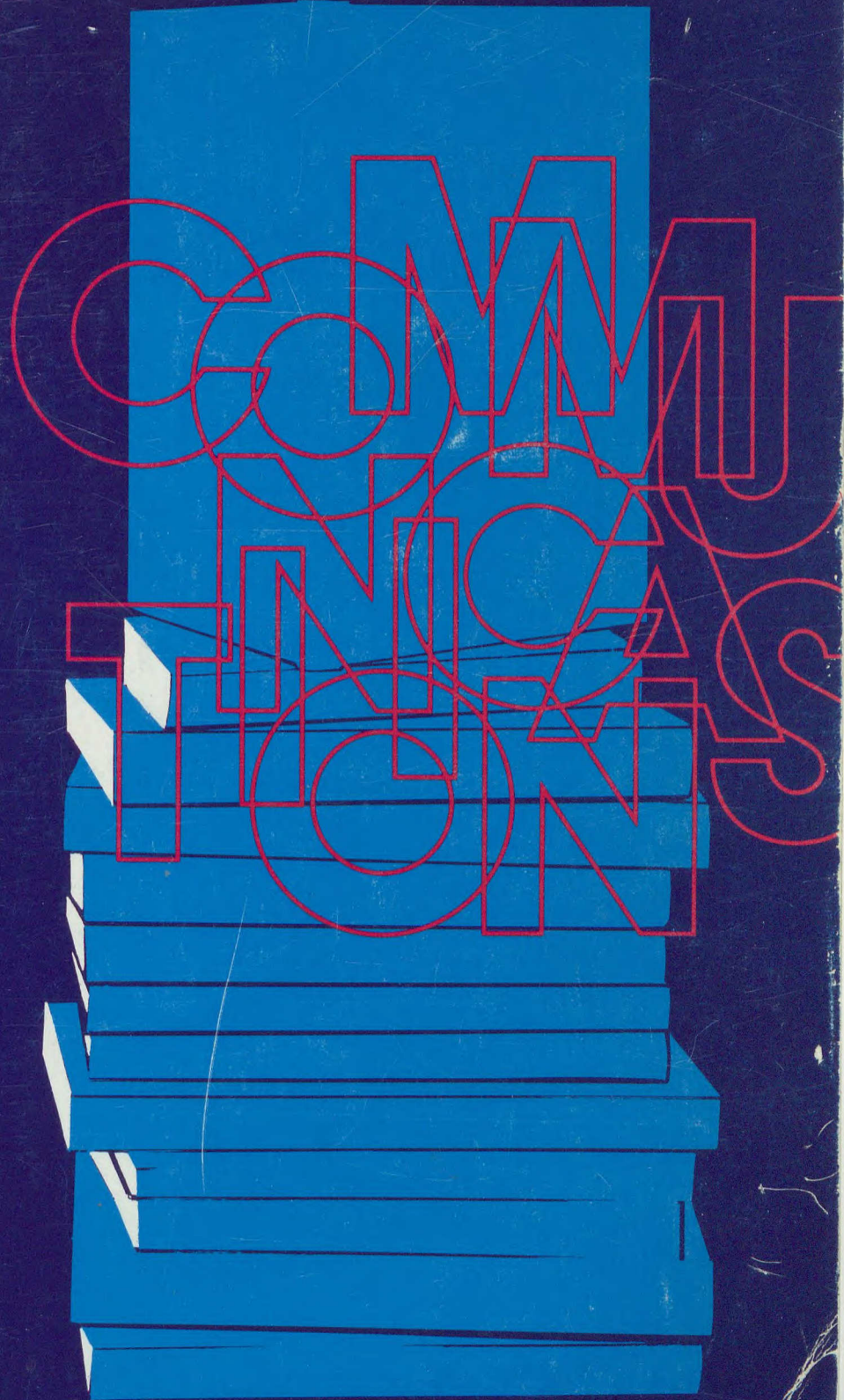


# Communications and Public Policy in Canada

by Peter S. Grant



Government of Canada  
Department of Communications

Gouvernement du Canada  
Ministère des Communications

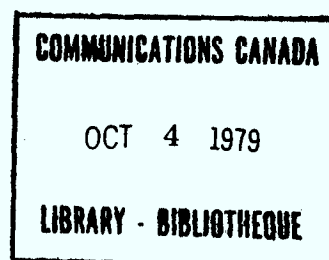


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AND PUBLIC POLICY  
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## Introduction

Over the last ten years, there has been an enormous increase in social and governmental concern over the impact of communications systems on Canadian society. With this increased concern has come a deepening of government involvement in communications regulation which is likely to continue at an even greater pace into the foreseeable future. The complexity and importance of the issues involved in communications regulation is also increasing rapidly, particularly in a country like Canada where communications policy issues are complicated by a number of factors. Among these are the galloping technology which in some areas threatens to outpace the capacity of government to deal with it; the fact that communications in Canada is provided by a mixed public-private enterprise system, which raises difficult questions for public funding and competition policy, and the fact that communications policy is inevitably affected culturally, economically, and technologically by the presence of the United States.

These comments are familiar ones. But they also lead to a clear conclusion, namely, that there is a rapidly developing need for intelligent and perceptive resource people to deal with legal and economic policy issues in the communications field in Canada. This need has already become apparent both in industry and government, and it will undoubtedly increase steadily over the next few years. To deal effectively with these problems, lawyers and economists will be required who are thoroughly conversant with communications policy issues, regulatory alternatives, and institutional realities in the Canadian context.

This study constituted one of a number of related research projects undertaken at the Faculty of Law, University of Toronto, in the period from 1972 to 1978, in order to increase knowledge and expertise in the field of communications and public policy in Canada. Among the projects undertaken was the collection and abstracting of all telecommunications regulatory decisions at the federal and provincial level in Canada, a study of the Quebec Regie des Services Publics, a historical review of telecommunication legislation in Canada, and a study of competition policy and the Canadian telecommunications carriers.

The purpose of the present study was to review, abstract, categorize and set out in bibliographical form all legal and economic research studies, periodical articles, textbooks and other reference material, whether from Canada, the United States or elsewhere, relating to communications law and policy. Special attention was paid to materials having relevance to Canadian policy issues. The completion of this project proved particularly difficult because the number of sources of interest turned out to be substantially higher than anyone had expected. In the end, over 6,000 studies, articles and other sources relating to communications and public policy were discovered, from which the selection was made for the present work.

The completion of this project was made possible by financial support from a number of government agencies, whose assistance to the research program at the Faculty of Law, University of Toronto, is gratefully acknowledged. Primary funding was provided by the federal Department of Communications. Supplementary funding was supplied by the Canadian Radio-television and Telecommunications Commission, the British Columbia Department of Transport and Communications, the Manitoba Department of Consumer, Corporate and Internal Services, the Ontario Department of Transportation and Communications, and the Quebec Department of Communications.

The research for this study was done by law students working under my direction at the Faculty of Law in the period from 1972 to 1978, many of whom participated in other related studies as well. Basic preliminary work was carried out in 1972-75 by Paul Baston, Mary Eberts, Paul Emond, John D. Gregory, John J.L. Hunter, Lesley Lane, John Loosemore, Paul D. Morrison, Gordon Norsworthy, Nicholas Poppenk, Elizabeth Stewart, Wendy J. Thompson and Rosalind Zisman. Reorganization and updating was carried out in 1976-77 with the assistance of Rick Burgess, Anne Clendenning, Alexandra Hoy, Ann Scott, Ronald Swiddle and Dave Thompson. In preparing this work for publication I have added a number of more recent sources which have come to my attention since 1977. In its present form, therefore, the study includes reference up to March, 1979. The contribution of the students who participated in the research is particularly acknowledged, although I take ultimate responsibility for any errors or omissions.

Peter S. Grant

April 1, 1979



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## CHAPTER 1

### COMMUNICATIONS PERIODICALS, STATISTICAL SOURCES AND BIBLIOGRAPHIES

Research into communications and public policy, as in other major fields, requires a combination of dedication, method and imagination. There are few areas of study, however, which involve the eclectic variety of sources that characterizes the communications field. As will be seen elsewhere in this volume, a substantial amount of articles, reports and studies already exist on major subjects in the communications field. In addition, however, the researcher should be aware of sources that are not as familiar to students of law and economics, but which are indispensable to informed discussion. The present chapter deals with a number of these sources, many of which are unavailable at university libraries but which are obtainable through industry or government agencies.

Most of the sources discussed below are recurring publications, including newspapers, trade periodicals, statistical reports, annual financial reports, annual directories, and broadcast rating services. While these publications rapidly become dated, their topical character is particularly valuable for studies which are directed towards future policy in the communications field, since they include current financial or economic data in rapidly changing areas of technology. The chapter concludes with a table of other bibliographies which relate to specific areas of study in the communications industry and which may be useful.

This chapter is organized into four parts:

- 1.1 Newspapers and Trade Periodicals
- 1.2 Legal and Economic Periodicals



1.3 Statistical Sources

1.4 Other Bibliographies

### 1.1 NEWSPAPERS AND TRADE PERIODICALS

A source which is invaluable to researchers consists of the major Canadian newspapers. In recent years, the business press in Canada has devoted increasing space to industry and regulatory developments in the communications field. Although the best coverage appears in the Financial Post, the Financial Times of Canada, and the Globe and Mail's recently expanded Report on Business, reference can also be usefully made to the business sections of other newspapers. Access to clippings from these sources depends on the researcher. A number of communications organizations, including the CRTC, subscribe to commercial clipping services, which clip from all Canadian dailies, weeklies, trade and consumer publications in English and/or French as well as select American publications, to the customer's specifications. The clippings are submitted to the customers at the end of the specified time period and no files are kept. This of course means that there is no back-issue search except through the customer's own file.

In Toronto there are two clipping services which offer the basic services with some additions. Bowden's Press Clippings offers the above mentioned service plus coverage of the Canadian Press and Broadcast News wire services subject to any restrictions governing timed release. They also publish a media directory of Canadian and American dailies and weeklies. Canadian Press Clipping Service, operated by Maclean-Hunter Limited, offers the regular service, excepting French weeklies, and also has a Radio Monitor Service. They regularly monitor four Toronto stations on a set schedule but will secure old broadcasts and set up future monitoring on specific broadcasts not carried on the four specific stations. In addition Maclean-Hunter offers a reader service covering the Financial Post.

If a researcher requires press-clippings from the past then it is advisable to contact the library departments of various newspapers which clip their stories and arrange them by subject index. In addition the CBC Reference Library in Toronto has a subject index file going back 25 years and covering the major Canadian and American dailies and weeklies. These files are particularly extensive on stories relating to broadcast regulation and the CBC. The CRTC also maintains an extensive clipping file going back to 1969.

A second major source of information regarding communications and public policy is the large number of trade periodicals that serve the various sectors



of the communications industry. Although much of the material in the trade periodicals tends to be of a transitory nature, particularly in regard to new products, trade news, personnel shifts, and so on, a surprising amount of useful material is also presented, including comment on recent regulatory decisions, interpretations of current rules and regulations, editorial reaction to current and forthcoming legal or regulatory developments, and forecasts of technological change and their impact on the industry.

The major problem presented by the trade periodicals, however, is the great number of periodicals involved, and the difficulty in finding one's way through this material. A useful way of cutting down the time required to research these periodicals is to make use of the standard periodical indices, which are found in most public libraries, and which provide a guide to the major subject headings covered. The major indices are the following:

Business Periodical Index  
 Canadian Periodical Index  
 Public Affairs Information Service  
 Bulletin  
 Readers' Guide to Periodical Literature  
 Social Sciences and Humanities Index

Listed below are the trade periodicals found to be of most significant benefit to policy researchers in the communications field. For ease of reference, they are listed under basic industry categories, along with brief notes as to the nature of their content.

#### Advertising

Advertising Age. This American newspaper of marketing is issued weekly, and includes current news regarding the magazine, broadcasting and newspaper industries. Published in Chicago.

Canadian Media Directors Council Media Digest. This reference tool published by Marketing magazine (see below) is useful for estimates of trends and as a frame of reference for comparative studies. It contains basic market information as well as detailed data on television, radio, newspapers and magazines in Canada.

Canadian Media Rates and Data. A publication out of Skokie, Illinois by Standard Rate and Date Service Inc., containing broadcast data of use to advertisers and agencies who advertise in Canada, organized by province and city.

Editor & Publisher Market Guide. A New York publication which contains market information of use to newspaper advertisers and includes the relevant Canadian statistics.

Marketing. A newspaper of marketing communications in Canada with particular reference to advertising agencies, commercial and industrial marketers, and their interrelationships. Published by Maclean-Hunter Limited, in Toronto.

Marketing/Communications. This American weekly magazine formerly called "Printer's Ink" is concerned with advertising and marketing. Published in Orange, Connecticut.

Sales Management Survey of Buying Power. An American publication out of New York which includes estimates of population, income and retail sales in U.S. on several demographic breakdowns, with similar information for Canada.

#### Book Publishing

ACP Notebook. This newsletter is published bi-monthly by the Association of Canadian Publishers, Toronto. It contains brief notes on trade developments with an emphasis on government relations.

The Bookseller: The Organ of the Book Trade. This is the British counterpart of Publishers' Weekly. Published in London, it contains notes and news on the book trade.

Quill & Quire. A monthly publication covering the book publishing industry in Canada, published in Toronto.

Publishers' Weekly: The Book Industry Journal. A weekly American publication published in Ann Arbor, Michigan which is considered one of the best trade journals, featuring news of the book publishing industry, plus annual publication statistics and summary of trends in content and sales.

#### Film and Theatre

American Cinematographer. This American monthly



published in Los Angeles contains articles on technical aspects of the motion picture industry.

Back Stage. An American weekly published in New York dealing with theatrical and non-theatrical films, radio and television shows and commercials, and theatre.

Boxoffice. Although an American publication, Boxoffice has a "Canadian edition" featuring contributions from correspondents across the nation. It is published weekly, in Kansas City, Missouri.

Calendar of International Film and Television Events. This is an annual publication of the International Film and Television Council in Rome. It covers meetings of the Council's member organizations and keeps track of film and television events throughout the world. Also included are international festivals, conferences and exhibitions.

Canadian Film Digest. This Canadian monthly contains commentary on the commercial Canadian and international film industries. Published by Film Publications of Canada Limited, in Toronto.

Cinema Canada. A Canadian bi-monthly journal published in Toronto containing Canadian film industry news, including technical development news.

Cinéma-Québec. This is a Canadian critical film magazine published in Montreal in the French language which gives heavy emphasis to developments in Quebec cinema, but also contains articles on the international film scene.

Film Quarterly. An American quarterly published in Berkeley, California, formerly known as the Hollywood Quarterly, contains informed and scholarly opinions on current developments in the motion picture industry, including reviews of recent film releases.

Films in Review. Published monthly in New York (except June - July and August - September, when bi-monthly), this periodical contains articles, both gossipy and informative, as well as extensive film reviews, regular columns and book reviews.

Monthly Film Bulletin. A monthly publication of the British film industry, published in London containing reviews of major international film releases, including information regarding cast and production.

Motion. A Canadian bi-monthly magazine published in Toronto devoted to coverage of events concerning

the film, theatre and television industries in Canada. It presents newsy profiles of media personalities as well as information regarding current happenings, new books and film releases.

New Canadian Film/Nouveau Cinéma Canadien. Published by the Cinématèque québécoise in Montreal, this magazine contains information on Canadian film production and upcoming events.

Performing Arts in Canada. An established Canadian quarterly of the performing arts, published in Toronto, with regular coverage given to cinema, theatre and dance.

The Reel Thing. Published on an irregular basis by the Ontario Film Association, Barrie, Ontario, The Reel Thing contains information on new film releases, plus frequent interviews with filmmakers.

Screen. Published irregularly by the Media Division of the National Film Board in Montreal, Screen contains articles and commentary of interest to media personnel.

Sight and Sound: The International Film Quarterly. A British quarterly devoted to film reviews and articles on current movements in film content and technique. An independent artical magazine sponsored and published by the British film industry.

Take One. A Canadian bi-monthly published in Montreal containing news of the motion picture industry, production notes and reviews. Considered to be one of the best critical periodicals in this field.

That's Showbusiness. This Canadian Variety-style newspaper of the entertainment industry is published bi-weekly. It contains news of current media happenings as well as inside industry gossip.

Variety. An American weekly newspaper which offers complete coverage of the entertainment industry, including films, video, radio, music and stage. Generally contains reports of current events and government action and regulation of the "show business" industry.

#### Music and Recordings

Billboard. An American weekly published in New York concerned with the music and recording industries. Articles on current trends and popular recording artists are common.

Cashbox. Calls itself the International Record-Music weekly, this trade magazine is published in New York.

Le Compositeur Canadien/The Canadian Composer. A Canadian periodical published bi-monthly by the Composers, Authors and Publishers Association of Canada Ltd., containing Canadian music composition and publication news.

The Music Scene. A Canadian periodical published six times a year by the Performing Rights Organization of Canada (formerly BMI Canada) containing Canadian music industry news and promotion.

Opera Canada. Canadian quarterly published by the Canadian Opera Association in Toronto.

Rolling Stone. Published by-weekly in San Francisco, containing news and opinion by American new-wave journalists. Also up-to-date music coverage and rock industry news.

RPM. A Canadian weekly publication from Toronto, containing popular music recording and radio broadcasting news. Occasional articles on aspects of CRTC regulation of FM format and the Canadian content rule.

Sound. Monthly Canadian publication published in Toronto featuring articles and reviews by music industry personalities, plus independent laboratory reports on new developments in stereo and sound equipment.

#### Journalism, Mass Media and Communications Research

Canadian Communications Research Information Centre Newsletter. This excellent newsletter is published regularly on a bilingual basis by the Canadian Communications Research Information Centre in Ottawa and contains notes on current research, updated bibliographical references to current literature in the Communications field, and a calendar of events.

Canadian Journal of Communication. Formerly Media Probe, this magazine in typed format is published quarterly in Toronto and contains research articles on mass media and communications studies.

Columbia Journalism Review. A U.S. bi-monthly journal containing articles by professors, academics and professional journalists on current issues in the field of news reporting, publishing and broadcasting. Scholarly perspective. Some international commentary.

Communication Research. Concerned with the study of communication processes at all levels. This journal, published in Los Angeles on a quarterly basis, focuses on explication and testing of models that explain the processes and outcomes of communication.

Communicontents. Published by Arizona State University, this journal contains abstracts and critical reviews of current communications publications.

Content. A monthly newsletter for Canadian journalists, including commentaries, letters, gossip columns and miscellany on both print and electronic media. Also includes subscription to Carleton Journalism Review, a research-oriented quarterly in tabloid form which is published by the School of Journalism, Carleton University, Ottawa.

Editor & Publisher. An American newspaper-oriented weekly published in New York, E&P carries an advertising news section, articles on newspaper management, circulation material and spot news of the newspaper industry.

Gazette: An International Journal for Mass Communications. A quarterly journal published in the Netherlands which contains articles by academics and professionals on press, radio, TV, advertising, public opinion and propaganda, as well as occasional special sections. Includes bibliography, book reviews and news of current international activities.

In Search/Enquête. Subtitled "The Canadian Communications Quarterly," this bilingual quarterly magazine is published by the Department of Communications, Ottawa, and offers a selection of articles touching on different fields of communications in Canada intended for the level of the general reader.

Journalism Quarterly. An American journal published in Minneapolis which concerns itself with research in journalism and mass communications. Each issue carries a listing, under 25 subject headings, of major articles from the standard trade periodicals and scholarly journals that are concerned with the communications field.



Professional Associations in the Mass Media. Updated regularly, this UNESCO handbook gives details concerning national and international press, film, radio and television associations - including a brief history and account of their current activities.

### Radio and Television

AV Communication Review. Published quarterly by the Association for Educational Communications and Technology in Washington, D.C. contains topics related to media of concern to educators.

Access. This activist journal is published every two weeks by the National Citizens Committee for Broadcasting, Washington, D.C. In addition to feature articles, the magazine contains regular news on citizens groups at the FCC and in the courts.

Access. Published quarterly by the Alberta Educational Communications Corporation, Edmonton, containing material of interest to educators.

ACT. Action for Children's Television, founded in 1968, is a U.S. organization dedicated to child-oriented quality television without commercialism. The ACT newsletter is published in Newtonville, Massachusetts.

Broadcast Management/Engineering. A monthly technical journal on radio and television broadcasting, including a separate section on cable, published in New York.

Broadcaster. A Canadian monthly published in Toronto with articles of a general nature on radio and television broadcasting and advertising; notes on new products and services. Includes one-sentence statements of recent CRTC decisions on radio, television and cable.

Broadcasting. A U.S. weekly periodical from Washington, D.C., containing broadcasting industry news and reportage and commentary on current events of concern to broadcasters. Also includes data relating to establishment of new TV, AM and FM stations, renewal of licenses, actions and applications, and ownership changes. Also available annually: Broadcasting Yearbook, Cable Sourcebook.

Cable Communicators. A monthly magazine published in Toronto of interest to those involved in the cable television industry in Canada.

Canadian Telephone and Cable Television Journal. Five issues per year of cable television and telephone industry news. Special issue on cable television published in May. Published in Toronto.

CATV and Station Coverage Atlas. An annual publication from Television Digest Inc., Washington, D.C., containing 35-mile zone maps of all television stations and construction permits, as well as statistics relevant to the cable TV industry. Includes advertiser's index and reports on state of FCC regulatory activity.

CCTA News. A short monthly bulletin with current news of the cable television industry, published in Ottawa by the Canadian Cable Television Association.

Communications and Cable TV Business. A monthly publication from Toronto containing Cable Industry news.

EBU Review. A bi-monthly magazine published in Geneva by the European Broadcasting Union. The "Programmes, Administration, Law" edition contains articles on radio and television broadcasting, primarily in Europe. A separate section covers notes on comments on radio and television law.

Educational Broadcasting Review. An American bi-monthly published by the National Association of Educational Broadcasters in co-operation with Ohio State University. Contains "Open Forum" section for opinions on current broadcasting, and articles on a wide range of aspects of media research.

Journal of Broadcasting. An American quarterly published by the Broadcast Education Association, containing scholarly articles and research notes on the broadcast media - both legal and educational aspects.

Modulation. A bilingual newsletter published regularly by the Department of Communications, Ottawa, covering radio and television technical developments, including the rf spectrum and communications satellites.

Pulse. Published in Toronto, this publication bills itself as the "Film and TV Newsletter". Contains notes on current television and film production, along with general industry and festival news.

Radical Software. A monthly (except July, September and December) U.S. periodical with a radical viewpoint, dealing with innovative techniques for use of visual media. Published in New York, the

emphasis is upon experimentation and diversity of expression of ideas, thoughts and activities of those persons working in video.

Radio-Television Daily. This American daily newspaper of commercial radio and television contains up-to-the-minute media news and commentary. Published in New York.

Television. An American magazine for management personnel in broadcast advertising, Television is published monthly in New York and includes an annual index.

#### Telecommunications Carriers and Data Communications

Canadian Communications Reports. A short newsletter published twice monthly by Maclean-Hunter Limited, Toronto, which covers new developments in the regulation of telephone, cable and satellite communications.

Canadian Datasystems. A trade journal published by Maclean-Hunter Limited in Toronto given to promotion and discussion of the computer field in general; only occasional topical commentary on computers as related to communications.

Canadian Interconnection. A short newsletter published monthly by Maclean-Hunter Limited, Toronto, which focuses on government developments in the customer-owned attachments and system interconnection fields in Canada.

Communications of the ACM. A publication out of New York of the Association for Computing Machinery, a group dedicated to the development of information processing as a discipline and to the responsible use of computers in an increasing diversity of applications.

Communitronics. A technical journal of communication and electronics, published by-monthly in Pointe Claire, P.Q.

Computer Data. Calling itself the "Canadian Computer Magazine", this monthly magazine is published in Toronto by Whitsed Publishing Ltd., and covers trends and forecasts in the data processing industry in Canada.

Datamation. A monthly journal of computer industry news, published in New York.

Electronics and Communications. A Canadian monthly published in Toronto which states in its editorial purpose: to bring new component and product information to the electronics industry and to potential users of electronic communications, control and instrumentation equipment in general industry, science and medicine, research and development, and to report on the development of new products and their practical application.

Fiber Optics and Communications Newsletter. A monthly newsletter published by Information Gatekeepers, Inc., in Brookline, Massachusetts covering U.S. and news on fiber optics, communications and related fields.

Moody's Public Utility Manual. Moody's is a comprehensive source of information published in New York on public utility enterprises of all descriptions, including much Canadian coverage.

Public Utilities Fortnightly. An American journal published every two weeks in Washington, D.C., containing current regulatory, financial and utility news and commentary.

Telecommunications Reports. This weekly newsletter is published in Washington and covers government regulation of the telephone, telegraph and radio communications fields. Familiarly known as the "Yellow Peril", it is probably the best of the insider newsletters on telecommunications regulations, and includes substantial excerpts from pleadings, submissions and decisions in the United States.

Telephone Engineer and Management. Calling itself the "telephone industry magazine", this American publication is bi-monthly, and contains technical information and general news of interest to all sectors of the telephone industry - management, engineering, plant-installation, maintenance and operating, commercial, marketing, traffic and accounting.

Telesis. A monthly technical journal of Bell-Northern Research published in Ottawa containing articles by professional engineers on new developments in telecommunications technology.

Telephony. A U.S. weekly published in Chicago containing telephone industry news, notes of new products, and brief reports of court and regulatory agency decisions.



## 1.2 LEGAL AND ECONOMIC PERIODICALS

An increasing number of articles in legal and economic periodicals deal with the regulation of communications. These journals are indexed in the same way as the trade periodicals in the various legal periodical indexes, available at all law school libraries. In particular, reference should be made to the following:

Canadian Index to Legal Periodicals  
 Index to Periodicals relating to Law  
 Index to Legal Periodicals (U.S.)  
 International Index to Legal Periodicals

A number of periodicals in the legal and economic field have a particular emphasis on communications policy. These are listed below:

American Bar Association: Annual Report of Sections. Three sections of the ABA publish annual journals or reports which deal frequently with communications regulation, namely, the Administrative Law Section, the Antitrust Law Section, and the Public Utility Law Section.

Broadcast Management/Engineering. This monthly magazine, published in New York, contains a regular column on the interpretation of the FCC Rules & Regulations.

Canadian Communications Law Review. An annual journal published at the Faculty of Law, University of Toronto, containing articles and case notes on communications and public policy in Canada, most of them developed from the research program in communications law at the Faculty of Law.

EBU Review. A bi-monthly journal published by the Administrative Office of the European Broadcasting Union. Includes a separate section of articles on radio and broadcasting law and regulation, primarily focusing on Europe.

Federal Communications Bar Journal. The official journal of the Federal Communications Bar Association, containing articles and case comments on communications regulations by lawyers and FCC commissioners.

Motion Picture Law Review. A U.S. monthly published in Los Angeles which supplements Motion Picture Law Digest.

Performing Arts Review. An American quarterly published in New York which is subtitled, "The Journal of Management and Law of the Arts." Covers relevant commercial, non-profit and academic sectors of the

performing arts, including theatre, motion pictures, television, music, and dance. Coverage is also given to subsidy, legislation, subsidiary rights, technological developments in the arts, and pertinent fine and graphic arts.

Perry's Broadcasting and the Law. This newsletter appears twice a month to report and interpret current court and FCC rulings affecting broadcasting practice and operations.

Publishing, Entertainment, Advertising and Allied Fields Law Quarterly (P.E.A.L.). Reprints of U.S. law review articles relating to the named industries, published in Mundelein, Illinois.

Rutgers Journal of Computers, Technology and the Law. A law journal published twice a year by the Rutgers Law School, Newark, N.J., focusing on legal aspects of data processing. (Formerly the Rutgers Journal of Computers and the Law).

### 1.3 STATISTICAL SOURCES

This part deals with a number of statistical and financial sources which are invaluable to researchers in the communications field in Canada. Almost all of the sources identified below are issued on at least an annual basis, so that statistics can be updated year by year. Four basic sources are discussed: (1) the annual reports by Statistics Canada on the communications industry; (2) the availability of the annual financial reports of the public companies in the industry; (3) a table of the annual trade directories issued in Canada; and (4) a note on the broadcast rating services in Canada.

#### Statistics Canada Reports

These are a critical source of information for Canadian public policy. Listed below are all the present regular reports issued by Statistics Canada on the broadcasting, cable, telecommunications, computer and motion picture industries.

Other reports, not noted below, are available in regard to the publishing industry and the sound recording industry.

Cable Television (Catalogue No. 56-205). Published annually, this pamphlet contains current data on wireline facilities, subscribers and contracts by area, and operating revenue and expenses by area and by revenue group. Employee statistics by area are recorded as well as financial information regarding income, surplus accounts, assets, liabilities and net worth.

Communications Service Bulletin (Catalogue No. 56-001). This short newsletter is published about 20 times a year for industry, government and others who wish to have the most recent summary information on telecommunications. Included are the telegraph and cable industry, the telephone industry, radio and television broadcasting, cable television, plus information of general interest concerning new technological developments or new regulations by government agencies.

Motion Picture Production (Catalogue No. 63-206). This annual publication breaks down Canadian motion picture production into four categories: number of employees, the salaries involved, the gross revenue from each production, as well as an analysis of the various types of films produced.

Motion Picture Theatres and Film Distributors (Catalogue No. 63-207). This annual statistical report gives figures relating to the admission figures,

numbers of features distributed and shown, prices and resulting revenues to the immediate participants in this area of the motion picture industry.

Radio and Television Broadcasting (Catalogue No. 56-205). This is an annual statistical report on revenue and expenses of the broadcasting industry. Also included are notes as to property, plant and equipment as well as employee statistics.

Telegraph and Cable Statistics (Catalogue No. 56-201). This annual report deals with basic statistics of the telegraph and cable companies operating in Canada, including CN and CP Telecommunications, Teleglobe Canada, and a number of smaller companies.

Telephone Statistics (Catalogue No. 56-203). Basic statistics of telephone operation are included, such as number of telephone calls, type of service, wire and pole-line mileage, as well as assets and liabilities. Also documented are employee statistics and a breakdown of revenue and expenditure by province.

Telephone Statistics - Preliminary Report on Large Telephone Systems (Catalogue No. 56-202). This short pamphlet gives statistics for the large systems, including telephones by type of service, certain employment and financial data and number of telephone calls.

#### Annual Reports of Public Companies

A source often overlooked by students of media concentration or competition policy is the annual financial reports of the public companies operating in the communications field. Such reports can furnish valuable information as to the current holdings, recent acquisitions and current profit and loss position of the principal companies in the industry.

In the event that a search for public companies operating in certain fields is required, it is best to consult the current Canadian Key Business Directory published by Dun & Bradstreet, Toronto. Businesses are listed by their area of interest (e.g. Communications, Electronic Equipment, Printing, Publishing and Allied Industries, etc.) and names and addresses are supplied. It is usually possible to obtain their most recent financial report by writing to the Secretary or checking the files of the Provincial Securities Commission or Stock Exchange. Similarly, most business school libraries have a file containing annual financial reports of most Canadian and American public companies.

It may also be useful to consult the Financial Post Survey of Industrials, published annually by, Maclean - Hunter Ltd. This publication surveys the annual reports of broadcasting, cable, and telephone companies, and equipment manufacturers. To assist in understanding the information in these annual reports, reference should be made to Financial Reporting in Canada, published by the Canadian Institute of Chartered Accountants, Toronto.

#### Annual Trade Directories

The directories listed below are issued on an annual basis, or sometimes more frequently, by the trade periodicals serving the communications industry. They contain extremely useful data on numbers of companies, subscribers or coverage patterns, trade associations, and industry executives.

Broadcaster Directory. A useful basic directory to the Canadian broadcasting industry, this publication is issued twice yearly. It provides detailed listings for all broadcasting stations and cable systems, as well as data on government agencies, video production, and unions.

Broadcasting Yearbook. Contains information regarding business and operation of radio and television enterprises in the U.S. Special market information concerning audience viewing and listening patterns is included.

Canadian Film Digest Yearbook. This annual publication is included in a subscription to Canadian Film Digest magazine. A handy reference source for information regarding production, distribution and exhibition of commercial films in Canada, it also lists valuable statistical information, censorship boards and rates, recipients of Academy and Canadian Film Awards, and provincial amusement taxes and theatre licence fees.

Editor & Publisher International Yearbook. Published annually by Editor & Publisher magazine, this yearbook contains factual information about the Canadian, U.S. and foreign newspaper industries:

Film Canadiana. Billed as a "Yearbook of Canadian Cinema", this annual publication, published in Ottawa, contains information on film and television organizations, production and distribution companies, and general data on Canadian television and cinema.

International Media Guide, Radio - Television. Contains data on television and radio stations and networks plus ownership statistics on an international basis. Published in New York.



International Motion Picture Almanac. This almanac gives a complete who's who and statistical summary of the U.S. movie industry, and also gives data on theatre circuits in Canada.

International Television Almanac. Primarily concerned with information on U.S. television, but also contains data on the television industry in Canada, including names of stations.

Radio Facts. This publication, more properly entitled "Digest of Basic Canadian Radio Facts," is issued annually by the Radio Sales Bureau of Canada (RSB) in Toronto. Contains useful information on radio audience, no. of sets in use, average hours tuned, FM radio penetration, and revenue figures.

Radio - Television Yearbook. Chiefly a reference work for U.S. broadcasters, this yearbook contains data on advertisers, professional associations, and personnel in the broadcasting field.

Standard Directory of Advertisers. This definitive resource book gives information on 16,000 U.S. advertisers including product trade names and amounts of money spent for advertising.

Television Factbook. A prime reference source for information on coverage, circulation and other television industry statistics in the United States.

TV Basics. A short pamphlet annually published by TVB of Canada Inc. in Toronto, which provides a concise overview of television trends and developments in Canada. It contains statistics relating to Canadian television audience composition and viewing patterns.

TV - Film Filebook. This well-researched publication issued in Toronto, contains complete information on the Canadian television and film industry. Areas covered include: government film departments, sound recording studio, and market research organizations, as well as all other major categories of interest to professionals in TV and film.

Writers' and Artists' Yearbook. This directory, published in London, England, for writers, artists, playwrights, screenwriters, photographers and composers, gives details regarding the state of the market for publication and broadcast. It includes Canadian entries.

Yearbook of the Canadian Entertainment Industry. An annual publication with directory information published by Film Publications of Canada Ltd., Toronto.

### Broadcast Rating Services

Since the viewer response to the broadcast media determines the ultimate disposition of the advertising dollar, the Canadian rating services are obviously key tools in the analysis of the economics of competition in the broadcast industry. In addition, researchers may find statistics of viewing and listening patterns of more general interest. Information provided by the rating services could be particularly useful in determining which media are reaching which groups of people, and the potential costs and revenues of new broadcast undertakings.

Currently over 100 firms in Canada provide market research in a variety of areas related to advertising and the media. For an up-to-date listing, see Financial Post Survey of Markets, published annually by Maclean-Hunter Ltd., Toronto. A variety of specialized services are offered by these firms, including advertising penetration studies, consumer surveys, economic and industrial analysis, new product testing, and general market surveys. The firms also provide a variety of broadcast audience measurements, in most cases tailored to specialized uses. The two basic broadcast rating services in Canada in general use are those of the BBM Bureau of Measurement and the A.C. Nielsen Company of Canada Ltd.

The BBM Bureau of Measurement is a federally-incorporated non-profit organization, the membership of which is made up of advertisers, advertising agencies, radio and television stations and networks, and associated suppliers. National surveys of radio and television stations are conducted in the spring and fall, covering all of Canada except the Yukon and Northwest Territories. Reports are based on personal diary surveys which measure normal radio and television use over a two-week period. Projections are made according to groups divided by age and sex, with further projections made on the basis of "official language spoken," and by ethnicity in areas where the majority group forms at least 10% of the population.

370 "sampling cells" are delineated, most of which are counties, metropolitan areas or census divisions. An initial selection of households is made with a random starting point, and individuals are selected from the compiled list of about 400,000 persons who comprise the chosen households. The diary completed by the members of the sample is of a closed-end design. It includes a brief questionnaire requiring demographic information (including data on cable TV) and a daily journal to record, by 15-minute segments, the person's radio listening and television viewing over

a 7-day period. Diaries are then returned by mail, edited manually, and then re-checked and analyzed electronically and by computer.

In a typical BBM report, individual stations are identified in the left-hand column, with figures representing proportion of audience placed in the boxes on the right. The percentage of viewers watching particular shows is shown, with a breakdown of the figures according to sex and age.

## 1.4 OTHER BIBLIOGRAPHIES

Although the present volume provides a basic bibliography of legal and economic sources relating to Canadian Communications, there are a number of other bibliographies which may be useful, particularly in regard to specific subject areas. These are listed below, in alphabetical order by author.

Reference should also be made to the Canadian Communications Research Information Centre Newsletter, issued regularly in Ottawa by the Canadian Communications Research Information Centre and containing extensive updated bibliographical material, and reports and abstracts of research studies on communications in Canada.

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## CHAPTER 2

### CONSTITUTIONAL JURISDICTION OVER COMMUNICATIONS

In any federal state, an important question is the extent to which jurisdiction to regulate communications devolves upon the local or national government. In Canada and the United States, questions of constitutionality are determined by reference to the written constitution of each country. The recent First Ministers' Conference on the Constitution, held in Ottawa on February 4-6, 1979, singled out communications as a prime area for discussion, and agreement was reached by the federal government and nine of ten provinces on a change in the jurisdiction to regulate cable television. As the cases and articles in this part make clear, the constitutional questions relating to communications remain complex and controversial.

In Canada, the division of legislative powers between the provinces and the federal government is determined by the provisions of the British North America Act. Section 92, which gives the provinces exclusive power to make laws in relation to matters coming within certain classes of subjects, includes among these classes, 92(13) (Property and Civil Rights in the Province") and 92(16) ("Generally all Matters of a merely local or private Nature in the Province"). Section 92(10) also grants provincial legislative power in regard to "Local Works and Undertakings other than such as are of the following Classes," and adds three exceptions, including paragraph 92(10) (a) which reads

"Lines of Steam or other Ships, Railways, Canals, Telegraphs, and other Works and Undertakings connecting the Province with any other or others of the Provinces, or extending beyond the Limits of the Province."

A further provincial legislative power is set out in section 93, which (subject to provisions having for their purpose the protection of religious minorities) commits education exclusively to the responsibility of the provincial legislatures. The opening paragraph of section 91 gives the Dominion a general residual power "to make laws for the Peace, Order and good Government of Canada" in relation to all Matters not within section 92, and then sets out, by way of example, 29 specifically enumerated classes of subjects over which the exclusive legislative authority of the Dominion is declared to extend. None of these classes expressly refer to communications as such, although paragraph 29 incorporates into section 91 the exceptions to paragraph 92(10) noted above, including paragraph 92(10) (a) regarding inter-provincial undertakings.

As noted further below, a number of judicial decisions have explored the issue of constitutional jurisdiction to regulate communications facilities and undertakings in Canada. In general, the questions raised in these decisions touch on five matters. First, what communications services would be caught under federal jurisdiction as constituting interprovincial undertakings under section 92(10) (a)? Second, how does the constitution deal with areas like broadcasting, cable television, or computer/communications, where the technology was unheard of at the time of the Confederation? Third, are any of these new communications technologies embraced by the "peace, order and good government" clause, and so caught under federal authority? Fourth, what authority do the provinces acquire in regard to communications activities by virtue of their authority over "local works and undertakings" and over "education"? Finally, is it possible to make a distinction between control over the technical hardware involved, and control over matters such as program content or cultural impact?

The chapter is divided into three parts:

- 2.1 Judicial Decisions relating to Constitutional Authority over Communications
- 2.2 Canadian Articles and Studies on Constitutional Jurisdiction
- 2.3 Constitutional Jurisdiction over Communications in the United States

## 2.1 JUDICIAL DECISIONS RELATING TO CONSTITUTIONAL AUTHORITY OVER COMMUNICATIONS

Set out below is a summary of each of the principal judicial decisions relating to constitutional authority over communications in Canada. The cases are set forth in chronological order. The focus in these cases is on the constitutional authority to regulate communications services and facilities and no attempt has been made to include cases on the question of freedom of expression. On this issue, reference should be made to Walter S. Tarnopolsky, The Canadian Bill of Rights, 2nd edition revised, Toronto: McClelland and Stewart, 1975, at chapter 5.

1. City of Toronto v. Bell Telephone Co. of Canada. [1905] A.C. 52, affirming 6 O.L.R. 335, which reversed 3 O.L.R. 465, 3 C.R.C. 93 (House of Lords, Judicial Committee of the Privy Council, Lord Macnaghten, Lord Davey, Lord Robertson, Lord Lindley and Sir Arthur Wilson, November 11, 1904).

Bell Telephone had been incorporated under federal legislation in 1880 (S.C. 1880 c.67) which authorized it to acquire any lines for the transmission of telephone messages "in Canada or elsewhere," and to construct and maintain its lines along, across, or under any public highways, streets, bridges, watercourses... either wholly in Canada or dividing Canada from any other country, subject to certain conditions. An Ontario law passed in 1882 on application by Bell Telephone required it to obtain municipal consent before constructing lines in a municipality. The Privy Council held that notwithstanding Bell's "legislative bargain", the company had acquired from the federal legislature "all that was necessary to enable it to carry on its business in every province of the Dominion", and that "no provincial legislature was or is competent to interfere with its operations, as authorized by the Parliament of Canada". The governing consideration was the powers granted to the company by its charter rather than powers which it has actually exercised. Accordingly the Ontario statute was ultra vires, as interfering with the operations of an undertaking falling within the exclusive jurisdiction of Parliament under s. 92(10)(a) of the B.N.A. Act. Lord Macnaghten also noted that the undertaking authorized by the federal statute "was one single undertaking" and the contention that its local and long-distance business might be divided so that the former fell under provincial jurisdiction was not tenable. An amendment to the federal statute passed in 1882 (S.C. 1882, c. 95) declared the

works of the company to be for the general advantage of Canada and gave the municipal engineer a voice in the location of Bell lines. It was held that this added nothing to the jurisdiction already established over Bell Telephone under s. 92(10)(a): moreover the necessity for consulting with a municipal engineer did not give him any veto power over Bell's activities.

(Bell Telephone had sought and obtained provincial enabling legislation in Ontario, Quebec, Manitoba, New Brunswick and Nova Scotia in 1882 after an adverse decision had been rendered in the Quebec Court of Appeal holding that Bell was a local undertaking in the absence of any connection between provinces or declaration for the general advantage of Canada: see *R. v. Mohr* (1881), 7 Q.L.R. 183. This decision was expressly overruled by the decision above, and the Ontario statute, and by implication the other provincial acts, declared ultra vires.)

2. Re Regulation and Control of Radio Communication in Canada (Radio Reference), [1932] A.C. 304, [1932] 2 D.L.R. 81, [1932] W.W.R. 563, 39 C.R.C. 49, affirming [1931] S.C.R. 541, [1931] 4 D.L.R. 865 (House of Lords. Judicial Committee of the Privy Council, Viscount Dunedin, Lord Blanesburgh, Lord Merrivale, Lord Russel of Killowen and Sir George Lowndes, February 9, 1932)

Following the signing and ratification by Canada of the International Radiotelegraph Convention (Washington, 1927), the Governor in Council referred the following question to the Supreme Court: "Has the Parliament of Canada jurisdiction to regulate and control radio communication, including the transmission and reception of signs, signals, pictures and sounds of all kinds by means of Hertzian waves, and including the right to determine the character, use and location of apparatus employed?" In the Supreme Court of Canada, it was held that radio communication was subject to federal authority, although two of the five judges were unwilling to call this authority exclusive. On the basis of known technology, it was clear that radio waves could not be confined within a single province: hence radio could not be said to be a "local matter" under section 92(16) of the B.N.A. Act. Anglin, J. held that the combined effect of sections 91(29) and 92(10)(a) brought radio communication within the federal sphere, adopting a broad definition of "telegraph". Newcombe and Smith, J.J. found that the regulation of radio was ancillary to a number of s. 91 heads and that its national dimensions would also bring it within the "peace,

order and good government" clause. Moreover, Canada's international treaty obligations also brought the matter within federal jurisdiction. Lamont and Rinfret, JJ., dissenting, held that Parliament's jurisdiction was not exclusive but was limited in certain respects because a receiving antenna which merely picks up a wave and translates it into an understandable message could be considered a "local work" under s. 92(10)(a).

On appeal to the Privy Council, held affirming the majority judgement of the Supreme Court, the question must be answered in the affirmative. While the Radiotelegraph Convention was not strictly speaking an "Empire treaty" within section 132 of the B.N.A. Act, it came "to the same thing", as being an international obligation that could only be effectively enforced in Canada by Dominion legislation. Per Viscount Dunedin: "It is Canada as a whole which is amenable to the other powers for the proper carrying out of the Convention; and to prevent individuals in Canada infringing the stipulations of the Convention it is necessary that the Dominion should pass legislation which should apply to all the dwellers in Canada..." As legislation to give effect to the Convention is not mentioned explicitly in either sections 91 or 92, it must fall within the general words at the opening of section 91 respecting peace, order and good government.

The Privy Council also rejected the provincial argument that the operation of a receiving instrument, since it might not cause a disturbance beyond a limited area, was a local matter. Apart from the Convention, radio broadcasting falls under section 92(10)(a) of the Act since it comes within both the words "telegraphs" and the general words "undertakings connecting the Province with any other or others of the Provinces or extending beyond the limits of the Province." Per Viscount Dunedin: "The argument of the Province really depends on making, as already said, a sharp distinction between the transmitting and the receiving instrument. In their Lordships' opinion this cannot be done. Once it is conceded, as it must be, keeping in view the duties under the convention, that the transmitting instrument must be so to speak under the control of the Dominion, it follows in their Lordships' opinion that the receiving instrument must share its fate. Broadcasting as a system cannot exist without both a transmitter and a receiver. The receiver is indeed useless without a transmitter and can be reduced to a nonentity if the transmitter closes. The system cannot be divided into two parts, each independent of the other..."



'Undertaking' is not a physical thing but is an arrangement under which of course physical things are used. Their Lordships have therefore no doubt that the undertaking of broadcasting is an undertaking 'connecting the Province with other Provinces and extending beyond the limits of the Province.; But further, as already said, they think broadcasting falls within the description of 'telegraphs'. No doubt in everyday speech telegraph is almost exclusively used to denote the electrical instrument which by means of a wire connecting that instrument with another instrument makes it possible to communicate signals or words of any kind. But the original meaning of the word 'telegraph' as given in the Oxford Dictionary is: 'An apparatus for transmitting messages to a distance, usually by signs of some kind.' Now a message to be transmitted must have a recipient as well as a transmitter. The message may fall on deaf ears, but at least it falls on ears. Further, the strict reading of the word 'telegraph', making it identical with the ordinary use of it, has already been given up in Toronto v. Bell Telephone Co., [1905] A.C. 52... As their Lordships' views are based on what may be called the pre-eminent claims of s. 91, it is unnecessary to discuss the question...whether, if there had been no pre-eminent claims as such broadcasting could have been held to fall either within property and civil rights,' or within 'matters of a merely local or private nature'... Although the question had obviously to be decided on the terms of the statute, it is a matter of congratulation that the result arrived at seems consonant with common sense. A divided control between transmitter and receiver could only lead to confusion and inefficiency."

[The statement of the historical development of radio communication upon which the arguments in the Radio Reference were based is reproduced at [1931] S.C.R. 541. In 1937, in the Privy Council judgement in the Labour Conventions case, Lord Atkin stated that the "true ground of the [Radio Reference] decision was that the convention in that case dealt with classes of matters which did not fall within the enumerated classes of subjects in s. 92 or even within the enumerated classed in s. 91. Part of the subject matter of the convention, namely, broadcasting, might come under an enumerated class but if so it was under a heading, "Inter-provincial Telegraphs," expressly excluded from s. 92...": see A.-G. Can. v. A.-G. Ont., [1937] A.C. 326 at 351. [1937] 1 D.L.R. 673 at 681.]

3. R. v. Ontario Labour Relations Board, ex parte  
Dunn, [1963] 2 O.R. 301, 39 D.L.R. (2d) 346 (Ont.  
Supreme Court, McRuer, C.J.H.C., April 16, 1963)

Prior to a certification proceeding involving employees at the Bramalea plant of Northern Electric Co. Ltd., an application was brought to prohibit the Ontario Labour Relations Board from taking a vote, on the ground that Northern Electric was subject to federal jurisdiction in respect to its labour relations. The Bramalea plant was devoted exclusively to the manufacture of crossbar automatic switching equipment. Held, the application should be dismissed. Prima facie, labour relations is a matter falling within provincial legislative competence, and to bring the relations between a manufacturing company and its employees within federal jurisdiction because the company is almost wholly owned by Bell Telephone Co., an enterprise coming within the exception in s. 92(10) (a) of the B.N.A. Act, and to which it sells its output depends on proof of facts and not on abstract propositions of constitutional law. Although the labour relations of the Bell Telephone Company and its employees are subject to federal labour legislation, it cannot be said that those between the Northern Electric Co. and its employees at an Ontario plant are similarly subject to federal jurisdiction merely because the latter company is almost wholly owned by Bell which purchases a large part of Northern's output of equipment for use in its telephone communication system. The process of manufacture does not thereby become an integral part of Bell's operations, since it could as easily be carried on by any other company or the equipment could be purchased in many other places.

Section 2 of the Bell Telephone charter, as amended in 1882, empowered Bell "to manufacture telephones and other apparatus connected therewith" and section 4 of the 1882 legislation stated that "the said Act of incorporation as hereby amended, and the works thereunder authorized, are hereby declared to be for the general advantage of Canada." Held, the declaration had no meaning in so far as the operations of the company involved connecting interprovincial and international lines since it is only works wholly situate within a Province that are covered by the declaratory jurisdiction given by s. 92(10)(c) of the B.N.A. Act. Moreover, section 4 covered only works authorized under the Acts of incorporation and did not extend to manufacturing

operations carried on by another company in which Bell had a controlling interest.

4. Re Public Utilities Commission and Victoria Cablevision Ltd., et al. (1965), 52 W.W.R. (N.S.) 286, 51 D.L.R. (2d) 716 (B.C. Court of Appeal, Davey, Sheppard, Lord, Maclean and Bull, JJ. A., March 22, 1965).

When three cable television systems objected to a demand for information served upon them by the B.C. Public Utilities Commission, the Commission brought three stated cases on questions of law to the B.C. Court of Appeal to determine whether such systems were within the jurisdiction of the province. The three systems were each licensed by the federal Dept. of Transport to operate a land station performing a "commercial broadcasting receiving service" subject to the Radio Act, with the right to receive by air programs from certain designated television stations located in B.C. and in the state of Washington. Held, the cable television systems are outside of provincial jurisdiction and hence we are not subject to regulation by the Public Utilities Commission. Per Sheppard, J.A., Davey, Lord and Bull, JJ.A., concurring: "The receiving of the programs by air is beyond doubt within the exclusive jurisdiction of the Dominion... The question remains whether as contended by counsel to the Commission the transmission by cable of the programs received by the antennae is a distinct and separate business and within the jurisdiction of the Province. The facts do not support that contention... The reasons for the antennae and their operation by the respondents is to pick up and convey for reward programs to subscribers who otherwise would receive them imperfectly or not at all. The rental is the payment for the program, that is, for its receipt by the antennae and its transmission to the customer, and not merely for the transmission by cable: the cable merely extends the effective range for transmitting the programs received by the antennae. It follows that the cable and the rentals are an integral part of the undertaking controlled by the Dominion..." The principle of indivisibility of undertaking enunciated by Lord Porter in A.-G. Ont. et al. v. Winner, [1954] 4 D.L.R. 657. [1954] A.C. 541. 71 C.R.T.C. 225, applies. "If the cables and rentals paid by the customers were subject to provincial legislation, then the Legislature could restrict the right conferred by the Dominion. The Public Utilities Act, if applicable,

would impose restrictions upon the respondents as follows, viz., to furnish adequate service (s. 5), not to abandon a service without permission of the Commission (s. 7), to obey orders of the Commission (s. 9), to furnish information to the Commission (s. 10), not to begin construction or operation without a certificate of public convenience and necessity from the Commission (s. 12), to charge rates fixed by the Commission (s. 22). Such sections (e.g. ss. 5, 12, 22) even if applied to cables and rentals only, must operate upon the antennae to such an extent as to invoke the comments of Lord Porter "but can you emasculate the actual undertaking and yet leave it the same undertaking". In other words, if the Provincial Legislature purport to operate on the cables and rentals, nevertheless it must affect the operation of the antennae so as to entrench upon s. 92(10)(a), and therefore to enact that which is ultra vires of the Province and within the legislative jurisdiction of the Dominion." Per Maclean, J.A., Davey, Lord and Bull, JJ. A. concurring: "In my view the exclusive legislative jurisdiction of Parliament extend up to the point where the T.V. signal is received by the subscriber and that the undertaking of the respondents is nothing more or less than an integral part of the receiving facilities."

5. Regina v. City of New Westminster, ex parte Canadian Wirevision Ltd. (1966), 55 D.L.R. (2d) 613, 54 W.W.R. (N.S.) 238, affirming 50 D.L.R. (2d) 277, 53 W.W.R. (N.S.) 373 (B.C. Court of Appeal, Norris, Lord and McFarlane, JJ. A., October 21, 1965).

A federally incorporated cable television company had received a licence from the Minister of Transport in accordance with the Radio Act. "authorizing" it to provide service within certain technical limitations "to Vancouver-Burnaby-Richmond-New Westminster, B.C. only." The company then applied for a trade licence from the New Westminster City Council. Under the B.C. Municipal Act, the Council could refuse in any particular case to grant a licence but its discretion could not be exercised "unreasonably." In fact the council considered (1) that it would be economically unsound for more than one company to operate in the city, (2) that the owners of a competing licence applicant were local residents known to council, and considered reliable, (3) that the city would derive revenue from the competing applicant, and (4) that the business was akin to a public utility. The council unanimously refused to grant the

company a trade licence, and the company moved for the issue of a writ of mandamus. Held, the motion should be dismissed. Refusal of a licence even if it in effect prohibits the company from carrying on its business within the municipality, does not destroy or sterilize the company's powers nor its status as a company. Dominion companies are bound by provincial laws of general application where they are not directed against such companies so as to interfere with their powers and status as such. The licence granted under the Radio Act did not purport to authorize the appellant to carry on its business without regard to relevant provincial laws or municipal regulations. The use of the word "only" indicates that the stated condition was a limitation rather than an authorization. Therefore the principle applied in City of Toronto v. Bell Telephone Co., [1905] A.C. 52, did not apply. Nor did the council refuse the licence unreasonably. None of the grounds applied were irrelevant or alien grounds indicating a failure to exercise discretion.

[This decision must now be considered of doubtful authority in view of the next decision below.]

6. Commission du Salaire Minimum v. Bell Telephone Co. of Canada, [1966] S.C.R. 767, 59 D.L.R. (2d) 145, affirming [1966] Que. Q.B. 301, 59 D.L.R. (2d) 106, which reversed [1963] Que. S.C. 433 (Supreme Court of Canada, Taschereau, C.J.C., Fauteux, Abbott, Martland, Judson, Ritchie and Hall, JJ., October 4, 1966)

Further to a by-law enacted under the Minimum Wage Act, R.S.Q. 1941, c. 164, the Minimum Wage Commission of Quebec sought to impose a wage levy upon Bell Telephone Co. in respect of the year 1959. Bell contended that it was not subject to the Minimum Wage Act. The action was maintained at trial but was reversed by the Quebec Court of Appeal. On further appeal to the Supreme Court of Canada, held, the appeal should be dismissed. The Minimum Wage Act, being a statute which regulates to an extent the wages to be paid by an employer to his employees, does not apply to Bell because the company is an undertaking of the kind described in subsection 92(10) Act. Per Martland, J.: "In my opinion all matters which are a vital part of the operation of an interprovincial undertaking as a going concern are matters which are subject to the

exclusive legislative control of the federal parliament within s. 91(29)." The determination of such matters as hours of work, rates of wages, working conditions and the like, is a vital part of the management and operation of any commercial or industrial undertaking. Regulation of the field of employer and employees' relationships in an undertaking such as that of Bell is a "matter" coming within the class of subjects defined in s. 92(10)(a) of the B.N.A. Act and, consequently, is within the exclusive legislative jurisdiction of the Parliament of Canada. Decisions upholding provincial jurisdiction to enact workmen's compensation legislation binding on interprovincial undertakings could be distinguished in that such legislation did not regulate the employment contract. Any provincial legislation dealing with a matter which would have been the subject matter of contract between employer and employee, while valid in respect of employers not within exclusive federal legislative jurisdiction, cannot apply to employers who are within that exclusive control.

7. Oshawa Cable T.V. Ltd. v. Whitby, [1969]  
2 O.R. 18, 4 D.L.R. (3d) 527 (Ontario Supreme Court,  
Stark J., February 4, 1969)

The applicant, a cable television system that had commenced the extension of its Oshawa system into the Town of Whitby, applied to quash a by-law which had been passed by the Town under section 379 (1), para. 99 of the Municipal Act, R.S.O. 1960, c. 249. Paragraph 99 permitted municipalities to pass by-laws "authorizing and regulating the erection and maintenance" of communications equipment along highways and public places. The Whitby by-law prohibited the applicant's operations unless it first obtained a permit from the town engineer, which could not be issued unless an agreement was entered into "prescribing the considerations, terms and conditions" of the grant of user by the town. Stark, J. held that the by-law exceeded the very limited authority given municipalities under the Act, which did not contemplate a power to prohibit, but only an authority to authorize and regulate. The by-law also offended in delegating authority to the engineer, in imposing a licence fee or tax, and in the discrimination inherent in the agreement. If the Act purported to grant the power to pass such a by-law, it would be ultra vires. Although the provinces can pass legislation designed to regulate traffic and the placement



of equipment on highways, CATV operations are exclusively within federal jurisdiction. A by-law within the limited effect of para. 99 would not be ultra vires, however. The provision in the draft agreement providing for a payment of a percentage of the company's gross revenue to the town would also appear to be outside the competence of the province since it constituted an indirect tax.

8. R. v. O.L.R.B., ex parte Northern Electric, [1970] 2 O.R. 654, 11 D.L.R. (3d) 640 (Ontario Supreme Court, Lacourcière, J., January 30, 1970)

Northern Electric manufactured and installed telecommunications equipment for customers operating telephone, telegraph, satellite, television and microwave transmission and communications networks throughout Canada and internationally. Its principal customer was its parent company, Bell Canada. In the course of its installation, Northern was obligated to test the equipment to ensure that it was operational, often involving systems across provincial borders. Once installed, the system would normally be operated by the customer, but Northern would often undertake extensions, modifications, maintenance and repairs. A trade union was certified by the Ont. Labour Relations Board as bargaining agent for employees in the installation department of Northern in Ontario. On a motion for certiorari by Northern, Lacourcière, J. held that the Board was without constitutional jurisdiction to make such a decision. As Northern's customers operated lines of communication extending across provincial boundaries they were exclusively subject to federal jurisdiction under s. 92(10)(a) of the B.N.A. Act, 1867. Northern's installation operations formed an integral and necessarily incidental part of the operation of at least its principal customer, Bell. Moreover, Northern operated lines of communication extending across provincial boundaries on a temporary basis. Hence Northern's installation department was within federal not provincial jurisdiction. Lacourcière, J. also discussed the meaning of the terms "work" and "undertaking" in s. 92(10)(a).

9. Benson and Hedges (Canada) Ltd. v. A.-G. B.C. (1972), 27 D.L.R. (3d) 257, [1972] 5 W.W.R. 32 (B.C. Supreme Court, Hinkson, J. April 28, 1972)

A number of plaintiffs, including newspaper publishers and advertising agencies, sought declarations that two statutes of British Columbia were ultra vires. The first, a 1971 amendment to section 83 of the Government Liquor Act, prohibited advertising of the sale of liquor within British Columbia. Held, this was part of valid legislation aimed at regulating the sale of liquor within the province and is not an invasion of the field of criminal law. Once it is established that the Province may prohibit the sale of liquor, including the advertising of such sale, it then becomes a matter for the Legislature rather than the Courts as to the extent to which that power is exercised. Nor was section 83 an attempt to indirectly interfere with rights of trade and commerce under s. 9(2) of the B.N.A. Act, 1867. The prohibitions in s. 83 are directed against acts done within the Province. The statute does not prohibit the sending into B.C. of newspapers and journals from outside the province containing liquor ads. Nor does it prohibit any communication with B.C. from abroad. Furthermore, section 83 is not aimed at the status and powers of a Dominion company, but rather is restrictive of the rights of the public in the Province generally. Nor would s. 83 expunge any trade marks relating to liquor. The manufacturers of liquor products are still entitled to use their registered trade marks to identify their products.

The second statute attacked was the Tobacco Advertising Restraint Act, Stat. B.C. 1971, c. 65, which prohibited the advertising of tobacco in any form, including the exhibition, display, publication, distribution, broadcasting, or telecasting of tobacco ads. Held, the statute was ultra vires. A Province has legislative authority to regulate individual forms of trade confined to the Province and in so doing may include therein enforcement provisions. Advertising is employed to induce people to acquire the product advertised and is a part of the business of selling the product generally. The impugned statute regulates the selling of tobacco products within the Province to the extent that this aspect of their sale is not permitted. It is not necessary that regulation of tobacco advertising be part of a general regulatory scheme of the tobacco business. While legislative authority in relation to health is not exclusively committed to either the Federal Parliament or the provincial legislatures, this

statute cannot be sustained on this basis since it makes no reference to health and does not directly restrict the manufacture, sale or consumption of tobacco products.

10. Regina v. Chapman and Grange, [1973] 2 O.R. 290, 11 C.C.C. (2d) 84, 20 C.R.N.S. 141, 34 D.L.R. (3d) 510 (Ont. C.A., Gale C.J.O., Evans and Arnup, J.J. A., December 27, 1972)

Two accused were charged with conspiring to effect an unlawful purpose, contrary to s. 423(2) of the Criminal Code, to wit: acquire knowledge of certain telephone conversations not addressed to them and divulge their purport. The charge arose from the accused having wiretapped the Bell Canada telephone line of a union office during a labour dispute. One of the accused, a police officer, was found removing tapes from a recorder set to automatically monitor the telephone line and it was subsequently established that he had earlier turned over other tapes to the other accused, a strike-breaker. Section 112 of the Telephone Act, R.S.O. 1970, c. 457, made it an offence to acquire knowledge of any telephone conversation and to divulge the purport thereof except when lawfully authorized to do so. On appeals by the accused from conviction, held, the appeals should be dismissed. The act of one accused in handing over the tapes to the other no doubt constituted "divulging" of the conversation, although such a finding was not necessary. The agreement was to collaborate in the unlawful purpose and the offence was complete when the agreement was made, even if nothing had been done to carry it out.

Arnup, J.A., per curiam, rejected the argument that s. 112 of the Telephone Act was not intended to apply to Bell Canada lines a matter of construction, even though other sections of the Act were expressly made applicable to federal as well as provincial lines, and s. 25 of the Bell Canada Special Act, S.C. 1880, c. 67, made it an offence to intercept messages. The principle underlying s. 112 is the privacy of telephone conversations, not the manner of operation of the system. Section 112 is not legislation in relation to criminal law and thus ultra vires the legislature. Instead the section seeks to create a right of privacy and penalize its breach and is therefore legislation in relation to a "civil right" under s. 92(13) of the B.N.A. Act, 1867. The intent of the legislation was that s. 112 apply to both

federal and provincial lines.

11. Re C.F.R.B. Ltd. and A.-G. Canada, [1973] 3 O.R. 819, 38 D.L.R. (3d) 335, 14 C.C.C. (2d) 345 affirming [1973] 1 O.R. 79, 30 D.L.R. (3d) 279, 9 C.C.C. (2d) 323 (Ont. C.A., Schroeder, Kelly and Evans, JJ. A., June 21, 1973)

The licensee for station CFRB, Toronto, was charged with broadcasting a program of a partisan character in relation to a provincial election on the day before such election, contrary to section 28(1) of the Broadcasting Act. The station brought a motion for judicial review prohibiting the prosecution on the grounds that section 28 ultra vires the Parliament of Canada and contravened the Canadian Bill of Rights.

Following a transfer of the matter from the Divisional Court to a Judge of the Supreme Court of Ontario sitting in Chambers (see Re C.F.R.B. Ltd. and A.-G. Canada (No. 1), [1973] 1 O.R. 57, 9 C.C.C. (2d) 320, 30 D.L.R. (3d) 257), the motion was dismissed by Grant, J. The station appealed this decision to the Ontario Court of Appeal, arguing that the constitutional basis for federal jurisdiction over broadcasting established in the Radio Reference, [1932] A.C. 304 was confined to the physical means whereby radiocommunication effected, and did not extend to the program content as distinct from the signal of a broadcast.

Kelly, J.A., per curiam, dismissed the appeal. The scope of the exclusive legislative authority of the Parliament of Canada is relation to radio communication, a matter that has attained such dimensions as to affect the body politic of Canada, includes the whole of the undertaking of broadcasting and is not limited to the "carrier system". "It would be flying in the face of all practical considerations and logic to charge Parliament with the responsibility for the regulation and control of the carrier system and to deny it the right to exercise legislative control over what is the only reason for the existence of the carrier system, i.e., the transmission and reception of intellectual material." Although section 28 affects provincial elections, "that alone is not a disqualifying factor if the section is properly in relation to the subject-matter of radio communication." Radio communication "makes use of certain physical qualities of space which are, and have been declared to be public

property." In the implementation of the broadcasting policy enunciated in the Broadcasting Act, franchises are granted conferring on the holder the exclusive right to use certain frequencies in the electromagnetic spectrum. Parliament has a duty to ensure that the franchises should not be used so as to prejudice the public interest. That public interest requires that the electors' choice in a democratic election not be unduly influenced by pressures put upon them. "The proven influence of the radio message, its rapidity of circulation, as well as its almost universal coverage of those within its sphere of reception and its unique ability to infiltrate into the homes of the electors, properly made Parliament apprehensive as to its use during elections and particularly its misuse at a time when any misunderstanding created by a broadcast would be difficult, if not impossible to overcome." The restriction was for a period of comparatively short duration indicating an intention not to put restrictions on the use of radio at times when statements made could be denied or discredited before they had an effect on the election. Further, the restriction applied only to broadcasting transmitting or receiving undertakings for which a licence is required. Since the carrier system is beyond the reach of provincial regulation the statute does not trench upon or encroach upon the field of the provincial legislature in passing laws governing provincial elections.

[A motion for leave to appeal this decision to the Supreme Court of Canada was dismissed with costs on November 13, 1973. See C.F.R.B. Ltd. v. A.-G Canada, [1973] S.C.R. ix.

12. Regina v. Communicomp Data Ltd. (1974). 6 O.R. (2d) 680, 20 C.C.C. (2d) 213, 53 D.L.R. (3d) 673, 19 C.P.R. (2d) 230 (Ont. County Court, Shapiro, Co. Ct. J., June 10, 1974)

Communicomp Data, the subsidiary of a property developer in Mississauga, Ontario, was charged with operating a broadcasting undertaking without a licence, contrary to s. 29(3) of the Broadcasting Act and ss. 3 and 11 of the Radio Act. Communicomp had set up an antenna which received television programs from Canadian and U.S. stations, "cleaned" the transmission, converted UHF channels to VHF, changed channels of local stations to eliminate ghosting, but did not add locally-originated programs. The signals

were then passed on to subscribers along a coaxial cable. All the subscribers were in two apartment buildings owned by the parent company and a group of condominiums whose co-operative owned a share in the accused company and each subscriber paid a fee in some form. The accused contended (1) that its operation was not a "broadcasting receiving undertaking", (2) that the regulation of its enterprise was ultra vires the Parliament of Canada, and (3) that the prosecution was an abuse of process in that it was discriminatory. At the first trial, August, P.C.J. found against the accused on the first two grounds but acquitted it on the last. On an appeal by way of trial de novo from this acquittal, held, the appeal should be allowed and the accused convicted.

As to the constitutional question, held, the Parliament of Canada has legislative authority to license and regulate cable television as part of its authority to legislate in relation to broadcasting - television as well as radio broadcasts - and this authority extends to a cable television operation wholly within the Province of Ontario, and in fact all within one city. The receiving and distribution equipment of a cable company cannot be divorced from the transmitting television stations, many of which are outside the Province or carry programs which originate outside the Province, and the reasoning which justifies federal jurisdiction over television transmission applies equally to cable television which is itself part of the broadcasting system and a conduit for transmission television broadcasts. The fact that cable television transmits these signals through cable rather than through the air is immaterial - both means must be within the ambit of the federal legislation so as to permit the effective carrying out of the broadcasting policy set out in the Act.

13. Capital Cities Communications Inc. et al. v. Canadian Radio-Television Commission et al. (1977), 36 C.P.R. (2d) 1, affirming [1975] F.C. 18, 52 D.L.R. (3d) 415, 19 C.P.R. (2d) 51, 7 N.R. 18 (Supreme Court of Canada, Laskin, C.J.C., Martland, Judson, Ritchie, Spence, Pigeon, Dickson, Beetz and de Grandpré, JJ., November 30, 1977).

Rogers Cable TV Ltd. and two associated cable television licensees applied to the CRTC for an amendment of their licence "to permit commercial deletion and substitution on a random basis" in respect of the signals of U.S. television



stations carried on the basic service. Three Buffalo television stations affected intervened before the CRTC but the Commission granted the applications, authorizing the deletion of commercial messages from U.S. television signals, but on condition that only public-service announcements be substituted rather than promotional messages for Rogers. When the Buffalo stations appealed the three decisions to the Federal Court of Appeal, the court unanimously dismissed the appeal, holding that the decisions were within the jurisdiction of the Commission. Thurlow, J., added that in his view the applicants had no status to bring the appeal in that they had no proprietary or other legal rights in the signals transmitted into Canadian airspace from their stations in the U.S. The stations appealed further to the Supreme Court of Canada, on five questions: (1) whether Thurlow, J., erred in his comments on status, (2) whether the Broadcasting Act was ultra vires the Parliament of Canada insofar as it purported to regulate or authorize the CRTC to licence and to regulate the content of programs carried by CATV systems situated wholly within provincial boundaries, (3) whether the CRTC had jurisdiction under the Act to regulate cable systems which receive and distribute television signals, (4) whether the Commission had exceeded its jurisdiction in attempting to regulate in accordance with a policy statement, and by stating that Rogers should obtain CRTC consent before entering into terms of settlement in a concurrent civil action launched by the Buffalo stations which might inhibit its ability to conform to Commission requirements, and (5) whether the decisions were contrary to the Inter-American Radiocommunications Convention (Havana, 1937).

