INTRODUCTION

PHILIP BRYDEN*
SPECIAL ISSUE EDITOR

This special issue of the *Alberta Law Review* is devoted to administrative and regulatory law. While the choice of this subject matter for a special issue of the *Alberta Law Review* is simply a happy coincidence, its publication follows on the appointment of Dr. Hudson Janisch as the inaugural TransCanada Chair in Administrative and Regulatory Law at the University of Alberta and the collection itself includes two pieces by Janisch.

The TransCanada Chair was established through a generous gift of $1.5 million by TransCanada Corporation as part of the Faculty of Law's tremendously successful Law Campaign 2008. The donation of funds to support the Chair reflects TransCanada's commitment to investing in the communities in which it does business. It also recognizes the important role that education and research concerning administrative and regulatory law plays in ensuring that Canada's regulatory systems continue to meet the needs of both the industries being regulated and the general public. As Sean McMaster, TransCanada's Executive Vice President and General Counsel, observed in the press release announcing Janisch's appointment, "Canada's legal and regulatory system is supported by our country's education system.… We feel this new role will provide many opportunities for new contributions to further develop and enhance Canada's regulatory and administrative law frameworks."[1]

The Faculty of Law is extremely grateful to TransCanada for its generosity, and is delighted that Janisch agreed to accept our offer of appointment as the inaugural holder of the Chair. In my estimation, Hudson Janisch is the leading Canadian academic of his generation in the field of regulatory law. His law teaching career in Canada spans the University of Western Ontario, Dalhousie University, and the University of Toronto, where he retired in 2004 as Professor Emeritus and Osler, Hoskin & Harcourt Chair of Law and Technology. Since retiring from the University of Toronto, Janisch has continued to pursue an active research agenda and has taught in a part-time capacity at the University of British Columbia and the University of Victoria, as well as fulfiling his responsibilities as TransCanada Chair in Administrative and Regulatory Law at the University of Alberta.

Although Janisch's academic writing covers a wide range of administrative and regulatory law topics, the specialty for which he is most widely known internationally is telecommunications regulation. He has lectured on the subject at a variety of international institutions, including the University of Melbourne, Fudan University, Hong Kong University of Science and Technology, Beijing University of Posts and Telecommunications, and the University of Cape Town. He had a major influence on the development of the 1993 *Telecommunications Act*,[2] and has been a mentor for an entire generation of Canadian

* Wilbur Fee Bowker Professor and Dean, Faculty of Law, University of Alberta.

1 "Hudson Janisch appointed as inaugural TransCanada Chair in Administrative and Regulatory Law," (18 August 2010), online: University of Alberta <http://www.law.ualberta.ca/news_events/transcanada_chair_janisch.php>.

2 SC 1993, c 38.

telecommunications lawyers and executives. Indeed, his stature within the telecommunications industry is such that in 2005, Janisch was inducted into Canada's Telecommunications Hall of Fame. It is entirely appropriate, therefore, that his first article in this collection, "Regulation and the Challenge of Broadband Telecommunications: Back to the Future?"[3] draws on his expertise in the field of telecommunications regulation.

In this article, which is based on his inaugural lecture as the TransCanada Chair, Janisch contrasts Canadian and Australian approaches to the regulatory challenges faced by both countries as they seek to expand their networks of broadband telecommunications. Three themes emerge in the course of this discussion. The first is the way in which the structure of an industry such as telecommunications influences the rationale for regulation, and is in turn influenced by changing technology. As Janisch points out, two characteristics have traditionally made us think about telecommunications as a "natural monopoly": network effects and economies of scale.[4] The desirability of having a network that connects all potential users of a telecommunications service and the high capital cost of establishing the network have tended to make us believe that it was desirable to have a single service provider who enjoyed the benefits of a monopoly in return for a promise, enforced by a regulatory agency, to provide a reasonable level of service at reasonable rates. What happens to this way of thinking, however, when changing technology makes it possible for what were once separate industries to become competitors, for example, when cable companies are able to offer phone and internet service in competition with telephone companies? Moreover, how do we assess the future demand for telecommunications services based on our inevitably partial understanding of the way existing technologies are likely to evolve? Is it, as the Australians seem to think, in the national interest to build a national broadband network based on fibre optic cable or, as Canadian regulators seem to have concluded, is it better to allow industry to employ a variety of technological options, including satellite, copper, and wireless, as well as fibre optics, to build a broadband network?

