



60 Minutes of Telecommunications Law From An Historical Perspective

Article © 2007 Marshall Diel & Myers (<http://www.law.bm/>), All Rights Reserved.

RELATED ARTICLES

[Bermuda's Dot.Com Laws](#)
[Using Bermuda as your E-Commerce Platform to the World](#)
[60 Minutes of Telecommunications Law From an Historical Perspective](#)

The provision of communication systems and services have been regulated or controlled by government from the inception of the particular technology.

Government's intervention in this field is protected under our Constitution.

Section 9 (1) of the *Bermuda Constitution Order 1968* guarantees freedom of expression but the Section 9 (2) proviso upholds the constitutionality of laws which are reasonably required for the purpose of regulating telephony, telegraphy, posts, wireless broadcasting, television or other means of communication.

Governments, to varying degrees, have recognised that maintaining and controlling the integrity of a country's communications infrastructure are essential and critical objectives for the protection, advancement and welfare of the society and or the particular political regime. It is, therefore, not surprising to find that the transmission of mail and the provision of telephone, telegraph and overseas telecommunication are considered essential services under the First Schedule of the *Labour Relations Act 1975*.^[1] Likewise, it is not surprising to find that when the legislative history of communications is examined, most systems for the delivery of communications are only permitted if, and only if, Government, by law, has given authorisation to the service provider.

An Act to establish and regulate post offices in the Ports of St. George and Hamilton, 1812 followed by *An Act relating to the establishment of Post Offices in these Islands, 1818*.

Throughout the 1800s and into the beginning of the 1900s post office legislation was periodically amended to regulate the operation of the Islands' post offices. By Section 5 of the Post Office Act 1900 the Islands' Postmaster and his agents were given the exclusive privilege of conveying, receiving, collecting, sending, dispatching, and delivering all letters in Bermuda. This Act was the first truly comprehensive piece of public legislation which dealt with who could deliver mail communications, what constituted such a communication, the rate for transmission, the location of post offices, the hours of operation, mandatory obligations to deliver the mail, prohibitions on sending dangerous, seditious and indecent communications, obtaining insurance for delivery, penalties for tampering with the communication (4 years) and provisions to ensure the confidentiality of communications.^[2]

An Act to aid in the support of communication by Steam Boat between the towns of Hamilton and St. George, 1854. In conjunction with the Post Office Legislation, Government viewed ships as communication vehicles much in the same way as we view fibre optic and satellites today as vehicles for transmitting communications. The steam or boat communication legislation came to an end in 1951.

An Act to aid in the encouragement of Steam Communication between British Guyana and New York, or some other eligible port in the United States of America, by way of Bermuda, 1854.

An Act to provide for the establishment of a mail between these Islands and the United Kingdom by way of New York 1860.

An Act to encourage Steam communication between Bermuda and New York, 1862.

An Act to provide additional Mail Communication between Hamilton and St. George, 1863 - 64.

The Military Telegraph Act, 1864. This Act appears to be the first legislation enacted in Bermuda which related to a technological means of communication, namely the telegraph. Samuel Morse in 1844 appeared before the U.S. Congress and transmitted a telegraph message over a wire line erected between Washington DC and Baltimore.

An Act to provide for the incorporation of any company or companies undertaking to lay electric submarine cables in the waters adjacent to these Islands, 1866.

An Act to facilitate the Establishment of Telegraphic Cable communications between places beyond the sea by way of these Islands, 1871. The first functional submarine cable was laid between France and England in 1845. The first telegraphic cable to be laid across the Atlantic Ocean which resulted in successful transmissions took place in 1866.

The New York Mail Act, 1875.

The New York Steam Communication Act, 1877.

An Act to provide for Steam Communication between these Islands and London in the Crop Season of 1883, 1882.

The New York Steam Communication Act 1882.

The Liverpool and Newport News Steam Communication Act, 1883.

The Ocean Mails Act, 1886.

The Bermuda Telephone Company Act, 1887, as amended by the Acts of 1928, 1957, 1961 and 1978. The telephone was invented by Alexander Graham Bell in 1876 and patented by him in 1877. It took enterprising Bermudians 10 years to recognise the importance and profitability of his invention.