In the Supreme Court of Canada, the appeals were dismissed, Pigeon, Beetz and de Grandpré, JJ., dissenting. Per Laskin, C.J.C., Martland, Judson, Ritchie, Spence and Dickson, JJ. concurring: As to the constitutional question, the court rejects the argument that legislative jurisdiction is divided in respect of the regulation of television signals received by cable systems, so that exclusive federal jurisdiction applies to the reception of signals at the antenna but any subsequent distribution within a particular province is a matter exclusively for that province. This contention would distinguish and limit the effect of the Radio Reference, [1932] A.C. 304, on the basis that the Hertzian waves end at the antennae of the cable distribution systems. The observations

of Stewart, J. in Fortnightly Corporation v. United Artists Television, Inc. (1968), 392 U.S. 390 at 399 viz., "Essentially, a CATV system no more than enhances the viewer's capacity to receive the broadcaster's signals... (the basic function the equipment serves is little different from that served by the equipment generally furnished by a television viewer," are apt for the purposes of the present case. "The systems are clearly undertakings which reach out beyond the Province in which their physical apparatus is located... The common sense of which the Privy Council spoke in the Radio case seems to me even more applicable here to prevent a situation of a divided jurisdiction in respect of the same signals or programmes according to whether they reach home television sets and the ultimate viewers through Hertzian waves or through coaxial cable. The fallacy in the contention...of the appellants is their reliance on the technology of transmission as a ground for shifting constitutional competence which the entire undertaking relates to and is dependent on extra-provincial signals which the cable system receives and sends on to its subscribers." Nor can the contention that Parliament cannot regulate program content but only the equipment or machinery be accepted. "To put the matter in another perspective, it would be as if an interprovincial or international carrier of goods could be licensed for such carriage but without federal control of what may be carried or of the conditions of carriage. This submission amounts to a denial of any effective federal legislative jurisdiction of what passes in inter-provincial or international communication, whether by radio or television, and is in truth an invitation to this Court to recant from the Radio case...I hold the view that the Radio case was correctly decided under the terms of ss. 91 and 92(10)(a) ... Programme content regulation is inseparable from regulating the undertaking through which programmes are received and sent on as part of the total enterprise." No view is expressed however as to the regulatory authority over programs locally originated by such systems, which were not involved in the facts of this case.

14. Regie des Services Publics et al. v. Dionne et al. (1977) 38 C.P.R. (2d) 1, (Supreme Court of Canada, Laskin, C.J.C., Martland, Judson, Ritchie, Spence, Pigeon, Dickson, Beetz, and de Grandpré, JJ., November 30, 1977).

Francois Dionne was issued a licence for a broadcasting receiving undertaking by the CRTC on

April 30, 1974. The licensed area included Rimouski, Mont-Joli, Matane and the Matapedia Valley, P.Q. Dionne also applied to the Public Service Board of Quebec and the Board issued an order on September 13, 1974 in which it granted part of the same area to Dionne and the other part to another applicant, Raymond D'Auteuil. Later, the Board also issued two supplemental orders and Dionne appealed all three orders under s. 44 of the Public Service Board Act to the Quebec Court of Appeal. The Court of Appeal unanimously allowed the appeals, declaring the three orders null and void on the basis that cable television was exclusively subject to federal jurisdiction. Following the appeal judgements in the Victoria Cablevision and Capital Cities cases, the court held that section 23 of the Public Service Board Act and the Regulation respecting cable-distribution public services adopted pursuant to section 3a of the Communications Department Act, S.Q. 1969, c. 65, were ultra vires insofar as they applied to Dionne's undertaking. On further appeal to the Supreme Court of Canada on the constitutional question, held, 6-3, the appeal should be dismissed.

Per Laskin, C.J.C., Martland, Judson, Ritchie, Spence and Dickson, JJ., concurring: The constitutional issue raised here was also argued in the Capital Cities case (noted above), and this court concluded that there was exclusive federal jurisdiction to regulate cable television systems and their programming, at least where such programming involved the interception of television signals and their retransmission to cablevision subscribers. More should be said, however, about the provincial submission that since the cable distribution operation was locally situate and limited in its subscriber relations to persons in Quebec it was essentially a local work or undertaking within provincial competence. "The fundamental question is not whether the service involved in cable distribution is limited to intraprovincial subscribers or that it is operated by a local concern but rather what the service consists of... (the inquiry must be as to the service that is provided and not simply as to the means through which it is carried on. Divided constitutional control of what is functionally an interrelated system of transmitting and receiving television signals, whether directly through air waves or through intermediate cable line operations, not only invites confusion but is alien to the principle of exclusiveness of legislative authority, a principle which is as

much fed by a sense of the constitution as a working and workable instrument as by a literal reading of its words. In the present case, both the relevant words and the view of the constitution as a pragmatic instrument come together to support the decision of the Quebec Court of Appeal...The suggested analogy with a local telephone system fails on the facts because the very technology employed by the cable distribution enterprises in the present case establishes clearly their reliance on television signals and on their ability to receive and transmit such signals to their subscribers."

Per Pigeon, J., Beetz and de Grandpré, JJ., concurring, dissenting. "In my view, the question in this case is whether the unchallengeable federal jurisdiction over radiocommunication involves exclusive legislative authority over all cabledistribution systems making use of signals received by radiocommunication or whether such exclusive authority extends only to what I will call the radiocommunicative aspect." Federal jurisdiction over some activities or operations does not necessarily mean that any undertaking involved in such activities automatically comes under federal jurisdiction. Hertzian waves are used by provincially regulated telephone companies, for example, and by truckers, taxicabs, police forces, power companies, and citizens band users. "All those communications are undoubtedly subject to the federal licensing power and there is no specific limit to the possible extent of the conditions that may be appended to the licences. However, it seems clear to me that it would be an abuse of this licensing power to require that every undertaking obtaining a licence should become subject to federal jurisdiction." In regard to cable systems, from a physical point of view with respect to the material set-up, the provincial aspect is by far predominant: moreover, the developing technology of cable may supplant radio with local program distribution. The federal power over radiocommunication implies complete federal control over technical aspects of radio reception, but should not involve control over economic aspects. And even if the federal licence can be denied on non-technical grounds, this would give rise to a political not a legal conflict. This should not invalidate the provincial legislation which would only be sterilized, not ruled ultra vires.

15. Procureur General du Quebec v. Kellogg's Company of Canada et al. (1978), 19 N.R. 271, reversing [1975] Que. C.A. 518 (Supreme Court of Canada, Laskin, C.J.C., Martland, Judson, Ritchie, Spence, Pigeon, Dickson, Beetz and de Grandpré, JJ., January 19, 1978)

Under the authority of section 102(0) of the Consumer Protection Act, S.Q. 1971, c. 74, the Quebec cabinet enacted General Regulations, Division XI-A of which was added in 1972 to deal with advertising intended for children. Section 11.53 provided that "no one shall prepare, use, publish or cause to be published in Quebec advertising intended for children which...(n) employs cartoons." After four complaints had been filed against Kellogg's alleging breaches of this regulation in connection with ads broadcast on television stations in Montreal and Sherbrooke, the Attorney-General of Quebec sought an injunction against Kellogg's to restrain further infractions. the ads in question had been prepared in Ontario. At trial, the injunction was granted but this decision was reversed by the Quebec Court of Appeal (2-1). A further appeal was taken to the Supreme Court of Canada on the constitutional questions. Held, 6-3, the appeal should be allowed and the judgement at trial restored.

Per Martland, J., Ritchie, Pigeon, Dickson, Beetz and de Grandpré, JJ., concurring: "As its name indicates, the purpose of the Consumer Protection Act is the protection of consumers in Quebec by regulating the commercial conduct of persons engaged in the sale of goods in that province...In my opinion, this regulation does not seek to regulate or to interfere with the operation of a broadcast undertaking. In relation to the facts of this case, it seeks to prevent Kellogg from using a certain kind of advertising by any means. It aims at controlling the commercial activity of Kellogg. The fact that Kellogg is precluded from using televised advertising may, incidentally, affect the revenue of one or more television stations but it does not change the true nature of the regulation... Kellogg is not exempted from the application of restriction upon its advertising practices because it elects to advertise through a medium which is subject to federal control. A person who caused defamatory material to be published by means of a televised program would not be exempted from liability under provincial law because the means of publication were subject to federal control. Further, he could be

enjoined from repeating the publication. In my opinion, the position of Kellogg in relation to this regulation is analogous. It cannot justify conduct which has been rendered illegal because it is using the medium of television. Throughout these reasons I have stressed the fact that it is Kellogg and not the television station which is sought to be enjoined. The question is whether Kellogg's conduct has been regulated by the provincial legislation. Whether the regulation could be applied to the television station itself or whether an injunction against Kellogg would bind such station does not arise in this case and I prefer to express no opinion with respect to it."

Kellogg also contended that because its ads were produced in Ontario, the regulation encroached on the federal power respecting interprovincial trade. "In my opinion the contention fails. The aim of regulation (n) was certainly not to control interprovincial trade in television programs and it does not do so. The impact of the regulation may affect such trade, but only indirectly..." It is also questionable whether this case really involves interprovincial trade, and in any case, a province is entitled to regulate the use within its own borders of a product made in another Canadian province, e.g. the prohibition of the sale of food unfit for human consumption. As to the argument that Parliament has already legislated on broadcast advertising and that this is paramount, in fact the CRTC has not exercised this power and so it is unnecessary to determine whether a conflict exists.

Per Laskin, C.J.C., Judson and Spence, JJ., concurring, dissenting: "We are not concerned here with the use of advertising in any general sense or as related to some activity, whether it be a local trade or the practice of a profession, which is within provincial legislative jurisdiction.. We are concerned rather with the right to resort to a particular medium which is within exclusive federal competence, and the generality of the challenged provincial legislation and regulation does not aid the Province in extending its prohibition of advertising to a medium which is outside of its legislative jurisdiction... This case, on its facts, does not raise an issue as to the power of a Province, under the legislation and regulation now before us, to apply them to forbid an advertiser to use a telecast originating in another Province but seen in the legislating Province. That



would be to reach into extraprovincial activity as well as into a medium which is within exclusive federal competence even in respect of purely intraprovincial operations. I put this situation simply to expose the assertion of the appellant herein for what it is, namely an attempt to control the content of television programmes. I do not think a rational distinction can be drawn between television programmes which originate with the television station or come in from outside the Province and those which are bought and paid for by a commercial advertiser. Whether and in what circumstances he can use that medium is for its regulatory agency to determine under competent federal legislation."

[Although Martland, J. was inaccurate in stating that the CRTC has enacted no regulations respecting broadcast advertising--see e.g. sections 8, 9, 10 and 11 of the Television Broadcasting Regulations --it remains true that the Commission has not enacted regulations respecting children's advertising which expressly conflict with the Quebec regulation.]

2.2 CANADIAN ARTICLES AND STUDIES  
ON CONSTITUTIONAL JURISDICTION

Set out below is a summary of the existing literature on constitutional jurisdiction in the communications field in Canada, arranged in chronological order.

Campbell, B.L. "Quebec Moving Pictures Act: some constitutional notes," (1965) 11 McGill Law Journal 131.

The author compares the basic principles of public law which are solely reserved to the federal power in Canada and those which underlie the Quebec Moving Pictures Act. He concludes that grave doubts exist as to the constitutionality of the provincial legislation.

Laskin, Bora, "Transport and communication: works for the general advantage of Canada," Chapter 8 in Canadian Constitutional Law. 3rd ed. Toronto: Carswell, 1966.

Dixon, R.C. "Constitutional issues of Educational T.V." (1968) 3 Manitoba Law Journal 75.

This article is concerned with the constitutional question of increasing the use of ETV (educational television) and the practical problems of the creation of an ETV agency and the implementation of an effective ETV policy.

McNairn, C. "Transportation, Communications and the Constitution," (1968) 47 Can. Bar Review 355.

This article is concerned with the adequacy of the scope of federal constitutional authority, as presently delimited, over transportation and communication. In particular, it analyzes section 92(10) of the B. N. A. Act which ascribes to Ottawa jurisdiction over interprovincial "works and undertakings," and proceeds to discuss the scope of these "works and undertakings" as demonstrated in the case law.

Alyluia, Kenneth. "Constitutional Aspects of Cable Television: Notes on the case law and a Questionnaire to Municipalities," (1969) 1 Canadian Communications Law Review 47.

Although cable television has existed in certain areas of Canada since the early 1950's, the

question of constitutional jurisdiction over this form of communication has not been conclusively answered by 1969; there has been but four reported cases on the subject of cable television, the earliest dating from 1965. With the increase in number of cable television operations in Canada, it becomes increasingly important to determine the degree of control which the federal and provincial governments may validly exercise over cable television operations. In the first part of this research paper, Mr. Alyluia discusses the case law in this area up to 1969. The second part of the paper is devoted to a practical analysis of municipal regulation of cable television, based on the returns from questionnaires sent to municipal officials across Canada.

Atkey, Ronald G. "The Provincial Interest in Broadcasting under the Canadian Constitution," (1969) 1 Canadian Communications Law Review.

In this very to-the-point article, Atkey discusses the problems posed by the "constitutional paradox" of educational broadcasting: to wit, provincial control over education in face to federal control over broadcasting.

The article commences with a historical review of federal-provincial interrelationships in broadcasting. There follows a brief review of educational jurisdiction, and details of recent developments in dealing with the constitutional paradox.

In the next section, Atkey reduces the problem to one of definition: what is educational broadcasting? A list of proposed definitions and positions follows.

The article closes with some of the author's recommendations for the constitutional landing of educational broadcasting and general broadcasting.

Dalfen, Charles M. "Constitutional Jurisdiction over Interprovincial Telephone Rates," (1970) 2 Canadian Communications Law Review 177.

This brief note begins by outlining the current division in practice of jurisdiction over inter-provincial telecommunications. The core of the article is an analysis of jurisdiction on a constitutional basis, in light of section 92(10)(a) of the B.N.A. Act, and follows three criteria: extraprovincial service; extraprovincial physical

extension; and relationship, if only in an incorporate capacity, to a national system. There is also a brief review of possible federal control in the field via the peace, order and good government power, or by 92(10) (a).

Shaw, Richard A. "Municipal Regulation of CATV," A Case Study in Vaughan Township," (1970) 2 Canadian Communications Law Review 70.

Mr. Shaw's research focused on the cable struggle in Vaughan township, just north of Metropolitan Toronto in 1967, 1968 and 1969. Although such competition has since given way to a situation in which CRTC licensing precludes municipal "auctions," the history of municipal involvement in the cable field prior to the acceptance of the CRTC provides a fascinating introduction to the complex legal issues raised by the growth of cable systems.

Cable Television, the Broadcasting Act and the Canadian Constitution. Report prepared for the Canadian Radio-Television Commission by Environics Research Group Ltd., 1971.

This report, initiated by the CRTC in response to provincial claims to jurisdiction over cable television, reviews the nature and validity of these claims in the context of Canadian constitutional law and practice in the field and the existing regulatory framework at the federal level. It supports the view that the CRTC has jurisdiction to regulate in this field, although pure cablecasting operations may be outside this authority. Hybrid operations likely fall into CRTC jurisdiction as well. The report concludes by outlining a series of alternative courses of action open to the federal government and/or the CRTC to resolve the problems of constitutional jurisdiction.

Canada, Dept. of Communications. Telecommission Study 1 (a), "An analysis of the constitutional and legal basis for the regulation of telecommunications in Canada," Ottawa: Information Canada 1971.

This brief report is based on a study of the constitution and legal basis for the regulation of telecommunications in Canada, done by representatives of government industry and the academic community.

It includes a detailed compilation and brief description of federal and provincial telecommunication legislation, an in depth analysis

of the constitutional and legal basis for regulation, and an outline of an alternative to constitutional jurisdiction over interprovincial rates.

The report canvasses the relevant readings of the B.N.A. Act and the corresponding legal, provincial regulatory power or exclusive federal jurisdiction and also notes that the jurisdictional issue is complicated by the nature of telecommunications itself; a service that is in some respects local, while in others national. The federal government regulates Bell Canada, B.C. Tel and CNCP Tel; the provincial government regulates telephone services in the Maritimes and Prairie provinces; and in many smaller areas the municipality regulates the local telephone company. The result is an inconsistency of policy which adds further uncertainty to the regulation of telecommunications in Canada.

Kaiser, Gordon. "Constitutional aspects of the regulation of the Canadian computer technology," (1971) 1 Queen's Law Journal 97.

The underlying assumption of this analysis is that federal regulation of computer technology is desirable. In justifying this position, it recommends that the regulation of Canadian computer technology be seen as involving two distinctly separate issues: first, the regulation of data banks, and second, the regulation of data-transmission technology. The article reviews these issues from a constitutional point of view, looking to matters of protection of basic individual rights, interrelation of data transmission to telecommunications, competition policy, international telecommunication policies, and national technological goals.

Fine, J.D. "Whither goes the wire? The extent of federal competence to regulate CATV," (1972) 18 McGill Law Journal 615.

In this short note, the author develops the thesis that even the extreme physical limit of a CATV system, its connection lines to tenants in apartment buildings is a matter falling squarely within the sole purview of the appropriate commissions and departments of the national government.

Jordan, F.J.E. Privacy, Computer Data Banks, Communications and The Constitution. A report of a task force established jointly by Department of Communications/Department of Justice. Ottawa: Information Canada, 1972.

A study of the constitutional aspects of information processing and transmission systems which seeks to identify the respective areas of federal and provincial legislative and regulatory competence under the British North America Act, 1867.

"Jurisdictional and legal aspects of computer/communications in Canada," in Branching Out, (Report of the Canadian Computer/Communications Task Force), Volume 2, Ottawa: Information Canada, 1972.

The object of this part of the report is three-fold: first, to briefly outline the nature of the legislation affecting the computer/communications industry in order to provide an overview of the present jurisdictional setting; second, to examine the present role of the administrative agencies affecting computer/communications; and finally, to comment on a variety of constitutional and jurisdictional issues raised by the role of computer/communications in Canada.

Lederman, W.R., "Telecommunications and The Federal Constitution of Canada," in English, H. Edward (ed.). Telecommunications for Canada: An Interface of Business and Government. Toronto: Methuen, 1973.

The theme of this paper is the federal division and distribution of public legislative powers in Canada, as these things relate to the regulation of the country's telecommunication systems, and as they relate to the legal environment generally in which the companies of the telecommunications industry operate. The author treats the following specific topics: the division of authority to incorporate companies and to regulate the telecommunications industry; cable television networks and computer service networks; and "co-operative federalism" and telecommunications.

Mullan, David and Beaman, Roger. "The Constitutional Implications of the Regulation of Telecommunications," (1973) 2 Queen's Law Journal 67.

The article explores the constitutional validity of any future claims by the federal government to jurisdiction over the whole field of telecommunications. The authors examine each medium:



telephones, radio, television, satellites and computers, discussing the relevant case and statute law relating to the question of jurisdiction over it. They conclude that there are strong arguments in favour of federal regulation of all facets of the industry. Indeed, a comprehensive nationally controlled telecommunications policy would benefit the nation as a whole.

2.3 CONSTITUTIONAL JURISDICTION OVER  
COMMUNICATIONS IN THE UNITED STATES

Set out below is a table of articles in American legal periodicals relating to the question of state vs. federal regulation of communications in the United States.

Davis, John A. "Control of Community Antenna Systems," (Television Transmission, Inc. v. Public Utilities Commission (Cal) 301 P 2d 862). (1956-1957) 11 Arkansas Law Review 93.

Note, "State regulation of radio and television," (1959) 73 Harvard Law Review 386.

Sampson, R. "Federal-state conflicts and utility regulation," (1961) 68 Public Utilities Fortnightly 729.

Note, "Jurisdictional disputes since the CBS decision," (1964) 39 New York University Law Review 657.

Willis, E.I. "Transportation and communications utilities - the cross fire of federal-state regulatory conflicts," (1964) Public Utilities Fortnightly.

Note, "Community antenna television: the new federal exercise of jurisdiction," (1966) 51 Iowa Law Review 366.

Note, Beelar, D.C. "Cables in the sky and the struggle for their control," (1967) 21 Federal Communications Bar Journal 26.

Note, "Federal, state and local regulation of CATV - after you, Alphonse," (1967) 29 University of Pittsburg Law Review 109.

Note, "CATV regulation - a complex problem of regulatory jurisdiction," (1968) 9 Boston College Industrial & Commercial Law Review 429.

Note, "FCC jurisdiction over CATV: a need for reins? Buckey Cablevision, Inc. v. FCC (387 F 2d 220)," (1968) 56 Georgetown Law Journal 546.

Witt, John. "CATV and local regulation," (1968) 5 California Western Law Review 30.

Hutchin and Kenniff: "The concept of interstate commerce: a U.S., Canada and Australia case study," (1968) 10 Cahiers 705.

Taylor, R.H. "Case for state regulation of CATV distribution systems," (1969) 23 Federal Communications Bar Journal 110.

Botein, M. "CATV regulation: a jumble of jurisdictions," (1970) 45 New York University Law Review 816.

Note, "Constitutional law - procedural guidelines involved in municipal control of motion pictures," (1970) 41 Mississippi Law Journal 611.

Perlman, Stephen B. Legal Aspects of Selected Issues in Telecommunications. Montvale, N.J.: AFIPS Press, 1970.

Willis, E.I. "Federal - state regulatory conflicts - there ought to be a law," (1978) 86 Public Utilities Fortnightly 64.

Note, "Federal and state regulation of cable television: an analysis of the new FCC rules," (1971) Duke Law Journal 1151.

Ruddy, F.S. "American constitutional law and restrictions on the content of private international broadcasting," (1971) 5 The International Lawyer 102.

Note, "Administrative law - communications - radio and television - FCC's jurisdiction over CATV under the communications act of 1934 includes authority to impose program origination requirements," (1972) 41 University of Cincinnati Law Review 983.

Barnett, S.R. "State, federal, and local regulation of cable television," (1972) 47 Notre Dame Law 685.

Note, "Administrative law - FCC jurisdiction over CATV - origination cablecasting regulation held within FCC's authority," (1973) 4 Rutgers Camden Law Journal 391.

Note, "Administrative law - FCC's origination requirement for CATV upheld by Supreme Court," (1973) 22 Journal of Public Law 301.

Note, "Administrative law - telecommunications - FCC rule requiring CATV systems to operate as local outlets by cablecasting is reasonably ancillary to the performance of the commission's responsibilities for the regulation of TV broadcasting," (1973) 22 Catholic University Law Review 708.

Note, "Cablecasting: A Myth or Reality -- Authority of the Federal Communications Commission to regulate local program origination on cable television -- an evaluation of the Commission's cable-casting rules

after United States v. Midwest Video Corporation (92 U.S. 1860)," (1973)26 Rutgers Law Review 804.

Note, "FCC Jurisdiction -- television interference caused by construction of tall buildings in urban areas," (1973) 59 Cornell Law Review 158.

Haydock, R.S. "Public utilities and state action: the beginning of constitutional restraints," (1973) 49 Denver Law Journal 413.

Note, "FCC Jurisdiction Over extra-territorial Radio Broadcasting," (1974) 6 Law and Policy in International Business 608.

Sparkes, V.M. Municipal agencies for the regulation of cable television: a study of current developments and issues. (Ph.D. thesis, Indiana University, 1974).

Kohn, R.I. "Cable Television: to what extent may the state regulate?" (1974) 49 Los Angeles Bar Bulletin 513.

Mills, Moynahan, Perlini and McClure. "Constitutional considerations of multiple media ownership regulation by the Federal communications commission," (1975) 24 American University Law Review 1217.

Mahony, S. "Cable television's jurisdictional dispute," (1975) 24 Catholic University Law Review 872.

## CHAPTER 3

### ROLE AND STATUTORY JURISDICTION OF THE COMMUNICATIONS REGULATORY AGENCIES

This chapter is concerned with the function and statutory jurisdiction of the administrative agencies which regulate electronic communications in Canada. The problem of "regulation" is unique to those countries, such as the United States and Canada, which have determined that radio, television, cable television, telephone, telegraph and computer/communications should be furnished by private firms and individuals. Where, as in many countries, electronic communications is provided solely by the state, the question of regulation by an independent agency does not arise; instead, control may be exercised directly through the medium of ownership. As will be apparent throughout this chapter, the field of administrative law is one of the fastest growing areas of public policy today. The problems presented by the communications regulatory agencies share many elements with agencies involved in other fields, such as transportation, energy and local business licensing. In some respects, however, the problems of regulating communications are unique, particularly in regard to the difficulties presented by the combination of "carrier" regulation, and its affinities with utility regulation, with "content" regulation, with its unique issues relating to freedom of expression.

The chapter is organized into five parts:

- 3.1 A Chronology of Government Reports Affecting the Role and Jurisdiction of the Communications Regulatory Agencies
- 3.2 The Independent Regulatory Tribunal and the Question of Accountability
- 3.3 Administrative Agencies and Judicial Review

- 3.4 Practice and Procedure before the Regulatory Agencies
- 3.5 How to Find Regulatory and Judicial Decisions in the Communications Field



3.1 A CHRONOLOGY OF GOVERNMENT REPORTS AFFECTING  
THE ROLE AND JURISDICTION OF THE COMMUNICATIONS  
REGULATORY AGENCIES.

Set out below is a table, in chronological order of all reports of governments, Royal Commissions, or task forces, which relate to the functions or jurisdictions of the regulatory agencies or of government communications in Canada.

Canada: Report of the Royal Commission on Radio Broadcasting. (Aird Report). Ottawa: King's Printer, 1929.

Canada: Report of the Royal Commission on National Development in the Arts, Letters and Sciences. (Massey Report). Part I, section II, "Mass media"; part III, section XVIII, "Broadcasting". Ottawa: Queen's Printer, 1951.

Canada: Report of the Royal Commission on Broadcasting. (Fowler Report). 3 vols. Ottawa: Queen's Printer, 1957.

Canada: Report of the Royal Commission on Publications. (O'Leary Commission). Report. Ottawa: Queen's Printer, 1961.

Canada: Report of the Royal Commission on Government Organization. (Glassco Report). 5 vols. Vol.4, Special Areas of Administration, "Canadian Broadcasting Corporation". Ottawa: Queen's Printer, 1963.

Canada: Secretary of State, Report of the Committee on Broadcasting. (Fowler Report). Ottawa: Queen's Printer, 1965.

Canada: Secretary of State. White Paper on Broadcasting. Ottawa: Queen's Printer, 1966.

Canada: Report of the Royal Commission on Bilingualism and Biculturalism. 6 vols. Book IV, The Cultural Contribution of Other Ethnic Groups, chap. VII, "The media of communication". Ottawa: Queen's Printer, 1969.

Canada: Report of the Special Committee of the Senate on Mass Media (Davey Report). 3 vols. Ottawa: Information Canada, 1970.

Canada: Department of Communications. Instant World: A Report on Telecommunications in Canada. Ottawa: Information Canada, 1971.

Quebec: Ministère des Communications. Pour une politique des communications. Quebec: Editeur Officiel du Quebec, 1971.

Canada: Department of Communications. Branching Out: Report of the Canadian Computer/Communications Task Force. 2 vols. Ottawa: Information Canada, 1972.

Ontario: Report of the Royal Commission on Book Publishing. Toronto: Queen's Printer, 1972.

Quebec: Commission Parlementaire sur la Liberté de la Presse. Les travaux de la commission de 1969 (Rapport Pierre Beausoleil). Quebec: Assemblée Nationale, 1972.

Canada: Minister of Communications. Proposals for a Communications Policy for Canada: a Position Paper of the Government of Canada (Green Paper). Ottawa: Information Canada, 1973.

Canada: Minister of Communications. Computer/Communications Policy: A Position Statement by the Government of Canada. (Dark Green Paper) Ottawa: Information Canada, 1973.

Canada: Minister of Communications. Communications: Some Federal Proposals, (Grey Paper). Ottawa: Information Canada, 1975.

Canada: Minister of Communications. Statement on Proposed Constitutional Amendments with Respect to Cable Distribution Systems. Ottawa: Department of Communications, February 13/ 1979.

### 3.2 THE INDEPENDENT REGULATORY TRIBUNAL AND THE QUESTION OF ACCOUNTABILITY

One of the most controversial issues raised by the creation of the independent regulatory tribunal is the relationship between the regulator and the government of the day. A related issue is the familiar criticism that regulatory agencies inevitably become captive to the interests of the industry they regulate. In Canada, the literature on these subjects is still relatively undeveloped. However, a number of recent studies have begun to examine these questions in earnest. The issue has become particularly topical with the proposal in Bill C-16 that the federal government be enabled to direct the Canadian Radio-television and Telecommunications Commission as to the policy which it should apply and the specific means it must employ in carrying out such policy.

#### Canadian Studies And Articles

Hull, W. H. N. A Comparative study of the problems of ministerial responsibility in Australian and Canadian broadcasting. (Ph.D. thesis, Duke University, 1959).

Penney, Ronald G. "Telecommunications policy and ministerial control," (1970) 2 Canadian Communications Law Review 8.

Should broadcasting in Canada be regulated beyond the allocation of frequencies? And if regulation of programming is dictated by considerations of national policy, are these considerations inherently self-defeating because of the nature of the medium? And once brought under regulation, is broadcasting in Canada inevitably governed by partisan politics? Or is "politics" a useful antidote to the particular problems inherent with the independent regulatory commission? In this paper, Mr. Penney examines the development of the agencies controlling broadcasting in Canada, and considers a number of arguments on both sides of these questions.

Doern, G. B., and others. "The structure and behaviour of Canadian regulatory boards and commissions: multi-disciplinary perspectives," (1975) 18 Canadian Public Administration 189.

This article reviews the basic issues and approaches raised regarding the structure, functions, and behaviour of administrative and regulatory agencies, boards, and commissions. Multidisciplinary perspectives suggest the elementary need to treat such units of government as living, breathing organizations and hence counsel against simplistic explanations or descriptions of their structure and behaviour.

Baum, D. J., "Broadcasting regulation in Canada: the power of decision," (1975) 13 Osgoode Hall Law Journal 693.

Professor Baum suggests that by not accepting some of the restraints that were written on the face of the Broadcasting Act and by permitting, or even pressuring, the CRTC to make unauthorized use of conditions of licensing power, Parliament has effectively created a broadcasting parliament in the CRTC. His ultra vires argument is developed by reference to the role the agency assumed in the CBC license renewal hearings, the issues of children's advertising, and cable regulation.

Janisch, Hudson N., "The Role of the Independent Regulatory Agency in Canada," (1978) 27 University of New Brunswick Law Journal 83.

In this excellent study, Professor Janisch reviews four issues involving the CRTC - - commercial deletion, Manitoba cable television, pay television, and the CBC inquiry - - to assess the independence of the regulatory process in communications regulation in Canada. His article is particularly useful in developing the arguments for and against "independence" vs. "accountability", and includes comparative references to transport regulation in Canada and the U.S. literature.

Janisch, Hudson, and others. "Political Accountability for Administrative Tribunals," pp.1-99 in Proceedings of the Conference on Administrative Justice, Ottawa: University of Ottawa, 1978.

This conference involved the presentation of a paper by Professor Janisch on the issue of accountability vs. independence, followed by comments from Judge Yvon Côté, Guy Roberge and Robert Buchan.

Janisch, Hudson N., "Policy-Making in Regulation: Towards a New Definition of the Status of Independent Regulatory Agencies in Canada," (1979) 17 Osgoode Hall Law Journal 1.

This lengthy study includes an update by Professor Janisch of all of the material dealt with in his previous articles, along with an attempt to bring together the issues and problems raised by recent developments.

#### American Books and Articles

Kreslov, Samuel and Muslof, Lloyd D. The Politics of Regulation. Boston: Houghton, Mifflin, 1964.

Nagel, S. "Regulatory commissioners and party politics," (1964) 17 Administrative Law Review 39.

Loevinger, L. "Administrative agency as a paradigm of government - a survey of the administrative process," (1965) 40 Indiana Law Journal 287.

Redford, E. S. "President and the regulatory commissions," (1965) 44 Texas Law Review 288.

Friedman, R. S., Klein, B. W., Romani, J. H. "Administrative agencies and the publics they serve," (1966) 26 Public administrative Review 192.

Smith, J. B. "Administrative commission - pestilence or prophylaxis," (1966) 6 Washburn Law Journal 75.

Welborn, D. M. "Presidents, regulatory commissioners and regulatory policy," (1966) 15 Journal of Public Law 3.

Cary, W. L. Politics and the Regulatory Agencies. New York: McGraw-Hill, 1967.

Jones, M. G. "Role of administrative agencies as instruments of social reform," (1967) 19 Administrative Law Review 279.

- Edelman, M. "Public regulatory bodies: economic functions and political functions," (1968) 35 I.C.C. Practitioners' Journal 747.
- Kohlmeier, L. M. The Regulators. New York: Harper and Row, 1969.
- Unnevehr, C. "Is it time to review the regulatory process?" (1969) 84 Public Utilities Fortnightly 15.
- MacAvoy, Paul W. (ed.). The Crisis of the Regulatory Commissions: An Introduction to a Current Issue of Public Policy. New York: W. W. Norton & Co., 1970.
- Shepherd, W. G. "Regulation and its alternatives," (1970) 22 Stanford Law Review 510.
- Swidler, J. C. "Comments on the case for de-regulation," (1970) 22 Stanford Law Review 510.
- MacIntyre, A. E. "Status of regulatory independence," (1969) 29 Federal Bar Journal 1; (1971) 38 I.C.C. Practitioners' Journal 354.
- Johnson, Nicholas. "New Fidelity to the Regulatory Ideal" (1971) 59 Georgia Law Journal 869.
- Goodsell, C. T., and Gayo, C. C. "Appointive control of federal regulatory commissions," (1971) 23 Administrative Law Review 291.
- Bernstein, M. H. (ed.). "Government as regulator," (1972) 400 Annals of the American Academy 1.
- Hilton, George W. "Basic behaviour of regulatory commissions," (1972) 62 American Economic Review 47.
- Johnson, Nicholas. "Consumer rights and the regulatory crisis," (1972) 24 Stanford Law Review 1092.
- Posner, R. A. "Behaviour of administrative agencies," (1972) 1 Journal of Legal Studies 305.
- Sampson, Roy J. "Inherent advantages under regulation," (1972) 62 The American Economic Review 55.
- Moore, John E. "Recycling the regulatory agencies," (1973) 32 Public Administration Review 291.
- Pgeffer, Jeffrey. "Administrative regulation and licensing: social problem or solution?" (1974) 21 Social Problems 468.



Wiley, Richard E. "The extent of independence of federal regulatory agencies," (1974) Public Utilities Fortnightly.

Dixon Jr. Robert G. "The independent commissions and political responsibility," (1975) 27 Administrative Law Review 1.

### 3.3 ADMINISTRATIVE AGENCIES AND JUDICIAL REVIEW

This part examines the relationship between regulatory agencies and the courts. This area is one of the traditional fields of legal study, and is treated in most law schools under the heading "administrative law". Included within this subject are the nature of statutory appeals from agency decisions on questions of law or jurisdiction and the history and development of the prerogative writs. Very little of the literature focuses on a particular regulatory tribunal or on the communications regulatory agencies as such; instead, the literature is directed towards administrative law in general.

The following material has been divided into four parts. The first part consists of a basic list of Canadian and Commonwealth textbooks on administrative law. The second is a table of articles from Canadian and Commonwealth law periodicals on administrative law questions. The third is a table of American articles on the general problems in administrative law in the United States, primarily in the context of the Administrative Procedures Act. Finally, a table is presented of articles on the impact of judicial review on the Federal Communications Commission.

#### Canadian and Commonwealth Textbooks

de Smith, S. A. Judicial Review of Administrative Action, 2nd ed. London: Stevens, 1968.

Dussault, René. Le Contrôle Judiciaire de l'Administration au Québec. Québec: Les Presses de l'Université Laval, 1969.

Hewitt, D. J. The Control of Delegated Legislation. Sydney: Butterworth, 1953.

Hodgson, J. S. Public Administration. Toronto: McGraw-Hill, 1969.

Jackett, W. R. The Federal Court of Canada - A Manual of Practice. Ottawa: Information Canada, 1971.

Mullan, D. J. Administrative Law. Toronto: Carswell, 1973.

Mundell, D. W. Manual of Practice on Administrative Law and Procedure in Ontario under the Statutory Powers Procedure Act. Toronto: Queen's Printer, 1971.

Reid, Robert F. Administrative Law and Practice.  
Toronto: Butterworths, 1971.

Rubinstein, Ammon. Jurisdiction and Illegality.  
Oxford: Clarendon Press, 1965.

Wade, H. W. R. Administrative Law, 2nd ed. Oxford:  
Clarendon Press, 1967.

Canadian and Commonwealth Articles

Willis, John. "Section 96 of the British North  
America Act." (1940) 53 Harvard Law Review 251.

Willis, John. "Delegatus Non Potest Delegare, (1943)  
21 Canadian Bar Review 257.

Shumiatcher, M. C. "Section 96 of the British North  
America Act Re-Examined," (1949) 27 Canadian Bar  
Review 131.

Laskin, Bora. "Certiorari to Labour Boards: The  
Apparent Futility of Privative Clauses," (1952) 30  
Canadian Bar Review 986.

Aikman, C. C. "Subdelegation of Legislative Power,"  
(1960) 3 Vict. U of Well. L.R. 69.

Dreidger, E. A. "Subordinate Legislation," (1960)  
38 Canadian Bar Review 1.

Willis, John. "Administrative Law in Canada," (1961)  
39 Canadian Bar Review 251.

Angus, W. H. "The Waning Jurisdiction of the Courts,"  
(1963) 28 Saskatchewan Bar Review 133.

Arthurs, H. W. "The Three Faces of Justice - Bias  
in the Tripartite Tribunal," (1963) 28 Saskatchewan  
Bar Review 147.

McAllister, G. A. "Administrative Law," (1963) 6  
Canadian Bar Journal 439.

Gordon, D. Marshall. "Administrative Tribunals,"  
(1964) 12 Chitty's Law Journal 92.

Note, "Jurisdictional error in administrative law,"  
(1965) 5 Sydney Law Review 89.

Note, "Jurisdiction of the courts over domestic  
tribunals - natural justice," (1966) 2 Adelaide  
Law Review 414.

- Carter, Roger. "The Apparent Virility of Privative Clauses," (1967) University of British Columbia Law Review - C.de D. (Centennial Edition) 219.
- Hendry, J. M. "Some Problems of Canadian Administrative Law," (1967) 2 Ottawa Law Review 71.
- Morden, J. W. "Recent Developments in Administrative Law," Law Society of Upper Canada Special Lectures, 1967 Toronto: de Boo p. 275.
- Wade, H. W. R. "Unlawful administrative action: void or voidable?" (1968) 83 Law Quarterly Review 499.
- Keith, K. J. "Appeals from administrative tribunals," (1969) 5 Victoria University of Wellington Law Review 123.
- Molot, Henry L. "Annual Survey of Canadian Law: Administrative Law," (1969) 3 Ottawa Law Review 465.
- Norman, K. "The Privative Clause: Virile or Futile?" (1969) 34 Saskatchewan Law Review 334.
- Northey, J. F. "The Changing Face of Administrative Law," (1969) 3 N.Z.U.L.R. 426.
- Smillie, J. A. "Jurisdictional Review of Abuse of Discretionary Power," (1969) 47 Canadian Bar Review 623.
- Wade, H. W. R. "Constitutional and Administrative Aspects of the Anisminic Case," (1969) 85 L.Q.R. 198.
- Arthurs, H. W. "Regulation-making: the creative opportunities of the inevitable," (1970) 8 Alberta Law Review 315.
- Yardley, D. C. M. "The Abuse of Powers and its Control in English Administrative Law," (1970) 18 American Journal of Comparative Law 565.
- Christie, I. M. "The Nature of the Lawyer's Role in the Administrative Process," Law Society of Upper Canada Special Lectures, Toronto: de Boo, 1971.
- Gordon, D. M. "What Did Anisminic Decide?" (1971) 34 Modern Law Review 1.
- Henderson, G. F. "Federal Administrative Tribunals in Relation to the New Federal Court of Canada," Law Society of Upper Canada Special Lectures. Toronto: de Boo, 1971.

Hogg, P. W. "The Jurisdictional Fact Doctrine in the Supreme Court of Canada," (1971) Osgoode Hall Law Journal 203.

MacKinnon, B. J. "Appeals from Provincial Administrative Tribunals," Law Society of Upper Canada Special Lectures. Toronto: de Boo, 1971.

Molot, H. L. "Annual Survey of Canadian Law: Administrative Law," (1971) 4 Ottawa Law Review 458.

Thomson, C. R. "Provincial Tribunals and the Prerogative Writs," Law Society of Upper Canada Special Lectures. Toronto: de Boo, 1971.

Abel, Albert. "The dramatis personae of administrative law," (1972) 10 Osgoode Hall Law Journal 61.

Molot, H. L. "Self-created rule of policy and other ways of exercising administrative discretion," (1972) 18 McGill Law Journal 310.

Angus, William H. "Judicial review: do we need it?", (1974) 26 Administrative Law Review 301; The Individual and the Bureaucracy (ed. Daniel J. Baum). Toronto: Osgoode Hall Law School/York University, 1975.

Hogg, Peter W. "Judicial review: how much do we need?" (1974) 26 Administrative Law Review 337; The Individual and the Bureaucracy (ed. Daniel J. Baum). Toronto: Osgoode Hall Law School/York University, 1975.

Borgeat, L. "La place de l'appel dans le droit du controle judiciaire de l'administration," (1975) 16 Cahiers de droit 125.

Fera, N. M. "Judicial review under sections 18 and 28 of the Federal Court Act," (1975) 21 McGill Law Journal 255.

Wexler, S. "Non-judicial decision making," (1975) 13 Osgoode Hall Law Journal 839.

Jones, D. P. "Supreme Court of Canada and administrative law," (1976) 14 Alberta Law Review 1.

Clark, D. H. "The Supreme Court of Canada, the House of Lords, the Judicial Committee of the Privy Council and administrative law," (1976) 14 Alberta Law Review 5.

American Articles - General

Berger, R. "Administrative arbitrariness and judicial review," (1965) 65 Columbia Law Review 55.

Fisher, B. C. "Rule making activities in federal administrative agencies," (1965) 17 Administrative Law Review 252.

Fuchs, R. F. "Agency development of policy through rule-making," (1965) 59 Northwestern University Law Review 781.

Nagel, S., Curris, C. "Exercise of procedural discretion by the regulatory agencies," (1965) 17 Administrative Law Review 173.

Sultan, A. "Supreme Court review of "informal" or threatened agency action," (1965) 18 Administrative Law Review 55.

"Abuse of discretion: administrative expertise vs. judicial surveillance," (1966) 115 University of Pennsylvania Law Review 40

Davis, K. C. "Judicial control of administrative action: a review," (1966) 66 Columbia Law Review 635.

Jaffe, L. L. "Administrative law: burden of proof and scope of review," (1966) 79 Harvard Law Review 914.

Shapiro, M. M. "Supreme Court and government planning: judicial review and policy formation," (1966) 35 George Washington Law Review 329.

Hannon, P. J. "Administrative law making," (1967) 42 Journal of the State Bar of California 661.

Byse, Ginnane, Wollenberg, Solomon, McGowan. "Judicial review of agency action," (1967) 20 Administrative Law Review 147.

Note, "Intermediate appellate review boards for administrative agencies," (1968) 81 Harvard Law Review 1325.

Forkosch, M. D. "Credibility gap in judicial review of administrative determinations," (1969) 18 Cleveland-Marshall Law Review 257.

Note, "Review of administrative rulings: the anomaly of district court fact-finding," (1969) 19 Catholic University Law Review 215.



Towle, W. H. "Non-reviewability problem under the administrative procedure act," (1969) 2 John Marshall Journal 271.

Zamir, I. "Administrative control of administrative action," (1969) 57 California Law Review 866.

Kaufman, I. R. "Judicial review of agency action: a judge's unburdening," (1970) 45 New York University Law Review 201.

Koslow, S. "Standardless administrative adjudication," (1970) 22 Administrative Law Review 407.

Note, "Scope of judicial review of decisions of administrative agencies," (1971) 23 South Carolina Law Review 472.

Vining, G. J. "Direct judicial review and the doctrine of ripeness in administrative law," (1971) 69 Michigan Law Review 1443.

#### American Articles on Judicial Review and the FCC

Willis, J. W. "Judicial review of FCC decisions, 1966-1967," (1967) 21 Federal Communications Bar Journal 111.

Collins, D. F. "Judicial review of FCC decisions, 1968-1969," (1969) 23 Federal Communications Bar Journal 57.

Note, "Administrative law - judicial review - decision of FCC renewing TV license overruled as not supported by substantial evidence," (1970) 83 Harvard Law Review 1412.

Swift, R. F. "Judicial Review of F.C.C. Decisions 1969-1970," (1970 - 1971) 24 Federal Communications Bar Journal 86.

Beizer, R. A., Quale, J. C. "Judicial review of FCC decisions: 1972," (1973) 25 Federal Communications Bar Journal 251.

Note, "Judicial scrutiny of the FCC: the illusion of usurpation," (1972) 52 Boston University Law Review 659.

Swift, R. F. "Judicial review of FCC decisions: 1970-1971," (1972) 25 Federal Communications Bar Journal 66.

Berman, P. J. "CATV leased access channels and the FCC: the intractable jurisdiction question," (1975) Annual Survey of American Law 623; (1975) 51 Notre Dame Law 145.

Note, "F.C.C. lacks jurisdiction over two-way, non-video intrastate on cable television leased access channels," (1976) 89 Harvard Law Review 1257.

### 3.4 PRACTICE AND PROCEDURE BEFORE THE REGULATORY AGENCIES

The issue of procedural reform has recently emerged as a major issue of concern before the regulatory agencies involved in communications regulations, particularly the CRTC. The impetus for reform has come from the growing realization that people want the right to participate in decisions that affect their lives and regulatory procedures have all too often favoured industry participants who are more knowledgeable about regulatory procedures and policies.

In recognition of this, one of the first initiatives of the CRTC following its assumption of jurisdiction over the federally-regulated telecommunications carriers in 1976 was to call a hearing into revisions of the practices and procedures for telecommunications regulation. The decision of the Commission on this question was released on May 23, 1978, and constituted a thorough-going reform of the pre-existing procedures to facilitate public participation. See Telecom Decision CRTC 78-4.

More recently, the CRTC convened a hearing in November 1978 into its procedures respecting the regulation of broadcasting and cable television, based on a lengthy announcement dated July 25, 1978. The decision of the Commission on this question has not yet been issued, but it is expected that the result of the proceeding will be to further facilitate public involvement in the hearing process. The transcripts of hearing for both the broadcasting and telecommunications proceedings into Practices and Procedures constitute significant source material for studies into the regulatory process in Canada.

The material below is divided into two parts. First are a number of Canadian articles on procedures before the regulatory agencies. The second part consists of articles from American law periodicals relating to two issues: first, general problems in administrative procedure in the United States and second, the issue of standing before the FCC.

Canadian Articles

Goodman, Edwin A. "Advocacy before administrative tribunals," (1971) Pitblado Lectures 23.

In this very forthright article, the author expands on the role and techniques of counsel before administrative agencies. The topic is examined against three backdrops: the importance of knowing the board's policy on an issue; the means and importance of getting facts before the board; and the use and presentation of law before the tribunal, in contrast to its presentation before a bench or a jury.

Johnston, C. Christopher. "Notes on procedure at CRTC public hearings," (1972) 4 Canadian Communications Law Review 130.

The author outlines pre-hearing procedures, order of appearance, presentation of evidence, cross-examination, role of solicitors and appeal procedures at CRTC public hearings.

McCallum, S. K., and Watkins, G. "Citizen's costs before administrative tribunals," (1975) 23 Chitty's Law Journal 181.

In discussing the merits of a submission made to the Canadian Transport Commission as to whether the commission should award costs to parties or intervenors that appear before it, the authors touch upon the CRTC's regulatory style and attitude towards costs.

Gotlieb, A. E. "The Individual and the Telecommunications Regulatory Process in Canada," p 5-41 of The Individual and the Bureaucracy (ed. D. J. Baum) Toronto: Osgoode Hall Law School, 1975.

Gotlieb discusses the process of interaction between the individual and the various administrative authorities for which the Minister of Communications has a direct or ultimate authority. The article deals, as well, with some of the remedies available to the individual in the face of decisions which affect his "right to communicate" and considers some of the problems and potential solutions.

An introductory section provides a useful background of the regulatory responsibilities of the Minister of Communications and the constitutional and legal basis for the exercise of these functions.

Grant, Peter, and others. "Public Participation in the Administrative Process," pp. 229-262 in Proceedings of the Conference on Administrative Justice, Ottawa: University of Ottawa, 1978.

This conference involved the presentation of a paper by Mr. Grant on the issue of public participation and the awarding of costs to intervenors at CRTC rate hearings, followed by comments from Andrew J. Roman, Geoffrey Stevens and Colin K. Irving.

American Articles - - General

Beeler, Donald C. "American Bar Association's Program for Improvements in Administrative Procedure and Practice," (1956) 15 Federal Commission's Bar Journal 86.

Foell, Darrell W. "Are Ex Parte Representations Permissible in Administrative Agency Rule-Making Function?" (1959) 28 University of Cincinnati Law Review 338.

Lovett, L. G. "Ex parte and the FCC: the new regulations," (1967) 21 Federal Communications Bar Journal 54.

Cohn, S. L., Zuckman, H. L. "FCC v. Schreiber: in camera and the administrative agency," (1968) 56 Georgetown Law Journal 451.

Koch, M. J. "Non-litigation proceedings before administrative agencies," (1968) 17 Cleveland-Marshall Law Review 162.

Sager, W. H., Shapiro, L. S. "Administrative practice before federal agencies," (1969) 4 University of Richmond Law Review 76.

Raney, J. T. and Murray, J. P. "Delays and bottlenecks in the licensing process affecting attitudes: the role of improved procedures and advanced planning," (1970) Duke Law Journal 25.

Robinson, G. O. "Making of administrative policy: another look at rulemaking and adjudication and administrative procedure reform," (1970) 118 University of Pennsylvania Law Review 485.

Note, "Democratizing the administrative process: toward increased responsiveness," (1971) 13 Arizona Law Review 835.

American Articles on the Issue  
of Standing before the FCC

Note, "Federal Communications Act - Manufacturer Has Standing to Protest Renewal of Broadcasting License Held by Competitor's Subsidiary," (1958) 44 Virginia Law Review 1327.

Note, "Federal Communications Act - Manufacturer in Competition with Parent Company of Station Licensee Has Standing to Protest FCC Renewal of License," (1959) 72 Harvard Law Review 770.

Note, "Procedure - right to intervention in F.C.C. ratemaking proceedings," (1963) 61 Michigan Law Review 978.

Note, "FCC v. Schreiber - a new weapon in the administrative arsenal?" (1966) 20 Southwestern Law Journal 374.

Singer. "Church of Christ: standing at the evidentiary hearing," (1966) 55 Georgia Law Review 264.

Note, "Standing of television viewers to contest FCC orders: the private action goes public," (1966) 66 Columbia Law Review 511.

Note, "WORZ, Inc. v. FCC (345 F 2d 85) - a new rule of procedure in television licensing," (1966) 114 University of Pennsylvania Law Review 939.

Note, "Administrative law - community representatives have standing to challenge FCC license renewal," (1967) 65 Michigan Law Review 518.

Note, "Administrative law - F.C.C. - responsible representatives of the listening public granted standing to intervene at FCC hearings," (1967) 4 San Diego Law Review 141.

Note, "Administrative law - expansion of "public interest" standing," (1967) 45 North Carolina Law Review 998.

Note, "Standing to challenge administrative agency conduct: recent developments in the federal common law," (1969) 44 Tulane Law Review 95.

Note, "Public participation in license renewals and the public interest standard of the FCC," (1970) Utah Law Review 461.

Hanes, C. "Citizen participation and its impact upon prompt and responsible administrative action," (1970) 24 Southwestern Law Journal 731.

Note, "Television: the public interest in license renewals," (1970) 20 Catholic University Law Review 328.

Note, "Standing for review of actions by federal administrative agencies: a new test," (1970) 23 University of Florida Law Review 206.

Note, "Implications of Citizens Communications Center v. FCC," (1971) 71 Columbia Law Review 1500.

Note, "Standing to challenge administrative action: the concept of personal stake," (1971) 39 George Washington Law Review 570.

Note, "Public participation in federal administrative proceedings," (1972) 120 University of Pennsylvania Law Review 702.



### 3.5 HOW TO FIND REGULATORY AND JUDICIAL DECISIONS IN THE COMMUNICATIONS FIELD

Access to regulatory and judicial decisions is obviously critical to the study of communications policy in Canada. Until recently, however, there has been a real problem in obtaining access to decisions particularly at the regulatory level. Even more serious has been the lack of an annotated guide to past decisions. In this part, we discuss the sources that are now available to assist in the research of judicial and regulatory decisions in the communications field.

#### Canada

Judicial Decisions. There are over 200 decisions of courts relating to aspects of communications regulation in Canada. Until recently there was no consolidated reference to these decisions. However, this problem has now been resolved. A complete summary of all judicial decisions from 1857 to 1979 is now set out in Part 4 of Grant, Peter, Canadian Communications Regulation (Toronto, Law Society of Upper Canada, forthcoming). Included within Part 4 is also an alphabetical list by case name and an index by subject-matter.

Federal Regulatory Decisions. Access to decisions of the CRTC and its predecessor regulatory agencies has been uneven until recently. On the broadcasting side, the only general source consisted of the Annual Reports of the CRTC, which have included summaries of leading decisions organized by subject-matter since 1969. The actual text of the decisions was reproduced in the Annual Reports from 1971 to 1975 and since 1975 has been reprinted in CANADIAN RADIO-TELEVISION AND TELECOMMUNICATIONS DECISIONS AND POLICY STATEMENTS, cited as C.R.T. Until recently, no subject index existed to CRTC decisions, and no index of any kind for broadcasting decisions prior to 1968. On the telecommunications side, access to decisions since April 1, 1976, has been greatly increased by the publication on a monthly basis of the Telecommunications Bulletin by the CRTC which summarizes decisions, orders and the current status of proceedings respecting the telecommunications carriers for the previous month. Until recently, however, no index of any kind existed for the over 300 telecommunications regulatory decisions prior to 1976.

Both problems have recently been resolved. A complete summary of all federal regulatory decisions

in both broadcasting (1958-1979) and telecommunications (1903-1979) cross-indexed by subject-matter, will appear in Parts 2 and 8 respectively of Grant, Peter, Canadian Communications Regulation (Toronto, Law Society of Upper Canada, forthcoming).

Provincial Regulatory Decisions. This area still presents considerable difficulties for the independent researcher. There is as yet no consolidated reference to all decisions of the provincial regulatory agencies relating to communications, although well over 1,000 decisions are involved. In the interim, reference must be made to the Annual Reports of the boards or commissions involved, some of which include the text of the important decisions, or inquiries can be made to the particular regulatory board itself. Two recent studies also provide a general guide to the decisions of particular provincial boards: (1) Gregory, John D. "Telephone Regulation in Quebec: A study of the Quebec Public Service Board," (1973) 5 Canadian Communications Law Review 1; and (2) Janisch, Hudson, and Huber, Paul, "A Critique of Provincial Regulation of Telecommunications in the Atlantic Provinces," (1976) 8 Canadian Communications Law Review 1 (forthcoming).

#### United States

Access to judicial and regulatory decisions in the communications field in the United States is obtained through three publications: FCC Reports, Public Utilities Reports and Pike & Fischer Radio Regulation, each of which is discussed below. All three services are subscribed to by the CRTC, Ottawa. The first two sources are notoriously delayed, however, and therefore it is usually necessary to refer to current trade periodicals, noted in Part 1.1 above, for notes on decisions within the past year.

Federal Communications Commission Reports (F.C.C.) Now in their second series, FCC Reports are issued in pamphlet form and later reissued as hardcover volumes. The reports are indexed by date, locality, and title of decision, with a subject index on a key-word basis.

Public Utilities Reports (P.U.R.) This extensive reporting service includes regular volumes, digest volumes and keyword indexes. The P.U.R. Digest operates in the same way as the Canadian Abridgement. P.U.R. Digest 2nd has yearly updates. For the period from 1954 to 1973, reference should be made to P.U.R. 3rd, which also has annual digest volumes. The period from 1974 to the present is covered in P.U.R. 4th.

Pike and Fischer Radio Regulation (R.R.) This is a comprehensive reporting service on all facets of federal broadcast regulation in the United States. The service originated in 1945 and after some experimentation with extent and format, began a second series in 1963. A two-volume consolidated Digest exists for the first period, and the decisions and reports are indexed in the Finding Aids section of the Current Service of the present series, mentioned below. Radio Regulation now comprises three parts. The Current Service volumes contain the Communications Act, as amended, other relevant statutes, and related material including Congressional committee reports, treaties and international agreements, and the Rules and Regulations of the Federal Communications Commission relating to broadcasting, including proposed amendments. The Decisions volumes, entitled Cases: Second Series, report and headnote decisions and reports of the FCC and court decisions since July 1963. Finally, these Digest volumes reprint the headnotes of all the decisions in section keyed to the material in the Current Service volumes. Volume One of the Current Service contains an extensive Finding Aids section, which cites all the decisions, excerpts and court cases in R.R. first series by name, title and docket number. FCC Reports are cited in R.R. 2d by docket number, as are Proposed Rulemaking by docket and section number. There are lists of citations both of R.R.2d cases in later decisions and of rehearing and review of FCC decisions by the Commission and the Courts. A cross-reference service gives the citation in FCC Reports of R.R.2d decisions and R.R.2d citations for FCC Reports cases. Likewise the section numbers found in FCC Rules and R.R.2d are cross-referenced. A master index gives section numbers in the Current Service and the Digest for subject classes and subheadings.

## CHAPTER 4

### COMMUNICATIONS TECHNOLOGY

One of the realities of the field of communications is that it is at the forefront of technological change. The significance of this for those involved in making public policy is obvious -- will technology overtake and overwhelm the regulator, or can technological change be anticipated, understood and directed to the public benefit? "After all," said Edward Burroughs, the Bishop of Ripon, in a sermon to the British Association for the Advancement of Science on September 4, 1927, "we could get on very happily if aviation, wireless, television and the like advanced no further than at present..." But that was a forlorn hope. Technological change has developed an aura of inevitability which has swept all before it.

In dealing with the new technology, a new priesthood has also developed: A priesthood of people who understand and work comfortably with the concepts and vocabulary of the technology. In the communications field, more than any other, it is important that lawyers, economists and policy-makers be aware of the scope and limitations of the technology since this has a direct impact on public policy.

The purpose of this chapter is to set out a number of basic reference sources which explain the new fields in communications technology to the layman. The chapter also examines the growing literature on the nature and impact of technological change.

The chapter is organized in three parts.

- 4.1 General Books and Studies on Communications Technology
- 4.2 Books and Studies on Particular Aspects of Communications Technology
- 4.3 Studies relating to the Control of Technological Change.

4.1                   GENERAL BOOKS AND STUDIES  
ON COMMUNICATIONS TECHNOLOGY

In this part, a number of general reference sources are listed which provide a good introduction to the communications technology field. All of the sources listed in this chapter can be read by the intelligent layman and the following sources are particularly useful in giving a general overview to the entire area. Although some of the studies below are now somewhat dated, the general discussion of technological change is still relevant.

Canada, Dept. of Communications. Telecommission Study 4 (a), "The Future of Communications Technology." Ottawa: Information Canada, 1971.

This report presents a detailed survey of existing technology in the communications field and comments on future trends. It points out that technological discoveries take two decades to have significant social impact so that depending on cost factors, major system changes in the next 30 years will be based on known techniques. The bulk of the report outlines projected developments in the following areas: (1) common carrier networks, particularly with respect to data services, (2) broadcasting especially expanded cable system multi receiver households and the growth of audio-visual playback devices (3) mobile communications (4) data storage and processives involving opposing trends toward large memory banks and minicomputers (5) transmission technology and (6) switching technology. Finally the report predicts that the system as a whole will become more integrated and that greater efficiency will result from over increasing economic trade-offs.

Beck, A.H.W. Words and Waves: An Introduction to Electrical Communications. New York: McGraw Hill, 1967.

Gerbner, George et al. (eds.). Communications Technology and Social Policy: Understanding the New "Cultural Revolution." New York: Wiley - Interscience, 1973.

Hamsher, Donald H. (ed.). Communication System Engineering Handbook. New York: McGraw - Hill, 1967.

Hellman, H. Communications In the World of the Future. Evans & Co., 1969.

Maddox, B. Beyond Babel: New Directions in Communications. New York: Simon and Schuster, 1972.

Pierce, J.R. Symbols, Signals and Noise: The Nature and Process of Communication. New York: Harper and Row, 1961.

President's Task Force on Communications Policy (Rostow Report). Staff Paper 1, "A Survey of telecommunications technology." Washington: 1969.

4.2 BOOKS AND STUDIES ON PARTICULAR  
ASPECTS OF COMMUNICATIONS TECHNOLOGY

This part sets out a number of sources on technological developments in particular fields of communications. The treatment is in most cases much more detailed than in the general sources noted in part 4.1. The fields dealt with below are telecommunications carriers, computer/communications, television, radio, cable television, satellite communication, film, videotape, and printing and publishing. Canadian sources are usually listed first, followed by American sources.

Telecommunications Carriers

Bell-Northern Research, Telesis. Ottawa, Bell-Northern, 1966-

This monthly periodical presents articles on new developments in Canadian telecommunications technology of consistently high quality.

Canada, Dept. of Communications, Telecommission Study 7(1), "Postal Services and Telecommunications," (Ottawa, Information Canada, 1971).

A brief study of the possibility of converting some of the present postal service to an electronic system.

Canada, Dept. of Communications. Telecommission Study 8(6) (ii), "Interconnection between TCTS and CN/CP." (Ottawa: Information Canada, 1971).

This study includes a technical description of the message record systems, TELEX and TWX, of the two principal carrier groups in Canada.

Angelakos, D.J. and Everhart, T.E. Microwave Communications. New York: McGraw - Hill, 1967.

Brown, Ronald. Telecommunications: The Booming Technology. New York: Doubleday and Co., 1970.

Costigan, Daniel M. FAX: The Principles and Practice of Facsimile Communication. Philadelphia: Chilton Book, 1971.

Woodruff, H. Charles. ABC's of Microwaves. Indianapolis, Ind.: Howard W. Sams, 1965.



Computer/Communications

Parkhill, D.F. The Challenge of the Computer Utility.  
Don Mills, Ont.: Addison-Wesley Publishing Co.,  
1966.

The purpose of this book is to facilitate the growing discussion of "computer utilities" by providing a broad overview of the subject that will reveal something of the history, technology, and economics of the computer utility, and explore some of its possible implications for our society. The book is not confined to technology, but stresses the close relationship between technological change and the economic, political and social evolution. Topics fall under four main headings:

- (1) principal historical and technological developments leading to computer utility;
- (2) the technology of computer utilities;
- (3) economic and legal considerations;
- (4) future possibilities.

Canada, Report of the Canadian Computer/Communications Task Force. Branching Ont. Ottawa, Information Canada, 1972.

An excellent study prepared for the Department of Communications concerning the current and desirable trends in computer/communications. The study first presents a concise overview of the whole industry and then outlines some general policies and recommendations for it. It then looks to computer/communications from several aspects: data processing, data communications, the data services environment stimulation of development and the role of institutions. Throughout, the Task Force has made recommendations for government action. Volume 2 of the study treats some specific items. Jurisdictional and legal aspects of computer/communications are presented. Then the applications of the industry to three social fields are analyzed: automation of payments and credit, applications in education, and Canada health care delivery systems.

Canada, Dept. of Communications. Telecommission Study 5(9), "Problems in data transfer, particularly of visual data." (Ottawa: Information Canada, 1971).

This is a general but fairly detailed study of the prospects, possibilities and problems of the use of computers in producing and transmitting visual displays, whether text and numbers (alphanumerics), graphics or animation. This includes, among others, teletypwriters, cathode-ray tubes and light boards. The report deals with the technology - hardware and software - potential social effects of computer graphics, and recommends more encouragement (public and private - including universities) and Canadian content to this field. A brief NRC report is appended.

Bennett, William R. and Davey, James R. Data Transmission. New York: McGraw - Hill, 1965.

Lucky, R.W. et al. Principles of Data Communications. New York: McGraw - Hill, 1968.

Martin, James. Telecommunications and the Computer. Englewood Cliffs, N.J.: Prentice - Hall, 1969.

Murphy, Donald E. and Kallis, Stephen A. Introduction to Data Communication. Maynard, Mass.: Digital Equipment Corp., 1968.

Sprague, Richard E. Information Utilities. Englewood Cliffs, N.J.: Prentice - Hall, 1969.

Winkler, S. (ed.), Computer Communications: Impacts and Implications (First International Conference on Computer Communication, Washington, D.C., 1972).

#### Television

Abbot, Waldo and Rider, Richard L. Handbook of Broadcasting: The Fundamentals of Radio and Television. New York: McGraw - Hill, 1957.

Alkin, E.G.M. Sound with Vision: Sound Techniques for Television and Film. New York: Crane, Russak, 1973.

Chester, Giraud et al. Television and Radio. 4th ed. New York: Appleton - Century - Crofts, 1971.

Chinn, Howard A. Television Broadcasting. New York: McGraw - Hill, 1953.

Other books in the McGraw - Hill series on television include:

Bretz. Techniques of Television Receivers

- Deutsch. Theory and Design of Television Receivers
- Dome. Television Principles
- Fink. Television Engineering, 2d, ed.
- Fink. Television Engineering Handbook
- Fowler & Lippert. Television Fundamentals - Theory, Circuits and Servicing
- Grob. Basic Television: Principles and servicing
- Kiver. Color Television Fundamentals
- Wentworth. Color Television Engineering
- Coleman, H.W. (ed.). Color Television. New York: Hastings House, 1968.
- Fink, Donald G., and Lutyens, David M. The Physics of Television. New York: Doubleday and Co., 1960.
- Hilliard, Robert L. (ed.). Understanding Television: An Introduction to Broadcasting. New York: Hastings House, 1964.
- MacRae, Donald L. et al. Television Production: An Introduction. Toronto: Methuen, 1973.
- Millerson, G. The Technique of Television Production. New York: Hastings House, 1968.
- NAB Broadcast Engineering Conference Technical Papers. Blue Ridge Summit, Pa.: TAB Books, annual.
- National Association of Broadcasters. NAB Engineering Handbook. 5th ed. New York: McGraw - Hill, 1960.
- Oringel, Robert S. (ed.). Audio Control Handbook For Radio and Television Broadcasting. 4th ed. New York: Hastings House, 1972.
- Pawley, Edward. BBC Engineering 1922-1972. Welwyn Garden City, Herts.: Broadwater Dress, 1972.
- Radio Corporation of America. Closed - Circuit Television Systems: Color and Monochrome. Camden, N.J.: RCA, 1958.

Waters, Earl J. ABC's of Radio and TV Broadcasting. Indianapolis, Ind.: Howard W. Sams, 1967.

#### Radio

Belt, Forest H. Easi - Guide to Citizens Band Radio. Indianapolis, Ind.: Bobbs-Merrill, 1973.

Coddington, Robert H. Modern Radio Broadcasting: Management and Operation in Small - to - Medium Markets. Blue Ridge Summit, Pa.: TAB Books, 1969.

Feldman, Leonard. FM from Antenna to Audio. Indianapolis, Ind.: Howard W. Sams, 1969.

Hilliard, Robert L. (ed.). Radio Broadcasting: An Introduction to the Sound Medium. New York: Hasting House, 1967.

Klapper, Jacob (comp.). Selected Papers on Frequency Modulation. New York: Dover Publications, 1970.

Laport, Edmund A. Radio Antenna Engineering. New York: McGraw - Hill, 1952.

Moore, James M. Radio Spectrum Handbook. Indianapolis, Ind.: Howard W. Sams and Co., 1970.

Nisbett, Alec. The Use of Microphones. London: Focal Press, 1974.

Noll, Edward M. First - Class Radiotelephone Licence Handbook. Indianapolis, Ind.: Howard W. Sams and Co., 1970.

Olson, Harry F. Modern Sound Reproduction. New York: Van Nostrand Reinhold, 1972.

The Radio Amateur's Handbook: The Standard Manual of Amateur Radio Communication. Newington, Conn.: American Radio Relay League, annual.

Sands, Leo G. 101 Questions and Answers About AM, FM and SSB. Indianapolis, Ind.: Bobbs-Merrill, 1972.

Sessions, Ken W. The 2 - meter FM Handbook: Using FM for Amateur Radio. Blue Ridge Summit, Pa.: TAB Books, 1972.

#### Cable Television

Cable Television Information Center. Technology of Cable Television. Washington: 1973.

Cooper, Robert B., Jr. CATV System Management and Operation. Thurston: TAB Books, 1966.

National Cable Television Association. Technical Volume: 22nd Annual NCTA Convention Official Transcript. Washington: NCTA, 1973.

Ray, Verne M. (ed.). CATV Operator's Handbook. Thurmont: TAB Books, 1967.

Schlafly, H.J., The Real World of Technological Evolution in Broadband Communications. New York: Sloan Commission on Cable Communications, Research Paper, 1970.

Ward, John E. Present and Probable CATV/Broadband Communication Technology, rev. ed. New York: Sloan Commission on Cable Communications, 1972.

#### Satellite Communications

Gatland, Kenneth W. (ed.). Telecommunication Satellites: Theory, Practice, Ground Stations, Satellite Economics. Englewood Cliffs, N.J.: Prentice-Hall, 1964.

Mueller, G. and Spangler, E., Communications Satellites, New York: John Wiley & Sons, 1964.

UNESCO. Communications in the Space Age - The Use of Satellites by the Mass-Media. Amsterdam: UNESCO, 1968.

#### Film

Ewing, Sam. Don't Look at the Camera: Shortcuts to Television Photography and Filmmaking. Blue Ridge Summit, Pa.: TAB Books, 1973.

Happe, L. Bernard. Basic Motion Picture Technology. London: Focal Press, 1971.

Malkiewicz, J. Kris. Cinematography: A Guide for Film Teachers. New York: Van Nostrand Reinhold, 1973.

Spottiswoode, R. The Focal Encyclopedia of Film and Television: Techniques. New York: Hastings House, 1969.

Zettl, Hervert. Sight Sound Motion: Applied Media Aesthetics. Belmont, Calif.: Wadsworth Publishing, 1973.

#### Videotape

The Video Handbook. New York: Media Horizons, 1972.

Batz, Jean - Claude and Kiefer, Jean - Claude. La Video-cassette: Naissance d'un Medium. France: Maison Mame 1973.

Marsh, Ken. Independent Video: A complete Guide to the Physics, Operation and Applicability of the New Television for the Student, The Artist, and for Community TV. San Francisco: Straight Arrow Books, 1974.

Mattingly, Grayson and Smith, Welby. Introducing the Single - Camera VTR System: A Layman's Guide to Videotape Recording. New York: Charles Scribner's Sons, 1971.