The second theme is the uneasy relationship between regulation and competition as means of serving the public interest in establishing and maintaining a telecommunications network that provides reasonable service at reasonable rates. While regulated monopolies were successful in building up networks, for some time now telecommunications regulators have suspected that the introduction of competitive pressure would not only result in lower prices to consumers but also spur technological innovation that was not necessarily in the commercial interest of an incumbent monopolist to pursue. Janisch describes a variety of means by which regulators sought to introduce competition in the face of economies of scale and network effects, typically by requiring incumbents to allow competitors to connect with their networks. The convergence between North American telephone and cable television networks as vehicles for the transmission of voice and data communication has introduced one form of competition into the telecommunications universe, but it is not obvious that this form of competition is sufficient, in and of itself, to serve the best interests of the Canadian public. Moreover, a policy of allowing competitors of organizations that have made significant investments in building up networks to have access to those networks presents

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3 Hudson Janisch, "Regulation and the Challenge of Broadband Telecommunications: Back to the Future?" (2012) 49:4 Alta L Rev 767.

4 *Ibid* at 770.

major challenges, both in ensuring at a practical level that the terms and conditions on which access is granted are fair and in ensuring that incumbents have the right financial incentives to maintain and, in some instances, expand their infrastructure.

The third theme is the relationship between the economic efficiency goals of regulation and broader distributive or social policy goals. Janisch illustrates this relationship in the broadband telecommunications context most sharply in his discussion of the diffusion of broadband network service to rural areas in vast countries like Canada and Australia.[5] It also appears more subtly in his discussion of "cherry-picking," and the ways in which allowing competitors access to commercially attractive network segments (typically at rates that are attractive to customers within those segments) undermines the ability of the organization charged with the construction and maintenance of the network to generate the revenues that are needed to maintain and improve it.[6]

Janisch seeks to illuminate the tensions within the world of telecommunications regulation rather than to resolve them in a conclusive fashion. Indeed, his concluding observations suggest that he does not believe there is a conclusive resolution to them, but rather a continuing evolution of the industry in response to both technological and competitive change and a corresponding evolution in the public policy challenges facing regulators.[7]

Janisch's second contribution to this collection is entitled "The Relationship Between Governments and Independent Regulatory Agencies: Will We Ever Get It Right?"[8] This article is based upon a lecture originally presented at the Energy Regulatory Forum held in Calgary on 10 May 2011. I am grateful to the organizers of the Forum[9] for encouraging Janisch and the authors of the next article in the collection, "The Crown's Duty to Consult Aboriginal Peoples: Towards an Understanding of the Source, Purpose, and Limits of the Duty,"[10] to submit their work to the *Alberta Law Review* for publication in this special issue.

In his second article, Janisch explores the perennial difficulty of reconciling regulation by independent regulatory agencies operating at arm's length from government with the accountability our system of democracy demands of elected officials for major public policy decisions. Janisch's focus is on the different ways in which governmental actors interfere with the decisions of regulatory agencies, and on whether it is ever possible to achieve an appropriate balance between regulatory independence and political control. He offers up a wide range of examples as he explores this theme, beginning with telecommunications and

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5 *Ibid* at 776-83.
6 *Ibid* at 783-84.
7 *Ibid* at 784.
8 Hudson Janisch, "The Relationship Between Governments and Independent Regulatory Agencies: Will We Ever Get It Right?"(2012) 49:4 Alta L Rev 785.
9 The Forum's organizing committee for 2011 included Robert D Heggie, Chief Executive, Alberta Utilities Commission; Lisa Hynes, Legal Counsel, Alberta Court of Appeal; Patricia Johnston, QC, General Counsel, Alberta's Energy Resources Conservation Board; Douglas A Larder, QC, General Counsel and Executive Director (Law Division), Alberta Utilities Commission; former Dean of Law Alastair R Lucas, QC, University of Calgary; Hugh Williamson, QC, Borden Ladner Gervais; and Dr. Moin A Yahya, Associate Professor of the Faculty of Law, University of Alberta and Commission Member, Alberta Utilities Commission; as well as myself.
10 Chris W Sanderson, QC, Keith B Bergner & Michelle S Jones, "The Crown's Duty to Consult Aboriginal Peoples: Towards an Understanding of the Source, Purpose, and Limits of the Duty" (2012) 49:4 Alta L Rev 821.

energy regulation at the federal level, moving on to electric utilities regulation in British Columbia and Alberta, and concluding with a general discussion of the reform of public agency governance in Alberta.

