exclusive federal legislative jurisdiction. Cable companies, so long as they operate as "broadcasting receiving undertakings", fall within federal jurisdiction. Telesat Canada, Teleglobe Canada and CNCP are within exclusive federal jurisdiction. What is left to the provinces are local telephone companies which do not operate interprovincially.

The constitutional position is based on sound ground and, rather than abandon it in the face of provincial pressure by delegating regulatory authority, it is suggested that a regulatory tribunal having both federal and provincial appointees be established. It is recommended that each province (with the approval of the Governor in Council) appoint one member and the federal government appoint four members, for a total of fourteen members

(sixteen if the Yukon and Northwest Territorties are included as provinces).

In a matter before the tribunal involving more than one province the matter would be heard and decided by a panel consisting of seven members, three provincial appointees and four federal appointees. The three provincial appointees would be selected by the Chairman on the basis of (a) the degree of involvement in the matter of the province by whom the member was appointed and (b) if there is equal involvement among the provinces, on a rotating basis. The selection by the Chairman would not be subject to review. An arrangement such as this is necessary in order to restrict the size of the panel to a reasonable number of members.

In a matter before the tribunal involving only one province the matter would be heard and decided by a panel of three members, two provincial appointees and one federal appointee. One provincial member would be the member appointed by the province concerned, and the other would be selected by the Chairman on a rotating basis.

The Chairman would be a federal appointee, and the Vice Chairman a provincial appointee. All appointments to the tribunal should be for a period of years subject to removal for cause and only by a resolution of the Senate and House of Commons.

It is to be noted that, except where only one province would be involved, there would always be a majority of federal appointees sitting. If there were a provincial majority, it is to be expected that local interests would prevail over national interests.

It is also to be noted that what is contemplated here is a full exercise of federal legislative jurisdiction, embracing all members of TCTS in relation to their whole telecommunications undertakings. This is thought to be essential to effective regulation. While this will be an encroachment on the powers now (unconstitutionally) exercised by provincial regulatory bodies, it will expand provincial participation into interprovincial telecommunications regulation.

CABLE COMPANIES

Cable systems must be regarded as local distribution systems capable of handling many types of traffic other than what may be picked up at a head-end. In fact there is an increasing use of them for the carrying of other traffic and this trend will probably continue for some time to come. Viewed as local distribution systems, the cable systems should not be regulated under the broadcasting provisions of the Bill, as it proposes, but under the provisions regulating telecommunications carriers.

The basic link between cable operations and broadcasting is programming. If programming is to be regulated, then a common regulatory scheme can apply. In most other respects the cable systems should be treated as what they are, carriers.

The cable systems are exclusively local, and were it not for the broadcasting receiving aspect of their operations they would not fall within federal jurisdiction. As that aspect of their operations diminishes and new non-broadcasting roles are assumed, the justification for federal jurisdiction also diminishes. Provided that public policy contemplates the cable systems remaining as local undertakings, their transfer to provincial jurisdiction would not be prejudicial to effective regulation.

PROVISION OF COMPETITIVE PRIVATE LINE VOICE AND DATA COMMUNICATIONS SERVICES BY TELEPHONE COMPANIES

Where a telephone company provides both public telephone service and competitive services such as data communications and private line voice services, there is a danger that the competitive services will be priced so low as not to cover the true costs associated with them. Thus, the subscribers to the monopoly services may, in effect, subsidize the subscribers to the competitive services. A similar but not so important risk arises where a telephone company provides data processing services or information services, or a cable company provides non-programming services.

Such subsidization would be not only unfair to public telephone subscribers, but it also would be prejudicial to competition because the competing providers of competitive services, having no lucrative monopoly upon which to fall back, must price so as to cover their full costs.

The risk of this occurring is very real, and in fact is probably happening right now. Evidence adduced at the CNCP/Bell interconnection hearings related to the situation in both Canada and the U.S.A. tended to confirm this.

Theoretically, it would be possible through regulation to prevent such subsidization, and the CRTC in its Cost Inquiry is making strides in that direction. However, little or no attempt to deal with the matter is being made at the provincial level.

It is an incredibly complicated matter to separate the respective costs of monopolistic and competitive services when both are provided by the one supplier. It would facilitate the process substantially if a telephone company were permitted by law to provide competitive services only through an arm's-length subsidiary which would reimburse the parent company for circuits, etc., at tariffed rates on a non-discriminatory basis. In this connection it is important to note that regulation may have as its purpose either to:

1. replace competition, as in the case of the regulation of monopolies, or
2. promote competition, as in the case of the anti-combines legislation.

Because of the desirability of competition in the data communications and private line voice segment of the telecommunications services industry, it is necessary to regulate the monopolistic telephone companies in order to prevent anti-competitive practices on their part.