The Halifax and Bermuda Cable Company Act, 1890 authorised the Halifax and Bermuda Cable Company Limited, to lay submarine cables in waters of Bermuda and to connect stations over public lands. The specific plan was to lay a cable from Halifax, Nova Scotia to Bermuda and provide to Bermuda telegraphic communication to and from Bermuda. The primary concern of Government continued to be that the company obtaining permission from public works and the Corporations to lay lines; ensure the company maintains its works, and if anyone tampers with the equipment, such person would be subjected to a penalty of ,5.00 to ,10.00.[3]

A new public protection emerged for the first time in the form of Section 11 which stated that every telegraphic line established by the company under the provisions of this Act shall be open to use of all persons without favour or preference except that all government messages, whether imperial or

colonial, shall be transmitted by such telegraph line in priority to all other messages. The Act was repealed by the Cable and Wireless Public Limited Company (Consolidated Licence) Act 1985.

The Direct West Indies Cable Company Act, 1897 authorised the Direct West Indies Cable Company Limited to provide telegraphic communication in Bermuda by land lines. It does not appear that (by land line) authorisation was given or sought by this particular company to lay a cable to another jurisdiction such as Halifax. The universal access provision of service was expanded by making it clear that anyone could have access to the service provided you paid for the service. The Act was repealed by the Cable and Wireless Public Limited Company (Consolidated Licence) Act 1985.

The Wireless Telegraphy Act 1903. The Act was repealed by the Wireless Telegraphy and Signaling Act, 1925. The 1925 Act was prohibitive legislation which restricted the use of wireless telegraphy or other signaling stations unless the person holds a licence from the Governor. The Act set up a licensing regime. It regulated the type of equipment which could be used, it permitted the Governor to take control of the system in case of emergency. It created a regulatory regime whereby a board, in this case, the Board of Trade, prescribed rules and a Board of Trade Inspector was given the task of ensuring compliance. He could obtain a search warrant. There were no tampering provisions, but penalties for obstructing the Inspector. It was mandatory for all sea going ships carrying passengers or of 1600 tons (or more) to be equipped with a wireless telegraph service. The Act was amended and repealed in part by the Private Radio Set (Discontinuance of Licenses and Fees) Act, 1947.

The New York Steam Communications Act, 1905.

The Wireless Telegraph and Signaling (Ship Stations) Regulations, 1909. First legislation which considered and prohibited interference (by merchant ships) with the transmission of any messages of lawfully established wireless telegraph stations.

The New York Steam Communications Act, 1914 - 1928 (repealed 1951).

New York Communication Act, 1930.

The Wireless Telegraph and Signaling Act 1936.

Established a system of classifying licences:

Class 1 - a public broadcasting service used for dissemination of radio telephonic emissions.

Class 2 - a private experimental station intended for experiments with a view to the development of radio-electric practice or science.

Class 3 - amateur transmitting stations

Class 4 - receiving sets using valve rectification

Class 5 - receiving sets using other than valve rectification

The Act sets out application requirements for a licence. The applicants had to meet the approval of the Examining and Advisory Committee which Committee reported to the Governor. The application was made to the Colonial Secretary and it had to disclose the name and nationality of the applicant (historically British citizenship was required and no doubt in 1929 there was some concern about Germany and spying); the location of the apparatus, the proposed circuit, proposed output power, the proposed bandwidth and the name of the proposed operator. By 1929 the Government understood the basics of the technology and the legislation reflects this

greater understanding.

The legislation set up the first system of restricting operations to particular bandwidths.

The regulation addressed for the first time interference between two or more licenced operating stations with the solution being a definite wavelength allotment by the Governor.

For the first time there appears a requirement that all transmissions be logged. In certain instances, operators under a Class 1 Licence were required to listen in on the transmissions.

Specific requirement that messages received could not be divulged. This is the first reference to maintaining confidentiality of communications transmitted over the new technology. This requirement was made a condition of the actual licence issued.

From 1943 to 1967 a series of licences were granted to C&W, all of which were extinguished and replaced with the Cable and Wireless Public Limited Company (Consolidated Licence) Act 1985. The Consolidation Act was driven by changes in technology and techniques in telecommunications.

The Bermuda Broadcasting Company Act, 1943 gave the BBC the right to construct and operate a broadcasting station in Bermuda.