I was tempted to observe in the previous paragraph that Janisch offers a depressingly long list of examples of political interference with the decisions of independent regulators, and he acknowledges that there are moments when a new illustration of the phenomenon feels like "déjà vu all over again."[11] However, to view the article as simply an extended complaint about political interference in the work of expert regulators would be to miss the point of Janisch's message. This is that whether or not it is a good thing, within the Canadian regulatory environment political control is inevitable, and the real issue is not "*whether* there should be political control, only *how* it can be achieved without excessively compromising the integrity of the regulatory agencies."[12]

Janisch offers us a number of important lessons in how the crucial balance can be struck, and also how it can be undermined. First, it is critical to recognize that legislation frequently entitles political actors to become involved in regulatory matters, whether by creating a power to make policy directives; offering a minister the right to require reconsideration of a decision; giving a party a right of appeal to a minister or cabinet on the merits; or by reserving to a minister or cabinet the right to actually make the final decision. These mechanisms all have their own advantages and disadvantages, but it is important to respect both the fact of their existence and the legal limitations on how and when they can be exercised. Second, it is important for regulators to avoid inviting political interference by failing to give adequate expression to the reasons for decisions that have obvious political implications. This is not a matter merely of ensuring that the reasons are adequate as a matter of law,[13] but of considering whether the reasons make a sufficient attempt to address the concerns of persons affected by the decision who are likely to encourage politicians to intervene. Third, it may be useful to use the legislative process *in advance* of a regulatory proceeding to make decisions on questions of public policy that have the effect of constraining the scope of a regulatory hearing by taking certain issues off the table. This suggestion is likely to prove controversial to some who would say that a regulatory proceeding before an impartial expert tribunal is a better forum than the political arena for enabling people who are interested in particular public policy choices to voice their concerns. On the other hand, it does have the virtue of highlighting those aspects of the regulatory process that inevitably have political repercussions and focusing public accountability for those choices on elected officials.

Once again, Janisch avoids easy prescriptions for a complex phenomenon, though he does suggest that as a general proposition it is preferable to focus political control away from individual decisions and to concentrate on mechanisms that allow political actors to take responsibility for general policy.[14] He concludes by observing: "Looking back, I see that the

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11 *Supra* note 8 at 820.

12 *Ibid* [emphasis in original].

13 See e.g. *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 SCR 708; *Law Society of Upper Canada v Neinstein*, 2010 ONCA 193, 99 OR (3d) 1; *VIA Rail Canada v National Transportation Agency*, [2001] 2 FC 25 (CA).

14 Janisch, *supra* note 8 at 820.

weakness in all these regulatory reform proposals has been that we, and by that I mean all who are interested in administrative law and regulation, have failed to educate our political masters as to the importance of protecting the independence and integrity of regulatory agencies. If we could ever do so, *that* would really be the cat's pajamas!"[15]

The third article in the collection is authored by Chris Sanderson, QC, Keith Bergner, and Michelle Jones, all of whom practice law at Lawson Lundell LLP in Vancouver. This article is based on a paper originally presented by Mr. Sanderson at the Energy Regulatory Forum, and in it the authors draw on their collective experience as counsel in *Rio Tinto Alcan v Carrier Sekani Tribal Council*,[16] *Beckman v Little Salmon/Carmacks First Nation*,[17] and *Standing Buffalo Dakota First Nation v Enbridge Pipelines*[18] to synthesize the law governing the source, purpose, and limits of the legal duty to consult Aboriginal peoples. Of particular significance for readers interested in administrative and regulatory law, the authors go on to explore how the duty to consult and the rules of procedural fairness relate to each other in different types of regulatory proceedings, and how the duty to consult can be satisfied in these types of proceedings.

