Jurisdictions and Decision-Making in Canadian Broadcasting

VOLUME 3

Legal Powers and Structures, and Constitutional Issues in Canadian Broadcasting/Communications

The Centre for Canadian Communication Studies
University of Windsor
Windsor, Ontario
Canada
November, 1979

FINAL REPORT

TITLE: Jurisdictions and Decision-Making in Canadian Broadcasting: A Review of Present Configurations and an Analysis of Future Possibilities

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FOR: Department of Communications, Ottawa

UNDER: Department of Supply and Services Contract Serial No.: OSU78-00257

PERIOD: September 1, 1978 - November 30, 1979

ABSTRACT

This study presents four scenarios for the distribution of powers over Canadian broadcasting/communications within the existing constitutional framework over the next ten years. These scenarios are the end product of the application of problem-sensing scenario building techniques to: the delineation of pertinent trends; a detailed examination of numerous legal/constitutional, structural, technological, regulatory and economic issues in Canadian broadcasting/communications; and the explication of the assumptions implicit in the four basic policy approaches to such a division of powers.

The four basic policy approaches to the division of powers over broadcasting/communications utilized in the scenario building represent four positions on a continuum of centralization/decentralization of powers in a federal state. The continuum positions utilized include the two end points (highly centralized and highly decentralized) and two intermediate positions (shared and separate) -- all four approaches being valid within the Canadian context since each has held sway as a general method of distributing powers in Canada at some point in time since Confederation.

The highly centralized and highly decentralized approaches

both contemplate exclusive powers over the entire field of broadcasting/communications, but the former would grant all those powers to the federal government while the latter would grant them to the provincial governments. Both the shared and separated approaches involve joint federal-provincial powers over broadcasting/communications, but by different arrangements: the shared policy perspective allocates all such powers to both levels of government, while the separated approach makes each level responsible for different aspects or sub-fields of the overall broadcasting/communications field.

The study also entails some limited follow-up activity to the scenario building itself. This involves the outlining of: the policy issues that the scenarios highlight; the possible choices for each of the issues so identified and their associated risks; and the configuration of choices which each power-sharing scheme would require in order to maintain its integrity.

ACKNOWLEDGMENTS

In most studies and research projects, the contributors to the final product are more numerous than the author credits would suggest. This particular study is especially noteworthy in that regard:

- At different times during the study, research assistance was provided by Cathy Maloney and Andy Prokopich.
- Much advice and encouragement was provided by Dr. Tom Carney whose work is quoted liberally in what follows.
- The Quebec consulting firm of Jean-Paul L'Allier et Associés provided the comments and observations of Jean-Paul L'Allier and Claude Fortin (Now with Teleglobe Canada).
- Much of the L'Allier material was translated from French by Sue McVinnie.
- The Department of Communications personnel were most helpful -- most notably Don MacLean, along with Gilles Desjardins, Del Brodhead, and Ian Ironside.
- And Doreen Truant was most patient in deciphering our handwriting and tortuous prose in the process of typing the final manuscript, earlier progress

JURISDICTIONS AND DECISION-MAKING IN CANADIAN BROADCASTING:

A REVIEW OF PRESENT CONFIGURATIONS AND AN

ANALYSIS OF FUTURE POSSIBILITIES

reports and various working documents produced during the course of the study.

All of these people, then, made some contribution to the final report; however, the ultimate responsibility for the report, of course, rests with the authors themselves.

VOLUME 3

LEGAL POWERS AND STRUCTURES, AND CONSTITUTIONAL ISSUES

IN CANADIAN BROADCASTING/COMMUNICATIONS

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CHAPTER I

A REVIEW OF PRESENT FEDERAL AND PROVINCIAL POWERS AND STRUCTURES IN COMMUNICATIONS

A. SOME ISSUES RELATING TO THE INSTITUTIONS UNDER FEDERAL JURISDICTION

I have not provided an analysis nor even a description of The Broadcasting Act, R.S.C. 1970, c B-11 as amended, because I assumed that it is well known to the readers of this report. An organizational chart is appended which simply identifies the various participants and institutions in the field of broadcasting. One point however is raised here. The powers of the C.R.T.C., C.B.C., and Governor-in-Council are fairly well defined in the legislation. But the powers of the Department of Communications and the Secretary of State are very ill defined. Both departments are created by separate Acts, viz., the Department of State Act, R.S.C. 1970, c. S-15 and the Department of Communications Act, R.S.C. 1970, c.24.

Pursuant to the Department of Communications Act,

> the duties, powers and functions of the Ministry of Communications extend to and include all matters over which the Parliament of Canada has jurisdiction, not by law assigned to any other department, branch or agency of the Government of Canada, relating to
> (a) telecommunications; and
> (b) the development and utilization generally of communication undertakings, facilities, systems and services for Canada.

This apparently open-ended grant of power to the Minister

is somewhat illusory. The Minister is given no law making or rule making power over telecommunications. The Act in essence is declaratory of the traditional prerogatives of a Cabinet Minister. It serves to circumscribe his/her powers for the benefit of other Departments so that each will know how far one's jurisdiction extends. The Minister is given the power to formulate policies only. In section 5 there are examples provided for the type of policies the Minister must formulate. For example, the Minister shall:

> (a) coordinate, promote and recommend policies and programs with respect to communication services for Canada . . .;
>
> (b) promote the establishment, development and efficiency of communication systems and facilities for Canada;
>
> (c) assist Canadian communications systems and facilities to adjust to changing domestic and international conditions;
>
> (d) plan and co-ordinate telecommunications services for departments, branches and agencies of the Government of Canada;
>
> (e) compile and keep up to date detailed information in respect of communication systems and facilities and of trends and developments in Canada and abroad relating to communication matters; and
>
> (f) take such action as may be necessary to secure, by international regulation or otherwise, the rights of Canada in communication matters.

Pursuant to section 5(2) the Minister can also enter into agreements with the government of any province or agency thereof respecting the carrying out of programs for which the Minister is responsible.

The Broadcasting Act also gives the Minister of

Communications some specific powers. Notable is 3.17(3) which authorize the Minister of Communications to order the Executive Committee of the C.R.T.C. to attach a condition or to remove a condition (as the case may be) to a licence issued to the C.B.C.

Although the Minister has wide powers to coordinate, promote, recommend, assist, plan and "take such action" it is unclear how this power can be used. The Minister can not require a citizen or a broadcaster to do or to refrain from doing something. Similarly the Minister can not dictate or order the C.R.T.C. or C.B.C. to do or refrain from doing something in the absence of express statutory authorization such as found in 3.17(3) of The Broadcasting Act. But it is also unclear whether the Minister has any power to even advise the C.R.T.C. as to the choice of policy it is to adopt. The Broadcasting Act created a relatively independent agency to regulate broadcasting in Canada. Section 15 of The Broadcasting Act makes it clear that it is the C.R.T.C. which is to "regulate and supervise all aspects of the Canadian broadcasting system with a view to implementing the broadcasting policy enunciated in section 3 of [the] Act." Section 15 recognizes that the C.R.T.C. may be bound by some directives of the Governor-in-Council but it is only to the extent authorized by the Act itself. Nor can the Minister justify advising the C.R.T.C. of government policy on the basis that it is consistent with Section 3 of the Act. Indeed the argument works the other way. Parliament has stated its broadcast

policy in section 3 but it is for the C.R.T.C. solely to implement that policy in the way it sees fit.

However, in the past year there have been examples of the Minister of Communications formulating policies that are inconsistent with C.R.T.C. policies and have the effect of undermining the C.R.T.C.'s policy decisions. One involved the issue of commercial deletion, another dealing with ownership of cable hardware and yet another in pay television. A similar situation arose when the Prime Minister requested the C.R.T.C. to hold an investigation of an alleged pro-separatist bias in the C.B.C. These incidents are detailed and commented upon by Professor Hudson Janisch in "The Role of the Independent Regulatory Agency in Canada" (1978) 27 U.N.B. Law Journal 83.

Admittedly the Minister's actions, in for example the commercial deletion case, were not binding upon the C.R.T.C. But where the executive agreed with another country to suspend the policy of commercial deletion contrary to the stated policy of the C.R.T.C., what is the C.R.T.C. to do? Supposedly the C.R.T.C. could hold firm but such embarrassing situations would not exist if the respective functions of the C.R.T.C. and the Minister were clarified.

A related issue concerns the degree to which the C.R.T.C. can accept and be bound by directives or policy. As the C.R.T.C. is given the jurisdiction to exercise its discretion in many areas an argument could be made that it unlawfully fetters its discretion if it considers itself bound by Ministerial policy statements. The issue was raised by the Divisional Court

in Corporation of the Township of Innisfil et al. v. Corporation of the City of Barrie, et al. (1977) 3 M.P.L.R. 47. That case involved the O.M.B. deciding an issue in accordance with the policy preference of the Treasurer of Ontario. The court held that the Board could choose to accept or reject the Minister's "advice" or policy choice. The Court stated that ". . . the Board clearly was not in law bound by the policy statement but on the facts of this case committed no jurisdictional error in deciding it was bound." The underlined portion of this statement by itself is of considerable consequence. However its impact is somewhat mitigated by a previous passage which reads as follows:

> Once the Board concluded, as it did, that the prepondering effect of the policy statement was such that it was obliged to comply with it, that it so outweighed and overbalanced other consideration that it was to be followed, its conclusion is not reviewable by a Court.

This sentence would indicate that the Board in fact chose to follow the Minister's policy because it made sense. Had the Board, however, considered itself bound by the policy, even if it vehemently disagreed with it, a different result should have followed.

Therefore, by analogy it is arguable that when the C.R.T.C. reverses its policies on an issue such as commercial deletion because of pressure to do so by the Minister of Communications an arguable case can be made that the C.R.T.C. has declined to exercise its jurisdiction as required by law.

The existence of the Department of State Act infuses further confusion in the area. Without it, it is arguable that

the Minister of Communications possesses a residual policy making function in telecommunications which is not assigned to the C.R.T.C. or to any other department. Since the C.R.T.C. would seem to be vested with exclusive jurisdiction over broadcasting then this leaves other areas of telecommunications for the Department such as telephony. There might even be some room for D.O.C. involvement in broadcasting as it is arguable that the Minister can not be prevented from advising or recommending. The Minister's coercive powers are limited however to those set out in The Broadcasting Act or any other Act of Parliament.

But The Department of State Act states:

> The duties, powers and functions of the Secretary of State of Canada extend to and include all matters over which Parliament of Canada has jurisdiction, not by law assigned to any other department, branch or agency of Canada relating to
>
> . . . . . .
>
> (e) libraries, archives, historical resources, museums, galleries, theatres, film and broadcasting.

Although the Secretary of State would not have jurisdiction over the wider field of telecommunications, it seems that Parliament gave the residual jurisdiction over broadcasting to two Departments. It will be of interest to determine how the Departments of State and Communications have sorted out their respective jurisdictions. Section 5 of the Department of State Act does authorize the Governor-in-Council to assign any of the duties and powers of the Secretary of State to the head of any other department but I am unaware of the extent to which this power has been exercised.

Moreover, whereas prior to 1975 the Secretary of State exercised the power of the Minister under parts II and III of the Broadcasting Act, that power in part II of the Act is now exercised by the Minister of Communications by virtue of The Canadian Radio-television & Telecommunications Commission Act, S.C. 1975, c.49. Hence, although the C.B.C. continues to report to Parliament through the Secretary of State as provided by s.47 of the Act and the Secretary of State has some limited power to approve or disapprove of certain bylaws made pursuant to s.44(c)(d) and (e), it is the Minister of Communications who exercises the important intermediary position between the C.B.C. and the C.R.T.C. in s.17(3) of the Act.

