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Résumé de l'article

L'article 23 de la *Loi sur la radiodiffusion* prévoit que le gouverneur en conseil peut annuler ou renvoyer au Conseil de la radiodiffusion et des télécommunications canadiennes, pour un nouvel examen ou une nouvelle audition, l'attribution, la modification ou le renouvellement de toute licence de radiodiffusion. Cette disposition manque de précision et la procédure suivie par le Cabinet reste obscure. En effet l'on ne sait trop si des parties intéressées peuvent s'adresser au Cabinet, ou si leur demande l'atteindra effectivement.

Cet article analyse la législation pertinente, les situations dans lesquelles le Cabinet est intervenu (quelques-unes dans lesquelles il s'est abstenu), et les mécanismes de la procédure. Cette dernière partie est basée sur des interviews menées auprès de personnes participant à cette procédure, et elle en démontre le caractère possiblement inéquitable.

L'auteur conclut que le pouvoir de révision du Cabinet devrait être maintenu mais que sa mise en oeuvre devrait être orientée par des normes.

Cabinet Action and the CRTC: An Examination of Section 23 of the Broadcasting Act

Donna SOBLE KAUFMAN *

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Avant-propos

The basic research for this paper was carried out in Ottawa, Toronto and Montréal in 1984 and early 1985. Because there is very little current doctrine or case law available on the subject, I conducted a series of personal interviews in order to piece together the situation as it exists today. I am fortunate that so many participants in the process agreed to assist me in this project. They were more than generous with their time and the information they furnished was exceedingly helpful. They are, in alphabetical order: Lorne H. Abugov, André Bureau, Q.C., Jack Burghardt, M.P., Avrum Cohen, John T. Coleman, R.S. Engle, Edwin A. Goodman, Q.C., Alain Gourd, Senator Jerry Grafstein, The Honourable Herb Gray, P.C., Q.C., M.P., Denis Guay, Norah M.C. Hockin, William A. Howard, Ian A.M. Ironside, T. Gregory Kane, Dr. Jake V. Th. Knoppers, Dean R.A. Macdonald, Senator P. Michael Pitfield, P.C., Q.C., Robert Rabinovitch, Professor Ed Ratushny, Kathryn Robinson, Geoff Scott, M.P., and Shirley Serafini.

This article is substantially based on these interviews. All information has been verified to the extent that it was possible to do so. Facts which are not attributed to other sources were provided by one or more of the persons mentioned above.

Introduction

> It is doubtful whether anyone can define precisely some optimal balance among political, administrative and judicial mechanisms of review.[1]

It is the scope and purpose of this paper to examine the nature and extent of Cabinet review in relation to broadcasting decisions made by the

1. P.G. THOMAS, "Administrative law reform : legal versus political controls on administrative discretion", (1984) 27 *Canadian Public Administration* 120, 126.

Canadian Radio-television and Telecommunications Commission, an "independent public authority" created by the *Broadcasting Act*.[2]

The examination begins with a look at the relevant statutory enactments. This is followed by a discussion of the role of Cabinet and its members in the overall scheme of responsible government as it exists, in fact or in theory, in Canada today. The mechanics of the review process are set out, and the paper concludes with thoughts about this contentious procedure.

1. The Broadcasting Act

Section 23 of the *Broadcasting Act* states as follows:

23.(1) The issue, amendment or renewal by the Commission of any broadcasting licence may set aside, or may be referred back to the Commission for reconsideration and hearing by the Commission, by order of the Governor in Council made within sixty days after such issue, amendment or renewal, and subsection 19(4) shall not apply in respect of any such hearing.

(2) An order of the Governor in Council made under subsection (1) that refers back to the Commission for reconsideration and hearing by it the issue, amendment or renewal of a licence shall set forth the details of any matter that, in the opinion of the Governor in Council, is material to the application and that, in his opinion, the Commission failed to consider or to consider adequately.

(3) Where the issue, amendment or renewal of a broadcasting licence is referred back to the Commission under this section, the Commission shall reconsider the matter so referred back to it and, after a hearing as provided for by subsection (1), may

(*a*) rescind the issue of the licence;

23.(1) L'attribution, la modification ou le renouvellement par le Conseil de toute licence de radiodiffusion peuvent être annulés ou peuvent être renvoyés de nouveau au Conseil pour un nouvel examen et une nouvelle audition, sur décret du gouverneur en conseil rendu dans les soixante jours qui suivent cette attribution, cette modification ou ce renouvellement, et le paragraphe 19(4) ne s'applique pas relativement à une telle audition.

(2) Un décret du gouverneur en conseil rendu aux termes du paragraphe (1) qui renvoie de nouveau au Conseil, en vue d'un nouvel examen et d'une nouvelle audition, l'attribution, la modification ou le renouvellement d'une licence, doit énoncer les détails de toute question qui, de l'avis du gouverneur en conseil, est pertinente à la demande et que, selon lui, le Conseil a omis d'examiner ou d'examiner convenablement.

(3) Lorsque l'attribution, la modification ou le renouvellement d'une licence de radiodiffusion sont renvoyés de nouveau au Conseil en vertu du présent article, le Conseil doit examiner de nouveau la question ainsi renvoyée et, après l'audition prévue au paragraphe (1), il peut

a) annuler l'attribution de la licence;

2. R.S.C. 1970, c. B-11, as amended.

(*b*) rescind the issue of the licence and issue a licence on the same or different conditions to any other person;

(*c*) rescind the amendment or renewal; or

(*d*) confirm, either with or without change, variation or alteration, the issue, amendment or renewal.