Sanderson, Bergner, and Jones note that the duty to consult is only one of a number of legal obligations the Crown has in its dealings with Aboriginal peoples, and that it co-exists with, rather than supplants, the Crown's fiduciary and treaty obligations to Aboriginal peoples and its obligation to justify infringements of Aboriginal rights.[19] The duty to consult arose in an effort to prevent the possibility of asserted but unproven claims to Aboriginal rights or title being undermined by resource development or other activities that might take place before the final status of those claims was determined, either by way of adjudication or through negotiation.[20] The authors acknowledge that the duty has been expanded to perform other functions, such as filling procedural gaps in treaties,[21] and that it serves broader purposes in reconciliation of the interests of Aboriginal peoples with those of other stakeholders.[22] They argue, however, that the duty is not designed in and of itself to redress historical wrongs, create leverage in respect of negotiating positions, or dictate particular substantive outcomes in respect of competing claims to use land or other resources.[23]

Sanderson, Bergner, and Jones devote the final portion of their article to the question of the forum for consultation and the roles of different potential actors in the consultation process. These questions are critical in regulatory proceedings in which a project that is proposed for regulatory approval may have an impact on Aboriginal rights or claims. The authors note that it is up to the legislature to set the mandate for a regulatory tribunal, and they suggest that legislation may empower the tribunal to engage in consultation itself, to

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15 *Ibid* [emphasis in original].
16 2010 SCC 43, [2010] 2 SCR 650 [*Carrier Sekani*].
17 2010 SCC 53, [2010] 3 SCR 103 [*Carmacks*].
18 2009 FCA 308, [2010] 4 FCR 500, leave to appeal refused, 33462, 33480, 33481, 33482 (2 December 2010) [*Standing Buffalo*].
19 *Supra* note 10 at 830.
20 See *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 SCR 511; *Taku River Tlingit First Nation v British Columbia (Project Assessment Director)*, 2004 SCC 74, [2004] 3 SCR 550.
21 See *Mikisiew Cree First Nation v Canada (Minister of Canadian Heritage)*, 2005 SCC 69, [2005] 3 SCR 388 and more generally, Sanderson, Bergner & Jones, *supra* note 10 at 826-27.
22 Sanderson, Bergner & Jones, *ibid* at 827-28.
23 *Ibid* at 830-34.

adjudicate the adequacy of consultation, to play both of those roles, or to play neither of them.[24] They argue that it is also important to bear in mind whether the proponent of the project is itself an agent of the Crown, as was the case in *Carrier Sekani*, or is a private actor, as was the case in the *Standing Buffalo* litigation.[25] Another relevant consideration is whether the regulator is a final decision-maker or simply makes a recommendation to a government decision-maker, whether a minister or cabinet.[26] The most complex situations are those in which the proponent of the project is a private party, to whom the Crown's consultation obligations cannot be delegated, but the regulatory tribunal responsible for the final decision is not granted an explicit mandate to engage in consultation. Sanderson, Bergner, and Jones argue that the normal decision-making processes of the tribunal can result in a process that satisfies the honour of the Crown, provided that the affected First Nation is given adequate notice, timely access to all necessary information, the opportunity to consult directly with the proponent or to attend regulatory proceedings, and the opportunity to express their interests and concerns directly to the regulatory tribunal that is responsible for the decision.[27] They recognize that this proposition will be controversial to those who take the view that the Crown's honour can only be satisfied by discussions in which the Crown is directly engaged, but their position is that the important inquiry is whether the regulatory process is sufficient to maintain the Crown's honour rather than on whether a particular form of consultation takes place.[28]

The final article in this collection, "Comparing Aboriginal and Other Duties to Consult in Canadian Law,"[29] was written by Professor Peter Carver of the Faculty of Law, University of Alberta. Carver explores a range of situations in which public law doctrines impose consultation obligations. Like Sanderson, Bergner, and Jones, Carver is centrally concerned with the legal duty to consult Aboriginal peoples as it is articulated in the Supreme Court of Canada's *Carrier Sekani* and *Carmacks* decisions, and the relationship between this obligation and common law concepts of procedural fairness. Where he departs from their analysis is in exploring two other constitutionally imposed consultation obligations, one dealing with the constitutional obligation to recognize collective bargaining rights as part of the protection of freedom of association offered by section 2(d) of the *Canadian Charter of Rights and Freedoms*,[30] and the other the obligation to consult judges in relation to the setting of judicial salaries, as an aspect of the constitutional protection of judicial independence.[31] Carver explores not only the ways in which the purposes of these consultative duties relate to each other, but also the ways in which consultation must be conducted in these different contexts in order to be meaningful.