The Cable & Wireless (West Indies) Limited, Licence Act, 1948 which by this private Act gave C&W a licence to maintain and operate a wireless telegraph station in Bermuda. The grant was made pursuant to the Wireless Telegraphy and Signaling Act 1925. The licence required the company to observe the International Telecommunications Convention and the International Telegraph Regulations. The Licence contained provisions requiring non-interference unless equipment is bona fide required and in conformity with the most efficient means for preventing interference. Indemnification to the Government. The licence required the licenced apparatus to be open to use of all persons on equal terms without favour or preference whether as regards rates of charge, order of transmission or otherwise. Only British subjects could be employed by the company. The licence gave C&W a monopoly on transmissions to and from Bermuda.[4]

The Wireless Telegraphy Act, 1960

This Act repealed previous wireless telegraph legislation. The Act set up the Advisory Committee to advise the Governor on the subject matter. The Act as is apparent from its heading only regulated this form of technology. It confirmed the general prohibition that no person shall establish or use wireless telegraphy without a licence. The Act contained revocation of licence provisions and created offences for sending false or misleading communications, using or obtaining confidential information; causing interference. The Governor of course could obtain control of the stations in the event of emergencies. The Act was repealed by the Telecommunications Act, 1973.

The Telecommunications Act 1973

This appears to be the first attempt at regulating the telecommunications industry as a whole rather than by way of piecemeal private Acts and public legislation aimed at a particular form of communication. It is the genesis of our present 1986 Act.

Features of the 1973 Telecommunications Act:

Established the Telecommunications Authority.
Enacted a general prohibition on establishing and maintaining a telecommunications system/network.
By 1973 Bermuda acknowledged the importance of Telecommunications to Bermuda and had appointed a Minister responsible for telecommunications. Only the Minister could issue a licence.
Established penalties for non-compliance with the Act.
Established penalties for interfering with and damaging telecommunication systems and the transmission of messages.
Acknowledge the right of the Governor to take control in the public interest.
Noticeably absent in the 1973 Act were confidentiality provisions, provisions whereby the Minister and the Telecommunication Authority could issue directives, provisions setting out the duties of Carriers, provisions allowing the general public or carriers to file complaints against Carriers, interconnection provisions as between BTC and C&W.

Cable and Wireless Public Limited Company (Consolidated Licence) Act 1985

Features of the 1985 C&W Act:

Wholesale exemption from Bermuda's 60/40 rule.
Continuation of stationary monopoly in respect of international telephone and associated voice services, international telex services, international private leased circuits, international circuit-suited data services, public correspondence services between ship and shore.
Exemption from the Exchange Control Act 1972.
Power to lay lines on public highways, and in municipalities subject to obtaining appropriate consents.
Contains the first commentary on interconnection. By Section 5, the Company was not permitted to establish its own physical means of telecommunications between its premises and the end user without the written consent of the Minister, such consent not to be unreasonably withheld if existing telecommunication operating entities (ie BTC) are unable or unwilling to provide interconnecting circuits. The company was further required to do all such acts and things as may be necessary to effect a connection or connections between the telecommunications facilities of the licensee and the internal telecommunications systems of Bermuda for the purpose of providing telecommunication services.
The establishment of a review body, the Cable and Wireless Services Review Body, to consider the services being provided having regard to the advances, regulatory changes and market conditions not only in Bermuda, but overseas.
Section 9 required C&W to provide and maintain facilities of a capacity adequate to assure quality of service commensurate with changes in technology and to improve same so that such services are comparable to those generally available outside Bermuda.

THE CURRENT LAW GOVERNING TELECOMMUNICATIONS Telecommunications Act 1986

Whatever can be said about this Act may be obsolete in six months when it is expected that it will be repealed and replaced. The 1986 Act has been used with mixed results to advance Government's 1994 competition policy which sought to end telecommunication monopolies by granting new licences to competitive Carriers. The backbone of the policy is a commitment to the belief that excellent service, the introduction of new technologies and price advantages are best achieved where there is meaningful competition in the marketplace. The history of the policy can be found in three documents:

- i. Telecommunications Commission Consolidated Report dated 13 June 1994;
- ii. The Policy Statement of the Minister of Management and Technology dated 23 June 1995; and
- iii. The Position Paper of the Minister of Technology and Information entitled Establishment of a Regulatory Structure to Support Competition in Public Telecommunications Services in Bermuda, dated 10 May 1996.

As is apparent, Government used an old vehicle, namely the 1986 Act to advance an entirely new way of delivering telecommunications to and from Bermuda. The result has been painful for most of the participants and competition has only been able to gain a toe-hold instead of a solid foothold in the marketplace.