(4) The issue, amendment or renewal by the Commission of any broadcasting licence that has been referred back to the Commission pursuant to subsection (1) and confirmed pursuant to paragraph (3)(*d*) may by set aside by order of the Governor in Council made within sixty days after such confirmation. 1967-68, c. 25, s. 23.

b) annuler l'attribution de la licence et attribuer une licence dans les mêmes conditions ou dans des conditions différentes à toute autre personne;

c) annuler la modification ou le renouvellement; ou

d) confirmer, avec ou sans changement, l'attribution, la modification ou le renouvellement.

(4) L'attribution, la modification ou le renouvellement par le Conseil de toute licence de radiodiffusion qui ont été renvoyés au Conseil en conformité du paragraphe (1) et confirmés en conformité de l'alinéa (3)*d*) peuvent être annulés par décret du gouverneur en conseil rendu dans les soixante jours qui suivent cette confirmation. 1967-68, c. 25, art. 23.

While these are *a posteriori* powers, it should be noted that, in virtue of section 27 of the same Act, the Governor in Council — Cabinet — also has the power to issue, from time to time, "Directions" to the Commission. There is, therefore, *a priori* control as well.[3] Furthermore, the CRTC itself has very wide powers to make regulations and set conditions for licensees.[4] Moreover, under the aegis of section 3, the Commission may — and does — on an *ad hoc* basis make far-reaching policy decisions for which it is not accountable because these decisions are seen as fulfilling its mandate to

3. At present, the power to give directions to the Commission is narrowly circumscribed by the Act. However, Bill C-20, which was read for the first time on December 20, 1984, would amend the *Canadian Radio-television and Telecommunications Act*, S.C. 1974-75-76, c. 49, to permit Cabinet to "issue to the Commission a direction concerning *any* matter that comes within the jurisdiction of the Commission" (emphasis added). The scope for *a priori* intervention would thus be almost limitless, save "in respect of the issuance of a broadcasting licence to a particular person or the amendment or renewal of a particular broadcasting licence" (*id.*).

4. This is done in virtue of s. 15 of the Act, which provides as follows:

15. Subject to this Act and the *Radio Act* and any directions to the Commission issued from time to time by the Governor in Council under the authority of this Act, the Commission shall regulate and supervise all aspects of the Canadian broadcasting system with a view to implementing the broadcasting policy enunciated in section 3 of this Act. 1967-68, c. 25, s. 15.

15. Sous réserve de la présente loi, de la *Loi sur la radio* et des instructions à l'intention du Conseil émises, à l'occasion, par le gouverneur en conseil sous l'autorité de la présente loi, le Conseil doit réglementer et surveiller tous les aspects du système de la radiodiffusion canadienne en vue de mettre en œuvre la politique de radiodiffusion énoncée dans l'article 3 de la présente loi. 1967-68, c. 25, art. 15.

regulate and supervise the Canadian broascasting system. However, as set out above, if the CRTC, in making such an *ad hoc* regulation, policy, or license condition does not conform with the policy objectives articulated (or sometimes even unarticulated) by Cabinet, the Governor in Council may set the decision aside or refer it back to the Commission for reconsideration and hearing.

It is important to note that section 23(1) is devoid of any guidelines. Nowhere, for instance, does it give the specific right to parties who feel aggrieved to seek relief by this route, nor does it indicate the procedure which Cabinet must follow. In these respects the section is rather unusual as a brief examination of two other acts will demonstrate.

The first is the *National Transportation Act*,[5] which, in section 64(1), provides that "The Governor in Council may at any time, *either upon petition of any party, person or company interested, or of his own motion, and without any petition or application*, vary or rescind any order, decision, rule or regulation of the Commission...".[6] Not only, then, does this provision permit the Governor in Council to "vary" a decision — a power which Cabinet does not possess in broadcasting matters — but it also spells out that interested parties may petition the Cabinet to examine their grievances.

The second example is section 7 of the *Criminal Records Act*,[7] which permits the Governor in Council, given certain conditions, to revoke a pardon granted by the National Parole Board. This is how the section reads in part:

> 7. A pardon may be revoked by the Governor in Council
>
> [...]
>
> (b) *upon evidence establishing to the satisfaction of the Governor in Council*
>
> (i) that the person to whom it was granted is no longer of good conduct, or
>
> (ii) that such person knowingly made a false or deceptive statement in relation to his application for the pardon, or knowingly concealed some material particular in relation to such application.[8]

5. R.S.C. 1970, c. N-17.
6. Emphasis added. For an interpretation of this section, see *The Jasper Park Chamber of Commerce et al. v. Governor General in Council*, [1983] 2 F.C. 98, 109 (F.C.A.). See also, on this point. L. VANDERVORT, *Political Control of Independent Administrative Agencies*, Study Paper prepared for the Law Reform Commission of Canada, Ottawa, Ministry of Supply and Services, 1979, p. 40, and C.C. JOHNSTON, The Canadian Radio-television and Telecommunication Commission: A Study of Administrative Procedure in the CRTC, (1980), 84.
7. R.S.C. 1970, c. C-12.
8. Emphasis added.

As can be seen, apart from the case where a person is convicted after a grant of pardon, the Governor in Council can act only upon proof which meets the standard set out in the Act. Here, then, is a case where a statute decrees *how* Cabinet must deal with an issue, and the key condition is the sufficiency of proof. The practical result of this is that where the evidence does not meet the minimum standard, the courts will intervene and set aside an Order in Council which contravenes the Act.[9]

It is instructive to trace the history of section 23 of the present *Broadcasting Act*, a section which is frequently, though incorrectly, said to create an appeal to the Cabinet. On second reading in the House of Commons of Bill C-163 (which created the Act), the Honourable Judy LaMarsh, Secretary of State and Minister responsible for piloting the Bill through the House, said of this section :