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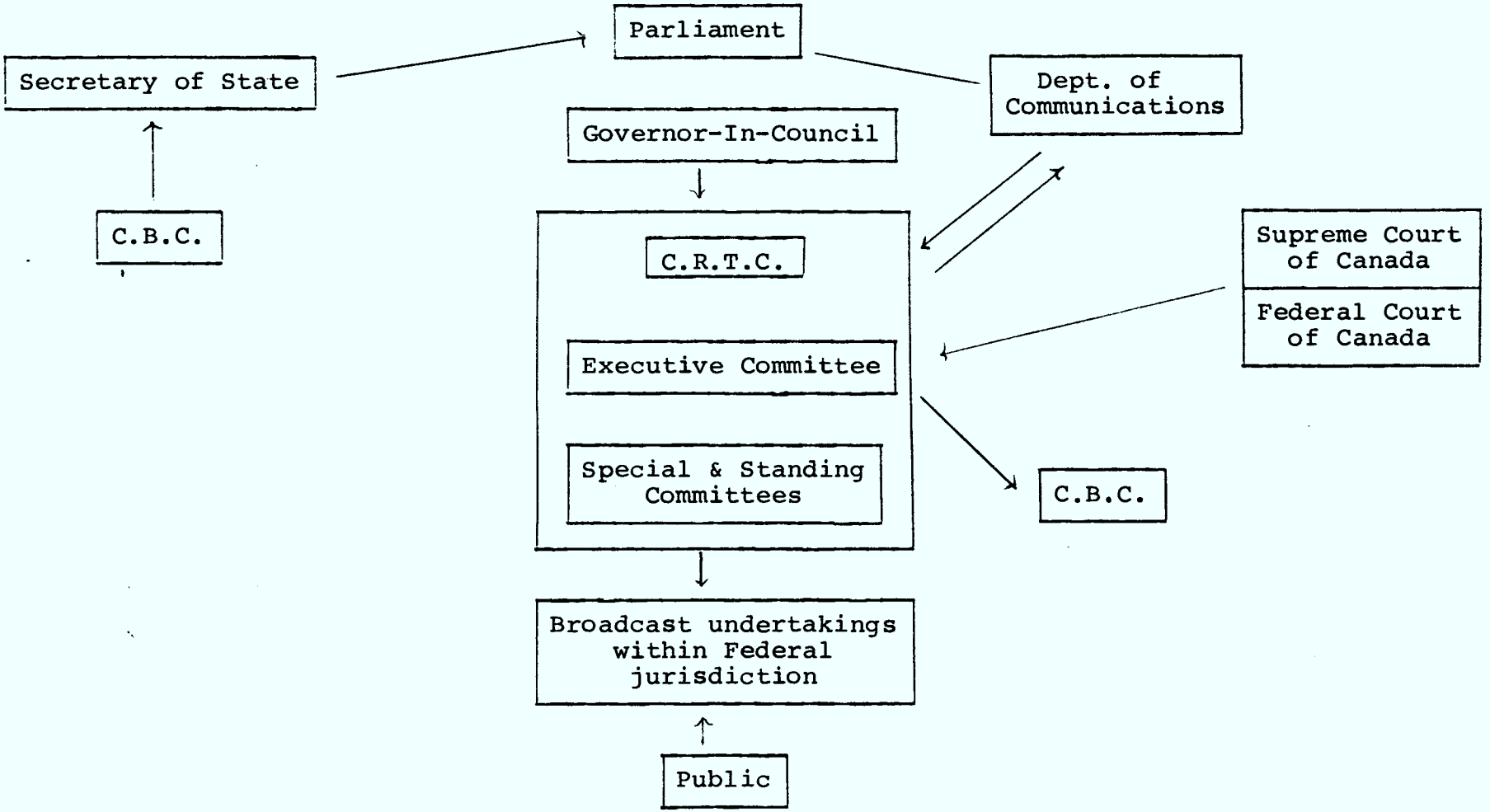
Parliament
Secretary of State
Dept. of Communications
Governor-In-Council
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B. SASKATCHEWAN

In 1953 the Saskatchewan Legislature created the Saskatchewan Government Telephone Corporation which was a public corporation with the following purposes and powers: as set out in section 8 of The Saskatchewan Government Telephones Act, R.S.S. 1965, c.42:

> 8. The purposes and powers of the corporation shall be:
>
> (a) the construction, maintenance and operation of a communication system for the purpose of transmitting, by electrical means, telephonic, telegraphic and wireless messages of all kinds including facsimile and photograph transmission;
>
> (b) the provision of circuits for the transmission of radio and television programs;
>
> (c) the leasing of circuits to any person for any of the said purposes;
>
> (d) any other purposes and powers connected with or incidental to the purposes and powers herein mentioned. R.S.S. 1643, c.37, s.8.

However in 1969 the Corporation underwent a name change and with that change of name came a correspondingly wider power to the different name. The Corporation was now called the Saskatchewan Telecommunications Corporation or Sask Tel, the official abbreviated form of the name. This change was effected by The Saskatchewan Government Telephones Change of Name Act, 1969, c.52. The powers of Sask Tel were somewhat expanded in comparison to those of its predecessors and are as follows:

8.(1) the purposes and powers of the corporation are:
(a) the construction, maintenance and operation of a telecommunication system;
(b) the leasing or otherwise providing to any person telecommunication services;
(c) to participate in projects and undertakings to establish,construct and operate a co-ordinated telecommunication system in the province and in Canada and to provide connection and intercommunication with and between other telecommunication systems;
(d) any other purposes and powers connected with or incidental to the purposes and powers herein mentioned.

(2) The telecommunication services provided by the corporation and the acceptance or use thereof by any person are subject to the charges, rates, terms and conditions established and revised from time to time by the corporation and set out or described in a schedule that shall be available for public inspection at the business offices of the corporation during business hours.

(3) Notwithstanding subsection (2), where in the opinion of the corporation the schedule of charges, rates, terms and conditions referred to in that subsection does not adequately accommodate the provision of a particular telecommunication service requested by a person, the corporation may, by itself or jointly with the owners or operators of other telecommunication systems, enter into a special agreement with such person to provide the service in accordance with charges, rates, terms or conditions at variance with or in addition to those set out or described in the schedule and the agreement shall have precedence over the schedule to the extent necessary to give effect to such agreement.

The term "telecommunication" is defined in section 9 of the 1969 Act in the following way:

(a) 'telecommunication' means the emission, reception, transmission, switching, storage and presentation of messages, communications, sounds, signs, signals, images, impressions and information by electric, electromagnetic, electro-optical, sonic, supersonic, mechanical or chemical means or by a combination of any such means and the processing and transformation of such messages, communications, sounds, signs, signals, images, impressions and information into useful forms, media or functions and, without re-

stricting the generality of the foregoing, includes all means by which telephone, telegraph, wireless, data, facsimile, radio, television and other communication services are provided;

(b) 'telecommunication line' includes poles, structures, wires, cables, anchors, pipes, conduits, apparatus and equipment of all kinds used in whole or in part to provide telecommunication services.

Sask Tel powers thus include not only the ownership and operation of telecommunication hardware but potentially could include the operation of a broadcast undertaking engaged in the production of television and radio programs.

Section 43 of the 1966 Act was amended by section 22 of the 1969 Act to provide Sask Tel with the following additional powers:

43.(1) For the purpose of establishing, constructing, or operating a telecommunication system, including a telecommunication satellite system, to provide telecommunication services in Canada and connection and intercommunication with and between telecommunication systems, the corporation may:

(a) enter into agreements with any person including a corporation, agency or commission of any government controlling, owning or operating a telecommunication system, providing for connection, intercommunication, joint operation and reciprocal use or transmission of business between telecommunication systems;

(b) subject to the approval of the Lieutenant Governor in Council and subject to such terms, if any, as he may prescribe:

(i) purchase or otherwise acquire and enter into agreements to purchase or otherwise acquire shares, bonds, debentures or securities of a company incorporated by or under the authority of an Act of Canada or of any province in Canada;

(ii) guarantee the payment of the principal and interest on any notes, bonds, debentures and other securities issued, and temporary

loans obtained, by a company incorporated by or under the authority of an Act of Canada or of any province in Canada.

(2) The corporation may do all such acts and things as are necessary or incidental to the exercise of its rights, privileges and obligations in respect of any agreement, purchase, acquisition or guarantee made under the authority of subsection (1) and without restricting the generality of the foregoing, the corporation may for those purposes:

(a) hold, sell, transfer or otherwise deal with shares, bonds, debentures or securities purchased or acquired by it;

(b) exercise the right to vote as owner of the shares, bonds, debentures or securities purchased or acquired by it or appoint proxies to exercise such right on behalf of the corporation;

(c) make such arrangements as it deems advisable for the proper apportionment of expenditures and commissions, the division of receipts and profits, the payment of compensation and such other adjustments as may be necessary under any agreement entered into under subsection (1)

As a result of The Community Cabelcasters Act, 1977, 1976-77 c.12 Sask Tel would obtain a significant position in the cable industry. This Act however has yet to be proclaimed. That Act distinguishes between community cablecaster and commercial cablecasters. Section 4(1) of the Act prohibits any person from providing "cablecast service to any dwelling or hospital unless such a person is a community cablecaster." However this provision is not as prohibitive as it first appears for the term "cablecast service" is detailed somewhat narrowly in section 2(d) of the Act:

(d) "cablecast service" means the arrangement whereby cablecast programming is originated from tapes,

> films, cassettes or discs, or as live productions, from one or more locations within the province and is received by persons at one or more other locations within the province and is rendered intelligible by one or more electronic terminal devices:
>
> (i) for educational, entertainment, cultural or information purposes;
> (ii) for a toll; and
> (iii) by means of a cable system;
>
> but does not include any transmission, emission, reception or distribution of signs, signals, writing, images, sounds or intelligence of any nature by means of electromagnetic waves propagated in space without artificial guide;

From this definition it can be seen that the province only assumes control over those cablecast undertakings that are exclusively closed-circuit and are entirely located within the province. Moreover "cable system" as found in s.2(d) is further defined in s.2(e) as follows:

> (3) "Cable system" means any poles, wires, cables, amplifiers, anchors, pipes or conduits, or any combination thereof, owned in whole or in part by Saskatchewan Telecommunications and connecting one or more locations within the province from which messages occupying a band width of twenty kilohertz or more are presented with one or more other locations within the province at which such messages are received;

Hence provincial control is exerted only over those cable operators with an intra-provincial scope using cables, etc. "owned in whole or in part by" Sask Tel. (I am not certain at this time if there are any commercial cablecasters in private companies in Saskatchewan that own their own cables.)

By section 3 of the Act a community cablecaster is limited to co-operatives and only those co-operatives that enter into a lease with Sask Tel for the necessary services

and equipment needed to operate the cablecast systems.

Hence although provincial control extends only to intra-provincial cablecasters which use Sask Tel hardware, no one can become such a cablecaster unless (a) they are a co-operative and (b) they lease the hardware from Sask Tel. Although s.3 of the Act is not clear it seems that a community cablecaster would have to lease all of "the necessary services and equipment" from Sask Tel. Assuming the community cablecaster is within exclusive provincial control, the C.R.T.C. requirements that cable operators own some of the hardware would not be applicable.

The commercial cablecaster would not fall within provincial jurisdiction as determined by this Act (as opposed to the B.N.A. Act) where (i) he owns his own hardware or leases it from a private corporation, or (ii) even if the cablecaster uses Sask Tel hardware he engages in an inter-provincial undertaking in the sense that the cablecaster receives his programs from signals transmitted from outside the province by means of electromagnetic waves, or (iii) even if the cablecaster originates his own programming, he transmits them by means of electromagnetic waves propagated in space without artificial guide.

"Control" over community cablecasters is shared by Sask Tel with a provincial authority named.(I believe) The Sask-Educational Communications Authority (hereinafter S.E.C.A.) established pursuant to s.3 of The Educational Communications

Corporation Act, 1974, 1973-74, c.35 and The Saskatchewan Arts Board created in 1949 by The Arts Board Act S.S. 1949, c.63. In addition to governmental bodies are the Program Advisory Council, which is made up of subscribers and will be referred to shortly. Sask Tel is required by s.5 of The Community Cablecasters Act, 1977 "to ensure the delivery of community programming and educational programming to the subscribers." The manner in which this programming is to be ensured is not set out in the legislation. But both community programming and educational programming are defined in s.2(h) and (1) of the Act respectively as follows:

> 2(h) "community programming" means the presentation by a cablecaster to its subscribers of messages based on the resources of a municipality served in whole or in part by the cablecaster and directed toward the well-being of the residents of such municipality;
>
> 2(1) "educational programming" means the presentation by a cablecaster of messages:
>
> (i) designed to be presented in such a context as to provide a continuity of learning opportunity aimed at the acquisition or improvement of knowledge or the enlargement of understanding of members of the audience to whom such programming is directed;
>
> (ii) intended to provide information on the availability of courses of instruction; or
>
> (iii) intended to publicize special education events within the educational system;

Section 6 of the Act requires the community cablecaster providing the community and educational programming to

advise Sask Tel of the subscribers that receive such programming.

The import of section 7 is not clear. It reads as follows:

> Educational programming shall only be provided by a person or community cablecaster designated by the provincial authority.

Two questions are raised by this provision. The first deals with the use of the word "person" in the section. As "person" is defined in s.2(s) as including a natural person, partnership, syndicate, trust, corporation or association, it would seem that a person other than a community cablecaster can operate a cablecast service as long as it is confined to educational programming and this notwithstanding 2.4(1) which limits cablecast service to community cablecasters. Moreover s.2(e) defines "educational programming" as the presentation by a cablecaster. Section 2(b) defines a "cablecaster" as including both a commercial cablecaster and a community cablecaster. It may be that s.7 contemplates educational programming as other than an intra-provincial cablecast service but is saying that regardless of the particular medium or its scope all educational programming is subject to the control of the provincial authority, S.E.C.A. If this was the legislation's intention it would have been preferable to have the word "person" omitted in this Act and a similar provision placed in the legislation specifically dealing with educational broadcasting which will be considered later. A different interpretation of this section might be

given which would resolve this difficulty. One might argue that although cablecast service is limited to community cablecasters, the production of educational program material is not the exclusive preserve of community cablecasters.

The second apparent difficulty with section 7 is the fact that educational programming appears to be divided between Sask Tel and the provincial authority, S.E.C.A. It seems that by s.5 every community cablecaster must provide educational programming to its subscriber and Sask Tel is empowered to "ensure" that it occurs. But s.7 suggests that only some community cablecasters will be required or allowed to provide educational programming.