Videofraex. The Spaghetti City Manual. New York: Praeger, 1973.

White, Gordon. Video Recording. London: Newnes Butterworths, 1971.

#### Printing and Publishing

Arnold, Edmund C. Ink on Paper 2: A Handbook of the Graphic Arts. New York: Harper and Row, 1972.

H.S. Bailey, Jr., The Art & Science of Book Publishing. New York: Harper & Row, 1970.

Hattery, Lowell H. and Bush, George P. (eds.). Technological Change in Printing and Publishing. Rochelle Park, N.J.: Hayden Book, 1973.

#### 4.3 STUDIES RELATING TO THE CONTROL OF TECHNOLOGICAL CHANGE

This part sets out a number of reports and studies dealing with the general impact of innovation and technological change and the need for research and development in the Canadian environment. Also included are certain studies which touch on the social impact of technological change.

Canada, Senate Committee on Science Policy, A Science Policy for Canada, Ottawa: (Queen's Printer, 1970).

This report was submitted by the Lamontagne Special Committee on science policy. The first volume traces the history of Canada's policy from W.W. I, touching on the between-wars period, W.W. II and the non-policy period of the 50's, and the attempts in the 1960's of the Glasco Commission to create a science policy. The analysis of the present situation includes a comparison between Canada's performance and that of other countries, an over-all survey of Canada's research and development effort, a chapter on universities and provincial research organizations, comments on industrial research and the need to co-ordinate it with government. The concluding chapter states basically that a science policy is needed in Canada and that there should be some over-all government guidance of research and development in Canada rather than a program of devoting large sums of money to science and allowing it to develop on its own.

Canada, Dept. of Communications. Telecommission Study 4(b), "Research and development policies and programs." Ottawa: Information Canada, 1971.

This report gives a quantitative and qualitative description of research and development (R&D) activities in Canada. It determines that telecommunications R&D is justified in government, industry and university levels in that it enhances and strengthens telecommunications, reinforces independence from other economies and advances Canadian industry at home and in the world market. Further, the study concludes that although R&D policies, when measured against broad goals, have contributed and been relatively effective, on a narrower scale they tend to be self-feeding. It further concludes that there is an acute need for agreement on the relative priorities that should be given to basic and applied research. The final chapter outlines telecommunications R&D plans and policies for the 70's including vertical integration of R&D functions with operating



and manufacturing function; inclusion of estimation of sociological effects of communications in R&D research; the establishing of communications goals to which R&D can be directed; and the need for long term R&D planning

Canada, Dept. of Communications. Telecommission Study 6(a), "Report on the Seminar on Telecommunications and Participation." Ottawa: Information Canada, 1971.

This report was based on the Seminar on Telecommunications and Participation, held at the University of Montreal, April 3 to 5 1970. The object of this seminar was to consider ways by which telecommunications technology and systems can be developed in order to increase the opportunities for participation and to propose guidelines for such development.

It was observed by the study that the combination of media and information technology is challenging inherited values and that the principal product of this is a desire by citizens to participate in making decisions which affect their lives. The seminar warned that participation should not simply be a panacea nor should it be completely uncontrolled for fear too much participation may lead to a collapse of consensus.

The seminar's specific recommendations and conclusions were: (1) that as technology fragments the media and increases attention to specialized audiences, local identity is reinforced and the regions as a result come potent political forces; (2) that opportunity must be made for creative participation through data banks and demand television, so that localities and individuals may send as well as receive messages; (3) that the key to effective participation is education for John-Q Citizen in technological know-how; (4) that full use be made of our present technology before using new designs; (5) that interdisciplinary study and research is necessary if democratization of the media is to be achieved.

Canada, Dept. of Communications. Telecommission Study 6(b), "Report on the Seminar on Access to Information." Ottawa: Information Canada, 1971.

This report is based on the Seminar on Telecommunication and the Arts held at York University April 30 to May 3, 1970. The object of the seminar was to evaluate the impact of advanced telecommunications on the Arts in Canada

and to make recommendations for government and industry to consider. The underlying feeling was that technology should not be a substitute for human interaction, but a tool to enhance it.

The basis recommendations of the seminar-were: (1) that communications networks be used primarily for, by and about Canadian society; (2) that hardware and software already within the community receive more urgent and higher priority than new hardwares; (3) that creative communication center labs for research and experimentations be formed; (4) that a national information system be formed for the Arts; (5) that a program for education for artists in the new technology be established; (6) that broadcasting include in current information programs news concerning the Arts, science and technology; (7) that the CRTC study the possibility of compelling all broadcasting systems to provide minimum percentages of experimental broadcasting; (8) that there be greater access to TV facilities for all; (9) that prime time national arts shows devised by artists be aired on C.B.C.; (10) finally, that the Government hire artists as consultants.

Capion, W.M. (ed.), Technological Change in Regulated Industries. Washington, D.C.: Brookings Institution, 1971.

The essays in this volume are the outcome of a conference held at the Brookings Institute in February 1969. They seek to determine whether the effects of regulation vary significantly among industries, and if so, whether this results from variations in the regulatory approval, the organization of the firms or the nature of the technology. Of special interest is the essay by William G. Shepherd which examines the communications industry.

Mansfield, Edwin, The Economics of Technological Change. London, Longman's, 1969.

The book begins with a macroeconomic examination of the elements responsible for technological change and an account of the ways in which the economy is affected by it. A part of the book is an account of the implications of innovation in the particular context of automation, redundancy and public policy.

## CHAPTER 5

### INTERNATIONAL COMMUNICATIONS AND SATELLITES

One of the distinguishing features of telecommunications facilities and services is their international character. And in addition to their role as a link to other countries, telecommunications undertakings make use of two resources - the radio frequency spectrum and the geostationary orbit - which by their very nature transcend national boundaries and require a framework of international cooperation and regulation. Section 3 (b) of the proposed Telecommunications Act (Bill C-16) recognizes this in part with the statement that "the radio frequency spectrum is public property that should be administered in the public interest and in accordance with international agreements and conventions to which Canada is a party".

This chapter is devoted to studies and articles on the framework for international communications, including the international institutions which regulate the radio frequency spectrum and the geostationary orbit. Reference is also made to the growing literature on the cultural and economic effects of broadcasting across borders, an issue made more urgent by the growing availability of direct broadcast satellites. Finally, the chapter concludes with a review of the literature on domestic satellite communication in Canada and the United States, including the role of Telesat Canada.

The increasing impact of international agreements on the structure and content of domestic licensing and regulation of telecommunications makes it imperative that these agreements be fully understood. Until recently there was no comprehensive guide to the international treaties relating to telecommunications. However, a chronological table of all such treaties will shortly be available, along with the text of the important

treaty provisions, in Part 5 of Grant, Peter, Canadian Communications Regulation (Toronto: Law Society of Upper Canada, forthcoming).

This chapter is divided into three parts:

- 5.1 International Communications and International Institutions
- 5.2 International Broadcasting and Communications Satellites
- 5.3 Domestic Communications Satellites

## 5.1 INTERNATIONAL COMMUNICATIONS AND INTERNATIONAL INSTITUTIONS

This part refers the reader to texts and articles dealing with the development of international communications, the history and role of the International Telecommunication Union (ITU), Geneva, and the development of the International Telecommunications Satellite Organization (INTELSAT).

Interest in this area has recently been heightened by the World Administrative Radio Conference (WARC), scheduled to be held for 10 weeks commencing September 24, 1979, in Geneva, by the ITU. More than 1500 representatives from 154 countries are expected to participate. At the 1979 WARC, the current International Table of Frequency Allocations, established in 1959, will be revised. The general problems of the ITU in administering the spectrum is also the subject of many of the articles and studies listed below.

A substantial part of the literature below focuses on the development of INTELSAT and the long arduous task of working out Definitive Arrangements which satisfy both the commercial needs of the organization and the demand of developing countries for an equal voice in INTELSAT policy and management. The INTELSAT arrangements have been the subject of renewed interest in the light of the feasibility of cross-border access to U.S. and Canadian domestic satellites by both countries. The literature below also reviews the INTELSAT issue in the context of the development of a coherent "law of space".

Finally, the literature below includes a number of historical studies relating to the evolution of international communications. This is an area which has been virtually ignored in Canada, and there is a substantial need for good studies of the evolution of Teleglobe Canada and its role in Canadian communications.

The books and articles listed below are set out in chronological order.

Jessup and Taubenfeld. Controls for Outer Space. New York, 1959

Haley, Andrew G. Space Law and Government. New York: Appleton-Century Crofts, 1963.

McDougall, Laswell and Vlasic. Law and Public Order in Space. New Haven: Yale University Press, 1963.

Cohen, Maxwell. "Towards a legal regime in space," (1963) 1 Manitoba Law School Journal 147.

Cohen points out the need for a swift development of the law of space, particularly that which would affect the operation of space communications. He suggests that clear language embodied in specific documents is necessary, rather than a painful adaptation of customary rules.

Schick, F., "Space law and communication satellites," (1963) 16 Western Political Quarterly 14.

Throop, A.E., "Some legal aspects of satellite communications," (1964) American Bar Association Section of International & Comparative Law 61.

Segal, B.G., "Communications satellites - progress and the road ahead," (1964) 17 Vanderbilt Law Review 677.

Johnson, J.A., "Satellite communications: the challenge and the opportunity for international cooperation," (1964) 19 Federal Communications Bar Journal 88.

Estep, S.D., "International lawmakers in a technological world: space communications and nuclear energy," (1964) 33 George Washington Law Review 162.

Gatland, Kenneth W. (ed.). Telecommunication Satellites: Theory, Practice, Ground Stations, Satellite Economics. Englewood Cliffs, N.J.: Prentice-Hall, 1964.

Jaffe, Leonard. Communications in Space. New York: Holt, Rinehard and Winston, 1964.

Stolusky, W.G., "Unauthorized interception of space-oriented telecommunications," (1965) 25 Federal Bar Journal 412

International Telecommunications Union. From Semaphore to Satellite. Geneva: I.T.U., 1965.

Marks, L.H., "Early Bird - a new horizon for broadcasters," (1965) 16 EBU Review 41(No.93).

Jenzo, Space Law. London, 1965.

Glazer, J.H. "Some interpretive grapes concerning the application of the International telecommunications convention to military radio installations," (1965) 25 Federal Bar Journal 307.

Levin, H.J., "Organization and control of communications satellites," (1965) 113 University of Pennsylvania Law Review 315.

Menter, "Government regulation of space activities," (1965) 7 Airforce JAG Law Review 55.

Simsarian, J., "Interim arrangements for a global commercial communications satellite system," (1965) 59 American Journal of International Law 344.

Doyle, S.E., "International satellite communications and the law," (1965) 11 McGill Law Journal 137.

This article begins by questioning the incongruent coexistence of advancing technology and poverty and underdevelopment. The structure and control of international satellite communications is then outlined. Following is a submittal of the thesis of I. Chepnau that the satellite network is dominated by U.S. monopoly capital.

Lyall, Francis. Law and Space Telecommunications. (LL.M. Thesis, McGill University, 1965).

Vlasic, Ivan A., "The developing law of outer space," (1966) 7 Chitty's Law Journal 241.

The author examines specific problems of space law, and comments on the status of the UN space resolutions.

Goedhuis, Prof. D. "Reflection on the Evolution of Space Law," (1966) Netherlands International Law Review 1.

Fox, H., "Introduction to space law for the business community," (1966) 4 American Business Law Journal 151.

Farmer, "International regime in outer space," (1966) 31 Saskatchewan Bar Review 32.

Note, "International telecommunications union," (1966) 31 Saskatchewan Bar Review 41.



Woetzel, R.K., "International cooperation in telecommunications systems," (1967) 61 American Society of International Law Proceedings 24.

Martin, P., "Outer Space Treaty," (1967) 19 External Affairs 86.

Throop, A.E., "Some legal facets of satellite communications," (1967) 17 American Union of Law Review 12.

Doyle, S.E., "Communication satellites: international organization for development and control," (1967) 55 California Law Review 431.

Johnson, J.A., "International cooperation in satellite communications systems," (1967) 61 American Society of International Law Proceedings 24.

Note, "Symposium: the impact of science and technology on international law (communications satellites)," (1967) 55 California Law Review 419.

Colino, R.R., "INTELSAT: doing business in outer space," (1967) 6 Columbia Journal of Transnational Law 17.

Trooboff, P.D., "INTELSAT: approaches to the renegotiation," (1968) 9 Harvard International Law Journal 1.

J.R. Washburn, "Arbitration procedures for INTELSAT's legal disputes", (1968) 23 Arbitration Journal 97.

Note, "Exploration and peaceful uses of outer space: U.N. Conference, Vienna 1968," (1968) External Affairs 403.

Musolf, L.D., (ed), Communications Satellites in Political Orbit. San Francisco, Chandler Publishing Co., 1968.

President's Task Force on Communications Policy (The Rostow Reports). Staff Paper II, "Organization of the U.S. International Communications Industry". Washington: U.S. Government Printing Office, 1968.

This wide-ranging discussion of the international communications industry touches on the structure of ownership, the competition and clashes of interest between the carriers and Comsat, and the operation of technologies and ownership among voice and record carriers. It discusses the evolution of the present situation, outlines the principal problems

and possible corrections. The main problem is that of excess channel capacity, as illustrated by the TAT-V - Intelsat dispute. The paper examines the future of the record carrier industry, and stops short of recommending its consolidation; it also discusses Comsat's prospects. It then takes an overview of the industry, finding a merger of the carriers, carrier participation in satellites, and stiffer competition all undesirable. Rather it urges consolidation of the whole into a single entity subject to strict controls. This could give a sounder framework for system choices, help solve questions about the future of record carriers and Comsat, and improve regulation. After dealing with some of the objections to this solution, it outlines "necessary conditions" for this course of action: limited functions, these only in non-competitive domains, no domestic services, strengthened regulation. It discourages government ownership of this structure. There is appended a panel report on engineering aspects of satellites and other modes of long-haul transmission.

Shute, J.V., "The struggle for intercontinental television: Introduction and Part I - The Early Bird era," (1968) 19 EBU Review 52 (No.108).

Shute, J.V., "Part I (section 2) - The Early Bird era," (1968) 19 EBU Review 56. (No. 109).

Shute, J.V., "Part II - The Intelsat period," (1968) 19 EBU Review 65 (No.110).

Schramm, Wilbur L. Communication Satellites for Education, Science and Culture. Paris: UNESCO, 1968.

Jasentuliyana, N., "Regulatory functions of I.T.U. in the field of space telecommunications," (1968) 34 Journal of Air Law & Commerce 62.

Doyle, S.E., "Analysis of the socialist states' proposal for inter-sputnik: an international communication satellite system," (1969) 15 Villanova Law Review 83.

Ende, Asher H., "International telecommunications: dynamics of regulation of a rapidly expanding service," (1969) 34 Law and Contemporary Problems 389.

Laskin, Paul L., Communicating by Satellite. New York: Twentieth Century Fund Task Force, 1969.

Smith, Delbert (ed.). International Telecommunication Control: International Law and the Ordering of Satellite and Other Forms of International Broadcasting. Leyden: A.W. Sijthoff, 1969.

Marks, L.H., "Communications satellites - a launch vehicle for international understanding," (1969) 20 EBU Review 50 (No.118).

Devine, Thomas Joseph. Towards International Regulation of Telecommunications by Satellite. (LL.M. Thesis, McGill University, 1969).

Smith, D.D., "Legal ordering of satellite telecommunication: problems and alternatives," (1969) 44 Indiana Law Journal 377.

Weil, Gordon L. Communicating by Satellite: An International Discussion. New York: Carnegie Endowment for International Peace, Twentieth Century Fund, 1969.

Marzin, P., "Space communications: European projects," (1969) 20 EBU Review 19 (No.118).

Stockholm International Peace Research Institute. Communication Satellites. Stockholm: Almquist & Wiksell, 1969.

Wozencraft, F.M., "INTELSAT arbitration agreement - a pattern for the future?" (1969) 3 The International Lawyer 759.

Twentieth Century Fund. Communicating by Satellite. New York, 1969.

Colino, R.R., "Use of the INTELSAT satellite system for Project Apollo: A possible precedent for television distribution requirements," (1969) 20 EBU Review 24 (No.118).

Robb, Stewart Andrew. The Collins' Overhead or Russian Extension Telegraph Project: A Pioneer Attempt to Establish Telegraphic Communication between North America and Europe. M.A. Thesis, Simon Fraser University, 1969.

Ashley, George E., "International Communications: What Shape to Come?" (1969) 34 Law and Contemporary Problems 417.

An article on the historical development of international communications. The emphasis here is on the structure of the industry; i.e., a single voice carrier and multiple

telegraph carriers. Ashley discusses the question of whether international communications should be one entity, charged with the provision of the various methods of transmission: cable, high-frequency radio, and satellite. His answer is a definite "no."

Ende, Asher H., "International Telecommunications: Dynamics of Regulation of a Rapidly Expanding Service," (1969) 34 Law and Contemporary Problems 389.

In this article Ende outlines the development of the international communications industry emphasizing the growth of a competitive international telegraph industry within it. He surveys the growth of international telecommunications from the telegraph, through radiotelephony to satellite, describing the ways in which the FCC has attempted to regulate while curtailing the competitive aspects as little as possible. There is discussion, also, of the repeated considerations of the possibility of merging the individual telegraph carriers alone, or merging them with the international facilities of AT&T or Comsat-- considerations which, as yet, have come to nought.

Carnegie Endowment for International Peace and the Twentieth Century Fund. Communicating by Satellite: An International Discussion. New York, 1969.

Dunlop, Orrin Elmer. Communications in Space: From Marconi to Man on the Moon. New York: Harper & Row, 1970.

Fischer, Heinz-Dietrich and Merrill, John C. (eds.). International Communication: Media - Channels - Functions. New York: Hastings House, 1970.

Ablard, C.D., "International telecommunications satellite consortium conference - where do we go from here? (1970), 12 Air Force JAG Law Review 231, (1970) 21 EBU Review 49 (No. 123).

Gerardi, Peter A. Public administrative and policy aspects of satellite communications. (Ph.D. thesis, American University, 1970)

Twentieth Century Fund. The Future of Satellite Communications. New York, 1970.

Leive, D.M., International Telecommunications and International Law: the Regulation of the Radio Spectrum. Dobbs Ferry, N.Y.: Oceana Publications Inc., 1970.

This excellent treatise analyzes the means by which a natural resource available to all nations - the radio frequency spectrum - is apportioned among and used by nations. Further, it examines in detail the International Telecommunication Union, the international institution responsible for regulating the use of the spectrum and the international law establishing rules of conduct that govern such use.

Kierans, Eric, "Dilmer address at Conference on Satellite Communications, October 24, 1969," (1970) 20 University of Toronto Law Journal 333.

Kierans outlines the major potential problems of Satellite Communications that will require solving by an international regulatory authority, and points out the drawbacks inherent in allowing Intelsat to exercise a regulatory role.

Valters, E.N., "Perspectives in the emerging law of satellite communication," (1970) 5 Stanford Journal of International Studies 53.

Bissonnette, "International cooperation in outer space," (1970) External Affairs 364.

Evans, R.V., "Satellite communications - the legal gap," (1970) 11 Jurimetrics Journal 92.

Jones, E.B., Earth Satellite Telecommunications Systems and International Law. Austin: The University of Texas at Austin, 1970.

A comparative study based upon developmental aspects of earth satellite telecommunications systems and international law. It provides an account of historical, scientific, economic, legal and political background of such activities and their interrelationships. It emphasizes the fundamentally international character of communications satellites and the several aspects of cooperation among nations that have been involved.

Valters, Erik Nikolaus. International law of communications satellites: scarce resources in a new environment. (Ph.D. thesis, Columbia University, 1970).

G.S. Robinson, "NASA's bilateral and multilateral agreements - a comprehensive program it interact cooperation in space research", (1970) 36, Journal of Air Law & Commerce 729.

Vendor, Christiane, "L'U.I.T. et quelques problèmes existant au sein de cette organisation", (1970) 20 University of Toronto Law Journal 386.

This brief note sets out some of the problems facing the International Telecommunication Union. Basically the problems revolve around the logistics of the formulation, adoption, implementation, and enforcement of ITU policies.

Panel Discussion, "The Legal Problems of International Telecommunications with special reference to Intelsat." Session of Conference on Legal Problems of International Communications (sponsored jointly by DOC and the International Law Association). (1970) 20 University of Toronto Law Journal 287.

In this discussion among experts, several legal aspects of satellite communications are touched upon. Among these are international regulation, protection of transmissions and authorship, and the interconnection of domestic, regional and global systems. It was agreed upon that Intelsat-Intersputnik cooperation was desirable.

Nixon, F.G., "Intelsat: a Progress Report on the Move toward Definitive Agreements," (1970), 20 University of Toronto Law Journal 380.

A short review of the history of Intelsat is given, along with a report at more recent attempts at international negotiation, especially that which is designed to make changes in the management of the Intelsat system. Other important issues include the legal status of the organization, the continuing governmental role in the form of a periodic meeting of government representatives, and the composition of the governing body and its voting arrangements.

McKnight, "International regulation of science and technology," (1970) 25 International Journal 745.

Canada, Department of Communications. Telecommission Study 3(d), "The International Role of Canadian Telecommunications Companies". Ottawa: Information Canada, 1971.

This short report was prepared for the Department of Communications by a project team made up of representatives of various organizations. The majority of the report outlines in descriptive fashion: (1) Canadian telecommunication enterprises involved in a direct

international role, and (2) the issues affecting their interests such as international operating services, information flow, the role of consultants, and export problems. The general conclusions of the report are: (1) that further study be given to the problem of access to the growing quantity of information on international telecommunications planning, (2) that there should be joint review of projects by government agencies, consultants, and manufacturers for classification of their roles, (3) that the World Plan Meeting CCITT/CCIR 1971 consider mutual briefing on the status of Canadian projects, (4) that there be loans and financing available in flexible form to encourage Canadian consulting services, and (5) that Canadian government agencies financing international telecommunications projects make modest provision for Canadian industry training costs in support of I.T.U fellowships to Canada from developing nations.

Canada, Department of Communications. Telecommission Study 3(e) "An Analysis of International Telecommunications Operations and the Growth and Handling of International Traffic". Ottawa: Information Canada, 1971.

This report prepared for the Telecommission discusses the extent of facilities and international services, the obligations of various service systems, the size and nature of markets, investments, and the determination of rates, tariffs and settlements. Each of these is discussed with relation to the geographic grouping of systems the study calls International #2 (International telecommunication from Canada to Continental U.S., Mexico, Alaska, Hawaii, Puerto Rico and St. Pierre/Miquelon) and International #1 (the rest of the world). Particular items for attention noted by the study were: (1) that present telephone routes via AT&T to points outside U.S. be replaced with routes of maximum Canadian content, (2) that International Direct Dialling be established via COTC, (3) that regular coordination be established between international and domestic carriers, (4) that international standards be improved in quality conformity, (5) that interconnection between Canadian Telex and U.S. TWX be effected, (6) that Telex service be fully automated where possible and (7) that telegraph service from all foreign countries be provided through COTC to achieve maximum Canadian content.



Canada, Department of Communications. Tele-commission Study 3(a), "International Implications of Telecommunications; the Role of Canada in Intelsat and other Relevant International Organizations". Ottawa: Information Canada, 1971.

This brief Telecommission Study examines the international implications of telecommunications and the role of Canada in international organizations. The bulk of the study is a descriptive overview of international telecommunication organizations whether they be governmental, non-governmental or professional and industrial. The prime conclusion of the study was that Canada's participation in all international organizations concerned with telecommunications is justified in terms of national interest and should be reviewed periodically and improved in accordance with Canadian national policy. More specific recommendations were that (1) industry be consulted preparatory to meetings of the U.N. and its agencies, (2) Canada should move to ensure greater coordination among these organizations in order to improve effectiveness and maximize benefits for all, (3) structures and procedures of ITU and its sub-agencies should be reviewed, (4) Canada's role in CCIR should be strengthened and its working structure and methods improved in view of rapid advances in radio communications, (5) the structure and working method of CCITT should be improved, (6) the disposition of present treaties with an eye to future treaties should be done on an inter-departmental basis within Canada. Consultations should include government departments, agencies and industry.

Canada, Department of Communications. Telecommission Study 3(c), "International Legal Problems Concerning Transfer and Storage of Information". Ottawa: Information Canada, 1971.

This Telecommission report sets out a limited study of the legal problems that could emerge from trans-border flow and the foreign storage of data. The study isolates two main types of legal problems. The first is classified as political. These include such problems as security, the protection of privacy and access to information. The study recommends contracts and bilateral agreements as the best safeguards in this area. The second type of problem is classified as classically legal. This includes such issues as: property interests in data, data banks and computer

programs; competition and anti-trust issues peculiar to the communications industry; import and export controls; and problems of taxation of data. In this second area the study finds the laws of copyright, confidence, patents and contracts to be vague and inadequate. Further, the study points out problems of confictions, objectives in Canadian and American reform of combines and anti-trust law. The major recommendation of the study was to develop international agreements on the above issues with regard to information systems.

Colino, R.R., "Intelsat: a comparison of the interim and definitive arrangements," (1971) 22 EBU Review 49 (No. 129).

Note, "Role of the International Telecommunications Union for the promotion of peace through communication satellites," (1971) 4 Case Western Reserve Journal of International Law 61.

Ablard, C.D., "The Intelsat definitive agreements: a recapitulation," (1971) 22 EBU Review 68 (No. 128).

Legal and Political Aspects of Satellite Telecommunication. Madison, Wisconsin: EDSAT center, 1971.

Carnegie Endowment for International Peace and the Twentieth Century Fund. Planning for a Planet: An International Discussion on the Structure of Satellite Communications. New York, 1971.

Note, "U.N. Committee on the Peaceful Uses of Outer Space," (1971) 21 External Affairs 123.

Corliss, William R. Satellites at Work. Washington, U.S. Government Printing Office, 1971.

Dalfen, Charles. "Towards an International Convention on the Registration of Space Objects: the Gestation Process," (1971) 9 Canadian Year Book of International Law 252.

Maddox, Brenda. Beyond Babel: New Direction in Communications, New York: Simon and Schuster 1972.

Doyle, S.E., "Permanent arrangements for global commercial communication satellite system of Intelsat," (1972) 6 International Law 258.

Chayes, A., "Current issues in international telecommunications policy," (1972) 6 Indiana Law Review 182.

Masouyé, C., "The gestation of a new international convention regarding space satellites," (1972) 23 EBU Review 51 (No.5).

Galloway, Jonathan F. The Politics and Technology of Satellite Communications. Lexington, Massachusetts: Lexington Books, 1972

This study examines the technological innovation of satellite communications as it relates to three basic processes: the relation of innovations in communications technology to innovations in policy and the policy-making process; the distinction (or lack of it) between domestic and foreign policy-making; and, the processes of rational decision-making characteristic of an appropriate for issues which are complex because of the consequences of technological innovations. It looks to early developments in space communications, the 1962 Communications Satellite Act, national security and INTELSAT and INTERSPUTNIK with regard to American-Soviet relations in this area.

Grimin, K.D. The international regulation of telecommunication, 1865-1965. (Ph.D. thesis, University of Tennessee, 1972).

Foster, W.F., "The Convention on International Liability for Damage Caused by Space Objects," (1972) 10 Canadian Year Book of International Law 137.

Tang, C., "The Boundary Question in Space Law: a balance sheet," (1973) 6 Ottawa Law Review 266.

Note, "Proceedings of the conference on international communications and institutions (Ottawa, March 23-24, 1973)," (1973) 5 Canadian Communications Law Review 125.

This conference included a number of papers and panel discussions concerning the future of the ITU and Intelsat particularly from a Canadian perspective. In particular, see Walker, B.A. and Torobin, A.J., "Problems Associated with the Creation of Operational Institutions for International Satellite Communications," (1973) 5 Canadian Communications Law Review 126; Panel Discussion, "The Impact of Satellite Technology on International Telecommunications Operation and International Institutions," (1973) 5 Canadian Communications Law Review 140; and Panel Discussion, "The Present and Future Role of the ITU in the Management of International Telecommunications," (1973) 5 Canadian Communications Law Review 175.

Pritchard, W.L. and Bargellini, P.L.,  
 "Communications Satellites" in Gerbner, George et  
 al. (eds.). Communications Technology and Social  
 Policy. New York: Wiley, 1973.

Colino, Richard R. The INTELSAT definitive  
 arrangements: ushering in a new era in satellite  
 telecommunications. Geneva: European Broadcasting  
 Union, 1973.

Kildow, Judith. INTELSAT: Policy Maker's Dilemma.  
 Lexington, Massachusetts: Lexington Books, 1973

Pelton, Joseph N. Global Communications Satellite  
 Policy: INTELSAT, Politics and Functionalism,  
 Mount Airy, Md: Lomond Books, 1974.

Note, "Role of the International Telecommunication  
 Union in the settlement of harmful interference  
 disputes," (1974) 13 Columbia Journal of Trans-  
 national Law 82.

Sherman, C.E., "The International Broadcasting  
 Union: a study in practical internationalism,"  
 (1974) 25 EBU Review 32 (No.3).

Dalfen, C.M., "Telecommunications", in Canadian  
 Perspectives on International Law and Organization  
 (edited by R. St. J. MacDonald et al). Toronto:  
 University of Toronto Press, 1974.

This article attempts to examine the central  
 themes that have emerged in international  
 communications law in relation to both hard-  
 ware and software aspects. In addition, it  
 presents Canada's contribution to the process  
 of developing the different facets of inter-  
 national communications law.

Ende, Asher, H. "International Communications,"  
 (1976) 28 Federal Communication Bar Journal 1.

## 5.2 INTERNATIONAL BROADCASTING AND COMMUNICATIONS SATELLITES

This part deals with a rapidly growing problem area in international law, the field of international broadcasting. Originally limited to radio, an extensive literature had developed around the use of radio broadcasting for war propaganda and political purposes. With the advent of television across international borders, the concerns expressed have widened to include cultural sovereignty. The matter has become particularly controversial with the introduction of "direct broadcast satellites", i.e. satellites in geostationary orbit with a high enough power to reach a dish antenna on the roof of any private home in a nation. The concerns over the control of "program-carrying signals" has led to a number of efforts to develop treaties or declarations to establish principles of international law acceptable to all countries. The conflict between cultural sovereignty and the desire for free flow of communications is nowhere so evident as in this area.

Two recent international documents relate to satellite broadcasting and have been a focus of attention. One is the Final Acts of the World Broadcasting-Satellite Administrative Radio Conference, Geneva, 1977. This Conference agreed upon a detailed plan giving orbital positions to all countries in Regions 1 and 3 for eventual operational broadcasting-satellite systems in the 12 GHz band. This plan came into force on January 1, 1979. A similar plan will be worked out for Region 2 (the Americas) at a regional conference to be held in 1982. Until 1982 the Region 2 countries have agreed to restrict themselves to experimental broadcasting-satellite systems (such as Hermes, the Canadian-designed satellite which was launched on January 17, 1976) rather than operational systems, and to reserve enough orbital positions to provide for operational needs after 1982. A second document which was considerably more controversial was the UNESCO Declaration of Guiding Principles Governing the Use of the Mass Media in Strengthening Peace and International Understanding and in Combating War Propaganda, Racism and Apartheid. After bitter debate at the General Conferences of UNESCO in 1974 and 1976, a version of this declaration more acceptable to Western countries was finally approved at the General Conference in 1978.

The books and articles listed below are set out in chronological order.

Childs, Harwood and Whitton, John B. Propaganda by Short Waves. Princeton, N.J.: Princeton University Press, 1942.

Sargent, William. Battle for The Mind. New York: Doubleday and Co., 1957.

Holt, Robert T. Radio Free Europe. Minneapolis: University of Minnesota Press, 1958.

Codding, George A., Jr. Broadcasting Without Barriers. Paris: UNESCO, 1959.

Qualter, Terrence H. Propaganda and Psychological Warfare. New York: Random House, 1962.

Michie, Allen A. Voices Through The Iron Curtain: The Radio Free Europe Story. New York: Dodd, Mead and Co., 1963.

Kononoff, Serge. The Nature of Communist Propaganda , and its Western Counterpart. (M.A. Thesis, Université de Montréal, 1963).

Goldsen, Joseph, M. (ed.). Outer Space in World Politics. New York: Praeger, 1963.

Barghoorn, Frederick C. Soviet Foreign Propaganda. Princeton, N.J.: Princeton University Press, 1964.

Marks, L.H., "The role of broadcasters in space communications," (1964) 15 EBU Review 46 (No. 84)

Cohen, Maxwell (ed.). Law and Politics in Space. Montreal: McGill University Press, 1964.

Zeman, Z.A.B. Nazi Propaganda. London: Oxford University Press, 1964.

Urban, George R. (ed.). Scaling the Wall: Talking to Eastern Europe. Detroit: Wayne State University Press, 1964.

Davison, W. Phillips. International Political Communication. New York: Frederick Praeger, 1965.

Frenkel, Herbert M. and Frenkel, Richard E. World Peace Via Satellite Communications. New York: Telecommunications Research Associates, 1965.

Bowler, Reginald Arthur. Propaganda in Upper Canada: A Study of the Propaganda Directed at the People of Upper Canada during the War of 1812. (M.A. Thesis, Queen's University, 1965).

New house, W.J., Jr., "The Constitution and International agreements on unilateral action curbing 'peace-imperiling' propaganda [with a comment by N.L. Nathanson]", (1966) 31 Law & Contemporary Problems 506.

Fagen, Richard. Politics and Communications. Boston: Little, Brown and Co., 1966.

Havinghurst, C.C., "International control of propaganda - a symposium," (1966) 31 Law and Contemporary Problems 437.

Havinghurst, C.C. (ed.), International Control of Propaganda. Dobbs Ferry, New York: 1967, Oceana Publications Inc.

This is an excellent collection of studies on Propaganda - Authors and topics include C.C. Havinghurst, A. Larson (The Present Status of Propaganda in International Law), R.T. Davies (The American Commitment to Public Propaganda), R.C. Rowson (The American Commitment to Private International Political Communications - a View of "Free Europe"), Y. Bobrakov (War Propaganda: A Serious Crime Against Humanity), K. Grzybowski (Propaganda and the Soviet Concept of the World Public Order), W.J. Newhouse (The Constitution and International Agreements), N.L. Nathanson (A Comment on Professor Newhouse's Paper), W.W. Van Alsyse (The First Amendment and Suppression of Warmongering), G. von Glahn (The Case for Legal Control of "Liberation" Propaganda), W.U. O'Brien (International Propaganda and Minimum World Public Order), J.B. Whitton (The Problem of Curbing International Propaganda), and R.A. Falk (On Regulating International Propaganda: A Plea for Moderate Aims).

UNESCO, Communications in the Space Age: the Use of Satellites by the Mass Media. Amsterdam: UNESCO, 1968.

This book outlines the social implications of the flow of news and education by satellites and as well examines the cultural opportunities and new dimensions for radio and TV which will result. Finally, it warns of a need for new international agreements in the broadcasting field and gives some of its own recommendations in this regard.

John Lee (ed.). Diplomatic Persuaders - The New Role of the Mass Media in International Relations. London: John Wiley & Sons Inc., New York, London, 1968.



Mass media is playing an increasingly important role in the formation of world opinion, and governments in order to survive are forced to supplement formal diplomatic relations with a direct appeal to the people of other countries.

Powell, J.T., "Satellites, sovereignty and speculation," (1968) 22 Federal Communications Bar Journal 218.

Colino, R.R., "International satellite telecommunications and developing countries," (1968) 3 Journal of Law & Economics 8.

Emery, Walter B. National and International Systems of Broadcasting: Their History, Operation and Control. East Lansing: Michigan State University Press, 1969.

Schiller, Herbert. Mass Communications and American Empire. New York: Augustus McNalley Publishing, 1969.

Powell, J.T., "Czechoslovakian crisis and international broadcasting in perspective," (1969) 23 Federal Communications Bar Journal 3.

D'Arcy, J., "Direct broadcast satellites and the right to communicate," (1969) 20 EBU Review 14 (No. 118).

Hult, J.L. Broadcast Opportunities with Satellites and CATV, and Their Control in the Public Interest, 1970 Rand Corporation Paper 4333.

Prepared for the 7th Space Congress, April 1970, this paper explores the opportunities for providing new TV broadcast services and a variety of social benefits from broadcasting with satellites and CATV. The relative costs of the various alternatives are outlined, and new regulatory and operational policies are suggested. The paper is intended to raise international concern about the control of satellite broadcasting in order to gain support for permissive frequency allocations. Also, it attempts to stimulate the interest of vested interests by outlining a wealth of novel opportunities available under the suggested new policies.

Gotlieb, Allan E. and Dalfen, Charles M., "Direct satellite broadcasting: a case study in the development of the law of space communications," (1969) 7 Canadian Yearbook of International Law 33; (1970) 2 Canadian Communications Law Review 228.

This is an article devoted to a review of the problem facing implementation of direct satellite broadcasting, as well as proposed or researched solutions to the problems. A large section is devoted to surveying the sources and principles of law relating to satellite telecommunications generally. The four main sources are the laws of space, international telecommunications, satellites, and broadcasting. The last section reports on the evolution of legal norms for direct satellite broadcasting.

"Direct broadcasting from satellite: the case for regulation," (1970) 3 New York University Journal of International Law & Politics 72.

UNESCO, Broadcasting from Space. New York: UNESCO Publications Center, 1970.

Gotlieb, A.E. "Recent Developments in the Law of Space Communications: Some Current Satellite Questions," (1970) 20 University Toronto Law Journal 359.

Gotlieb emphasizes the need for a major international co-operative effort to avoid monopoly of satellite broadcasting by a few countries and to establish conditions for the development of satellite systems and their equitable use. Political questions of representation on a possible international regulatory body are considered. Finally, the relative advantages and disadvantages of satellite broadcasting are looked at - Gotlieb maintains that the former far outweigh the latter, as long as co-operation is the keynote.

Vlasic, Ivan. "International Legal Problems of Direct Satellite Broadcasting," (1970) 20 University of Toronto Law Journal 314.

Problems of direct satellite broadcast are considered, and the "piecemeal" approach to long-range planning is contrasted with a more all-embracing, normative orientation suggested by Professor Vlasic. The most immediately predictable difficulties are discussed, particularly the broadcasting of undesirable political or cultural content to other countries.

Dalfen, Charles M., "Direct satellite broadcasting: towards international arrangements to transcend and marshal the political realities," (1970) 20 University of Toronto Law Journal 366.

Direct satellite broadcasting involves transmission of the message directly into the home by space satellite: it is an agent of speedy global communication. Dalfen canvasses some problems of editing and/or standardization of program content, access to the satellite by participants in the hypothetical international agreement, and arrangements in the realm of financial, technical, and cultural input to the satellite program.

Lee, Edward G., "Unesco meeting on space communications: Legal issues", (1970) 20 University of Toronto Law Journal 375.

This is a report on a meeting on international arrangements in the space communications field held at the UNESCO headquarters in Paris December 2-9, 1969 under the chairmanship of Eric W. Kierans, the then federal Minister of Communications. Among the subjects under discussion were the free flow of information, problems of content control, and the protection of satellite television transmissions against unauthorized use.

Canada, Department of Communications. Telecommission Study 3(b), "Communications and the Canadian Assistance Program for Developing Countries". Ottawa: Information Canada, 1971.

This Telecommission report describes the organization, scope and impact of Canadian assistance programs with regard to communications. It outlines three aspects of Canadian contribution in the past and present including,; (1) the Canadian International Development Agency, (2) multicultural aid through agencies of the UN and World Bank, and (3) the private sector, including CUSO, CBC, Export Development Corporation, International Development Research Center, National Film Board and Department of Communications. The study concludes that assistance in improving telecommunications in developing countries is a valid activity leading to improved social well being. The suitability of Canada's technology combined with an intimate understanding of problems of developing nations was stressed. However, the study cautions that the rate of introduction of telecommunications should be geared to the cultural, economic and social priorities of the recipient. To this end, the report recommends,; (1) that assistance programs be coupled with research into relationships between communication and the development process, (2) that appropriate software development studies accompany systems implementation, (3) that government aid be used to encourage training programs for developing countries.

Gold, M.E. "Direct broadcast satellites: implications for less developed countries and world order," (1971) 12 Virginia Journal of International Law 66.

Note, "Role of the International Telecommunications Union for the promotion of peace through communication satellites," (1971) 4 Case Western Reserve Journal of International Law 61.

Hage Robert, "Communications Satellites and Problems of Copyright in Canada," (1970) 2 Canadian Communications Law Review 41.

Lyons, Patrice Ann, "International Regulation of Television Signals," (1971) 2 Performing Arts Review 271.

Dugmore, K., "Newest frontier in communications: the direct broadcast satellite," (1971) 13 Air Force Law Review 259.

Dittrich, Dr. R., "Transmission via space satellites," (1972) 23 EBU Review 52 (No.1)

Wells, Alan. Picture - Tube Imperialism? The Impact of U.S. Television on Latin America. Maryknoll, New York: Orbis Books, 1972.

International Propaganda and Communications. New York: Arno Press, 1972.

A collection of 31 articles, written between 1930-1950, republished as a study on the uses and effects of propaganda.

EBU Department of Legal Affairs, "Comments of the EBU on the Draft Convention to Prohibit the Unauthorized Distribution of Program-Carrying Signals Communicated by Satellites," (1972) 23 EBU Review 51 (No. 2).

Dalfen, Charles M. "The International Legislative Process: Direct Broadcasting and Remote Earth Sensing by Satellite Compared," (1972) 10 Canadian Yearbook of International Law 186.

By surveying relevant policy statements and negotiation concerning broadcasting and remote earth sensing by satellite, the author attempts to illustrate the two prevailing approaches to the development of international law in this and related areas. He profits out the advantages and drawbacks of both the "legislative" process through the United Nations and the "operational" process of bilateral and multilateral co-operation in actual space activities.

Bezencon, M., "Television via direct broadcast satellites: light or damper?" (1973) 24 EBU Review 14 (No. 4)

Lee, Comm. R.E., "Broadcasting via satellite." (1973) 24 EBU Review 21 (No. 3).

Masouyé, C., "The distribution of signals transmitted by satellite (or the 'Nairobi turning-point')," (1973) 24 EBU Review 40. (No. 5).

Chayes, Abram; Fawcett, James, and others. Satellite Broadcasting. New York: Oxford, 1973.

Note, "Mexican-United States Border Broadcasting Dilemma," (1973) 4 California Western International Law Journal 141.

EBU Department of Legal Affairs, "EBU memorandum concerning the Draft Convention Against the Unauthorized Distribution of Programme-Carrying Signals Transmitted by Satellites," (1973) 24 EBU Review 49 (No. 3).

Fruitkin, A.W., "Space communications and the developing countries", in Communications Technology and Social Policy (edited by George Gerbner et al.). New York: John Wiley, 1973.

Dalfen, Charles M. "Direct Satellite Broadcasting: International Responses," (1973) 5 Canadian Communications Law Review 227.

Panel Discussion, "Direct Satellite Broadcasting: Legal and Institutional Issues," (1973) 5 Canadian Communications Law Review 227.

Juneau, Pierre, "International Broadcasting: Diversity or Uniformity?" (1973) 5 Canadian Communications Law Review 206.

Nichols, J.C., "Some aspects of direct satellite broadcasting," (1974) 25 EBU Review 10. (No. 3)

Masouyé, Claude, "A new international convention (the Convention Relating to the Distribution of Programme-Carrying Signals Transmitted by Satellite)," (1974) 25 EBU Review 46. (No. 5)

Dittrich, Robert, "The Brussels Satellite Convention," (1974) 25 EBU Review 60. (No. 6)

Straschnov, G., "Convention Relating to the Distribution of Programme-carrying Signals Transmitted by Satellite", (1974) 21 Bulletin of the Copyright Society of the U.S.A. 369.

Symposium, "Control of Program Content in International Telecommunications," (1974) 13 Columbia Journal of Transnational Law 1.

This symposium includes a number of articles and panel discussions, including McWhinney, E., "The Antinomy of Policy and Function in the Law of Telecommunications," with Comment by Leive, D., Nichols, J. and Nixon, F.G.; "A Discussion of General Principles," with Chayes, Friendly, Olsson, Shakespeare and Webster; and "Direct Broadcasting to the Third World," with Jasentuliyana, de Seixas Correa, Nichols, Singer, and Chayes.

Ferrier, M.A., "Proposals for an international convention on direct broadcasting," (1975) 26 EBU Review 35. (No. 2)

Poulantzas, Nicholas M. "Direct Satellite Telecommunications Sovereignty and Freedom of Information," (1975) 23 Chitty's Law Journal 87.

EBU Department of Legal Affairs. "Memorandum on direct television broadcasting by satellite and the legal norms for its use," (1975) 26 EBU Review 58 (No. 1).

### 5.3 DOMESTIC COMMUNICATIONS SATELLITES

Although the initial impetus for communications satellites came from their suitability for international communications across borders, increasing use has been made of such satellites for domestic purposes. In this context, a geostationary satellite operates as a "micro-wave tower in the sky" and can provide an efficient technology for delivering signals to remote areas, particularly on a single-point to multi-point basis. In Canada the space segment for satellite systems is provided by Telesat Canada, a statutory corporation created in 1969, with mixed public-private ownership. Until recently, all earth stations were also required to be owned and provided by Telesat Canada as well. On February 27, 1979, however, the federal Minister of Communications announced a new earth station licensing policy under which broadcasters, cable television licensees and recognized telecommunications common carriers would be permitted to own and operate television receive-only terminals; common carriers could also apply for licences for transmit/receive earth stations to operate with Anik C satellite system (12/14 GHz), scheduled for service in 1981.

The existing literature on Telesat Canada is still in an embryonic state, focusing as it does on its original creation and proposed role. There has been no analysis to date in the literature of the impact of the arrangement by which Telesat Canada joined the Trans-Canada Telephone System, following a controversial proceeding before the CRTC in 1977. In its decision, the Commission had declined to approve the proposed agreement between Telesat and TCTS for a number of public interest reasons. See Telesat Canada, Proposed Agreement with Trans-Canada Telephone System (1977), 3 C.R.T. 265. However, the decision was reversed by cabinet in Order in Council P.C. 1977-3152, November 3, 1977. The transcripts and evidence of the Telesat proceeding continue to be an invaluable source material for study. Aspects of Telesat's marketing policies are also expected to be examined in the current CRTC proceeding into TCTS rates, initiated on August 4, 1978.

Also included in a separate section below is the American literature on domestic satellite communications in the United States. The regulatory policy of the FCC towards satellites has been based on an "open-sky" approach since the early 1970's and the growth of satellite-based communications systems since then has been phenomenal. The articles noted are listed in chronological order.



Canada

Robb, W., "Telesat Canada", (1969) 42 Canadian Business 13.

Dalfen, Charles M., "The Telesat Canada domestic communications satellite system", (1969) 1 Canadian Communications Law Review 182.

The author addresses the ramifications of the decisions to adopt for Canada a domestic communications satellite system under three headings: policy, hardware, and the Telesat Canada Corp. Under the first heading he examines the whys and wherefores of the structure, financing, building, and control of the system. Under the second heading, the problems with procurement are canvassed. Under the third heading, Telesat Canada is examined to determine priorities with respect to its regulation, its jurisdiction, its ownership and control, users of the system, and regulation of the system. The conclusion surveys the questions remaining to be considered or likely to arise with respect to this project.

Booth, A., "Telesat", (1970) 1 Canadian Bar Journal (N.S.) 25.

In this brief note, the author describes the corporate structure of Telesat Canada, established to provide a domestic satellite telecommunications system.

Stach, Erwin. "Communications in the North," (1970) 2 Canadian Communications Law Review 145.

Canada, Department of Communications. Telecommission Study 8(c), "Report on northern communications". Ottawa: Information Canada, 1971.

This 115 page study stresses a new definition of "the North" extending beyond the traditional area outlined by geographers as being 60° parallel latitude - the suggested new definition would include Northern B.C., Alberta, Manitoba, Saskatchewan, Ontario, Quebec and Newfoundland - since telecommunications inadequacies stretch further south. The report stresses the need to develop communications systems to accompany and support the pace of industrial development as well as to sustain cultural and social growth. The preliminary chapters of the report (ch. 2-7) give surveys of present and prospective development in the north (1) in the economic and industrial sphere (mineral, oil and gas potential); (2) of existing telecommunications and the relationship of these to

such factors as industrial growth and population density (3) a survey of existing broadcasting and information services (4) outline of terrestrial information services to serve north (High Frequency, Low Frequency, radio relay and tropospheric scatter systems with special emphasis on present problems and future trends (5) survey of satellite options for Northern Communication with special emphasis on the use of the ANIK satellite by Telesat Canada. This basic survey included a report on the Northern Communications Conference which stated its purpose as a public focus on relevance of communications to northern needs and aspirations (included cultural, educational, social and economic - usually from point of view of community units). In addition the report includes submission by Metis, Indian and Eskimo organizations expressing concern that broadcasting and information services be oriented to and reflect their culture and provide for their participation. The basic conclusion of the report was that to bring the level of service to the north to the standard of the south required a co-operative approach and that there was a legitimate role for the Federal Government as co-ordinator and catalyst for this action foreseen by Parliament in the establishment of the Department of Communications. Joint Federal-Provincial co-operation is seen as essential (cohesive program of academic research, rate of taxes).

Brown, J.B., "Is Anik really the answer to communications in the North?" (1973) 6 Science Forum 20.

Note, "Canada puts up first communications satellite [ANIK 1]," (1973) 6 Science Forum 49.

Carruthers, J., "What happened to public participation in Telesat?" (1973) 6 Science Forum 22.

Button, R.E. "Cable TV in Orbit: Communications Satellites," (1975) 20 Canadian Patent Reporter (2d) 61.

#### United States

Moulton, Horace P., "Communications satellites - the proposed Communications Satellite Act of 1962," (1962) Public Utilities Fortnightly 1.

Rosenbaum, "Regulation in orbit: administrative aspects of The Comsat Act of 1962," (1963) 58 NorthWestern University Law Review 216.

Schrader, G.D., "Communications satellite corporation: a new experiment in government and business," (1965) 53 Kentucky Law Journal 732.

Schwartz, H., "Governmentally appointed directors in a private corporation - the communications satellite act of 1962," (1965) 79 Harvard Law Review 350.

Mobius, J.B.M. Communication processes and United States Government policy: The development of a communication satellite policy in the executive branch. (Ph.D. thesis, Massachusetts Institute of Technology, 1965).

Mansbach, B.T., "Authorized entity" - "authorized user" question in the communications satellite act of 1962," (1966) 20 Federal Communications Bar Journal 117.

Schmidt, O.H. Space age regulation: an examination of certain regulatory problems arising out of the Communications Satellite Act of 1962. (Ph.D. thesis, West Virginia University, 1967).

Schwartz, H., "Comsat, the carriers, and the earth stations: some problems with "melding variegated interests," (1967) 76 Yale Law Journal 441.

Marks, L.R., "Domestic communications satellites and international co-operation." (1967) 61 American Society of International Law Proceedings 24.

Note, "Future of domestic satellite communications," (1967) 19 Stanford Law Review 1058.

Moe, Ronald Chesney. Telecommunications policy: the legislative history of the Communications Satellite Act of 1962. (Ph.D. thesis, Columbia University, 1968).

Mathews, A.B., "The history and philosophy of COMSAT's satellite television rates," (1969) 20 EBU Review 10 (No. 116)

Shute, J.V., "A domestic satellite communications system for the United States," (1969) 20 EBU Review 67. (No. 118)

President's Task Force on Communications Policy (Rostow Report). Staff Paper IV, "Domestic application of communications satellite technology". Washington: U.S. Government Printing Office, 1969.

Scheson, David C., "Domestic satellite developments", (1970) Public Utilities Fortnightly 1.

Note, "Establishment of domestic communications in the United States: satellite facilities by non-governmental entities," (1972) 23 EBU Review 59 (No. 6).

Roff, J.H., "Comments on the FCC Domestic Communications Satellite Proceeding", (1973) Public Utilities Fortnightly.

Scheson, David C., "The Federal Communications Commission and the Domestic Communications Satellite Proceeding", (1973) Public Utilities Fortnightly.

Shapiro G.H.: Epstein G.M., Cass R.A. "Cable-Satellite Networks: Structures and problems," (1975) 24 Catholic University Law Review 32.

Nelson, Richard W. "Domestic Satellites, The FCC and Competition in Domestic Telecommunications," (1975) 51 Land Economics 235.

Note, "Private Diplomacy and Public Business: Public Supervision of the Communications Satellite Corporation," (1978) 45 University of Chicago Law Review 419.

## CHAPTER 6

### RADIO AND TELEVISION LICENSING

This chapter reviews the rapidly growing literature on the licensing and regulation of radio and television stations in Canada. While radiocommunication has been regulated since 1906 and broadcasting licences have been issued since 1922, it is only in the last 20 years that interest in broadcast regulation and the impact of the broadcasting system has really come into its own. This period has coincided with the creation of an independent regulatory agency -- first, the Board of Broadcast Governors (BBG) from 1953 to 1968, then the Canadian Radio-television Commission (CRTC), from 1968 to 1976, and now the Canadian Radio-television and Telecommunications Commission (CRTC), from 1976 to the present -- to "regulate and supervise" the Canadian broadcasting system. The transcripts of the public hearings of the BBG and CRTC provide an invaluable and relatively untapped source for researchers concerned with broadcasting and public policy.

A number of issues relating to radio and television licensing and regulation are dealt with in other chapters, to which the reader is referred. For sources on constitutional jurisdiction over broadcasting, see Chapter 2. For references on the statutory jurisdiction of the CRTC, on its status as an independent regulatory agency, and on its practices and procedures, see Chapter 3. For literature on international broadcasting and the use of satellites, both international and domestic, see Chapter 5. For the growing literature on cable television, pay television and subscription television, see Chapter 7. For sources on advertising regulation, see Chapter 11. For references to the questions of access to the media, including the applicability of a fairness doctrine for broadcasters in Canada, see Chapter 12. And for the question of violence on television and other issues relating to the social impact of radio and television, see Chapter 13.

This chapter is divided into the following four parts:

#### 6.1 Radio Spectrum Allocation and Assignment

- 6.2 Licensing and Regulation of Broadcasting  
in Canada
- 6.3 Licensing and Regulation of Broadcasting  
in the United States
- 6.4 History and Regulation of Broadcasting  
in other Countries.

## 6.1 RADIO SPECTRUM ALLOCATION AND ASSIGNMENT

As noted in Chapter 5, the use of the radio frequency spectrum inherently requires an international regulatory framework in order to prevent harmful interference. The literature on the international aspects of radio spectrum allocation, including the role of the International Telecommunication Union, is noted in Chapter 5. In this Part, on the other hand, the literature on the domestic aspects of radio spectrum allocation and assignment is set out. In Canada, there has been relatively little study of the role of the federal Department of Communications in licensing radio spectrum users. In the United States, by contrast, there has been a growing interest in the process of frequency assignment, and the literature includes a number of studies of how the licensing process could be rationalized with a form of auction system.

The sources set out below are divided into Canadian and U.S. references and are listed in chronological order.

### Canadian Studies

Canada. Department of Communications. Telecommission Study 2(c). "Spectrum Management - Alternatives and Economic Implications." Ottawa: Information Canada, 1971.

This paper, prepared by a study group at McMaster University, outlines alternative methods of spectrum allocation under conditions of excess supply or excess demand, the latter occurring at present only in limited areas in Canada. Brief discussions of bank reallocation (defraying cost by a premium on license fees) and of other technological measures to increase spectrum space or the efficiency of present uses precede a lengthier examination of economic value as a criterion for allocation. The study deals with means of measuring the spectrum's economic value to its users preferring a market mechanism of some kind to determination by experts in the central government. A summary, including the social benefits to be considered by regulators, and a flow chart for all allocation decisions, rounds off the study. An appendix shows the fallacy of using cost of spectrum as a measure of its economic value, since this will show only value (revenue) in the last user's calculation; a "consumer



surplus" value must be added to the cost to show the value of spectrum use.

Canada. Department of Communications. Telecommission Study 2(h). "Re-appraisal of the Present Management of Radio Spectrum." Ottawa: Information Canada, 1971.

This gives conclusions and recommendations of task forces set up by the Canadian Radio Technical Planning Board (CRTPB) to study aspects of spectrum allocation. There was no unanimity among groups in their discussion of broadcast spectrum, mobile and fixed services, microwave and other areas. The reports generally favour DOC policy and emphasize the social utility of spectrum use. Appendices contain the responses and reservations of various private industry groups, including broadcasters, electrical equipment manufacturers, TCTS, and others. The complete report of all the task forces is available for \$40.00 from the CRTPB.

Perkins, Craig. "Protection Against Interference on the AM Broadcast Band," (1971) 3 Canadian Communications Law Review 173.

This study considers the various rights and remedies of the public, the licensing authorities, the broadcaster interfered with, and the causer of the interference in situations where the reception of an AM broadcasting station in Canada is blocked out or made objectionable because of faintness or noise.

Grant, Peter S. Broadcasting and Cable Television Regulatory Handbook. 2 volumes. Toronto: Law Society of Upper Canada, 1973.

Part E of this extensive compilation, at pp. 585-990, sets out the complete text of all Department of Communications regulations, rules, radio standards specifications, broadcast procedures, and notices to broadcast consultants, affecting broadcasting or cable television in Canada.

Gotlieb, Allan. "The Individual and the Telecommunications Regulatory Process in Canada," (1973) 25 Administrative Law Review 175. Also published in Baum, D.J. (ed.) The Individual and the Bureaucracy. Toronto: Osgoode Hall Law School, 1974, at pp. 5-41.

This paper reviews the departmental responsibilities of the Minister of Communications under the Radio Act and examines the process of consultation with affected persons in developing radio standards and policies.

Grant, Peter S. Canadian Communications Regulation. 2nd edition. 2 volumes. Toronto: Law Society of Upper Canada, forthcoming.

Part 6 of this two volume work includes updated references to the relevant DOC documents respecting radio spectrum licensing and assignment.

#### U.S. Studies

Note, "Allocating Radio Frequencies between Common Carriers and Private Users: The Microwave Problem," (1961) 70 Yale Law Journal 954.

Metzger, S.D. and Burrus, B.F., "Radio Frequency Allocation in the Public Interest: Federal Government and Civilian Use," (1965) 4 Duquesne University Law Review 1.

Rosenblum, V.G. "Low Visibility Decision-Making by Administrative Agencies: The Problem of Radio Spectrum Allocation," (1965) 18 Administrative Law Review 19.

Note, "Crisis in Electromagnetic Frequency Spectrum Allocation: Abatement Thru Rate Distribution," (1967) 53 Iowa Law Review 437.

Dingell, J.D. "The Role of Spectrum Allocation in Monopoly or Competition in Communications," (1968) 13 Antitrust Bulletin 871.

Levin, Harvey, J. "The Radio Spectrum Resource," (1968) 11 Journal of Law and Economics 433.

President's Task Force on Communications Policy (Rostow Report). Staff Paper 7 "Use and Management of the Electromagnetic Spectrum". Washington: U.S. Government Printing Office, 1968.

A discussion of the characteristics of the spectrum, its present use, regulation, overcrowding, and suggestions for amelioration. The basic approach is that there is no good in maximizing frequency use for its own sake, but only in aiding services which need spectrum space. It outlines a theory of efficient spectrum use, not to be measured by cost of equipment, but by marginal benefit analysis, modified by the special characteristics of the spectrum. It deals specifically with the possibility of non-block allocation and the separation of government use. After a look at two alternate approaches -- a market approach, which is found deficient, and an

interesting spectrum engineering system to increase use potential, which, however, was also inadequate -- the report sets out conclusions. These are: optimum use is not good enough; more consideration should be given to economic and engineering factors. A review is presented of current urgent problems in various areas of spectrum, notably in the VHF-lower UHF ranges; in microwave; and in millimeter range. Finally, the institutional arrangement is criticized, and a consolidation of FCC and DTM (now OTP) urged -- though FCC is acknowledged competent in making social judgments about licensees for broadcasting as it now stands. Seven substantial appendices follow, dealing generally with more technical analyses of spectrum, its use and requirements for its use, especially in public service and by carriers. Management is also discussed.

President's Task Force on Communications Policy (Rostow Report). Staff Paper 7: Appendix H. "Legal Aspects of Subjecting the Electromagnetic Spectrum to a Market Mechanism". Washington, U.S. Government Printing Office, 1968.

This is a legal study annexed to Appendix G, the TEMPO investigation of a market model of spectrum assignment, favouring such a scheme. This staff paper offers a critique of the market approach. The author first describes the creation of the property right in the spectrum, showing how land and water have also been transferred from the government to private users. The spectrum right would be rectangular, defined as the strength of signal on a given bandwidth at a given frequency at the boundaries. It would be totally alienable, subdivisible, and so on; a registry would be set up. There is a discussion of rental or sale from the government, and of why there should be no prescriptive rights in this property. Next, enforcement is discussed, mainly in terms of the definition of the property right and its effect on enforceability, but also with regard to measurement of breach of duty, who could enforce, who is liable and what judicial tribunals and remedies (injunctions, not fines or licence suspensions) are available.

Hult, J.L. The Promise of U.H.F. Satellites for Mobile Broadcast, and Low-Cost Services & Related New Communications Allocations, Operations & Policies. Rand Corporation Paper, P-4071, May, 1969.

Proposals for new policy and regulation approaches that would contribute to the efficient and economical utilization of the UHF spectrum. A new allocation scheme for space services above 450 MHz is suggested that would accommodate the needs of the proposed UHF satellites, and exploit those portions of the remainder of the spectrum that are amenable to intensive sharing by terrestrial and satellite services. The available spectrum can be doubled by two-way independent (up and down) polarization and by placing satellite up-links at much higher frequencies unsuitable for down-links. The government should provide and manage the transmission medium and sell broadcast time to program producers who may use it for pay, free, or subsidized TV. A choice of best-quality TV channels between 710 and 1215 MHz would be available at less producer cost than at present and at less consumer cost than CATV. Ground networks to facilitate the "wired city" of the future will also be needed to permit the satellite relay service to be used for vehicles and remote areas. Service could begin as early as 1975.

Johnson, Nicholas. "Towers of Babel: The Chaos in Radio Spectrum Utilization and Allocation," (1969) 34 Law & Contemporary Problems 203.

Note, "Property System for Market Allocation of the Electromagnetic Spectrum: A Legal - Economic Study (De Vany, Eckert, Meyers, O'Hara, Scott)," (1969) 21 Stanford Law Review, 1499.

Robinson, G.O. "Radio Spectrum Regulation: The Administrative Process and the Problems of Institutional Reform," (1969) 53 Minnesota Law Review 1179.

Standford Institute. A Study of Land Mobile Spectrum Utilization. Stanford, Cal.: Stanford Research Institute, 1969.

Hult, J.L. Sharing the U.H.F. between Space and Terrestrial Services. Rand Corporation Paper, P-4436. September, 1970.

Report prepared for the Proceedings of the National Electronics Conference, Chicago, December 7-9, 1970. The demand for spectrum at UHF has exceeded the supply for exclusive use of the contending services. Satellite relays offer great promise for area coverage services to small terminals that will involve more direct users and

greater investment than all other services combined. The UHF is the choice portion of the spectrum for these services from the standpoints of both the satellite relay performance and the total system costs. In addition, UHF, with its complete sharing reuse for the new highest-quality space services, can provide double duty without hindering the current terrestrial services or limiting their future development. The most difficult case of sharing between the two types of TV broadcast service was examined in detail; the study showed that sharing will be feasible with adequate margins using earth terminals with small receiving antennas.

Levin, Harvey J. The Invisible Resource - Use and Regulation of the Radio Spectrum. Washington, D.C.: Johns Hopkins Press, 1971.

Professor Levin describes and analyzes the economic characteristics of the radio spectrum, giving a detailed account of the workings of the communications systems as they relate to spectrum use. He also discusses procedures and institutions that might be feasible alternatives to the present regulatory machinery. He suggests the most practicable course in the U.S. may be somewhere between the present system where market considerations play almost no part in spectrum allocation, and a full-fledged market for the spectrum.

Note, "Power to Some People: The FCC's Clear Channel Allocation Policy," (1971) 44 Southern California Law Review 811.

Klein, H.S. "Legal Aspects of Radio Jamming," (1973) 4 Performing Arts Review 101.

Note, "Chaos on the Citizens' Band - Regulatory Solutions for Spectrum Pollution," (1975) 26 Hastings Law Journal 797.

Minasian, J.R. "Property Rights in Radiation: An Alternative Approach to Radio Frequency Allocation," (1975) 18 Journal of Law and Economics 221.

Note, "Twentieth Century Music Corp. v. Aiken (500 F 2d 127): Are Broadcasting Signals Dedicated to the Public?" (1975) 36 University of Pittsburgh Law Review 994.

6.2 LICENSING AND REGULATION OF BROADCASTING  
IN CANADA

Since 1968, when the Broadcasting Act was revised to create the Canadian Radio-Television Commission and to give it expanded powers to license and regulate broadcasting undertakings, the broadcasting industry in Canada and the nature and extent of broadcast regulation has changed dramatically. The issues confronted by the CRTC since 1968 have included matters which go to the heart of the broadcasting system. Among these issues are the extension of alternative (second) English and French television service to the smaller markets in Canada, and the role of CTV; the introduction of third English and French television service to principal Canadian markets; removal of the freeze on FM licensing, and the reform of FM regulations and licensing policy; the introduction of cable television to Canada and the development of cable regulations and licensing policy; inquiries on such matters as controversial broadcasting, the relationship of police with the media and cross-ownership; examination of the role of the CBC; review and reform of the Canadian content regulations, increasing the quota for television, and introducing a 30% quota for music on AM radio; and the introduction specialized television services, including pay television and multilingual television. Needless to say, many of these issues have not yet been resolved and there continues to be substantial controversy over the many of the CRTC regulations and policies.

This part reviews the growing literature on CRTC regulations and policies and also includes sources on the history of broadcasting in Canada. The references are listed in chronological order. As noted at the outset of this chapter, sources relating to cable television licensing and regulation are set out in Chapter 7 and references to access and fairness in broadcast programming are provided in Chapter 12. The statutory role and procedures of the Commission are reviewed in Chapter 3.

Edwards, C.P. "A Historical Sketch of Radio Communications," (1932) Canada Yearbook 607.

Charlesworth, H. "The Canadian Radio Broadcasting Commission," (1933) Canada Yearbook 731.

Hodgetts, J.E. "Administration and politics: the case of the Canadian Broadcasting Corporation," (1946) 12 Canadian Journal of Economics and Political Science 454.

McCormack, T. "Canada's Royal Commission on Broadcasting," (1959) 23 Public Opinion Quarterly 92.

Beswick, Peter Allan. The Board of Broadcast Governors and the Public Interest. (M.A. Thesis, Carleton University, 1962)

Quatter, Terence H. "Politics and broadcasting: case studies of political interference in national broadcasting systems," (1962) 28 Canadian Journal of Economics and Political Science 225.

Raymond, Bruce. "Radio," in Irving, J.A. (ed.) Mass Media in Canada. Toronto: Ryerson, 1962.

Hull, William H.N. "The public control of broadcasting: the Canadian and Australian experiences," (1962) 28 Canadian Journal of Economics and Political Science 114.

Lambert, Richard S. School Broadcasting in Canada. Toronto: University of Toronto Press, 1963.

Gilmor, R. Paul. The Canadian Broadcasting Corporation and Parliamentary Responsibility. (M.A. Thesis, Assumption University, 1963)

Shea, Albert A. Broadcasting the Canadian Way. Montreal: Harvest House, 1963.

The author takes a look at Canadian broadcasting focusing particularly on the period from 1958 to 1962, when second television stations were introduced and the Grey Cup dispute occurred.

Black, John Buchanan. Aspects of the Regulatory Power of the Board of Broadcast Governors (M.A. Thesis, University of Western Ontario, 1964).

Weir, E. Austin. The Struggle for National Broadcasting in Canada. Toronto: McClelland & Stewart, 1965.

A basic and substantial study of the history of the CBC and public broadcasting in Canada and the development of government policy towards the Corporation in the period from 1920 to 1963.

Jamieson, Don. The Troubled Air. Fredericton, Brunswick, 1966.

A former broadcaster looks to some of the problem issues found in the broadcast industry, including the extension of alternative service.



Peers, Frank W. "The nationalist dilemma in Canadian broadcasting," in Russell, Peter (ed.) Nationalism in Canada. Toronto: McGraw-Hill, 1966.

Trotter, Bernard. "Canadian broadcasting Act IV, scene 67, or double talk and the single system," (1966) 73 Queen's Quarterly, 461.

Andras, Andy. "The Broadcasting Act", (1968) 13 Canadian Labour 13.

Thomas, Paul Griffith. A Study of the Canadian House of Commons Committees on Broadcasting, 1958-1967. (M.A. Thesis, University of Manitoba, 1968)

Alleyn, Jacques R. "Developments in Canadian broadcasting law," (1968) EBU Review 47 (No. 116)

Dixon, Richard C. "Constitutional Issues of Educational Television" (1968) 3 Manitoba Law Journal 75.

In this article, the definitions and the legislative rights of federal and provincial governments with respect to education and communication are considered. The constitutional questions of increased use of ETV are explored, and attention is given to the practical problems of the creation of an ETV agency and the establishment of a workable ETV policy.

Grant, Peter S. "The regulation of program content in Canadian television: an introduction," (1968) 11 Canadian Public Administration 322.

A lengthy study of the evolution of the Canadian content regulations from 1958 to 1968, and an examination of the principal changes brought about by the 1968 Broadcasting Act and the creation of the CRTC. The article looks at the sanctions available to the BBG and CRTC., viz prosecutions, license suspension or revocation, and the history of their use by the BBG. The nature of the CRTC's powers to annex licence conditions relating to programming is also examined. Brief notes are added on the constitutionality of federal legislation respecting broadcasting and cable television and the applicability of the Canadian law of copyright to cable television. The article concludes with comments on the economic, political and structural limits to administrative action by the CRTC.

Note, "Keeping in touch with the American empire: what price Canadiana?" (1969) 6 Canadian Dimension 5.

Norwood, John G. "Judicial review of the condition making power in the 1968 Broadcast Act: ultra vires and the principles of natural justice," (1969) 1 Canadian Communications Law Review 24.

Under Section 17 of the Broadcasting Act, the CRTC is given the power to annex conditions to licences issued for broadcasting undertakings. In this paper, Mr. Norwood examines some of the legal limits on the Commission's ability to annex such conditions. In Part 1, he focuses on the substantive content of various possible licence conditions and asks what specific conditions would or would not be ultra vires. In Part 2, he examines some of the procedural aspects relating to the imposition of licence conditions and discusses whether the Commission is bound in such proceedings to observe the rules of natural justice.