> There is one important matter with regard to the licensing power to which I should refer. It was stated in the white paper that the licensing power would be delegated to the regulatory authority — that was a proposal with which the standing committee concurred — but that provision would be made for appeals against licensing decisions to the governor in council. Although it has happened very seldom in the past that the recommendations of the B.B.G. have been rejected by the governor in council, the important thing to remember is that there have been occasions in the past when such recommendations were deemed to be contrary to the public interest, and it is certainly not without possibility that such a situation could occur again in the future.
>
> On closer consideration, Mr. Speaker, it was concluded that formal appeals to the governor in council would not be practical, but it is proposed that the governor in council should have the power, within a period of 60 days after a decision by the commission, to set aside a licensing decision or to refer it back to the commission for another public hearing. It should be noted that this does not give the government any power to issue a licence, nor does it give the government any power to nominate an acceptable licensee.[10]

A reading of the Minister's remarks gives us clear guidance as to the intention of the government which introduced the Bill. Section 23 was meant to be used by the Governor in Council, and *only* by the Governor in Council,

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9. *Desjardins v. Bouchard et al.*, (1982) 11 C.C.C. (3d) 167, where the Federal Court of Appeal held that, in view of the specific wording of the Act, the revocation of a pardon by Cabinet was a quasi-judicial proceeding and therefore subject to the tenets of natural justice. See also D. LEMIEUX, *Le contrôle judiciaire de l'action gouvernementale*, Montréal, C.E.J., 1981, p. 221 : "En général, les décisions prises par le Cabinet qu'elles soient à portée générale ou individuelle, relèvent de la politique pure. Cependant, les tribunaux ont admis que dans certaines situations exceptionnelles, le Cabinet tranchait des droits et devait agir dès lors de manière équitable, sinon quasi judiciaire, en permettant aux personnes ainsi affectées d'être informées à l'avance afin qu'elles puissent faire des représentations avant que la décision ne soit prise."

10. Hansard, November 1, 1967, 3753.

to set aside a licensing decision or to refer it back to the Commission for reconsideration and hearing. It was never intended to be a general appeal to cabinet by applicants, and attempts to apply the section in such a manner have not succeeded.[11] But Parliament, in establishing a regulatory tribunal to administer almost all aspects of broadcasting, was not prepared to give complete control to this new body, and it therefore reserved unto the Governor in Council the right to alter the regulatory process on purely political grounds. It should, however, be noted that the Minister was clear that this was not a power to issue a licence or direct the commission to grant a licence to a particular applicant. Read and interpreted this way, there is, under the *Broadcasting Act*, no place for an applicant to seek relief or redress if there is a substantial question of policy in issue from the applicant's point of view.[12]

One must, of course, distinguish between the setting of policy and the application of policy. The former, under the Canadian system, is always the prerogative of the government, while the latter may be delegated to a regulatory body with an expertise in the field, such as the CRTC. Moreover, one must distinguish between the function of a court and the function of an administrative tribunal. The former never deals with policy; the latter almost always does. Tribunals like the CRTC usually have the right to administer and, under certain conditions, even set policy.[13] The government, therefore, frequently will insert an override provision to keep for itself that which, in a cabinet system of government, rightfully belongs to the Cabinet.[14]

It is worthwhile at this juncture to examine the traditional notion of responsible government, where a Minister explains, defends and accepts responsibility for the actions of his department. As Dicey noted,[15] "ministerial responsibility means [...] in ordinary parlance the responsibility of Ministers to Parliament, or, the liability of Ministers to lose their offices if they cannot retain the confidence of the House of Commons". However, "used in its strict sense", it refers to "the legal responsibility of every Minister for every act of the Crown in which he takes part."

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11. Thus, news reports in 1984 that a Quebec City radio station had "appealed to cabinet" did not reflect the true situation: see *infra*, note 41.
12. Where relief is sought on questions of law or jurisdiction, a motion for leave to appeal may be addressed to the Federal Court of Canada: s. 26(1) of the *Broadcasting Act*.
13. Sometimes in interpreting s. 3 of the *Broadcasting Act*, the Commission consciously or otherwise will, in fact, make policy decisions.
14. Similarly, courts do not sanction privative clauses which attempt to oust the right to judicial review: see, for instance, J. A. KAVANAGH, *A Guide to Judicial Review*, 2nd ed., Toronto, Carswell, 1984, p. 83.
15. A.V. DICEY, *Introduction to the Study of the Law of the Constitution*, 10th ed., London: Macmillan; New York: St Martin's Press, 1960, p. 325.

This responsibility was feasible in the mid-nineteenth century, when the business of a government department was sufficiently manageable for one man to oversee personally. But these circumstances have long-since changed,[16] and with the rapid growth of state intervention solutions to deal with the ever-increasing volume of work had to be found. One response to the problem was the creation of administrative bodies — boards, tribunals and commissions — which could take over some of the tasks hitherto the domain of Ministers and their departments. An early example is given by John P. Mackintosh in his work on the British Cabinet :

> In 1834 the Poor Law Commission had been set up as an independent body to prevent undue pressure from Parliament. Thirteen years later it was brought under the control of the Cabinet and the Commons were told that this was to establish a parliamentary spokesman for the Board whom they could question and criticize. But at least as strong a motive was the desire to extend the same direct ministerial control over the Board as existed over other departments.[17]

The same is true today. Parliament declared its wish to create an "independent public authority" to regulate and supervise the Canadian broadcasting system, bearing in mind the objectives of the "broadcasting policy for Canada" enunciated in section 3 of the *Broadcasting Act.* However, in section 23, Cabinet was given, in certain circumstances, an ultimate veto. This power is always exercised on the recommendation of the Minister of Communications — the Minister "responsible" for the Act. On the one hand, then, as was the case in England with the Poor Law Commission, the CRTC was given independence, yet government retained a vital measure of control.[18] In the result, Cabinet may reject a technologically sound decision made by experts in favour of a politically acceptable one. However, where that is the case, the Minister may ultimately have to answer to the House. Thus, political review of regulatory decisions plays an important part in the Canadian administrative structure.[19] The United