Somewhat novel is the provision in The Community Cablecasters Act, 1977 for Program Advisory Councils. Section 8(1) authorizes the subscribers of any community cablecaster to establish a Program Advisory Council which must consist of at least three persons all of whom must be subscribers but none of whom may be a member of the board of directors of a cablecaster. The Council would appear to be an advisory body only with the primary purpose of making "recommendations to the community cablecaster as to how its programming may be improved in any way the council considers advisable" (s.8(3)).

Equally interesting is the provision (s.8(6)) which makes the community cablecaster responsible "for all reasonable and necessary administrative costs incurred by its council as provided for by the regulations."

The Saskatchewan Arts Board has a variety of functions to play with respect to the community cablecaster. The Board was created in 1949 by The Arts Board Act S.S. 1949 c.63 with the aim of making opportunities available to the people of Saskatchewan in drama, visual arts, music, literature, handicrafts and other arts. It was to provide leadership in such activities and promote the development and maintenance of high standards for such activities. To achieve these goals it was empowered to train lecturers and instructors as well as granting scholarships and loans.

The Arts Board is now authorized to use its funds to encourage the production of material suitable to the cablecaster. Section 13 of The Community Cablecasters Act, 1977 spells out the Board's power in more detail:

> 13. In the performance of its endeavours referred to in section 11A of The Arts Board Act, the board may utilize the moneys contained in the fund to:
>
> (a) subject to the regulations, make grants or loans to any person who is prepared to produce material on location in the province;
>
> (b) produce on location in the province, either on its own or in conjunction with any other person, material intended for use as programming by a cablecaster;
>
> (c) assist any person mentioned in clause (b) to distribute its material to any cablecasters.

However in addition to acting as a funding agency, the Board is in charge of computing and collecting the fee payable by the subscriber to the Crown in right of the Province. As an aside it might be noted that a subscriber pays to the cablecaster one monthly sum which consists of a toll and a

fee. This toll is set by the cablecaster for providing the cablecast service. The fee is set by the Act as a percentage of the toll. The cablecaster must forward to the Minister of Finance the fee portion of the subscription monthly payment. It should be emphasized that there are no limitations imposed on the amount of the toll that can be imposed by the cablecaster. The toll goes to the cablecaster but the fee goes to the Provincial Treasury.

The fact that the cablecaster is not regulated in the rates it charges its subscribers is consistent with what appear to be the underlying philosophy of the legislation: viz., the minimal regulation of the community cablecaster. No license is required to operate as a community cablecaster. There appears to be very little control by the provincial government over the method and manner of programming. As long as a lease is entered into with Sask Tel for use of its equipment any community service co-operative can become a community cablecaster. Although s.5 requires Sask Tel to "ensure the delivery of community and educational programming" there does not appear to be any sanction provided for violation of a Sask Tel order or directive. However it may be made a condition of the lease that the lessee provide the requisite quality in its programming. Having said that, it should be noted such a practice would be at variance with the traditional practices of common carriers not to interfere with content. The Lieutenant Governor in Council can direct the Registrar of Co-Operative Associations for Saskatchewan

to dissolve a co-operative but on grounds that are unrelated to the type of programming provided by the community cablecaster. (See s.106 of The Co-operative Associations Act, R.S.S. 1965, c.246).

Section 43(j) of The Community Cablecasters Act, 1977 does however authorize the Lieutenant Governor in Council to make regulations "respecting any matter deemed necessary or advisable to carry out the intent and purpose of their Act." Section 43(a) through (i) provide some specific but not exhaustive examples of the type of regulations envisaged. Although the wording of 43(j) may be wide enough to encompass regulations authorizing licensing provisions or content control it is unlikely that such was intended by the Act. The powers of the Lieutenant Governor in Council as provided in section 44 are herein set out:

> 44. For the purpose of carrying out the provisions of this Act according to their intent, the Lieutenant Governor in Council may make regulations that are ancillary to and are not inconsistent with this Act, and every regulation made under this section has the force of law and, without restricting the generality of the foregoing, the Lieutenant Governor in Council may make regulations:
>
> (a) defining any word or expression used in this Act but not defined in this Act;
>
> (b) governing the functioning and operations of the board with respect to the production of cablecast programming;
>
> (c) governing the forms of and conditions under which financial assistance may be made available by the board pursuant to this Act;
>
> (d) prescribing the forms to be used for the purposes of this Act or the regulations;

(e) prescribing the administrative costs of a council for which a cablecaster shall be responsible;

(f) prescribing the information and records to be made available to the Minister of Finance by a cablecaster;

(g) prescribing penalties for violation of the regulations;

(h) prescribing the method of collection of the fee and any other conditions or requirements affecting such collection;

(i) prescribing, for the purposes of section 31, the rate of interest payable in respect of the fee payable by a subscriber and prescribing the day on which the fee shall be forwarded to the Minister of Finance or his appointee;

(j) respecting any matter deemed necessary or advisable to carry out the intent and purpose of this Act.

Similarly, although section 9 of The Community Cablecasters Act, 1977 requires every community cablecaster to file with the Saskatchewan Arts Board a report:

(a) outlining the activities of its Program Advisory Council; and

(b) describing the nature, source and content of the materials utilized by it in its programming; for its most recently completed fiscal year,

however the Art Board would not appear to have any formal powers of censure over a community cablecaster that ignored the recommendations of its Program Advisory Council or utilized inferior material in its programming. The only truly effective power of control would be that the Arts Board would refuse to grant or loan a community cablecaster any money if it was not acting in a manner acceptable to the Arts Board. The degree to which a community cablecaster is dependent upon the Arts Board for its funding will determine the degree

to which it is under governmental control.

Since the jurisdiction of the C.R.T.C. does not constitutionally (arguably) or statutorily extend to a totally intra-provincial cablecast system (i.e. closed-circuit) then community cablecasters are relatively free of the regulation and control suffered by the rest of the broadcast undertakings in Canada. If the community cablecasters share the same cable as the commercial cablecaster an argument might be made that the C.R.T.C. could exercise control over the community as well as cablecaster. This point is briefly discussed in Chapter II.

The third and final aspect of telecommunications in Saskatchewan deals with educational broadcasting. The Educational Communications Corporation Act, 1974, 1973-74, c.35 created the Saskatchewan Educational Communications Corporation. The powers of the corporation are set out in s.10 of the Act:

> 10. The corporation may:
>
> (a) operate one or more broadcasting undertakings primarily devoted to the field of educational broadcasting;
>
> (b) within the policy guidelines established by the provincial authority, produce, acquire, sell, lease, distribute, exhibit or otherwise deal in programs and materials of an educational nature whether for use in broadcasting or otherwise;
>
> (c) enter into operating agreements with any person, agency of the Government of Canada, owners or operators of broadcasting stations or networks for the broadcasting and distribution of educational programs;

(d) enter into agreements with any person, university, college or other post-secondary educational institution in connection with the production, acquisition, sale, lease, presentation, exhibition or distribution of, or other dealing in, the programs and materials of the corporation;

(e) acquire, prepare, publish, distribute and preserve, whether for a consideration or otherwise, any audio-visual materials, papers, periodicals and other literary matter of the corporation;

(f) make arrangements or enter into agreements with any person for the use of any rights, privileges or concessions of the corporation;

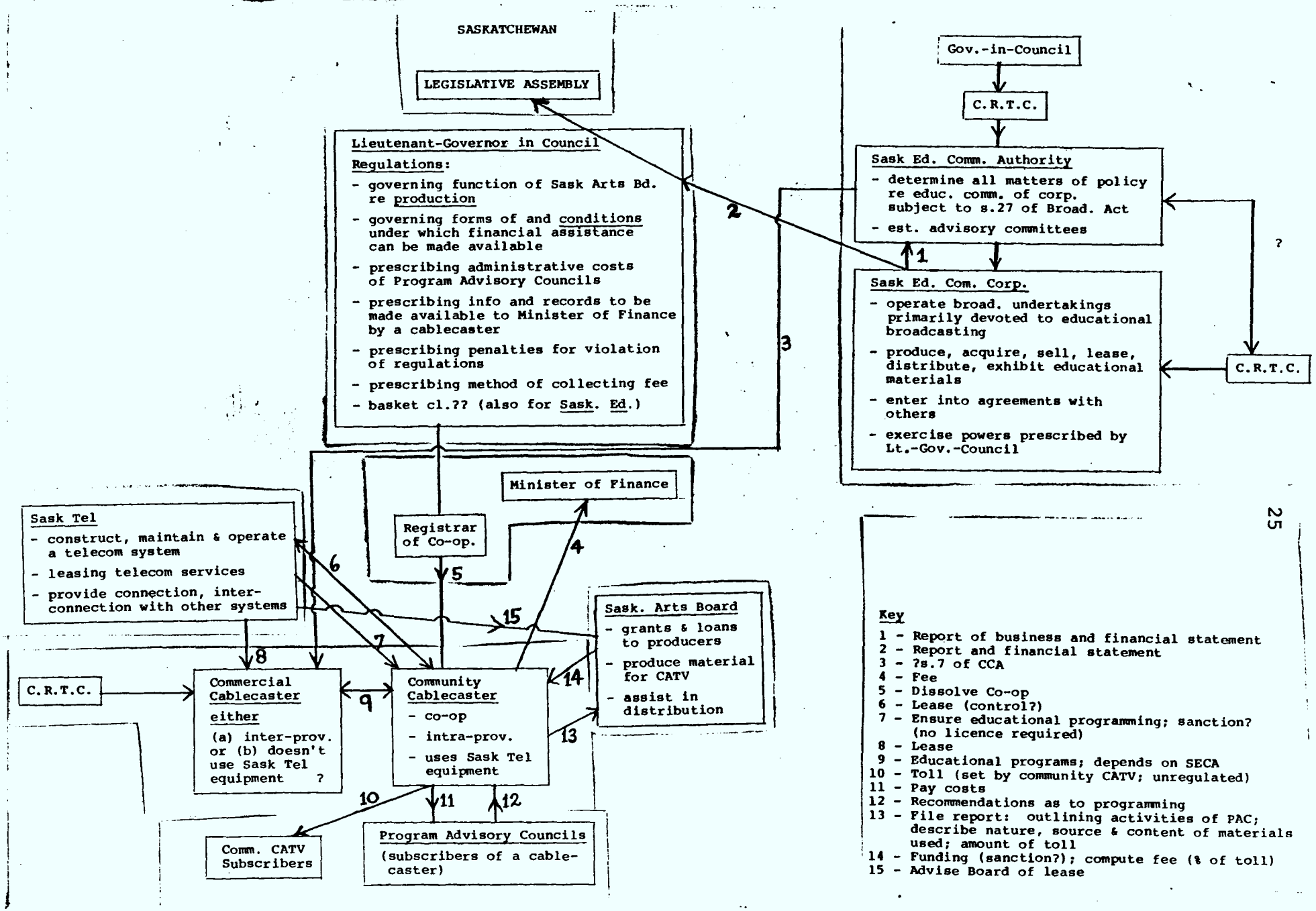
(g) exercise such other powers as may be prescribed by the Lieutenant Governor in Council having regard to the efficient operation of its business for the public good.

The Corporation is subject to the control of the provincial authority, S.E.C.A.

S.E.C.A. is authorized by s.3(2) to "determine all matters of policy in respect of educational communications within which the corporation shall operate in the exercise of the powers conferred on it by their Act [i.e. s.10 above]." Section 3 however recognizes the paramount authority of the Governor-in-Council under s.27 of the Broadcasting Act. S.E.C.A.can also create advisory committees "for any purpose in connection with this Act" (s.3(3)(a)).

Pursuant to s.21 of the Act the Corporation must submit to S.E.C.A. and to the Lieutenant Governor in Council a report of its business for its preceding fiscal year and a financial statement showing the business of the Corporation for that fiscal year. These reports must be laid before the Legislative Assembly. Presumably the Corporation would also

come within the jurisdiction of the C.R.T.C. and yet a potential conflict could arise between the C.R.T.C. and S.E.C.A. in determining the policies of the Corporation. The constitutional question over educational broadcasting is dealt with in Chapter II.



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Key

1 - Report of business and financial statement
2 - Report and financial statement
3 - ?s.7 of CCA
4 - Fee
5 - Dissolve Co-op
6 - Lease (control?)
7 - Ensure educational programming; sanction? (no licence required)
8 - Lease
9 - Educational programs; depends on SECA
10 - Toll (set by community CATV; unregulated)
11 - Pay costs
12 - Recommendations as to programming
13 - File report: outlining activities of PAC; describe nature, source & content of materials used; amount of toll
14 - Funding (sanction?); compute fee (% of toll)
15 - Advise Board of lease

C. ONTARIO

Educational broadcasting is primarily the concern of The Ontario Educational Communications Authority pursuant to The Ontario Educational Communications Authority Act, R.S.O. 1970, c.311; as amended SO. 1972, c.1; S.O. 1974 c.12. The objects and powers of the Authority are set out in section 3 & 7:

3. The objects of the Authority are:

(a) to initiate, acquire, produce, distribute, exhibit or otherwise deal in programs and materials in the educational broadcasting and communications fields;

(b) to engage in research in those fields of activity consistent with the objects of the Authority under clause a; and

(c) to discharge such other duties relating to educational broadcasting and communications as the Board considers to be incidental or conducive to the attainment of the objects mentioned in clauses a and b. 1970, c.23, s.3.