Bennett, John. "The licensing of religious radio stations in Canada," (1969) 1 Canadian Communications Law Review 1.

In this study, the policy of the Board of Broadcast Governors and the Canadian Radio-Television Commission towards the licensing of religious radio stations is discussed. The five applications since 1958 where this question was raised are examined in detail, and comments are offered on the reasons for refusal in each case. Mr. Bennett speculates briefly on the adequacy of the reasons of the Board and the Commission and the possibility of requiring fuller reasons. The paper concludes with an evaluation of the present policy on religious broadcasting and a review of the alternatives open to the Commission to increase the availability of religious programming.

Peers, Frank W. The Politics of Canadian Broadcasting, 1920-1951. Toronto: University of Toronto Press, 1969.

In this comprehensive analysis of the development of Canadian broadcasting policy, Professor Peers describes the contending forces, the politicians, pressure groups, newspapers, and business interests that joined in the conflict. He explains how struggles between broadcasters and government leaders, between political parties, between members of the same party and between broadcasters themselves went on both openly and behind the scenes, and places the significance of such power struggles in the development of the

Canadian broadcasting system in perspective. Professor Peers also examines the two royal commissions and eleven parliamentary committees which investigated radio broadcasting between 1928 and 1951. He assesses their influence and effectiveness as well as the role played by parliamentary debates during the period. This is an exhaustive account of the development of Canadian broadcasting, and an excellent case study of the political process.

Peers, Frank W. "Oh say, can you see," in Lumsden, Ian (ed.), Close the 49th Parallel. Toronto: University of Toronto Press, 1970.

Nichols, Robert William. Interest Groups and the Canadian Broadcasting System. (M.A. Thesis, Carleton University, 1970).

Pattenden, David. The Board of Broadcast Governors and the Public Interest. (M.A. Thesis, Queen's University, 1970)

Penney, Ronald G., "Telecommunications Policy and Ministerial Control," (1970) 2 Canadian Communication Law Review 8.

Should broadcasting in Canada be regulated beyond the allocation of frequencies? And if regulation of programming is dictated by considerations of national policy, are these considerations inherently self-defeating because of the nature of the medium? And once brought under regulation, is broadcasting in Canada inevitably governed by partisan politics? Or is "politics" a useful antidote to the particular problems inherent in the independent regulatory commission? In this essay, Mr. Penney examines the development of the agencies controlling broadcasting in Canada, and considers a number of arguments on both sides of these questions.

Toogood, Alexander Featherston. Canadian Broadcasting: A Problem of Control (Ph.D Thesis, Ohio State University, 1970). Also available from the Canadian Association of Broadcasters, Ottawa.

Beke, A. John, "Government Regulation of Broadcasting in Canada," (1970) 2 Canadian Communications Law Review 104; (1971-72) 36 Saskatchewan Law Review 39, 235.

In the first part of this comprehensive two-part study, Beke examines the necessity for and extent of legal control

of broadcasting, both generally and in Canada today. A brief historical summary follows of the mechanics (mostly commissions) that have been used in the past to define and recommend the goals of broadcasting in Canada; this is completed by a look at the substantive goals that have been expressed to date. The second half of Part I of this article is a study of the licensing process as used to control broadcasting in Canada. The criteria employed in awarding licences initially, the use of licence renewals, power increases, and frequency transfers, are all looked at as regulatory techniques. The final sections reveal that the licensing process is not as effective in regulation as it could be; there is a brief analysis of natural justice in this context, and recommendations for more efficacious use of the process by which licences are controlled.

Boyle, Harry. "Responsibility in Broadcasting," (1970) 8 Osgoode Hall Law Journal 119; (1970) 2 Canadian Communications Law Review 191.

In this article, Boyle, then CRTC Vice-Chairman, supports the policy that television should cater to a wider public interest through a diversity of programs. He expresses a concern that the structure of the industry has prevented diversity and freedom of communication. This communications medium requires understanding and cooperation from both broadcasters and regulators so that it can properly achieve maximum social potential. He feels that regulation is required to elevate it from a purely commercial tool, but that regulation must be carefully controlled to avoid paternalism and authoritarianism. A postscript is added which contains relevant excerpts from the transcript of the Trade Regulation Round Table, 1969, including comments and discussion concerning Boyle's paper.

Chercover, M. and Templeton, C. "Comment," (1970) 8 Osgoode Hall Law Journal 171.

Random comments and observations on the television industry are made by two persons intimately concerned with the development of Canadian broadcasting. The authors predict great leaps forward for technology and programming in television, but warn that certain problems of state-measured public

interest, increased Americanization of programming, and high cost of local production could be viewed as obstacles to the goals of the Broadcasting Act.

Simard, "Loi de l'office de radio-telediffusion du Quebec", (1970) Cahiers 89.

Charbonneau, M. and Lawrie, R. "The Financing of Non-Commercial Radio in Canada," (1970) 2 Canadian Communications Law Review 47.

This paper explores the problems inherent in financing the conventional FM station on a private non-commercial basis without breaching federal government policy. The paper discusses a number of expedients, including subscription financing (used by the Pacifica Foundation in the United States but so far not in Canada), the support of broadly based community groups like INTERCOM, and the possibility that the licence be transferred to the CBC so that an arrangement similar to that currently utilized by CICA-TV, the provincially operated ETV station, can be worked out.

Halyk, L. "TV-radio; sixty percent Canadian," (1970) 7 Performing Arts. 38

Note, "Canadian content: CAPAC proposals incorporated in CRTC's new radio regulations," (1970) 52 Canadian Composer, 14.

Note, "CLC to CRTC: much U.S. TV is 'mediocre'," (1970) 15 Canadian Labour 5.

Note, "Make TV more Canadian," (1970) 35 World Affairs 13.

Stack, E. "Communications in the north," (1970) 2 Canadian Communications Law Review 145.

This article describes the existing communications systems in the North (primarily the territory lying above the 55th parallel): radio, telephone, television and the press. The author outlines the technological problems involved in providing service to this vast, spread-out area and notes the difficulties posed by the lack of economic return. There is a description of the technology and prospects for satellite communication as well as an outline of the operation of Telsat Canada.

The author also discusses CRTC policy with regard to the north and examines the socio-cultural impact of modern communications, particularly television.

Canada Department of Communications. Telecommission Study 8(c), "Report on northern communications". Ottawa: Information Canada, 1971.

For a summary of this study, see Chapter 8, at Part 8.3.

Stursberg, Peter. Mister Broadcasting: The Ernie Bushnell Story. Toronto: Peter Martin Associates Limited, 1971.

Spry, Richard. "On the cheap [CRTC, Canadian content on TV and cablecasting]," (1971) 10 Content 2.

McGregor, W. D. "In reply [to Richard Spry on Canadian content]," (1971) 11 Content 14.

Lavoie, Elzear. "L'évolution de la radio au Canada français avant 1940," (1971) 12 Recherches Sociographiques 17.

Maistre, G. "L'influence de la radio et de la télévision américaine au Canada," (1971) 12 Recherches Sociographiques 51.

Janisch, Hudson N. et al, "Campus broadcasting on carrier current systems," (1971) 3 Canadian Communications Law Review 222.

This article studies the report prepared by the Campus Broadcasting Project and submitted to the CRTC for its consideration on the matter of licensing student broadcasters on carrier current systems. The study also reviews the responses to a questionnaire sent to Ontario universities and colleges and sets out the Commission's announcement of May 4, 1972, which adopted most of the Project's recommendations.

Boyle, Harry J. "From Crystal Set to Satellite: History of Broadcasting in Canada," (1972) 24 Content 13.

Richardson, Keith. "Real TV about Real People [The People Behind Toronto's City-TV]," (1972) 25 Content 2.

Ross, Sam. "The Airwave War of Webster, Lamarsh and Murphy, [Competition for the largest listening audience in Vancouver among hotliners]," (1972) 23 Content 5.

Singer, Benjamin O. (ed.) Communications in Canadian Society. Toronto: Copp Clark, 1972.

A collection of articles intended to deal with communications from a social science perspective. A number of studies relate to broadcast regulation, namely, Stewart, W. Brian, "The Canadian Social System and the Canadian Broadcasting Audience"; Peers, Frank W., "Broadcasting and National Unity"; and Boyle, Harry J., "The Media Control Institutions in Society: Canada and the U.S. Compared".

Gailitis, Maris M. The Costs of Information Retrieval Television: A Case Study in the Cost-Effectiveness of Educational Media. Toronto: O.I.S.E., 1972.

Proulx, Gilles. Pour Une Radio Reformée. (Editions du Jour, 1973).

Suggestions by a former Quebec broadcaster to improve Canadian radio service.

Grant, Peter S. Broadcasting and Cable Television Regulatory Handbook. 2 volumes. Toronto: Law Society of Upper Canada, 1973.

A comprehensive collection of all the relevant regulatory materials, including regulations and procedures under the Broadcasting Act; other statutes, regulations and codes relating to advertising and program content; statutes relating to judicial review of administrative action; international treaties, and channel allocation and assignment lists; and regulations and procedures under the Radio Act.

Sikstrom, Mark A. et al. Community Programming on Radio: A Report on the Attitudes of Broadcasters and Community Officers on Public Service Programming in Calgary, Alberta. (Calgary: The Queen's Printer, 1974).

Note, "Resurgence of Canadian nationalism and its effect on American Canadian Communications relations," (1974) 9 Journal of International Law & Economics 149.

Peers, F.W., "Canadian Radio-Television Commission on the state of Canadian broadcasting and its prospects", (1974) 17 Canadian Public Administration 654.



Professor Peers comments on CRTC stipulations for renewal of the CBC broadcasting licences, and evaluates its policy objectives.

Note, "Saving the CBC" (1974) 53 Canadian Forum 4.

Porteous, John. Please Stand By: A History of Broadcasting in Canada. Toronto. Lester and Orpen, 1974.

Romanow, Walter Ivan. The Canadian Content Regulations in Canadian Broadcasting: An Historical and Critical Study. (Ph.D. Thesis, Wayne State University, 1974; Ann Arbor, Mich.: Xerox University Microfilms, 1975).

An extensive study of the problems of Canadian content in Canadian broadcasting and Canadian ownership of Canadian broadcast operations, with an explanation and evaluation of BBG and CRTC positions on these matters.

Hudson, H. E. Community communication and development: A Canadian case study. (Ph.D. Thesis, Stanford University, 1974)

This is a study of a project sponsored by the federal Department of Communications which provided inexpensive facilities to two regions in the Canadian North for two-way communication and broadcasting. Native people in both regions live in isolated villages where access is generally only by plane and two-way communication has been possible only by radio-telephone.

Baum, Daniel J. "Broadcasting Regulation in Canada: The Power of Decision" (1975) 13 Osgoode Hall Law Journal 693.

Allard, T. J. The C.A.B. Story, 1926-1976: Private Broadcasting in Canada. Ottawa, Canadian Association of Broadcasters, 1976.

An anecdotal review of the history of the trade association of private broadcasters in Canada.

Cabatoff, K. "Radio-Québec: une institution publique à la recherche d'une mission," (1976) 19 Canadian Public Administration 542.

Pepin, René. "Introduction a l'étude du phénomène de la propriété des mass media électroniques au Canada," (1976) 7 Revue de droit de l'Université de Sherbrooke 49.

Babe, R. E. "Regulation of private television broadcasting by the Canadian Radio-Television Commission: a critique of ends and means," (1976) 19 Canadian Public Administration 522

Charland, W. "Multilingualism and the CBC mandate: an example of ineffectual regulation," (1977) 4 Dalhousie Law Journal 1966

Peers, Frank W. The Public Eye. Toronto: University of Toronto Press, 1979.

Grant, Peter S. Canadian Communications Regulation. Second Edition. 2 volumes. Toronto: Law Society of Upper Canada, forthcoming.

Parts 1 and 2 of this extensive work provide a comprehensive guide to all CRTC regulations, circulars, policy statements, and licensing decisions affecting broadcasting stations in Canada, along with editorial notes on the evolution of the regulations and the results of CRTC prosecutions.

6.3 LICENSING AND REGULATION OF BROADCASTING  
IN THE UNITED STATES

This Part sets out references to the literature relating to the history and government regulation of broadcasting in the United States, in chronological order. The references below include studies of the licensing policies of the Federal Communications Commission relating to radio and television broadcasting, but does not address the question of FCC policies on cable television. For sources on cable television and subscription television, including pay television, see Chapter 7 below.

This Part also excludes sources relating to the FCC's fairness doctrine and the equal-time rule. For the literature relating to these policies, see Chapter 12 below. The general role and statutory jurisdictions of the FCC is dealt with in Chapter 3 above, along with sources on the question of FCC independence and accountability, FCC procedures, and availability of FCC decisions.

Stern, Robert H. The Federal Communications Commission and Television. The Regulatory Process in an Environment of Rapid Technical Innovation. (Ph.D. Thesis, Harvard University, 1953).

Fowler, P.C. The Formulation of Public Policy for Commercial Broadcasting by the Federal Communications Commission. (Ph.D. Thesis, Indiana University, 1956).

Note, "The Criteria Employed by the Federal Communications Commission in Granting Mutually-Exclusive Applications for Television Facilities," (1956-57) 45 Georgetown Law Journal 265.

Note, "Economic Injury in FCC Licensing: The Public Interest Ignored: Southeastern Enterprises, 13 Pike & Fischer Radio Reg. 139," (1957) 67 Yale Law Journal 135.

Brown, Ralph S. Jr., "Character and Candor Requirements for FCC Licensees," (1957) 22 Law & Contemporary Problems 644.

Rowse, Arthur. Slanted News. Boston: Beacon Press, 1957.

Note, "Harris Subcommittee Report: 50 Years of Broadcasting Regulation," (1958-59) 3 Journal of Broadcasting 56.

Goldman, Eric F. (ed.). Broadcasting and Government Regulation in a Free Society. Santa Barbara: Center for the Study of Democratic Institutions, 1959.

Irion, H. Gifford, "FCC Criteria for Evaluating Competing Applicants," (1959) 43 Minnesota Law Review 479.

Note, "State Regulation of Radio and Television." (1959) 73 Harvard Law Review 386, 2 P.E.A.L. 246.

Ellis, E. I. and Reinsch, L.J. Radio Station Management. New York: Harper & Row, 1960.

This book discusses what were, at the time of writing, new concepts in broadcasting, the method of starting a new station, organization and administration and related topics. An easy-to-read sourcebook for the newcomer to station operations.

Thomas, Lowell S. Jr. "Federal Communications Commission: Control of 'Deceptive Programming,'" (1960) 108 University of Pennsylvania Law Review 868.

Sarner, Harvey, "Assessments for Broadcast Licenses," (1961) 21 Federal Bar Journal 209.

Ford, Frederick W., "Economic Considerations in Licensing of Radio Broadcast Station," (1961) 17 Federal Communications Bar Journal 191.

Levin, H. J., "Federal Control of Entry in the Broadcast Industry," (1962) 5 Journal of Law & Economics 49.

Note, "Federal Communications Commission and Program Regulation - Violation of the first amendment?" (1962) 41 Nebraska Law Review 826, 5 P.E.A.L. 263.

Note, "Regulation of Program Content by the FCC," (1964) 77 Harvard Law Review 701, 8 P.E.A.L. 129.

Hilliard, Robert L. (ed.). Understanding Television: An Introduction to Broadcasting. New York: Hastings House, 1964.

Loevinger, L., "The Role of Law in Broadcasting," (1964) 8 Journal of Broadcasting 113.

Minow, Newton. Equal Time: The Private Broadcaster and The Public Interest. New York: Atheneum, 1964.

Irion, H.G., "Need for broadcast service" - a key phrase in communications law," (1964) 19 Fed. Communications Bar Journal 13, 6 P.E.A.L. 400

Cox, K. "FCC, the Constitution and Religious Broadcast Programming," (1965) 34 George Washington Law Review 196.

Note, "Conditional broadcasting licenses: defining the legal perimeters," (1965) 33 George Washington Law Review 764.

Skornia, H.J., Television and Society - an Inquest and Agenda for Improvement. New York: McGraw-Hill, 1965

This book discusses the business corporation as a controller in broadcasting, leadership, the managers and networks, the problems of regulation, the hidden economics of broadcasting, the effects of radio and TV broadcasting and international relations.

Coase, R. H. "Evaluation of public policy relating to radio and television broadcasting: social and economic issues," (1965) 13 U. of Chicago Law School Record 23.

Loevinger, Lee. "Issues in Program Regulation," (1966) 20 Federal Communications Bar Journal 3.

Note, "National Policy and the 'Public Interest' - A Marriage of Necessity in the Communications Act of 1934," (1966) 114 University of Pennsylvania Law Review 386.

Barnow, Erik. A Tower of Babel: A History of Broadcasting in the U.S. to 1933. New York: Oxford University Press, 1966.

Summers, Robert E. and Summers, Harrison, B. Broadcasting and the Public. Belmont, Calif.: Wadsworth, 1966.

Hilliard, Robert L. Radio Broadcasting. New York: Hastings House, 1967.

Alexander, S.S. The Public Interest in Public Television. Rand Corporation Paper, P-3676, September 1967.

The proposal of the Carnegie Commission for Educational Television to build, with federal support, a public broadcasting system, provides the basis of this examination of the suitability of and necessity for social scientists to deal with questions involving value judgments -- an area of inquiry they have resolutely avoided. Reasonable, moral men, through

rational inquiry, can agree on what is "in the public interest," but this will often challenge generally accepted values. Although the attempt to achieve excellence rather than acceptability must be made, the real question is whether Congress will, or can, continue support of an institution which does so. (Presented at a Conference on the Use and Regulation of the Radio Spectrum, held at Airlie House, Warrenton, Virginia, September 11-12, 1967.)

Cox, Kenneth. "Does the FCC Really Do Anything?" (1967) 2 Journal of Broadcasting 97.

Doyle, S.E., "Do We Really Need a Federal Department of Telecommunications?" (1967) 21 Federal Communications Bar Journal 3.

Herman, W. Land Associates. The Hidden Medium: A Status Report on Educational Radio in the U.S. Washington, D.C.: National Association of Educational Broadcasters, 1967.

Carnegie Commission on Educational Television. Public Television - A Program for Action: The Report of the Carnegie Commission on E.T.V. Toronto, London, New York: Bantam Books, 1967.

The report concludes that a well-financed, well-directed educational TV which is larger and more pervasive must be brought into being if the full needs of the American public are to be served. It advocates freedom from constraints of commercial TV, freedom from pressure of inadequate funds and freedom to create, innovate, and to be heard.

Koenig, Allen E. and Hill, Ruane B. (eds.). The Farther Vision: Educational Television Today. Madison: University of Wisconsin Press, 1967.

F. J. Kahn, (ed.), Documents of American Broadcasting. New York: Appleton-Century-Crofts, 1968.

This excellent collection of original documents, statutes, policy statements and court decisions traces the development of regulatory power over broadcasting in the United States from the Wireless Ship Act of 1910 through the Communication Act of 1934, which established the FCC, to the Com Sat Act of 1962. Specific chapters deal with the regulation of programming (the Blue Book, the self-regulation codes),

broadcast journalism (including the fairness doctrine and its application) the regulation of competition, and educational broadcasting. After each chapter is a specialized bibliography on the subject treated therein.

Fowler, P. C. "The Policy of the Federal Communications Commission with Respect To Programming," (1968) 2 Journal of Broadcasting 99.

Quaal, Ward L. and Martin, Leo A. Broadcast Management, Radio Television. New York: Hastings House, 1968.

President's Task Force on Communications Policy. (Rostow Report). Staff Paper 6. "Future Opportunities for Television". Washington: U.S. Government Printing Office, 1968.

Barnouw, Erik. The Golden Web: A History of Broadcasting in the U.S., 1933-1953. New York: Oxford University Press, 1968.

Udell, Gilman G. (comp.). Radio Laws of the U.S. Washington: Government Printing Office, 1968.

Wilson, H. T. The Regulation of Standard Radio Broadcasting; 1934-1952: Defending The Public Interest Through Licensing Policies. (Ph. D. Thesis, Rutgers University, 1968)

Olson, H. R. (Chairman), Business and Legal Problems of TV and Radio. New York: Practising Law Institute, 1968.

This book discusses financing the creation of programs (investigation, safeguards, agreements); the acquisition of the broadcast product (program packages, negotiations, and agreements); music performance and recording (practices and licences); sporting events (negotiation and acquisition of rights); program advertising content (claims and litigation in the defamation, privacy, copyright, and unfair competition fields); ancillary use of program features (i.e. licencing manufacturers of merchandise); the relationship and relations between stations and networks (NBC Television affiliation agreement, CBS Television Affiliation Agreement and ABC Primary TV affiliation Agreement), relations with sponsors, agents, labour organizations; station licences and contracts for transfers and control of broadcasting stations. The book ends with a discussion of the equal opportunity and fairness doctrine and section 315 of the Communications Act.



Aleinikoff, E.N. "Educational Television - A Non-Commercial Viewpoint," (1968) 53 Iowa Law Review 880.

Note, "Television Service and the FCC," (1968) 46 Texas Law Review 1100.

Skornia, H. J. and Kitson, J. W. (eds.) Problems and Controversies in Television and Radio. Palo Alto: Pacific Books, 1968.

Brundage, Gloria Swegman. The Nature and Development of the Concept of Public Interest in Program Service of Radio Broadcasting. (Ph.D. thesis New York University, 1969)

Gillmor, Donald M. and Barron, Jerome A., "The Regulation of Radio and Television Broadcasting. Some Problems of Law, Technology and Policy", in Mass Communication Law: Cases and Comments. St. Paul, Minn: West Publishing, 1969.

Longley, Lawrence Douglas. The Policy of Broadcasting: Industry, Congress, and the F.C.C. (Ph.D. thesis, Vanderbilt University, 1969.)

Dordick, H.S. Chester, L.G. Firstman, S.I. and Bretz, R. Telecommunications in Urban Development. Rand Corporation Memorandum, RM-6069-RC, July, 1969.

Ways in which television can be used to improve life in the urban ghetto. A survey, made in Los Angeles and New Orleans, indicates that the failure to communicate community information within the ghetto, and between the ghetto and neighbouring communities is largely responsible for the isolation of ghetto residents and for their inability to enter into the economic mainstream. Television, as a familiar and relatively trusted medium, has a great potential for communicating many types of information. This study considers the role of television in three major areas of education: preschool; elementary and secondary; and adult. The major conclusion is that one or more pilot projects should be implemented to assess the institutions required to produce and broadcast these programs, potential sources of financial support, and degree of public acceptance and use. The project would include two South Central Los Angeles communities and would provide programs on job information, educational opportunities, city hall news, and cultural events.

Bretz, R. Television and Ghetto Education: The Chicago Schools Approach. Rand Corporation Papers. P- 4108, June 1969.

An evaluation of the ITV cluster programming approach developed in Chicago, with emphasis on the usefulness of the program in providing material to the classrooms of ghetto areas. The Chicago public schools have moved toward a practical solution to the problem of improving ghetto schools through a very localized use of instructional television systems. As a direct result of ITV, staff members of participating cluster schools of Chicago report a significant improvement in both attitude and achievement of the average pupil. Moreover, teachers who have little or no experience in working with under-privileged children can benefit greatly from the in-service training received when observing techniques of more experienced television instructors. These and other aspects of cluster programming are compared with characteristics of the central production alternative in terms of cost as well as services. Suggestions are made for the urban school of the future.

Goldin, H.H. "Financing Public Broadcasting," (1969) 34 Law and Contemporary Problems 203.

Macy, John W., Jr. "Public Broadcasting: A Medium in Search of Solutions," (1969) 34 Law and Contemporary Problems 203.

Jaffe, L.L. "Program Control," (1969) 14 Villanova Law Review 581.

Barker, E.A. "The FCC's Role in TV Programming Regulation," (1969) 14 Villanova Law Review 581.

Bryant, A.P. "Historical and Social Aspects of Concentration of Program Control in Television," (1969) 34 Law and Contemporary Problems 203.

Webbink, Douglas William, "The impact of UHF promotion: the allchannel television receiver law," (1969) 34 Law & Contemporary Problems 203.

Jennings, Ralph M. How to Protect Citizen Rights in Television and Radio. New York: Office of Communication, United Church of Christ, 1969.

Niven, Harold (ed.). Broadcasting and Social Action - A Handbook for Station Executives. Washington: National Association of Broadcasters, 1969.

Minasian, J.R. "Political Economy of Broadcasting in the 1920's," (1969) 12 Journal of Law & Economics 391.

Erickson, D.H.V. FM Broadcasting: Its Technical, Political and Economic History. (Ph.D. Thesis, University of Illinois, 1969)

Note, "FCC and broadcasting license renewals: perspectives on WHDH," (1969) 36 University of Chicago Law Review 854.

Note, "Federal communications commission and comparative broadcast hearings: WHDH as a case study in changing standards," (1969) 10 Boston College Industrial & Commercial Law Review 943.

Barnouw, Erik, The Image Empire: A History of Broadcasting in the U.S. from 1953. New York: Oxford University Press, 1970.

Note, "Administrative law - judicial review - decision of FCC renewing TV license overruled as not supported by substantial evidence," (1970) 83 Harvard Law Review 1412.

Goldin, H.H. "'Spare the golden goose' - the aftermath of WHDH in FCC license renewal policy," (1970) 83 Harvard Law Review 1014.

Stebbins, Gene R. Listener-Sponsored Radio: The Pacifica Stations. (Ph.D. Thesis, Ohio State University, 1970)

Note, "We Pick 'em, You Watch 'em: First Amendment Rights of Television Viewers," (1970) 43 Southern California Law Review 826.

Le Duc, Don R. and McCain, T.A. "The Federal Radio Commission in Federal Court: Origins of Broadcast Regulatory Doctrines," (1970) 4 Journal of Broadcasting 393.

Nicholas Johnson. How to Talk Back to Your TV Set. New York: Bantam Books, 1970.

A largely critical look at the American television industry by the FCC radical commissioner. He describes the concentration of ownership in the media, the sins of omission in news and public affairs programming, the relation of broadcasting to minority groups, the "promise and peril" of cable TV, and ends with a survey of the role of community groups in resisting entrenched media power and in innovation,

particularly by action before the FCC.  
An appendix lists some decisions he feels  
are important in showing what the FCC is  
up to, and gives a general bibliography.

Tish, R.I., "The Federal Communications Commission's license renewal policies - a turn of events, some unanswered questions, and a proposal," (1970) 15 St. Louis University Law Journal 1.

Note, "Federal Communications bar association briefing conference on equal employment guidelines," (1970-71) 24 Federal Communications Bar Journal 3.

Note, "Television: Old Theories, Current Facts, and Future Policies," (1971) 61 American Economic Review 69.

A History of Broadcasting: Radio to Television.  
New York: Arno Press and the New York Times, 1971.

Brown, Les, Television: The Business Behind the Box. New York: Harcourt Brace Jovanovich, 1971.

Cahalan, Joseph M. Congress, mass communications and public policy - the Public Broadcasting Act of 1967. (Ph.D. Thesis, New York University, 1971)

Prowitt, Marsha O, Bannon. Guide to Citizen Action in Radio and Television. New York: Office of Communications, United Church of Christ, 1971.

Stanley, N.E. "Federal Communications Law and Women's Rights: Women in the Wasteland Fight Back," (1971) 23 Hastings Law Journal 15.

Lee, R.E. "Inquiry into Children's Programming - A Call for Action?" (1971) 47 Notre Dame Law Review 230.

Bryant, Ashbrook P. "Regulation of Broadcast Networks," (1971) 15 St. Louis University Law Journal 3, 11 P.E.A.L. 17.

Clift, Charles, Weiss, Frederic A. and Abel, John P. "Ten Years of Forfeitures by the Federal Communications Commission," (1971) 15 Journal of Broadcasting 379.

Emery, Walter B. Broadcasting and Government: Responsibilities and Regulations. Rev. ed. Lansing: Michigan State University Press, 1971.

This book provides an excellent discussion of regulation of broadcasting in the United States including the basis and scope of

FCC regulations and controls, the character, classification and utilization of radio frequencies as well as the practical problems of getting on the air. The book also discusses what it calls "ethereal realities and a look to the future".

Pember, D.R. "Broadcaster & the Public Interest: A Proposal to Replace an Unfaithful Servant," (1971) 4 Loyola University Law Review (L.A.) 83.

Note, "Diversity in Television Program Content: A Proposal for Sustaining Programming," (1971) 7 Columbia Journal of Law & Social Problems 319.

Note, "Administrative law - FCC - full comparative hearings mandated for contested broadcast license renewals," (1971) 40 Fordham Law Review 335.

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Anthony, R.A., "Towards simplicity and rationality in comparative broadcast licensing proceedings," (1971) 24 Stanford Law Review 1.

Fenton, B.S., "Federal communications commission and the license renewal process," (1971) 5 Suffolk University Law Review 389.

Blakely, Robert J. The People's Instrument: A Philosophy of Programming for Public Television. Washington, D.C.: Public Affairs Press, 1971.

Note, "Public Interest in Balanced Programming Content: The Case for FCC Regulation of Broadcasters' Format Changes," (1972) 40 George Washington Law Review 933.

Note, "Quizzes and the Law: Fifteen Years After 'Twenty-One' - How Far Can They Go?" (1972) 3 Performing Arts Review 629.

Tickton, S.D. "Communication and Credibility of Broadcast Programmes," (1972) 23 EBU Review 28. (No. 3)

Note, "Communications law - license renewals - a challenging applicant for a broadcast license is entitled to a full comparative hearing on the merits of his application as against an incumbent licensee under section 309(e) of the communications act of 1934," (1972) 40 George Washington Law Review 571.

Note, "FCC renewal hearings and full comparative hearings," (1972) 25 Vanderbilt Law Review 227.

Note, "Media reform through comparative licence-renewal procedures - the Citizens (Citizens Communication Center v. FCC, 447 F.2d 1201) case," (1972) 57 Iowa Law Review 912.

Botein, M., "Comparative broadcast licensing procedures and the rule of law: a fuller investigation," (1972) 6 Georgia Law Review 743.

Note, "FCC license renewal policy and the right to broadcast," (1972) 52 Boston University Law Review 94.

Note, "FCC investigation and regulation of college carrier-current radio stations," (1972) 8 Columbia Journal of Law and Social Problems 196.

Powledge, Fred. Public Television: A Question of Survival. Washington, D.C.: Public Affairs Press, 1972.

Milam, Lorenzo W. Sex in Broadcasting: A Handbook for Starting Community Radio Stations. Los Gatos, Calif.: Dildo Press, 1972.

Boyd, W.M. Ineffective Federal Regulation: The FCC and Television Editorializing. (Ph.D. Thesis, University of California at Berkeley, 1972.)

Cheek, L., "Analysis of Proposals to Deregulate Commercial Radio Broadcasting," (1972) 25 Federal Communications Bar Journal 1.

McDonough, P.J., "Public Interest, Convenience, and Necessity: The Myth of the FCC," (1972) 2 New Dimensions in Legislation 188.

Krasnow, E.G. and Shooshan, H.M. "Congressional Oversight: The Ninety-Second Congress and the Federal Communications Commission," (1973) 26 Federal Communications Bar Journal 81.

Krasnow, Erwin G. and Longley, Lawrence D. The Politics of Broadcast Regulation. New York: St. Martin's Press, 1973.

Noll, Roger G., Peck, Merton J., and McGowan, John J. Economic Aspects of Television Regulation. Washington, D.C.: Brookings Institution, 1973.

This book examines how government policies toward television shape the performance of the industry. The authors believe that most criticism of the television industry

is traceable to a single fact: the number of stations available to American communities, although greater than the number available anywhere else in the world, is smaller than the number for which both advertisers and viewers would be willing to pay. The main objective of the book is to evaluate current regulatory practices and the potential that the new technologies offer. They conclude that the conventional "free" television in the UHF band is less promising for expanding television broadcasting capacity than is each of several alternatives.

Note, "FCC License Renewal Policy: The Broadcasting Lobby versus the Public Interest," (1973) 27 Southwestern Law Journal 325.

Note, "Administrative law - broadcast license renewals - FCC cannot bar voluntary reimbursement for expenses when allowing withdrawal of a petition to deny renewal," (1973) 51 Texas Law Review 335.

Hadl, R.D., "Current developments in communications law in the United States," (1973) 24 EBU Review 56. (No. 4)

Ellmore, R.T., The Licensing of television broadcast stations in the United States to 1972, with special reference to the criteria used in the selection of television licensees. (Ph.D. Thesis, University of Southern California, 1973).

Goldberg, H. and Kramer, A.H., "FCC broadcast license renewal reform: two comments on recent legislative proposals," (1973) 42 George Washington Law Review 67.

Erikson, Don V. Armstrong's Fight for FM Broadcasting: One Man vs. Big Business and Bureaucracy. Montgomery: University of Alabama Press, 1973.

Wedlake, G.E.C., SOS: The Story of Radio Communication. New York: Crane, Russak, 1973.

LeDuc, Don R. (ed.). Issues in Broadcast Regulation. Washington, D.C.: Broadcast Education Association, 1974.

A collection of articles offering a compact overview of current regulatory issues. The chapter titles are: The Regulatory Process; The Broadcast License - Challenge and Renewal; The Broadcaster and Content Control; The Broadcaster and Competition; and The Study of Communication Law.



Tickton, S.D. Broadcast station license renewals action and reaction: 1969 to 1974. (Ph.D. Thesis, University of Michigan, 1974.)

Brown, T.R. The Financing of Public Television, 1966-1972. (Ph.D. Thesis, Stanford University, 1974.)

Sweeney, W.H. "Regulation of Television Program Content by the Federal Communications Commission," (1974) 8 University of Richmond Law Review 233.

Macy, John W. Jr., To Irrigate a Wasteland: The Struggle to Shape a Public Television System in the U.S. Berkeley, Cal.: University of California Press, 1974.

Note, "FCC as Fairy Godmother: Improving Children's Television," (1974) 21 UCLA Law Review 1290.

Toohy, Daniel W., Marks, Richard D., and Lutzker, Arnold P. Legal Problems in Broadcasting: Identification and Analysis of Selected Issues. Lincoln: University of Nebraska Press, 1974.

Baxter, W.F. "Regulation and Diversity in Communications Media," (1974) 64 American Economic Review: Papers and Proceedings 392.

Kahn, Frank J. "The Quasi-utility Basis for Broadcast Regulation," (1974) 18 Journal of Broadcasting 259.

Beser, S.M., and Mitchell, B.M., "Noll, Peck and McGowan's Economic Aspects of Television Regulation [review article]" (1974) 5 Bell Journal of Economics and Management Science 301.

David, M.M. "Financial Qualifications for the Purchase of a Radio Station," (1974) 5 Performing Arts Review 141.

Rubiner, A.J. "Primer for Purchase of a Radio Station," (1974) 53 Michigan State Bar Journal 398.

Note, "Administrative law - constitutional law - racial characteristics of license applicants considered in comparative broadcast hearing," (1974) 9 Suffolk University Law Review 225.

Note, "Administrative law - communications - developing standards for diversification of broadcasting formats," (1974) 52 Texas Law Review 558.

Note, "Administrative law - hearings before the Federal communications commission - fact that applicant for

TV license had Blacks on its board of directors must be considered and accorded a comparative merit by the Commission," (1974) 24 Catholic University Law Review 135.

Note, "Administrative law - radio and television-communications - minority ownership likely to increase diversity of content must be accorded merit in FCC licensing hearing," (1974) 43 University of Cincinnati Law Review 669.

Boros, J.S. "Communications law - License renewal challenges. Regulation of programming," (1974) Annual Survey American Law 597.

Holtkamp, J.A. "Suburban community issue: rebutting the presumption that a suburban applicant intends to serve the central city," (1974) 27 Federal Communications Bar Journal 81.

Sadowski, Robert P. "Broadcasting and State Statutory Laws," (1974) 18 Journal of Broadcasting 433.

Howard, Herbert H. "Multiple Broadcast Ownership: Regulatory History," (1974) 27 Federal Communications Bar Journal 1.

Note, "Constitutional considerations of the multiple media ownership regulation by the FCC," (1975) 24 American University Law Review 1217.

Note, "Concentration of Ownership of Media of Mass Communication: an examination of new FCC rules on cross-ownership of newspapers and broadcast stations," (1975) 24 Emory Law Journal 1121.

Chase, O.G. "Public Broadcasting and the Problem of Government Influence: Towards a Legislative Solution," (1975) 9 University of Michigan Journal of Law Reform 62.

Lindsay, M.K. "Public Broadcasting: Editorial Restraints and the First Amendment," (1975) 28 Federal Communications Bar Journal 63.

Note, "Limits of Broadcast self-regulation under the 1st Amendment," (1975) 27 Stanford Law Review 1527.

Geller, H. "Comparative renewal process in television: problems and suggested solution," (1975) 61 Virginia Law Review 471.

Hyde, R.H. "FCC policy and procedures relating to hearings on broadcast applications in which a new applicant seeks to displace a licensee seeking renewal," (1975) Duke Law Journal 253.

Note, "Administrative law - communications - entertainment formats - when there are substantial questions of fact, the abandonment, incident to a license assignment of a non-unique entertainment format serving a specialized audience is a matter of public interest requiring an evidentiary hearing before the FCC," (1975) 9 Georgia Law Review 479.

Note, "Federal regulation of radio broadcasting-standards and procedures for regulating format changes in the public interest," (1975) 28 Rutgers Law Review 966.

Note, "Listeners' rights: public intervention in radio format changes," (1975) 49 St. John's Law Review 714.

Note, "Program diversity in the broadcast media and the FCC: the section 310(b) labyrinth - delicate balance," (1975) 17 Boston College Industrial and Commercial Law Review 25.

Note, "Radio and television - broadcasting formats- FCC required to evaluate adequacy of available substitute broadcasting formats in the relevant service area before approving a transfer involving a format change," (1975) 53 Texas Law Review 1099.

Note, "Comparing the incomparable: towards a structural model for FCC comparative broadcast license renewal hearings," (1976) 43 University of Chicago Law Review 573.

Note, "Development of new public interest standards in the Format Change Cases (Citizens Comm. to save WEFM v. FCC, 506 F.2d 246)," (1976) 25 Catholic University Law Review 364.

Note, "Media cross-ownership: the FCC's inadequate response," (1976) 54 Texas Law Review 336.

Baker, J. "Free speech and federal control: the U.S. approach to broadcasting regulation," (1976) 39 Modern Law Review 147.

6.4 HISTORY AND REGULATION OF BROADCASTING  
IN OTHER COUNTRIES

This Part sets out a number of useful sources relating to the development and regulation of broadcasting in countries other than Canada or the United States. The sources are set out in alphabetical order by author.

Australian Broadcasting Commission. "Regulations Governing the Organization of Educational Broadcasting and Relations with Governmental Education Authorities," (1968) 19 EBU Review 60 (No. 112).

Baker, W.J. A History of the Marconi Company. London: Methuen, 1970.

Bakewell, Joan and Garnham, Nicholas. The New Priesthood: British Television Today. London: Penguin Press, 1970.

Black, Peter. The Biggest Aspidistra in the World: A Personal Celebration of Fifty Years of the BBC. London: British Broadcasting Corp., 1972.

Black, Peter. The Mirror in the Corner: People's Television. London: Hutchinson, 1972.

Briggs, Asa. The History of Broadcasting in the United Kingdom, Volume I (The Birth of Broadcasting to 1926). London: Oxford University Press, 1961.

Briggs, Asa. The History of Broadcasting in the United Kingdom, Volume II (The Golden Age of Wireless to 1939). London: Oxford University Press, 1965.

Briggs, Asa. The History of Broadcasting in the United Kingdom, Volume III (The War of Words to 1946). London: Oxford University Press, 1970.

Emery, Walter B. National and International Systems of Broadcasting: Their History, Operation and Control. East Lansing, Michigan: Michigan State Univ. Press, 1969.

A comprehensive survey of the major broadcasting systems through the world, giving brief historical perspectives and social contexts for each system. The most important aspects of the impact of broadcasting on particular areas are discussed. Part II of the book then goes into various issues related to international broadcasting, looking at international broadcast organizations and the matter of "pirate" stations.

Fuhr, Dr. E.W., Konrad, Dr. W., "New developments in German broadcasting law," (1968) 19 EBU Review 49. (No. 108)

Hansson, G., "Rules governing the right of rectification in Nordic broadcasting," (1966) 17 EBU Review 79. (No. 100)

Harris, Paul. When Pirates Ruled the Waves. London: Impulse Books, 1970.

The story of the pop radio pirates of the 1960's who for three years operated from storm lashed radio ships anchored off Britain's shores. The author describes how the popularity of these stations grew and how they multiplied until competition between them reached, almost literally, a cut-throat level. The book concludes with a criticism of the concentration of power of radio and television in one body (the BBC) under the control of the government.

Hood, Stuart. A Survey of Television. London: Heinemann, 1967.

Kinane, K. Educational Television in Developing Countries. Tokyo: Nippon Hoso Kyokai, 1965.

Koumanfoo, T.A. "Broadcasting in Greece: structure, organization and operation," (1966) 17 EBU Review 53. (No. 95).

Lehr, W. "Broadcasting, Press and Cinema in the Federal Republic of Germany: The Michael Commission Reports," (1968) 19 EBU Review 43. (No. 108).

Lewis, N. "IBA programme contract awards," (1975) Public Law 317

Markham, James W. Voices of the Red Giants: Communications in Russia and China. Dubuque: Iowa State University Press, 1967.

Miquel, Pierre. Histoire de la Radio et de la Télévision. Paris: Éditions Richelieu, 1972.

Nordenstreng, K. "Broadcasting in the Soviet Union," (1969) 20 EBU Review 19. (No. 117).

Namurois, Albert. "Belgian broadcasting - a review of some current problems," (1973) 24 EBU Review 42. (No. 2)

Namurois, Albert. Structure and Organization of Broadcasting in the Framework of Radio-Communications. Geneva: European Broadcasting Union, 1973.

Paulu, Burton. British Broadcasting: Radio and Television in the United Kingdom. Minneapolis: University of Minnesota Press, 1956.

Paulu, Burton. British Broadcasting in Transition. Minneapolis: University of Minnesota Press, 1961.

Paulu, Burton. Radio and Television Broadcasting on the European Continent. Minneapolis: University of Minnesota Press, 1967.

Raman, P.S., "The administrative problems of broadcasting in developing countries," (1968) 19 EBU Review 66. (No. 109)

Santoro, Anthony. The Shadow in the Cave: A Study of the Relationship Between The Broadcaster, His Audience, and The State. London: George Allen & Unwin, 1973;

Wedell, E. G. Broadcasting and Public Policy. London: Michael Joseph, 1968.

This British work looks at the public broadcasting system from the point of view of the contribution which it could make to a modern educated society. It concentrates on the framework of the system rather than its content, and on the determination of policy and the avenues of policy execution rather than the detailed production processes. There is a discussion of the triangle of forces which determines the output of the broadcasting services, namely controllers, producers and consumers. The last chapter discusses the choices open and the principles on which such choices might be based if broadcasting is to play a constructive part in the culture pattern of the next generation.

Wutherle, Dr. J., "The legal conditions of television relays in Czechoslovakia," (1965) 16 EBU Review 51. (No. 93)

## CHAPTER 7

### CABLE TELEVISION AND SUBSCRIPTION TELEVISION

It is a well-known truism that Canada is the most heavily cabled country in the world. Close to 50% of Canadians are now cable subscribers and over 80% of Canadians live within the licensed area of a cable television operator. Although cable television began as early as 1951 in Canada, most of its development has occurred since 1968, when the new Broadcasting Act brought the technology under the jurisdiction of the Canadian Radio-Television Commission (CRTC). (In 1976, the CRTC was superseded by the Canadian Radio-television and Telecommunications Commission). It is probably not an exaggeration to say that the development of a rational regulatory approach to cable television by the Commission has been accompanied by more public hearings, discussion and controversy than any other regulatory area in Canadian history.

Nor has the issue shown any signs of receding. Controversy continues over the introduction of pay television, the offering of non-programming services by cable television, and whether cable should be classified as a utility subject to rate regulation, or as a programmer, subject to the controversial questions of content regulation. These issues have also been greatly complicated by the continuing debate as to the appropriate level of government to regulate cable television. Although the Supreme Court of Canada finally ruled in 1977 that cable was exclusively under federal jurisdiction, recent federal-provincial negotiations have moved significantly toward a two-tier system, whether by constitutional amendment or administrative negotiation.

A number of issues relating to cable television are dealt with in other chapters, to which the reader is referred. For sources on the constitutional jurisdiction question, see Chapter 2. For the role of the regulatory agencies, see Chapter 3. For literature on the Canadian radio and television broadcasting system, see Chapter 6. For issues relating to the use of international or domestic communications satellites by cable television systems, see Chapter 5.



For disputes relating to the telecommunications carriers, see Chapter 8. For sources on the question of access to the community channel and the applicability of the fairness doctrine, see Chapter 12. And for the question of cable television and copyright, see Chapter 15.

This chapter is divided into the following three parts:

- 7.1 Cable Television in Canada
- 7.2 Cable Television in the United States
- 7.3 Pay Television and Subscription Television

7.1 CABLE TELEVISION IN CANADA

This part sets out the legal and economic literature on the development and regulation of cable television in Canada. The sources are listed in chronological order.

In addition to the studies listed below, a major research source consists of the hearings, decisions and policy statements of the CRTC on cable televisions from 1968 to the present. These are indexed and summarized in Grant, Peter S., Canadian Communications Regulation (Toronto: Law Society of Upper Canada, forthcoming) in Parts 1 and 2 respectively.

Harris, Neil H., "Contractual terms of cable television pole agreements in Canada: a preliminary analysis," (1969) 1 Canadian Communications Law Review 85.

In this research study, the contractual relationship between cable television licensees and telephone and other utility companies is examined. Basing his analysis on a detailed examination of representative agreements entered into prior to the end of 1969 between pole owners and cable television operators, Harris discusses the typical terms relating to such matters as the ownership of the poles and coaxial cable, responsibility for installation and maintenance, pole relocation, construction costs, treatment of amplifiers and service drops, contractual safeguards for the utility (indemnification, bonding, use of utility's name), restrictions as to service and charges, rental charges, term and termination clauses, and rights of assignment.

Alyluia, Kenneth. "Constitutional Aspects of Cable Television: Notes on the Case Law and a Questionnaire to Municipalities," (1969) 1 Canadian Communications Law Review 47.

Shaw, Richard A. "Municipal Regulation of CATV: A Case Study in Vaughan Township," (1970) 2 Canadian Communications Law Review 70.

De Mercado, J., "Switched Multiservice Cable Systems - The Wired System," (1970) Cable Television.

"Dim outlook for cable TV," (1970) 43 Canadian Business (March 1970) 11

Pither, W.G., "Outlook from the private sector: the CATV industry position," (1970) Canadian Telephone & Cable TV Journal (September-October).

Bilton, Kent et al., "The Anatomy of the Cable Television Licensing Policy of the CRTC: a Practical Case Study," (1970) 2 Canadian Communications Law Review 79.

This study tries to answer some of the questions concerning the priorities and interests held by the CRTC in its cable licensing practices by examining cable television licensing decisions made after comparative hearings held in a number of Canadian cities in 1970. The basic terms of reference were to examine the new cable applications for Toronto, Burlington, Calgary, Edmonton, and Halifax and to attempt to reach some common conclusions as to Commission licensing policy. The study included a review of the previously issued CRTC policy guidelines for cable television, the written briefs filed in each case, and the transcripts of the Commission hearings.

Clery, V., "Cable and the community," Canadian Forum, Vol. 50 (October 1970), pp. 231-2.

"Cable TV and community programming (CAC brief to CRTC)," (1971) 1 Canadian Consumer (July-August 1971), 134.

Burke, Stanley, "Dialogue is a Participatory Thing (Community cable television; the need for changes)," 10 Content (August 1971) 3.

Canada, Canadian Radio-Television Commission. Cable Television in Canada. Ottawa: Information Canada, 1971.

Canada, Department of Communications. Tele-commission Study 6(d), "Report on the Seminar on the Wired City". Ottawa: Information Canada, 1971.

This report was based on a seminar on the "Wired City" held at the University of Ottawa, June 26, 27, 28, 1970, the objective of which was to determine ways by which urban needs could be shaped or advanced by telecommunications technology and the consideration of the feasibility of a "wired city pilot project" involving government, industry and universities. The seminar considered divergent views on the best development of existing technology. The

basic conclusions of the seminar were: (1) that the "wired city" was a convenient label for the concept of total communications in urban areas which would come inevitably, planned or not, (2) that whatever its technical structure the "wired city" implies social change of such magnitude that it requires study and planning; (3) that such study could take the form of a formal task force and pilot project or specialized research into critical areas, (4) that all recommendations were premised on the notion that preliminary studies were essential, multi-disciplinary staff a must, and that a prime objective of any project should be accounting for the needs of the ordinary citizen in the realm of privacy and for the needs of low income groups.

Canada, Department of Communications. Telecommunication Study 8(d), "Multiservice cable television systems - the Wired City". Ottawa: Information Canada, 1971.

This report contains general comments on the need for a future "total" telecommunications system, a review of existing systems and comments on desirable changes. Increasing problems of urban congestion can be partially met by an efficient telecommunications system that would reduce the need for geographical concentration. There is a general review of existing systems including the telephone system, cable television, and computer data storage, and existing technology with comments on various categorizations such as low medium and high information rates, use of paired wires v. coaxial cables, transmission by analogue system v. digital system, division of facilities by band-width (FDM) v. time (MDS) uni v. bi-directional service and broad v. narrow band transmission. In general the majority of present information flow is over the telephone system including computer data transmission. This system was designed for voice transmission and as such is not the most suitable one for the more sophisticated technology envisaged in the total telecommunications system of the future. Capacity of the system could be greatly increased if the present use of paired copper wires, which have an extremely narrow band width was replaced by a system of coaxial cables allowing for a much broader band, and which could use a digital transmission system divided up on the

basis of time. Pp. 38-42 contain a list of 117 services that could be provided under a "total" communications system. Tables 3-5 give an idea of the present and future capacities of the Bell system, showing projected growth, present facilities for data systems, and existing digital transmission systems. Table 6 shows CNCP's switched data services. The major present difficulty of a total communications system is cost; to implement a complete system would involve a capital investment of \$70 billion, ten times the existing investment in telecommunications facilities.

Babe, R.E. Economics of Canadian Cable Television Industry. (East Lansing: Michigan State University Press, 1972).

Juneau, Pierre, "Local Cablecasting: the Barefoot Media," (1972) 4 Canadian Communications Law Review 116.

Juneau, then CRTC chairman, encourages cable operators to continue in their efforts to produce inexpensive local programming and to ignore blasé criticisms of "unprofessional" relating to their program format and technique. He maintains that the "barefoot" approach has a dynamic influence on community viewing because of the wide variety of programs that can be produced at very low cost and because of the fresh points of view that "amateurism" naturally attracts.

Grant, Peter S., Broadcasting and Cable Television Regulatory Handbook. 2 volumes. Toronto, Law Society of Upper Canada, 1973.

A comprehensive collection of all the relevant statutory and regulatory materials on broadcasting and cable television, including regulations and procedures under the Broadcasting Act; other statutes, regulations and codes relating to advertising and program content; statutes relating to judicial review of administrative action; international treaties, and channel allocation and assignment lists; and regulations and procedures under the Radio Act.

Pelletier, Gérard, "Cablecasting -- Regulation Blues," [The secretary of state speaks out], 32 Content (June 1973) 15.

Johanssen, P. "The Canadian Radio-Television Commission and the Canadianization of Broadcasting," (1973) 26 Federal Communications Bar Journal 183.

Petty, B. and Allebes, E. "Resurgence of Canadian Nationalism and its Effect on American-Canadian Communications Relations," (1974) 9 Journal of International Law and Economics 149.

Babe, R.E., "Public and private regulation of cable television: a case study of technological change and relative power," (1974) 17 Canadian Public Administration 187.

The author maintains that the development of cable television as a two-way telecommunications distribution system has been retarded and almost thwarted by the fragmentation of government jurisdiction and the restrictive conditions of the telephone carriers. The article outlines this difficulty, discusses the monopoly - competition conflict and suggests that a more rational jurisdictional approach is necessary.

Button, R.E. "Cable TV in Orbit - a look at the link between cable and satellites," (1975) 20 Canadian Patent Reporter (2d) 61.

Trudel, P. "Les politiques de programmation et de tarification de la Régie des services publics en matière de cable distribution," (1975) 10 Thémis 215.

Babe, R.E. "Regulation of private television broadcasting by the Canadian Radio-Television Commission: a critique of ends and means," (1976) 19 Canadian Public Administration 552.

Pepin, René. "L'élimination par les télédiffuseurs de la publicité contenue dans les émissions américaines," (1976) 6 Revue de droit de l'Université de Sherbrooke 405.

Swinton, Katherine. "Advertising and Canadian Cable Television -- A Problem in International Communications Law," (1977) 15 Osgoode Hall Law Journal 543.

A useful review from a broad perspective, of the international policy issues presented by the CRTC's decision to authorize Canadian cable television licensees to delete the advertising contained in the signals of U.S. border stations, culminating in the Capital Cities judgment in the Supreme Court of Canada on November 30, 1977.

Boucher, J. "La télévision communautaire au Québec:  
étude juridique," (1977) 12 Thémis 47.



7.2 CABLE TELEVISION IN THE UNITED STATES

This part reviews the extensive literature on the development and regulation of cable television in the United States. The sources are set out in chronological order, and indicate the evolution of policy discussions on cable television south of the border. Early articles focus primarily on jurisdictional issues. Later studies are more concerned with the promise of the "wired city" and include extensive discussion of the FCC reports, orders and decisions on cable television, culminating with its Final Report and Order issued in 1972. The recent literature has continued to focus on the technological promise of cable television and the appropriateness of the restrictions placed on its development by federal regulation.

Cable television has been one of the most extensively studied "new technology" areas in the United States, in the early 1970's it was a darling of the research foundations. As the industry continues to develop, its peculiar mixture of carriage and content and the fact that it affords convenient access to the private home has continued to stimulate researchers concerned with both the promise and the potential for abuse of the technology.

L'Heureux, R.D., "CATV - a television service beset," (1964-65) 19 Federal Communications Bar Journal 27.

Cole, Jr. J.P., "Community antenna television, and the broadcaster establishment, and the federal regulator," (1965) 14 American University Law Review 124.

Seiden, Martin H. An Economic Analysis of CATV Systems. Report to the FCC. Washington, D.C.: U.S. Government Printing Office, 1965.

Note, "Community antenna television: reaction of the industry," (1965) 40 Notre Dame Law 311.

Huntley, R.E.R., and Phillips, Jr. C.F., "Community antenna television: a regulatory dilemma," (1965) 18 Alabama Law Review 64.

Note, "Wire mire: the FCC and CATV," (1965) 79 Harvard Law Review 366.

Huntley, R.E., and Phillips, Jr., C.F., "Community antenna television: some issues of public policy," (1965) 18 Alabama Law Review 296.

Note, "TV broadcasting and CATV controversy," (1966) 41 St. Johns Law Review 225.

Meyer, G., "Nine myths of CATV," (1967) 27 Federal Bar Journal 431.

Smith, E.S., "CATV - a tainted virgin?" (1967) 27 Federal Bar Journal 451.

Winters, Robert L. Municipal Regulation of CATV - Model Ordinance. National Institute of Municipal Law Offices, 1967.

Barnett, H.J., and Greenberg, E.A. A Proposal for Wired Television. Rand Corporation Paper, P-3668, August, 1967,

A national system of wired city television is proposed as a means of providing programs that educate, inform, and entertain specialized interests as well as appeal to mass tastes. Additional channels would be available for educational television, pay-TV, political uses, credit purchases, and an almost indefinite list of other functions. The cost would be low, and the system would free the present TV spectrum for other vital private and governmental purposes.

Greenberg, E., "Wire television and the FCC's second report and order on CATV systems," (1967) 10 Journal of Law and Economics 181.

Note, "Federal communications commission and regulation of CATV," (1968) 43 New York University Law Review 117.

Witt, J.W., "CATV and local regulation," (1968) 5 California Western Law Review 30.

Anthony, George, "A regulator looks at state CATV regulations," (1968) 82 Public Utilities Fortnightly 28.

Chester, L.G., and Dordick, H.S. Communications Goals for Los Angeles: A Working Paper for the Los Angeles Goals Program. Rand Corporation Paper, P-3769-1, June, 1968.

A technological and cost analysis of three modes of TV transmission -- UHF, VHF, and Cable -- prepared for the Los Angeles Goals Program of the City Planning Department. Research indicates that 100 percent of ghetto residents use TV as a news source, while newspapers are used by only 3 percent as a news source: therefore, a program using TV to communicate with the ghetto should be instituted immediately, first, for intra-ghetto communication, and, ultimately, through a city built and operated network. On the basis of flexibility

and, in reality, feasibility, a cable system seems the most promising because of the ability to adapt to other educational needs.

Note, "CATV - the FCC's dilemma," (1969) 3 Suffolk University Law Review 343.

Note, "Childhood of CATV," (1969) 30 Ohio State Law Journal 382.

Mathews, J.D., "CATV from the Industry Viewpoint," (1969) Public Utilities Fortnightly (September 25, 1969).

Schildhouse, S., "CATV - from the regulatory point of view," (1969) Public Utilities Fortnightly (September 25, 1969).

Annello, D.A., "The CATV problem from the broadcaster's viewpoint," (1969) Public Utilities Fortnightly (September 25, 1969).

Baker, Warren E., "The CATV problem from the telephone carrier's view," (1969) Public Utilities Fortnightly (September 25, 1969).

Note, "Regulation of community antenna television," (1969) 23 Arkansas Law Review 432.

Note, "FCC's proposed CATV regulations," (1969) 21 Stanford Law Review 1685.

Note, "FCC's proposed CATV regulations: riding herd on the bonanza," (1969) 5 Columbia Journal of Law and Social Problems 169.

LeDuc, D.R., "FCC v. CATV et al: a theory of regulatory reflex action," (1969) 23 Federal Communications Bar Journal 93.

Verrill, Charles O., Jr., "CATV's Emerging Role: Cable-caster or Common Carrier?" (1969) 34 Law and Contemporary Problems 586.

This article describes the forces that compelled the FCC to finally take jurisdiction over community antenna television in the U.S. It was not until 1965 that the Commission extended full jurisdiction to all cable, in order to avert future adverse impact on existing and potential broadcast service. Cable television, then, was to be regulated not because it was a common carrier, nor because it was a broadcast service, but because it posed a threat to over-the-air TV. The author goes on to trace the first recognition

by the FCC of cable's potential in the broadcasting or cablecasting field, i.e. in local programs, in 1969. In his concluding sections, Verrill emerges as a supporter of cable as exclusively a carrier or transmitter, free to develop new services and techniques because it leaves programming to the broadcaster.

Loftus, R.W. "The Cities and Cable: A Question of Ownership," (1969) TV Communications (September).

Dreyer, Robert A. CATV: Emerging Problems-II. New York: Practicing Law Institute, 1969.

Barnett, H.J. and Greenberg, E., "Regulating CATV systems: an analysis of FCC policy and an alternative," (1969) 34 Law and Contemporary Problems 203.

Feldman, N.E. Cable Television and Satellites. Rand Corporation Paper, P-4171, August, 1969.

To realize the full potential of cable TV, the number of head ends (input points to the cable distribution network) in the cities should relate directly to distinct neighborhoods. The optimum number of head ends might be as many as 50,000. Surplus channels could be used for monitoring the local school board or zoning board meeting, for example. Local-interest and special audience programming can cost as little as \$100 per hour. To minimize costs, the operator could rent out videotaping equipment. In 10-20 years a 4-cable system could provide 400 TV channels. Additional channels could be used (1) to repeat existing programs so that they could be viewed when convenient; and (2) to present university lecture classes to larger audiences (the poorly prepared student could thus hear the same lecture many times and take each course as often as necessary). Satellite networking of cable head ends would be far more efficient and economical than direct satellite broadcasting.

Feldman, N.E. Cable Television: Opportunities and Legal Problems in Local Program Origination. Rand Corporation Report, R-570-FF, September 1970.

Evaluates past cable experience with local programming in Canada: in the somewhat isolated tract of Dale City, Virginia; and in Lakewood, Ohio, a suburb of Cleveland. The study concludes that (1) local programming can cost little to produce, (2) community-oriented programming can at times have high audience appeal, (3) local volunteer groups can produce only a few hours of programming per

week to at most perhaps enough for 1 or 2 channels, (4) to survive financially, cable systems generally must import distant stations as well as carry signals from local stations (no other means for attracting subscribers has yet been shown to be viable), (5) cable operators should be required to rent out equipment, to make available their studios, and to provide free channels for community programming, and (6) cable operators should also be required to make channels available on a leased basis with the cable operator absolved of responsibility for program content.

Lieberman, D., "Wide spectrum services: is this the future CATV?" (1970) TV Communications (June, 1970).

Mooney, et al., "Cable and the PUC: three points of view," (1970) TV Communications (May, 1970).

Mullally, D.P., "CATV: where do we grow from here?" (1970) 58 Illinois Bar Journal 954.

Farey, L., "CATV: is it one industry or two?", (1970) TV Communications (December, 1970).

Note, "Who's afraid of CATV?" (1970) 16 New York Law Forum 187.

Dreyer, Robert A. and others, Current Developments in CATV. New York: Practicing Law Institute, 1970.

A general text dealing with copyright, arrangements for new cable systems and authority of government to regulate.

Keys, L.O., "So you want to read meters," (1970) TV Communications (May, 1970).

Botein, M., "FCC's proposed CATV regulations," (1970) 55 Cornell Law Review 244.

Chazen, L., and Ross, Leonard., "Federal regulation of cable television: the visible hand," (1970) 83 Harvard Law Review 1820.

Powell, N.G., "CATV technical standards, a review of FCC proposals," (1970) TV Communications, (September, 1970).

Smith, Stafford, "Recent FCC Proposals: an analysis for Laymen," (1970) TV Communications (August 1970).

Johnson, L.L., Cable Television and the Question of Protecting Local Broadcasting. Rand Corporation Report, R-595, MF, (October, 1970).

Proposed FCC regulations for protecting TV broadcasters from loss through cable TV competition would permit a limited number of distant signals to be cabled into large market areas, but only if commercial advertising carried by the distant originating stations were replaced by advertising sold by local stations whose market was penetrated. This study concludes that this plan is inadequate because (a) it does not offer protection in small markets where the threat of cable is most severe; (b) selling their own commercials on distant signals may overcompensate some local stations and undercompensate others; and (c) the plan might introduce undesirable incentives, since broadcasters would become increasingly dependent on revenues generated from advertising on distant signals rather than in doing an effective job of local broadcasting. If FCC protection is necessary, a better approach would involve requiring cable operators to compensate broadcasting stations for their actual audience losses caused by cable operations.

Johnson, L.L., The Future of Cable Television. Some Problems of Federal Regulation. Rand Corporation Memorandum, RM-6199-FF, (January, 1970).

The first of a series of studies of cable TV and the public interest under Ford Foundation sponsorship. Contrary to present FCC policy, this study concludes that the public interest is best served by allowing cable TV to grow freely under liberal rules, picking up distant broadcast signals without restriction except for payment. By paying for retransmission rights and by originating programs that also available for retransmission, cable TV would share in the costs of broadcasting thus making up for any loss of broadcasting revenue from advertisers. The study proposes that if cable TV should later become a real competitive threat to over-the-air TV, protective regulations should be tailored to the needs of the most vulnerable stations, rather than serving, as now, to protect the profit levels of the strong VHF stations in large cities. It recommends which stations would be strengthened by requiring non-discriminatory access to all programs for all stations.

Park, R.E. Potential Impact of Cable Growth on Television Broadcasting. Rand Corporation Report, R-587-FF, (October, 1970).

Although future growth of cable television promises more diverse programming, it also poses some threat to over-the-air television broadcasting stations. A computer model is developed to compare station audience, revenue, profit, and local programming expenditure, with and without cable. A very strong set of distant signals is assumed, and cable penetration is assumed to reach ultimate levels (about 40% to 45% nationwide). Results indicate that concern over the impact of cable is misdirected on several counts: (1) Reduction in aggregate station revenue due to cable is small enough to be balanced by 1 year's typical revenue growth. (2) Stations in larger markets would, on the average, be little hurt by unrestricted cable growth. (3) Stations in smaller markets would suffer severe revenue reduction due to cable at ultimate penetration. (4) At least through the 1970's, nonnetwork UHF stations would gain substantially, because cable puts them on the same technical footing as competing VHF stations.

Jones, William K. Regulation of Cable Television by the state of New York. Albany: New York State Public Service Commission, 1970.

Possu, R.A. Cable Television: The Problem of Local Monopoly. Rand Corporation Memorandum, RM-630 9-FF, (May, 1970).

This study probes advantages and disadvantages of alternative forms of local cable television regulation. With the scramble among cable operators for municipal franchises growing, so is the concern about local monopoly, and the potential for abridging the public interest through excessively high subscriber fees and direct channelling of huge profits into the hands of cable companies who successfully compete for the right to "wire up" individual communities. The author urges a period of experimentation with a variety of the options available for both preventing monopoly prices and capturing monopoly profits for the public - and because of current uncertainty over future cable-television characteristics, for examining the actual extent of the monopoly problem.

Note, "Regulation of community antenna television," (1970) 70 Columbia Law Review 837.

Ohls, J.C., "Marginal cost pricing, investment theory and CATV," (1970) 13 Journal of Law and Economics 439.



Park, R.E. Future Growth of Cable Television. Rand Corporation Paper, P-4527, (December, 1970).

Expected ultimate cable penetration levels are estimated by fitting a set of logistic growth curves to 1969 data on cable systems. Highest penetration, 60% on average, is to be expected in areas with two or fewer local signals. In such cases, the number of distant signals carried has little or no effect on expected penetration. Lowest penetration is estimated for cable systems that carry no distant signals and operate in areas with many local signals; such a system can expect ultimately to serve 29% of all homes in its service area on average. Expected penetration for systems with other combinations of local and distant signals ranges from 37% to 50%. Rough calculations based on these estimates suggest an ultimate nationwide average cable penetration on the order of 40% to 45%. Ultimate penetration may be higher than estimated if radically new cable services are offered in the future. The kind of origination now offered, however, does not significantly affect penetration.

Goldberg, Victor, "Marginal Cost Pricing, Investment Theory and CATV: Comment," (1971) 14 Journal of Law and Economics. 513.

Ohls, James C., "Marginal Cost Pricing, Investment Theory and CATV: A Reply," (1971) 14 Journal of Law and Economics 517.

Kestenbaum, L. "Competition in Communications," (1971) 16 Antitrust Bulletin 769.

The writer reviews two areas: the telephone common carrier system, confronted with equipment suppliers and specialized carriers, and the broadcasting system, confronted with cable TV. He provides a discussion of the Carterfone case, and asserts that the FCC has adopted a doctrinaire approach to the problem. The second half of the article provides a useful background and recent history of cable in America, which, he maintains, points to a slow but gradual recognition by the FCC that cable can have an affirmative value. It is not his intent, he says, to demonstrate the ultimate impact of cable, or suggest definitive conclusions. His point is that FCC has not imposed upon existing stations the burden of justifying restrictive rules applicable to the cable medium which it placed on the Communications Common Carriers. He concludes by arguing that FCC has shown more alacrity for competition in a common carrier context,

perhaps because it has a more basic stability, in contrast to the volatile nature of the broadcasting industry.

Park, R.E. Cable Television and UHF Broadcasting.  
Rand Corporation Paper R-684-MF, (January, 1971).

FCC policy has restricted growth of cable television in the larger markets, largely because of fears that distant signals carried by cable would fragment the audiences of nonnetwork UHF stations and force many of these already financially troubled stations off the air. This report, using a model that calculates the revenues of nonnetwork UHF stations with and without cable, concludes that the FCC's fears are unfounded and that cable will help, not hurt, nonnetwork UHF stations through the 1970's and that the small negative impact of cable in the 1980's will be lost in the static of more decisive developments.

Bair, W.S. Interactive Television: Prospects for Two-Way Services on Cable. Rand Corporation Paper, R-888-17F (November, 1971).

This report describes the technical, economic and regulatory forces which influence the development of two-way interactive communication services on cable systems and the public policy issues that it raises. Broad policy questions are dealt with in the summary introduction and the final section; a more detailed description of potential services, including "subscriber response services," is set out in sections II and III. Near-term economics of this group of services is dealt with in section IV. Finally, the present status of two-way cable, including recent field tests and demonstrations is discussed in section V.

Park, R.E. Prospects for Cable in the 100 Largest Television Markets. Rand Corporation Paper, R-875-17F (October, 1971).

This study attempts to answer the question "will cable television sell in the cities?" It takes into account the regulatory policies recently proposed by the FCC which hopes to get cable moving without jeopardizing over-the-air broadcasting. This report concludes that the rules will meet the Commission's objective of allowing cable systems in the 100 largest TV markets to carry a limited number of distant signals, but further concludes that to keep cable moving the rules by themselves are probably not sufficient.

Readers interested only in broad policy consideration should read sections I and V. Sections II and IV add a general understanding of method used and a more detailed picture of results. Section III is addressed to more technical readers.

Johnson, L.L. Cable Television and Higher Education, Two Contrasting Experiences. Rand Corporation Paper R-828-17F, 1971.

The purpose of this report is to explore briefly the contrasting experiences of two institutions -- Oregon State University and the University of Oregon -- each of which has access to a cable channel supplied by its cable system operations in its local area. This exploration illustrates both the opportunities and the problems of employing channels for higher education and carries implications for public policy in future use of cable technology.

Mitchell, M.R. State Regulation of Cable Television. Rand Corporation Paper, R-783-MF, October, 1971.

Municipalities were the first regulators of cable television and although the FCC has, in recent years, extended its jurisdiction over many aspects of this new industry, the municipalities continue to play a primary role through their franchising procedures. This report examines the experience of two states, Connecticut and Nevada, that have attempted to regulate cable for several years and reviews a current debate in New York about the appropriate role of the state. It provides federal and state officials concerned with the topic with some insight into problems of state regulation of cable television and provides guidelines for formulating well-conceived public policy in future.

Note, "Common carrier CATV: problems and proposals," (1971) 37 Brooklyn Law Review 533.

Danielson, G.E., and Wheeler, R.J., "Status of the cable antenna television industry in California and a proposal for state regulation," (1971) 2 Pacific Law Journal 528.

Note, "Cable television and the first amendment," (1971) 71 Columbia Law Review 1008.

Sloan Commission on Cable Communication: On the Cable: The Television of Abundance. New York: McGraw-Hill, 1971.