16. This change was judicially noted in 1910, when Farwell L.J. felt compelled to observe — "bitterly", in the view of H.W.R. Wade (Administrative Law, 5th ed., 1982, 30) — that, "if ministerial responsibility were more than the mere shadow of a name, the matter would be less important, but as it is, the Courts are the only defence of the liberty of the subject against departmental aggression" : *Dyson v. A.-G.*, [1911] 1 K.B. 410, 424 (C.A.). See also R. DUSSAULT, *Traité de droit administratif canadien et québécois*, Québec, P.U.L., 1974, p. 1078 : "Aussi, bien que le pouvoir législatif demeure toujours le censeur possible du pouvoir exécutif, la relation qui existe entre ces deux pouvoirs peut, sur ce plan, être décrite en termes du subordination du premier au second" (footnotes omitted).

17. J.P. MACKINTOSH, *The British Cabinet*, 3rd ed., London, Stevens & Sons Ltd., 1977, p. 151.

18. For a full discussion of the role of administrative agencies in the context of responsible government in the U.K., see E.C.S. WADE and G.G. PHILLIPS, *Constitutional and administrative law*, 9th ed., by A.W. Bradley, London, Longman, 1977, p. 97 s.

19. A good description of this process is found in *Independent Administrative Agencies*, a Working Paper published by the Law Reform Commission of Canada, Ottawa, Ministry of

States, on the other hand, have a strong commitment to technocracy and the appearance is maintained that a regulatory system which is apolitical exists. This is in direct contrast to the Canadian position, where the necessity of politics in the regulatory process is acknowledged, while in the United States it seems to be hidden.[20] Canada openly admits, by including provisions for review by cabinet in statutes creating regulatory agencies, that technological answers make up only part of the data of the final decision. It is, then, a question of political philosophy to decide what is legitimate and necessary in the regulation-policy mix, and how abuse of the system can be avoided.

Historically, the United States Supreme Court is an interventionist Court in policy matters. An early American broadcasting case, *National Broadcasting Co., Inc. et al. v. United States* (the "NBC case"),[21] addressed the issue of whether the Federal Communications Commission had the authority to pass special (and far-reaching) regulations to apply to network radio stations. Justice Frankfurter, for the majority, held that, in essence, the comprehensive network broadcasting regulations enacted by the Commission represented a particularization of the Commission's conception of the public interest sought to be safeguarded by Congress in enacting the *Communications Act* of 1934.[22] Justice Frankfurter outlined the competing policies which the Commission had considered before passing the regulations in issue, and decided that the Court should not assert its personal views regarding the effective utilization of radio and thereby deny that the Commission was entitled to promulgate the regulations it had passed.

In Canada, where the regulatory process is not seen as necessarily apolitical, this sort of case might well have given rise to the responsible

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Supply and Services, 1980, p. 87: "Although appeals to courts are grounded on accepted standards and restricted to matters of record or, occasionally, clearly enunciated new material, Cabinet 'appeals' are quite different. They are really policy appeals replete with lobbying external to any formal written representations made, and allow for reversal on grounds of 'evidence' unrelated to the considerations an agency may have regarded as relevant. Such review may have a detrimental effect on agencies and detract from the integrity of the administrative process in the eyes of those who are parties to proceedings before agencies. To be reversed on such an appeal can be demoralizing and can contribute to a less than conscientious approach to agency responsibilities. This is particularly so when the appeal is not well documented and the reasons obscure."

20. An example of this is that under the *Communications Act* of 1934 (which creates the Federal Communications Commission), the FCC, an independent federal agency, is responsible directly to Congress. The President of the United States is not a member of Congress, nor are the members of his cabinet, but it is generally assumed that the President himself vets every major FCC decision. Moreover, the only review possible is judicial review by the Circuit Courts of Appeal: s. 402 of the Act.
21. (1943) 319 U.S. 190.
22. 47 U.S.C.

Minister raising the issue of "public interest" *proprio motu*: it certainly would not have been left to the courts.

2. The Interaction of Cabinet and the CRTC

The above discussion inevitably leads us into an examination of the mechanics of Cabinet review. It is essential here to broaden the focus of our approach and examine in some detail the inter-relationship between Cabinet and independent regulatory agencies and the dynamics of their interaction.

It is a mistake to believe that the CRTC, the Department of Communications and the Department of Justice function independently of each other. My research indicates that, in fact, they are, informally, in constant contact in an effort to oil the machine in the proper places to ensure it will run smoothly and efficiently. As a result, section 23 of the *Broadcasting Act* has been invoked rarely and has been applied even less often.[23]

As seen above, there can be both *a priori* and *a posteriori* government intervention in the policy-making of the CRTC. An example of the former is the Direction[24] issued pursuant to paragraph 22(1)(a) of the Act, respecting the issue and renewal of broadcasting licences to daily newspaper proprietors[25] — an *a priori* limitation of cross-ownership of newspapers and broadcasting stations. The accompanying "explanatory note" gives the policy reasons behind the Direction:

> This Direction is to ensure that, with certain exceptions, enterprises engaged in the publication of daily newspapers shall be prohibited from owning or controlling broadcasting undertakings operating in the same market area for the general purpose of fostering independent, competitive and diverse sources of news and view-points within Canada.[26]

There is a good rationale for the issuance of an *a priori* Direction from Cabinet on any issue which involves a fundamental policy decision. For instance, Cabinet may wish to make a decision as to whether the government will favour one specific technology over another. The issues at stake in the

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23. The Privy Council Office does not keep statistics on this point, but those involved in the process suggest that eight to ten petitions are received each year.
24. See *supra*, note 3.
25. P.C. 1982-2294, July 29, 1983. The background and legality of this Direction are discussed in *New Brunswick Broadcasting Co., Limited v. Canadian Radio-television and Telecommunications Commission*, (1984) 13 D.L.R. (4th) 77, where the Federal Court of Appeal held the Direction to have been validly made. This case is now before the Supreme Court of Canada, but note that the Direction was revoked on May 30, 1985: P.C. 1985-1735.
26. This note does not form part of the Direction, "but is intended only for information purposes".

consideration of such a decision would go far beyond the broad general mandate given the CRTC in section 15 of the Act, "to regulate and supervise all aspects of the Canadian broadcasting system with a view to implementing the broadcasting policy enunciated in section 3 of this Act".