Features of the 1986 Act:

Part I

Sets out definition section, application of international obligations (International Telecommunication Convention), provision which allows Government to establish and maintain any means of telecommunications, the role of the Department of Telecommunications and the Telecommunications Inspector.

Part II

Sets out role of Telecommunication Commission, delegation of functions by the Minister of Telecommunications to the Commission. Granting / revoking a licence cannot be delegated.

Part III

Section 9 prohibition of establishment and maintenance of public telecommunication services or systems without obtaining the grant of a licence from the Minister.

BTC Acts deemed to constitute the grant of a licence to BTC.

Temporary permits can be issued.

Grant of a licence shall be at the discretion of the Minister.

All licence applications shall be referred by the Minister to the Commission who usually hold a public inquiry and then report back to the Minister with a recommendation.

Minister is given power to issue and revoke licences. Revocation can occur if the holder wilfully or negligently fails to operate the facilities or services, or if the holder has made false statements or engaged in fraud.

Provision is made for the designation of specified carriers which to date has been applied by the Minister to Carriers who have a substantial control of a public telecommunication service so that there is insufficient competition. BTC is the only specified Carrier. Unlike new Carriers, a specified Carrier must gazette their proposed rates/services and then be subjected to an enquiry to determine whether the rate or service can be introduced.

Section 15 permits the Minister to give directives to non compliant Carriers provided a report has been received from the Commission.

Section 16 (3) permits the Minister to refer any matter to the Commission for investigation and report.[5]

Part IV

This part is perhaps one of the most significant changes from the 1973 Act, as it sets out some basic requirements for the introduction and perhaps preservation of competition. In particular, the duty of interconnection is introduced as a basic requirement of all Carriers.

Section 21 (1) (amended in 1999) sets out the fundamental duties of Carriers which include: furnishing telecommunication services upon any reasonable request; establishing interconnection with other Carriers upon reasonable request and on reasonable terms and conditions[6]; maintaining customer confidentiality; refraining from anti-competitive conduct.

Pursuant to Section 21 (2), Carriers must interconnect within 30 days.

Section 21 (12) - No Carrier can disconnect another Carrier without the approval of the Minister.

Section 21 (4) (5) (6) - Interconnection agreements must be executed and approved within a tight time frame (Maximum 30 day process).

Section 22 (6) - Dispute resolution procedure has been amended to permit either party to refer a dispute to the Commission and the Commission can thereafter issue directives.

Section 22 (1) - The provision which allows any member of the public to file a complaint to the Minister is retained.

Section 25 provides for appeals to the Minister of Commission directives and rates and service decisions. There is a 21 day time period for filing an appeal. The Minister has power to suspend the Commission's decision pending the outcome of the Minister's decision. Under Part VII of the Act (Section 60) the Minister's appeal decision or any directive she might give under Section 15 can be appealed to the Supreme Court. A 21 day time period for appealing to the Supreme Court applies.[7]

Part V - Special Provisions Regarding Radio.

Part VI - Offences and Penalties.

Section 39 - If you operate an unlicensed public telecommunications system contrary to Section 9, the potential punishment is 2 years imprisonment or a fine of \$2,000 or both.

Section 40 - If a Carrier fails to comply with a directive, the potential punishment is \$5,000 for each day of non-compliance.

Section 44 makes it an offence for the Minister, the Commission and the Department to disclose confidential information. Section 61B of the Act allows a Carrier to claim, subject to certain restrictions, that material is confidential.

Section 48 creates an offence for transmitting or receiving messages by an unlicensed means of telecommunications.

Sections 49 and 50 create offences for destroying, stealing, altering, detaining, delaying messages. The unauthorised redirecting and unauthorised copying of messages is also prohibited.

Section 51 creates an offence for damaging telecommunications installations.

Section 53 creates an offence for the grossly offensive, indecent, obscene, menacing use of a public telecommunication service; causing annoyance or inconvenience and anxiety; abusive or threatening behaviour.

Section 53 (2) is the first provision in Bermuda which creates an offence for hacking into a computer via a public telecommunication service or systems. This is an important provision in Bermuda's emerging e-commerce legislation.

Section 64 incorporates power of search provisions where there is reasonable grounds for suspecting that an offence has been committed under the Act.

Section 66 permits the Minister to exempt any person, any telecommunication service and any equipment from the regulations and the Act itself.

Part VII Supplementary and Miscellaneous.

Section 59 Minister can make regulations.