This study by experts in diverse fields, commissioned by the Alfred P. Sloan Foundation, touches upon most or all of the major areas of interest in cable television: Some in passing, such as copyright or technology, and some at more length such as regulation and programming. Major chapter headings include entertainment on the cable, news and opinion over the cable, the impact of cable on over-the-air TV, politics on the cable, the community voice - ownership and control of cable systems, and the regulation of cable. The Commission makes recommendations in most of these areas, which are summed up in a final chapter. Among them: that franchises to cable operators be limited to ten years; that franchises specify allocation of channels among various categories of use; that pay TV be laid open to the entrepreneur, that cable systems and broadcasters should compete on equal access terms, subject to certain exclusivity conditions and carriage of local stations, the networks and carriers not be permitted to own cable franchises; that cable franchises be limited in size; that public television and in some cases, newspapers and commercial stations, be allowed to operate cable systems; that modern copyright legislation be passed; and that state agencies have a measure of control over cable. Appendices set out present and possible Cable/Broadband communications technology, prospects and policies for cable, the New York experience with public access cable channels (requirements of research in this field) and extracts of twenty background papers prepared by the Commission staff on different aspects of cable systems.

Price, M. Content on Cable: the Nascent Experience. Sloan Commission Paper, September, 1970.

Immediately after the FCC announced that large cable systems would have to originate programming (a position later softened and questioned by the courts), there was a great deal of interest in the kinds of programming that cable operators might be able to rent. This study outlines the early plans for such origination, which ranged from modest efforts to establish community access boards to ambitious ideas for New Town cable systems as well as some future proposals.

Pemberton, J. Jr. Forseeable Problems in a System of Maximum Access. Sloan Commission Paper, May, 1971.

This study points out that as cable grows, maximum access to channels will become increasingly important. It recommends therefore, that cable operators should be prohibited altogether and common carrier status should be mandated for

able. Further, it recommends that all households in the franchise area should be wired and subscribers and programmers given access to channels. It points out that such a system would increase regulatory problems such as control of defamation, fraud, and obscenity, but would decrease regulatory problems with respect to maintenance of the fairness doctrine, or imposition of equal time or right of reply rules.

Barrett, M. The Future of News and Public Affairs: Broadcasting and Cable TV. Sloan Commission Paper, September, 1971.

A study outlining the ways in which problems that now characterize the broadcasting of news and public affairs might be solved with cable. First, it asserts that cable needs to offer complete freedom of access, allowing anyone to make a program or send a message to whatever audience he can attract. Second, it recommends that all such programming, with the exception of that which goes over government or public access channels, should be paid for by the viewer. Such a system, if it included a two-way capability, might produce a broadband television news service comparable to those of newspapers and magazines.

Crichton, J. Toward an Immodest Experiment in Cable Television: Modestly Produced. Sloan Commission Paper, March, 1971.

This study suggests that problems of ghetto residents as consumers might be alleviated by low-budget programming on the cable. An experiment might involve an over-all "buy" channel that, like a local newspaper, would provide a large variety of information, news, and shopping, and that would carry the cable schedules of the other local channels. On the other channels might be programs similar to conventional women's programs, but aimed at the specific interests and customs of low-income minority groups.

Kahn, E. Commercial Uses of Broadband Communications. Sloan Commission Paper, June, 1971.

This study outlines the immense data-carrying capacity of cable which makes it particularly well-suited to commercial purposes. It enumerates stockmarket and banking transactions, credit card authorization, retailing, meter reading, market research and reservation and information services as a few possibilities among many. The study warns, however, that two-way capability is essential to the entrepreneur seeking to sell goods and services with the cable and so if two-way capability

is not mandated in new cable systems, or does not otherwise become widespread, business will look to competing technologies, especially those offered by the Bell system.

Kestenbaum, L. Common Carrier Access to Cable Communications: Regulatory and Economic Issues. Sloan Commission Paper, August, 1971.

This study defines common carrier status for cable as "a framework by which persons desiring to transmit programs or offer services over cable systems are able to do so...on a fair and non-discriminatory basis, without interference or control by the system operator over the user's programs or services." It predicts that common carrier status would ease the problem of ownership in cable while at the same time encouraging diversity of programming. It points out that cable lends itself well to use as a common carrier because of its channel capacity and its ability to add more channels to meet demand.

Jackson, M. Cable Communications and Social Services. Sloan Commission Paper, 1971.

The purpose of this study is to explore some of the ways in which cable communications may affect society's ability to help individuals who in one way or another, are less fortunate than most. Four areas of import are discussed: first, communicating with those who could use social services - providing information about what is available and how to obtain it; second, providing information directly relevant to a person's interest, need or problem; third, use of cable communications in direct action to solve a problem -- for example arranging a job placement and, finally, the use of communication in management of the service function whether it be public or private. Finally this study examines whether the cable offers a chance to radically increase the proportion of social service delivered by electronic communication, or aided by it, and what benefits and disadvantages we may expect from such innovations.

Chayes, A. The Impact of Satellites on Cable Communication. Sloan Commission Paper, May, 1971.

Chayes asserts in this study that communications satellites will be complementary to, not competitive with, cable systems. He outlines two recent technical developments which he feels are of major importance for the future of satellite communications: random access (making it possible for any earth station in a satellite system to communicate



with any other earth station), and broadcasting capability. He feels that satellites are likely to be the vehicles for large scale interconnection of cable systems in the future, and are also likely to be the vehicles that provide broadcast services for homes that are beyond the reach of either cable or terrestrial broadcast systems. Chayes predicts that much farther in the future satellites could become the preferred vehicle for switched interconnection among cable systems.

McGowan, J.J., Noll, R.G., and Pich, M.J. Prospects and Policies for CATV. Sloan Commission Paper, September, 1971.

Community antenna television systems (CATV) have been heralded simultaneously as a panacea for most of the ills which beset the broadcast medium and as a technical change which will add little to existing television capabilities. This paper sets forth the factual basis for these two views and sets forth predictions and prescriptions for the future of cable. The first section of the study deals with the problem of estimating the size of the cable surplus and the related question of the extent of cable acceptance. The second section examines the consequences for over-the-air broadcasting of the "standard" cable system. The third section examines the possibilities for augmenting the standard cable system with new television services that might pay their own way. The final section gives some general policy conclusions as to who should use the surplus discussed in section one.

Kalba, K.K. Communicable Medicine: Cable Television and Health Services. Sloan Commission paper, September 1971.

This report suggests that cable may offer medicine an important vehicle for the continuing professional education of doctors and other health workers, for the remote delivery of health services, and for public health education. Because cable television is home-oriented, a "health channel" suggests itself, although very little medical programming exists.

Mayer, Martin. Cable and the Arts. Sloan Commission Paper, March 1971.

This study discusses the problems in programming of the arts, which heretofore have led a marginal existence in the mass media, and whether the arts could be resuscitated on cable.



It outlines the problems of obtaining audience and paying bills as primary needs. Further, it proposes pay TV, advertiser-supported programming and free programming as the main options for meeting costs. The study gives a brief discussion of further problems, such as the customary residuals arrangements, which discourage multiple showings of a given program, the demands of TV unions, and the development of new talent.

Cranbery, G. Cable Television and Public Safety. Sloan Commission Paper, May, 1971.

This study outlines experiments in use of cable technology for public safety that are now going forward in a few places such as Liberal, Kansas and Weston, West Virginia. It proposes that in larger cities dedicated channels might be used in the future for training of police and firemen. The cable might also be used for the surveillance of public streets, subway stations and other areas as well as fire and burglar alarms in homes and shops.

Dortleck, H.S., and Lyle J. Access by Local Political Candidates to Cable Television: A Report of an Experiment. Rand Corporation Paper, R-881-17F, November 1971.

One of the major potential applications of broadband cable with its many channels is permitting access of political candidates to the television medium at far lower cost than is possible by over-the-air broadcast. The purpose of this study is to report briefly on an experiment conducted in Waiianai, Hawaii - an economically depressed area but one with a cable system covering most of the community. The experiment involved free channel access to a number of candidates for city council and state legislature, with questionnaires and interviews designed to answer such questions as: (1) the extent to which listeners would show interest in viewing political candidates unaccustomed to using TV and unable to afford such exposures, (2) the extent to which political candidates take advantage of the channel time where it is available, and (3) the number of impediments, aside from cost of channel time, which stand in the way of use of the video medium for political campaigning.

Pool, Ithiel de Sola.. and Alexander, H., Politics in a Wired Nation. Sloan Commission Paper, September 1971.

This study begins with the statement that there is no way to state what the effects of cable television will be on politics. Rather it attempts to outline what its effects on politics could be at what cost and by what means. It considers four modes of cable and examines the potential political effects of each system. The first model is commercial cable with little public control of the use of facilities or time. This would lead to use of only a few channels, with little political or public service material. The second model involves legislative control of cable for the purpose of protecting existing interests so that there would be only gradual changes in present broadcasting policies. A contract carrier system is the third model of cable, which would allow maximum immediate use of cable's capabilities. The fourth model is a mixture of the first three and is similar to the one proposed to the U.S. Congress by the FCC in 1971. Finally this study considers how a developed cable system might handle political origination of various kinds, both during election campaigns and in ordinary public affairs programming.

Roud, R. Cable Television and the Arts. Sloan Commission Paper, March 1971.

This study discusses five types of programs in the arts which are possible on cable, including artistic performances transmitted from major theatres and centres; regional cable and videotape producers which might help to develop an art form peculiar to cable; instructional films for students of the arts on artistic and craft techniques; educational programming for a general audience, particularly in non-performing arts; and information programs on community arts events.

Urban Cable Systems. Washington: The Mitre Corporation, November 1971.

This report analyzes the possibilities of modern cable systems, their operational, technical and economic feasibility, and presents a plan for Washington, D.C. that reflects the potential uses of cable. The system design is based on an analysis of the demographic, social, municipal and commercial characteristics of the District and the types

of programming and services that could be provided to meet the needs of the District. A review of hardware, software and programming developments, a market survey, and an extensive financial and economic viability analysis were part of the system design process.

Note, "Cable television: a regulatory dilemma," (1971) 13 Boston College Industrial & Commercial Law Review 326.

Hochberg, P.R., "Step into the regulatory vacuum: cable television in the District of Columbia," (1971) 21 Catholic University Law Review 63.

Mitchell, B. and Comanor, W., "Cable television and the impact of regulation," (1971) 2 Bell Journal of Economics and Management Science 154.

Johnson, L.L. and others. Cable Communications in the Dayton Miami Valley: Basic Report. Rand Corporation Study, R-943-KFIF, January, 1972.

This extensive report is a compilation of ten papers which are grouped into three areas. The first three deal with technology and economics, the next five with new and expanded services to satisfy changing local community needs, and the final two with issues of franchising and ownership. Paper One, "Systems Designs for the Dayton Metropolitan Area", considers alternative ways of providing cable TV coverage to the 13 incorporated cities plus incorporated areas that together contain nearly 600,000 people. Paper Two, "Financial Projections for the Dayton Metropolitan Area", suggests that a metropolitan-wide system would be economically viable even if it were solely dependant on monthly subscriber revenues and a modest amount of advertising revenue. Paper Three "Coverage of the Five-County Miami Valley Region" considers a yet larger system in which a number of small towns outside the metropolitan area are connected to the metropolitan system through a network of microwave relays. Paper Four, "Cable Systems and the Social Geography of Dayton" discusses a number of sociological characteristics of the city of Dayton. Paper Five, "Cable Television and Public Interest Progress" discusses possible programming that would serve public needs. Paper Six, "Television and the Dayton Area Resident" is the result of an extensive survey. Paper Seven, "The Potential Uses of Cable in Education" is a

detached account of the ways in which cable can be used at secondary and elementary levels. Paper Eight, "The Application of Cable to Continuing Medical Education", Paper Nine, "Issues of Franchising", focuses on specific recommendations and guidance at the Council of Governments or the franchising process. Finally, Paper Ten, "Ownership Alternatives", treats three possibilities for the Dayton Metropolitan area --- (1) private, (2) municipal or governmental or (3) nonprofit community ownership.

Johnson, L.L. Cable Communications In the Dayton Miami Valley: Summary Report. Rand Corporation Report, R-942 KF/FF, January, 1972.

This report summarizes and supplements the detailed discussions contained in the companion Basic Report. It is concerned mainly with the economics and technology of cable, the range of new services that might be provided in the foreseeable future and questions of franchising and ownership of cable systems. On the basis of ten-year financial projections, it concludes that an interconnected network of six cable systems covering thirteen incorporated cities on the Dayton metropolitan area has good prospects for being economically viable. The report discusses a few of the many possibilities for using cable: local program origination to meet community needs, adult and higher education; applications in elementary and secondary schools; facsimile mail, information storage and retrieval; interconnected municipal alarm systems and traffic control; and special pay channels for movies, sports and cultural events not otherwise available on TV.

Maddox, B. Beyond Babel: New Directions in Communications. New York: Simon and Schuster, 1972.

Written for the non-expert, this book explains the technology and regulation of satellites, cable television and telephones.

Phillips, Mary Alice Mayer. CATV: A History of Community Antenna Television. Evanston, Illinois: Northwestern University Press, 1972.

NCTA, The Selling of Cable Television 1972. Transcript of NCTA Marketing Workshop. Washington: National Cable Television Association, 1972.

Molenda, M. "Cable TV: Challenge to Education and Law," (1972) 1 Journal of Law & Education 151.

Shafer, Jon. A Cable TV Guide for Educators. St. Paul, Minnesota: Education Research and Development Council of the Twin Cities Metropolitan Area, 1972.

City of Detroit. Cable Television in Detroit: A Study in Urban Communications. Detroit: City of Clerk's Office, 1972.

Barrow, R.L., "New CATV rules: proceed on delayed yellow," (1972) 25 Vanderbilt Law Review 681.

Burch, Dean, "FCC Letter of Intent re Cable TV Regulation," (1972) 3 Performing Arts Review 97.

Comanor, William S. and Mitchell, Bridger M., "The Costs of Planning: The FCC and Cable Television," (1972) 15 Journal of Law and Economics 177.

Note, "A regulatory programme for cable television in the United States," (1972) 23 EBU Review 53.(No.4)

Note, "Regulation of cable television: the Federal Communications Commission's 1972 rules," (1972) University of Illinois Law Forum 608.

Keshishoglou, J.E., "To cable or not to cable? A summary of the development and potential of cable television," (1972) 23 EBU Review 32 (No.4)

Botein, M., "Access to cable television," (1972) 57 Cornell Law Review 419.

Price, Monroe, and Wicklein, John. Cable Television: A Guide for Citizen Action. Philadelphia: Pilgrim Press, 1972.

Tate, Charles (ed.) Cable Television in the Cities: Community Control, Public Access and Minority Ownership. Washington, D.C.: The Urban Institute, 1972.

Walsh, D.G., "CATV: let the cables grow," (1972) 55 Marquette Law Review 205.

Note, "Regulation of CATV," (1972) Urban Law Annual 227.

Kenny, J.V., "Closed circuit television: what place in our regulatory framework?" (1972) 31 Federal Bar Journal 167.

Park, Rolla Edward., "Cable Television, UHF Broadcasting, and FCC Regulatory Policy," (1972) 15 Journal of Law and Economics 207.

Posner, Richard A., "The appropriate scope of regulation in the cable television industry," (1972) 3 Bell Journal of Economics and Management Science 98.

Seiden, Martin H. Cable Television U.S.A.: An Analysis of Government Policy. New York: Praeger Publishers, 1972.

An analysis and detailed description of how the Federal Communications Commission has altered the concept of governmental regulation by involving itself unnecessarily in the innermost workings of a minor part of the American communications industry - cable television. The author claims this involvement has sapped and diverted the limited energies of the FCC, to the detriment of other communications services such as telephone and broadcast.

Kalba, Kas and others, "The Cable Fable," (1972) 2 Yale Review of Law and Social Action 195.

This issue of the Yale Review of Law and Social Action was entirely devoted to articles on cable television, particularly focusing on replies to the Sloan Commission Report, On the Cable. Articles include Theodore S. Ledbetter, Jr. and Susan C. Green, "An Overview of Pay Cable Television," Nicholas Johnson and Gary G. Gerlach, "The Coming Fight for Cable Access," Thomas Freebairn, "Public Access in New York City: An Interview with Theadora Sklover," David Othmer, "Portable, Half-inch Production: A Note on Costs," Michael Molenda, "CATV and Access to Knowledge," Richard C. Leone and Robert S. Powell, Jr., "CATV Franchising in New Jersey," Ralph Lee Smith, "Ownership Policy and the Cable Industry," Francille Rusan, "What You See Is What To Get: Cable Television and Community Control," Jerrold Oppenheim, "The Coaxial Wiretap: Privacy and the Cable," and Robert K. Yin, "Cable on the Public Mind."

Rivkin, Steven R. Cable Television: A Guide to Federal Regulations. Rand Corporation Report, R-1138-NSF, March 1973.

A detailed and substantial report providing a complete analysis of the federal laws and regulations applicable to cable television, as issued by the FCC in 1972 and amended later that year. The text of the relevant FCC Reports and Orders is also set out.

Smith, R.L., "CATV: FCC rules and the public interest," in Communications Technology and Social Policy (edited by George Gerbner). New York: John Wiley, 1973.

Gerlach, G.G. "Toward the Wired Society: Prospects, Problems, and Proposals for a National Policy on Cable Technology," (1973) 25 Maine Law Review 193.

Levin, H.J., "Television's second chance: a retrospective look at the Sloan Cable Commission," (1973) 4 Bell Journal of Economics and Management Science 343.

Price, M.E., "Cable television in Alaska: the need for state initiative," (1973) 2 UCLA-Alaska Law Review 135.

Wiley, R.E., "Procedural accommodation of federal and state regulatory interests in cable television," (1973) 25 Administrative Law Review 213.

Note, "Cable moguls and perplexed locals: a model application form for a CATV license," (1973) 10 Harvard Journal on Legislation 486.

LeDuc, Don R. Cable Television and the FCC: A Crisis in Media Control. Philadelphia: Temple University Press, 1973.

Lapierre, D.B., "Cable Television and the Promise of Programming Diversity," (1973) 42 Fordham Law Review 25.

Pool, Ithiel de Sola (ed.) Talking Back: Citizen Feedback and Cable Technology. Cambridge, Mass-achusetts: The MIT Press, 1973.

A collection of papers addressed to political scientists, sociologists, educators, journalists, policy-makers and civic-minded members of the general public who want to know what the technical possibilities of two-way cable are, how close they are upon us, and what their social impact may be.

Note, "Toward community ownership of cable television," (1974) 83 Yale Law Journal 1708.

Woodward Jr., Charles C. Cable Television: Acquisition and Operation of CATV Systems. New York: McGraw-Hill, 1974.

Note, "Toward Community Ownership of Cable T.V.," (1974) 83 Yale Law Journal 1708.



Cabinet Committee on Cable Communications. Cable: Report to the President. Washington: U.S. Government Printing Office, 1974.

Policy recommendations concerning industry structure, programming, regulatory framework, and consumer interests.

McKenna, Joan. Cable Television and the Future. Berkeley, California: Quantum Communications, 1974.

Crandall, R.W. and Fray, L.L., "Reexamination of the prophecy of doom for cable television," (1974) 5 Bell Journal of Economics and Management Science 264.

LeDuc, Don R., "Cable franchising in the U.S.: a pattern in emerging problems," (1974) 25 EBU Review 47. (No.2)

Lazar, M.J. The development of cable antenna television systems in the city of New York, 1960-1970. (Ph.D. thesis, New York University, 1974).

Agostino, D.E. A comparison of television channel use between cable subscribers and broadcast viewers in selected markets. (Ph.D. thesis, Ohio University, 1974).

Besen, S.M. "Economics of the Cable Television Consensus," (1974) 17 Journal of Law & Economics 39.

Holingren, W.A. The Impact of Cable Television on a Suburban Community. (Ph.D. thesis, University of Pittsburgh, 1974).

Park, Rolla E., "The role of analysis in the formation of cable television regulatory policy," (1974) 5 Policy Sciences 71.

Note, "Proposed Cable Communications Act of 1975: A Recommendation for Comprehensive Regulation," (1975) Duke Law Journal 93.

Wallach, M.I. "Whose Intent? A Study of Administrative Preemption: State Regulation of Cable Television," (1975) 25 Case Western Reserve Law Review 258.

Note, "Cable TV and Content Regulation: the F.C.C., the First Amendment and the electronic newspaper," (1976) 51 New York University of Law Review 133.

Note, "National Association of Regulation Utility Commissioners v. F.C.C., D.C.Circuit February 10, 1976 - (F.C.C. lacks jurisdiction over two-way non-video intrastate communication of cable T.V. leased access channels)," (1976) 89 Harvard Law Review 1257.

### 7.3 PAY TELEVISION AND SUBSCRIPTION TELEVISION

The issue of pay television and its development in Canada has been extensively debated since 1973 but there is still a surprising lack of Canadian legal or economic studies in the published literature. The best source for researchers in this area consists of the transcripts of the CRTC public hearings on pay television, the extensive briefs filed with the Commission, and the decisions and studies published by the Commission. The first major hearing on pay television was held by the Commission in June 1975 following the publication of a Position Paper on Pay Television on February 17, 1975. On December 16, 1975, the Commission released a policy statement which stated that the introduction of pay television was premature. In June 1976, however, the CRTC announced that it would receive submissions concerning the introduction of pay television and its organization. These were eventually refined to a public hearing in June 1977 and the Commission released its conclusions and studies in 1978. Although the Commission again asserted that the introduction of pay television was premature, pressures have continued to develop and the issue has become even more topical with the recent federal-provincial constitutional discussions on cable television.

The sources listed below focus on pay television and subscription television in the United States and provide a useful introduction to the development of regulatory policy south of the border.

Horton, Robert W. To Pay or Not to Pay: A Report on Subscription Television. Santa Barbara, California: Center for the Study of Democratic Institutions, 1960.

U.S. Congress, House, Committee on Interstate and Foreign Commerce. Subscription Television - 1969. Washington: Government Printing Office, 1969.

Note, "Subscription television, the FCC, and the courts," (1970) 15 St. Louis University Law Journal 283.

Brown, N.K., "Subscription television controversy: a continuing symptom of Federal communication commission ills," (1970-71) 24 Federal Communications Bar Journal 259.

Note, "Regulation of Pay-Cable and Closed Circuit Movies: No Room in the Wasteland," (1973) 40 University of Chicago Law Review 600.

Rappaport, Richard W. "The Emergence of Subscription Cable Television and its Role in Communications," (1976) 29 Federal Communications Bar Journal 301.

## CHAPTER 8

### TELECOMMUNICATIONS CARRIERS AND COMPUTER/COMMUNICATIONS

This chapter focuses on the literature relating to the regulation of the telecommunications carriers in Canada, and includes a section on the regulatory issues presented by the interface of data processing and data transmission. Telephone and telegraph companies have been regulated at the federal level since 1906, under the provisions of the Railway Act. Prior to April 1, 1976, the regulation of the federally incorporated telecommunications carriers had been carried out by the Canadian Transport Commission, as a supplement to its jurisdiction over railways and transport. With the proclamation of the Canadian Radio-television and Telecommunications Commission Act in April 1, 1976, however, the jurisdiction to regulate the telecommunications carriers was transferred to the Canadian Radio-television and Telecommunications Commission.

The various agencies which have regulated the telecommunications carriers at the federal level are indicated in the following table:

July 13, 1906-June 30, 1938.	Board of Railway Commissioners for Canada.
July 1, 1938-September 18, 1967..	The Board of Transport Commissioners for Canada.
September 19, 1967-February 28, 1972.	Canadian Transport Commission, Railway Transport Committee.
February 29, 1972-March 31, 1976.	Canadian Transport Commission, Telecommunication Committee.
April 1, 1976-	Canadian Radio-television and Telecommunications Commission.

For a note on the availability of decisions and orders of these regulatory agencies and their provincial counterparts, see Part 3.5 above.

Since the CRTC inherited jurisdiction in 1976, the issue of telecommunications has become considerably more controversial in Canada. In a sense, Canadian regulation has in the short span of three years been catching up with problems that regulators in the United States have been grappling with for two decades. Included among these problems are customer-owned attachments to the telephone system, carrier entry into data processing, system interconnection, carrier purchasing and procurement policy, carrier involvement in related activities such as directory publication, conflicts between the cable industry and the carriers, and the tariff restrictions on line-sharing and resale.

A number of these issues directly relate to the question of competition in the telecommunications industry, and are affected by revisions in 1976 to the Combines Investigation Act. For a review of the literature on competition policy and a note on the inquiries which have been commenced under the Combines Investigation Act, see Chapter 10 below.

The present chapter includes both U.S. and Canadian material and is divided into four parts:

- 8.1 History of Telecommunications in Canada
- 8.2 Principles of Public Utility Regulation
- 8.3 Issues in the Regulation of Telecommunications Carriers
- 8.4 Issues in the Regulation of Computer/Communications

8.1 HISTORY OF TELECOMMUNICATIONS  
IN CANADA

This part sets out a number of books and studies relating to the history of the telecommunications carriers in Canada. Most of the studies are anecdotal in nature and focus on incidents of popular interest. However, they are frequently useful in placing regulatory developments in a historical context.

Britnell, George Edwin. Public Ownership of Telephones in the Prairie Provinces. (M.A. Thesis, University of Toronto, 1934).

Callin, M.E. "The Development of Telecommunications in Canada," (1967) Canada Yearbook 862.

Cashman, Tony. Singing Wires: The Telephone in Alberta. Edmonton: Alberta Government Telephones Commission, 1972

Collins, Robert. A Voice from Afar: The History of Telecommunications in Canada. Toronto: McGraw-Hill Ryerson Limited, 1977.

Fetherstonhaugh, R.C. Charles Fleetford Sise, 1834-1918. Montreal, 1944.

Grant, Peter S. Telephone Operation and Development in Canada, 1921-1971. Toronto: Faculty of Law, University of Toronto, 1974.

This collection of papers, taken from annual proceedings of the Telephone Association of Canada, deals with a range of matters affecting the development of the Canadian telephone system, including development of the TCTS, rural telephone service, extended area service, accounting and business practices, and development of new services.

Grindlay, Thomas, A History of the Independent Telephone Industry in Ontario. Toronto, Ontario Telephone Service Commission, 1976.

Patten, William, Pioneering the Telephone in Canada. Montreal, 1944.

Spafford, William Dufferin Stewart. Telephone Service in Saskatchewan; A Study in Public Policy. (M.A. Thesis, University of Saskatchewan, 1961).

## 8.2 PRINCIPLES OF PUBLIC UTILITY REGULATION

This part deals with texts and articles on the general questions presented by the regulation of public utilities. These include such matters as the characteristics of regulated industries, their legal status, purposes of regulation, rates and earnings, including the rate level and the rate structure, quality of service, and corporate finance and inter-corporate relations, including control of capitalization and the capital structure.

Virtually all of the standard texts in the area of public utility regulation are American, and deal not only with telecommunications carrier regulation but also with transport, gas, electricity, and other utilities. The sources set out below are divided between texts and articles. The texts are set out in alphabetical order by author, and the articles are set out in chronological order.

### Texts

Barker, Harry. Public Utility Rates. New York: McGraw-Hill, 1917.

Barnes, J.R. The Economics of Public Utility Regulation. New York: 1947.

Bauer, John. Public Utility Valuation for Purposes of Rate Control. New York: Macmillan, 1934.

Bonbright, James C., Principles of Public Utility Rates. New York: Columbia University Press, 1961.

Clemens, Eli Winston. Economics and Public Utilities. New York: Appleton-Century Crofts Inc., 1950.

Farris, M.T. and R.J. Sampson. Public Utilities Regulation, Management and Ownership. Boston, Houghton, Mifflin, 1973.

Foster, Jay Rhoads and Rodey, Bernard S. Public Utility Accounting. New York: Prentice-Hall, 1951.

Garfield, Paul J. and Lovejoy, Wallace P. Public Utility Economics. New York: Prentice-Hall, 1964.

Gordon, Myron J. Alternative models of the cost of capital for a public utility. Toronto: University of Toronto, Faculty of Management Studies, 1972.



Jones, William K. Cases and Materials on Regulated Industries. Brooklyn: Foundation Press, 1967. [Also see Supplement of Statutes, 1967].

Kahn, A.E. The Economics of Regulation - Principles and Institutions. Volumes 1 and 2. New York: John Wiley & Sons Inc., 1970.

An excellent treatise by a well-known U.S. economist and regulator.

Nichols, Ellsworth. Ruling Principles of Utility Regulation. Washington: Public Utilities Reports Inc., 1964.

Phillips, C.F. The Economics of Regulation. Homewood, Illinois: Richard D. Irwin, 1969.

This book is a basic text in the field. It covers economic and administrative practices, regulatory theory and deals with specific industries: transport, gas, electricity and communications.

Priest, A.J.G. Principles of Public Utility Regulation - Theory and Application, Volume 1 and 2. Charlottesville, Virginia: The Miche Company, Law Publishing, 1969.

A good general purpose textbook on the conventional problem areas of rate regulation, with some comments on the Bell system.

Public Utility Financial Management: An Analysis of Significant Factors Affecting Public Utilities. Kingston: Queen's University School of Business, 1969.

Shepherd, W.G. and Gies, T.G. Utility Regulation: New Directions in Theory and Policy. New York: Random House, 1966.

This seminal collection of papers covers both economic and regulatory issues in the public utilities field. Of particular interest are the following: Utility Growth and Profits Under Regulation; Pricing and Resource Allocation: The Public Utility Sector; The Need for New Concepts in Public Utility Regulation; Joint Cost and Price Discrimination: The Case of Communications Satellites; Telephone Regulation in Michigan: Emphasis and Misemphasis in Regulatory Policy; The Effectiveness of Economic Regulation - A Legal View.

Trebing, Harry M. (ed.). Performance Under Regulation. M.S.U. Public Utilities Studies, Institute of Public Utilities, Division of Research, Michigan State University, 1965.

A collection of original papers explaining a wide range of factors affecting performance in the public utilities industries. Particular attention is given to the problems of measurement and evaluation: the interrelationships between the rate of return, price structure, and performance; and the influence of the regulatory process and market structure on performance.

Trebing, Harry M. Essays on Public Utility Pricing and Regulation. M.S.U. Public Utilities Studies, Institute of Public Utilities, Division of Research, Michigan State University, 1971.

This collection of original papers seeks to treat public utility pricing from a variety of perspectives in order to present both a broad overview of relevant variables as well as an in-depth analysis of each topic. The subjects considered include efficient pricing, welfare theory, applied pricing problems, competition and technological change, externalities, regulatory practices, and adequacy of regulation.

Trebing, H.M. and Howard, R.H. Rate of Return Under Regulation: New Directions and Perspectives. Michigan State University, Institute of Public Utilities, East Lansing: Michigan State University, 1969.

This volume contains a collection of papers and comments including the following which are of particular interest: Reassessment of Economic Standards for the Rate of Return under Regulation: Rate of Return on Equity Capital under Regulation: and Information Requirements for Regulatory Decisions.

Turner, George E. Trends and Topics in Utility Regulation. Washington: Public Utilities Reports Inc., 1969.

A lengthy volume of selected annotations of significant trends in public utility regulation, appearing regularly in Public Utilities Fortnightly. The period covered is 1955 to early 1969.

Webber, A.C. Principles of Public Utility Regulation. Washington, D.C.: Public Utilities Reports Inc., 1941.

Welch F.X. Cases and Text on Public Utility Regulation. Washington, D.C.: Public Utilities Reports, Inc., 1968.

Taking examples from the full range of public utilities, the author canvasses the important issues public utility status, reasonableness of rates of process of rate fixing and regulation by commissions.

Wilcox, Clair. Public Policies Toward Business. 4th Edition, Homewood, Illinois: Richard D. Irwin, 1971.

#### Articles

Sampson, R., "Federal-state conflicts and utility regulation," (1961) 68 Public Utilities Fortnightly 729.

Averch, Harvey and Johnson, L.L. "Behaviour of the Firm under Regulatory Constraint," (1962) 52 American Economic Review 1052.

A seminal article postulating a tendency by utilities to over-capitalize under rate of return regulation. For a discussion, see Kahn, A.E., The Economics of Regulation, vol.2, at pp. 49-59 and 106-107 (noted above).

Cramton, R.C. "The effectiveness of economic regulation: a legal view," (1964) 54 American Economic Review 182.

Jackson, A.B. "The Determination of the Fair Return for Public Utilities," (1964) 7 Canadian Public Administration 343.

Jackson presents an overview of problems associated with public utility rate regulation, and is chiefly concerned with the system employed to determine a "fair and reasonable" rate of return.

Lerner, A.P., "Conflicting principles of public utility price regulation," (1964) 7 Journal of Law & Economics 61.

Priest, A.J.C., "Some bases of public utility regulation," (1964) 36 Mississippi Law Journal 18.

Webb, C.A., "Changing concepts and new ideas in ratemaking," (1964) 31 I.C.C. Practitioners' Journal 1102.

Leventhal, H., "Vitality of the comparable earnings standard for regulation of utilities in a growth economy," (1965) 74 Yale Law Journal 989.

Price, Jr. J.H., Walker, R., Spacek, L., "Accounting uniformity in the regulated industries," (1965) 30 Law & Contemporary Problems 824.

Tierney, P.J., "Commission and innovations in rate-making," (1965) 32 I.C.C. Practitioners' Journal 776.

Dixon, J.C., "Public utilities - homely stepchild," (1966) 8 Air Force JAG Law Review 27.

Nelson, D.C., "Development of economic regulation: historical roots and economic bases," (1966) 42 North Dakota Law Review 331.

Saunders, W.B., Rose, W., Carpenter, W.E., and Rahbany, K.P., "Application of costs to new ideas in rate-making: a panel discussion," (1966) 33 I.C.C. Practitioners' Journal 926.

Kosh, D.A., "Determination of the fair rate of return in principle and practice," (1966) 12 Practical Lawyer 9.

Priest, A.J.G., Cramton, R.C., and others, "Regulated industries symposium," (1966) 51 Iowa Law Review 263.

Oldham, J.C., "Rate base determination and profits to affiliates," (1967) 39 University of Colorado Law Review 509.

Somers, "The 'end-result' approach to public utility regulation," (1967) 16 Buffalo Law Review 689.

The author criticizes the traditional rate-making procedures of regulatory agencies, i.e. determining a rate base and a rate of return on that base. He proposes having the prevailing market cost of capital determine the "end result" (that is, the amount of operating capital needed by the utility and the cost of keeping or attracting it), and thus by-passing the whole procedure of computing a rate base and a rate of return, given the fact that the latter is always adjusted anyway to achieve the desired end result. This end-result is actually the desired starting point for utility price-making, the information which the agency uses to set rates which will produce funds sufficient to pay that price.

Note, "Earnings-price approach to fair rate of return in regulated industries," (1968) 20 Stanford Law Review 287.

Demsetz, H., "Why regulate utilities?" (1968) 11 Journal of Law & Economics 55.

Nelson, Boyd L., "Econometrics and Applied Economic Analysis in Regulatory Decisions," (1969) 34 Law and Contemporary Problems 330.

This article is a nontechnical survey of the application of econometrics to the analysis of regulatory decision-making. Econometrics consists of the application of the principles of statistical inference to economic quantities. The author advocates the use of econometric models in the communications regulatory process, particularly in the demand and cost fields to assist in the development of rate levels and rate structure.

Note, "Rate-making under conditions of regulated intermodal competition: the status of incremental cost pricing," (1969) 55 Virginia Law Review 691.

Bernstein, "Utility Regulation: The Little Locomotive that Couldn't," (1970, Washington University Law Quarterly 223.

The author outlines the historical basis of rate base regulation particularly of railways, indicating that it played an important role in the growth and development of the American economy. In recent decades, however, although the nature of regulated industries, and of the economy in general, has changed, the nature of utility regulation has not. What is needed, Bernstein advocates, is a "new formulation of the role of regulation in this society." In particular, some alternative to rate base regulation must be found, for in several respects, it must be considered a "total disaster."

DeGrandpre, A.J., "Fair Return for Utilities: Concept of Reality?" (1970) 16 McGill Law Review 19.

The article provides for the newcomer to the field a basic explanation of the terms "rate base" and "rate of return". In outlining the major Canadian and American decisions which have elaborated the concept of "reasonable rate of return," the author argues that the rate of return should not be regulated stringently and unflexibly, but that a "zone of reasonableness" concept should be followed in setting a fair and just rate of return. If anything, he maintains, that zone should be wider than it now is.

Parker, A.L., "Regulation of Public Utilities," (1970) 10 Natural Resources 827.

Although directed specifically towards electrical utilities this article provides a useful discussion of the various means of determining reasonable public utility rates. The author's major argument is that procedures are presently tied to the indefinite and imprecise "fair value" rate base and rate of return. These factors are basically non-factual, and therefore extremely time-consuming to determine. Because of the time-consuming nature of this aspect of regulation, then, utility commissions have been able to take little effective action in related areas of responsibility such as controlling quality of service or operating expenses.

Poth, Jr. H.A., "Rate Regulation in an Inflationary Economy," (1970) 85 Public Utilities Fortnightly 17.

Klevatorik, A. "The "optional" fair rate of return," (1971) 21 The Bell Journal of Economics and Management Science 122.

Downs, C.E., "The Use of the Future Test Year in Utility Rate-Making," (1972) 52 Boston University of Law Review 791.

This article provides a good description of traditional rate-making procedure, with definitions of its various components: i.e. rate base, rate of return and test year. The author criticizes the common use of the historical test year to determine the appropriate rate base, as being unresponsive to the realities of inflation, and offers an alternative: the future test year. He feels that the use of this "prospective" method is the only means by which regulatory agencies can keep an eye to the future and thus retain some semblance of realism for the rate-making process.

Jordan, William A. "Producer Protection, Prior Market Structure and the Effects of Government Regulation," (1972), 15 The Journal of Law and Economics 151.

Manne, H.G. "Social Responsibility of regulated utilities," (1972) Wisconsin Law Review 995.

Currie, K.A. Behaviour of the regulated monopolist under demand uncertainty. (Ph.D. thesis, University of Iowa, 1973).

Haydock, R.S. "Public utilities and state action: the beginning of constitutional restraints," (1973) 49 Denver Law Journal 413.

Cooke, George V. "The Need for reform in regulatory laws and procedures," (1973) 92 Public Utilities Fortnightly 31.

Campbell, Thomas G. "Should Regulatory Commissions be abolished, modified, retained?" (1973) 92 Public Utilities Fortnightly 17.

Lowny, Edward D. "Justification for regulation; the case for natural monopoly," (1973) 92 Public Utilities Fortnightly 17.

Welch, Francis X. "Regulated Competition: FCC's halfway house," (1973) 92 Public Utilities Fortnightly 39.



Holthausen, D.M. The firm under regulation: an analysis of uncertainty, incentives and regulatory lag. (Ph.D. thesis, Northwestern University, 1974).

Schmalensee, R., "Estimating the costs and benefits of utility regulation," (1974) 14 Quarterly Review of Economics and Business 51.

Trebing, Harry M., "Realism and relevance in public utility regulation," (1974) 8 Journal of Economic Issues 209.

Jones, R.D., Cudahy, Richard D. and Honda, Edwin H. "Crisis in rate regulation - the disappearing return on equity," (1974) Public Utilities Fortnightly.

Raynor, Richard A. "Competition within a regulated environment," (1974) 94 Public Utilities Fortnightly 24.

Jones, W.K. "Judicial Determination of Public Utility Rates: A Critique," (1974) 54 Boston University Law Review 873.

Joskow, P.L. "Inflation and Environmental Concern: Structural Change in the Process of Public Utility Price Regulation," (1974) 17 Journal of Law and Economics 291.

Samuels, W.J. "Public Utility Ratemaking and Competitive Structure -- Carterfone in Jeopardy," (1974) 20 Wayne Law Review 819.

Gibbons, Gail L. "Some Legal Aspects of the future test period in utility rate regulation," (1974) 16 Arizona Law Review 947.

Note, "Public Utilities comprehensive adjustment clause has a sufficient nexus to rate proceedings to be statutorily permissible as an interim rate increase," (1975) 6 Seton Hall Law Review 551.

Note, "Public Utilities; Fair Rates for Fair Service," (1975) 53 North Carolina Law Review 1083.

Barnett, C. "Regulation - The Winds of Change," (1975) 42 I.C.C. Practitioner's Journal 560.

Doern, G.B. and others, "Structure and behaviour of Canadian regulatory boards and commissions: multi-disciplinary perspectives," (1975) 18 Canadian Public Administration 189.

Note, "Public Utilities: The allowance of advertising expenditures for rate-making purposes - Is this trip really necessary?" (1976) 29 Oklahoma Law Review 202.

8.3 ISSUES IN THE REGULATION OF  
TELECOMMUNICATIONS CARRIERS

This part deals with particular issues raised in the regulation of telecommunications carriers, other than the question of computer/communications which is dealt with in part 8.4 below. Both the CRTC proceedings into Procedures and Practices in Telecommunications Regulation and the Cost Inquiry, still in progress, have involved the reexamination of fundamental aspects of rate regulation. These proceedings and other recent developments such as the Saudi Arabia appeal have made it clear that the issues involved in regulation have just begun to crystallize and that a great deal of future discussion will be required to arrive at appropriate conclusions.

The books, articles and studies noted below are broken into Canadian and American sources, and are listed in chronological order.

Canadian Books, Articles and Studies

O'Brien, John Wilfrid. Public and Privately-owned Telephone Systems, An Economic Comparison. (Ph.D. Thesis, McGill University, 1962).

Wright, Arthur Robert. An Examination of the Role of the Board of Transport Commissioners for Canada as a Regulatory Tribunal. (M.A. Thesis, Carleton University, 1962).

Marshall, Arthur Richard. The Public Regulation of the Bell Telephone Company of Canada. (M.A. Thesis, McGill University, 1965).

Riddell, John Barry. Toward an Understanding of the Friction of Distance: An Analysis of Long Distance Telephone Traffic in Southwestern Ontario. (M.A. Thesis, University of Toronto, 1966).

Lindsay, McKelvey & Co. Bell Canada: Changed Financing Methods and a More Realistic Approach to Rate Regulation. Toronto: 1970.

Canada, Department of Communications. Telecommission Study 1(b), "History of Regulation and Current Regulatory Setting". Ottawa: Information Canada, 1971.

This brief report, prepared by the Trans-Canada Telephone System, sketches the historical development of telephone regulation as it affects each company in TCTS. It alludes to some of the better known organizational and regulatory aspects of the telephone industry and then adds three appendices. The first provides a short history

of each member company written by the company itself. The second is a bibliography of relevant federal and provincial legislation. It is noted particularly by this study that the regulatory policy adopted by various jurisdictions differs widely - ranging from a specific list of statutory criteria in Manitoba to no predetermined criteria whatever in Saskatchewan. The third section is a submission by the government of Ontario describing the independent telephone system in Ontario and the Ontario Telephone Service Commission.

Canada, Department of Communications. Telecommission Study 1(d), "The Relationship between Common Carriers, Broadcasters and Cable TV". Ottawa: Information Canada, 1971.

This paper describes the basic features of the Canadian telecommunications industry as seen from the divergent points of view of the broadcasters, common carriers and cable operators on such matters as satellite communication, the wired-city, ETV, and computer/communication systems. There is a brief description as well of the existing regulatory legislation, federal and provincial. The study then considers the positions of the above parties on specific questions: ownership of technical facilities, participation of cable systems in non-broadcasting activities such as data transmission, role of the common carriers in broadcasting, effect of provincial legislation on rate setting, regulation of educational services, carrier's rates to broadcasters, interconnection of customer-owned equipment to carrier systems, and competition for common carriers.

Canada, Department of Communications. Telecommission Study 1(f), "Relevance of Regulatory Experiences in Countries other than Canada". Ottawa: Information Canada, 1971.

This study provides on the basis of information gathered through the Department of External Affairs, a brief summary of the telecommunications regulatory environment in 12 other countries: Australia, Brazil, France, India, Japan, Kenya, Mexico, Spain, Sweden, Switzerland, United Kingdom and Germany. (The U.S. is dealt with in Report 1(e), noted under the U.S. studies listed further below). Given the source of the data, each summary is no more than an encyclopaedic introduction into some of the more obvious characteristics of telecommunications in these countries. The relevance of this information is summarized in Chapter 2. The chapter

inferentially makes a number of important points. First, because of the superficial nature of the information it would be dangerous to draw any conclusions, let alone conclusions that are of relevance to Canada. Secondly, because there is no attempt to delineate those characteristics of other countries that are peculiar to that country, one may question whether "identifiable trends" are of anything more than passing interest to Canadians. However, some trends may be of interest. For example most telecommunications are regulated under central government jurisdiction. Also, there is a distinct lack of private ownership or competition in this area. Each country is examined individually in the report under the general headings: provision of telecommunication services (who provides what to whom), regulatory approach, special considerations, contemporary issues and a short bibliography. Significant variations between countries in the information available and in the sophistication of the services offered has meant that this format is not always strictly adhered to. Each discussion of a country's facilities is prefaced by a short statistical summary illustrating the extent of the services within the country.

Canada, Department of Communications. Telecommission Study 2(a), "The Canadian Telecommunications Industry". Ottawa: Information Canada, 1971.

This report, by Walter D. Gainer, provides an introductory study of the economic issues and problems associated with regulation of the Canadian telecommunication industry. It is divided into four chapters the first of which outlines the output and market characteristics of the Canadian industry, noting particularly the diversity of ownership and the highly integrated nature of the industry. The second chapter attempts to identify the nature and components of the public interest recommending: a standard of service, price and quality; the need for equal and reasonable access; and the need for a single, workable, public complaint procedure for regulatory bodies. Mr. Gainer's third chapter outlines his thoughts on regulation suggesting that its scope must be widened to cover broad policy issues and that appropriate guidelines be established to permit long-term planning. The final chapter is a distilled summary of the first three.

Canada, Department of Communications. Telecommission Study 2(b)(i), "Communications in Canada: A Statistical Summary". Ottawa: Information Canada, 1971.

Professor A.R. Dobell's detailed quantitative summary of the Canadian telecommunications industry, excluding satellites, deals with limited areas only, because of lack of data and time for analysis. His general introduction describes the size of the industry's component parts, the economics of the regulated industry, and the industry's role in the Canadian economy as a whole; then outlines the history of the industry's output, product and factor prices, inputs and productivity, and capital formation. The demand for telephones is found to be homogeneous across Canada, and price inelastic except for domestic long-distance calls; it is income elastic. Population and technology elasticity are ignored for want of data. The telegraph sector feels more competition, and shows a long-run sensitivity to the GNP. The problems of estimating production functions are described, and the industry broken down to Bell, telephones generally, and telegraph. He finds high capital intensity, skilled labour, lack of influence from the capital or labour markets on investment decisions because of regulation; he makes no conclusions, but doubts the existence of economics of scale for plant size past a certain point. The telecommunications industry is found to be gaining in national importance in fixed capital formation. After a discussion of assumptions and models, the author shows that the telephone sector accounts for 95% of the industry's capital expenditure: calculations for telegraph are distorted by the high cost of microwave construction in the early sixties. He calls for more studies on individual investment decisions.

The broadcasting industry has low capital-output ratios because the consumer buys the receiver. Advertising revenue grows faster than the GNP, and national ad revenue is GNP-elastic. Local ad revenue grows faster, and is less elastic. Little is said of individual spending decisions of advertisers, or of cable television. Growth trends, size and number of plants, and capital intensity differ in the two sectors of the telecommunications manufacturing industry - communications equipment, and wire and cable. Both include about 60% non-TV material. Input leakages were important. There is some evidence of economies of scale. He concludes with growth projection tables for Bell, telephone as a whole, telegraph, broadcasting, investment, labour, and the impact of the industry on the Canadian economy.

Canada, Department of Communications. Telecommission Study 2(b)(ii), "Household Demand for Telecommunications Services - A Projection to 1980". Ottawa: Information Canada, 1971.

Professor Bakony's brief study deals only with telephone and telegraph, not with cable television. He builds a three-sector model: demographic (household), GNP, and telecommunications, and discusses their influence on demand. Only telephone is given extensive analysis: telegraph estimates are extrapolated from global figures for past years. The author describes possible variations in each sector: for households, the population, the age/sex composition of the labour force, the number of households, the educational level. His output (GNP) model considers changes in the size of the labour force, weekly hours, education, capital stock and technological change, capital stock projections and production functions, and the gross domestic product. In the telecommunications sector he combines demographic forecasts with historical telecommunication revenue trends to make projections, which are classed into local and long-distance services and by different commodities and behaviours of investment patterns. He then outlines in tables his specific projections for telephones, showing a decline until 1972 and possibly continuing. In appendices Bakony gives his data and sources, company-by-company revenue graphs, installations, and the total number of messages.

Canada, Department of Communications. Telecommission Study 2(d), "Communications and Regional Development". Ottawa: Information Canada, 1971.

This report examines the relationship of telecommunications to economic disparities and regional development. The study team, drawn from industry and government, noted the lack of statistical analysis in this area. The study outlines the importance of the adequacy of regulation with respect to telecommunications plant and capital requirements for the support of accelerated regional growth, and further, the need to ensure a new telecommunications policy will be consistent with existing policies for reduction of economic disparities and the overall social and economic objectives of the government. A comparative examination of current telecommunications development with that of national and regional development is also given. The report concludes that the factors which give rise to regional disparities include variations in natural resource endowment, climate, location, size of markets, degree of urbanization industrialization, and commercialization. Since telecommunications are an integral part of the economic infra-structure it may be that telecommunications can compensate for the physical disadvantages or location of a region.



Canada, Department of Communications. Telecommission Study 2(e), "Telecommunications Carriers Market Projection and Analysis". Ottawa: Information Canada, 1971.

This brief overview prepared by TCTS and CNCP Telecommunications predicts a continued high overall growth rate, and urges regulatory bodies to consider the need for large-scale capital investment as well as that for current revenue when determining policy for carriers. After sketching out the assumptions on population and household growth trends, the study predicts a falling rate but increasing absolute demand for telephone and message services. Short-term needs of individuals (new instruments and extended service), of businesses (data transmission), and of government and education will demand a six-billion-dollar investment in plant by 1975, and double-circuit capacity by 1980. Possible internal constraints on this growth, physical, managerial, financial and technological, are indicated. Some vague indications of longer-term trends are also given.

Canada, Department of Communications. Telecommission Study 2(f), "Corporate Ownership and Integration in the Telecommunications Industry". Ottawa: Information Canada, 1971.

This report, does not purport to deal with existing, specific situations but merely to discuss issues and potential problems in the abstract. Chapter 2 presents a brief statistical summary of who owns what, how much, etc. Chapter 3 deals with competition and is divided into four parts. The first is a very simplistic discussion of what monopoly is, under what conditions it tends to occur, and its advantages and disadvantages. The second and third parts deal with vertical and horizontal integration. After briefly discussing some of the disadvantages of each type of integration the Report launches into an examination of the three leading rate hearings that have dealt with vertical integration - the 1956 B.C. Telephone Hearing, the 1966 Bell Hearing and the 1970 Bell Rate Hearing. Underlying this examination in these cases is a pervasive skepticism of the ability of the regulatory technique to deal with the problems of integration in a meaningful way. In the fourth part of this Chapter the report looks at some of the more topical industry trade practices such as foreign attachments, interconnection, line sharing & predatory pricing. There is some reference to the American experience and in particular the Carterfone decision.



The fourth chapter deals with a recurring topic, namely, how to protect the public interest. After a discussion of the relative merits and demerits of a regulated vs. non-regulated industry, the report concludes that the best hope for securing satisfactory industry performance is through an appropriate mix of the two approaches. With regard to the regulatory aspect of this approach, the report emphasizes the critical importance of adopting an optimal regulatory procedure.

Canada, Department of Communications. Telecommission Study 2(g), "Description of the Canadian Telecommunications Manufacturing Industry". Ottawa: Information Canada, 1971.

This study, prepared by a joint government-industry committee, first describes the industry as a whole, pointing out that no component manufacturers or internal services were included. Generally the industries are Canadian-owned, except for IBM-dominated computer production. The biggest vertically-integrated concerns are Bell-Northern Electric and the GT & E group. Marketing, technology and economic position are all set out in general terms. There follows a description of the industry by sectors: telephone and telegraph equipment, radio communications equipment, TV and radio broadcast and distribution equipment, telecommunications wire and cable, radio and TV receivers, and electronic computers and related equipment. Regulatory policy is said to affect telephone, telegraph, radio and TV sectors directly; the others feel indirect influence. The future will see greater growth, calling for more R&D in all sectors. The main hopes are in industrial demand and export markets. The report recommends a consortium to pool facilities for international competition. There follow tables on Canadian and foreign ownership of companies, Canadian capital telecommunications equipment exports for 1969, and estimated world demand for communications equipment in 1968 and 1980 by type of equipment.

Canada, Department of Communications. Telecommission Study 2(i), "Study of Industrial Structure of Telephone Operating Industries". Ottawa: Information Canada, 1971.

A lightweight study of the industrial structure of telephone operating industries written by CNCP Telecommunications, TCTS and the Telephone Association of Canada. It traces the history and original structure of the telephone and tele-

graph industries. In looking at other countries the report concludes that the industry in Canada provides excellent service. The appendices discuss the connection between organizational structure and innovation, looks briefly at the question of integration which the study sees as advantageous to the industry and gives outlines of the growth of various Canadian telecommunications companies and their ranking in the world.

Canada, Department of Communications. Telecommission Study 7(A,b), "Regulatory Bodies: Structures and Roles". Ottawa: Information Canada, 1971.

This report contains the submissions pertaining to regulatory bodies, their structures and roles, submitted to the Telecommission by the Canadian Transport Commission (CTC), the Trans-Canada Telephone System (TCTS), and CNCP Telecommunications (CNCP). CTC exercises federal jurisdiction over five telegraph and six telephone companies, mainly with regard to tolls, based on the Railway Act and the incorporating statutes of the companies. TCTS is a combined structure of Crown and private enterprise regulated by either federal or provincial boards. These boards are largely independent, interfere minimally with management and regulate on the basis of the company as a whole. The report recommends a national consulting body and a system to regulate inter-provincial rates in this area. CNCP characterizes the industry as a two group structure consisting of the telephone systems and CNCP, with a combination of regulated monopoly and limited competition, with regulation regarded as a substitute for the limitations market forces would put on the company if it were completely competitive. (The overall views of the Telecommission project team, including also CBC, COTC and Quebec-Telephone, were incorporated in Chapter 19 of "Instant World", the general report of the Telecommission, published in April 1971.)

Canada, Department of Communications. Telecommission Study 7(c), "Relationship Between Department of Communications and Telecommunications Carriers". Ottawa: Information Canada, 1971.

This brief study contains submissions from CNCP, TCTS, and Telesat Canada on how to set up and maintain liaison between the Department and the carriers on matters relating to the development of communications policy. The carriers suggest that an advisory council be formed, consisting of representatives of the department and the carriers

to exchange information and discuss policy on an ongoing basis.

Canada Department of Communications. Telecommission Study 8(a), "Problems Relating to the Regulation of Private Line Services". Ottawa: Information Canada, 1971.

This study is a compilation of three reports. Part 1 is a submission from CNCP outlining the private line services offered by CNCP and commenting on regulation. It recommends two-carrier competition between CNCP and TCTS in this area, indicating that regulation should be aimed at the control of monopoly power and the avoidance of duplication of local services. Part 2 is the submission of TCTS giving a brief survey of its private line services and commenting on the relatively competitive nature of the market. The study points out the problems of a regulated carrier meeting competition from unregulated companies, recommending that where there is effective market competition in an area there should be little or no regulation. The final part is the submission of an "In-House" project team comprised of members of federal government departments and agencies. This submission defined private line services as those services dedicated to the user for a continuous period of time without access to the switched networks. It isolated competition between regulated and unregulated companies, cost separations and criteria for regulating highly specialized services as the major problems in this area.

Canada, Department of Communications. Telecommission Study 8(b)(i), "Study of Interconnection of Private Telecommunications Systems with the Systems of the Telecommunications Common Carrier". Ottawa: Information Canada, 1971.

A review of the existing situation regarding interconnection of telecommunications systems, especially between private systems and TCTS. The major common carriers, TCTS and CNCP, provide an integrated telecommunications system. In the private sector the Hotel Association and IBM desire a more liberal interconnection policy, the resource development industries claim problems obtaining interconnection services in remote areas, and radio paging and mobile land radio feel their services would be improved if they were allowed to interconnect. Present tariffs prohibit interconnection unless the carriers consent, and they generally oppose interconnection. The project team concludes that many public service communication ser-

VICES as well as the resource development industries merit interconnection while other private systems would at least merit study. A further recommendation was that many technical problems could be overcome by setting satisfactory construction standards on equipment.

Canada, Department of Communications. Telecommunication Study 8(b)(ii), "Interconnection between TCTS and CNCP". Ottawa: Information Canada, 1971.

A study of the possibilities of interconnection between the TWX systems operated by TCTS members and CNCP's Telex system. There is a technical description of both services; both are systems that transfer written messages over switched networks, TWX using the telephone system and Telex a three level network operated by CNCP. Block diagrams of the Telex network are provided in Appendix A. In the U.S. the FCC has decided that Western Union should acquire the entire Telex-TWX system from AT & T, making record transmission a single carrier responsibility.

Because of the technical differences between the systems (TWX uses A.C. analogue form transmission, while Telex uses a D.C. digital form) an integration of the two systems involves major technical problems and therefore high costs. TCTS argues that the two systems serve different markets. Telex a random message service and TWX a more precise data service and therefore Canada would not benefit from an integration of the systems. CNCP takes the position that the best structure for the telecommunications industry is effective two carrier competition; therefore they should be given a monopoly position in public record transmission similar to that being given to Western Union. They also feel that to allow for effective competition in the provision of private line services they should be permitted to interconnect their private services with the telephone system. Both want to expand their systems into data services. The report comments that two mutually exclusive data services are not suitable for Canada and government intervention may be needed. The general comment is made that Canada is behind other Western nations in development of policy and experimentation towards integrated record and data systems, and some basic decisions will have to be reached soon. A chart is provided with an accompanying text comparing the development of various systems in four countries. An appendix sets out a submission by TCTS on the technical aspects of interconnection.

Canada, Department of Communications. Telecommission Study 8(b)(iii), "Problems of Interconnection of Terminal Services to Common-Carrier Provided Telecommunications". Ottawa: Information Canada, 1971.

This brief study outlines the system conflicting interests of the common-carriers, users of telecommunications systems, and the manufacturers of the equipment to be used. The carriers have considerable technical inertia; they must also guard against degradation of the system and be able to identify trouble spots and update their system when necessary. Users want to innovate according to their own, and not the system's, needs. Manufacturers have different interests as they sell to the carriers or to the users. The report sums up by urging equilibrium among the sectors, whether by private negotiation or by legislation.

Canada, Department of Communications. Telecommission Study 8(c), "Report on Northern Communications". Ottawa: Information Canada, 1971.

This study stresses a new definition of "the North" extending beyond traditional area outlined by geographers as being 60° parallel latitude: the suggested new definition would include Northern B.C., Alberta, Manitoba, Saskatchewan, Ontario, Quebec and Newfoundland, since telecommunications inadequacies stretch further south. The report stresses the need to develop communications systems to accompany and support the pace of industrial development as well as to sustain cultural and social growth. The preliminary chapters of the report (Ch. 2-7) give surveys of present and prospective development in the north (1) in the economic and industrial sphere (mineral, oil and gas potential); (2) of existing telecommunications and the relationship of these to such factors industrial growth and population density (3) a survey of existing broadcasting and information services (4) outline of terrestrial information services to serve north (High Frequency, Low Frequency, radio relay and tropospheric scatter systems with special emphasis on present problems and future trends) (5) survey of satellite options for Northern Communication with special emphasis to the use of the ANIK satellite system by Telesat Canada. This basic survey included a report on the Northern Communications Conference which stated its purpose as a public focus on relevance of communications to northern needs and aspirations, including cultural, educational, social and economic--usually from point of view of community units. In addition the report includes submission by Metis, Indian and Eskimo organizations expressing concern that broadcasting and information services be ori-

ented to and reflect their culture and provide for their participation. The basic conclusion of the report was that to bring the level of service to the north to the standard of the south required a co-operative approach and that there was a legitimate role for the federal Government as co-ordinator and catalyst for this action foreseen by Parliament in the establishment of the Department of Communications. Joint federal-provincial co-operation is also seen as essential.

Mauro, A.V., "Canadian Transport Commission", (1971) Pitblado Lectures 104.

The author examines what he considers to be the three modes of regulation relied upon by the CTC: (1) entry - an applicant must show his entry to be for public convenience and necessity; (2) rates - they must be equitable for both providers and purchasers of the service; and (3) service extensions - the criteria is whether there are changed circumstances since the last application. The importance of board policy is also stressed.

Gotlieb, Allan E., "The individual and the telecommunications regulatory process in Canada", with a comment by Abel, Albert S., (1973) 25 Administrative Law Review 175; The Individual and the Bureaucracy (edited by Daniel J. Baum) Toronto: Osgoode Hall Law School/York University, 1975.

The author analyzes regulatory practices and procedures, as they have evolved over the years and as they are still evolving, and discusses some of the issues and policy problems which they present.

Gregory, John D., "Telephone regulation in Quebec: a Study of the Quebec Public Service Board", (1973) 5 Canadian Communications Law Review 1.

The author gives a wide overview of the problems and successes of the Quebec Public Service Board, showing how it has departed from the traditional practices of utility regulation. He gives introductory notes on utility regulation, outlines the history of the board, explains its jurisdiction and discusses its regulatory policies with regard to the Quebec telephone companies over which it exercises jurisdiction.



English, H. Edward, "Canadian Telecommunications: Problems and Policies," Study 1 in Telecommunications for Canada: An Interface of Business and Government, H. Edward English, ed., pp. 3-36. Toronto: Methuen, 1973.

Based on the seven studies set out later in this volume, which were undertaken in 1969 at the invitation and expense (although otherwise independent) of Bell Canada, Professor English provides in this article a brief overview of what he sees as the basic aims of telecommunications policy, some observations on the structure and behaviour of the Canadian telephone and telegraph industry, and some tentative recommendations. In Chapter I (pp. 5-11), in regard to the basic aims of policy, he suggests three economic criteria - efficiency of supply, contribution to growth, and no unwarranted inequalities in income distribution - and three social goals - protection of individual rights, retention of national sovereignty, and the servicing of perceived social needs not adequately expressed by the market place, in particular, the provision of basic service to rural or remote areas. The Part concludes with a brief elaboration of the theory behind the achievement of these criteria.

In Chapter II (pp. 11-23), English notes a number of structural features of the Canadian telco industry, particularly the TCTS consortium and its individual members, and the limited duopoly with CN-CP Telecommunications. After a look at the new technology, he identifies pricing policy, non-price decisions, and investment as being three key behaviour characteristics upon which public policy should focus. He suggests that by and large the three economic criteria, efficiency, growth and distribution, have been met.

Finally, in Chapter III (pp. 24-36), the article concludes with some policy issues and recommendations. In regard to social objectives, English recommends that they be defined with both precision and flexibility, and that priority be given in government communication research activity to cost analysis and on modifications to carrier accounting systems upon which policy judgements must be based. In regard to industry structure, English suggests that the guiding principle should be to separate so far as possible the competitive components and rely upon competition as the



regulator for those activities that do not need to be technically associated and financially consolidated with the non-competitive components. For long distance service, he recommends that the national telco system (TCTS and CNCP be made "a more systematic and socially accountable organization" and that government acquire the capacity to review both the effects of changing technology on industry structure and the larger investment programs in the industry. He suggests that metering of local service is likely to evolve in one form or another. His optimal structure for local communications services (including video, computer information) is to have the "pipeline" leased to suppliers on a time-use basis; to have government regulate quality of services and supply some video services; and to make common carrier excess computer capacity available on a commercial basis, with governments having priority use. English does not find compelling arguments for breaking the corporate connection between Bell and Northern Electric. He notes that McManus and Beigie in later studies identify the inadequacies of rate regulation where flat rates on local service render elasticity comparisons impossible, where there may be a bias towards excessive expansion, and where regulatory lag exacerbates problems of allocation of resources in terms of inflating costs. English suggests regulatory review of price structure, major investments and minimum quality of service, experimentation with metered local services, and removal of regulatory lag effects through an index system. Direct regulation of competitive services would be removed, however, to be replaced by government force exerted through purchase policies or direct competition.

Beigie, Carl E., "An Economic Framework for Policy Action in Canadian Telecommunications," Study 2 in Telecommunications for Canada (edited by H. Edward English) at pp. 37-212. Toronto: Methuen, 1973.

This lengthy study attempts to produce a framework for economic policy action, with a set of recommendations designed to permit flexibility for accommodating legal, political and other non-economic factors that may be judged desirable for achieving public policy objectives.

Carr, Jack, "Demand and cost: An Empirical Study of Bell Telephone of Canada," Study 5 in Telecommunications for Canada (edited by H. Edward English) at pp. 301-313. Toronto: Methuen, 1973.

The purpose of this study is to estimate empirical demand functions for the primary telecommunications services of Bell and to estimate empirical cost or production functions for Bell's operation as a whole.

Scott, W.R., "Certain Accounting Aspects of Telecommunications Regulation," study 6 in Telecommunications for Canada (edited by H. Edward English), at pp. 315-338. Toronto: Methuen, 1973.

This study examines certain accounting and related matters which are relevant to the economic regulation of the telecommunications industry.

McManus, John C., "Federal Regulation of Telecommunications in Canada," study 8 in Telecommunications for Canada (edited by H. Edward English) at pp. 389-428. Toronto: Methuen, 1973.

This study attempts to assess some of the economic effects of the Board of Transport Commissioners' regulation of the two largest firms in the Canadian telecommunications industry - Bell Canada and the British Columbia Telephone Company. McManus examines the economic argument for regulation of the industry, reviews the exercise of regulatory authority at the federal level in Canada, and analyzes some of the indirect effects of the regulatory environment that has existed in Canada upon decision-making within the firm.

Dakin, A.J. Telecommunications and The Planning of Greater Metropolitan Regions. Ottawa: Department of Communications, 1973.

Grant, Peter S. Competition Policy and the Canadian Telecommunications Carriers: An Introduction. Toronto: Faculty of Law, University of Toronto, 1976

An introductory study on the questions of competition policy relating to the telecommunications carriers raised to date. Included in the discussion are the issues of customer-owned attachments, carrier entry into data processing, system interconnection, carrier purchasing and procurement policy, carrier involvement in related activities such as directory publication, conflicts between the cable industry and the carriers, and the tariff restrictions on line-sharing and resale. Essentially, the discussion of these issues is descriptive in nature, with a view to providing a basic review of how each of these questions

has been raised and dealt with in the cases up to January 1, 1976. (A brief addendum added on March 1, 1979, notes the principal developments that have occurred in the period 1976-79 that relate to competition policy.)

Janisch, Hudson, N. (ed.) Telecommunications Regulation at The Crossroads. Proceedings of a Conference at the Faculty of Law, Dalhousie University. Halifax: Dalhousie Continuing Education Series, 1976 (Number 13).

An excellent collection of papers and panel discussions on current issues in telecommunications regulation, involving participants from across Canada. Topics include "Regulation and the Cost Inquiry" (Charles King; comments by Ed Hicks and Hazen Marr); "Regulation and Inflation" (Ivan Duvar; comments by John Meyer and Ron House); "Alternative Techniques for Consumer Protection in Telecommunications Regulation" (Andrew J. Roman; comments by Ernest Saunders, William N. Rowe and Peter Grant); "Competition and Regulation" (Mac Davies; comments by Joe Schmidt and Les Cox); "Interconnect Competition" (comments by John Campbell and Bill Smith); "EAS and Usage Sensitive Pricing" (Ed Graham; comments by Gordon Maxfield and Jack McGrath); and "Attainment of Objectives and Jurisdiction" (David Mullan; comments by Ron Downie and Eldon D. Thompson).

#### U.S. Books, Articles and Studies

Trienens, H.J., "Current problems in the pricing of telephone services to meet competition," (1963) Public Utilities Fortnightly.

Phillips, C.F., "Some observations on the FCC's telephone investigation," (1966) 77 Public Utilities Fortnightly 23.

Gabel, Richard. Development of Separations Principles in the Telephone Industry. Institute of Public Utilities, Division of Research, Michigan State University, 1967.

A comprehensive, analytical treatment of separations principles in the U.S. telephone industry. These principles or methods pertain to the division of revenues, expenses and investment of the communications common

carriers between interstate and intrastate jurisdictions and the results are of great significance for the rates for toll and exchange telephone service. The objectives and differing viewpoints of the various participants in the separations process, including the state regulatory commissions, the Federal Communications Commission and the Bell system, among others, are set out in this book. Gabel also supplies a critique of separations principles and recommendations for the future.

Doyle, S.E., "Do We Really Need a Federal Department of Telecommunications?" (1967) 21 Federal Communications Bar Journal 3.

The author outlines developments to date in the establishment of a Federal Department of Telecommunications in the United States. He briefly describes the areas of concern which had prompted such developments and identifies four possible approaches toward establishing "Deptel." Doyle submits that the U.S. has "tolerated a widely dispersed, generally inefficient and inadequate, multi-centred communications planning system too long," and states that the time is long overdue for development of a central national planning and management office with the power to formulate and implement an overall national telecommunications policy.

President's Task Force on Communications Policy (Rostow Report). Staff Paper 8. "Role of the Federal Government in Telecommunications". Washington: U.S. Government Printing Office, 1968.

A study of the current structures of the federal government which regulate telecommunications, and of the implications of the recommendations of the other staff papers on this organization. The present patchwork agglomeration of bodies is shown to be inadequate in regulation, R&D, and procurement. The report recommends a greatly increased executive branch responsibility to assist in the formulation of policy alternatives. For such a body, highly-trained interdisciplinary people are needed; their development could be encouraged with special scholarships. Advantages of the new body, besides regulation, R&D, procurement, would be a uniform policy for Intelsat and for developing countries. The report feels that the breadth of concern of the members of such an agency would lessen

the chance of conflict of interest between government as user of telecommunications services, and government as representative of the public interest. The new agency would not supplement all existing bodies and functions -- for example the quasi-judicial FCC's treatment of broadcasting is desirable -- but would coordinate them and do work for which any one body would lack the resources or the interest.

President's Task Force on Communications Policy (Rostow Report). Staff Paper 5, "The Domestic Telecommunications Carrier Industry". Washington: U.S. Government Printing Office, 1968.

A detailed study of the structure of the U.S. telecommunications carrier industry and the major questions of regulatory policy which are currently in debate, particularly competition, terminal attachment policy, costing, interconnections of private line systems, resale and line-sharing, and computer/communications.

Monaghan, V.R., "Future regulatory policy aspects of the telephone industry"(1968) 82 Public Utilities Fortnightly 33.

George, Gerald F., "F.C.C. v. Bell Systems: abdication of regulatory responsibility," (1969) 44 Indiana Law Journal 459.

Symposium, "Telegraph and Telephones," (1969) 34 Law and Contemporary Problems 203.