On an informal level, there is a constant stream of statements of broad government policy which the CRTC is meant to take into consideration in its ongoing hearings. Because of the informality the CRTC today could say it is not legally bound by the *Broadcasting Act* (which is why new legislation with general policy directives emanating from elected people is thought to be necessary by the Minister of Communications).[27] Presently, the Minister of Communications is powerless to take any action vis-à-vis a CRTC regulation he disagrees with for policy reasons. He must wait until that policy is carried out, and then his — Cabinet's — only recourse is *a posteriori* by way of section 23 of the *Broadcasting Act.*

In summary, then, under present legislation, the Cabinet can enforce its will only by way of a Direction under section 27 or, under section 23, by way of an order setting aside or referring certain decisions back to the Commission for reconsideration and hearing. And ultimately, the Governor in Council, under section 23(4), may set aside any decision which has been re-heard and upheld by the CRTC. However, it is important to note that Cabinet is generally loath to change CRTC decisions and that this power is used sparingly. In this connection, it should again be emphasized that because the CRTC is completely independent in terms of specific decisions it makes, and because the Commission does not consult the Department of Communications regarding *particular* cases, it seems fitting that the responsible Minister, and ultimately the Cabinet, should have the recourse of review and revision available in this marriage of the parliamentary system and the regulatory process.

This, of course, puts into question the whole spectrum of the "political element" in the decision making of administrative agencies. One can readily imagine at one extreme the political element encompassing broad government policy and where this should lead, while at the other end, the political component would consist of lobbying for personal gain. And somewhere in the middle, the political element would embrace the ever-present influence of federal-provincial relations.[28] Each of these elements, among many others, would undoubtedly play a part in the dynamics of the inter-relationship between Cabinet and the CRTC. Indeed, CRTC decisions often reflect the very real tension between national objectives — the "public interest" — and vested private interests.

27. See *supra*, note 3.

28. See also *infra*, note 40.

A former chairman of the CRTC was quoted as saying that Cabinet should no longer be allowed to review or overturn Commission decisions because "vested interests and lobbyists" can put pressure on Ministers too easily. "Appeals to the Cabinet", he said, "undermine the benefits and advantages sought in the creation of independent regulatory agencies".[29] And one author stated that "traditional parliamentary mechanisms, such as ministerial responsibility, questions, debates and committee investigations, are said to no longer provide adequate checks upon the numerous dispersed discretions to administrative entities".[30] Of course, in appropriate cases, relief may be had in the courts, but the rules for review are strict and not necessarily efficacious.[31]

3. Past Cases Examined

It is important at this point to examine various Orders in Council which have been issued in virtue of section 23 of the *Broadcasting Act*.

The first was an Order dealing with two Manitoba licences. Both licences were set aside. The formal document was short and to the point:[32]

> His Excellency the Governor General in Council, on the recommendation of the Minister of Communications, pursuant to section 23 of the Broadcasting Act, is pleased hereby to order that the issue by the Canadian Radio-Television and Telecommunications Commission of the following broadcasting licences, be set aside:

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29. "Curb Cabinet Power over CRTC: Chairman", *Globe and Mail*, August 11, 1983. The Chairman at the time was John Meisel. In a similar vein, see C.C. JOHNSTON, *supra*, note 6, p. 85 s., where the author suggests that Cabinet review "can play havoc with principles of fairness".

30. P.G. THOMAS, *supra*, note 1, p. 125.

31. See, in general, J.A. KAVANAGH, *supra*, note 14.

32. P.C. 1976-2761, November 10, 1976. In a press release issued on the same day, the Minister of Communications, Jeanne Sauvé, explained that the action by the Governor in Council "was the only means available to allow the CRTC to start afresh and ensure the introduction of cable television into these three communities taking into account the new federal-provincial agreement". This agreement, the Minister said, would result "in a better harmonization of federal and Manitoba interests in communications", while recognizing "the responsibility of the Federal Government for the regulation and supervision of all broadcasting and broadcast-related services including Pay TV distributed by the Manitoba Telephone System, while recognizing the responsibility of the provincial government for the regulation and supervision of other telecommunication services distributed within the province by the Manitoba Telephone System". While this was the first Order in Council issued under s. 23 of the *Broadcasting Act*, it should be noted that "non-issuance of an Order in Council does not necessarily imply that no petitions were submitted": L. VANDERVORT, *supra*, note 6, p. 173. As discussed *infra*, many petitions never reach Cabinet.

(a) the licences to serve Selkirk and Portage La Prairie, Manitoba which were issued to Winnipeg Videon Limited by CRTC Decision 76-650 of September 16, 1976;
(b) the licence to serve Brandon, Manitoba, which was issued to Grand Valley Cablevision Limited by CRTC Decision 76-651 of September 16, 1976.