While much of Carver's analysis of the duty to consult Aboriginal peoples overlaps with that of Sanderson, Bergner, and Jones, there are important differences. For example, while

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24 *Ibid* at 846.
25 For the discussion on this point, see Sanderson, Bergner & Jones, *supra* note 10 at 847.
26 *Ibid* at 848-49.
27 *Ibid* at 851-52.
28 *Ibid* at 852.
29 Peter Carver, "Comparing Aboriginal and Other Duties to Consult in Canadian Law" (2012) 49:4 Alta L Rev 855.
30 Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11. See *Ontario (AG) v Fraser*, 2011 SCC 20, [2011] 2 SCR 3; *Health Services and Support - Facilities Subsector Bargaining Assn v British Columbia*, 2007 SCC 27, [2007] 2 SCR 391.
31 See *Reference re Remuneration of Judges of the Provincial Court of PEI*, [1997] 3 SCR 3.

Carver agrees with Sanderson, Bergner, and Jones that the honour of the Crown has emerged as a source of the duty to consult,[32] he roots the duty in the constitutional recognition of Aboriginal and treaty rights in section 35(1) of the *Constitution Act, 1982*[33] and sees the duty to consult as playing an essential role in governmental efforts to justify infringements of Aboriginal rights.[34] While Carver acknowledges that consultation does not provide Aboriginal peoples with a veto over resource development, he is more open than Sanderson, Bergner, and Jones to the possibility that in some circumstances the consultation obligation can dictate substantive outcomes.[35] Finally, Carver is less sanguine than Sanderson, Bergner, and Jones that existing tribunal arrangements provide an effective means of satisfying the duty to consult.[36] Whether the reader is ultimately more persuaded by Carver's reasoning or by the arguments presented by Sanderson, Bergner, and Jones on these points, I think it is clear that both articles address issues that are not only central to our understanding of the law governing Aboriginal rights, but are vital to our contemporary understanding of the role and functioning of regulatory agencies.

As a final observation, the reader will note that even though the theme of this issue is administrative and regulatory law, we have demonstrated a marked preference for articles that explore issues arising principally in the regulatory context. This preference is consistent with TransCanada's thinking about the emphasis of the Chair, and in my view it is a useful corrective to the general trend in Canadian administrative law teaching and scholarship to give greater weight to issues that arise primarily in the context of adjudicative tribunals rather than regulatory agencies. There are practical reasons for this emphasis, and I must admit that over the years my own administrative law teaching and scholarship has been biased in favour of the adjudicative tribunal setting. Hudson Janisch has always stood out in my mind as the Canadian scholar who did the most to ensure that administrative law issues that arose in the regulatory context were not lost on law students. His contributions to Canada's leading administrative law teaching text, Evans, Janisch, Mullan, and Risk's *Administrative Law: Cases, Text, and Materials*[37] focused significantly on rulemaking, and offered a generation of Canadian administrative law teachers and students their first (and in some instances their only) insights into the fascinating world of regulation. I am delighted that he and the other contributors to this volume are able to continue this tradition, one that the University of Alberta's Faculty of Law will seek to maintain through the work of the holders of the TransCanada Chair in Administrative and Regulatory Law.

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32 Carver, *supra* note 29 at 867-68. Compare Sanderson, Bergner & Jones, *supra* note 10 at 823-25.

33 Being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

34 Carver, *supra* note 29 at 867.

35 Compare Carver, *ibid* at 883-86 with Sanderson, Bergner & Jones, *supra* note 10 at 834, 845.

36 Compare Carver, *ibid* at 886-88 with Sanderson, Bergner & Jones, *ibid* at 845-52.

37 JM Evans et al, *Administrative Law: Cases, Text, and Materials* (Toronto: Emond Montgomery, 1980), went through four editions with Janisch as a contributing author. The second edition was published in 1984, the third edition in 1989 and the fourth edition in 1995. A fifth edition was published under David J Mullan's editorship in 2003 and in 2010 Emond Montgomery published a sixth edition edited by Gus Van Harten, Gerald Paul LR Heckman, and David J Mullan. The preface to the second edition, at v, identifies Janisch as the author primarily responsible for the material dealing with rulemaking and structuring the exercise of discretion and the prefaces of the third and fourth editions also attribute primary responsibility for the analogous material in these editions to him. Although significantly updated, the latest edition still draws significantly on Janisch's insights into areas such as rulemaking. For example, compare Gus Van Harten, Gerald Paul LR Heckman & David J Mullan, *Administrative Law: Cases, Text, and Materials*, 6th ed, (Toronto: Emond Montgomery, 2010) at 645-51 with JM Evans et al, *Administrative Law: Cases, Text, and Materials*, 3d ed (Toronto: Emond Montgomery, 1989) at 223-26, 230-31.