7. (1) The Authority has the following powers incidental ancillary to its objects,

(a) to enter into operating agreements with the appropriate agency or agencies of the Government of Canada and with broadcasting stations or networks for the broadcasting of educational programs;

(b) to enter into contracts with any person in connection with the production, presentation or distribution of the programs and materials of the Authority;

(c) to acquire, publish, distribute and preserve, whether for a consideration or otherwise, such audio-visual materials, papers, period-

icals and other literary matter as relate to any of the objects of the Authority;

(d) to make arrangements or enter into agreements with any person for the use of any rights, privileges or concessions that the Authority may consider necessary for the purposes of carrying out its objects.

O.E.C.A. once under the authority of the Department of Education was transferred in 1972 to the Ministry of Colleges and Universities by The Government Reorganization Act, S.O. 1972, c.1, s.16.

The Authority is governed by a board of directors. When acquiring or disposing of land the Authority must obtain the approval of the Lieutenant Governor in Council. The Board of Directors may make by-laws "regulating its proceedings and generally for the conduct and management of the affairs of the Authority" (s.5(1)). These by-laws must be filed with the Minister and the Lieutenant Governor in Council can amend or revoke any such by-law "provided that any such amendment or revocation shall not prejudice the rights of any person dealing with the Authority" (s.5(3)). However s.6(3) stipulates that the officers and employees are not Crown employees which may be significant in terms of who the C.R.T.C. will license as an educational broadcaster.

Section 9 authorizes the Authority to appoint regional councils and advisory committees "as it considers necessary to advise it in developing the policy and operations of the Authority . . ."

Although the Ministry of Colleges and Universities is

concerned with the more particular matter of educational broadcasting, the Ministry of Education has authority generally over education. Although originally the Minister of Education was to concern himself only with "books" the phrase "other learning materials" was added by The Education Act S.O. 1974, c.109. The Education Act, R.S.O. 1970, c.111 empowered the Minister not only to purchase and distribute textbooks and "learning materials" for use in schools but also authorized the Minister to contract for the development over production of such learning materials. However it seems that the Ministry of Education is primarily concerned with the use of materials in the schools and has no authority over educational broadcasting.

The Ontario Telephone Service Commission was created by The Telephone Act, R.S.O. 1970, c.457. The principal object of the Commission is the regulation of the telephone systems in the province. However the Commission would seem to have some apparent authority over cablecasters in the province who desire to use telephone lines as a means of transmitting their signals. Section 96 requires Commission approval before a telephone system enters into an agreement "with any other system, whether the latter system is under the jurisdiction of the Legislature or not providing for the connection, intercommunication, joint operation or reciprocal use of the respective lines and other plant controlled, owned or operated by the systems . . ." Arguably the phrase "any other system" includes a cablesystem. Section 99 however

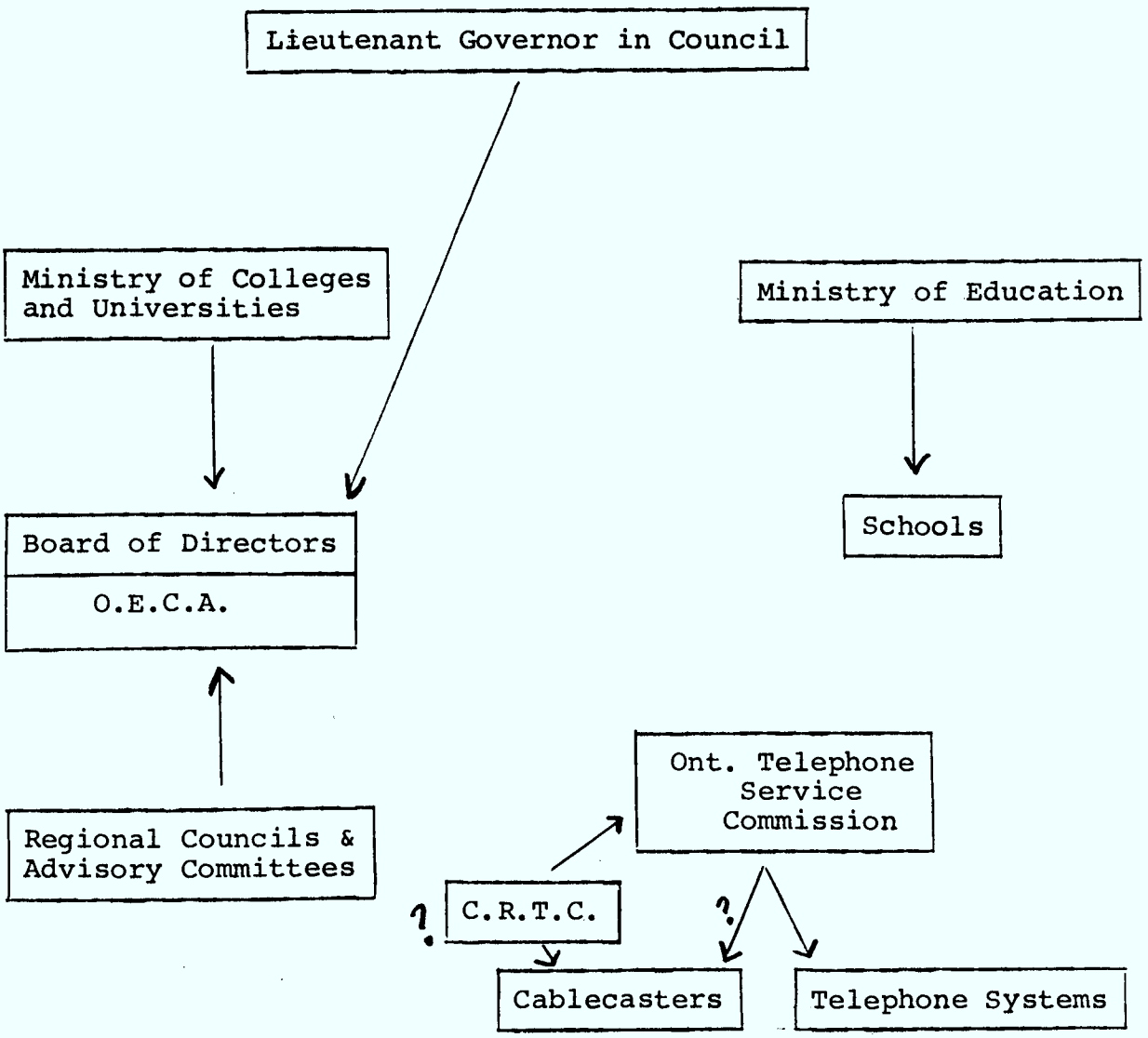
provides for the joint approval of the C.T.C. (now C.R.T.C.) and the Telephone Commission where intercommunication is desired between a provincial telephone system and "a system" under the jurisdiction of Parliament. However s.99 probably concerns any "telephone" systems because of the subsequent wording in that section and would therefore not be relevant for other telecommunication systems.

Section 117 however does specifically refer to a "communication service" which is "any form of communication by electrical currents or impulses conducted by wires, cables or radio, other than telephone service." Section 117 requires the approval of the Telephone Commission where a "communication service" is sought to be provided as part of a telephone system.

The Ministry of Transportation and Communications was created in 1971 pursuant to the Ministry of Transportation and Communications Act, 1971, S.O. 1971 c.13; amended 1972 c.1 s. 100. The said Act deals more particularly with the Minister's power in respect of transportation than it does with respect to communications. However, section 3 of the Act contains a general provision which states:

> The Minister is responsible for the administration of this Act and any other Acts that are assigned to him by the provisions thereof or by the Lieutenant Governor in Council.

ONTARIO


Lieutenant Governor in Council
Ministry of Colleges and Universities
Ministry of Education
Schools
Board of Directors
O.E.C.A.
Regional Councils & Advisory Committees
Ont. Telephone Service Commission
C.R.T.C.
?
?
Cablecasters
Telephone Systems

D. MANITOBA

Pursuant to The Manitoba Telephone Act, S.M. 1955, c.76 there was created The Manitoba Telephone Commission, a body corporate empowered to "control, maintain and operate The Manitoba Telephone System." In 1962 the system was re-organized. Although the Commission was continued its members consisted of the members of a "board" which now was empowered to do essentially what was previously done by the Commission. The Commission was renamed The Manitoba Telephone System, R.S.M. 1970, c.T40 s.11(1). It seems that the Board/System is concerned generally with telephones. Section 21 of The Manitoba Telephone Act, R.S.M. 1970 c.T.40 sets out the power of the Board. The Board "shall control, maintain and operate the system of the Commission" and this follows a number of specific powers which includes the requirement that the Board "regulate the installation and maintenance of telephone service . . ."

M.T.S. thus owns and operates the hardware of the telephone system in the province and has a monopoly on telephone services.

A dispute arose in Manitoba concerning the issue of ownership by cable operators of part of the hardware of the cable system. The C.R.T.C. had ruled that cable operators should own a portion of that hardware but Manitoba Tel. was willing only to lease the use of its hardware to the cable

companies. The dispute over the hardware was partially resolved by an agreement entered into between the Queen in right of Canada and the Queen in right of Manitoba on November 10, 1976. The gist of the agreement was to give Manitoba control over its hardware and Canada control over the programming that would be distributed over the Manitoba facilities. Some of the provisions of the agreement are set out herein for a more accurate description of its contents:

Article II states:

> The regulation and supervision of programming services, including programming services distributed in Manitoba over or by means of facilities or apparatus of the Agency, are exclusive responsibilities of Canada.

Article III

> The regulation and supervision of telecommunication services, other than programming services, distributed in Manitoba by means of facilities and apparatus of the Agency are exclusive responsibilities of the Province.

In Article 1, "programming service" or programming is defined to mean:

> audio and/or visual matter, . . . where such matter is directed to the public by means of telecommunication facilities and where such matter is designed to inform, enlighten, or entertain, or is similar in nature, character or substance to matter normally provided by television or radio broadcasting and may reasonably be expected to have an impact on the achievement of the objectives of the Canadian broadcasting system. For greater clarity and without limiting the generality of the foregoing, programming services include broadcast programming, pay television programming, local or community programming, but do not include point to point services, teleconferencing or teleshopping services. (emphasis added)

Although some questions may arise with respect to the definition of programming it seems that Canada's jurisdiction

extends to the traditional form of programming provided on radio and television whereas the newer and yet to be implemented telecommunication services, such as burglar alarms, stock market quotations and airport information would be within provincial jurisdiction. Manitoba however relinquishes jurisdiction over the programming of pay television and local or community programming.

Article V of the Agreement supposedly gives Manitoba control over MTS hardware vis-a-vis cable operators. Article V states:

> For the purpose of providing authorized programming services to the public, a broadcasting receiving undertaking may lease from the Agency [M.T.S.] all necessary facilities and apparatus excluding signal modification and studio equipment, channel modulators and the antenna and hardware of a broadcasting receiving undertaking, the terms and conditions under which the Agency provides such facilities and apparatus being agreed between the Agency and the undertaking in accordance with applicable statutory provisions.
> (emphasis added)

Hence this provision does not require cable operators to lease the hardware from M.T.S. If the cable operators and M.T.S. were not able to agree on the terms of such a lease or if the cable operator wanted to own their own hardware, the cable operator could lay and own their own cables and other facilities for the broadcast of their programming. This however would depend upon the cable operator being able to obtain the agreement of municipalities for the laying of its private cable in streets and lanes. Politically, this may not be likely. Moreover The Manitoba Telephone Act authorizes the Minister to "purchase, lease, expropriate or

otherwise acquire, within the province any system" with the approval of the Lieutenant Governor in Council. This provision is identical to s.3 of the 1955 legislation when system meant only a telephone or telegraph system. However "system" was redefined in 1975 in S.M. c.25 to include a telecommunication and data processing system. Hence theoretically, if a cable operator chose not to lease its equipment from M.T.S. and built its own system, M.T.S. could turn around and expropriate it.

As this Agreement is binding only on the provincial and federal executives and not on the C.R.T.C., cable operators or anyone else, those not party to the Agreement could choose to ignore it. The C.R.T.C. however has agreed to acquiesce in the agreement and no longer imposes on the cable operators in Manitoba the ownership requirements that it imposes on cable operators in other provinces.

The Agreement has some additional provisions which I will summarize here. Technical standards remain the responsibility of Canada. Manitoba undertook to provide sufficient channel capacity to accommodate the distribution of programming services and it was "understood" that the distribution of programming services had priority over the distribution of other services over the M.T.S. facilities. However, pursuant to Article IX Canada and Manitoba undertook "to cooperate with a view to ensuring the orderly provision of programming and other services in Manitoba which makes common use" of the M.T.S. facilities.