Saleh, Donald Edward. Reduced form estimation of the CES production function: a cross-section study of the telephone industry (Ph.D thesis, Claremont Graduate School and University Center, 1969).

Streamo, James Patrick. The demand for telephone service: an econometric investigation. (Ph.D thesis, Purdue University, 1969).

Williams, George P., "Separation of Functions in the F.C.C.: The A.T. & T. Rate Case," (1969) 14 South Dakota Law Review 103.

In this article the author examines the various arguments opposing the use of the FCC's Common Carrier Bureau as an expert adviser to the FCC in the Rate Case of 1965-66, while at the same time being an active party in the proceedings. It is in fact the practice of the Bureau, which is responsible for the regulation of the

telephone industry, to initiate formal proceedings against a carrier who objects to rate adjustment proposals made by the Bureau. At such a proceeding the Bureau acts as a party adverse to the carrier, presenting its own witnesses and evidence and conducting cross-examinations. In the AT&T Rate Case, AT&T objected to the fact that three FCC Commissioners who comprise the Telephone Committee would preside over the proceedings, resulting in a violation of the separation of functions requirement of the FCC. At the heart of the argument is the question of whether this was a rulemaking or adjudicating proceeding, for separation of functions is required only in the latter.

Gabel, Richard, "The Early Competitive Era in Telephone Communication, 1893-1920," (1969) 34 Law and Contemporary Problems 340.

The author's thesis, as he traces developments in telephone communication in the early years, is that competition, contrary to popular opinion, was neither inefficient nor costly. In fact, this period resulted in the most rapid rate of growth of service in the history of the industry. After years of experience, regulation remains unproved, while the good performances of the competitive era has been forgotten. Gabel concludes by suggesting simply that rather than accept blindly the value of regulation, we should consider it in the light of those past events.

Canada, Department of Communications. Tele-commission Study 1(e), "The Relevant U.S. Legislative Regulatory Experience to the Canadian Telecommunications Situation." Ottawa: Information Canada, 1971.

This comprehensive report, compiled by Dallas W. Smythe, documents the U.S. regulatory experience and extrapolates some suggestions for future telecommunications regulation in Canada. Professor Smythe sees a regulatory dilemma in the U.S. experience. If the telephone field is left unregulated monopolistic trends follow on the heels of feverish competition. Regulation, on the other hand, by the U.S. state and federal regulatory commissions, has provided ad hoc responses to specific crises with no cohesive framework for planning. The commissioners have been co-opted by those they regulate and the short-staffed, short-funded commissions

have been unable to keep up with the rapid changes taking place in the field. Smythe suggests that more competition in the industry and a revamped regulatory system under federal jurisdiction would partially ameliorate this problem. For Canada he recommends the establishment of a crown corporation, Telecommunications Canada, to handle long haul transmissions and the creation of an agency to produce policy-oriented critical studies.

M.R. Irwin. The Telecommunications Industry, Integration or Competition. New York: Praeger Publishers, 1971.

In addition to interest in the great promise telecommunications hold for all segments of society there is growing concern with the ability of the existing complex of common carriers and regulatory agencies to assure that industry performance will be maximized in a fashion that best promotes the general welfare. In particular the responsiveness of state and federal commissions has been challenged. In this study Professor Irwin examines the interdependence of corporate conduct, regulatory and antitrust policies and market structure. For the practitioner, the study illustrates the need to look beyond the traditional set of problems associated with the rate base, rate of return and rate structure. For the academic economist it stresses the need to go beyond simple statistics of partial equilibrium analysis and assess the fundamental structural and institutional determinants of performance before making pronouncements about appropriate steps for maximizing welfare. For all, this study calls attention to the real task of public policy in communications which now, more than ever before has become one of optimizing a total industry structure in a fashion best suited to changing national requirements.

Kestenbaum, L., "Competition in Communications," (1971), 16 Antitrust Bulletin 769.

The writer reviews two areas -- the telephone common carrier system, confronted with equipment suppliers and specialized carriers, and the broadcasting system, confronted with cable television. He provides a good discussion of the Carterfone case, and looks at the FCC, asserting that it has adopted a doctrinaire approach to the problem. The second half of the article provides a background and recent history of cable television in America, which, he maintains, points to a slow but



gradual recognition by the FCC that cable can have an affirmative value. It is not his intent, he says, to demonstrate the ultimate impact of cable or suggest definitive conclusions. His point is that FCC has not imposed upon existing stations the burden of justifying restrictive rules applicable to the cable medium which it placed on the Communications Common Carriers. He concludes by arguing that FCC has shown more alacrity for competition in a common carrier context, perhaps because it has a more basic stability, in contrast to the volatile nature of the broadcasting industry.

Cox, Kenneth A., "An Appraisal of Regulatory Pricing Policies in Communications," in Essays on Public Utility Pricing and Regulation (edited by Harry M. Trebing). East Lansing: Michigan State University, 1971.

Phillips, C.F., "Domestic Telecommunication Policy: An Overview," (1972) 29 Washington & Lee Law Review 235.

In Phillip's view, the "threshold issues" affecting the structure of the telecommunications industry are the extent to which competition should be encouraged and how it could be accommodated within a regulatory framework. He proceeds to outline the gradual liberalization of the FCC's regulations by describing certain landmark Commission decisions which have permitted increased competition. Many issues are raised by the increased reliance upon the forces of competition, perhaps the most important of which is the formulation of a policy concerning the most suitable market structure for the future development of the telecommunications industry. Another issue is that of pricing. Generally, says Phillips, the FCC has been inconsistent in its decision making, perhaps as a result of an absence of overall policies in these and other facets of the industry.

Gilchrist, Bruce and Wessel, Milton R., "Government Regulation of Communications," in Government Regulation of the Computer Industry. Montvale, New Jersey: AFIPS Press, 1972.

Maddox, Brenda. Beyond Babel: New Directions in Communications. New York: Simon and Schuster, 1972.

Written for the non-expert, this book explains the technology and regulation of satellites, cable television and telephones.

Irwin, Manley R. and Trebing, Harry M., "A Survey of Problems Confronting the Communications Industry in the U.S.," Study 3 in Telecommunications for Canada (edited by H. Edward English), at pp. 213-252. Toronto: Methuen, 1973.

This paper explores the major problems facing the U.S. domestic communications industry and presents a critique of public policy alternatives. It reviews the current market structure, deals with the development of regulatory and anti-trust policies, views the major regulatory accomplishments and problems, and examines the major issues remaining to be resolved.

Marchand, M.G., "Economic principles of telephone rates under a budgetary constraint," (1973) 40 Review of Economic Studies 507.

Posner, Richard A., "Theories of Economic Regulation," (1974), 5 Bell Journal of Economics and Management Science 335.

Von Rabenau, B. and Stahl, K., "Dynamic aspects of public goods: a further analysis of the telephone system," (1974) 5 Bell Journal of Economics and Management Science 651.

Bigelow, R.P., Davlin, Z.O. "Own Your Own Telephone System," (1974) 59 Massachusetts Law Quarterly 63.

Wewar, William. "IBM, CML Satellite and the Clayton Act: the FCC's Retreat from Competition in the Telecommunications Industry," (1975) 8 Law and Computer Technology 30.

Baer, Walter S. and Mitchell, Bridger M. "Impact of Competition on an independent telephone company," (1975) 96 Public Utilities Fortnightly 23.

Zimmerman, Edwin. "Legal and Political Prospects for more Competitive Policies toward Regulated Industries," in Promoting Competition in Regulated Markets. Washington D.C.: The Brookings Institute, 1975.

Waverman, Leonard. "The Effects of Regulation in Domestic Intercity Telecommunications," in Promoting Competition in Regulated Markets. Washington, D.C.: The Brookings Institute, 1975.

Note, "Recent Federal Actions Affecting Long Distance Telecommunications; a Survey of Issues Concerning the Microwave Specialized Common Carrier Industry," (1975) 43 George Washington Law Review 878.

Homer, R.S., Kilburn, E.A., Malone, William and Melody, Dr. W. "Relationships Between Monopoly, Competition and Regulation," (1975) 28 Federal Communications Bar Journal 179.

Strasburg, Bernard. "The Common Carrier and Regulation: An Introduction," (1975) 28 Federal Communications Bar Journal 113.

Nelson, Dr. Boyd. "Development of The Domestic Communications Industry," (1975) 28 Federal Communications Bar Journal 118.

Cosson, David. "Development of Regulation of Common Carrier Communications," (1975) 28 Federal Communications Bar Journal 132.

Berman, Paul J. and Oettinger, A.G. "Changing Functions and Facilities: The Politics of Information Resources," (1975) 28 Federal Communications Bar Journal 227.

A candid study focusing on the costing of competitive telecommunications services, detailing the effect of the separations process on this question, and commenting on the political nature of the judgement required.

Note, "Recent Federal Actions Affecting Long Distance Telecommunications: A survey of Issues Concerning the Microwave Specialized Common Carrier Industry," (1975) 43 George Washington Law Review 878.

Note, "Competition in the Telephone Equipment Industry: Beyond Telerent," (1977) 86 Yale Law Journal 538.

Loeb, H.J. "The Communications Act Policy Toward Competition: A Failure to Communicate," (1977) 30 Federal Communications Bar Journal 1.

Note, "Resale and Sharing of Private Line Communications Services: A.T. & T. Restriction and FCC Regulation," (1978) 61 Virginia Law Review 679.

Note, "Intercity Telecommunications Competition After Execunet," (1978) 31 Federal Communications Law Journal 117.

8.4 ISSUES IN THE REGULATION OF  
COMPUTER/COMMUNICATIONS

The field of computer/communications, or the integration of data processing and data transmission, presents unique issues in regard to regulation, since the transmission component is largely provided by telecommunications carriers under regulation but the processing component is provided under a competitive environment. Within the last three decades, the computer has managed to become one of the most versatile and indispensable servants of science, business and government. But, as noted in the federal Dark Green Paper on Computer/Communications Policy (April, 1973), "there is good reason to believe that the current situation is no more than a take-off position for developments which may make computer services universally accessible, and the industry one of the largest in the world."

Terms like remote-access computer systems, tele-processing systems, computer utilities, and information utilities are employed to describe networks of computers and data banks connected via communications links. But regardless of the name, it is widely agreed that the widespread economical distribution of computer services to all segments of society has profound social and economic implications for Canada and for every country in the world. Concern over these issues led to the establishment in 1970 of the Canadian Computer/Communications Task Force, which published a two-volume report entitled Branching Out in 1972.

The issues raised in the Task Force's report have continued to be debated, and access to computer/communications services has accelerated with the introduction of the Datapac and Infoswitch networks by TCTS and CNCP respectively. More recently, the future of competition in the data communications field has been raised in the context of the application by CNCP Telecommunications to interconnect its private line services with the Bell Canada local public switched network. The decision by the CRTC on this application, expected shortly, will no doubt raise a host of new issues which will also have to be resolved by regulators in the future.

The literature relating to computer/communications, particularly in regard to regulation, is set out below in chronological order, first as to Canadian sources, and second, as to U.S. sources.

Canadian Books, Articles and Studies

Parkhill, D.F. The Challenge of the Computer Utility.  
Don Mills, Ontario: Addison-Wesley Publishing Co., 1966.

This book seeks to facilitate the growing discussion of "computer utilities" by providing a broad overview of the history, technology, and economics of the computer utility, and some of its possible implications for society. The book is not confined to technology, but stresses the close relationship between technological change and the economic, political and social evolution. Topics fall under four main headings: principal historical and technological developments leading to the computer utility; the technology of computer utilities; economic and legal considerations; and future possibilities.

Touchie, Rodger Don. Economics of Integrating Computers and Communications Systems in Canada. (M.B.A. Thesis, University of British Columbia, 1969).

Lawford, Hugh, "International Legal Problems of Computer Communications: Automation of the Transnational Information Flow," (1970) 20 University of Toronto Law Journal 337.

Lawford's paper attempts to set out in very broad terms the state of computer technology and the international legal problems that seem likely to emerge. Among those discussed are: regulatory jurisdiction, export controls, property interests in computer programmes, import duties, anti-dumping controls and the protection of privacy. Particular stress is placed upon the issue as an economic-nationalist one, with special reference made to problems posed by powerful multinational computer corporations.

Canada; Department of Communications. Telecommission Study 5(a,c,d,e), "Policy Considerations with regard to computer utilities". Ottawa: Information Canada, 1971.

Alternative developments for "computer utilities" - computer facilities linked with telecommunications resources - are outlined in point form with a number of options under several headings. The participation of common carriers and various technical considerations are discussed, after which the study looks at various policies to regulate the industry. It recommends an independent government agency to regulate an integrated network of computer utilities, from which carriers would be barred except if they set up a separate corporate structure. There follows an eight page glossary of computer utility terms. Appendices

contain an analysis of responses to a questionnaire on the industry; a report on the data processing industry; an investigation by Professors Cowan and Waverman on the economics of integration of telecommunications carriers and data processors, concluding that there may be none; a critical comment on this economic study and a description of the Computer/Communications Task Force.

Science Council of Canada, A Trans-Canada Computer Communications Network. (Report No. 13). Ottawa: Information Canada, 1971.

Canadian Computer/Communications Task Force, Branching Out, 2 volumes, Ottawa: Information Canada, 1972.

An excellent report in two volumes prepared for the federal Department of Communications concerning the current and desirable trends in computer/communications. The study first presents a concise overview of the whole industry and then outlines some general policies and recommendations for it. It looks at computer/communications from several aspects: data processing, data communications, the data services environment, stimulation of development, and the role of institutions. Throughout, the Task Force has made recommendations for government action, and these are summarized in a concluding section. Volume 2 of the study treats some specific items. Jurisdictional and legal aspects of computer/communications are presented. Then the applications of the industry to three social fields are analyzed: automation of payments and credit; applications in education; and Canada's health care delivery system.

Canadian Computer/Communications Task Force. Background Papers. 7 Volumes. Ottawa: Information Canada, 1972-74.

Following the publication of Branching Out, the Report of the Canadian Computer/Communications Task Force in 1972, the following 16 background studies were separately published in seven volumes:

Volume 1

Study 1: "The Canadian Computer Supply Industry Study," by George R. Forsyth and Brian Owen.

Volume 2

Study 2: "Peel Country Pilot Education System," by Lyman Richardson.

Study 3: "Computer/Communications Activities at Canadian Universities," by the Task Force.

Volume 3

Study 4: "CATV Technology for Citizen Feedback to Government," by Jean-Michel Guite.

Volume 4

Study 5: "Canadian Policy Options in Computer/Communications," by A.J. Lipinski and H.M. Lipinski.

Study 6: "Working Paper on Strategic Options," by the Hayward Computer Corporation Ltd.

Volume 5

Study 7: "Canadian Datasystems' Survey," by Maclean-Hunter Research Bureau.

Study 8: "A Canadian Computer Industry Survey and Analysis," by F.T. White.

Study 9: "The Use of Electronic Data Processing by Canadian Business," by the Chamber of Commerce and the Task Force.

Study 10: "Oil Industry Use of Computer/Communications in Calgary," by Canuck Survey Systems Ltd.

Volume 6

Study 11: "Local Facility Study," by J. Worrall.

Study 12: "Computer/Communications Network Study," by O. Riml.

Study 13: "Standards," by the Task Force.

Study 14: "Technological Review of Computer/Communications," by the Task Force.

Volume 7

Study 15: "Computers and Communications in the Canadian Business Community," by the Task Force.

Study 16: "Data Communications Survey," by the Task Force.

Science Council of Canada, Strategies of Development for the Canadian Computer Industry (Report No. 21). Ottawa: Information Canada, 1973.

Minister of Communications, Computer/Communications Policy: A Position Statement by the Government of Canada. (Dark Green Paper) Ottawa: Information Canada, 1973.

Hutchison, G.D. "The Search for Orderly Development in Computer/Communications," (1973) 46 Canadian Business 34.

Gotlieb, A.E. "Some Social and Legal Implications of New Technology: the Impact of Communications and Computers," (1973) 51 Canadian Bar Review 246.



Gotlieb, A. and others. "Transborder transfer of information by communications and computer systems: Issues and Approaches to guiding principles," (1974) 68 American Journal of International Law 227.

Verma, Pradmode K. (ed.). Proceedings of the Third International Conference on Computer Communication, Toronto, August 3-6 1976. Ottawa: International Council on Computer Communications, 1976.

This Toronto conference, hosted by the Trans-Canada Telephone System, involved participation by a number of Canadian industry personnel. The proceedings include a number of papers on computer/communications, including legal issues, network planning, Datapac, specific applications, system design, management issues, privacy and security issues, hardware and software, flow and congestion controls, and national policies and business development.

#### U.S. Books, Articles and Studies

C.C. Barnett, Jr. The Future of the Computer Utility, New York: American Management Association 1967.

With the growth in the concept of sharing computer services on a fee or contract basis, has come an even more ambitious trend -- a centralized computer utility that will connect individual users to an outside service facility. Companies of all sizes will realize the advantage of tapping large mainline capacity without the expense of buying or maintaining their own computers. This book tells why this service will someday be as commonplace in the business community as the telephone is today, and explains in non-technical terms the purpose, use and benefits of such a utility.

Note, "Computer Services and Federal Regulation of Communication," (1967) 116 University of Pennsylvania Law Review 328.

This article was written as a response to an FCC notice of inquiry requesting comments and suggestions on the interdependence of computers and communications services and facilities. In the context of relevant FCC and judicial decisions, the author discusses the question of whether data processing services which depend upon common carrier communication

facilities should be regulated by the FCC. He concludes that the public interest would appear to be best served by continued competition at this relatively development stage when regulation might well deter entry of new companies into a young industry.

Greenberger, F. (ed.). Computers and Communications: Toward a Computer Utility. Englewood Cliffs, N.J.: Prentice-Hall, 1968.

A collection of articles on the trend towards the use of computer technology as a communications utility. Articles include: Girsetti, R.S. "The Synthesis of Communications and Computers"; Muench, P.. "Common Carrier Approach to Digital Data Transmission"; Withington, F.G. "The Market for a Computer Utility Industry"; and Early, L.B. "Satellite Communications for the Computer Utility".

Strassburg, B. "Communications and computers: how shall the twain meet?" (1968) Public Utilities Fortnightly.

Strassburg, B. "The marriage of computers and communications - some regulatory implications," (1968) 9 Jurimetrics Journal 12.

Dunn, Donald A., Lipinski, A.J., et al. Policy Issues Printed by the Interdependence of Computer and Communication Services. Menlo Park, California: Stanford Research Institute, 1969.

Topics covered include: policy issues presented; analysis of responses to the FCC computer inquiry; patterns of technology in data processing and communication; preface to a theory of regulation; and a dynamic financial model of a utility.

Irwin, Manley R. Computer Utility: A Public Policy Overview. East Lansing: Institute of Public Utilities, Michigan State University, 1969.

Martin, James. Telecommunications and the Computer. Englewood Cliffs, N.J.: Prentice-Hall, 1969.

Davison, C., Babcock, S.L., "Computers and federal regulation," (1969) 21 Administrative Law Review 287.

Dunn, Donald A., "Policy issues presented by the interdependence of computer and communications services," (1969) 34 Law and Contemporary Problems 369.

In 1966 the FCC issued a notice of inquiry to obtain the opinions of the data-processing and communications industries concerning the regulatory problems arising from the interdependence of computer and communications services. This paper examines the four major areas of concern of the inquiry: cost and quality of data communications services; provision of teleprocessing services by non carriers; provision of data-processing services by communications common carriers; and privacy.

Irwin, Manley R., "Computers and communications: the economics of interdependence," (1969) 34 Law and Contemporary Problems 360.

In this paper Irwin's thesis is that computer and communication facilities are finding themselves increasingly interdependent through the growth of computer networks, with users gaining access to the computer via a remote terminal attached to a telephone line. As this interdependence increases two issues will come to the fore: the interface of different manufacturers' equipment in the same communications system; and the diversification of both computer firms and common carriers into the other's area of previous responsibility.

Irwin, Manley R., "Computer Utility: Competition or Regulation," (1969) 76 Yale Law Journal 1299.

A useful discussion as to whether the computer industry should be regulated, given the softening of the lines separating data processing and communications brought about by the emergence of a new industry known as the data or computer utility. It is Irwin's view that competition should prevail, largely because there is as yet no serious monopoly threat. However, he feels that the FCC must move to reduce circuit costs and improve carrier performance, and he outlines three non-regulatory means by which this could be accomplished.

Irwin, Manley R., "The Computer Utility: Market entry in search of public policy," (1969) 3 Journal of Industrial Economics 239.

A note on the FCC inquiry into the policy implications of computer time-shared operations. The question of the Commission's regulatory obligations is discussed as well as its attempt to distinguish between "data processing" and "communications".

Irwin, Manley R., "Regulatory decisions affecting the data processing community: the Federal Communications Commission," (1969) 13 Data Processing 344.

Smith, D.D., "Interdependence of computer and communications services and facilities: a question of federal regulation," (1969) 117 University of Pennsylvania Law Review 829.

Trebing, Harry M., "Common carrier regulation - the silent crisis," (1969) 34 Law and Contemporary Problems 299.

The success of future regulatory action in the communications field will depend on its ability to accommodate various new developments such as the blurring of the distinction between traditional common carrier activities and the newer computer/communications industry; and the opening up of new markets due to innovations in communications technology. "This paper explores various dimensions of the problem with a view toward presenting a better delineation of the issues involved, a critique of regulatory policy, and recommendations for improving Commission control".

Bigelow, R.P., "Some Legal and Regulatory Problems of Multiple Access Computer Networks," (1970) 11 Jurimetrics Journal 47.

This paper discusses some of the regulatory forces at work in the computer and communications industries and some of the current legal problems of interest to developers and users of multi-access computer networks. Questions considered include standards, separate pricing, taxation and proprietary software, the computer-communications interface, wire communications, CATV, microwave, privacy and antitrust.

S.L. Matheson & P.M. Walker. Computers and Telecommunications: Issues in Public Policy. New York: Prentice-Hall Inc., 1970.

There are several important public policy issues, the answers to which will shape the future structures of the rapidly growing data communications and remote-access computer industries. This book identifies these issues as revolving around four basic questions: (1) What is the regulatory status of computers/communications services? (2) Are common carrier communication services and tariffs responsive to the requirements of the data processing industry? (3) Should new specialized common carriers be authorized? and,

(4) can privacy be protected against the increasing phenomenon of concentration and exchange of information? In this excellent study, Matheson and Walker probe the short and long term effects of each alternative upon the communications common carriers, the communications and computer equipment manufacturing firms offering remote-access computer services, and the users of communication facilities and remote-access computer services.

Perlman, S.B., Legal Aspects of Selected Issues in Telecommunications. Montvale, N.J.: AFIPS Press 1970.

This report deals primarily with the relationship between common carriers and the data processing industry. There is also a chapter on CATV. The emphasis is on FCC activity in these fields.

Note, "Regulation of Computer Communication," (1970)  
7 Harvard Journal on Legislation 208.

In this paper, the question of the extent to which the Bell System's monopoly on telephone services should apply to non-telephone telecommunications services, especially data communication, i.e. the communication of information between the computer and the customer, is discussed. Recently the demand for nontelephone services has led to the emergence of many new firms seeking entry into the telecommunications market. This demand and the desire for new entry present problems of regulation to the F.C.C., four of which are discussed here: to what extent should the established regulated carriers be allowed to provide teleprocessing services? what restrictions should a regulated common carrier be allowed to enforce regarding the use of its communications lines? how should rates charged for non-telephone services be determined when the service is provided by a regulated common carrier? and how should entry into the telecommunications market be controlled?

Loevinger, L., "Communications Regulation," in Holmes, G.W. and C.H. Norville, The Law of Computers. Institute of Continuing Legal Education, Ann Arbor, Michigan, 1971.

Note, "Developing National Policy for Computers and Communications," in Greenberger, M. (ed.). Computers, Communications, and the Public Interest. Baltimore: Johns Hopkins Press, 1971.

Gilchrist, B. and M.R. Wessel. Government Regulation of the Computer Industry. Press, Montvale, N.J.: AFIPS Press 1972.

This research study examines the impact of a variety of government agencies on the computer industry and the methods of regulation used. As well as reproducing fifteen key source documents (such as the 1956 IBM consent decree), there are the following individual chapters of interest: The Pattern of Government Regulation; Regulation by Government Acquisitions; Regulation by Government Marketing Activities; Government Regulation of Exports and Imports; Government Regulation of Communications; and Antitrust Regulation.

Winkler, S. (ed.). Computer Communications: Impacts and Implications. First International Conference on Computer Communication, Washington, D.C., ICCE, 1972.

This volume contains papers on a variety of aspects of computer communications. The main topics of interest are: social impact of computers, data banks and individual privacy, teleconferencing, teleprocessing, technological advances, regulation and competition.

Note, "F.C.C. Computer Inquiry: Interfaces of Competitive and Regulated Markets," (1972), Michigan Law Review 172.

This article reviews the background and the findings of the F.C.C.'s Computer Inquiry, the latter as stated in the Final Decision, that the F.C.C. should not regulate the data processing industry and that communications common carriers should be permitted to enter the data processing market only through separately incorporated subsidiaries.

Note, "Federal Communications Commission Regulation of Domestic Computer Communications: A Competitive Reformation," (1973) 22 Buffalo Law Review 947.

Note, "Federal Communications Commission -- Review of Regulations Relating to Provision of Data Processing Services by Communications Common Carriers," (1973) 15 Boston College Industrial & Commercial Law Review 162.

Gabel, Richard. "Telecommunications Interconnection: Wherefrom and Whetherto?," Chapter 8 in Communications Technology and Social Policy, George Gerbner et al. (eds.), at p. 101. New York: Wiley-Interscience, 1973.

Kimber, Dieter. "An Assessment of the Computer/ Telecommunications Complex in Europe, Japan, and North America," Chapter 11 in Communications Technology and Social Policy, George Gerbner et al. (eds.), at p. 147. New York: Wiley-Interscience, 1973.

Note, "Computer or Communications? Allocation of Functions and the Role of the Federal Communications Commission," (1974) 27 Federal Communications Bar Journal 161.

Bigelow, Roy (ed.). Computer Law Service. 5 volumes. Chicago: Callaghan & Co., 1974.

Volume 4 of this service contains a number of articles relating to the regulation of computer/ communications in the United States, including the following (figures indicate chapter, section and article numbers):

- 6.1.1. Bigelow, R.P., "Some Legal and Regulatory Problems of Computers with Communications Capabilities."
- 6.2.1. Buckley, J.E., "Communication Tariffs"
- 6.5.2. Cox, K.A., "Carterfone and the Computer Utility Concept."
- 6.4.4. Duggan, M.A., "U.S. Data Processing Subject to Regulation."
- 6.6.1. Irwin, M.R., "Computers and Communications; The Economics of Interdependence."
- 6.4.1. Irwin, M.R., "Public Regulation of the Computer Utility."
- 6.5.1. Irwin, M.R., "Regulatory Decisions Affecting the Data Processing Community."
- 6.4.7. Strassburg, B., "The Computer Inquiry - The Regulatory Results."
- 6.7.2. Strassburg, B., "The Regulatory Environment."
- 6.5.3. Strassburg, B., "Regulatory Signposts on the Expressway of Communications."

Berman, Paul J., "Computer or Communications? Allocation of Functions and the Role of the F.C.C.," (1974) 27 Federal Communications Bar Journal 161.



Freed, Roy. Computers and Law: A Reference Work.  
5th edition. Boston: Freed, 1976.

A useful collection of articles, cases and materials on computers and the law. Chapter J, "Computers and the Antitrust Laws", and Chapter K, "Computers and Communications Regulation", are of particular interest.

## CHAPTER 9

### NEWSPAPERS, BOOKS, MAGAZINES, FILMS, RECORDS AND THE PERFORMING ARTS

This chapter presents a review of the literature on the history, development and public policy issues of what may be termed the "unregulated" forms of communication in Canada. Unlike broadcasters (Chapter 6), cable television operators (Chapter 7), or telecommunications carriers (Chapter 8), the forms of communication dealt with here are not directly regulated or licensed by government agencies in Canada or the United States. Nevertheless, both as major contributors to Canadian culture and as part of the rapidly-increasing information industry, these forms of communications have come under much more study in recent years.

Although the modes of communications examined here are not directly regulated, they are substantially affected by government policy. This can come in the form of tax incentives (e.g. the film industry's capital cost allowance), tax disincentives (e.g. Bill C-58 and its effect on foreign magazines aimed at the Canadian market), government subsidies (e.g. the Canada Council, the Secretary of State), lottery support schemes (e.g. the Wintario "half-back" plan, and the earmarking of lottery funds to arts and cultural activities), quota systems (e.g. the effect of the Canadian content quota on AM radio stations on the Canadian record industry), copyright law (e.g. the effect of the importation provisions on Canadian books) and competition legislation (e.g. the inquiries into newspaper mergers, and motion picture distributors). The latter three issues are dealt with in Chapter 6 (radio broadcasting), 15 (copyright) and 10 (competition law) respectively.

Apart from the above measures, which can be specifically directed towards Canadian communications and cultural industries, such industries are also subject to laws of general application, which can in some cases have substantial impact on their operation. Examples would include the law relating to defamation and the reporting

of judicial proceedings, and other censorship questions (see Chapter 13), access and fairness questions (see Chapter 12), and privacy and freedom of information (see Chapter 14). This chapter provides references to the general development of the non-regulated communications industries, and the evolution of policy issues other than those dealt with specifically in other chapters.

This chapter is divided into the following five parts:

- 9.1 Newspapers and Journalism
- 9.2 Book and Magazine Publishing
- 9.3 The Film Industry
- 9.4 The Recording Industry
- 9.5 Theatre and the Performing Arts

9.1 NEWSPAPERS AND JOURNALISM

The best overall source on the newspaper industry in Canada continues to be the Report of the Special Senate Committee on Mass Media (the Davey Report), issued in 1971 after extensive hearings. In addition to the Committee's three-volume report, noted below, reference should be made to the proceedings and evidence of the Committee, which are separately available and for which an excellent subject index exists.

Two continuing sources which focus on journalism and the mass media should also be noted in addition to the references noted below. One is the Carleton Journalism Review, which commenced publications in 1977. Issues are currently distributed free to subscribers of Content magazine. The second source is the Canadian Journal of Communication, formerly Media Probe, which has been published quarterly since 1976.

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Fournier, Jean-Pierre, "Overlapping Interests is a Dicey Matter," [Analysis of La Presse crisis], 15 Content (January 1972) 8.

Garrety, Earl, "The View from Outside Montreal," [Interviews with journalists from outside the province, after the Quebec 'crisis'], 2 Content (November 1970) 10.

Gordon, Charles, "Reaching in Helps Your Outreach," [The content of the editorial pages; use and abuse], 11 Content (September 1971) 9.

Greening, William Edward. The Globe and Canadian Politics, 1890-1902: a Study of the Policies of The Globe and their Influence on Liberal Policies. (M.A. Thesis, University of Toronto, 1939).

Hawkins, Reuben Francis. A Content Analysis of the Globe and Mail Coverage on Yorkville for the Three Year Period 1965-1967. (M.S.W. Thesis, University of Toronto, 1968).

Hopkins, Garth, "When You're No.3, Why Even Try?" [Death of the Toronto Telegram], 12 Content (October 1971) 6.

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Jones, Elwood Hugh. Political Aspects of the London Free Press, 1858-1867. (M.A. Thesis, University of Western Ontario, 1964).

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9.3

THE FILM INDUSTRY

Whether the current pace of Canadian film investment, encouraged by the capital cost allowance provisions of the Income Tax Act, can maintain itself, or whether the present boom is destined to decline dramatically, is impossible to tell. But the developments of the last few years have focused increasing attention on the Canadian film industry and on what government policies should be implemented to increase its viability. There is a substantial lack of good studies on this question, and the literature is only beginning to appear. The sources listed below are set out in chronological order.

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9.4 THE RECORDING INDUSTRY

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Shemel, Sidney and Krasilovsky, M. William. This Business of Music. New York: Billboard Publishing, 1976.

The book is a comprehensive handbook of the Who, What, When, Where, Why and How of the sprawling and complex music business. The book supplies detailed information on everything from an artist's selection of material to frozen funds in foreign record deals, from rights of privacy to musical commercials, from movie soundtracks to mechanical rights infringement, from taxation and capital gains to the cost of demos. There are, in addition, appendices containing forms and working samples of agreements and licences, plus texts of copyright statutes and regulations.



9.5 THEATRE AND THE PERFORMING ARTS

This part deals with the literature on theatre, dance and the performing arts generally. Again this is an area that has been very poorly studied in Canada, apart from anecdotal memoirs of certain larger institutions, such as the Stratford Festival, the National Ballet and the Royal Winnipeg Ballet. The sources below are arranged in chronological order.

Canadian Books and Studies

Oland, Sidney M., Materials for a History of the Theatre in Early Halifax. (M.A., Dalhousie University, 1966).

Scott, Robert Barry. A Study of Amateur Theatre in Toronto: 1900-1930. (M.A. Thesis, University of New Brunswick, 1966).

Williams, Albert Ronald. A Survey of the Professional and Major Amateur Theatre Presentations in Saskatoon from 1912-1930. (M.A. Thesis, University of Saskatchewan, 1967).

Bladen, Vincent. The Financing of the Performing Arts in Canada: An Essay in Persuasion. Toronto: Massey College, 1971.

Bélair, Michel. Le Nouveau Théâtre Québécois. Ottawa: Editions Leméac, 1973.

A discussion of the nature and major forces in modern Quebec theater. It urges a realization that Quebec needs a theater which truly represents the Quebec culture, because it can act as an essential force in the affirmation of the Quebec identity.

Yamin, Michael G., "Legal Problems in Broadway Theatrical Productions," (1966) 21 The Business Lawyer 453, 7 P.E.A.L. 133.

Clurman, David, "The New York Theatrical Financing Act," (1969) 1 Performing Arts Review 209.

McLellan, Goldwin, "Business-Art 'Economic Dilemma'," (1969) 1 Performing Arts Review 3.

Taubman, Joseph, "Performing Arts Law," (1969) 1 Performing Arts Review 269.

Taubman, Joseph, "Performing Arts Management and Administration," (1969) 1 Performing Arts Review 31.

## CHAPTER 10

### THE COMMUNICATIONS INDUSTRY AND COMPETITION LAW

The communications industry has extensive and sophisticated hardware requirements; public pressure demands its services in remote and less profitable regions. It is an industry, by its nature, ripe for arguments of natural monopoly and public utility. But when should such arguments be admitted?

Two distinct philosophies underlie anti-combines law: The traditional legal approach in which the idea that entrepreneurs should have equal opportunity to compete is central and the economic approach which stresses optimum resource allocation. A third major concern is relevant in the communications industry - the guarantee of fair and accurate information and of 'quality' content. This interplay of content and concentration adds a complicated dimension and is examined within the specific context of Parts 10.2 through 10.7.

Historically, the role that anti-combines legislation has played in the structuring of the Canadian communications industry has been relatively weak, principally because of the exclusion of most services from the ambit of the Combines Investigation Act and the judicial attenuation of much of the rest of the Act. On July 1, 1976, however, with the proclamation of the Stage One amendments to the Combines Investigation Act, S.C. 1974-75-76, c.76, the Act was made generally applicable to the services sector, and the wording of the statute was considerably tightened.

Many of the new provisions affect primarily the advertising industry, particularly those in Part V. Part V deals with conspiracies to prevent competition (s.32), other than certain permissible restrictions of advertising or promotions (see s.32(2)(f)), bid-rigging (s.32.2), professional sports (s.32.3), mergers and monopolies (s.33), discriminatory or predatory pricing (s.34), price allowances (s.35),

misleading advertising generally (s.36), representations as to tests or testimonials (s.36.1), double ticketing (s.36.2), pyramid selling (s.36.3), referred selling (s.36.4), bait-and-switch selling (s.37), sale above advertised price (s.37.1), promotional contests (s.37.2), good faith defence for media (s.37.3), and price maintenance (s.38).

Other provisions of the legislation are of more general application. These include exemptions for collective bargaining, underwriters, and amateur sport (ss.4-4.2), the powers of the Director of Investigation and Research (Part 1, ss.5-15), powers of the Restrictive Trade Practices Commission (Part II, ss.16-22), staff of the Director and the Commission (ss.23-25), privacy of proceedings (s.27), the power of the Director to make representations to other federal commissions, including the Canadian Radio-television and Telecommunications Commission (s.27.1), special remedies, including removal of customs duties, powers respecting patents or trade marks, injunctions, and appeals (ss.28-31.1), matters reviewable by the Commission, including refusal to deal (s.31.2), consignment selling (s.31.3), exclusive dealing, market restriction and tied selling (s.31.4), provisions respecting foreign judgments, directors or suppliers (ss.31.5-31.7), offences and procedures related to investigations by the Director or the Commission (ss.40-46.1), and investigations of monopolistic situations (s.47).

The amendments to the Combines Investigation Act which came into force in 1976 completed the first stage of revision. A committee of experts was appointed in the fall of 1975 to study and make recommendations to the Minister of Consumer and Corporate Affairs concerning Phase II of the revisions to the Canadian competition policy. The report of the committee, dealing with mergers, monopolization, specialization and export agreements, price discrimination, and other issues in pricing policy, was submitted to the Minister on March 31, 1976. Following further discussion Bill C-42, containing the Phase II amendments to the Act was introduced and given first reading on March 16, 1977. The Phase II amendments dealt primarily with what could be termed the "structural" aspects of competition policy such as mergers, monopolies, practices in oligopolistic industries and specialization agreements. The Phase II proposals also included the establishment of a class action for damages suffered by groups as a result of violations of the Act to complement the civil cause of action introduced under Phase I.

The current status of Phase II is most uncertain. Following extensive criticism, the bill was

allowed to lapse at the end of the summer of 1978 and has not been reintroduced so far in the 1978-79 session. Given the impending federal election and other priorities, it is unlikely that action will be forthcoming on these amendments for a substantial period of time. In the meantime, the materials listed below provide a useful guide in assessing the situation under the legislation formerly and presently in force.

The chapter is organized into eight parts:

- 10.1 The Law of Competition: An Introduction
- 10.2 Application of Combines Legislation to the Regulated Industries
- 10.3 Radio, Television and Competition
- 10.4 Competition and Communications Utilities, Satellites and Computers
- 10.5 Competition and Advertising
- 10.6 Competition and Newspapers
- 10.7 Competition and the Motion Picture Industry
- 10.8 Inquiries under the Combines Investigation Act involving the Communications Industry

Part 10.8 should be referred to when dealing with the role of competition within the specific areas detailed in Parts 10.3 through 10.7.

10.1 THE LAW OF COMPETITION: AN INTRODUCTION.

This section refers the reader to basic texts and articles dealing primarily with competition policy and the scope and effect of the legislative reform of the Canadian law on competition. Note, specifically, Stanbury's bibliography, an excellent departure point for further study.

Canadian Books

Skeoch, L.A. Restrictive Trade Practices in Canada. Toronto: McClelland & Stewart, 1966.

Professor Skeoch brings together a group of basic writings on restrictive trade practices in Canada to provide a good early survey of the combines field. Part one presents a detailed history of combines legislation, extracts from parliamentary debates on the intent of legislation, and articles on its judicial interpretation. Part two sets out brief summaries of all the reports prepared under the legislation, as well as the remedial action taken in each case. The final section includes studies on such matters as resale price maintenance, patents and restrictive conduct, and the history of industrial mergers over the period 1900-1949. An excellent basic reference. (Appendices & selected bibliography).

Cryslar, Alfred C. Restraint of Trade and Labour: Canada: Butterworths, 1967.

Stanbury, W.T. (ed.) Competition, the Law and Public Policy in Canada. Vancouver: 1970.

Purdy, H.L. Transport Competition & Public Policy in Canada. Vancouver: Univ. of British Columbia Press, 1972.

In examining contemporary forces of intermodal competition as they relate to the inter-city transport picture Purdy appraises the effect of public regulation of rates and services in the area. The communications reader may find the structure of his analysis useful in approaching the issue of regulation vs. competition.

Gosse, Richard. Law of Competition in Canada. Toronto: Carsell, 1972.

Canadian competition policy: proceedings of a conference. Queen's University Industrial Relations Centre, 1972.

Kilgour, David G. Cases and Materials on Unfair and Restrictive Trade Practices. Toronto: 1972.

#### Canadian Articles

Henry, D.H.W. "The United States antitrust laws: a Canadian viewpoint". (1970) 8 Canadian Year Book of International Law 249.

This article deals with the multinational firm and the extraterritorial application of anti-trust laws, especially as the relations between U.S. and Canada are affected.

McDonald, B.C. "Canadian competition policy: interim report of the Economic Council of Canada." (1970) 15 Antitrust Bulletin 521.

Skeoch, L.A. "Merger Issues in Canada." (1971) 16 Antitrust Bulletin 131.

Goldman, N.P. "Canadian competition law and unfair trade practices." (1972) 13 Boston College Industrial and Commercial Law Review 1303.

Goldman outlines the basic policies underlying Canadian competition law, and points out the particular provisions that are concerned with unfair trade practices - price discrimination, promotion allowances, misleading advertising, and so forth. He assesses the effectiveness of these laws in carrying out competition policy, and considers some of the changes embodied in the proposed Competition Act, particularly the establishment of a quasi-judicial tribunal empowered to shape national competition policy.

Heydon, J.D. "Recent developments in restraint of trade." (1975) 21 McGill Law Journal 325.

This article examines recent changes in the law of restraint of trade, referring to a number of decisions by courts throughout the Commonwealth as well as several important Canadian decisions which, Heydon contends have considerably expanded the scope of the doctrine. The notions of 'trade' and 'restraint', the categories of restraints to which the doctrine applies, the legitimate interests recognized as capable of protection and the reasonableness requirement are among

the aspects considered. The article discusses as well, the immediate future of the law in in this area.

Brent, A.S. "An Act to amend the Combines Investigation Act." (1975) 40 Saskatchewan Law Review 106.

The article reviews the legislative history of Canada's competition laws, surveys the most obvious deficiencies in the combines legislation prior to 1975 and examines the changes Bill C-2 makes in the Combines Investigation Act. Brent concludes that Bill C-2 represents a failure on the part of the federal Parliament: even if the Bill survives a constitutional challenge as to its validity it may still have the effect of hampering provincial attempts to protect their consumers. The only solution, he contends, is a joint venture by the federal and provincial governments to enact, in cooperation, a complete code of competition law.

Feltham, I.R. and Beattie, A.L. "Restrictive Practices and Agreements" (1975) Special Lectures of the Law Society of Upper Canada 449.

Feltham offers some ideas on the perspective from which to review restrictive trade practices and agreements, deals with a number of situations in which the restrictive trade agreements are generally not subject to overriding regulation and reviews a number of aspects of contractual marketing systems. Beattie comments briefly on Feltham's lecture and summarizes the statutory situation vis a vis Part V of the Combines Investigation Act.

Kaiser, G. "The new competition law; stage one." (1976) Canadian Business Law Journal 147.

Kaiser provides an excellent overview of the major provisions of the first of a two-stage legislative reform of the Canadian law on competition, Bill C-2. The major amendments discussed include: the establishment of the new review procedure before the Restrictive Trade Practices Commission applicable to the practices of refusals to deal, consignment selling, exclusive dealing, tied sales and market restrictions; the expanded prohibitions on price maintenance and misleading sales promotion; a review procedure by which the Restrictive Trade Practices Commission can require Canadians not to comply with foreign judgments or corporate directives adversely



affecting competition in Canada; authority for the Director of Investigation and Research to intervene in federal regulatory proceedings; and, lastly, the institution of the new private civil action founded on breach of the statute.

Hogg, P.W. and Grover, W. "The Constitutionality of the Competition Bill." (1976) 1 Canadian Business Law Journal 197-228.

Professors Hogg and Grover discuss the three heads of federal power under the B.N.A. Act that could be invoked in order to support Bill C-2: the "peace, order, and good government power" which is contained in the opening words of S.91; the "trade and commerce power", which is contained in s.91(2); and the "criminal law power", which is contained in s.91(27). The article provides a concise reference to the judicial interpretation of each power, considers the power's applicability to the new Competition Bill and ultimately proffers the opinion that the strongest authority for Bill C-2 is

Stanbury, W.T. and others, "Anti-Combines Law and Policy in Canada, 1885-1975: A Bibliography." (1976) 3 Canadian Business Law Journal 352.

Stanbury provides an extensive bibliography of books, articles and other materials relating to Canada's anticombinelaw. The principal focus of the references is the Combines Investigation Act, cases flowing from the Act, and the changes in public policy toward restraint of trade; excluded from the purview are articles relating to the field of "Industrial Organization", "industry studies", the list of Reports by the Restrictive Trade Practices Commission and its predecessors, published research inquiries conducted by the Director of Investigation and Research and reported judgments of cases. The majority of the references fall in the period since World War II.

10.2 APPLICATION OF COMBINES LEGISLATION  
TO THE REGULATED INDUSTRIES

The communications industry presents particularly difficult questions in regard to the application of competition law because many segments of the industry are regulated by boards or tribunals and many practices which might be considered anti-competitive may be expressly authorized or required by the regulatory agency. A number of Canadian judicial decisions have established that where this is the case, the practice in question will not be considered "undue" within the meaning of the Combines Investigation Act. See Cherry v. The King, [1938] 1 D.L.R. 156, Reference re The Farm Products Marketing Act, [1957] S.C.R. 198, and Regina v. Canadian Breweries Ltd., [1960] O.R. 601. In recognition of this fact, the 1977 amendments to the Combines Investigation Act added a new section, section 27.1, which authorizes the Director of Investigation and Research to make representations before federal commissions, including the CRTC, respecting the impact of their decisions on competition policy.

The overlap of regulation with competition is one of the most difficult areas of public policy and there has been relatively little writing on this subject in Canada. The following articles focus on the general question of the application of anti-trust law to regulated industries, and address a number of aspects of this question in areas other than communications.

Cox, Hugh B. "Trends in application of the antitrust laws to regulated industries," (1960) Public Utilities Fortnightly.

Cramton, R.C. "Diversification of ownership in the regulated industries - the folklore of regulation," (1961) Public Utilities Fortnightly.

Hale, G.E. and Hale, R.D. "Regulation: a defense to anti-merger litigation?" (1966) 54 Kentucky Law Journal 683.

Loevinger, L. "Regulation and competition as alternatives," (1966) 11 Antitrust Bulletin 101.

Nelson, J. R. "Role of competition in the regulated industries," (1966) 11 Antitrust Bulletin 1.

Solomon, R. A. "Fosterin competition through regulation," (1966) Public Utilities Fortnightly.

Zimmerman, E.M. "The relationship of regulation to antitrust enforcement," (1966) Public Utilities Fortnightly.

Dilzell, J.D. "The role of spectrum allocation in monopoly or competition in communications," (1968) 13 Antitrust Bulletin 871.

Hyde, R.H. "The role of competition and monopoly in the communications industries," (1968) 13 Antitrust Bulletin 871.

Kestenbaum, L. "The Limits of a regulated monopoly - telephone attachments, interconnection, and use of circuits," (1968) 13 Antitrust Bulletin 871.

Mervin, M.N. "Antitrust immunity of "public utilities" regulated by the FPC," (1968) 54 American Bar Association Journal 687.

Moulton, H.P. "Monopoly and competition issues facing the communications industries," (1968) 13 Antitrust Bulletin 871.

Strassburg, B. "Competition and monopoly in the computer and data transmission industries," (1968) 13 Antitrust Bulletin 991.

Einhorn, H.A. "Regulatory agency - antitrust relationships." (1969) Public Utilities Fortnightly 21.

Landon, John Henry. "An intra-industry approach to measuring the effects of competition: the newspaper industry." (Ph.D. thesis, Cornell University, 1969).

Note, "Diversification in communication: the FCC and its failing standards," (1969) Utah Law Review 494.

Petrucelli, G.F. and Long, W.A. "Antitrust and the regulated industries: the role of the "doctrine" of primary jurisdiction," (1969) 1969 University of Toledo Law Review 303.

Posner, R.A. "Natural monopoly and its regulation," (1969) 21 Stanford Law Review 548.

Baker, D.I. "Antitrust division, Department of justice: the role of competition in regulated

industries," (1970) 11 Boston College Industrial & Commercial Law Review 571.

Comanor, W.S. "Should natural monopolies be regulated?" (1970) 22 Stanford Law Review 510.

"Aftermath of WHDH: regulation by competition or protection of mediocrity?" (1970) 118 University of Pennsylvania Law Review 368.

Posner, R.A. "Natural monopoly and its regulation: a reply," (1970) 22 Stanford Law Review 510.

Saveri, G. "Applicability of the antitrust laws to public bodies," (1970) 4 University of San Francisco Law Review 217.

Graney, Michael W. "The antitrust laws -- conflicts with regulatory agencies," (1971) 4 Natural Resources Lawyer 537.

Note, "Antitrust and regulated industries", (1971) 16 Antitrust Bulletin 669.

Phillips, C. F. "Increasing conflict between regulation and antitrust," (1971) 87 Public Utilities Fortnightly, 29.

Stelzer, I.M. "Antitrust and the regulated industries - antitrust and regulatory policies, an introduction," (1971) 16 Antitrust Bulletin 669

Areeda, Phillip E. "Antitrust law and public utility regulation," (1972) 3 Bell Journal of Economics and Management Science 42.

Johnson, S.Z. "Antitrust snarls of public utility promotional programs," (1972) 60 Georgetown Law Journal 1253.

Landon, J.H. and Wilson, J.W. "Economic analysis of combination utilities," (1972) 17 Antitrust Bulletin 237.

"FCC computer inquiry: interfaces of competitive and regulated markets," (1972) 71 Michigan Law Review 172.

Note, "Public utility regulation: wheeling and the Sherman act," (1972) Law & Social Order 507.

Green, Mark and Nader, Ralph. "Economic regulation vs. competition: Uncle Sam the monopoly man," (1973) 82 Yale Law Journal 871.

Jones, W.K. "Example of a regulatory alternative to antitrust: New York utilities in the early seventies," (1973) 73 Columbia Law Review 462.

Miller, Briggs, Farmer Jr., Khourie, Liftin, Perlberg, Salzman, and Spiegel. "Regulated industries," (1973) 43 American Bar Association Law Journal 125.

King, J.H. Jr. "'Arguably lawful' test of primary jurisdiction in antitrust litigation involving regulated industries," (1973) 40 Tennessee Law Review 617.

Lowry, Edward D. "Justification for regulation: The case for natural monopoly." (1973) 92 Public Utilities Fortnightly 17.

Welch, Francis X. "Regulated competition - FCC's halfway house," (1973) 92 Public Utilities Fortnightly 39.

Note, "Application of the antitrust laws to regulated monopolies -- two case notes," (1974) 47 Temple Law Quarterly 370.

Posner, S.P. "Proper relationship between state regulation and the federal antitrust laws," (1974) 49 New York University Law Review 693.

Raynor, Richard A. "Competition within a regulated environment," (1974) 94 Public Utilities Fortnightly 24.

Schwarzer, W.W. "Regulated industries and the anti-trust laws - an overview," (1974) 41 ICC Practitioner's Journal 543.

Posner, S.P. "Proper relationship between state regulation and the federal antitrust laws." (1974) 49 New York University Law Review 693.

Scanlon, T.M. and others. "Antitrust and regulated industries: collision course?" (1974) 43 American Bar Association Law Journal 275.

Handler, M. "Regulation versus competition," (1975) 44 University of Cincinnati Law Review 191.

Jacobs, L.W. "State Regulation and the federal antitrust laws," (1975) 25 Case Western Reserve Law Review 221.

Deweese, D. "The courts and economic regulation." (at p. 119-136 of Courts and trials: a multi

disciplinary approach, (ed. M.L. Friedland) Toronto:  
University of Toronto Press, 1975).

### 10.3 RADIO, TELEVISION AND COMPETITION.

This part focuses on antitrust questions as they relate to radio and television broadcasting and cable television. Until recently, very little study of these questions had taken place in Canada. Licensing of broadcasting and cable television is the responsibility of the CRTC under the Broadcasting Act and the Commission requires all transfers of ownership or control to be approved by it. The ownership policies applied by the Commission have essentially developed on an ad hoc basis and there are no firm rules on multiple ownership such as the FCC has promulgated in the United States. Among the issues of particular interest which have emerged in recent hearings are cross-media ownership, control of the CTV network, and control over pay-TV. The U.S. literature has also focused on the question of anti-competitive practices in the sale of advertising time, and the concentration of control over network programming.

#### Canadian Books and Articles

Henry, D.W.H. "The Combines Investigation Act and mass media," (1970) 8 Osgoode Hall Law Journal 147; (1970) 2 Canadian Communications Law Review 216.

The author comments generally on the courts' narrow interpretation of the Combines Investigation Act and its consequent ineffectiveness in many situations. With regard to the media, he notes that it does not apply at all to the service industries: broadcasting, telex, computers and advertising (with the exception of the misleading advertising sections). Finally, he stresses the dangers involved in undue concentration of ownership in the communications industries because of the overriding social interest in fair and accurate provision of information.

Report of the Senate Special Committee on Mass Media.  
Ottawa: Information Canada, 1970.

Although focusing primarily on the ownership and control of newspapers, this three volume report is also a valuable source book on ownership patterns in the broadcasting and cable television industry. The report generally commends CRTC ownership policies and also addresses some comments on the relationship between cable television systems and telephone companies.

Johnson, N. "Freedom to create: the implications of antitrust policy for television programming content", (1970) Law and Social Order 337; 8 Osgoode Hall Law Journal 11.

McDayter, W. A Media Mosaic - Canadian Communications through a Critical Eye. Toronto: Holt, Rinehard and Winston, 1971.

This book discusses concentration and monopoly in the media and the implications of these for foreign affairs and the electronic messages of the future.

Benson, John. "We're not selling Soap [a case against concentrated media ownership]," (1973) 30 Content 18.

Campbell, Robert and Hunt, Russell. "Oil, logs, minerals, ships, buses and the media [profile of a monopoly of media, an excerpt from the book, K.C. Irving]," (1973) 35 Content 2.

Pepin, René. "Introduction à l'étude du phénomène de la propriété des mass média électroniques au Canada," (1976) 7 Revue de droit de l'université de Sherbrooke 49.

An excellent study of the present ownership pattern for radio and television stations and cable television systems in Canada, the relations between networks and affiliates, the concentration of ownership issue, and the CRTC decisions on ownership and control under the Broadcasting Act.

#### Other Books, Articles and Studies

Coase, R.H. British Broadcasting: A Study in Monopoly. London: Longmans, 1950.

Celler, Emanuel. "Antitrust problems in the television broadcasting industry," (1957) 22 Law and Contemporary Problems 549.

Hansen, Victor R. "Broadcasting and the antitrust laws," (1957) 22 Law and Contemporary Problems 572.

Note, "FCC disclaims power to limit competition in broadcasting," (1957) 57 Columbia Law Review 1036.

Baird, W. Bruce. "Antitrust Immunity in the communications industries," (1958) 44 Virginia Law Review 1131.



Hale, G.E. and Hale, R.D. "Competition or control II: radio and television broadcasting," (1959) 107 University of Pennsylvania Law Review 585.

Schwartz, Bernard. "Antitrust and the FCC: the problem of network dominance," (1959) 107 University of Pennsylvania Law Review 753.

Levin, Harry J. Broadcast Regulation and Joint Ownership of Media. New York: New York Univ. Press, 1960.

Jenkins, Clive. Power Behind the Screen: Ownership Control and Motivation in British Commercial Television. London: MacGibbon and Kee, 1961.

Note, "Federal pre-emption in television anti-trust," (1961) 13 Stanford Law Review 624.

Altman, W. Thomas, D., and Sawyers, D. TV: From Monopoly to Competition and Back? Institute of Economic Affairs, 1962.

Irwin, Manley R. "The communication industry and the policy of competition," (1964) 14 Buffalo Law Review 256; 6 P.E. A.L. 269.

Taubman, J. "Pennsalt and entertainment pepper," (1964) 9 Antitrust Bulletin 813.

Note, "Aspects of pay television: regulation, constitutional law, antitrust," (1965) 53 California Law Review 1378.

Perry, R.L. "Current antitrust problems in broadcasting," (1966) 27 Ohio State Law Journal 1.

Toohy, D. W. "Newspaper ownership of broadcast facilities," (1966) 20 Federal Communications Bar Journal 44.

"Corporate acquisition of broadcast facilities: the 'public interest' and the antitrust laws," (1967) 8 Boston College Industrial & Commercial Law Review.

Austin, A.D. "Antitrust proscription and the mass media," (1968) Duke Law Journal 1021.

Cox, K.A. "Competition in and among the broadcasting, CATV, and pay-TV industries," (1968) 13 Antitrust Bulletin 871.

Hart, P.A. "The congressional perspective of competition in the communications industries," (1968) 13 Antitrust Bulletin 871.

Johnson, N. "Harnessing revolution for the communications industries of tomorrow," (1968) 13 Antitrust Bulletin 871.

Mahaffie, C.D. "Mergers and diversification in the newspaper, broadcasting and information industries," (1968) 13 Antitrust Bulletin 927.

Note, "Effect of antitrust legislation on anti-competitive practices of television networks in the sale of advertising time," (1968) 37 University of Cincinnati Law Review 605.

Trask, G.G. "Palace of humbug - a study of FCC policies relating to group ownership of television stations," (1968) 22 Federal Communications Bar Journal 185.

Levin, H.H. "Broadcast structure, technology, and the ABC: ITT merger decision," (1969) 34 Law & Contemporary Problems 203.

Note, "Conflicts of interest in news broadcasting," (1969) 69 Columbia Law Review 887, 10 P.E.A.L. 380.

Note, "Cross-media ownership and the antitrust laws - a critical analysis and a suggested solution," (1969) 47 North Carolina Law Review 794.

Litwin, G.H. and Wroth, W.H. The Effects of Common Ownership on Media Content and Influence. Washington, D.C., National Association of Broadcasters, 1969.

Barnett, S.R. "Cable television and media concentration," (1970) 22 Stanford Law Review 221.

Johnson, Leland L. Cable Television and the Question of Protecting Local Broadcasting. Santa Monica, Calif.: RAND Corp., 1970.

Posner, R.A. Cable Television: the Problem of Local Monopoly. (Rand Corporation Memorandum, May 1970).

Johnson, N. and Hoak, J.M. "Media concentration: some observations on the United States experience," (1979) 56 Iowa Law Review 267.

Levin, H.J. "Competition, diversity, and the television group ownership rule," (1970) 70 Columbia Law Review 79.

Bennett, R.W. "Media concentration and the FCC: focusing with a section seven lens," (1971) 66 Northwestern University Law Review 159.

Cherington, Hersch and Brandwin (eds.) Television Station Ownership - a case study in federal agency regulation. New York: Communications Arts Books, Hastings House, 1971.

Berg, Dr. Klaus. "Television judgment and broadcasting monopoly," (1971) 22 EBU Review, No. 129, p. 57.

Crandall, R.W. "Economic effect of television network program 'ownership'," (1971) 14 Journal of Law and Economics 385.

Kestenbaum, L. "Competition in communications," (1971) 16 Antitrust Bulletin 769.

Lago, A.M. "Price effects of joint mass communication media ownership," (1971) 16 Antitrust Bulletin 789.

Taubman, Joseph. "The role of the conglomerates in the American entertainment industry," (1971) 2 Performing Arts Review 349, (1970) University of Toronto Law Journal 236.

Note, "Professional football telecasts and the blackout privilege," (1972) 57 Cornell Law Review 297.

Besen, S.M. and Soligo, R. "Economics of the network - affiliate relationship in the television broadcasting industry," (1973) 63 American Economic Review 259.

Long, S. "Antitrust and the television networks: restructuring via cable TV," (1973) 6 Antitrust Law & Economics Review 99.

Noll, Roger G., Peck, Merton J., and McGowan, John J., Economic Aspects of Television Regulation. Washington, D.C.; Brookings, 1973.

Long, S.L. The Development of the Television Network Oligopoly. (Ph.D. thesis, University of Illinois, Urbana-Champaign, 1974)

Note, "Noll, Peck and McGowan's economic aspects of television regulation," (1974) 5 Bell Journal of Economics and Management Science 301.

Howard, H.H. "Multiple Broadcast Ownership: regulatory history," (1974) 27 Federal Communications Bar Journal 1.

Pearson, D.B. "Cable: the thread by which television competition hangs," (1974) 27 Rutgers Law Review 800.

Watkins, McNeil II. "Diversity ownership in broadcasting -- affirmative policy in search of an author," (1975) 27 University of Florida Law Review 502.

Kahn, F.J. "Cable, Competition and the Commission," (1975) 24 Catholic University Law Review 854.

Note, "Concentration of ownership of the media of mass communication: an examination of new FCC rules on cross ownership of colocated newspapers and broadcast stations," (1975) 24 Emory Law Journal 1121.

Note, "Antitrust implications of network television programming," (1976) 27 Hastings Law Journal, 1207.

10.4 COMPETITION AND COMMUNICATIONS UTILITIES,  
SATELLITES AND COMPUTERS.

This subject is undoubtedly the fastest growing field of interest in the area of competition policy in Canada. Particular impetus has been given by the Restrictive Trade Practices Commission, which since 1977 has been conducting hearings in its Bell Canada - Northern Telecom inquiry, noted at Item 10 at Part 10.8 below. This proceeding originally focused primarily on the effect of vertical integration on the telecommunication equipment supply market but has since been widened to include the question of terminal attachments and the issue of Bell's policy toward system interconnection. At the same time, the CRTC has been involved in three precedent-setting cases which have cast dramatic new light on the issue of competition vs. monopoly in regard to telecommunication carriers in Canada. These cases are the Telesat case (August 1977), the Challenge case (December 1977) and the CNCP Telecommunications case (expected to be released in March or April 1979). Very little academic study in Canada has been given to the matters raised in these decisions but there is little doubt that this area will shortly be the subject of much more research. The books and articles below focus on comparable questions as they have been raised in the United States. The American materials also include a number of studies on competition in the data processing field. In Canada this issue was focused on in Branching Out, the Report of the Canadian Computer/Communications Task Force (1971), but again there is a general lack of good academic studies in the field.

American Books

Coon, Horace. American Tel & Tel: The Story of a Great Monopoly. New York: Longmans, Green and Co., 1939.

Goulden, Joseph C. Monopoly. New York: G.P. Putnam's Sons, 1968.

The story of AT & T - examination of certain AT & T activities and policies that should be of concern to the phone-using public and to the officials charged with regulating a public utility that is unique in size, power and function.

Rodgers, W. Think - a biography of Watson and IBM. New York: New American Library, 1969.

This is the behind-the-image story of IBM - the company that computerized the works. It

is also the story of the man who shaped the company and his remarkable success. Perhaps the most important chapter is the final, which analyses potential anti-trust problems.

Irwin, M.R. The Telecommunications Industry: Integration or Competition. New York: Praeger Publishers, 1971.

In this study Professor Irwin demonstrates the interdependence of corporate conduct, regulatory and antitrust policies and market structure. For the practitioner, the study illustrates the need to look beyond the traditional set of problems associated with rate base, rate of return and rate structure. For the economist, it stresses the need to go beyond simple statistics of partial equilibrium analysis and assess the fundamental structural and institutional determinants of performance before making pronouncements about appropriate steps for maximizing welfare.

Borchardt, K. Structure and Performance of the U.S. Communications Industry - Government Regulation and Co-planning. Boston: Division of Research, Graduate School of Business Administration, Harvard University, 1970.

This study seeks to identify "structural" problems in the U.S. communications industry and to suggest approaches for handling them more effectively and expeditiously. The role of the Dept. of Justice under anti-trust laws in shaping the present industry structure is examined in some detail, and it is shown how at various times the Department and other government agencies have been in fundamental disagreement over whether 'competition' or 'co-ordination' is called for in the public interest. A number of situations are discussed in which the strong desire to avoid monopolies and yet not to depend wholly on public utility-type regulation has led to efforts of building into the industry structure a maximum number of competition features.

Bode, Hendrik Wade. Synergy: Technical Integration and Technological Innovation in the Bell System. Murray Hill, New Jersey: Bell Laboratories, 1971.

Sampson, Anthony. The Sovereign State: The Secret History of ITT. London: Hodder and Stoughton, 1973.

American Articles

Baskey, Bennett. "Monopoly and antitrust aspects of communications satellite operations," (1963) 58 Northwestern University Law Review 266.

Kirkpatrick, W.W. "Antitrust in orbit," (1964) 33 George Washington Law Review 89.

Irwin, M.R. "Computer utility: competition or regulation?" (1967) 76 Yale Law Journal 1299.

Acheson, D.C. "Competition problems in international communications," (1968) 13 Antitrust Bulletin 871.

Turner, D.F. "The role of antitrust policy in the communications industry," (1968) 13 Antitrust Bulletin 871.

Duggan, M.A. "Computers, communications and competition: a frenetic farrago," (1968) 1 Law and Computer Technology 2.

Geller, H. "Competition and monopoly policies in domestic satellite communications," (1968) 13 Antitrust Bulletin 871.

Strassburg, B. "Competition and monopoly in the computer and data transmission industries," (1968) 13 Antitrust Bulletin 991.

Rowe, F.M. "Antitrust and monopoly policy in the communications Industries," (1968) 13 Antitrust Bulletin 871.

Gabel, R. "The early competitive era in telephone communication, 1893-1920," (1969) 34 Law and Contemporary Problems 340.

Note, "FCC computer inquiry: interfaces of competitive and regulated markets," (1972) 71 Michigan Law Review 172.

Note, "Telex v. IBM (Telex Corp. v. IBM. 367 F Supp 258): implications for the businessman and the computer manufacturer," (1974) 60 Vanderbilt Law Review 884.

Binder, D. "Computers & market dominance: an emerging antitrust problem," (1975) 26 Mercer Law Review 427.

Note, "Telex v. IBM. (510 F 2d. 894): remodelling the areas in antitrust," (1976) 23 UCLA Law Review 737.

10.5 COMPETITION AND ADVERTISING

This Part sets out the literature relating to the antitrust implications of advertising. The articles are all from the United States, indicating the lack of equivalent studies in Canada. This is again an area which is overdue for study in Canada, particularly in regard to the effects of advertising on concentration ratios in the manufacturing industry, the effects of volume discounts, and the issue of price discrimination and "must-buy" practices.

American Articles

Baum, Daniel J. "Self-regulation and antitrust: suppression of deceptive advertising by the publishing media," (1961) 12 Syracuse Law Review 289, 2 P.E.A.L. 330.

Note, "Misrepresentation and the Lindsay bill: a stab at uniformity in the law of unfair competition," (1961) 70 Yale Law Journal 406; 2 P.E.A.L. 81.

Telser, Lester G. "Advertising and competition," (1964) 72 Journal of Political Economy 537

Gamboni, C.A. "Unfair competition protection after Sears and Compco," (1965) 40 New York University Law Review 101; 5 P.E.A.L. 185.

Note, "Antitrust implications of network television quantity advertising discounts," (1965) 65 Columbia Law Review 1213.

Turner, D.F. "Advertising and competition," (1966) 26 Federal Bar Journal 93.

Note, "Effect of antitrust legislation on anticompetitive practices of television networks in the sale of advertising time," (1968) 37 University of Cincinnati Law Review 605.

"Symposium on Robinson - Patman defenses, advertising and promotional allowances and antitrust compliance programs," (1968) 37 American Bar Association Antitrust Law Journal 64.

Ekelund, G. "Advertising and concentration: some new evidence," (1970) 15 Antitrust Bulletin 243.

Landon, J.H. "Relation of market concentration to advertising rates: the newspaper industry," (1971) 16 Antitrust Bulletin 53.



Mann, H.M. "Advertising and concentration: new data on an old problem," (1971) 16 Antitrust Bulletin 101.

Miller, R.A. "Advertising and competition: some neglected aspects," (1972) 17 Antitrust Bulletin 467.

Mueller, W.F. "Advertising monopoly and the FTC's Breakfast Cereal Case: an "attack on advertising?" (1973) 6 Antitrust Law & Economics Review 59.

Note, "Advertising and shared monopoly in consumer goods industries," (1973) 9 Columbia Journal of Law & Social Problems 241.

Peterson, R.D. "Advertising - agency industry: organization, entry and concentration," (1973) 6 Antitrust Law & Economics Review 83.

Friedland, T.S. "Possible resolution of the advertising - concentration debate," (1974) Quarterly Review of Economics and Business 123.

Huth, W.E. "Advertising industry - an unlikely monopolizer," (1974) 19 Antitrust Bulletin 653.

Sutton, C.J. "Advertising, concentration and competition," (1974) 84 Economic Journal 56.

Reed, O.L., Jr. "Psychological impact of TV advertising and the need for FTC regulation," (1975) 13 American Business Law Journal 171.

Note, "Sherman Act and the American Bar Association's Ban on Advertising: Madison Avenue will have to wait," (1976) 10 Suffolk University Law Review 557.

Thompson, M.J. "Government regulation of advertising: killing the consumer in order to 'save' him," (1976) 8 Antitrust Law & Economics Review 81.

10.6 COMPETITION AND NEWSPAPERS.

The publication of the three-volume Report of the Special Senate Committee on Mass Media in 1970 represents the only substantial effort so far to study the level of concentration in the newspaper industry in Canada and to suggest remedial measures. The recommendations of the Report relating to ownership have not generally been implemented, and concentration ratios have increased markedly since 1970. The effect of the Combines Investigation Act on mergers within the newspaper industry in Canada has been minimal, as evidenced by the results of the six inquiries relating to newspapers which have occurred. (These are summarized as Items 7, 8, 14, 18, 19 and 20 in Part 10.8 below). Particularly disappointing to those who would seek strong competition law in Canada is the result of the prosecution of K.C. Irving in New Brunswick which finally resulted in an acquittal in 1976. See Item 19 in Part 10.8 below. In addition to the articles referred to below, reference should be made to the article by D.H.W. Henry, Q.C., noted in Part 10.3.

Canadian Articles

Bartha, P. "The Combines Act and the press," (1969) 13 Commentator (January) 21.

Dahrin, R. "Quebec's press monopoly," (1969) 5 Canadian Dimension 13 (January, 1969).

L'Heureux. "La liberté de presse et la concentration des entreprises," (1974) 15 Cahiers de Droit 719.

American Articles

Wiggins, J.R. "Press and conflicts of interest," (1964) 24 Federal Bar Journal 358.

Flackett, J.M. "Newspaper mergers: recent developments in Britain and the United States," (1967) 12 Antitrust Bulletin 1033.

Note, "Antitrust - newspaper's maintenance of fixed maximum retail price held not to be combination in restraint of trade or commerce," (1967) 47 Boston University Law Review 274.

Note, "Independent contractor status of newspaper carriers: some antitrust questions," (1967) 1 Valparaiso University Law Review 157.

Flynn, J.J. "Antitrust and the newspapers: a comment on S.1312," (1968) 22 Vanderbilt Law Review 103.