In 1982, the CRTC issued several broadcasting licences for the provision of pay television in Canada.[33] As a condition of licence, five of the licences were made subject to an annual Canadian programming expenditure. In May 1982, by Order in Council,[34] Cabinet decided *not* to set aside this decision nor to refer it back to the Commission for the reason, *inter alia*, that the licensees were required as a condition of licence to devote, on an annual basis, a certain percentage of revenues and of their programming expenditures to Canadian programmes. However, in July of that year, the condition of licence of the annual Canadian programming expenditure requirement was amended in each of the five licences to provide that the Canadian programming expenditure, although still a condition of licence, should be averaged over the entire period of each licence, as opposed to the annual expenditure first specified as a condition of licence. These amendments were set aside by the Cabinet, *proprio motu*, pursuant to section 23(1) of the *Broadcasting Act*. The reason given for the Order was brief: "And Whereas, the Governor in Council has determined that it is in the public interest to set aside the amendments to the said licences made by the Commission...".[35]

In June 1982, the Minister of Finance announced the Government's Administered Prices Policy — the "6 and 5" programme — which established annual limits of 6 and 5 per cent in wage and price increases, save where exceptional circumstances existed. This policy was not adhered to in two CRTC decisions amending the broadcasting licences of two Quebec licensees, Cablevision Nationale Ltée and Télécâble Vidéotron Ltée. In both instances, the amendments were in respect of the rates charged for the provision of cable television services in certain parts of Quebec, and in both instances the CRTC decision allowed rate increases which exceeded the 6 and 5 per cent annual limits established by the government.

In following the recommendations of the Minister of Communications, pursuant to section 23 of the *Broadcasting Act*, and referring the CRTC decisions back for reconsideration and hearing by the Commission, the Cabinet gave a clear indication of what matters the Commission should have turned its mind to and others which it had failed to consider adequately.

33. Decision CRTC 82-240, March 18, 1982.
34. P.C. 1982-1509, May 14, 1982. We have no record of how this decision came to the Governor in Council for review.
35. P.C. 1982-2958, September 22, 1982.

The Order restated the clearly articulated policy of the government establishing wage and price controls. The Cabinet was of the opinion that the circumstances which would justify an exception to the government policy must be identified and considered by the CRTC. The Cabinet also thought that the Commission had failed to identify and consider, or had failed to identify and consider *adequately*, the exceptional circumstances that would justify the rate increase which the Commission had authorized. And so, both decisions were referred back for reconsideration.[36]

Less than two months later, the Cabinet, in similar circumstances, gave less guidance to the Commission but was equally categorical in its Order. Once again, the CRTC had amended a broadcasting licence — M.S.A. Cablevision Ltd. in British Columbia — in respect of installation rates charged for provision of cable television service in certain parts of B.C. This decision allowed increases in rates in excess of "6 and 5". In this instance, Cabinet set aside the decision and gave as its sole reason that it was in the public interest to do so.[37]

One can, of course, only speculate as to why, in similar cases, in August, the Minister would have recommended re-hearings and in October his recommendation would be to set aside the decision. It appears, however, that the Cabinet, by October, wished to make it perfectly clear that "6 and 5" was a government policy to which the CRTC would have to adhere unless exceptional circumstances existed. If such circumstances existed, the Commission would have to make them known in its decision ; if they did not, and the Commission ignored government policy, the Cabinet would exercise its powers and set aside the decision.

These Orders give a good picture of the mechanics of cabinet review under section 23(1) of the *Broadcasting Act*. The CRTC is completely independent of any government department in originally coming to a decision, but the Cabinet then may always intervene to give guidance or, ultimately, overturn a decision which contravenes government policy. In that sense, then, the CRTC is not a truly "independent" regulatory agency — nor can it be under the Canadian system of government.

4. The Case of Pay TV

Policy matters can be enormously complex, and nowhere is this better illustrated than in decisions handed down by the CRTC in relation to pay TV. On March 18, 1982, the Commission issued a licence to Allarcom

36. P.C. 1983-2665 and P.C. 1983-2666, August 24, 1983.
37. P.C. 1983-3238, October 18, 1983.

Limited to carry out a regional, general interest pay television service for Alberta. At the same time, the Commission also licensed a number of other services, including some "of a national general interest". On May 14, 1982, the Cabinet decided neither to set aside nor to refer back to the Commission the issue of these licences. In the months which followed, the CRTC issued two additional broadcasting licences to carry out pay television services in Canada.

All licensees encountered financial difficulties, and these are set out in great detail in an Order in Council passed on September 20, 1983,[38] which, pursuant to section 23 of the *Broadcasting Act*, referred an amendment (which extended Allarcom's service to Manitoba, Saskatchewan and the Northwest Territories), back to the CRTC for reconsideration and hearing. The Order seemed to indicate that the whole Pay TV policy was counter-productive and that the market-place had shown the analyses made by the CRTC to be wrong. The Cabinet, on the recommendation of the Minister of Communications, wanted the CRTC to re-evaluate its policies and their implementation to try to turn the tide for Pay TV. Not only was the Cabinet of the opinion that the Commission should consider and identify whether and to what extent the amendment was in accord with the objectives of the Canadian pay television system, as stated by the Commission, "but that this should be done in light of the apparent evolution of the overall market structure of the Canadian pay television system".

It is especially interesting to note that the following day, the Honourable Francis Fox, the Minister of Communications, issued a statement concerning the review by the Cabinet of the Allarcom decision.[39] The Order in Council, of course, stands on its own. However, several interesting points emerge in this statement.

Firstly, and most importantly, the Minister indicated that the Allarcom decision "is one in a series of decisions and events which have the potential for transforming the character of the pay television model put in place by the CRTC in its original pay TV licensing decision of March 18, 1982".