Article X is also important in that Manitoba undertook to ensure that the M.T.S. facilities when used to distribute programming services would only be used by undertakings authorized by Canada.

Article VI is also of some importance.

> In the event of a dispute as to terms, conditions or rates affecting the use of facilities and apparatus of the Agency for the purpose of providing authorized programming services, the Province undertakes to take the necessary measures to ensure that such dispute will be adjudicated by its competent regulatory authority in order to ensure that such terms, conditions or rates are just, reasonable, and in the public interest.

Pursuant to General Order in Council 841/78 the Public Utilities Board was named the authority to resolve such disputes. It is generally believed that the P.U.B. only has authority to resolve disputes between M.T.S. and a cable operator arising out of a contract between such parties for the use of M.T.S. facilities. Article VI however is not so limited and conceivably the P.U.B. could be resorted to at the negotiation stage if a dispute arises at that time.

There is presently litigation ongoing in Manitoba over the jurisdiction of the P.U.B. No one questions the right of the P.U.B. to regulate public utilities such as rates charges by M.T.S. for telephone service and Manitoba Hydro. However the cable operators in Manitoba are arguing that the P.U.B. should also have the right to approve the rates charged by M.T.S. to cable operators for short haul delivery services. M.T.S. argues that although the P.U.B. has jurisdiction over public utilities it can not exercise a general jurisdiction

over the owner of the public utility particularly when the owner is engaged in an activity that does not fall within the definition of a public utility. M.T.S. maintains that the use of the M.T.S. carrier system by cable operators is not a public utility and hence not within the jurisdiction of the P.U.B. The Manitoba Court of Appeal has recently held that the P.U.B. does not have jurisdiction over the rates charged by M.T.S. to cable operators.

Another provision of some interest is s.48 of The Manitoba Hydro Act R.S.M. 1970 c.H190 which states:

> Where works constructed or acquired by the corporation are not in use for the purpose for which they were constructed or acquired, the corporation may utilize them for such revenue-producing purposes as the board may deem proper.

Since the poles could be utilized by cable companies desirous of setting up their own system, this provision may be of some importance to cablecasters. However I have been advised that Manitoba Hydro entered into an agreement with M.T.S. to allow only M.T.S. the use of Manitoba Hydro's unused facilities. This agreement is apparently consistent with the desire of M.T.S. to be the sole carrier of cable programming in the province.

In terms of education, Manitoba has not become involved in educational broadcasting in the way that Ontario or Saskatchewan has. Pursuant to The Education Department Act, R.S.M. 1970, c.E-10 as amended by S.M. 1970, c.85 the Minister of Education is empowered to:

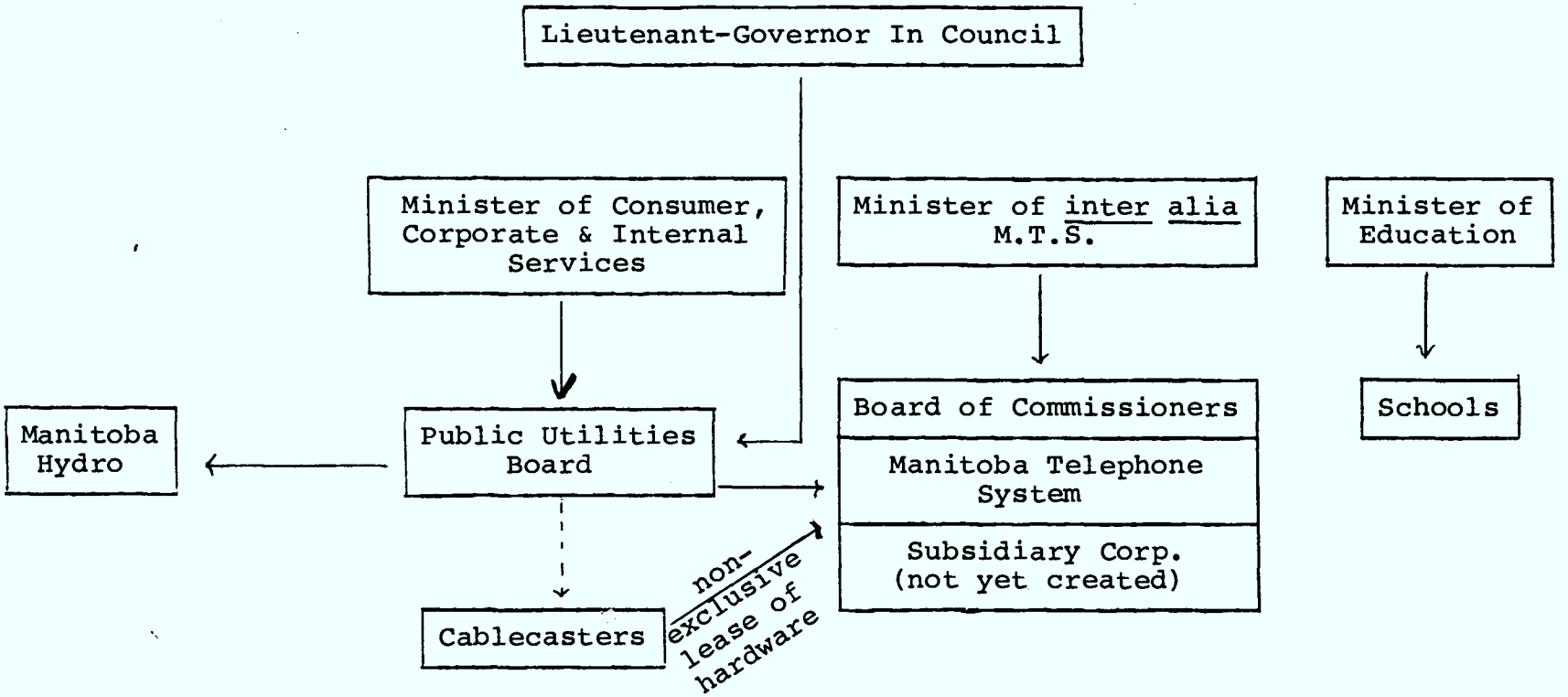
prescribe the text books to be used, and the moving

> picture films that may be shown, and the radio and television programs that may be received, in schools; (s.6(1)(t)).

Although the Minister has many other specific powers he is granted the plenary power to "generally make regulations respecting all matters having to do with education" (s.6(1)(gg)).

There are programs being transmitted via microwave between schools. Although these facilities must comply with D.O.C.'s technical requirements, there apparently is no regulation or licensing by a provincial or federal authority over such broadcasting.

MANITOBA


Lieutenant-Governor In Council
Minister of Consumer, Corporate & Internal Services
Minister of inter alia M.T.S.
Minister of Education
Manitoba Hydro
Public Utilities Board
Board of Commissioners
Manitoba Telephone System
Subsidiary Corp. (not yet created)
Schools
Cablecasters
non-exclusive lease of hardware

E. QUEBEC

Pursuant to the Communications Department Act S.Q. 1969 c.65 as amended by S.O. 1972 c.57 there exists a provincial Department of Communications. The functions of the Minister of Communications are as expected executive. Since the Act has been amended a number of times I reproduce here in full the Minister's powers as amended.

2. The functions of the Minister shall be to prepare a communications policy for the province of Quebec and to propose such policy to the government, to implement such policy, and to supervise the application and co-ordinate the carrying out thereof.
S.Q. 1969 c.65

   For the purposes of this act, the expression "communications" includes the broadcast, transmission and reception of sound, pictures, signs, signals, data or messages by wire, cable,waves or any electrical, electronic, magnetic, electromagnetic or optical means.
S.Q. 1972 c.57

3. Within the scope of the jurisdiction of the province of Quebec, the Minister shall:

   (a) supervise the communications networks established in the province of Quebec and promote the establishment, development, adaptation and efficiency of such communications networks; S.Q. 1969, c.65

   (b) execute or cause to be executed research, studies, inquiries and inventories on communications generally and on the communications networks established in Quebec;
S.Q. 1969 c.65

   (c) obtain from the government departments, public bodies, municipal corporations and the urban and regional communities the available information respecting their programs, projects and needs in the field of communications; S.Q. 1972, c.57

(d) establish communication services for all government departments and ensure the co-ordination of the communication services established by public bodies, municipal corporations and the urban and regional communities with the services it establishes; S.Q. 1972 c.57

(e) see that the laws and regulations respecting communications are carried out; S.Q. 1969 c.65

(f) discharge such other duties as are assigned to him by the Lieutenant-Governor in Council. S.Q. 1969 c.65

(g) coordinate the acquisition and use of audiovisual equipment by government departments and public agencies, and the negotiations carried on by such departments and agencies with industrial firms with regard to radio and television broadcasting and cable delivery; S.Q. 1975 c.14

(h) advise any public body in view of attaining the objects contemplated in subparagraph g.

A public body within the meaning of this section is any school corporation or any body the majority of whose members are appointed by the Lieutenant-Governor in Council or a minister, any body whose officers and employees must, by law, be appointed or remunerated in accordance with the Civil Service Act (1965, 1st session, chapter 14) and any body more than half of whose resources are derived from the consolidated revenue fund. S.Q. 1972, c.57

The Province of Quebec also established the Quebec Broadcasting Bureau by The Quebec Broadcasting Bureau Act, S.Q. 1969, c.17 (which replaced a 1945 Act to authorize the creation of a provincial broadcasting service). The Bureau, a corporation, was vested with the following objects as set out in An Act to Amend the Quebec Broadcasting Bureau Act S.Q. 1972, c.58, s.7:

The objects of the Bureau shall be to establish, possess and operate a service for producing audio-

> visual material and for radio and television broadcasts called "Radio Quebec."
>
> Moreover at the request of the Minister of Communications, it shall prepare for educational purposes audio-visual material and radio and television broadcasts for and in co-operation with the other departments or government bodies.

Also by s.23 of The Quebec Broadcasting Bureau Act, the Bureau was authorized to "erect stations for radio or wire broadcasting . . ."

The Lieutenant-Governor in Council must approve any of the Bureau's regulations before they come into force. Moreover the Lieutenant-Governor in Council can make regulations (as provided by An Act To Amend the Communications Department Act and Other Legislation, S.Q. 1972, c.57, s.3) to determine standards of the setting up and operation of radio and television broadcasting by the Quebec Broadcasting Bureau as well as the conditions on which such body may acquire, hold or alienate shares or capital stock of another corporation.

The Minister of Communications is given charge over the application of the Quebec Broadcasting Bureau Act.

Quebec, unlike any other province, also has attempted to regulate all broadcast undertakings in the province by means of the inconspicuously titled act, The Public Service Board Act, R.S.Q. 1964, c.229. The Board's powers included:

a) ensuring that the rates demanded by owners of "public services" be fair and reasonable. If they are not the Board has power to amend such rates (s.17 and 18 of the Act)

b) require the owner of a "public service" to adopt any

measure or reform tending to improve their services (s.20).

c) prevent the "construction, operation or administration of a public service" in the province without an authorization from the Board. The Board "may at any time cancel an authorization or amend it, whenever it deems it expedient in the public interest" (s.23).

The term "public service" was originally defined as any service "for the transmission by wire or wireless of telegraphic or telephonic messages or by the two means combined." (It also included railways and utilities.) However, in An Act To Amend The Public Service Board Act, S.Q. 1972, c.56 s.2 the definition of "public service" was amended to read:

> any service the principal or accessory object of which is
>
> (a) the broadcast, transmission or reception of sound, images, signs, signals, data or messages by wire and cable, waves or any electric, electronic, magnetic, electromagnetic or optical means.

Now it became apparent that the Public Service Board was assuming a jurisdiction very much like that of the C.R.T.C. Section 23 of the Public Service Act stated:

> No owner shall begin construction, operation or administration of a public service in this Province without having obtained an authorization for such purpose from the Board.
> The authorization must state the conditions which the Board deems useful or necessary for the protection of rights and interests of the public in general.
> The Board may at any time cancel an authorization or amend it, whenever it deems it expedient in the public interest.

Moreover the Lieutenant-Governor in Council was given wide powers over many aspects of communications and could require the Public Service Board to comply with his regulations.