Mahaffie, C.D. "Mergers and diversification in the newspaper, broadcasting and information industries," (1968) 13 Antitrust Bulletin 871.

Roberts, K. "Antitrust problems in the newspaper industry," (1968) 82 Harvard Law Review 319.

Note, "Failing newspaper or failing journalism: the public versus the publishers," (1970) 4 University of San Francisco Law Review 465.

Note, "Monopoly newspapers: troubles in paradise," (1970) 7 San Diego Law Review 268.

Knox, R.L. "Antitrust exemptions for newspapers: an economic analysis," (1971) Law & the Social Order 3.

Note, "Newspaper preservation act," (1971) 32 University of Pittsburg Law Review 347.

Note, "Newspaper preservation act: a critique," (1971) 46 Indiana Law Journal 392.

Note, "Newspaper preservation act: an ineffective step in the right direction," (1971) 12 Boston College Industrial & Commercial Law Review 937.

Scanlon, P.D. "Oligopoly, bread lines, and the press: a comment on 'economic' reporting in the media," (1970-71) 4 Antitrust Law & Economics Review 1.

Note, "Concentration of ownership of the media of mass communication: an examination of new FCC rules on cross ownership of colocated newspapers and broadcast stations," (1975) 24 Emory Law Journal 1121.

10.7 COMPETITION AND THE MOTION PICTURE INDUSTRY

The domination of motion picture theatres in Canada by Famous Players and Odeon has given rise to numerous complaints regarding unfair trade practices although there is very little examination of this issue in the Canadian literature. The results of the various inquiries into this issue by the Restrictive Trade Practices Commission and the Director of Investigation and Research are set out in Part 10.8 below: see Items 1, 13 and 17. With the 1977 amendments to the Combines Investigation Act bringing services generally within the ambit of the legislation, however, it is widely expected that many of the trade practices countenanced in the earlier proceedings would now be prohibited under the Act. The literature below focuses on the equivalent issue in the United States.

American Books

Huettig, Mae D. Economic Control of the Motion Picture Industry: a study in industrial organization. Philadelphia: University of Pennsylvania Press, 1944.

Conant, Michael. Antitrust in the Motion Picture Industry: Economic and Legal Analysis. Los Angeles: University of California Press, 1960.

Jobs, Gertrude. Motion Picture Empire. Hamden: Anchor Books, 1966.

American Articles

Cassady, R. "Damage measurement in motion picture industry private antitrust actions," (1964) 37 Southern California Law Review 389.

Gordon, J.S. "Horizontal and vertical restraints of trade: the legality of motion picture splits under the antitrust laws," (1965) 75 Yale Law Journal 239.

Note, "Experiment in preventive anti-trust: judicial regulation of the motion picture exhibition market under the Paramount decrees," (1965) 74 Yale Law Journal 239.

Note, "Political blacklisting in the motion picture industry: a Sherman Act violation," (1965) 74 Yale Law Journal 567.

Note, "Antitrust challenge to the GGPRX movie rating system," (1971) 6 Harvard Civil Rights Law Review 545.

Note, "Labor pains, movies and the antitrust blues," (1972) 20 UCLA Law Review 142.

Crandall, R.W. "Post-War Performance of the Motion Picture Industry," (1975) 20 Antitrust Bulletin 49.

10.8 INQUIRIES UNDER THE COMBINES INVESTIGATION ACT INVOLVING THE COMMUNICATIONS INDUSTRY.

This Part provides a summary of all inquiries initiated under the Combines Investigation Act involving the communications industry in Canada, in chronological order. The following summaries have been prepared on the basis of a review of all reports of the Restrictive Trade Practices Commission (RTPC), as well as the Annual Reports of the Director of Investigation and Research, from the earliest times to present.

Of the twenty inquiries noted below, the only one currently in progress is the Bell-Northern Telecom inquiry, Item 10. All of the inquiries involved the wording of the Combines Investigation Act prior to the 1977 amendments noted at the beginning of this chapter, and a number of them would no doubt reach a different result under the amended legislation.

1. Inquiry into an Alleged Combine in the Motion Picture Industry.

This inquiry concerned the unfair situation that Famous Players attained through its control of theatres. The Report of the Commissioner, April 30, 1931 concluded that a combine existed in the motion picture industry in Canada and named Famous Players, and other exhibitors, certain producers, distributors and the Motion Picture Distributors and Exhibitors of Canada (a trade organization) as parties to the combine, citing agreement and acquiescence to a system of 'protocol', the booking arrangements; pooling agreements; 'operating agreements' and the acquisition by Famous Players, sometimes by 'threats', of many theatres as the basis of their determination. Prosecution was instituted by the Attorney General of Ontario under the Act. See R. v. Famous Players, [1932] O.R.307. The Court held that, on the facts, the Crown had not made out a case. Successful cases brought on the basis of similar facts in the United States (Paramount v. U.S. [1930], 51 U.S. 42; U.S. v. National Pictures; Majestic v. United Artists [1930], 43 F. Rep. (2d) relied upon by the Crown were held inapplicable as the U.S. Sherman Act did not require "detriment to the public".) The case was not appealed.

2. Inquiry relating to the Distribution of Motion Picture Films.

The inquiry related to complaints that appeared in the press of a central Canadian city in July 1956 that distributors of motion picture films in that area were following a common policy of discriminating against independently-owned movie houses by offering chain houses priority of films and lower rentals. Several proprietors of independently-owned theatres in the area were interviewed by a member of the Combines Branch. The information so obtained did not indicate the existence of any collusion and was not considered to warrant more formal inquiry. The matter was discontinued.

3. Inquiry concerning the rates charged by a public utilities firm engaged in installing communications systems.

The Commission, after examining information as to the utility's method of costing and quoting upon installations, did not find that the utility's intercommunication business was being subsidized by its public utility business for the purpose of stifling and eliminating competition from smaller competitors. The inquiry was therefore discontinued May 20, 1959.

4. Inquiry relating to the policy of utilities engaged in the business of supplying teletype and related service.

The complainant alleged that the utilities, in supplying, sending and receiving equipment only where such equipment and service were to be used in the conduct of the customer and authorized users, and where no payment was exacted from any party other than the utility for the use of the utility's services, prevented the complainant from entering into the business of accepting, transmitting and delivering messages. The inquiry was discontinued on July 27, 1959, on the basis that the subject matter involved was essentially that of a service and as such was not within the ambit of the Combines Investigation Act.

5. Inquiry relating to the provision of teletype machines by three public utilities.

It was alleged that the policy of granting unequipped wire service only on a continuous basis was such as to make it impossible for the complainant company to supply machines to private users, who are seldom in a position to utilize continuous service. The Commission,

having ascertained that retention over both equipment and circuits was a simpler and more efficient method of operation and that the utilities obtained equipment from a number of suppliers, rejected the allegation that the policy unduly restricted trade. The inquiry was discontinued on March 30, 1962.

6. Inquiry concerning the sale of telephone directory covers.

The Commission rejected the allegation of price discrimination on the basis that although the company complained against had in fact offered a discount to certain merchants, such merchants had acquired no interest in the telephone book covers. The subject of the sale was advertising space, and was not a sale of an article within the ambit of the anti-combines legislation. The inquiry was discontinued on August 2, 1961.

7. Inquiry into the Production, Distribution and Supply of Newspapers in the Sudbury-Copper Cliff area (R.T.P.C. report dated February 26, 1964).

The Commission did not find any abuse of monopoly power to eliminate a potential competitor where the established monopolistic daily paper, after hearing of the plans regarding the commencement of a weekly, started its own weekly so that its competitor never operated at a profit and ceased publications.

8. Inquiry relating to the Acquisition in 1962 of the Times-Journal Newspaper published in Fort William, Ontario (R.T.P.C. report dated March 30, 1965).

The Commission, on an analysis of circulation patterns, rejected the allegation that the acquisition of the Fort William paper by the Port Arthur News Chronicle was an unlawful merger, on the ground that the two papers were not in competition, as each were a monopoly in their own independent market prior to the merger.

9. Inquiry relating to the production and distribution of phonographic records.

The Commission rejected the allegation that the firm had attempted to monopolize the production and distribution of records with French lyrics as it found that all major record manufacturers produced records with French lyrics.



The second allegation, that an unlawful merger, whereby the firm acquired a monopoly of the distribution of juke boxes in the Province of Quebec and the supplying of records to be played in these juke boxes, was rejected on the ground that there was no particular barrier to entry in that part of the trade. Inquiry discontinued, March 30, 1966.

10. Inquiry relating to the Manufacture, Production, Distribution, Purchase, Supply and Sale of Communications Systems, Communications Equipment and Related Products.

This inquiry was instituted in 1967 as a result of the acquisition by Bell Telephone of all the important telephone companies in Eastern Canada. The Director of Investigation and Research, having examined the evidence obtained in the matter, concluded that the investigation did not disclose a situation contrary to any provision of Part V of the Combines Investigation Act. It did, however, disclose that there existed conditions or practices relating to a monopolistic situation such as to warrant inquiry under section 47 of the Act. Following further study, the Director forwarded a Statement of Material (the "Green Book") relating to the inquiry to the Restrictive Trade Practices Commission pursuant to section 47 on December 20, 1976. Subsequently, the Commission announced that it would conduct a public inquiry into the matters raised in the Statement of Material, and hearings commenced on June 15, 1977 in Ottawa. Hearings have continued since that date and were still in progress in the beginning of 1979.

The Statement of Material forwarded to the Commission focused primarily on the effect of vertical integration in the telecommunications industry, particularly the effect of the ownership of Northern Telecom Ltd. by Bell Canada on competition in the Canadian telecommunication equipment industry and upon the regulation and provision of telecommunication services in Canada. The statement concluded that the public interest might best be served by a dissolution of the ownership ties between Northern Telecom and Bell Canada. In addition, the Statement presented evidence that Northern Telecom's dominance in the telecommunications equipment market had been further consolidated as a consequence of Bell Canada's practices, including its buying procedures, its acquisition

policy, its terminal attachment policy, its interconnect policy vis-a-vis cable television and its interconnect policy vis-a-vis non-Bell Canadian carriers. Additional evidence respecting these matters has been presented in the course of the Commission's hearings. The Commission is required by the Act to consider all such evidence and to report in writing to the Minister of Consumer and Corporate Affairs.

11. Inquiry concerning the Supply of Phonograph Records, which are trade-marked and copyrighted articles.

The Commission determined that there was no misuse of patents or trade marks as a Canadian company is free to import and sell trade marked goods manufactured in the United States by the American owner of the Canadian trade mark and that the American supplier might refuse to supply certain suppliers for breach of a provision to sell only to authorized retail dealers without violating the monopoly provisions of the Combines Investigation Act as opportunity existed for the importation of competing phonograph records. The inquiry was discontinued March 3, 1969.

12. Inquiry relating to the Production, Purchase, Sale and Supply of Books in the Province of Quebec.

This inquiry disclosed a price fixing conspiracy in relation to two classes of French language books sold in the Province of Quebec; school text books and other books. The evidence was remitted to the Attorney General of Canada and proceedings were taken under section 31(2) of the Act for two Orders of Prohibition. Orders were granted by the Quebec Court of Queen's Bench on January 30, 1970.

13. Inquiry relating to the Exhibition of Motion Pictures in Western Canada.

The Commission determined that the business of exhibiting motion pictures was not within the purview of the Act; jurisdiction could not be based on monopoly unless the individual was shown to be in the business of manufacturing, producing, transporting, purchasing, supplying, selling, storing, or dealing in film. Favourable treatment accorded to the individual theatres was insufficient evidence to support an allegation of conspiracy. The inquiry was accordingly discontinued on May 29, 1970.

14. Inquiry concerning the Production and Supply of Newspapers in the City of Vancouver and elsewhere in the Province of British Columbia (R.T.P.C. report dated August 16, 1970).

Recognizing the importance of the press and consequently the necessity of diversity and independent editorial policy but also the economic realities the Restrictive Trade Practices Commission approved a merger of the two Vancouver papers subject to a series of undertakings to ensure editorial independence. The Commission also rejected the use of a "package" advertising scheme used by the two papers as being contrary to the public good.

15. Inquiry relating to a Data-Processing Company Merger.

The Commission examined the merger of two foreign-owned data processing equipment manufacturers, Honeywell Inc. and General Electric Co., as each of the companies had Canadian subsidiaries. It was considered that the merger would provide more effective competition to the dominant firm in the industry and hence no inquiry was initiated.

16. Inquiry relating to Mass Market Distribution of Magazines and Paperback Books.

The Director concluded that abuse of exclusivity with respect to territory and distribution rights was not a general characteristic of the trade, and that non-exclusivity could interfere with efficient operations. This, in conjunction with the passage of the Periodical Distributors Act, which provided for regulation of the trade, during the period of inquiry, prompted the Director to seek and receive discontinuance in 1974.

17. Inquiry relating to the Distribution and Rental of Motion Picture Films.

The evidence obtained in the inquiry, concerning allegations by independent theatre operators unable to obtain good first-run motion picture films, that the major chain exhibitors in Canada have control over all such films, was referred to the Attorney General who subsequently advised the Director in 1974 that the circumstances did not warrant proceedings under the Act.

18. Inquiry relating to a Newspaper Merger in Toronto.

The Toronto Star's purchase of the Toronto Telegram's subscription lists and goodwill when the latter newspaper ceased publication in 1971 gave reason to believe that the acquisition was a merger which would place the Star in a monopoly position in the daily-evening newspaper field in Metropolitan Toronto. The matter was submitted to the Attorney General; the Department of Justice concluded in 1974 that prosecution or other criminal proceedings were not warranted.

19. Inquiry relating to the Production, Supply and Distribution of Newspapers in the Province of New Brunswick.

This inquiry was initiated in 1969 when it was learned that K.C. Irving Limited has acquired the controlling interest in University Press of New Brunswick and thereby control of the business of publishing English daily newspapers in the Province of New Brunswick. The Director determined that Irving was a party to a merger that substantially limited competition and to a monopoly that operated or was likely to operate to the detriment of the public. The evidence was referred to the Attorney General who decided to prosecute.

At the trial level, the prosecution was successful and an order was issued directing that the two Moncton newspapers be disposed of to parties having no connection with K.C. Irving, within twelve months of the determination of all appeals. See R. v. K.C. Irving et al. (1974), 8 N.B.R. (2d) 360, 16 C.C.C. (2d) 49, 45 D.L.R. (3d) 45, 13 C.P.R. (2d) 115. On appeal to the New Brunswick Court of Appeal, however, the convictions were unanimously set aside and the accused was acquitted of all charges. See R. v. K.C. Irving et al., (1975), 11 N.B.R. (2d) 181, 23 C.C.C. (2d) 479, 62 D.L.R. (3d) 157, 20 C.P.R. (2d) 193. On further appeal to the Supreme Court of Canada, the appeal was dismissed. The unanimous court held that on charges involving "merger, trust or monopoly" and "monopoly", proof must be adduced of operation or likely operation of a completely-controlled class of business in a market area to the detriment or against the interest of the public. This element cannot be presumed merely by showing complete control of a business. See R. v. K.C. Irving et al. (1976), 29 C.P.R. (2d) 83.

20. Inquiry into the Acquisition of a Quebec City Newspaper.

An inquiry was instigated pursuant to section 8(b) of the Act when Power Corporation made a bid to purchase "Le Soleil". Purchase would have given Power Corporation and associates control of approximately 70 percent of the market for French language daily newspapers in the Province of Quebec. The evidence was referred to the Attorney General for consideration of legal proceedings relating to a merger offence. As "Le Soleil" was then sold to another party, the Department of Justice concluded that the circumstances did not warrant prosecution.

## CHAPTER 11

### ADVERTISING REGULATION

On July 1, 1976, with the proclamation of the Stage One amendments to the Combines Investigation Act, S.C. 1974-75-76, c.76, the law in Canada respecting deceptive or misleading advertising and trade practices became substantially stronger. This recent change has reflected a general trend in the regulation of advertising away from the time-honoured approach of "caveat emptor" to a new concept of "caveat venditor" -- let the seller beware.

The aggregate effect of advertising on Canadian society has never been adequately determined, although the fact that the average television viewer sees some 40,000 commercials a year must give one pause. This chapter reviews the basic literature on the role of advertising in our society, the increasing regulation of misleading and deceptive advertising, and the issues presented by specific product advertising and by advertising directed to children.

Three aspects of advertising regulation are dealt with in other chapters. For a review of the literature on the antitrust implications of advertising, including the affect of advertising on concentration ratios in the manufacturing industry, the effects of volume discounts, and the question of price discriminations, see Chapter 10, at Part 10.5. For literature on the applicability of a fairness doctrine to advertising, including a right of access or reply to so-called "advocacy advertising", see Chapter 12, at Part 12.4. For studies on the impact of Bill C-58 regarding the deductibility of advertising expenditures on non-Canadian media for tax purposes, see Chapter 9, at Part 9.2.

This chapter is divided into four parts, as follows:

- 11.1 Role and Economics of the Advertising Industry
- 11.2 Regulation of Misleading and Deceptive Advertising

- 11.3 Regulation of the Advertising of Specific  
Products or Services
- 11.4 Regulation of Advertising Directed to Children.

11.1

ROLE AND ECONOMICS OF  
THE ADVERTISING INDUSTRY

This Part sets out the literature on the evolution of the advertising industry, its role in North American society and the economics of advertising. The material has been divided into Canadian and non-Canadian sources, and is set out in chronological order.

Canadian Books and Studies

Firestone, O.J., Broadcast Advertising in Canada, Ottawa: University of Ottawa Press, 1966.

This book discusses the changing role and structure of advertising in Canada, advantages and disadvantages, economic effects of advertising, a comparison with United States, and outlines main sources of revenue. A special chapter is aimed at discussion of broadcast advertising, its effectiveness, economic consequences, regulation and the special characteristics of radio advertising. The final chapters discuss the economics of advertising and its relation to the Canadian economy.

Mahatoo, W.H., Marketing Research in Canada; Principles, Readings and Cases. Toronto: Nelson, 1968.

This book opens with a brief history of marketing research in Canada. It goes on to discuss the two main stages of the research, sampling and field interviewing, and then treats the principal areas of marketing research application such as motivation research, advertising, media and product research, syndicated market services and industrial market research.

Institute of Canadian Advertising. A Report by the Institute of Canadian Advertising to the Special Senate Committee on Mass Media. Toronto, 1970.

ICA views regarding media performance on behalf of advertising are presented. Contains data pertaining to advertising ratios, media concentration and agency enfranchisement and an assessment of the influence of advertising and the agencies in the media.

Elkin, F. Rebels and Colleagues: Advertising and Social Change in French Canada. Montreal, McGill-Queen's University Press, 1973.



Includes material on the changing advertising themes in the mass media, the growth of a French-Canadian professional association, improved language adaptation, the development of independent French-Canadian advertising agencies and on the role of the new breed of advertising man.

Cooper, H. Advertising in Canada. Montreal, McGill University, 1973.

Concerned with the economics of advertising and advertising agencies, as well as topics relevant to social effects, effects on the media, and resultant regulation and control. Also contains an appendix of advertising codes, regulations and legislation.

Canadian Radio-Television Commission Research Branch. Subliminal Perception. Ottawa, 1974.

A short canvass of scientific opinion regarding the effects of subliminal stimuli on consumer choice and personality.

Maclean-Hunter Research Bureau. A Report on Advertising Revenues in Canada. Toronto, Maclean-Hunter 1974.

Contains principal statistics relating to billings and revenues (including cable television).

#### U.S. and U.K. Books

Borden, Neil H. The Economic Effects of Advertising. Homewood, Illinois: Richard D. Irwin, 1944.

Mayer, Martin. Madison Avenue, U.S.A. New York: Harper, 1958.

A very readable inside excursion into the workings of Madison Avenue, marketing capital of America, replete with anecdotal stories of failure and success.

Wood, James Playsted. The Story of Advertising. New York: Ronald Press, 1958.

Sandage, Charles H. and Fryburger, Vernon (eds.). The Role of Advertising: A Book of Readings. Homewood, Illinois: Richard D. Irwin, 1960.

Dunn, Samuel Watson. Advertising: Its Role in Modern Marketing. New York: Holt, Rinehart and Winston, 1961.

A basic student text which considers the advertising role in a number of ways - how it functions as a means of communication, a marketing tool, and a social institution.

Reeves, R. Reality in Advertising. New York, Knopf, 1961.

A theory of advertising built on experience. The author writes: "I do not think it is out of order to say that it cost \$1,000,000,000 to write this book. We spent that much of our clients' money and made many mistakes, to isolate these principles".

Buzzi, G., Advertising - Its Cultural; Political Effects. Minneapolis: University of Minnesota Press, 1964.

This study defines advertising as including persuasive messages of every kind which are used to influence the public. It discusses such issues as truth in advertising, the education of the public, and the overwhelming and often hidden powers of persuasion that advertisers have over the public.

Firestone, O.J., The Economic Implications of Advertising. Toronto, Methuen, 1967.

Backman, Jules. Advertising and Competition. New York, New York University Press, 1967.

This survey of the competitive nature of the role of advertising argues that this role demonstrates the importance and value of advertising to the American economy.

Warneryd, Karl-Erik and Vowak, Kiell. Mass Communication and Advertising. Stockholm, Economic Research Institute at the Stockholm School of Economics, 1967.

Wilson, Alexander (ed.). Advertising and The Community. Manchester: Manchester University Press, 1968.

Bauer, Raymond A. Advertising in America: the Consumer View. Boston, Division of Research, Graduate School of Business Administration, Harvard University, 1968.

A report and interpretation of the American Association of Advertising Agencies' study on the consumer judgment of advertising.

Hobson, J.W. The Selection of Advertising Media. London, Institute of Practitioners in Advertising, 1968.

Character, atmosphere, quantitative and qualitative coverage and cost ratios for all media are analysed with a view toward providing information for the advertiser and advertising agency, but also of interest to those who want to know what is in the minds of the advertised.

Campbell, Roy H. Measuring the Sales and Profit Results of Advertising; a Managerial Approach. New York, Association of National Advertisers, 1969.

This study is addressed to those in management who make decisions about advertising. The scope of the work covers advertising results, measurement methods and new experimental designs.

Cone, Fairfax M. With All Its Faults: A Candid Account of Forty Years in Advertising. Boston: Little, Brown, 1969.

Fascinating but rambling personal account of failure and success in the advertising game, written by someone on the inside.

Kleppner, O. and Settel, I. (eds.). Exploring Advertising. Englewoods Cliffs, New Jersey: Prentice-Hall, 1969.

An anthology of articles geared toward the advertiser.

Schiller, Robert D. (ed.). M.A.M.E.; Market and Media Evaluation; the AIA handbook of advertising to business, industry, government, and the profession. New York, MacMillan, 1969.

Primarily for advertisers, with news of developments in research methods.

Firestone, O.J., The Public Persuader: Government Advertising. Toronto: Methuen, 1970.

An evaluation of the methods used, and their effectiveness, by governments in their attempts to publicize programs and to convince the electorate. The book looks at the spending involved, and at the political patronage issues. There is a discussion of the role of advertising agencies in government activities, and a conclusion which briefly compares the American and British positions on this type of advertising.

Littlefield, James E. and Kirkpatrick, C.A. Advertising, Mass Communication in Marketing, 3rd. ed. Boston: Houghton Mifflin Co., 1970.

This standard text deals with principles, techniques and mechanics of advertising, concentrating on promotional activities from the perspective of the manufacturer.

Simon, J.L., Issues in the Economics of Advertising. Urbana, Chicago, University of Illinois Press, 1970.

This book discusses the influence of demand upon advertising expenditures, the relationship between advertising activity and retail sales of goods and the effect of various costs upon advertising expenditures.

Brann, Chr., Direct Mail and Direct Response Promotion. London: Kogan Page, 1971.

Deals with the philosophy, alternatives and creative aspects of this field of sales promotion. The place of direct response promotion in the overall marketing plan and review and critical comparison of direct sales promotion methods are discussed.

Pearce, Michael, Cunningham, Scott M., and Miller, Alan. Appraising the Economic and Social Effects of Advertising: a Review of Issues and Evidence. Cambridge: Marketing Science Institute, 1971.

Wight, R. The Day the Pigs Refused to be Driven to Market: Advertising and the Consumer Revolution. London: Hart-Davis; McGibbon, 1972.

The publisher states that this book is about how the worm is beginning to turn - how instead of Big Brother watching us, we're starting to watch Big Brother.

Carnell, Bob. The Mass Media as Gatekeepers in Respect to Advertising. Ann Arbor, Michigan, University Microfilms, 1973.

A good discussion of several aspects of advertising regulation - the role of competition in the economy, freedom of dissemination of information via advertising, and the right to compete in the information arena.

Cone, Fairfax M. The Blue Streak: Some Observations, Mostly About Advertising. Chicago, Crain Communications, 1973.

Successful advertising executive tells all. Cone criticizes mass media techniques, saying: "Good advertising is always written from one person to another. When it is aimed at millions, it rarely moves anyone."

Patterson, T.E. Political Advertising: Voter Reaction to Televised Political Commercials. Princeton, New Jersey, Citizens' Research Foundation, 1973.

Key, Wilson Bryan. Subliminal Seduction: Ad Media's Manipulation of a not-so-innocent America. Englewood Cliffs, New Jersey, Prentice-Hall, 1973.

A provocative treatment of a controversial topic. There will be many who will disagree with Professor Key's conclusions, but his argument, bolstered by illustrations from the ad industry, is thought-provoking.

Schwartz, T. The Responsive Chord. Garden City, New York, Anchor Press, 1973.

Contains information on the social and psychological effects of communication through advertising.

Hanson, Philip. Advertising and Socialism: The Nature and Extent of Consumer Advertising In The Soviet Union, Poland, Hungary and Yugoslavia. London: MacMillan Press, 1974.

Nicosia, F.M. Advertising, Management and Society: a Business Point of View. New York: McGraw-Hill, 1974.

This book, a project of the Consumer Research Program, Graduate School of Business Administration, University of California at Berkeley, is based on testimony given before the Federal Trade Commission in 1971 by members of the American Association of Advertising Agencies and the Association of National Advertisers.

Reaser, A.L. Advertising and Profitability. (Ph.D. thesis, University of California, Los Angeles, 1974).

Bowen, Lawrence. Advertising and the poor: a comparative study of patterns and response to television and magazine advertising between middle and low-income groups. (Ph.D. thesis, University of Wisconsin, 1974).

#### U.S. Articles

Blake, H.M. and Blum, J.A. "Network television rate practices: a case study in the failure of social control of price discrimination," (1965) 74 Yale Law Journal 1339.

Peterman, J.L. "Structure of national time rates in the television broadcasting industry," (1965) 8 Journal of Law and Economics 77.

- Spencer, Milton H. "Socio-economic aspects of advertising," (1967) Business Horizons.
- Dunbar, D.S. "Politics of the economics of advertising," (1968) 8 Journal of Advertising Research 73.
- Peterman, John L. "The Clorox case and the television rate structures," (1968) 11 Journal of Law and Economics 321.
- Bass, F.M., Pessemier, E.A., and Tigert, P.J. "A taxonomy of magazine readership applied to problems in marketing strategy and media selection," (1969) Journal of Business 337.
- Lambin, J.J. "Measuring the profitability of advertising; an empirical study," (1969) 2 Journal of Industrial Economics 86.
- Jones, M.G. "The cultural and social impact of advertising on American society," (1970) Law and Social Order 379; (1970) 8 Osgoode Hall Law Journal 65.
- Doyle, Peter. "Economic aspects of advertising: a survey," (1973) 78 Economic Journal 570.
- Peterson, R.D. "Advertising - agency industry: organization, entry and concentration," (1973) 6 Antitrust Law and Economics Review 83.
- Scheidell, J.M. "Price reducing potential of advertising," (1973) 39 Southern Economic Journal 535.
- Nelson, P. "Advertising as information," (1974) 82 Journal of Political Economy 729.
- Pope, D. "Development of national advertising, 1865-1920," (1974) 34 Journal of Economic History 295.
- Wright, P.L. "Analysing media effects on advertising responses," (1974) 38 Public Opinion Quarterly 192.
- Auld, D.A.L. "Advertising and the theory of consumer choice," (1974) 88 Quarterly Journal of Economics 480.
- Deutsch, L.L. "Some evidence concerning the information content of advertising," (1974) 18 American Economist 48.
- Ayanian, R. "Advertising and the Rate of Return," (1975) 18 Journal of Law and Economics 479.

11.2                   REGULATION OF MISLEADING  
                          AND DECEPTIVE ADVERTISING

This part deals with the literature in Canada relating to the regulation of misleading and deceptive advertising. As noted in the introduction, the provisions of the Combines Investigation Act respecting advertising and trade practices were substantially tightened in 1976 with the proclamation of the Stage One amendments to that Act, S.C. 1974-75-76, c. 76. (For a discussion of the progress of the Stage Two amendments respecting competition law, see Chapter 10 above).

The provisions in the Combines Investigation Act of greatest interest to the advertising industry are contained in Part V, which deals with conspiracies to prevent competition (s. 32), other than certain permissible restrictions of advertising or promotions (see s. 32(2)(f)); bid-rigging (s. 32.2); professional sports (s. 32.3); mergers and monopolies (s. 33); discriminatory or predatory pricing (s. 34); price allowances (s. 35); misleading advertising generally (s. 36); representations as to tests or testimonials (s. 36.1); double ticketing (s. 36.2); pyramid selling (s. 36.3); referred selling (s. 36.4); bait-and-switch selling (s. 37); sale above advertised price (s. 37.1); promotional contests (s. 37.2); good faith defence for media (s. 37.3); and price maintenance (s. 38). Much of the literature noted below focuses on the case law prior to the 1976 revisions and the reasons for the amendments.

For the text of the principal statutes and regulations currently in force at the federal level relating to advertising, see Grant, Peter S., Canadian Communications Regulation (Toronto, Law Society of Upper Canada, forthcoming), Volume 1, at Parts 1 (broadcasting regulations) and 3 (other program or advertising regulations or voluntary codes).

The literature below has been divided into Canadian and non-Canadian sources and is listed in chronological order.

Canadian Books and Articles

Somerville, W.L.N. "Advertising and promotions," (1963) Special Lectures: Law Society of Upper Canada. (Part II: Trade Competition and the Law).

A discussion of federal and provincial legislation bearing on the subject of advertising and promotions: sections 33B and 33C of the Combines Investigation Act,

sections 179, 306, 322, 369 and 351 of the Criminal Code and section 7 of the Trade Marks Act.

Cohen, Ronald I. "Misleading advertising and the Combines Investigation Act," (1969) 15 McGill Law Journal 622.

In this article, Cohen gives an account of the operation of the sections of the Combines Investigation Act which govern false or misleading statements by advertisers. He outlines the main issues raised by the relevant case law in Canada, stressing the trend of increased awareness by the Courts of the need for consumer protection.

Robb, W. "Advertising under scrutiny," (1969) 42 Canadian Business (March 1969) 14.

McCuaig, R.G. "Case comment: R. v. Colgate-Palmolive Ltd.," (1969) 8 Western Ontario Law Review 189.

McCuaig discusses this case with reference to its implications for future consumer protection in situations where buyers are induced to think that they are getting a "bargain". He maintains that the case displays a growing tendency of the courts to view consumer transactions in terms of "caveat venditor" - let the seller beware - rather than in the tradition of the old maxim "caveat emptor".

MacIntosh, E. "President's desk: so let's take a long look at the advertising game," (1969) 7 Canadian Consumer (November-December) 106.

Cohen, Ronald I. The Regulation of Misleading Advertising in Canada: a comparative approach. Canadian Consumer Council, Ottawa, November 1970.

A comparative study of private and public regulation of deceptive advertising in Britain, the U.S. and Canada. Cohen points out the need for further government regulation, and makes specific recommendations.

Nelson, Christine J. "CBC commercial acceptance policy," (1970) 2 Canadian Communications Law Review 21.

A description of the policies of the CBC's commercial acceptance department, based on interviews in December 1970 with Toronto-based advertising agencies. The author



concludes that the CBC's decision to keep its acceptance policies confidential cannot be defended on any public interest ground, and in fact gives rise to considerable potential for abuse.

Cohen, R.I. "Comparative false advertising legislation: a beginning," (1971) 4 Adelaide Law Review 69; (1972) 6 Canadian Patent Reporter (20) 88.

The author reviews American, British and Canadian legislation on the subject of false advertising, contrasting the American civil approach with the Anglo-Canadian criminal one. He notes the general absence of Canadian provincial legislation in the field, and discusses the case law on sections 33C and 33D of the federal Combines Investigation Act.

Swan, Judith W.L. "Misleading advertising: its control," (1971) 9 Alberta Law Review 310; (1971) 3 Canadian Communications Law Review 129.

This article deals with the legal and extra-legal sanctions employed in the control of false or misleading advertising. Swan concerns herself primarily with the relevant sections of the Combines Investigation Act and with the policy statements made by various voluntary associations of advertisers and broadcasters, and assesses the effectiveness of each means of control.

Lilkoff, L. and Pichette, S. "La publicité trompeuse et la protection du consommateur," (1972) 13 Cahiers 420.

This short article reviews the current state of legislation concerning misleading advertising in Canada, and poses questions that point out the areas in which the law is unwieldy and deficient.

Alyluia, Kenneth. "The regulation of commercial advertising in Canada," (1972) 5 Manitoba Law Journal 97; LL.M. Thesis, University of Toronto 1970.

This is a modified version of an LL.M. thesis submitted to the University of Toronto in April, 1970. Among the topics considered are: the common law, constitutional factors, the Combines Investigation Act, the Food and Drugs Act, the regulation of advertising on radio

and television, non-governmental regulation,  
and suggested reforms.

Bromstein, Reuben M. "Disproportionate advertising allowances in the United States and Canada," (1972) 4 Canadian Patent Reporter (2d) 154; 11 P.E.A.L. 453.

This article analyses the enforcement of s.35 of the Combines Investigation Act and compares it to its American counterpart. The historical background to the legislation is given for both countries and the author concludes that the Canadian provision is unequal to the task. This arises partly because, for constitutional reasons, the Canadian Act has been framed as criminal legislation, and private actions are not possible. In conclusion, the author looks at s.38 of the Competition Act (Bill C-256) and expresses hope that its new approach will produce more results.

Goodis, Jerry. Have I Ever Lied to You Before? Toronto, McClelland and Stewart, 1972.

Written by a professional advertising man. Foreword by Peter C. Newman claims: "an extraordinary combination of weltanschmerz, heart and moxie, he [Goodis] involves himself with his craft not in the good grey manner of an Anglican deacon on a service committee, but in a wild flamboyant love affair which has transformed Canadian advertising."

Truth in Advertising: a Symposium of the Toronto School of Theology, University of Toronto. Toronto, Fitzhenry and Whiteside, 1972.

A highly philosophical, sometimes unintelligible, set of treatises dealing with the "norms of truth" in advertising and society.

Trebilcock, Michael J. "Private law remedies for misleading advertising," (1972) 22 University of Toronto Law Journal 157, (1972) 4 Canadian Communications Law Review 211.

Professor Trebilcock examines the existing substantive doctrines in the private law area for possible use against misleading advertising, and points out the major procedural problems that must be resolved if consumers are to be attracted to a private law means of grievance settlement.

Quinlan, J.J. "Misleading Advertising and Deceptive Practices under the Combines Investigation Act," (1972) 5 Ottawa Law Review 277; (1972) 4 Canadian Communications Law Review 150.

A review of the jurisprudence under sections 36 and 37 of the Combines Investigation Act and the proposed changes contemplated with Bill C-256.

Canada. Department of Consumer and Corporate Affairs. Proposals for a New Competition Policy for Canada: First Stage. Ottawa: Information Canada, 1973.

This book was published at the time of the introduction of Bill C-227 in November, 1973. The provisions of the legislation respecting misleading advertising are summarized at pp. 10-17. Appendix C provides a useful 38-page compendium of all cases under the Combines Investigation Act relating to misleading advertising, taken from Appendix II of the Reports of the Director of Investigation and Research from 1961 to 1973.

Ziegel, J.S. "Great advertising debate," (1973) 3 Canadian Consumer, (August) 24.

Fitzgerald, P. "Misleading advertising: prevent or punish?" (1973) 1 Dalhousie Law Journal 246.

The author addresses what he terms the three-fold threat facing the consumer: deceit by the manufacturer, manipulation by the advertiser, and advertisement pollution from the media, and addresses the deficiencies of present Canadian law concerning these problems.

Cohen, R.I. "Bill C-7; its proposed amendments to the law of false advertising," (1974) 13 Canadian Patent Reporter (2nd) 197.

This paper makes a comparative analysis of the earlier Bill C-256 and the more recent Bill C-7 on the matter of misleading advertising. Fresh difficulties that can be expected to arise from the new legislation are pointed out and explained.

Henderson, G.F. "Misleading advertisements," (1974) 13 Canadian Patent Reporter (2d) 45.

The article presents a summary of cases under sections 36 and 37 of the Combines Investigation Act, prepared by the author

as chairman of a panel dealing with misleading advertising for the Law Society of Upper Canada Continuing Education Program (February, 1973).

Orr, G.D. "Misleading Advertising: Canadian Law," (1975) 10 Gonzaga Law Review 353.

Cohen, Ronald and Ziegel, Jacob S. The Political and Constitutional Basis for a New Trade Practices Act. (A Proposal for Consumer Misleading and Unfair Trade Practices Legislation for Canada, prepared for the Department of Consumer and Corporate Affairs, as part of the second stage revision of the Combines Investigation Act.) Ottawa: Department of Supply and Services, 1976.

Trebilcock, M.J. and others. Proposed Policy Directions for the Reform of the Regulation of Unfair Trade Practices in Canada (A Study on Consumer Misleading and Unfair Trade Practices, prepared for the Department of Consumer and Corporate Affairs, as part of the second stage revision of the Combines Investigation Act). Ottawa: Department of Supply and Services, 1976.

U.S. and U.K. Books and Articles

Simon, M.J. The Law for Advertising and Marketing. New York: W.W. Norton, 1956.

An attempt is made to analyse and concentrate the widely dispersed materials on the law of advertising and marketing and hitherto uncoordinated legal areas. The book is written primarily for the advertising executive and an effort has been made to keep the text as practical as possible.

Miller, David. "The advertising agency lawyer in radio and television (or, Blackstone in Wonderland)," (1958) 23 Law and Contemporary Problems 3.

Reynolds, W.G. "Legal curbs on advertising," (1960) 6 Practical Lawyer 19; 2 P.E.A.L. 39.

Leaper W.J., The Law of Advertising. London: Butterworths, 1961.

This study outlines the British law of contract, agency, copyright, registration of industrial designs, sale of goods, and defamation in relation to advertising. Further the book outlines the statutes and regulations relating to advertising and includes a chapter on Independent Television which allowed advertising.

Matteoni, Norman E. "A new antitoxin to advertising and the Federal Trade Commission," (1962) 37 Notre Dame Lawyer 524; 2 P.E.A.L. 500.

Note, "Effective guidance through cease and desist orders: the TV commercial," (1963) 38 Indiana Law Journal 442.

Chaloud, J.H. "Product weight and fill control," (1963) 19 Business Lawyer; 5 P.E.A.L. 496.

Note, "Federal regulation of deceptive packaging: the relevance of technological justifications," (1963) 72 Yale Law Journal 788; 4 P.E.A.L. 385.

Beerbower, Gary. "Scienter, deceptive practices, and enforcement," (1964) 4 P.E.A.L. 1.

Brennan, Bruce J. "Affirmative disclosure in advertising and control of packaging design under the Federal Trade Commission Act," (1964) Business Lawyer 133; 6 P.E.A.L. 219.

Millstein, Ira M. "The Federal Trade Commission and false advertising," (1964) 64 Columbia Law Review 439; 6 P.E.A.L. 315.

Moore, Charles R. "Deceptive trade practices and the Federal Trade Commission," (1964) 28 Tennessee Law Review 493; 3 P.E.A.L. 438.

U.S. Advertising Advisory Committee. Self-regulation in Advertising: a Report on the Operations of Private Enterprise in an Important Area of Responsibility. Advertising Advisory Committee to the Secretary of Commerce. Washington, U.S.G.P.O., 1964.

Purports to provide a clear, accurate report of the many types of activities, instituted and carried on by private businessmen, which operate in American society to regulate advertising.

Millstein, I.M. and others, "Symposium: advertising," (1964) 26 American Bar Association Section of Antitrust Law 158.

This symposium included the following papers: Millstein, I.M., "Introductory remarks," Schachte, H.M., "The view from the market place," Tennant, R.B., "An economist's view," Loevinger, L., "The role of government in the field of advertising," and Weil, G.H., "The challenge to traditional legal concepts."

Weston, G.E. "Deceptive advertising and the Federal Trade Commission: decline of caveat emptor," (1964) 24 Federal Bar Journal 548.

Note, "Extrinsic misrepresentations in advertising under section 5(a) of the Federal Trade Commission Act," (1966) 114 University of Pennsylvania Law Review 725.

Kintner, E.W. "Federal Trade Commission regulation of advertising," (1966) 64 Michigan Law Review 1269.

Longley, L. "The FCC's attempt to regulate commercial time," (1966) 11 Journal of Broadcasting 83.

Ramey, C.R. "Federal Communications Commission and broadcast advertising: an analytical review," (1966) 20 Federal Communications Bar Journal 71.

Dole, Richard F. Jr. "Merchant and consumer protection: the uniform deceptive trade," (1967) 76 Yale Law Journal 485; 7 P.E.A.L. 458.

Note, "Developments in the law - deceptive advertising," (1967) 80 Harvard Law Review 1005.

Blalock, J. "Television and advertising," (1968) 28 Federal Bar Journal 341.

Jentz, G.A. "Federal regulation of advertising: false representations of composition, character, or source and deceptive television demonstrations," (1968) 6 American Business Law Journal 409.

Zander, M. "Misleading credit advertisements," (1968) 118 The New Law Journal 1034.

Baker, Samm Sinclair. The Permissible Lie; the Inside Truth About Advertising. Cleveland, World Publishing Company, 1968.

Cox, Edward and others, The Nader Report on the Federal Trade Commission. New York: Richard W. Baron, 1969.

This book, prepared by a Ralph Nader group, concerns itself with the crises of government and advertising, the attempt to cope with the new marketplace, failures and delays, public relations, secrecy, collusion, partisan politics and with proposed cures.

Ismond, R.L. "Law of honest insurance advertising," (1969) 4 The Forum 175.

Travers, A.H. "Symposium: Federal Trade Commission regulation of deceptive advertising," (1969) 17 Kansas Law Review 551.

Cohen, D. "Federal Trade Commission and the regulation of advertising in the consumer interest," (1969) 33 Journal of Marketing 40.

Nance, J. "New control of advertisements," (1970) 120 The New Law Journal 55.

Poole, F.T. "Coping with the new restrictions on advertising," (1970) 34 Conveyancer and Property Lawyer 102.

Levitt, Theodore. "The morality (?) of advertising," (1970) Harvard Business Review (July-August).

Scanlon, P.D. "Oligopoly and 'deceptive' advertising: the cereal industry affair," (1970) 3 Antitrust Law and Economics Review 99.

Smith, Leon C. "Local station liability for deceptive advertising," (1970) 15 Journal of Broadcasting 107.

Note, "Corrective advertising and the F.T.C.," (1971) 70 Michigan Law Review 374.

Note, "Corrective advertising orders of the F.T.C.," (1971) 85 Harvard Law Review 477.

Grimes, W.S. "Control of advertising in the U.S.," (1971) 89 Harvard Law Review 1769.

Austern, H.T. "What is 'unfair advertising'? - a discussion of consumer advertising from the point of view of the consumer, the government and industry," (1972) 27 Business Lawyer 883.

Lawson, R. Law of Advertising and Labelling. Wellington, New Zealand: 1972.

Volner, I.D. "Games consumers play," (1972) 25 Federal Communications Bar Journal 121.

Bartlett, R.W. "Truth in advertising - the whole truth," (1972) 89 Banking Law Journal 998.

Note, "Corrective advertising: F.T.C.'s new formula for effective relief," (1972) 50 Texas Law Review 312.

Note, "Corrective advertising - new response to consumer deception," (1972) 72 Columbia Law Review 415.

Note, "FCC and the corrective advertising order," (1972) 6 University of San Francisco Law Review 367.

White, A.A. "Intentional exploitation of man's known weaknesses," (1972) 9 Houston Law Review 889.

Bullock, R.V. "Merchandising through use of lotteries," (1972) 11 P.E.A.L. 161.

Stone, Alan. "The F.T.C. and advertising regulation: an examination of agency failure," (1973) 21 Public Policy 203.

Thain, G.J. "Advertising regulation: the contemporary F.T.C. approach," (1973) 1 Fordham Urban Law Journal 349.

Loevinger, L. "Politics of advertising," (1973) 15 William and Mary Law Review 1.

Howard, John A. and Hulbert, James. Advertising and the Public Interest: a staff report to the Federal Trade Commission. Chicago: Crain Communications Inc., 1973.

An analytical report to the Federal Trade Commission of the testimony and record of the F.T.C.'s Hearings on modern advertising practices by two consultants to the Commission. The hearings were designed to cover broadly all major aspects of modern marketing techniques, particularly the problems of misleading, exploitative and unfair advertising.

Verkuil, P.R. "Developments in the regulation of supermarket advertising practices: an empirical analysis," (1973) 48 New York University Law Review 395.

Note, "False advertising: the expanding presence of the FCC," (1973) 25 Baylor Law Review 650.

Note, "Fraudulent advertising: the right of a public attorney to seek restitution for consumers," (1973) 4 Pacific Law Journal 168.

Note, "Enforcing California's false advertising law: a guide to adjudication," (1974) 25 Hastings Law Journal 1105.

Bernacchi, M.D. "Advertising and its discretionary control by the F.T.C.: a need for empirically based criteria," (1974) 52 Journal of Urban Law 223.



Kozyris, P.J. "Advertising intrusion: assault on the senses, trespass on the mind - a remedy through separation," (1975) 36 Ohio State Law Journal 299.

Reed, O.L. Jr. "Psychological impact of TV advertising and need for F.T.C. regulation," (1975) 13 American Business Law Journal 171.

Sugarman, N.A. and Vogt, P.W. "New advertising regulations and their application to exempt organizations," 54 The Tax Magazine 196.

Note, "Deceptive advertising, F.T.C. fact-finding and the seventh amendment," (1975) 43 Fordham Law Review 606.

Note, "Law of comparative advertising: How much worse is "better" than "great"?" (1976) 76 Columbia Law Review 80.

Conlon, S.B. "Comparative Advertising: Whatever Happened to "Brand X"?" (1975) 57 Chicago Bar Record 118.

Thompson, M.J. "Government Regulation of Advertising: Killing the Consumer in order to 'save' him," (1976) 8 Antitrust Law and Economics Review 81.

Lunsford, J.R. Jr. "Protection from false and misleading advertising," (1976) 35 Federal Bar Journal 87.

11.3 REGULATION OF THE ADVERTISING  
OF SPECIFIC PRODUCTS OR SERVICES

This part sets out the literature in Canada and the United States on the regulation of specific product advertising. (For sources on the general law on misleading or deceptive advertising, see Part 11.2 above). The areas which have generated the most discussion are food and drug advertising, alcoholic beverage advertising, cosmetic advertising, and cigarette advertising. For the literature on advertising directed to children, see Part 11.4 below. An increasing amount of attention has also been paid recently to the development of a fairness doctrine towards specific product advertising. The literature in this area is listed in Chapter 12, at Part 12.4 below.

Canadian Articles

Henry, D.H.W. "Food and drug advertising and pricing problems under the combines investigation act," (1966) 22 Business Lawyer 195; (1967) 22 Food & Drug Cosmetics Law Journal 222.

Gardiner, Michael. "Alcoholic beverage advertising on radio and television in Canada," (1969) 1 Canadian Communications Law Review 107.

This study examines the sharing of control over alcoholic beverage advertising between the CRTC at the federal level, and the liquor boards and commissions at the provincial level. The first part details the CRTC regulations; the second part examines the statutes and rules of each provincial board in its turn. The third part analyzes the composition and effect of the beer and wine clearance committee.

Wells, Eric. "Inhaling that ad is hazardous to health," (1971) 11 Content (September) 2.

Curran, R.E. "Canadian Regulation of Food, Drugs, Cosmetics, and Devices - an Overview," (1975) 30 Food, Drug & Cosmetic Law Journal 644.

U.S. Articles

Kintner, Earl W. "Federal Trade Commission regulation of food, drug and cosmetic advertising," (1960) 15 Business Lawyer; 1 P.E.A.L. 8.

Williams, Samuel L. "The Federal Trade Commission and food, drug and cosmetic advertising," (1961) Food, Drug, Cosmetic Law Journal 229; 3 P.E.A.L. 241.

Kleinfeld, Vincent A. "Recent developments in drug labelling regulations and interpretations," (1962) 17 Food, Drug, Cosmetic Law Journal 238; 4 P.E.A.L. 16.

Adams, C.A. "Food advertising law," (1964) 19 Food, Drug, Cosmetic Law Journal 441.

Neustein, Barry F. "Sale of proprietary drugs in non-drugstores," (1964) 17 New York University Intramural Law Review 15; 4 P.E.A.L. 375.

Jurow, I.H. "Safe and effective prescription-drug advertising," (1967) 22 Food, Drug, Cosmetic Law Journal 57.

Note, "Regulation of prescription drug discount advertising," (1967) 24 Washington & Lee Law Review 299.

Note, "Cigarette advertising: deceptive and against the public interest?" (1969) 17 Kansas Law Review 684.

Note, "F.C.C. and cigarette advertising," (1969) 19 Catholic University Law Review 255.

Ruge, Richard B. "Regulation of prescription drug advertising: medical progress and private enterprise," (1967) 32 Law and Contemporary Problems; 9 P.E.A.L. 261.

Thain, G.J. "Consumer protection: advertising - the FTC response," (1972) 27 Business Lawyer 891; (1971) 26 Food, Drug, Cosmetics Law Journal 609.

Boies, D. and Verkuil, P.R. "Regulation of super-market advertising practices," (1972) 60 Georgetown Law Journal 1195.

Powell, J.T. "Broadcast advertising of medical products and services: its regulation by other nations," (1972) 25 Federal Communications Bar Journal 144.

Note, "Professional Price Advertising Set Free - Consumers' 'Right to Know' in Prescription Price Advertising," (1975) 8 Connecticut Law Review 108.

Note, "Advertising of Professional Fees - Does the Consumer Have a Right to Know?" (1976) 21 South Dakota Law Review 310.

Note, "Prohibition of Abortion Referral Service Advertising Held Unconstitutional," (1976) 61 Cornell Law Review 640.

Note, "FTC proposed regulation of prescription drug price disclosure by retail pharmacists," (1976) 43 University of Chicago Law Review 401.

Hobbs, G.A. "Lawyer Advertising: a good beginning but not enough," (1976) 62 American Bar Association Journal 735.

Reiss, E.S. "Special Problems in Advertising," (1976) 31 Food, Drug & Cosmetic Law Journal 251.

11.4 REGULATION OF ADVERTISING  
DIRECTED TO CHILDREN

This Part reviews the literature on advertising directed towards children. This is a rapidly emerging area of public policy concern and the literature, particularly in Canada, is sadly lacking. Of particular interest is the development of the Broadcast Code for Advertising to Children which has been given virtually the strength of a CRTC regulation by the Canadian Radio-television and Telecommunications Commission through the imposition of licence conditions. This followed hearings before the Standing Committee on Broadcasting, Films and Assistance to the Arts in 1973.

The studies and articles noted below are divided into Canadian and U.S. sources, and are listed in chronological order. Since the Cohen article, the Quebec regulation prohibiting the use of cartoons in advertising directed to children was upheld in 1978 by the Supreme Court of Canada as applied to broadcast advertising. See the Kellogg's case, noted and summarized in Chapter 2 above.

Canadian Studies and Articles

Advice in Marketing Ltd. The Child's World and TV Advertising. Toronto: Canadian Advertising Advisory Board, 1971.

Note, "Quebec committee on child-directed advertising," (1973) 3 Canadian Consumer (April) 32.

Cohen, R.I. "Advertising to children: the constitutional validity of Quebec's regulation," (1974) 12 Canadian Patent Reporter (2nd) 173.

The author questions the constitutional validity of Quebec's 1973 advertising regulations and in so doing refers to the BNA Act heads of criminal law, trade and commerce, property and civil rights, and education.

U.S. Studies and Articles

Condry, J. Childhood, technology and society. Brief to F.T.C. Hearings on Advertising, 1971.

Littner, N. Television advertising and its psychological effects on children. Brief to F.T.C. Hearings on Advertising, 1971.

Ward, Scott. Effects of Television Advertising on Children and Adolescents. Cambridge: Marketing Science Institute, 1971.

Winick, Charles; Williamson, Lorne G; Chuzmir, Stuart F; Winick, Mariann Pezzella. Children's Television Commercials: A Content Analysis. New York: Praeger Publishers, 1973.

The effect of TV on children is a subject of continuous debate. This work shows, first of all, how much skill is needed to describe something as complex as a TV commercial by selecting 145 fundamental elements, most of which are the outgrowth of basic thinking about the potential effects of this type of advertising: how it fits into the fantasy world of the child, how the type of delivery might affect the child's compliance, etc. The book concludes with a layout of a broad plan for future research where it will be possible to interview or observe children directly.

Powell, J.T. "Protection of children in broadcast advertising: the regulatory guidelines of nine nations," (1973) 26 Federal Communications Bar Journal 61.

Rossiter, J.R. Children's susceptibility to television advertising: a behavioural test of cognition and attitude. (Ph.D. thesis, University of Pennsylvania, 1974).

Note, "F.T.C. guide banning TV ads that entice children: soft decision or assertive policy," (1975) 4 Capital University Law Review 109.

## CHAPTER 12

### MASS MEDIA - ACCESS AND FAIRNESS

Section 3(d) of the Broadcasting Act provides that "the programming provided by the Canadian broadcasting system should be varied and comprehensive and should provide reasonable, balanced opportunity for the expression of differing views on matters of public concern ...". This statement provides a basic underpinning in Canada for the obligation of broadcasters to present political and controversial subjects fairly, and some observers have concluded that a Canadian equivalent of the FCC fairness doctrine has begun to emerge.

The applicability of the fairness doctrine in the United States continues to be widely debated, however. At the heart of the issue is Mr. Justice Black's statement that the constitutional protection for freedom of speech in the First Amendment "rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public, that a free press is a condition of a free society." In a free marketplace, where anyone may start a newspaper or operate a broadcast station, this would give strong support to non-interference by government. But in the broadcasting field, where there are more applicants than frequencies, the Supreme Court has recognized that licensees may have fiduciary duties to handle issues of public concern fairly. The court has declined to apply the rule to newspapers, however, although it is an ironic fact that there are many more broadcast outlets than newspapers in most communities.

This chapter is divided into three parts, as follows:

- 12.1 Broadcasting or Publication of Political or Controversial Matter in Canada.
- 12.2 The Fairness Doctrine, Equal-Time Rule, and Access to the Media in the United States
- 12.3 Advertising and the Fairness Doctrine.

12.1 BROADCASTING OR PUBLICATION OF POLITICAL OR  
CONTROVERSIAL MATTER IN CANADA

The treatment of political and controversial subjects by the mass media in Canada raises many issues of public policy, some of which are dealt with in other chapters. On the issue of defamation and invasion of privacy by the mass media, for example, reference should be made to Chapter 14, at Part 14.4. In this part, the focus of the material is on two closely related questions. First, is there an obligation on the mass media to treat matters of public concern "fairly", in the sense that differing views should be presented? Second, is there or should there be an affirmative obligation on the mass media to grant access to persons or organizations who have been attacked or whose views are unrepresented in programming?

The material below is set out in chronological order and as will be seen focuses primarily on the broadcast media, in the light of the obligations respecting fairness set out in Section 3(d) of the Broadcasting Act. For additional material on the expanded opportunities for minority expression in cable television, see Chapter 7 above.

Squire, R. and Stepinac, S. "The CRTC Hearing into Air of Death: comments on the regulation of controversial broadcasting," (1969) 1 Canadian Communications Law Review 132.

The authors use the "Air of Death" hearing as a focal point for a discussion of the issues raised by controversial broadcasts. In essence, the article dissects the transcripts of the hearing in order to cover the full range of opinion. Among topics examined are the jurisdiction of the CRTC; whether reporting now can be, or indeed ought to be, unbiased; the possibility of using the full media to present a balanced viewpoint on an issue, rather than attempt to cover all sides in one program; the right to and access to reply via the media; and the question of responsibility for broadcasts, and freedom of expression.

Levy, Alan D. "Open-line radio programs and the law," (1969) 1 Canadian Communications Law Review 160.

The author begins by reviewing superficially the law in Canada and the U.S. on defamation, in its role as a check on freedom of speech. The right of access to the broadcasting media for a third person attacked in an open-line program is the examined, along with other possible remedies. The issues of de facto censorship and editorializing are inspected briefly.



Calver, Tone and Watson, A Study on Access: The Policies and Practices of 'Letters to the Editor' sections of Three Toronto Newspapers. Toronto, Osgoode Hall Law School, April, 1970.

This study outlines the "access to information" policies of the Globe & Mail, Toronto Daily Star and the Toronto Telegram.

Nichols, Robert W. Interest groups and the Canadian broadcasting system. (M.A. thesis, Carleton University, 1970).

Canadian Labour Congress, "Labour looks at the mass media. CLC brief to the Senate Committee on the Mass Media," (1970) 15 Canadian Labour 5.

The C.L.C. fears the use of mass media as an agent for the dissemination of brand propaganda. The brief recommends separate ownership of broadcasting and mass media enterprises, increased coverage of organized labour, postal rate breaks for trade publications, content controls on private broadcasters, and a stronger CBC and CRTC.

Berry, Paul M., Garton, Graham R., Parkinson, Gerald D., Pyne, Richard G., and Wallace, Patricia. "A right of access to the media: some Canadian reactions," (1970) 2 Canadian Communications Law Review 54.

In this research study, some of the implications of a right of access are explored in the context of recent Canadian proposals and events. Mr. Garton contributes a basic introduction to the Barron concept of access and relates it to Canadian law. Miss Wallace examines the impact of the CRTC hearing into "Air of Death" on the question of access and responsibility. Mr. Pyne examines the proposals of Intercom and Town Talk in regard to community cablecasting on cable channels and whether the promise of cable television in this context is likely to be fulfilled. Mr. Parkinson reviews some statistics on Ontario daily newspapers in an effort to see if more access could be provided in the print media on an economic basis. In the final section of the study, Mr. Berry re-examines the earlier arguments and offers some ominous conclusions on the government and institutional barriers to free access in Canada, particularly in light of the "Air of Death" report and the FLQ crisis.

Morris, Robert J. "The CHNS case: An Emerging Fairness Doctrine for Canada?" (1972) 4 Canadian Communications Law Review 1.

Following a review of the evolution of the American fairness doctrine, Morris examines the CHNS case, involving the broadcast by a Halifax station of an editorial attacking Miles for Millions in 1970, and its censure by the CRTC, in the context of earlier policy statements by the BBG and CRTC on controversial broadcasting. Morris also appends the lengthy comments by then CRTC Chairman Juneau to the Canadian Association of Broadcasters in 1972 which reiterated his view that broadcasters were expected to program fairly.

Scanlon, T.J. "After the fact [comparing CBC's and CTV's coverage of the elections]," (1972) 25 Content (November) 9.

Johansen, Peter, "The Tube on Parliament," [The prospect of television coverage of Parliament], 1972 25 Content (November) 14.

Palda, K. "Does advertising influence votes? An analysis of the 1966 and 1970 Quebec elections," (1973) 6 Canadian Journal of Political Science 638.

This study is based upon raw material provided by two Quebec elections affected by the full disclosure of electoral expenses laws, and attempts to determine whether advertising expenditures had a measurable and significant impact on the outcome of the two elections. The author's null hypothesis was defeated by the results,; the estimates showed advertising expenditures in various forms to be a powerful conditioning variable.

Enviro-nics Research Group. Reaching the Retired: a survey of the media habits, preferences and needs of the senior citizens in Metro Toronto. Ottawa: Information Canada, 1974.

This report, based on the premise that the media have been remiss in serving the elderly, was prepared for the Communications Committee of the United Church of Canada, and was funded in part by the CRTC. The study is concerned with the general insensitivity of the media to the needs of the elderly, and contains data which demonstrate the direction in which television ought to expand to meet those needs.

12.2 THE FAIRNESS DOCTRINE,  
EQUAL-TIME RULE, AND ACCESS TO  
THE MEDIA IN THE UNITED STATES

This part presents a chronological list of sources dealing with access and fairness questions in the United States. Most of the early articles deal with the genesis of the "equal-time rule" for political candidates, the fairness doctrine for controversial subjects in general, and the decision by the U.S. Supreme Court in the Red Lion case in 1969 to uphold the constitutionality of the FCC's fairness doctrine as applied to broadcasters. More recent articles have commented on the conflicting decision in the Tornillo case, where the Supreme Court declined to extend the principle of the Red Lion case to newspapers.

The following material does not address the question of the applicability of the fairness doctrine to advertising, which is dealt with in Part 12.3 below.

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Note, "Equal Time Act does not apply to regular weathercasts by political candidate (Brigham v. FCC 276 F.2d 828)," (1960) 20 Maryland Law Review 374.

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Erbst, Lawrence S. "Equal time for candidates: fairness or frustration," (1961) 34 Southern California Law Review 190; 2 P.E.A.L. 354.

Barron, Jerome A. "The Federal Communications Commission's fairness doctrine: an evaluation," (1961) 30 George Washington Law Review 1, 4 P.E.A.L. 214.

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Blaine, Harry R. "Equality, fairness and 315: the frustration of democratic politics," (1964) 24 Maryland Law Review 166, 6 P.E.A.L. 500.

Howell, R. "Fairness - fact or fable: the right of the broadcaster to advocate his own views over his station," (1964) 8 Journal of Broadcasting 321.

Alfange, D. Jr. "Balancing of interests in free speech cases: in defense of an abused doctrine," (1965) 2 Law in Transition Quarterly 35.

Grassi, A. "A right of rectification in broadcasting," (1965) 16 EBU Review 39. (No.89).

Dean, J.W. III. "Political broadcasting: the communications act of 1934 reviewed," (1966) 20 Federal Communications Bar Journal 16.

Bryant, A. "The F.C.C.'s '50-50' requirement," (1966) 10 Journal of Broadcasting 213.

Dill, Glenn. "A fairness doctrine for the press," (1967) 40 North Dakota Law Review 317, 7 P.E.A.L. 93.

Singer, Richard G. "The FCC and equal time: Never-Neverland revisited," (1967) 27 Maryland Law Review 221, 9 P.E.A.L. 133.

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Note, "Fairness doctrine: personal attacks and public controversies: Red Lion Broadcasting Co. v. FCC, 381 F.2d 908," (1968) 56 Georgetown Law Journal 547.

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Note, "Equal time for political candidates," (1968) 23 New York University Intramural Law Review 266.

Note, "Red Lion case (Red Lion Broadcasting Co. v. FCC, 381 F.2d 908): an opportunity for first amendment reappraisal," (1968) 29 University of Pittsburg Law Review 691.

Bagdakian, B.H., and others. "Right of access: a modest proposal [symposium]," (1969) 8 Columbia Journalism Review 4.

Note, "Duty of newspapers to accept political advertising - an attack on tradition," (1969) 44 Indiana Law Journal 222.

Blake, J.D., "Red Lion Broadcasting Co. v. FCC (89 Sup. Ct. 1794): fairness and the emperor's new clothes," (1969) 23 Federal Communications Bar Journal 75.

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Note, "Using the mails: a privilege or a right?" (1970) 50 Boston University Law Review 285.

Note, "We pick 'em, you watch 'em: first amendment rights of television viewers," (1970) 43 Southern California Law Review 826.

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Note, "Fairness doctrine and broadcast licence renewals: Brandywine v. Main Line Radio Inc. (24 F.C.C. 2d 18)," (1971) 71 Columbia Law Review 452.

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12.3 ADVERTISING AND THE FAIRNESS DOCTRINE

The applicability of the fairness doctrine to advertising has given rise to even greater controversy than in regard to programming. Since the FCC first applied its fairness doctrine to cigarette advertising in 1967, on the basis that reasonable time should also be afforded to messages against cigarettes, a spirited debate has ensued as to the applicability of this rule to other ads. Since that time, the FCC has attempted to step back and limit the applicability of the fairness doctrine to so-called "advocacy" advertising, i.e. advertising that is not product-oriented but seeks to promote a point of view. The treatment of advocacy advertising has received recent attention in Canada, although the CRTC has yet to announce its policies in this area.

The sources below are listed in chronological order. On a related question, there is a growing literature on comparative advertising and product disparagement. For a guide to this matter, see Chapter 14, at Part 14.4.

Canadian Sources

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This is the edited transcript of a discussion held in Toronto on April 4, 1977 by lawyers, advertisers, ad agencies, and regulators on the definition of "advocacy advertising", on the problems it might create, whether the Broadcasting Act applies, and whether such ads should be restricted or prohibited. The discussion was sponsored in part by the CRTC Task Force on Freedom of Broadcast Information and was chaired by CRTC Vice-Chairman Jean Fortier. The publication includes the script of a number of Canadian advocacy ads and an extended analysis with storyboard of the ad "Let's Free Enterprise."

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Note, "Communications - the fairness doctrine: a continuing advance into product advertising," (1972) 50 North Carolina Law Review 664.

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## CHAPTER 13

### MASS MEDIA -- IMPACT AND CONTROLS

This chapter reviews the literature relating to the impact of the mass media on society and the related questions of censorship and freedom of expression. The importance of mass media to Canadian life may be indicated by some simple measurements. More than 96% of Canadian homes have television sets and the average viewer spends almost 24 hours a week watching television. About 75% of Canadian homes receive at least one newspaper daily. In an average year, Canadians spend about \$100 million on records. About 24 million comic books are sold in Canada each year, plus more million books and magazines of all kinds. Movie-goers in Canada, mostly under 35 years of age, spend about \$200 million a year at the box office. And there are more than 15 million radios in Canada, tuned for many hours a day to Canadian AM and FM stations.

The impact of the mass media in Canada has been the focus of a number of major studies in Canada, apart from the continuing review of specific licensing issues by the CRTC. In broadcasting, these include the Aird Report of 1929, the Fowler Report of 1957, the Glassco Report of 1963, the Fowler Report of 1965, and the Cline Report of 1979. In regard to the mass media in general, reference should be made to the Massey Report of 1951, the O'Leary Report of 1961, the Davey Report of 1970, the Rohmer Report of 1972 and the LaMarsh Report of 1977. (For a listing of all such reports that relate to the role or jurisdiction of the communications regulatory agencies, see Chapter 3 above, at Part 3.1). Each of these extensive reports responded to a different problem at a different point in the evolution of mass media in Canadian society, but all share a concern for the maintenance of a strong Canadian culture and identity, with diverse sources of information, in the face of a growing new technology. The literature reviewed in this chapter also reflects a continuing preoccupation with the conflict between freedom of expression and responsibility in the mass media.

This chapter is divided into the following four parts:

- 13.1 Mass Media and Society
- 13.2 Censorship and Freedom of Expression in Canada

- 13.3 Censorship and Freedom of Expression in  
the United States
- 13.4 Fair Trial and Free Press.

13.1 MASS MEDIA AND SOCIETY

This part focuses on general literature on the impact of mass media on society, and focuses on Canadian sources, set out in chronological order. For a bibliography of U.S. and other sources, on the same question, reference should be made to Volume 2 of the Report of the Royal Commission on Violence in the Communications Industry (Toronto: Queen's Printer for Ontario, 1977), noted further below. For additional material on the history or evolution of various forms of mass media in Canada, see Chapters 6 (broadcasting), 7 (cable television), and 9 (newspapers, books, magazines, films, records and the performing arts).

Canadian Sources

Innis, Harold A. The Bias of Communication. Toronto: University of Toronto Press, 1951.

This major work argues that the course of history has been influenced by the communications systems developed by the various civilizations that have peopled the earth. A detailed and cogent economic treatise, this book has been a primary influence on many modern philosophers of media and communication, notably McLuhan.

McLuhan, Marshall. Understanding Media - The Extension of Man. New York, Toronto: New American Library, Signet, 1966.

McLuhan elaborates his idea that the medium through which man expresses himself comes to give a character and structure to man's communication by that medium, and finishes by moulding all of civilization - or the particular culture - around that structure. He then looks at many aspects of modern life as media - newspapers, money, cars, games and electronic media - and speculates on their social impact. The immediacy of the newest forms of communication and their global extent combine to transform man more quickly than in the past.

Casty, A., ed. Mass Media: Mass Man. Toronto: Holt, Rinehart and Winston, 1968.

A collection of materials on media as processors and conveyors of culture and information.

Irving, John A., ed. Mass Media in Canada. 2nd. ed. Toronto: Ryerson Press, 1969.

Assesses the status of mass communication in Canada. Among topics dealt with are: development of communications in Canada, press, books, film, radio, television, advertising and electronics.

Canada. Report of the Special Senate Committee on Mass Media. Volume 1, The Uncertain Mirror. Volume 2, Words, Music and Dollars. Volume 3, Good, Bad or Simply Inevitable? Ottawa: Queen's Printer, 1971.

A useful analysis of the state of the mass media in Canada, including ownership and control, economics and impact, public opinion, and concluding with recommendations on public policy.

Theall, Donald F. The Medium is the Rear-view Mirror: Understanding McLuhan. Montreal: McGill-Queen's University Press, 1971.

A handbook and guide that claims to clear away much of the confusion surrounding one of the most famous and least understood modern philosophers.

People and the Mass Media. Toronto: Ontario Federation of Labour, 1971.

This is a report of a conference called by the Ontario Federation of Labour and the Canadian Labour Congress to discuss the Senate Report on the Mass Media and how it affects the public and trade union movement.

McDayter, Walt, ed. A Media Mosaic: Canadian Communications Through a Critical Eye: Selections Chosen and Edited by Walt McDayter. Toronto: Holt, Rinehart and Winston, 1971.

Wilson, C.E. and Bambrick, F.K. "Dullness and Trust Often Are First Cousins," [Results of research done on distortion of information] (1971) 11 Content 12.

MacDonald, Dick. "A Commentary: But What Good Will It Do?" [on the Davey Report and media] (1971) 3 Content 2.

MacDonald, Dick. "Davey Report, Two Years Later," (1972) 26 Content 2.

Boyle, Harry J. "Running Offense for the People," [Role of journalists and broadcasters in face of technology, Media '72] (1972) 17 Content 5.

McLaughlin, G. Harry. Educational TV on Demand: An Evaluation of the Ottawa IRTV Experiment. Toronto: O.I.S.E., 1972.

Singer, Benjamin D. (ed.). Communications in Canadian Society. Toronto: Copp Clark, 1972.