Section 59A. Any person who has sustained loss or damage as a result of any act or omission which is contrary to the Act may sue for and recover in the Supreme Court an amount equal to the loss and damage from any person who engaged in, directed, authorised, consented or participated in the act or omission.

Section 61 (1). The privacy of communication shall be inviolable. While Bermuda's Constitution has no specific provision guaranteeing and protecting a right to privacy, the legislature has understood the basic need of individuals to feel secure that their communications are secure.

Sections 62 and 64 preserve the power of the Governor to control the subject matter of telecommunications in the interests of defence, public safety, public order or public morality.

The Public Telecommunication Service (Licence) Regulations 1998

These are the only regulations that currently exist. They set out requirements for making a licence application and they create 3 classes of licences:

Class A - Long Distance Carriers providing public telecommunication services.

Class B - Local Carriers providing public telecommunication services

Class C - Internet service providers who are using the circuits of Class A or Class B Carriers to provide the service.

Developments in 1999

Pursuant to a 1998 agreement between the Bermuda Government and Cable & Wireless it was agreed that the C&W 1985 Act would be repealed with C&W being permitted to form a local company called Cable & Wireless Bermuda Limited which company would be issued a comprehensive licence in lieu of the Act. In 1999 the new company was incorporated, the 1985 Act was repealed, and on the 30th August 1999, the Minister responsible for Telecommunications and E-Commerce granted the company a new licence.

Anticipated Developments in 2000

A new Telecommunications Act will be enacted, being the culmination of a combined effort on the part of the Ministry, the Department of Telecommunications and those involved in the industry. The hope is that the legislation will be capable of rapidly accommodating the relentless pace of technology and the legitimate expectations of the Carriers and the public.

[1] It is interesting to note that the legislation has not kept pace with technology and has yet to specifically recognise internet transmissions as an essential service. Given Government's commitment to e-commerce we can expect an amendment.

[2] In the United Kingdom, the provision of telecommunications and data processing services was historically in the exclusive domain of the Post Office. Unlike Bermuda, the introduction of public telecommunication services was a Government operated service. As can be seen by Bermuda's private Acts, the infra structure in Bermuda was built and operated by private enterprise.

[3] In the same year 1890 the Bank of Bermuda comes into existence. So too does the Princess Hotel.

[4] The Bermuda Electric Light, Power and Traction Company Act 1904 appears to be the first legislation to grant a utility a monopoly (25 years) if and only if it builds the necessary infrastructure within two years to provide electricity to the public. The next company was the railway company. Under the Bermuda Railway Company Act 1924 the Company was given a 40 year exclusive franchise.

[5] Filing a complaint under Section 16 with a view to obtaining a directive under Section 15 from the Minister can be an effective way to obtain fast relief if a Carrier cannot afford to wait out the time periods set out under the dispute regulation procedures of Section 22.

[6] Bermuda's Court of Appeal in *The Bermuda Telephone Company Limited v. The Attorney General*, Civil Appeal No. 8 of 1999 ruled that the Section 21 interconnection provisions were constitutional and did not offend Section 13 (freedom of association) of the Bermuda Constitution Order 1968. It is

believed that this is the first and at present only case in the Commonwealth which has considered whether a Carrier's right to freedom of association is violated by mandatory interconnection provisions. In the United States, the attack by the incumbent Carrier has been advanced with a degree of success under their protection of property provision. In the U.S., legislation is valid if interconnection is accompanied by reasonable compensation in the form of interconnection rates.

[7] In *Minister of Foreign Affairs, Trade & Industry v. Vehicles and Supplies Ltd.* [1991] 1 W.L.R. 550 the Privy Council held that pending an appeal to the Court, a decision of the Minister could not be stayed by the Court as his decision amounted to an executive decision. This decision has application to appeals brought in response to a Minister's decision on rates and services or under Section 15 where she has the power to make directives. Mr Justice Meerabux in *The Bermuda Telephone Company Limited v. The Minister of Telecommunication* (Civil Appeal 1999 : No. 4) followed the Privy Council ruling and refused BTC's application for a stay of new long distance interconnection rates. In *The Bermuda Telephone Company Limited v. Quantum Communications Limited* (Civil Appeal 1998 : No. 283) Mr Justice Meerabux refused BTC's stay application on traditional balance of convenience grounds. In that case, the Appeal was from the Minister sitting in his appellate jurisdiction under Section 22 of the Act.

NEED MORE INFORMATION? Contact us at info@law.bm