Pursuant to s.3a of the Communications Department Act, S.Q. 1969, c.65, as amended by S.Q. 1972, c.57 s.3 the Lieutenant-Governor in Council could make regulations (which were to be complied with by the Public Service Board) to

(a) determine for the purposes of the application of section 25 of the Public Service Board Act (Revised Statutes, 1964, chapter 229)

(1) the general principles governing the granting, suspension, cancellation and renewal of permits, authorizations and concessions by the Public Service Board;

(2) standards respecting the territorial application of such permits, authorizations and franchises, and standards respecting their term, which must not exceed nine years, and their renewal, which must be granted in every case where the holder complies with the law and regulations;

(3) the rights and obligations of any class of permit holders and the technical, managerial and financial requirements imposed on them;

(4) the form and tenor of and procedure for making applications for permits, authorizations and franchises;

(5) the cases where a person applying to the Board for issue or alteration of a permit, authorization or franchise shall previously obtain from the Minister a certificate attesting that the application is in conformity with the technical standards prescribed under subparagraph 3;

(6) the general conditions applicable to the contracts and financial commitments of holders of permits, authorizations and franchises;

(7) a tariff of fees and dues applicable to holders of permits, authorizations and franchises;

(8) standards and priorities respecting the broadcast and transmission of classes of productions or programs;

(b) determine for the purposes of the application of section 30 of the Public Service Board Act the general conditions for the use of communications installations by a service

other than that which is the owner of them;

(c) provide for the inspection of communications installations;

(d) determine, subject to the Quebec Broadcasting Bureau Act (1969, chapter 17), standards of production, acquisition, distribution and broadcast of radio and audio-visual material by the government departments and public bodies defined in section 3;

(e) determine the standards of the setting up and operation or radio and television broadcasting by the Quebec Broadcasting Bureau and the conditions on which such body may acquire, hold or alienate shares or capital stock of another corporation;

(f) determine the conditions of the establishment, operation, management, extension or alteration of a public service within the meaning of paragraph 3 of section 2 of the Public Service Board Act, and of the cession, sale, purchase or merger of all or part of such a service, or of the establishment, sale or purchase of all or part of a network or network chain and the installations connected with it;

(g) provide for any other measure required for the carrying out of this Act.

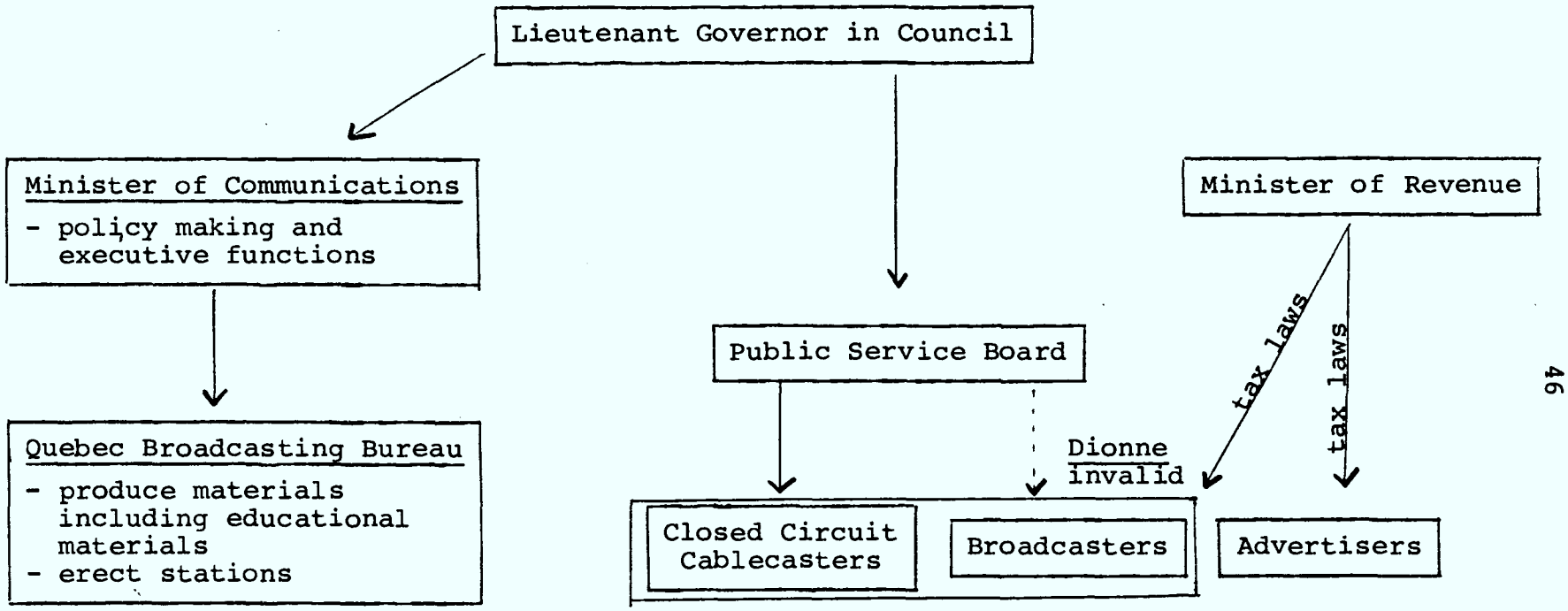
The Supreme Court of Canada in Re Public Service Board et al., Dionne et al., and A.G. of Canada (1977), 83 D.L.R. (3d) 178 held ultra vires s.23 of the Public Service Board Act as well as any regulations adopted pursuant to s.3(a) of the Communications Department Act in so far as they were applicable to a cable distribution public service which received off-air television signals. However, in the event that Quebec has totally intra-provincial cable systems (as in Saskatchewan) the machinery is in place with which such can be regulated.

Quebec also has imposed a tax on various aspects of the telecommunications industry. A description as well as an analysis of the constitutionality of this legislation is

provided in Chapter II.

Suffice to state at this point, that The Broadcast Advertising Tax Act, Bill 63 assented to December 22, 1977 imposes a 2% tax on the price of air-time of an advertisement by a radio, television and cable station. An earlier Act, presumably still in force, entitled The Telecommunications Tax Act, S.Q. 1965 c.28, amended 1967 c.35; 1971 c.30, 1972 c.25 imposes an 8% tax on the "price of every telecommunication sent or received by a user and on the rent due or paid by a user." There were some newspaper reports that an 8% media tax had been repealed in Quebec but I was unable to find any official notification to that effect.

QUEBEC


Lieutenant Governor in Council
Minister of Communications
- policy making and executive functions
Minister of Revenue
Public Service Board
Quebec Broadcasting Bureau
- produce materials including educational materials
- erect stations
tax laws
tax laws
Dionne invalid
Closed Circuit Cablecasters
Broadcasters
Advertisers

F. ALBERTA

The Department of Utilities and Telephones Act, S.A. 1973, c.68 as amended 1975, c.16 vests in the Department and Minister of Utilities and Telephones jurisdiction over telecommunication utilities which is defined broadly to include the transmission and reception of signals, etc. by "wire, radio, visual or other electromagnetic systems." The powers of the Minister are set out in s.7 of the Act. Nowhere is the Minister or Lieutenant Governor in Council given power to make regulations except with respect to grants and funding (s.8). Rather the Minister's powers are more traditional dealing with the formulation of policy and research. The powers of the Minister are as follows:

7. The Minister

(a) is responsible for the co-ordination of all policies, programs and activities of the Government of Alberta and government agencies in relation to all matters under the administration of the Minister;

(b) may as a representative of the Government of Alberta, maintain a continuing liaison with the Government of Canada and agencies thereof, the governments of other provinces and territories and agencies thereof, municipal corporations, corporations and co-operative associations in Alberta, in relation to matters under the administration of the Minister;

(c) may, on behalf of the Government of Alberta and with the approval of the Lieutenant Governor in Council, enter into an agreement relating to any matter pertaining to telecommunications or utilities with the Government of Canada, the government of any province or territory of Canada, an agency of

any of those governments, any municipal corporation in Alberta, any corporation, any co-operative association in Alberta or any other person;

(d) may carry out research projects related to matters pertaining to telecommunications or utilities;

(e) may compile, study and assess information directly or indirectly related to matters pertaining to telecommunications or utilities with a view to using the results of such study and assessment for the purpose of better carrying out his functions and responsibilities under this or any other Act and with a view to providing such information or results to other departments of the Government and to government agencies and to the public;

(f) shall conduct a continuing review of research related to any matter pertaining to telecommunications or utilities being carried out by the Government of Alberta or government agencies or by others and shall promote the co-ordination of such research and of facilities used for such research;

(g) may generally do such acts as he considers necessary to promote the improvement of telecommunications or utilities for the benefit of the people of Alberta and future generations.

Section 8 was amended by S.A. 1975 c.16 s.6:

8. (1) The Minister may make grants if

(a) he is authorized to do so by regulations under this section, and
(b) moneys are appropriated by the Legislature for that purpose or the grant is authorized to be paid pursuant to a special warrant.

(2) The Lieutenant Governor in Council may make regulations

(a) authorizing the Minister to make grants;

(b) prescribing the purposes for which grants may be made;

(c) governing applications for grants;

(d) prescribing the persons or organizations or classes of persons or organizations eligible for grants;

(e) specifying the conditions required to be met by any applicant for a grant to render that person eligible for the grant;

(f) prescribing the conditions upon which a grant is made and requiring the repayment thereof to the Government if the conditions are not met;

(g) providing for the payment of any grant in a lump sum or by instalments and prescribing the time or times at which the grant or the instalments may be paid;

(h) limiting the amount of any grant or class of grant that may be made;

(i) authorizing the Minister to delegate in writing to any employee of the Government any duty, power or function respecting the payment of any grant;

(j) requiring any person receiving a grant to account for the way in which the grant is spent in whole or in part;

(k) authorizing the Minister to enter into an agreement with respect to any matter relating to the payment of a grant.

(3) Any regulation made under subsection (2) may be specific or general in its application.

The Alberta Educational Communications Corporation was created pursuant to The Alberta Educational Communications Corporation Act, S.A., 1973, c.3. The A.E.C. Corporation must be composed of at least three but not more than four directors who are employees of the Government of Alberta. The Corporation's power set out in s.6 is extensive and includes the power to operate one or more broadcast undertakings devoted to the field of educational broadcasting.

The general powers of the Corporation are set out in section 6:

6. (1) The Corporation may

(a) operate one or more broadcasting undertakings primarily devoted to the field of educational broadcasting;

(b) subject to any directions made by the provincial authority, produce, acquire, sell, lease, distribute, exhibit or otherwise deal in programs and materials of an educational nature whether for use in broadcasting or otherwise;

(c) enter into operating agreements with any persons (including any agency or agencies of the Government of Canada, the owners or operators of broadcasting stations or networks, or any privately owned or publicly owned carrier) for the broadcasting and distribution of educational programs;

(d) enter into contracts with any persons (including universities, colleges or other advanced educational institutions) in connection with the production, acquisition, sale, lease, presentation, exhibition or distribution of, or other dealing in, the programs and materials of the Corporation;

(e) acquire, prepare, publish, distribute and preserve, whether for a consideration or otherwise, any audio-visual materials, papers, periodicals and other literary matter of the Corporation;

(f) make arrangements or enter into arrangements with any person for the use of any rights, privileges or concessions of the Corporation.

(2) The Corporation may

(a) purchase an estate in fee simple in any land, subject to the approval of the Lieutenant Governor in Council;

(b) subject to clause (a), purchase and hold any estate or interest in land and sell, lease or otherwise alienate any estate or interest in land no longer required for its purposes;

(c) acquire any estate or interest in land by gift or devise and alienate it, subject to the terms of any trust upon which it may be held;

(d) make such banking arrangements as are necessary for the carrying out of its duties and functions;

(e) draw, make, accept, endorse, execute and issue promissory notes, bills of exchange and other negotiable or transferrable instruments;

(f) subject to the terms of any trust upon which it may be held, invest in such manner as the Corporation considers proper, any moneys that come into its hands and that are not then required to be expended;

(g) act as trustee of any moneys or property given to the Corporation by will or otherwise;

(h) determine the place where the head office of the Corporation shall be situated;

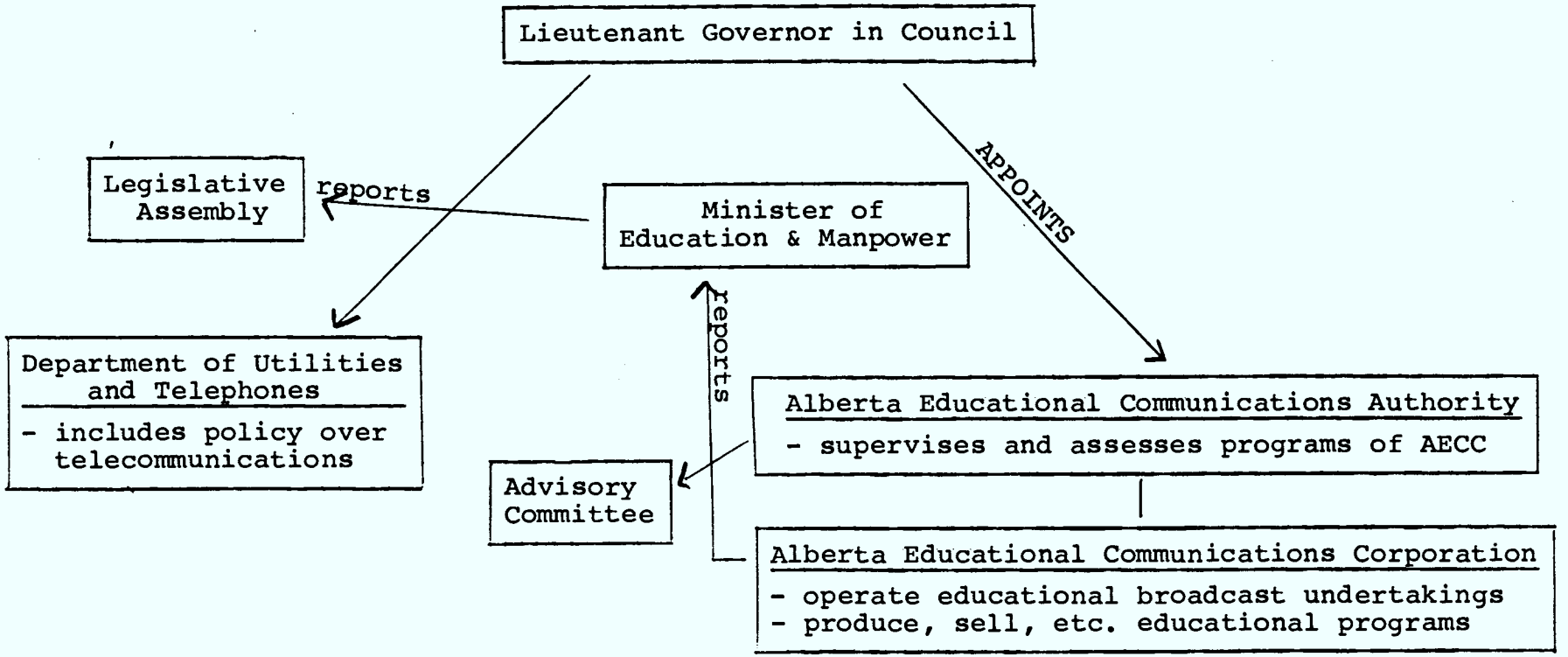
(i) appoint the auditor of the Corporation;

(j) perform such other functions and discharge such other duties as are assigned to it by the Lieutenant Governor in Council.