A collection of articles intended to deal with communications from a social science perspective. The general topics are "Social Forces and Communications Media," "Control of Communications Media," "Identity, Unity and Mass Communication," and "Social Problems and Communications".

Gordon, S.E. "Food for the Opinion-makers: Analysis of Reliance on Media by Government Policy Planners," (1973) 32 Content (June) 13.

Hunt, R. "Ten Buffaloes and a Beaver: The plight of Canadian research journalism," (1974) 54 Canadian Forum 25.

Ontario. Report of the Royal Commission on Violence in the Communications Industry. Volume 1. Approaches, Conclusions and Recommendations. Toronto: Queen's Printer for Ontario, 1977.

An expensive call to arms which contains a useful review of the problems and public policy issues presented by violence in the mass media, but is trendy and uneven when it comes to recommendations and conclusions. The first volume also includes excerpts from briefs presented at hearings of the Commission and materials and reports from other jurisdictions. The research studies set out in Volumes 2 to 7 are also summarized.

Ontario. Report of the Royal Commission on Violence in the Communications Industry. Volumes 2 to 7. Bibliography and Research Studies. Toronto: Queen's Printer for Ontario, 1977.

Concurrent with the publication of its Conclusions and Recommendations, the Ontario Royal Commission published the following studies in six volumes:

Volume 2  
Violence and the Media: A Bibliography

Volume 3

Violence in Television, Films and News.

- Study 1: "A Content Analysis of Entertainment Television Programming," by T.M. Williams, M. Zabrack, L. Joy
- Study 2: "Television Crime Drama: A Mythological Interpretation," by J. Taylor
- Study 3: "Images of Different Worlds: An Analysis of English-and-French-language Television," by A.H. Caron
- Study 4: "A Content Analysis of Feature Films," by J. Linton and G. Jowett
- Study 5: "Content Analysis of the News Media: Newspapers and Television," by D. Gordon and B. Singer
- Study 6: "Content Analysis of the News Media: Radio," by D. Gordon and L. Ibson.

Volume 4

Violence in Print and Music

- Study 7: "The Control of Mass Entertainment Media in Canada, the United States and Great Britain: Historical Surveys," by G. Jowett, P. Reath and M. Schouten
- Study 8: "Speaking the Unspeakable: Violence in the Literature of Our Time," by R. Fulford
- Study 9: "Violence in Literature for Children and Young Adults," by Claire England
- Study 10: "Magazines and Violence," by E. Beattie
- Study 11: "Violence and Popular Music," by P. Goddard

Volume 5

Learning from the Media

- Study 12: "Television Violence Effects: Issues and Evidence," by R. Goranson
- Study 13: "Television and Pro-Social Behaviour," by P. Rushton
- Study 14: "Replications of Media Violence," by P. Stanley and B. Riera
- Study 15: "Studies of Television and Youth Sports," by A. McCabe and D. Moriarty
- Study 16: "The News Media and Perceptions of Violence," by A. Doob and G. Macdonald
- Study 17: "Collective Conflict, Violence and the Media," by R. Jackson, M. Kelly and T. Mitchell

Volume 6  
Vulnerability to Media Effects

- Study 18: "Effect of Television on Children and Youth: A Development Approach," by G. Fouts  
Study 19: "Viewers' Perceptions of Selected Television Programs," by E. Tate  
Study 20: "Television and the Family as Agents for Socialization," by F. Rainsberry  
Study 21: "Violence, the Media and Mental Disorder," by J. Renner  
Study 22: "Institutionalized Populations' Views on Violence and the Media," by J. Renner

Volume 7  
The Media Industries: From Here to Where?

- Study 23: "A descriptive Study of Perceptions and Attitudes among Journalists in Ontario," by A.M. Osler  
Study 24: "An Analysis of Some News-flow Patterns and Influences in Ontario," by A.M. Osler  
Study 25: "Economic Determinants of Violence in Television and Motion Pictures and the Implications of Newer Technologies," by H. Edmunds and J. Strick  
Study 26: "Future Mass Media," by G. Thompson  
Study 27: "Alternatives for Canadian Television," by S. Griffiths  
Study 28: "Constitutional Jurisdiction over Violence in the Mass Media Industries," by P. Hogg

Beaulieu, L.A. "Media, violence and the family," (1978) 29 Reports on Family Law 104.

13.2 CENSORSHIP AND FREEDOM OF EXPRESSION  
IN CANADA

This part reviews the literature on government regulation of freedom of expression in Canada. The primary focus of the materials below is on the censorship of obscene or indecent matter and on the issue of hate propaganda. So far, there has been relatively little study of the general question of prior restraint of the press in Canada, although this is an area which warrants much further research.

A number of aspects of freedom of expression and censorship are dealt with in other chapters, to which the reader is referred. For the regulation of broadcasting stations see Chapter 6. For the question of political and controversial publication and broadcasting and the application of a fairness doctrine or a right of access to the media, see Chapter 12. And for restrictions on freedom of expression arising from the application of defamation law, a right of privacy, or national security laws, including the Official Secrets Act, see Chapter 14.

The material below has been arranged in chronological order and is broken into two parts: general sources in censorship, and the question of hate propaganda.

General Sources on Censorship

Laurencelle, Ulric-G. "Censorship and obscenity," (1961) 4 Canadian Bar Journal 223.

The author reports the conclusions of a seminar held at the 1961 annual meeting of the Canadian Bar Association which discussed a paper of the Saskatchewan Civil Liberties sub-section. The report, which was extremely liberal, is strongly criticized.

Jaffary, Karl D. "An approach to the criminal provisions regarding obscenity," (1962) 20 University of Toronto Faculty of Law Review 5.

Jaffary points out the difficulties involved in determining which group censorship laws are designed to protect, and that the question of literary merit is unrelated to the "tendency to deprave". He reviews the American and Canadian positions on the subject, dealing with problems of evidence, definition and interpretation.



Leigh, L.H. "Aspects of the control of obscene literature in Canada," (1964) 27 Modern Law Review 669.

This article is concerned with the shape of legislation relating to obscene literature, the attitude of the Canadian courts to the question of obscenity, and the question of the community standards test as an alternative to the Hicklin test as a predicate for regulation.

Percy, H.R. "Literature and the Law," (1964) 12 Chitty's Law Journal 318.

Baynton, G.W. "Freedom of the press - will it be preserved?" (1965) 30 Saskatchewan Bar Review 17.

In this article, developments in mass media are said to have changed the concept of a free press, its rights and responsibilities to present a fair and accurate account of events. The author traces the historical and present legal position of the press, evaluates the press as a social institution, and finally addresses himself to the question of how freedom of the press can be improved and preserved.

Getz, Leon, "The problem of obscenity," (1965) 2 University of British Columbia Law Review 216.

Problems involved in any attempt to objectivise the test of obscenity by the determination of "community standards" are pointed out by Professor Getz. He suggests that the use of a jury as a mechanism by which these standards may be ascertained is inadequate to the task; neither will judicial notice solve the problem. After examining some alternative techniques that might be useful in gauging public opinion on the matter of obscenity, Getz concludes by questioning the rationality of any involvement of the criminal law in this difficult area.

Charles, W.H. "Obscene literature and the legal process in Canada," (1966) 44 Canadian Bar Review 243.

A history of law relating to obscenity in Canada is presented, culminating in the Fulton Test of 1959. Charles examines the effect of this test on later adjudications, and attempts to contrast the legislative intent demonstrated by the background of the

legislation with the application of the law by the judiciary. Underlying assumptions regarding the effect of pornography on society are subjected to criticism, and a short analysis of the role of the criminal law in this field is outlined.

Tessier, A. "L'obscénité, sujet controversé en droit criminel," (1966) 26 Revue du Barreau 671.

Miller, J.G. "Some obscene thoughts," (1967) 25 University of Toronto Faculty of Law Review 128.

The author examines the approaches to obscenity used by the Ontario Court of Appeal and the Nova Scotia Supreme Court. The general history of Canadian obscenity cases is traced, with a view toward exposing the ineffectiveness of the present state of law on the topic. He concludes by offering a third, and hopefully better, test.

Tollefson, E.A. "Freedom of the Press," Contemporary Problems of Public Law in Canada. (Essays in honour of Dean F.C. Cronkite), Lang, O.E. (ed.), at p. 49. Saskatoon: University of Saskatchewan Press, 1968.

In this essay, Tollefson re-evaluates the decision and sweeping dicta of the Supreme Court of Canada in the Alberta Press Bill case ([1938] S.C.R. 100). He gives an account of the historical background of the case, and outlines its political importance. Tollefson's main submission is that the Press Bill case cannot be relied upon as authority for any rule relating to jurisdiction over the press.

Note, "Montreal Newsdealer Supply Co. v. Board of Cinema Censors of the Province of Quebec, [1969] C.S. 83," (1969) 15 McGill Law Journal 350.

Mallen, Bruce E. Report on Legislation, Acts, Regulations and Controls of the Federal and Provincial Governments which Affect the Mass Media in Canada. Montreal: Sir George Williams University, 1969.

Lists and in most cases annotates Canadian Acts, regulations and briefs on the media. Also discussed are planned changes and proposed legislation, particularly that related to ownership, editorial content and advertising.

Barnett, C.S. "Obscenity and s. 150 (8) of the Criminal Code," (1969) 12 Criminal Law Quarterly 10.

The author attempts to determine from the few relevant cases the meaning of 'obscene' within the Criminal Code of Canada, both as it purports to be and as it really is.

Powe, L.A. Jr. "The Georgia Straight and freedom of expression in Canada," (1970) 48 Canadian Bar Review 410.

Three cases involving the underground Vancouver newspaper, the Georgia Straight, are examined in order to present the author's opinion on the importance of freedom of expression in a democratic society. He points out illustrations of the lack of legislative and bureaucratic restraints on public officials who have powers of censorship, and advocates the broadening of the scope for freedom of expression through changes in the law of sedition and criminal libel.

MacDonald, Dick. "Tell me, what is censorship [comments from journalists at the Montreal symposium on censorship during October, 1970]," (1970) 2 Content (November) 8.

Krotter, Mark M. "The censorship of obscenity in British Columbia: opinion and practice," (1970) 5 University of British Columbia Law Review 123; (1971) 3 Canadian Communications Law Review 59.

Krotter discusses the powers, policies and views of the chief censorship bodies in British Columbia, and offers a critique of each. More concerned with opinion and policy than case law, he seeks to evaluate the effectiveness of the censors and the appropriateness of that structure for the regulation of obscenity.

Kirsh, H.J. "Film censorship: the Ontario experience," (1970) 4 Ottawa Law Review 312.

The author reviews the activities of the Ontario Board of Film Censors, with particular reference to the effect of the Board's classification scheme. He also examines the constitutionality of the Board's powers and the desirability of ex post facto criminal prosecution.

Wilson, C.W. and Bambrick, F.K. "How not to err, that is the point. [results of research on freedom of the press]," (1971) 14 Content (December) 12.

Weiter, Joseph. "Controlling obscenity by criminal sanction," (1971) 9 Osgoode Hall Law Journal 415.

This paper attempts to explore some of the problems that confront legislators and courts in their attempt to enforce morals in obscenity legislation through the utilization of the instrument of the criminal sanction.

Makuch, S. "Controlling obscenity by administrative tribunal - a study of the Ontario Board of Cinema Censors," (1971) 9 Osgoode Hall Law Journal 385; 3 Canadian Communications Law Review 31.

This paper examines the stated goals of the Board both in 1911 when it was first instituted, and today. The Board's formal structure is analysed, and an attempt is made to indicate how the goals and functioning of the Board are influenced by that structure. Draft legislation to reform the organization is examined and evaluated.

Jewett, P.E.S. "Censorship of movies for Canadian television," (1972) 30 University of Toronto Faculty of Law Review 2, (1971) 3 Canadian Communications Law Review 1.

Jewett examines the potential problem of the screening of films on television which contain explicit sexual references, nudity or violence, and discusses how this problem has been and is being handled by television broadcasters. He offers a justification for some censorship of these films, because of the nature of the television medium, and concludes by offering some possible solutions to the television broadcasters' movie censorship dilemma.

Mackenzie, J.B. "Section 98, Criminal Code and freedom of expression in Canada," (1972) 1 Queen's Law Journal 469; (1972) 4 Canadian Communications Law Review 197.

From 1919 to 1936 there was a section in the Criminal Code which prohibited any association "whose professed purpose or one of whose purposes is to bring about

any governmental, industrial or economic change in Canada by use of force, violence or physical injury to person or property or by threats of such injury". Mackenzie examines the political roots of this legislation and discusses its impact on Canadian society and the courts.

Dybikowski, J.C. "Law, liberty and obscenity," (1972) 7 University of British Columbia Law Review 33.

Professor Dybikowski presents a philosophical argument for the abolition of obscenity legislation. He develops the libertarian case against obscenity laws, relying heavily on the traditional arguments of John Stuart Mill. In addition, he examines Canadian, American and British experiences with the subject, and counters the main stand-by defenses of obscenity laws.

Singer, Benjamin D. (ed.) Communications in Canadian Society. Toronto: Copp Clark, 1972.

A collection of articles intended to deal with communications from a social science perspective. A number of studies relate to censorship and control, namely, Singer, Benjamin D., "Violence, Protest and War in Television News: The U.S. and Canada Compared"; McCormack, Thelma, "Censorship and 'Community Standards' in Canada"; and Latouche, Daniel, "Mass Media and Communication in a Political Crisis".

Houde, D. "La Liberté de la presse en droit anglais, américain et canadien," (1972) 13 Cahiers 121.

The author outlines the history and development of the law of the press in Britain, the United States and Canada. He maintains that, although in the U.S. there exists a veritable "law of freedom of the press", there has not been a corresponding evolution in English or Canadian law. This is a very comprehensive article, touching on all of the major cases which deal with the issue.

Finch, J.D. "Conspiracy, society and the press; the recent experience in English Law," (1972) 50 Canadian Bar Review 522.

This is a discussion of the crimes of "conspiracy to corrupt public morals" and "conspiracy to outrage public decency"

as seen in the British case *R. v. Knuller (Publishing, Printing and Promotions) Ltd.* [1971] 3 All. E. R. 314 which involved advertisements for homosexual liaisons. The terms "public morality" and "public danger" are examined with reference to the criminal codes of some U.S. states, and to the relevant Canadian law. Finch then questions the appropriateness of the criminal law for dealing with situations of this type.

Fox, Richard G. "Comment - *R. v. Prairie Schooner News Ltd. v. Powers*; and *R. v. Times Square Cinema Ltd.*," (1972) 50 Canadian Bar Review 315.

The author deals with the question of admissibility of survey evidence of community standards in obscenity prosecutions with reference to two cases in the Courts of Manitoba and Ontario. Fox points out some of the problems inherent in the interpretation of survey evidence by the court, but concludes with an observation that there is a risk involved in setting survey standards too high, particularly when "the alternative to imperfect science is less perfect judicial intuition".

Cooper, Harriet. Regulation and Control in Canadian Mass Media. Montreal: McGill University, 1973.

Part of a series on basic issues in Canadian mass communications. This primer for the student of communications regulation considers policies and regulatory procedures and evaluates them in light of the standard problems and conflicts.

Cooper, H.H.A. "Deep Throat - not all that easy to swallow," (1973) 21 Chitty's Law Journal 270.

This is a brief note about the much-publicized film, "Deep Throat" and its connection with hard-core pornography; the U.S. Supreme Court is chastised for its refusal to provide a clear and unequivocal definition of pornography.

Lamont, J.M.H. "Public opinion polls and survey evidence in obscenity cases," (1973) 15 Criminal Law Quarterly 135.

This paper outlines the development of the emerging Canadian law on the admissibility of public opinion surveys, while discussing

some possible difficulties inherent in such evidence. Commentary on the judicial attitude toward it is offered, and an argument posed to justify its use.

Samek, R.A. "Pornography as a species of second-order sexual behaviour: a submission for law reform," (1973) 1 Dalhousie Law Journal 265.

Fox, R.G. "Obscenity," (1974) 12 Alberta Law Review 172.

Because of the uncertainty of the law of obscenity, and its unevenness of interpretation and application, the law may be in need of reform. This article examines the fundamental difficulties of this area of law and deals with the possible justifications for such legislative prohibitions. It also discusses cases on the Criminal Code provisions, related federal legislation and the incidental matters of defences and expert witnesses. It concludes with a weighing of possible alternatives to the present law.

Lutes, R.E. "Obscenity law in Canada," (1974) 23 University of New Brunswick Law Journal 30.

Hunter, I.A. "Obscenity, pornography and law reform," (1975) 2 Dalhousie Law Journal 482.

Mullan, D. "Nova Scotia Board of Censors v. McNeil," (1975) 5 N.R. 43," (1976) 8 Ottawa Law Review 32.

Tarnapolsky, Walter S. The Canadian Bill of Rights. 2nd edition revised. Toronto: McClelland & Stewart, 1975.

This excellent work is the leading text on the Canadian Bill of Rights. Chapter 5 deals extensively with the judicial interpretation of the right of freedom of speech and freedom of the press in Canada.

Law Reform Commission of Canada. Limits of Criminal Law. (Working Paper 10). Ottawa: Information Canada, 1975.

Hogg, Peter. "Constitutional Jurisdiction over Violence in the Mass Media Industries," Study 28 for the Report of the Royal Commission on Violence in the Communications Industry, in Volume 7, The Media Industries: From Here to Where? Toronto, Queen's Printer for Ontario, 1977.

Hate Propaganda

Hughes, G. "Prohibiting incitement to racial discrimination," (1965) 20 University of Toronto Law Journal 361.

The author examines the possibilities of the United States, the United Kingdom and Canada adopting the U.N. international convention which would create a new crime of incitement to racial hatred. He discusses in particular the problems raised by the collision of such a law with the doctrine of freedom of speech.

Cohen, Maxwell. Report of the Special Committee on Hate Propaganda in Canada. Ottawa: Information Canada, 1966. (Excerpts reproduced in Singer, Benjamin D. Communications in Canadian Society. Toronto: Copp Clark, 1972, at pp. 264-295.)

This report reviews the forms of hate propaganda that have emerged in Canada, the media it employs, and recommended measures.

MacGuigan, M.R. "Proposed anti-hate legislation," (1967) 15 Chitty's Law Journal 302.

This article concerns itself with the controversy surrounding the recommendations of the Special Committee on Hate Propaganda (Cohen Committee), among which were: to render criminal the advocacy of genocide, the public incitement of hatred and the wilful promotion of hatred against "identifiable groups." MacGuigan discusses the significance of Bill S-5 in terms of the development of the criminal law in a changing society.

Arthurs, H.W. "Hate propaganda - an argument against attempts to stop it by legislation," (1970) 18 Chitty's Law Journal 7.

Professor Arthurs argues strongly against the use of legislation to curtail the spread of hate propaganda. He points out that the recent trend in Canadian law has been to allow greater freedom of speech, that (for those who would nip the rose in the bud) there is no point in legislating against an evil that might never arrive, and that in fact criminal sanctions might be counterproductive in the fight against hate literature. Instead he proposes



a mass education programme to cure the populace of the ignorance that serves as the swampland for the malaria of bias against peoples.

Hage, R.E. "The hate propaganda amendment to the Criminal Code," (1970) 28 University of Toronto Faculty of Law Review 63.

This short note outlines the background of pressures and circumstances that led to an amendment to the Criminal Code to deal with hate propaganda, and points out its potential for abuse and interference with fundamental freedoms.

Cohen, S.S. "Hate propaganda - the amendments to the Criminal Code," (1971) 17 McGill Law Journal 740.

Cohen traces the role of the civil law in controlling group libel, and then assesses the adequacy of the criminal law in dealing with hate literature. He presents an overview of the background and history of anti-hate law, and analyses the provisions of the proposed Bill C-3 in light of the likely usefulness for the prevention of hate propaganda.

Cohen, Maxwell. "The Hate Propaganda Amendments: Reflections on a Controversy," (1971) 9 Alberta Law Review 103; (1972) 4 Canadian Communications Law Review 243.

Stan, D. "Hate Literature in Canada - a civil liberties approach," (1973) 39 Manitoba Bar News 16.

Mr. Stan discusses the situation and debate which led up to the amendments to the Criminal Code to deal with hate literature, and considers whether they were necessary. He also questions whether these enactments infringe upon our freedom of speech concept to an extent that we are left without a basic right of freedom of speech as granted in the Bill of Rights.

13.3 CENSORSHIP AND FREEDOM OF EXPRESSION  
IN THE UNITED STATES

This part sets out the literature on government regulation of freedom of expression in the United States, in chronological order. As with the Canadian materials in Part 13.2, the focus is on the censorship of obscene or indecent matter, although a number of sources also examines the general question of prior restraint. Reference should also be made to Chapter 6 for additional sources on the regulation of broadcast program content by the Federal Communications Commission, and to Chapter 12 for the application of the equal-time rule, and the fairness doctrine to the mass media. In regard to restrictions on freedom of expression arising by reason of defamation law, the right of privacy, and national security, reference should be made to Chapter 14 below.

Note, "Movie censorship standards under the first amendment," (1959) 9 DePaul Law Review 44, 2  
P.E.A.L. 129

Kalven, Harry jr. "The metaphysics of the law of obscenity," (1960) Supreme Court Review 1; 2 P.E.A.L. 290.

Wallahan, Franklin J. "Immortality, obscenity and the law of copyright," (1961) 6 South Dakota Law Review 109; 3 P.E.A.L. 114

Cairns, Robert B., Paul, James C.N. and Wishner, J. "Sex censorship: The assumptions of anti-obscenity laws and the empirical evidence," (1962) 46 Minnesota Law Review 1009, 4 P.E.A.L. 499.

Note, "Obscenity in the mails: Post Office Department procedures and the first amendment," (1963) 58  
Northwestern University Law Review 664, 6 P.E.A.L. 139

Henkin, Louis. "Morals and the constitution: the sin of obscenity," (1963) 73 Columbia Law Review 391; 5  
P.E.A.L. 346.

Gerber, Albert B. "A suggested solution to the riddle of obscenity," (1964) 112 University of Pennsylvania Law Review 834, 7 P.E.A.L. 52

Goodhart, A.L. "Freedom of speech and freedom of the press," (1964) Washington University Law Quarterly 248.

Note, "Obscene publications and the constitution - censorship v. freedom of the press," (1964) 4 Washburn Law Journal 114.

Note, "Obscenity prosecution: artistic value and the concept of immunity," (1964) 39 New York University Law Review 1063.

Samuels, A. "Obscenity and the law: the balance between freedom to publish and public decency," (1964) 61 Law Society's Gazette 729

Bilgrey, Felix J. "Some questions concerning movie censorship and the first amendment," (1965) 18 Record of the Association of the Bar of the City of New York 32, 5 P.E.A.L. 379.

Forkosch, Morris D. "Freedom of the press: Crosswell's case," (1965) 23 Fordham Law Review 415, 7 P.E.A.L. 208

Oaks, D.H. "Suppression of the Nauvoo Expositor," (1965) 9 Utah Law Review 862

Note, "Free speech and obscenity: a search for constitutional procedures and standards," (1965) 12 UCLA Law Review 532.

Note, "Blueprint for censorship of obscene material: standards for procedural due process," (1965) 11 Villanova Law Review 125.

Note, "Obscenity: Roth goes to the movies," (1965) 14 Buffalo Law Review 631.

Gertz, E. "Illinois battle over 'Topic of Cancer'," (1965) 46 Chicago Bar Record 161.

Sigler, J. A. "Freedom of the mails: a developing right," (1965) 54 Georgetown Law Journal 30.

Verani, J. R. "Motion picture censorship and the doctrine of prior restraint," (1965) 3 Houston Law Review 11.

Namurois, A. "Freedom of speech on radio and television: a myth?" (1966) 17 EBU Review 44 (No. 98)

Ablard, C. D. "Obscenity, advertising and publishing: The Impact of Ginzburg (86 Supreme Court 942) and Mishkin (86 Supreme Court 958)," (1966) 35 George Washington Law Review 85.

Dibble, J. Rex. "Obscenity - a state quarantine to protect children," (1966) 39 Southern California Law Review 345, 9 P.E.A.L. 403

Dyson, R. B. "Looking-glass law: an analysis of the Ginzburg case (Ginzburg v. U.S., 86 Supreme Court 942)," (1966) 28 University Pittsburg Law Review 1.

Magrath, C. P. "Obscenity cases: grapes of Roth," (1966) Supreme Court Review 7.

Note, "Constitutional problems in obscenity legislation protecting children," (1966) 54 Georgetown Law Journal 1379, 9 P.E.A.L. 446.

Note, "More ads about dirty books," (1966) 75 Yale Law Journal 1364

Note, "Obscenity," (1966) 41 Notre Dame Law Review 753

Reiss, B. F. "Supreme Court and obscenity: Mishkin and Ginzburg - expansion of freedom of expression and improved regulation through flexible standards of obscenity," (1966) 21 Rutgers Law Review 43

Semonche, J. E. "Definitional and contextual obscenity: The Supreme Court's new and disturbing accommodation," (1966) 13 UCLA Law Review 1173.

Sigler, Jay A. "Customs censorship," (1966) 15 Cleveland - Marshall Law Review 58; 9 P.E.A.L. 18.

Gilber, A. "Supreme Court and obscenity. The Ginzburg test - restriction of first amendment freedoms through loss of predictability," (1966) 21 Rutgers Law Review 56

Sefange, D. The role of the Supreme Court in the protection of freedom of expression in the United States. (Ph. D. Thesis, Cornell University, 1967)

Haimbaugh, George D. Jr. "The second front: free expression versus individual dignity," (1967) 9 William and Mary Law Review 126, 9 P.E.A.L. 175.

Note, "Book named 'John Cleland's Memoirs of a Woman of Pleasure' v. Attorney General of the Commonwealth of Massachusetts, 86 Supreme Court 974," (1967) 31 Albany Law Review 143.

Note, "Dirty words and dirty politics: cognitive dissonance in the first amendment," (1967) 34 University of Chicago Law Review 367.

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13.4 FAIR TRIAL AND FREE PRESS

The final part of this chapter deals with the restraint on freedom of expression arising from the reporting of trials or judicial proceedings. In this area, the law in Canada and other Commonwealth countries, where the reporting of trials is governed by the law relating to constructive contempt, is dramatically in contrast with that in the United States, where the press is much more strongly protected by the First Amendment to the Constitutions.

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## CHAPTER 14

### COMMUNICATIONS AND PRIVACY

One of the growing areas of concern arising out of the explosion of new communications technologies is the potential erosion of personal sovereignty and privacy that may occur. This erosion can take many forms. It may occur when one's territorial privacy is involved, as with electronic surveillance. It may occur when confidential medical or financial records are exchanged between companies or accessed by a computer terminal. It may occur when the mass media reports on the "private" activities of a public figure.

This chapter reviews the literature in Canada and elsewhere relating to the question of privacy and communications technology. This is an area which has received increasing attention in the 1970's, first in regard to electronic surveillance, then with regard to the computerization of personal records by government and others, and most recently with the conflicting demands of citizens for access to government records.

This chapter has been divided into the following five parts:

- 14.1 The General Law of Privacy
- 14.2 Access to Records and Proceedings of Government Agencies
- 14.3 Computers and Privacy
- 14.4 Wiretapping and Eavesdropping
- 14.5 Defamation and Invasion of Privacy by the Mass Media

#### 14.1 THE GENERAL LAW OF PRIVACY

This Part reviews the literature on the legal "right of privacy", a right that has been given the status of a tort in the United States but is still in an embryonic state in most Commonwealth countries, including Canada.

The sources below are listed in chronological order. For material focusing specifically on the question of electronic surveillance, see Part 14.4 below. For material specifically examining the tort liability of the mass media for invasion of privacy, see Part 14.5 below.

##### Canadian and Commonwealth Sources

Cornfield, David A. "The right to privacy in Canada," (1967) 25 University of Toronto Faculty of Law Review 103.

The author reviews the historical background of privacy and its protection by law, finding the subject to be primarily a twentieth-century problem. He chastises the legislatures and courts for their slowness to find solutions and, finally, considers features which privacy legislation should contain.

Atrens, J. "Comment on the report of the Commission of Inquiry into Invasion of Privacy," (1968) 10 Criminal Law Quarterly 138.

A critique that maintains that this report is insubstantial, that the inquiry was poorly conducted, and that the recommendations fail to recognize the need for a balance between the competing values of individual privacy and the protection of society.

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This paper is concerned with the provincial responsibility to create tort protection for the privacy of citizens. It is divided into four parts: the first two are a conceptual and legal analysis of privacy in its aspect of intrusion, the third is an overview of the capabilities of the new electronic technology for intrusion, and the fourth is an examination of the desirability of an independent tort for the invasion of privacy.

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Gordon, Donald H. "Recoveries for violation of the right of privacy in quasi-contract and the federal income tax: an illustration of law's response to changes in attitudes about the personality," (1964) 10 Wayne Law Review 368; 7 P.E.A.L. 357.

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Ervin, B.J. Jr. "Right of privacy - the final answer," (1971) 7 Trial 13.

Mayer, Michael F. "Privacy, performers and the performing arts," (1971) 2 Performing Arts Review 3.

Note, "Confidential information - a general survey," (1971) 6 Sydney Law Review 382.

Pershe, R.M. "Are we about to acknowledge the right of invasion upon the lives of others under certain circumstances?" (1971) 32 Revista del Colegio Abogados de Puerto Rico 223.

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Note, "Constitutional law - freedom to communicate versus right to privacy: regulation of offensive speech limited by 'captive audience' doctrine," (1973) 48 Washington Law Review 667.

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Gitenstein, M.H. "The right to privacy is American [in Privacy's Parasite: a Symposium]," (1974) 1 Civil Liberties Review 59.

Metz, D.W. and Trubow, G.B. "The complexity of privacy [in Privacy's Parasite: Symposium] (1974) 1 Civil Liberties Review 59.

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Dwyer, E. "The right of privacy versus technological advance," (1975) 4 Bureaucrat 293.

Boyd, R. "Privacy, technology and ethical considerations," (1975) 10 Journal of Thought 285.

Miller, A. "Privacy in the modern corporate store; a speculative essay," in The Individual and the Bureaucracy, ed. by Baum, D., Toronto: Osgoode Hall Law School, 1975.

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14.2 ACCESS TO RECORDS AND PROCEEDINGS OF  
GOVERNMENT AGENCIES

The right to privacy is not an absolute right and is particularly subject to limitation in the case of the records and proceedings of government agencies. Increasing pressure has mounted in Canada for the enactment of freedom of information legislation which would grant the citizen access to documents in the hands of government subject to a narrow list of exceptions, with a refusal to be arbitrated by an independent court or commissioner. At present, governments in Canada release information if and when they decide to. The cumulative effect of the present barriers to citizen access -- the lack of a statutory right to access, procedural barriers including the right of standing, the Crown privilege set out in section 41 of the Federal Court Act, the effect of the oath of secrecy declared by public servants, the ambit of the Official Secrets Act, the classification system and its effects, the 1973 Guidelines for the Production of Papers, and the rules governing the transfer of documents to the public archives -- has been to create what Professor Murray Rankin has called "a very pervasive veil of secrecy" in the federal government. Provincial governments are no less protective. Even with the enactment of meaningful freedom of information legislation, however, it is generally conceded that many documents will still need to be kept confidential, such as certain records relating to cabinet proceedings, policy advice, national defence, law enforcement and legal proceedings, personal privacy, and commercial and financial information.

This Part sets out a selection of the literature in Canada and elsewhere relating to the debate on freedom of information. The material also includes references to sunshine laws, i.e. laws requiring administrative boards to carry on their hearings or proceedings in public. In addition to the sources set out below, which are listed in chronological order, reference should be made to the extensive Minutes of Proceedings and Evidence of the Standing Joint Committee on Regulations and Other Statutory Instruments in the period from 1976 to 1979. A number of useful studies, briefs and reports are set out as appendices to the evidence of the Standing Joint Committee.

The issue of personal privacy and the exemptions which should apply to records involving personal matters is also raised in Part IV of the Canadian Human Rights Act, S.C. 1976-77, c.33, which makes certain government files available for inspection and correction by persons affected.

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Rowat, Donald. "Administrative Secrecy and Ministerial Responsibility: A Reply," (1966) 32 Canadian Journal of Economics and Political Science 84.

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Kernaghan, Kenneth, Freedom of Information and Ministerial Responsibility. (Research Publication 2, September, 1978).

Rowat, Donald C. Public Access to Government Documents: A Comparative Perspective (Research Publication 3, November, 1978).

Ison, Terence G. Information Access and the Workmen's Compensation Board. (Research Publication 4, January, 1979).

Flaherty, David H. Research and Statistical Uses of Ontario Government Personal Data. (Research Publication 5, January, 1979).

Hanson, Hugh R. Access to Information: Ontario Government Administrative Operations. (Research Publication 6, February, 1979).

Swift, John "Ministerial Responsibility, ministerial control of government documentary information and Freedom of Information Legislation -- Are they related?" (1979) 37 The Advocate 121.

Grant, Peter S. Freedom of Information in Canada: A Model Bill. Ottawa: Canadian Bar Association, 1979.

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Note, "Open meeting statutes: the press fights for the 'right to know'," (1962) 75 Harvard Law Review 1199; 5 P.E.A.L. 64.

Davis, K.C. "Information Act: a preliminary analysis," (1967) 34 University of Chicago 761.

Hanson, A.B. "The right to know: fair comment - twentieth century," (1967) 12 Villanova Law Review 725.

Note, "Access to the rules and records of federal agencies - the Freedom of Information Act," (1967) 42 Los Angeles Bar Bulletin 459.

Note, "Freedom of Information and the I.R.S.," (1967) 20 Arkansas Law Review 283.

Note, "Freedom of information - the statute and the regulation," (1967) 56 Georgia Law Journal 18.

Paul, J. "Access to rules and records of federal agencies: the Freedom of Information Act," (1967) 42 Los Angeles Bar Bulletin 459.

Dobkin, J.A. "Release of government-owned technical data under the Freedom of Information Act: between Scylla and Charybdis," (1968) 14 Villanova Law Review 74.

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Sky, T. "Agency implementation of Freedom of Information Act," (1968) 20 Administrative Law Review 445.

Katz, J.M. "Games bureaucrats play: hide and seek under the Freedom of Information Act," (1970) 48 Texas Law Review 1261.

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Note, "Judicial discretion and Freedom of Information Act - disclosure denied: Consumers Union v. Veterans Administration," (1970) 45 Indiana Law Journal 421.

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Bagge, C.E. "Symposium: the Freedom of Information Act and the agencies," (1971) 23 Administrative Law Review 129.

Note, "Broadcasting and right of access to public forums," (1971) 6 Georgia Law Review 208.

Note, "Administrative law - Freedom of Information Act," (1971) 49 Texas Law Review 780.

Note, "Invasion of privacy and Freedom of Information Act," (1972) 40 George Washington Law Review 527.

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Rogge, O. John, "The right to know," (1972) 41 American Scholar 643.

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Note, "Rights of the public and the press to gather information," (1974) 87 Harvard Law Review 1505.

Note, "Investigatory files exemption to the FOIA: the D.C. circuit abandons Bristol-Myers," (1974) 42 George Washington Law Review 869.

Mersby, R. "The Freedom of Information Act," (1975) 39 Texas Bar Journal 147.

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#### 14.3 COMPUTERS AND PRIVACY

The advent of the computer has greatly magnified the capacity for organizations -- both commercial and governmental -- to collect and disseminate personal data about individuals. The computer permits enormous increases over the capacity of manual systems in the quantities of data that can be processed, collated, stored and retrieved, and this information can be centralized in electronic data banks. What are the implications of this for public policy? In 1972, the federal Task Force on Privacy and Computers published its report and background studies, which are still a principal source of information on this question. The issues canvassed by the Task Force included the following:

1. Under what conditions should an individual have access to files containing information about him?
2. What rights should he have to delete, amend, or add to such files?
3. To what extent can it reasonably be required that personal data should be protected against intrusion or accidental disclosure?
4. What rights does the individual have regarding dissemination of information in his files? Should he be informed before such dissemination takes place, or be advised (by means of an audit) of all uses?
5. What responsibilities does a record-keeping organization have with respect to the merging and dissemination of personal data?
6. Should individuals be concerned about personal data concerning them which is held in foreign databanks beyond the territorial jurisdiction of Canada?
7. To what extent should an organization holding personal data be responsible for its accuracy?
8. Should there be conventions or rules concerning the types of personal data which specified organizations may or may not hold in their files?

This Part reviews the literature in Canada and the United States on these issues. The sources are set out in chronological order.

Canadian Sources

Sharp, J.M. Credit reporting and privacy: the law in Canada and the U.S. Toronto, Butterworths, 1970.

This book answers the need for a study which explains the nature and workings of the agencies involved in credit reporting and the main ways in which the law extends to control or protect them. The prime objective is to deal with common Canadian-American legal tradition and philosophy: details unique to individual jurisdictions are left to be pursued by the reader.

Canada. Privacy and Computers: A Report of a Task Force Established Jointly by the Department of Communications and the Department of Justice. Ottawa: Information Canada, 1972.

A report of a Task Force established jointly by the Department of Communications and the Department of Justice. Considers in depth problems with regard to the impact of computer technology, privacy and the law, and the larger question of the inter-relationship between information and power. Section headings include Dimensions of the Issue, Empirical Findings, The Impact of Computer Technology, The Specific Areas of Concern, Privacy and the Law, and Conclusions.

Canada. Privacy and Computers. Background Studies. Ottawa: Department of Communications/Department of Justice, 1972.

As part of its work, the Task Force on Privacy and Computers commissioned a number of background studies which were made separately available. The studies are abstracted below:

Weisstub, D.N., and Gotlieb, C.C. The Nature of Privacy. Privacy as it applies to the individual in relation to fears and realities about the centralization of data, by groups, organizations and governments, and the shifts in the balance of powers which computers bring about. The threat to individual freedoms is looked at in the Canadian context, in an historical and ideological perspective, and in the social, political, psychological, philosophical and legal frameworks.

Carroll, J.M. Personal Records: Procedures Practices and Problems. An empirical analysis of the information systems in Canada, with emphasis upon measures taken to safeguard the privacy of data subjects. Consideration is given to ways of strengthening standards of security and confidentiality in private and governmental information systems. The Study examines, from a privacy perspective, information gathering, storage and dissemination practices in 13 areas of social activity in Canada. Data was gathered by means of a questionnaire, site interviews to selected data-bank operators and briefs from interested associations and organizations.

Gellman, H.S. Electronic Banking Systems and Their Effects on Privacy. Describes some existing electronic banking systems and suggests how they might evolve in future. Potential invasions of privacy by these systems and some possible safeguards are also examined.

Technological Review of Computer/Communications. (Jointly produced with the Canadian Computer/Communications Task Force). Projections over the next decade as to developments in computer hardware, software and communications facilities. Consideration is given to directions for changes in systems designed for the storage and retrieval of personalized information about individuals.

Gotlieb, C.C., and Hume, J.N.P. Systems Capacity for Data Security. Examines the methods by which data security can be assured for automated information systems. The study details the estimate of cost of various security measures, and identifies potential improvements to security systems and procedures.

Gellman, H.S. Statistical Data Banks and Their Effects on Privacy. Identifies some of the potential invasions of privacy that might occur through the preparation and use of statistical information. The study suggests some possible safeguards, together with comments about their possible effectiveness.

Williams, J.S. Legal Protection of Privacy. The techniques of enforcement and regulation, through the common law, of an individual's right to privacy. This study gives an indication of the practical limits to protection and assists in the elucidation of



the interests to be protected. It draws attention to areas which could be further developed within the existing legal framework.

Boucher, J. Vie Privée et Ordinateur dans le Droit de la Province du Québec. The author examines the extent to which a right of privacy is protected by the Quebec Civil Code and statutes. Although the law does not recognize a right of privacy as such, the laws of contract, property and torts offer various remedies. The author proposes that the law establish privacy as a personal right under the Civil Code.

Katz, K. Regulation of Federal Data Banks. Analysis of the different sorts of information systems maintained by the Government of Canada and the relative privacy sensitivity of each. The study examines various legislative and administrative responses which might be developed to lessen the extent of intrusion upon the individual's core value of privacy. Special emphasis is paid to techniques applicable to data systems maintained by the federal government.

Sharp, J.M. Regulatory Models. Examines ways of meeting the threat to privacy of the individual posed by information systems, both computerized and manual. Specific matters considered include appropriate definitions for databanks in Canada; rules for their operation, in the interest of data subjects' privacy; and the feasibility of self-regulation of the data processing industry and its professional staff. Particular attention is paid to possible regulatory models for credit companies.

Fabien, C. Ordinateur et Vie Privée: Techniques et Contrôle. The study examines and analyzes the relative merits of judicial and administrative techniques for the protection of the right of privacy in the context of personal information, including an examination of the technique of self-regulation and of the role of public opinion as a political control mechanism. Of primary interest in this study is the proposal for the establishment of an administrative mechanism in the office of an ombudsman.

Usprich, S.J. The Theory and Practice of Self-Regulation. Sketches the larger theoretical implications of self-regulation and the



conclusions they lead to concerning its applicability as a means of controlling the abuse of confidential information in the computer industry.

Jordan, F.J.E. Privacy, Computer Data Banks, Communications and the Constitution. A study of the constitutional aspects of information processing and transmission systems which seeks to identify the respective areas of federal and provincial legislative and regulatory competence under the British North America Act, 1867.

Dalfen, C. International Factors. A study of the issues created by the existence of databanks containing information about Canadians that are located outside Canadian borders, particularly in the U.S. The study examines potential problems facing Canada as a consequence of this situation, the effects of foreign laws on "extra-territorial" Canadian data, and possible responses for Canada.

Land, Thomas. "Legislation to cover data banks: Canada acts to protect right of privacy," (1973) 65 The Christian Science Monitor. (September 12, 1973) 8.

Report of the Canada Commissioners. "Protection of Privacy, credit and personal data reporting," (1975) Unif. L. Conf. 80.

Report of the Canada Commissioners. "Protection of privacy; collection and storage of personalized data bank information," (1975) Unif. L. Con. 208.

Note, "Data Industry Punches in Security Card," (1975) 69 Financial Post 18. (September 6, 1975).

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Michael, D.N. "Speculations on the relation of the computer to individual freedom and the right to privacy," (1964) 33 George Washington Law Review 270.

Long, Edward V. "The right to privacy: the case against the government," (1965) 10 St. Louis University Law Journal 1, 7 P.E.A.L. 169.

Dennis, R.L. Security in the Computer Environment. Santa Monica, California: Systems Development Corp., 1966.

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Note, "Privacy: a symposium (information and data storage)," (1966) 31 Law and Contemporary Problems 251.

Harrison, Annette. The Problems of Privacy in the Computer Age: An Annotated Bibliography. Santa Monica, California. Report RM-5495-PR/RC. The RAND Corp., December 1967.

U.S. Congress House Committee on Government Operations: Special Subcommittee on Invasion of Privacy. The Computer and Invasion of Privacy. Arno Press, New York, 1967.

Testimony and written submissions to the subcommittee on the matter of the establishment of a National Data Center are presented in this report in an effort by the subcommittee to create a climate of concern which would generate guidelines to protect confidentiality of reports and prevent invasion of privacy, while facilitating government research and analysis.

Ware, Willis H. Security and Privacy in Computer Systems. RAND paper P-3544. Santa Monica, California: The RAND Corp., April 1967.

Douglas, W.O. "Computerization of government files - what impact on the individual?" (1968) 15 U.C.L.A. Law Review 1371.

Lickson, C.P. "Protection of the privacy of data communications by contract: another case study on the impact of computer technology on the law," (1968) 23 Business Lawyer 971.

Note, "Privacy and efficient government: proposals for a National Data Center," (1968) 82 Harvard Law Review 400, 10 P.E.A.L. 359.

Note, "Symposium: computers, data banks and individual privacy," (1968) 53 Minnesota Law Review 2118.

Meldman, J.A. "Centralized information systems and the legal right to privacy," (1969) 52 Marquette Law Review 335.

Miller, A.R. "Personal privacy in the computer age: the challenge of a new technology in an information-oriented society," (1969) 67 Michigan Law Review 1091.

Grenier, E.J. Jr. "Computers and privacy: a proposal for self-regulation," (1970) Duke Law Journal 495.

Note, "Admissibility of computer-kept business records," (1970) 55 Cornell Law Review 1033.

Note, "Agency access to credit bureau files: federal invasion of privacy?" (1970) 12 Boston College Industrial and Commercial Law Review 110.

Note, "Consumer credit bureau: whom does the law protect?" (1970) 7 California Western Law Review 216.

Note, "Fair Credit Reporting Act," (1970) 23 Maine Law Review 253.

Note, "F.B.I. arrest records: the need to control dissemination," (1970) Washington University Law Quarterly 530.

O'Connor, W.J. "Right to privacy: bank credit reports," (1970) 87 Banking Law Journal 771.

Warner, M. and Stone, M. The Databank Society: Organizations, Computers and Social Freedom. London, George Allen & Unwin Ltd., 1970.

This book points out in documented detail the technical and social feasibility of constructing integrated data banks to cover the life details of whole populations. A social scientist and a computer scientist have

combined to produce a background to action on the part of the individual citizen as well as the social administration, the political decision-makers and the information technologists.

Holmes & Norville. The Law of Computers. Ann Arbor, Michigan: Institute of Continuing Legal Education, 1971.

An in-depth survey of the existing problems stemming from the increasing use of computers in our society, ranging from very technical problems of patent registration to the wide-ranging philosophical questions posed by the invasion of privacy and the threat to other constitutional rights resulting from the establishment of control data centre. Further, the study seeks out the legal guideposts established for future development.

Alschuter, A.W. "A different view of privacy [personal dossier and the computer]." (1971) 49 Texas Law Review 872.

Countryman, V. "Diminishing law of privacy: the personal dossier and the computer," (1971) 23 Harvard Law School Bulletin 8; (1971) 49 Texas Law Review 837.

Miller, Arthur R. The Assault on Privacy: Computers, Data Banks and Dossiers. Ann Arbor, University of Michigan Press, 1971.

A lucid presentation of what misuse of computers is doing and can do to individual freedoms by the possession and distribution of personal information for manipulative purposes. A preface by Ralph Nader indicates that the author warns of a new form of human slavery in an age when the computer is emerging from its infancy.

Niblett, G.B.F. Digital Information and the Privacy Problem. Paris: Organization of Economic Co-operation and Development, Study #2, 1971.

It seems likely that in the years coming most of the world's recorded information will be in computer-readable form. The report considers some of the safeguards and remedies that can help alleviate and minimize misuse of the computer as concerns privacy. Also discussed are professional standards with regard to privacy, technological safeguards, administrative practice, and legal remedies and sanctions.

Mitkva, A.J. "Consumer credit in the '70's: an overview (credit disclosures)," (1971) 26 Business Lawyer 753.

Note, "Admissibility of computer printouts under the business records exception in Texas," (1971) 12 South Texas Law Journal 291.

Note, "Federal pandering advertisements statute: the right of privacy versus the first amendment," (1971) 32 Ohio State Law Journal 149.

Note, "Habeas data: the right of privacy versus computer surveillance," (1971) 5 University of San Francisco Law Review 358.

Tucker, Robert B., Jr. "Personal information gathered by computer: legal considerations regarding its collection, use, and dissemination," (1971) 38 Popular Government, (December) 20.

Ervin, S.J. Jr. "First amendment: a living thought in the computer age," (1972) 4 Columbia Human Rights Law Review 13.

Kefauver, J.M. "Legality of dissemination of market data by trade associations: what does *Container (U.S. v. Container Corp., 89 Sup. Ct. 510)* hold?" (1972) 57 Cornell Law Review 777.

Miller, A.R. "Computers, data banks and individual privacy: an overview," (1972) 4 Columbia Human Rights Law Review 1.

National Academy of Sciences, Washington, D.C. Project on Computer Databanks. Databanks in a Free Society: Computers, Record-Keeping, and Privacy - Report. New York, Quandrangle Books, 1972.

Results of a nationwide in-depth study of what the use of computers is actually doing to record-keeping processes in the United States, and what the growth of large-scale databanks (both manual and computerized) means for the citizen's constitutional rights to privacy and due process.

Rowe, B.C. (ed.). Privacy, Computers and You. National Computing Center, Manchester, 1972.

Note, "Integrated information bank systems, social book-keeping and privacy," (1972) 24 International Social Science Journal 584.

Note, "Protecting privacy in credit reporting," (1972) 24 Stanford Law Review 550.

Whitear, G. "Privacy and the computer," (1972) 122 The New Law Journal 555.

Winkler, S. (ed.). Computer Communications: Impacts and Implications. First International Conference on Computer Communication, Washington, D.C., 1972.

This volume contain papers on a variety of aspects of computer communications. The main topics of interest are: social impact of computers, data banks and individual privacy, teleconferencing, teleprocessing, technological advances, regulation and competition.

Information Processing and the Right to Privacy. University of Windsor 14th Seminar on Canadian-American Relations, 1973.

Records, Computers and the Rights of Citizens. M.I.T., 1973.

Martin, James. Security, Accuracy, and Privacy in Computer Systems. New York: Prentice, 1973.

Hoffman, Lance. Security and Privacy in Computer Systems. New York: Melville, 1973.

Reed, Irving. Application of Information Theory to Privacy in Data Banks. Santa Monica, California: Rand, 1973.

Springer, Eric. Automated Medical Records and the Law. New York: Aspen, 1973.

Hentoff, Nat. "Surveillance, dataveillance, and personal freedom; Use and Abuse of Information Technology," (1973) 4 Columbia Human Rights Law Review 1.

Note, "Computer data bank -- privacy controversy revisited: an analysis and an administrative proposal," (1973) 22 Catholic University Law Review 628.

Auburn, F.M. "Report of the Sub-Committee of the Law Revision Commission on Computer Data Banks and Privacy," (1974) 6 New Zealand Universities Law Review 190.

Lea, D. "A massive blow on the arrest of privacy, databank devilry [in Privacy's Parasite: a Symposium]," (1974) 1 Civil Liberties Review 59.

Mallman, Otto. "Computers and civil liberties: the situation in the Federal Republic of Germany," (1974) 7 Law & Computer Technology 2.

Note, "Dissemination of arrest records and the Iowa Tracis bill," (1974) 59 Louisiana Law Review 1162.

Note, "Government access to bank records," (1974) 83 Yale Law Journal 1439.

Proxmire, W. "Consumer credit: privacy the collateral [in Privacy's Parasite: a symposium]," (1974) 1 Civil Liberties Review 59.

Spafford, J.L. "Consumer credit: giving creditors their due [in Privacy's Parasite: a symposium]," (1974) 1 Civil Liberties Review 59.

Davis, R.M. "Technologist's view of privacy and security in automated information systems," (1975) 4 Rutgers Journal of Computers and the Law 264.

Bouvard, M. "Computerized information and effective protection of individual rights," (1975) 12 Society 62.

Kondos, G. "Criminal records: private rights and Public needs," (1975) 1 Law and Computer Technology 144.

Bristol, J. and Felton, L. "Social legal and ethical aspects of privacy in computerized public welfare records in Texas," (1975) 1 Law and Computer Technology 118.

Boyer, B. "Computerized medical records and the right to privacy," (1975) 25 Buffalo Law Review 37.

Goldstein, R., Dexter, A. "Privacy regulation and your computer," (1975) 40 Business Quarterly (4) 30.

Corbett, J. "Computers and the protection of privacy," (1976) 126 New Law Journal 559.

Note, "Constitutional law-computerized law enforcement records," (1976) 4 Hofsta Law Review 881.

14.4 WIRETAPPING AND EAVESDROPPING

The question of the legality of electronic surveillance has been an issue of considerable controversy in Canada, culminating in the passage on December 4, 1973 of amendments to the Criminal Code making it an offence to intercept private communications by the use of certain devices, unless in the case of police use of electronic devices, a judicial authorization had been obtained. On August 18, 1977, these provisions were further amended to increase the powers of police to obtain judicial authorizations.

This Part reviews the literature in Canada and the United States on wiretapping and eavesdropping, and the sources are set out in chronological order. For a table of more general sources on the tortious aspects of the invasion of privacy by electronic means, see Part 14.1.

Canadian Sources

Chorney, N.M. "Wiretapping and electronic eavesdropping," (1965) 7 Criminal Law Quarterly 434.

The author discusses the legal problems concerning the definition and lawfulness of wiretapping, and also directs his attention to the admissibility of evidence obtained by actual wiretapping.

Ross, D.C. "Sound recordings as evidence," (1966) 14 Chitty's Law Journal 83.

The author reviews English, Canadian and U.S. authority on the topic of admissibility of tape-recorded evidence. He discusses some of the problems in obtaining it, canvases the trial situations in which it may be useful and looks at the criteria that must be satisfied before it is admitted.

British Columbia. Commission of Inquiry into Invasion of Privacy Report. Victoria, 1967.

Considers the use of electronic devices for eavesdropping purposes and urges the need for legislation to control them.

Beck, Stanley M. "Electronic surveillance and the administration of criminal justice," (1968) 46 Canadian Bar Review 643.

This article deals with the issues of the use of electronic surveillance by the police and the role of the judiciary in controlling



police practices, whether through giving content to the Bill of Rights or using their discretion to exclude evidence.

Ross, D. Craig. "Electronic eavesdropping and wiretapping," (1968) 16 Chitty's Law Journal 331.

The author notes, for a start, the existence of royal commissions and published works on the topic of eavesdropping and wiretapping. Then, to legitimize his call for legislation in the field, he details the case law on the legality of eavesdropping and wiretapping, and on the admissibility of the fruits of such activity into evidence. Finally, he looks at British Columbia's approach, and at court recording procedures.

Chitty, R.M.W. "Evidence wrongfully obtained," (1969) 17 Chitty's Law Journal 17.

The author argues that the present law admitting evidence obtained by a tortious act is satisfactory. Rendering it inadmissible would be to encourage the concealment of evidence, and the accused's damages from the tort are probably negligible.

Chitty, R.M.W. "Wiretapped evidence," (1969) 17 Chitty's Law Journal 87.

The author argues that there ought not to be any attempt at legislative interference with electronic eavesdropping, but that on practical grounds the courts ought to set their faces against admitting a tape record as evidence, unless it can be shown beyond reasonable doubt that full credence can be given to it.

Ryan, Edward F. "The invasion of privacy by electronic listening devices in Canada," (1971) 8 International Symposium on Comparative Law 87.

By way of introduction, the author observes (at the time of writing), there to be no remedy in Canada for an invasion of privacy by electronic means. He then reviews briefly the much-maligned B.C. commission into the problem, as well as the Ontario commission, of which Ryan himself was a member. The bulk of the article is spent assessing the recommendations of the federal Justice Committee that began studying the problem in May, 1969. The most attractive

feature of the article is that it examines closely the proceedings and internal decisions of the committee, as well as various briefs submitted to it, so as to weigh the recommendations made against the alternative courses possible, particularly in light of submissions made in the briefs presented. The point of view of private investigations, the police, and the courts are taken into account among others.

Khiat, Georges. "La violation du secret professionnel par la photocopie on la photographie," (1973) 33 Revue du Barreau Canadien 78.

In a brief case comment, the author elucidates the dangers, at least under the Civil Code, of indiscriminate photocopying. In this particular case, a woman was held to have violated the law who photocopied the envelopes of letters destined for the tenants of a building of which she was the landlady.

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14.5 DEFAMATION AND INVASION OF PRIVACY  
BY THE MASS MEDIA

The final Part in this chapter reviews the growing literature on the impact of the mass media on privacy. This issue substantially overlaps the question of defamation by the mass media and so both matters are dealt with below. For sources on the coverage of judicial proceedings by the mass media, which raises distinct issues, see Chapter 13 above. The broad question of censorship of the media is also dealt with in Chapter 13. For sources on the applicability of a fairness doctrine to the mass media, see Chapter 12.

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## CHAPTER 15

### COPYRIGHT AND COMMUNICATIONS

With the release of the Keyes-Brunet study on copyright reform in April 1977, the long process of bringing Canada's copyright laws in line with new technological developments has been pushed forward a further step. The need for a modern act is underlined by the fact that the revision of copyright legislation in the United States, one of the last western nations to carry out reform, finally came into force on January 1, 1978, after years of discussion and debate. But the Canadian copyright law remains largely what it was when it was enacted in 1921, when cable television, satellite communications, xerography and the computer were unheard of. With increased pressure for reform expected to mount, it is obvious that the next few years will be critical in determining the future direction of copyright policy in Canada.

This chapter is divided into the following parts:

- 15.1      General Principles of Copyright Law  
            and the Publishing Industry
- 15.2      Copyright in regard to Broadcasting  
            and Cable Television
- 15.3      Copyright and Satellite Communications
- 15.4      Copyright and the Music Recording Industry
- 15.5      Copyright and Computer Programs



15.1 GENERAL PRINCIPLES OF COPYRIGHT LAW  
AND THE PUBLISHING INDUSTRY

This part sets out a wide range of basic materials relating to copyright law. The focus is on books, studies and articles which provide a guide to the general principles of copyright law, particularly in regard to the traditional publishing fields. Included is a number of studies of the impact of photocopying on the rights of authors and publishers. All sources are listed in chronological order. The abbreviation "P.E.A.L." in the U.S. sources cited in this and other parts refers to Publishing, Entertainment Advertising and Allied Fields Law Quarterly, a U.S. law journal which reprints articles in the named fields.

Canadian Books, Reports and Articles

Canada. Royal Commission on Patents, Copyright, Trade Marks and Industrial Designs. Report on Copyright. Ottawa, Queen's Printer, 1957.

This Royal Commission report, usually referred to as the Ilesley report, provides a basic introduction to the problems of revising the Canadian copyright laws, as of 1957.

Maynard, A. "Critique des arrêts: prévue musicale d'un plagiat inconscient," (1963) 23 Revue du barreau Canadien 353.

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This article contends that Canadian artistic talent has been suppressed by overly-generous copyright laws.

Fox, Harold G. The Canadian Law of Copyright and Industrial Designs. Second edition. Toronto, Carswell, 1967.

This basic Canadian text contains an overview of the Canadian Copyright Act and the reported cases on copyright law, and includes chapters on registration, ownership, assignment, infringement and civil remedies. Separate sections deal with literary, musical, artistic and cinematographic works.

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The author includes a note on each of the world's major intellectual property organizations, discusses the role of the UN in the system, comments on specific problems such as the development of regional arrangements and the position of developing nations and sets out the Canadian position in the system.

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Recent advances in information technology have transformed such operations as data retrieval

and photocopying into "neo-publishing" technologies. This article explains how these developments simultaneously threaten the traditional knowledge creation incentives and encourage scholarly review and social decision-making. Copyright law attempts to maintain patterns of data-production, but does so at the expense of research and decision activities. These conflicts are analyzed, and a policy approach is suggested.

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This long-awaited report sets out the recommendations of two officials to the Department of Consumer and Corporate Affairs on amendments to the Canadian copyright law. The report includes chapters on the development of Canadian copyright law and the basic reasons for revision, estimation of the economic size of the copyright industries, recommendations on statutory revisions in regard to literary, dramatic, musical and artistic works, recommendations relating to material not protected by international copyright conventions, such as sound recordings, broadcasts, computer programs, and performances by performers, recommendations on other forms of "rights", such as public lending right, droit de suite, information storage and retrieval, and cablecasting, recommendations on exceptions to copyright protections, infringement, remedies and importation provisions, and recommendations on registration of collectives, the role of a copyright tribunal, Crown copyright, and Canada's position in regard to international conventions.

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15.3 COPYRIGHT AND SATELLITE  
COMMUNICATIONS

This part reviews the literature on the application of copyright law to satellite communications. Many of the issues raised here overlap with the treatment of broadcasters, dealt with in Part 15.2 above, but are rendered more difficult because of the capacity of satellites to transmit signals across national boundaries. For references to the literature on "pirate broadcasting," which raises similar issues, see Part 15.2 above.

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15.4

COPYRIGHT AND THE  
MUSIC RECORDING INDUSTRY

This part deals with the sound recording industry and reviews the literature on the effect of copyright on the marketing and distribution of music recordings. A large part of the literature is directed towards the question of whether a performing right should be granted in sound recordings. To the extent that such recordings have affinities with books, as for example in regard to importation, reference should be made to Part 15.1 above for additional sources. For additional material on the performing rights societies in Canada, U.S. and U.K., see Part 15.2 above. The sources below are arranged in chronological order.

Canadian Articles

Note, "Copyright Act," (1971) 4 Canadian Patent Reporter 2d 201.

A short annotation discussing the 1971 amendment to the Copyright Act (Bill S-9).

Warner, Gerald. "The S.R.L. Controversy: Should there be a Performing Right in Sound Recordings?" (1971) 3 Canadian Communications Law Review 194.

Alleyn, J.R. "The phonographic industry deprived of its performing rights in Canada," (1972) 6 Canadian Patent Reporter (2d) 258, (1972) 23 EBU Review 46 (No. 2).

In these two articles, Warner and Alleyn respectively outline and analyze the events leading up to the passage of Bill S-9 which amended the Copyright Act to confine copyright in records to the reproduction of the physical record, thus preventing the record manufacturers' attempts to obtain performing rights. Discussed are the Economic Council of Canada Report, the hearings before the Copyright Appeal Board for the approval of manufacturer's tariffs and the hearings of the parliamentary committees.

Mills, J.V. "What everybody needs to know about copyright (You and the Music Business)," (1974) 93 Canadian Composer 20.

Note, "Canadian Music Reproduction Rights Agency - a new agency to administer mechanical reproduction rights for music copyright owners," (1976) 110 Canadian Composer 38.



U.S. and U.K. Books and Articles

Bell, P. Ingress. "Copyright in gramophone records," (1956) 222 Law Times 244.

Morrison, Peter H. "Copyright publication and phonograph records," (1960) 48 Georgetown Law Journal 683, 1 P.E.A.L. 510.

Cary, George D. "The common law and statutory background of the law of musical property," (1962) 15 Vanderbilt Law Review 397, 4 P.E.A.L. 186.

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Finkelstein, H. "Music and the copyright law," (1964) 10 New York Law Forum 155.

Note, "Copyright and folk music - a perplexing problem," (1965) 12 Bulletin of the Copyright Society of the U.S.A. 277, (1964) 10 Wayne Law Review 702.

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Diamond, S.A. "Phonorecords and sound recordings," (1965) 13 Bulletin of the Copyright Society of the U.S.A. 1.

Grosner, Sylvan S. "Public performance of copyrighted music," (1965) 31 Detroit Lawyer 169, 5 P.E.A.L. 255.

Helfer, P.F. "Copyright revision and the unauthorized duplication of phonograph records - a new statute and the old problems: a job half done," (1966) 14 Bulletin of the Copyright Society of the University of Southern Alabama 137.

Note, "Phonograph records and the copyright compulsory license," (1966) 10 Idea 101.

Note, "Protection of sound recordings under the proposed copyright revision bill," (1967) 51 Minnesota Law Review 746.

Brack, H. "The rights of performers and producers of phonograms when gramophone records are used in broadcasting in the Federal Republic of Germany," (1968) 19 EBU Review 47 (No. 109)

Diamond, S.A. "Sound recordings and copyright revision," (1968) 53 Iowa Law Review 805.

Note, "Copyrighting the new music," (1968) 17 Buffalo Law Review 355, (1968) 16 Copyright Law Symposium 1.

Nimmer, Melville B. "Copyright and quasi-copyright protection for characters, titles and phonograph records," (1969) 59 Trademark Reporter 63, 10 P.E.A.L. 424.

Note, "Right of public performance in sound recordings," (1969) 15 Howard Law Journal 452.

Note, "Sound recordings, records, and copyright: aftermath of Sears and Compro," (1969) 33 Albany Law Review 371.

Kenton, S. "Recording artists' case for copyright revision," (1970) 4 Journal of the Beverley Hills Bar Association 21.

Krasilovsky, M.W. "Problems in the relationships between the record industry and librarians of recorded sound," (1970) 1 Performing Arts Review 559.

Nelson, M.J. "Jazz and copyright: a study in improvised protection," (1972) 20 Bulletin of the Copyright Society of the U.S.A. 83; (1972) 67 Northwestern University Law Review 216.

Strauss, L. Jr. "Foreign income in the music industry," (1970) 3 Vanderbilt International 90.

Brylawski, E.F. "Copyrightability of motion picture soundtracks," (1971) 18 Bulletin of the Copyright Society of the U.S.A. 357.

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Note, "Performers' rights and copyright: the protection of sound recordings from modern pirates," (1971) 59 California Law Review 548.

Note, "Record piracy and copyright: present inadequacies and future overkill," (1971) 23 Maine Law Review 359.

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Berk, L.E. "Legal instruction for college music students," (1972) 3 Performing Arts Review 149.

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Kaminstein, A.L. "Convention for the protection of producers of phonograms against unauthorized duplication of their phonograms," (1972) 19 Bulletin of the Copyright Society of the U.S.A. 175.

Keziah, D.P. "Registration problems encountered by the copyright office under the recent sound recording amendment," (1972) 20 Bulletin of the Copyright Society of the U.S.A. 3.

Massouye, C. "A new international convention on the protection of phonograms," (1972) 23 EBU Review 59 (No. 1).

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Schrader, D.M. "Sound recordings: protection under state law and under the recent amendment to the copyright law," (1972) 14 Arizona Law Review 689.

Sloane, O.J. "New copyright in sound recordings," (1972) 6 Journal of the Beverley Hills Bar Association 29.

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Goldstein, P. "Inconsistent Premises' and the 'Acceptable Middle Ground': a comment on Goldstein v. California (93 Sup. Ct. 2303)," (1973) 21 Bulletin of the Copyright Society of the U.S.A. 25.

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An excellent practical guide to the music industry for publishers, writers, record companies, producers, artists and agents.

Thompson, E. "International protection of performers' rights: some current problems." (1973) 107 International Labour Review 303.

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Note, "Goldstein v. California (93 Sup. Ct. 2303) - the constitutionality of a state copyright," (1973) Utah Law Review 851.

Waxman, J.M. "Performance rights in sound recordings," (1973) 52 Texas Law Review 42.

Yarnell, J.E. "Recording piracy is everybody's burden: an examination of its causes, effects and remedies," (1973) 20 Bulletin of the Copyright Society of the U.S.A. 234.

Note, "Convention for the protection of producers of phonograms against unauthorized duplication," (1974) 6 Law and Policy in International Business 587.

Note, "Copyright protection of sound recordings," (1974) 23 Drake Law Review 449.

Note, "Goldstein v. California (93 Sup. Ct. 2303) and the protection of sound recordings: arming the states for battle with the pirates," (1974) 31 Washington and Lee Law Review 604.

Note, "Goldstein v. California (93 Sup. Ct. 2303) - state copyright authority over sound recordings," (1974) 23 DePaul Law Review 791.

Note, "Copyright and proposed record piracy legislation in New York State," (1974) 5 Performing Arts Review 3.

Note, "Sound recording copyright: the disc dilemma," (1975) 36 University of Pittsburgh Law Review 887.

15.5 COPYRIGHT AND COMPUTER PROGRAMS

The final part in this chapter reviews the literature on the protection of computer software through copyright law or other means. Much of this literature overlaps the material noted in Part 15.1, dealing with the general principles of copyright law, e.g. the protection of literary form as opposed to the protection of ideas, the problems presented by photocopying etc. Both U.S. and Canadian sources are listed below, in chronological order.

Lawlor, R.C. "Copyright aspects of computer usage," (1964) 11 Bulletin of the Copyright Society of the U.S.A. 380.

Note, "Copyright protection for computer programs," (1964) 64 Columbia Law Review 1274.

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Note, "Scope of protection for computer programs under the Copyright Act," (1965) 14 DePaul Law Review 360.

Cunningham, D.J. "Information retrieval and the Copyright Law," (1966) 14 Bulletin of the Copyright Society of the U.S.A. 1.

Nelson, G.J. "Copyrightability of computer programs," (1966) 7 Arizona Law Review 204.

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Miller, A.R. "Computers and copyright law," (1967) 46 Michigan State Bar Journal 11.

Sheers, E.H. and Ericke, F.L. "Copyrights of patents for computer programs?" (1967) 49 Journal of the Patent Office Society 323.

Greenbaum, A.J. "Computers, copyrights and law prior to revision," (1968) 15 Bulletin of the Copyright Society 164.

Koller, H.R. and Moshman, J. "Patent protection for computer software: implications for industry," (1968-9) 12 Idea 1109.

Note, "Limits of copyright and patent protection for computer programs," (1968) 16 Copyright Law Symposium 81.

Nimmer, M.B. "New technology and the law of copyright: reprography and computers," (1968) 15 U.C.L.A. Law Review 931.

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Note, "Computers, the copyright law and its revision," (1968) 20 University of Florida Law Review 386.

Note, "Process patents for computer programs," (1968) 56 California Law Review 466.

British Computer Society. Software Protection: the legal protection of computer programs. (Report of proceedings of conference, Brighton, 1969).

This conference at Brighton brings together technical and legal experts to discuss basic questions posed by the computer program as a new form of intellectual property.

Koller, H.R. "Computer software protection: a report of an institute clinic," (1969) 13 Idea 351.

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Note, "Copyright labyrinth: Information storage and retrieval systems," (1969) 17 Copyright Law Symposium (ASCAP) 1.

Bender, D. "Post-Adkins trade secret protection of software," (1970) Rutgers Journal of Computers & Law 5.

Galbi, E. "Proposal for new legislation to protect computer programming," (1970) 17 Bulletin of the Copyright Society 280.

Henderson, Gordon F. "Protection for originality." (1970) 63 Canadian Patent Reporter 1.

The author writes on the international enforcement of copyright and the various distinctions in the law, such as what is meant by a "work", "original" and "performing right". He concludes by calling for a new copyright law. to keep pace with changing technology especially in the form of cablecasting and computers.

Jacobs, M.C. "Computer technology (hardware and software): some legal implications for antitrust copyrights and patents," (1970) 1970 Rutgers Journal of Computers & the Law 50.

Jeanneret, Marsh. Information retrieval and the Decision to Publish. Scholarly Publishing, April, 1970.

The basic premise of this book is that unrestricted access by computer to published knowledge will impair incentive to create new works.

McFarlane, G. "Legal protection of computer programs," (1970) Journal of Business Law 204.

Note, "Impact of the multiple forms of computer programs on their adequate protection by copyright," (1970) 18 Copyright Law Symposium (ASCAP) 92.

Ulmer, Euger. "The Washington international copyright proposals," (1970) 21 EBU Review, 48. (No. 120).

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Note, "Software protection: patents, copyrights and trade secrets," (1971) 35 Albany Law Review 695.

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Duggan, M.A. "Patents on programs? The Supreme Court says no," (1973) 13 Jurimetrics 129.

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Oberman, M.S. "Copyright protection for computer-produced directories," (1973) 41 Fordham Law Review 767.

Prasinos, N. "Worldwide protection of computer programs by copyright," (1974) 4 Rutgers Journal of Computers and Law 42.

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