Secondly, the Minister made a statement, interesting from a procedural point of view, to the effect that the "Governor in Council has received four submissions with respect to the CRTC decision amending Allarcom's licence. Three, including one from Allarcom itself, support the decision, while one asks that it be set aside or referred back to the CRTC for

38. P.C. 1983-2878.

39. Statement by Francis Fox, Minister of Communications, Concerning the Review by the Governor in Council of Decision CRTC 83-576, Ottawa, September 21, 1983.

reconsideration and hearing". The Minister did not, however, say on which of the four submissions the Cabinet had acted.[40]

Thirdly, Mr. Fox indicated that the Cabinet "does not necessarily disagree with the CRTC's decision to extend Allarcom's service", but that he did believe that "it is important for the CRTC to provide a further rationale for its decision and explain how it now views the future evolution of pay television in Canada". This was a clear recommendation by the Minister to the Commission to take the initiative to rethink and rearticulate its apparently unsuccessful policy regarding Pay TV.

In March 1984, the CRTC decision not to renew the licence of Quebec City station CJMF-FM was "appealed to cabinet".[41] However, Mr. Fox said that "the commission [...] cannot be overruled on licencing matters by cabinet".[42] The Act, of course, is clear on that point: non-renewal cannot give rise to review under section 23, since it is not the "issue, amendment or renewal" of a broadcasting licence.

Finally, we should consider two recent Orders in Council, both involving the Province of Saskatchewan. The first case arose on March 1, 1984, when the CRTC issued a broadcasting licence to Saskatoon Telecable Ltd. Soon after, the Governor in Council received a petition from the Government of Saskatchewan requesting that the decision be set aside or referred back to the Commission for reconsideration and hearing. It is interesting to note that this is the only published Order in Council which indicates that the review had been initiated by a provincial government. In the event, the Governor in Council decided it was not in the public interest to set aside or to refer back the decision.[43]

The second case concerned two CRTC decisions which had the effect of removing from two Saskatchewan cable systems all signals originating in the State of North Dakota, to be replaced by U.S. signals from Detroit, Michigan.

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40. Cabinet may, of course, consider a great variety of factors. As P. KENNIFF, D. CARRIER, P. GARANT and D. LEMIEUX point out in their study, *Le contrôle politique des tribunaux administratifs*, Québec, P.U.L., 1978, p. 130: "L'étude que le Comité fait du dossier apporte un autre éclairage à celle réalisée au niveau du ministère, car on tient compte de certains facteurs qui ne figuraient peut-être pas dans l'approche davantage sectorielle adoptée par le ministère. À ce titre, on peut signaler la politique linguistique, les disparités régionales et l'impact de la décision sur les relations fédérales-provinciales ou internationales." While these observations are still true today, it should be noted that the empirical phase of the research for this study was carried out in 1975.
41. *Montreal Gazette*, March 30, 1984.
42. *Globe and Mail*, March 31, 1984.
43. P.C. 1984-1387, April 18, 1984.

In the words of the petitioner (who stood to lose Canadian commercials), this switch ignored a long tradition of "community of interest" [44] between North Dakota and Saskatchewan.

Although the matters in issue were sensitive and important — Canada-U.S. relations and federal-provincial relations were involved — Cabinet nevertheless rejected the petition.[45]

5. When and Why Will Cabinet Intervene?

The key question which arises is under what circumstances will a petition be considered by Cabinet. My research indicates that there are between eight and ten petitions filed for cabinet review each year, and only a small fraction of that number ever result in Orders in Council. What becomes of the others? I am led to conclude that although a citizen may have a common law right of petition, he does not necessarily have a right to have his petition taken to Cabinet. This right to make a recommendation for Cabinet review under section 23 of the *Broadcasting Act* is, by constitutional usage, reserved to the Minister of Communications as the Minister responsible for administering the Act.[46] In theory, the Prime Minister also may initiate Cabinet action, but there is no recorded instance when this has happened in broadcasting decisions of the CRTC.

How petitions reach Cabinet and what procedure is followed are questions which flow logically from the above. If section 23 were to provide a right of appeal to Cabinet from CRTC decisions, then clearly the Cabinet would have to turn its mind to any and all petitions. This, however, is not the case. The wording of the section makes it clear that the powers granted may be exercised with complete discretion. My research indicates that they are. Furthermore, rarely are reasons or explanations given for the outcome of any petition.

The following is an analysis of the mechanics of Cabinet review. It presupposes that this discussion applies only to the review by Cabinet possible under section 23 of the *Broadcasting Act*.[47]

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44. Petition of The North Dakota Television Broadcasters, November 19, 1984, i.
45. P.C. 1984-4060, December 18, 1984.
46. This is part of the constitutional responsibility of a Minister in a parliamentary democracy: see, for instance, F. F. SLATTER, *Parliament and Administrative Agencies*, a Study Paper prepared for the Law Reform Commission of Canada, Ottawa, Ministry of Supply and Services, 1983, p. 85 s.
47. But note that different considerations apply to different enactments.

6. Mechanics of Cabinet Review

Because there is no formal procedure laid down in the *Broadcasting Act*, I have relied on discussions with several persons to ascertain what actually happens to a petition made pursuant to section 23. Although it is unclear who may be a petitioner, it is certain that the Act allows a review *proprio motu* by the Minister of Communications, and that in all cases the review procedure is very informal with no rules or guidelines as to how it should be initiated, by whom, or how it shoud be carried out. The only formality enunciated in the Act is that the Governor in Council must act within 60 days of the issue of the decision complained of, so presumably a petition must be filed in time for the Cabinet to examine it and decide within this delay. There is nothing in the Act to prevent a section 23 petitioner from also addressing himself to the Federal Court of Appeal under section 26 of the Act. Indeed, one would be wise to attempt both recourses at the same time because, under section 26, leave must be sought within one month after the making of the decision or order sought to be appealed from.