"Broadcast Undertaking" is described as having "the meaning given to it by the Broadcasting Act (Canada)."

Section 6(3) states that "the programs and materials transmitted through a broadcast undertaking of the Corporation are subject to supervision or assessment or both by the provincial authority." The "provincial authority," is created by the Lieutenant Governor in Council pursuant to s.2. It can in turn appoint advisory committees "for any purpose in connection with this Act . . ." The provincial authority, I think, has been named The Alberta Educational Communications Authority.

ALBERTA


Lieutenant Governor in Council
Legislative Assembly
reports
Minister of Education & Manpower
APPOINTS
Department of Utilities and Telephones
- includes policy over telecommunications
reports
Advisory Committee
Alberta Educational Communications Authority
- supervises and assesses programs of AECC
Alberta Educational Communications Corporation
- operate educational broadcast undertakings
- produce, sell, etc. educational programs

G. BRITISH COLUMBIA

Pursuant to the Department of Transport and Communications Act, S.B.C. 1973 (2d session), c.112, the Department and the Minister appointed to oversee it are given extensive powers in relation to transportation and communications. The definition of "communications" is very odd in that it is defined in the broadest form and includes "broadcasting" as defined in the federal Broadcasting Act but "does not include any form of communications over which the Parliament of Canada exercises exclusive jurisdiction."

The powers and functions of the Department are quite extensive. Sections 5 and 6 read:

> 5. The purpose and functions of the department are, under the direction of the minister,
>
> (a) to prepare and develop comprehensive policies respecting transportation and communications in the Province and to make reports and recommendations to the minister respecting the implementation of such policies;
>
> (b) to initiate and carry out any investigation, survey, research, study, inquiry, or inventory respecting transportation and communication facilities and future requirements for the Province, and to collect and circulate information acquired thereby;
>
> (c) to establish transportation and communication services for departments of the Government of the Province, and, for that purpose, to obtain from such departments information respecting their programmes, projects, and requirements in the field of transportation and communications; and
>
> (d) to administer all Acts and the regulations assigned to the Minister pursuant to section 4, and discharge such other duties as may be assigned to

the minister by the Lieutenant-Governor in Council.

6. For the purpose of carrying out his duties, powers, and functions, the minister may

(a) purchase, lease, or otherwise acquire and dispose of* any real or personal property;

(b) with the approval of the Lieutenant-Governor in Council, purchase, lease, or otherwise acquire any business or commercial or industrial enterprise relating to transport or communications;

(c) carry on or operate any business or enterprise acquired under clause (b); and
(emphasis added)

(d) expend such capital sums as may be required for the purposes of this section out of moneys appropriated by the Legislature for the purpose.

*amended 1976 c.18

Furthermore the Lieutenant-Governor in Council is empowered to make such regulations and orders for the purpose of carrying out the provision of the Act.

If the Minister can create and operate a commercial undertaking relating to communications, then supposedly the Minister by regulation would attempt to regulate its activities. If it was a broadcast undertaking within federal jurisdiction there would be constitutional difficulties. Since communications is defined to include the transmission and reception of sound and pictures by electromagnetic means it would seem that the broadcast undertaking created would necessarily fall within federal jurisdiction. However, as mentioned, "communications" is defined as excluding "any form of communications over which the Parliament of Canada exercises exclusive jurisdiction." This may be explained as an attempt

by the province to assume control over broadcast undertakings which are intra-provincial but which operate using the airwaves and not only cable. Although the recent Supreme Court of Canada decisions would suggest that the province could not justify such a scheme it has not yet been conclusively determined.

By The Telecommunications Utilities Act, S.B.C. 1973, c.90 every "telecommunications utility" is subject to the regulation and control of the B.C. Energy Commission. The Commission exercises the same power vis-a-vis telecommunications utility that it does vis-a-vis an energy utility as provided by the Energy Act. A "telecommunications utility" however is defined rather narrowly as being a "person . . . who owns or operates in the Province equipment or facilities for the conveyance or transmission of messages or communications by cable, telephone or telegraph where the service is offered to the public or to a corporation for compensation." A telecommunication utility does not include:

(i) a municipality in respect of services furnished by the municipality within its own boundaries; or

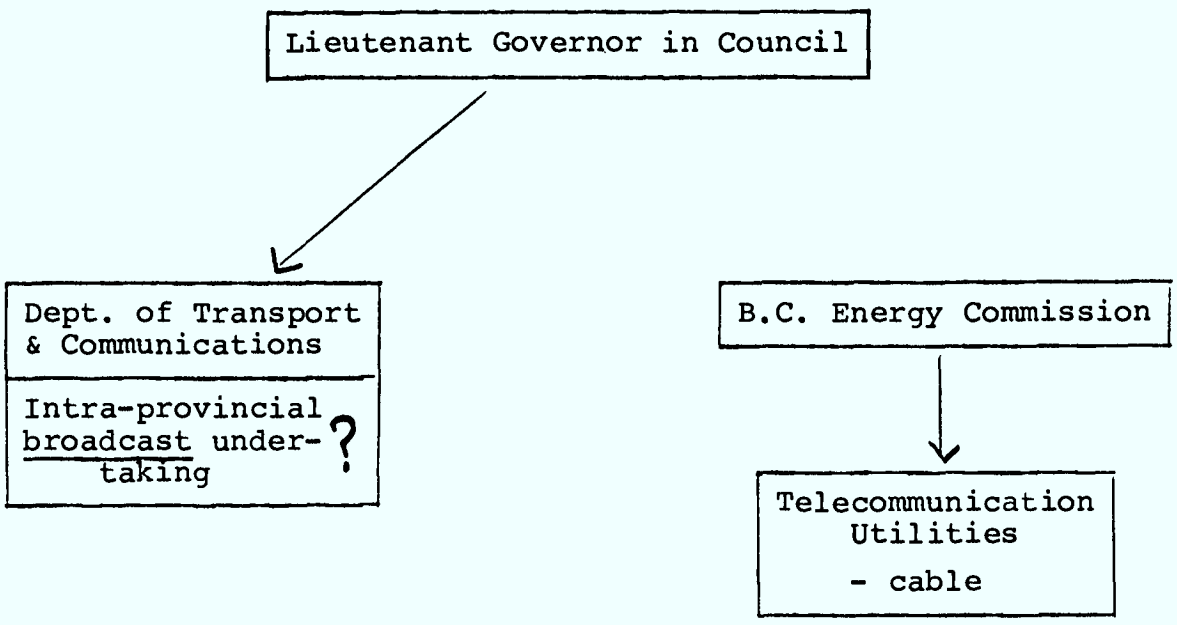
(ii) a person who furnishes service only to himself, his employees or tenants, where the service is not used by others; or

(iii) the B.C. railway.

Moreover the Act expressly applies to telecommunication utilities that are subject to the legislative authority of the province. However s.2 provides that when a telecommunications utility provides more than one class of service the

Commission assumes jurisdiction over the class of service which is within provincial jurisdiction notwithstanding that another class of service is outside of provincial jurisdiction.

BRITISH COLUMBIA



H. THE MARITIME PROVINCES

The Maritime Provinces have had very little involvement in the field of broadcasting although each of these provinces does have legislation relating to other aspects of telecommunications such as telephone and telegraph. New Brunswick and Prince Edward Island it seems have no legislation relating to broadcasting. Newfoundland and Nova Scotia have some legislation and this is set out here.

Newfoundland

The Department of Transportation and Communications Act, 1973, S.Nfld., 1973 c.36, amended, 1975-76, c.38, 1977 c.41 provides for the establishment of the Department of Transportation and Communications. Section 7 outlines the powers, functions and duties of the Minister which include

> (a) the supervision, control and direction of all matters within the legislative authority of the province relating to transportation and communications generally, including without limitation of the generality of the foregoing, all matters relating to
>
> . . . . . .
>
> (v) liaison with any Government, agency, corporation, body or person to the end that transportation and communications needs and interests are fully provided and protected, including, without limitation of the generality of the foregoing, needs and interests respecting air, land and sea transportation, broadcasting by radio and television and telephones and telegraphs,
>
> (b) such co-operation with the Government of Canada or any department, agency or body under the jurisdiction of the Parliament of Canada as may be necessary or

desirable for carrying out any of the purposes of the Act;

Section 14 is the standard clause allowing the Minister to enter into agreements with the Government of Canada or other provinces providing for joint undertakings.

Nova Scotia

The Communications and Information Act, S.N.S. 1972 c.6 creates a Nova Scotia Communication and Information Centre the powers of which are set out in s.4 and include

(b) disseminate, communicate and transmit information products, be they in the form of press releases, films, still photographs, television or radio presentations, advertising, graphic arts, printing or other creative forms, within the public service and outside the public service;

. . . . . .

(e) act as adviser on development technology in the field of communications "hardware" systems and introduce such systems as the Governor in Council deems to be contributory to a more efficient public service;

CHAPTER II

A COMMENTARY ON THE CONSTITUTIONAL ISSUES

In the last year a number of significant decisions relating to broadcasting have been handed down by the Supreme Court of Canada. Three principle areas affected by these decisions are canvassed in the following chapter. These areas involve:

a) Jurisdiction Over Cable

b) Educational Broadcasting

c) Taxation

A. Jurisdiction Over Cable

In Capital Cities Communications Inc. et al. v. C.R.T.C. et al., (1977) 81 D.L.R. (3d) 609 (S.C.C.) and Re Public Service Board et al., Dionne et al., and A-G. Canada et al., (1977) 83 D.L.R. (3d) 178 (S.C.C.) the Supreme Court of Canada resolved a contentious constitutional issue involving cablecast distribution systems. The Court held that Parliament had exclusive jurisdiction over those cablecast systems which receive off-air broadcast signals notwithstanding that these are then transmitted via cable to their subscribers.

The Supreme Court left open the question of jurisdiction over closed-circuit cable systems located entirely

within the boundaries of a province. A strong inference can be drawn from these decisions that the provincial legislatures would have exclusive jurisdiction over closed-circuit cable if the question was directly raised. Jurisdiction over open-circuit cable was based on the court's perception that the cable system constituted an inter-provincial undertaking when it utilized or relied upon the electromagnetic spectrum to transmit programs. A closed-circuit cable system which originates and ends within the boundaries of one province is not an inter-provincial undertaking. If such a system interconnected with other closed-circuit cable systems in adjoining provinces a different conclusion might follow but this is discussed further on.

If the courts chose to allocate to Parliament exclusive jurisdiction over an intra-provincial closed-circuit cable system then it would have to do so either on the basis of Parliament's power to make laws for the Peace, Order and Good Government of Canada or on the basis of the declaratory power in s.92(10)(c) of the B.N.A. Act. It is unlikely that reliance on the POGG power would be very successful. It is true that the Privy Council ruled inter alia on POGG to support federal jurisdiction over radio communication in Reference Re Regulation and Control of Radio Communication in Canada [1932] A.C. 304 but this was based on a Parliament's treaty-making power rather than turning on the inherent nature of the subject matter involved.

The Ontario Court of Appeal (Re CFRB, [1973] 3 O.R. 819) and at least one member of the Supreme Court of Canada on another occasion (Reference Re Anti Inflation Act, (1976) 68 D.L.R. (3d) 452 at 524 per Beetz J.) have also characterized radio communication as matters of national concern and thus coming within Parliament's POGG power. However radio communications have probably been so characterized due to the confusion and possible harm that could ensue if the allocation of radio frequencies were to be determined by ten provincial authorities. Hence the necessity for uniform control is undoubtedly the rationale for characterizing radio communication as a matter of national concern (POGG) as well as an interprovincial undertaking.