Although, as stated above, there is no set procedure,[48] the process followed is usually this:

1. A formal or informal petition is lodged somewhere: with the Minister of Communications, with the CRTC or sometimes even with the Prime Minister. Each will direct it to the Clerk of the Privy Council, who will send the petition to the Minister of Communications.
2. Upon receipt of the petition, the Minister requests his staff to prepare, for his use, an analysis of the issues raised. There is no hearing and no-one is told at this stage of the process what is happening. Everything is very informal.
3. The Minister, after assessing the report of his staff, decides whether to take the petition to Cabinet.
4. If the petition is taken to Cabinet, a cabinet document is prepared which follows the route of every Cabinet document.
5. The document may first go to a Cabinet committee and then to the full Cabinet. It is at this point that the issues raised are subjected to an inter-departmental discussion at the ministerial level.

48. See, for instance, P. KENNIFF, D. CARRIER, P. GARANT and D. LEMIEUX, *supra*, note 40, p. 127: "La procédure utilisée lors d'une demande d'annulation ou de révision au gouverneur en conseil se caractérise par une absence de formalisme et par le secret. Ces deux caractéristiques la distinguent de la procédure qui est suivie devant les tribunaux tant judiciaires qu'administratifs. L'article 23 n'édicte aucune procédure et puisqu'il ne s'agit pas d'un appel proprement dit, on ne peut se rapporter aux règles générales qui régissent les appels."

6. Where, however, the Minister of Communications decides that no policy issue is at stake, he will not present the petition to Cabinet. In that case, the petition will go no further, and even though the parties need not be informed, it is current practice to do so.
7. There is no provision for formal or informal oral presentation or further written presentation by the petitioner to the Cabinet. There is, however, nothing to prevent such a procedure and, in some circumstances, it does happen.
8. Once a petition is with Cabinet, everything is secret. However, a former Minister told me that although there are no criteria in most acts on which Cabinet may decide, Cabinet will rarely intervene against the decisions of an administrative body: "There is a presumption in favour of the decision of an administrative tribunal and Cabinet does not intervene lightly". Furthermore, he indicated that while there are political overtones in these decisions, they are not necessarily overriding: political sensitivity, regional consideration and international treaty commitments all enter into Cabinet decisions. However, the essential element is that a decision of a regulatory body must always be consistent with government policy.
9. After Cabinet has met and come to a decision, that decision is then made public by Order in Council.

The lack of procedure with regard to process and form for petitions to Cabinet should be remedied. There is an aura of uncertainty and mystery about the process which leaves petitioners perplexed and fearful that they may be dealt with unfairly.

Conclusion

> Canada has been clearly influenced by two quite separate notions as to the role of administrative agencies. In the United States wide discretionary powers have been granted to independent regulatory agencies [...] By contrast the British tradition is not to grant similar discretionary powers except to bodies which are immediately politically accountable. In drawing on both these traditions Canada seeks the best of both worlds. The danger is that it might end up with the worst of both — an appearance of political accountability without any of the benefits of openness, continuity, and even-handedness which might come from independent decision making.[49]

As pointed out earlier, the system of Cabinet review is not without its critics. The questions raised, apart from those which deal with the lack of

49. J.M. EVANS, H.N. JANISCH, D. J. MULLAN, R.C.B. RISK, *Administrative Law: Cases, Text and Materials*, 2e ed., Toronto, Edmond-Montgomery Publication Ltd., 1984, p. 703.

procedure, go to the heart of the notion of responsible government. This is the British tradition, largely followed by Canada, and it may well be, as the above quotation suggests, that the Canadian system cannot successfully be merged with any other system: the result may indeed be the worst of both worlds.

Section 3 of the *Broadcasting Act* states "that the objectives of the broadcasting policy for Canada enunciated in this section can best be achieved by providing for the regulation and supervision of the Canadian broadcasting system by a single independent authority". But the very Act which speaks of an "independent authority" contains legislative provisions — Directions and review — which are clearly incompatible with true independence. The use of the word "independent" is, therefore, somewhat misleading.[50]

Yet, one should not lose sight of the fact that, at present, at least, the powers of Cabinet are circumscribed: Directions must meet the criteria set out in the Act,[51] and the power to set aside or refer back to the Commission only applies, in the words of section 23, to the "issue, amendment or renewal" of a license. The power to *grant* a license is reserved to the Commission.

It has not been suggested that Cabinet has abused its *ex post facto* power of review. Intervention has been rare and appears always to have been based on government policy. This comports well with what Parliament intended when the *Broadcasting Act* was enacted: to create an agency free from *partisan* political intervention, but nevertheless subject to political control.[52]

In the *1982-83 CRTC Annual Report*, The chairman, John Meisel, wrote:

> Cabinet direction, and the undisputed power of the courts to review the Commission's jurisdiction and procedures, are completely adequate mechanisms for ensuring that harmony between the government's goals and the Commission's prevails, and that the regulator follows proper procedures. Appeals to the Cabinet undermine the benefits and advantages sought in the creation of independent regulatory agencies.[53]

I do not agree with this point of view. It is not in keeping with the Canadian system of responsible government. What the government sought to achieve in setting up the CRTC was an informed body with particular

50. The *Concise Oxford Dictionary*, 7th ed., 1982, defines "independent" as "not depending on authority or control; self-governing".

51. See *supra*, note 3.

52. See *supra*, note 10.

53. P. X.

expertise which would apply the major policies set by the government. Because Canada is such a complex country, there is a need for some synthesis of policy. Cabinet Ministers are ultimately politically accountable; this is a feature of Cabinet government. And even though Ministerial responsibility in the classic sense is no longer feasible on a day-to-day basis, the concept is still very much with us, particularly in important policy matters.

The notion, therefore, of a truly independent regulatory body is incompatible with the philosophy of Cabinet government. In the Canadian system of public law, political power is seen as an essential element of the political process and someone — a Minister or even the Prime Minister — is always accountable. The Minister of Communications is responsible for the administration of the *Broadcasting Act*; therefore, the initial step of cabinet review under section 23 of the Act is his. But it must be remembered that what sanctifies the political power and authority of the Minister is his accountability to Parliament.