In the CFRB decision (supra) the Ontario Court of Appeal relied on POGG not only to justify federal control over broadcasting hardware and frequency allocation but also over the content of broadcasting. This may be explained as an example of a judicial reluctance to divide an undertaking into two portions for jurisdictional purposes. However it may be arguable that the CFRB decision does provide some support for the view that radio and television as a medium, regardless of the technology it utilizes (including closed-circuit cable), is a matter of national concern and thus within Parliament's POGG power. This however is still a very unsettled area of constitutional law. In the Reference Re Anti Inflation Act (supra) a majority of the Supreme Court of Canada held that for a matter to be qualified for POGG

it must not only be a matter of national concern but must have "a degree of unity that made it indivisible, an identity which made it distinct from provincial matters and a sufficient consistence to retain the bounds of form." In that decision "inflation" was not considered to have the requisite specificity to qualify it as an example of Parliament's POGG power (except in times of emergency). A sound argument might be made that the radio and television medium would have that degree of specificity for POGG but it is more difficult to conclude that it is also a matter of national concern. Professor Hogg in his recent treatise, Constitutional Law of Canada, 1977, p. 260, suggests that for a matter to be qualified for POGG, uniformity of law must not only be desirable but essential. One would have to conceive of a situation where one province could by its legislation with respect to the content of television and radio harm the residents of neighbouring provinces or the country as a whole. This would seem to be a most unlikely occurrence. Perhaps an attempt by one province to use its closed-circuit cable systems as a means to advocate secession might justify federal intervention but this would be best achieved by Parliament's emergency power rather than the permanent and normal use of POGG. It is unfortunate that there is very little judicial guidance on the meaning to be attributed to 'matters of national concern.'

If Parliament chose to declare all existing and future closed-circuit cable systems in the provinces to be works

for the general advantage of Canada, this unilateral action would be sufficient to bring these systems within exclusive federal jurisdiction. Resort to this declaratory power is regarded by many as politically unwise and therefore it is an unlikely course for Parliament to follow.

As mentioned earlier there are possible ways in which a closed-circuit cable system might be characterized as an inter-provincial undertaking and thus come within s.91(29) of the B.N.A. Act.

One way involves the judicially created ancillary doctrine which, simply put, allows Parliament to legislate in relation to a matter otherwise within provincial jurisdiction if it is necessarily incidental (or, bears a rational and functional connection) to an admittedly valid federal law. Hence, if Parliament could show that control over closed-circuit cable (particularly pay TV) was necessary in order to effectuate its policies with respect to broadcasting (or to prevent the frustration of those policies) then a strong argument for federal control could be made. However, reliance on the ancillary doctrine implicitly acknowledges that closed-circuit cable is primarily a matter of provincial concern but which becomes a matter upon which Parliament has a limited concurrent jurisdiction. If a federal ancillary law on closed-circuit cable conflicts with a provincial law on closed-circuit cable, the federal law would be paramount.

Two other ways exist by which a closed-circuit cable

system could be characterized as an inter-provincial undertaking. The most obvious exists when one closed-circuit cable company has cables extending beyond the boundaries of one province. This would be analogous to Bell Canada's telephone system.

A second way involves two independently owned and controlled closed-circuit cable systems in adjacent provinces which have interconnecting facilities. Whether or not this would be feasible or sensible is another question, but it would be analogous to the telephone systems in the Prairie provinces. Professor Lederman has argued that federal jurisdiction could extend at least to the interprovincial or long distance aspect of the telephone system (W.R. Lederman, "Telecommunications and the Federal Constitution of Canada" in Telecommunications in Canada (1973, English ed.)) leaving provincial control over intra-provincial calls. If Lederman is correct the same could apply to the cable systems.

There is some authority involving railways which would deny the validity of Lederman's claim. In Montreal v. Montreal Street Railway, [1912] A.C. 333 (P.C.) the fact that a local railway physically connected to a federal railway did not justify federal control over the former. Lederman argues that the railway cases do not provide proper anologies. He states at p. 377:

> The significance of the interconnection of two telecommunication networks . . . is all pervasive in a technical and scientific sense throughout two networks, and, for the most part, immediately all-pervasive at that. The interconnection of two railway networks

> involves the movement of railway locomotives and cars carrying people or goods. They do not "pervade" both networks so rapidly or so completely as to require common controls in the technical sense in the same way that instant electronic impulses require common controls in interconnected telecommunication . . . networks. The time span involved in electronic movements through the interconnection is also radically different, and so is the nature of the things moving.

It is probably a safe conclusion that cable is more analogous to telephones than to railways.

If an intra-provincial closed-circuit cable system not only interconnected with an inter-provincial cable system but was in part controlled or operated by that inter-provincial company, then federal control over both systems would be likely: Luscar Colleries v. McDonald [1927] A.C. 925 (P.C.); Queen v. Board of Transport Commissioners [1968] S.C.R. 118. Although Lederman claims that ownership by the federal undertaking of a majority of shares of the local undertaking would warrant federal control over the latter a recent decision of the Newfoundland Supreme Court illustrates the court's reluctance to pierce the corporate veil even for constitutional purposes: Re Day and Ross (Nfld.) Ltd., (1978) 18 Nfld. & P.E.I. R. 397 (where federal jurisdiction over a local undertaking was denied notwithstanding that the local undertaking was a subsidiary of an inter-provincial undertaking).

B. Educational Broadcasting

Educational broadcasting poses a thorny constitutional problem. Section 93 of the BNA Act allocates exclusive legislative authority over education to its provinces. Our highest courts have ruled that broadcasting is solely the concern of Parliament. The problem lies in determining whether a law is primarily in relation to education (in which case only the provinces could enact it), primarily broadcasting (hence exclusively federal) or equally in relation to education and broadcasting (and therefore a law that could be passed by both levels of government). The presumption of constitutionality afforded to all legislation means that the courts will strain to find a legitimate basis for federal or provincial laws notwithstanding the presence of (respectively) provincial or federal aspects. It is quite conceivable that the courts will uphold any provincial or federal law on educational broadcasting leaving any clashes or conflicts to be resolved by the paramountcy doctrine meaning that the provincial law will be rendered inoperative. But even if the courts strain to find a valid aspect, the problem of defining these aspects (education and broadcasting) remain.

Some laws will pose more problems than others. Parliament undoubtedly has the power to determine which frequencies in the electromagnetic spectrum are to be employed for broadcasting whatever the purpose. Any similar provincial laws would be either ultra vires or inoperative.

More contentious would be the question of licensing. At the present time Parliament assumes exclusive power to determine who shall obtain a broadcast license. Could the province grant a license to a broadcaster on the basis that the applicant would be engaged solely in educational broadcasting? This is not solely a question of carriage. Choice of competing applicants often turns on the type of service to be provided. It does not seem likely that the provinces would be able to exercise an exclusive licensing function with respect to educational broadcasters. However the courts may concede to the provinces a supplementary function. In effect there could be a two-tiered scheme of regulation for educational broadcasters who would be required to be licensed by both the federal and provincial authorities.

Control over content is the most likely area of dispute. Federal control over content is firmly grounded in judicial precedent. It has been held that federal jurisdiction in relation to broadcasting encompasses not only control over the hardware but as well control over programming and content. This principle was first enunciated by the Ontario Court of Appeal in Re CFRB & A-G. Canada et al. (1973) 38 D.L.R. (3d) 335 and was confirmed by the Supreme Court of Canada in the recent decision of Capital Cities Inc. v. C.R.T.C. (1977) 81 D.L.R. (3d) 609 (S.C.C.). Nor would it seem to matter that the federal content control relates to a matter otherwise in provincial jurisdiction. In the CFRB decision the federal law

prohibited any radio station from broadcasting a program, advertisement or announcement of a partisan character in relation to a federal, provincial or municipal election on the day before the election. Notwithstanding the fact that provincial and municipal elections are within provincial jurisdiction, the federal law was held to be valid.

But the CFRB decision went further than simply approving the federal "content" law. One of the reasons the courts seemed to give for validating the federal law was that the provincial legislature would not be able to pass such a law. Since the power must rest somewhere (according to traditional constitutional theory) and since such a law was desirable (an irrelevant consideration for constitutional purposes) the court concluded that Parliament must be able to enact it. The court said:

> While the control of individual persons might be legally accomplished by provincial legislation, the carrier system, being solely under the control and regulation of the Parliament, is beyond the reach of provincial regulation.

Although seemingly settled, the question of provincial regulation of the content of broadcasts arose again in the recent Supreme Court of Canada decision of A.G. Quebec v. Kellogg's Co. of Canada et al., (1978) 83 D.L.R. (3d) 314.

At issue was a regulation enacted pursuant to Quebec's Consumer Protection Act, 1971 Que. c.74. The regulation reads:

> 11.53 No one shall prepare, use, publish or cause to be published in Quebec advertising intended for children which:
> . . . . . .
> (b) employs cartoons.

The Attorney-General of Quebec sought and obtained an injunction restraining Kellogg's from advertising on television using cartoons. Although the injunction was quashed by the Court of Appeal it was restored by the Supreme Court of Canada. The Supreme Court recognized Parliament's authority to legislate respecting the content of broadcast undertakings but nevertheless upheld the provincial regulation. The court did not however say that there was a concurrent field of jurisdiction. Instead the court emphasized that the injunction was sought against Kellogg's and not the television station. In other words, the court said that in this case the province was regulating not the broadcaster but the advertiser or manufacturer. Whether the province could also dictate program content to a broadcaster was left unanswered. The court was split 6:3. Chief Justice Laskin wrote the dissenting opinion. He was of the opinion that a provincial law otherwise valid could not apply to a federal undertaking and in particular to a broadcast undertaking. He was unimpressed by the distinction drawn by the majority between regulating the broadcaster and the advertiser. He said that this was simply an "attempt to control the content of television programmes" and this he believed was within Parliament's exclusive jurisdiction.

In Kellogg's, by relying on the distinction between a broadcaster and an advertiser the majority effectively avoided having to decide which provincial laws could or could not apply to a broadcast undertaking. But one wonders how far the majority would carry this distinction. Supposedly,

a provincial law could now effectively prevent a provincial or municipal politician from making partisan speeches on radio or television. Could the province prevent independent producers (i.e. those not employed by a broadcaster) from producing material contrary to provincial consumer laws or education laws? Kellogg's would suggest that this could occur. Could the province prevent any advertiser -- whether it be a manufacturer or advertising company -- from sponsoring a particular program on the basis that the program is unhealthy for children or antithetical to the objectives of our educational system?

Although the distinction created by the majority may appear to be illusory when applied to other possible situations, it may have been a necessary distinction to make in order to prevent a wholesale invasion by the provincial legislature into the field of broadcasting. If the province was able to regulate content then it could not be stopped, constitutionally, at commercials. It would be able to control the content of programs pursuant to its other heads of power. It could, for example, prohibit programs that are morally offensive or contain excessive violence just as it may do with respect to the cinema: McNeil v Nova Scotia Board of Censors (1978) 84 D.L.R. (3d) 1 (S.C.C.). Indeed it could regulate the programming of all general purpose broadcasters from the aspect of education and require an education content quota. Although it would not be able to enforce its laws by licence revocation (except possibly for educational broad-

casters) it could do so by a system of fines and even jail terms. Although any conflict with a federal law on content would result in federal paramountcy, the fact remains that there will often not be a conflict,at least not in the eyes of the judiciary who tend to apply the paramountcy doctrine very restrictively.

Many may consider that a compromise is required which enables the province some measure of control over educational programming without opening the door to provincial regulation of all program content. This is difficult to achieve under our constitution and under the present judicial conception of broadcasting. Education does not have any higher status in the B.N.A. Act than the other heads of power in section 92 such as 92(13) and (16) which were the sections ruled upon by the Supreme Court of Canada to permit provincial film censorship.

If the courts are able to rationalize a way of limiting the provinces to educational broadcasting then the question remains whether provincial education laws will apply to all broadcasters or only to those whose sole or primary function is educational programming. This will depend entirely on the judge who hears the constitutional case. Various options are possible. The courts may decide that when a provincial law imposes educational content controls on a general broadcaster that the broadcasting aspect outweighs the educational aspect and invalidate the law. In such a case the province would be limited to regulating only educational broadcasters.

An alternate albeit somewhat novel approach might be adopted. The court might allow the province to impose a 5% educational content quota on all broadcasters but not a 30% quota, on the basis that in the former situation a valid province's objective is achieved without too great an interference in a federal undertaking. Admittedly this can lead to very arbitrary decisions and involve the judiciary in actively engaging in policy-making but it is a possible option. There are some analogies in our constitutional history. A province can impose a tax on a bank but not one that is prohibitive: compare, Bank of Toronto v. Lambe (supra) with Alberta Bank Taxation (supra). Similarly the province was allowed to apply a mechanics lien law to an uranium mine but not to an oil pipeline: compare Re Perini Ltd. v. Can-Met Explorations Ltd. and Guaranty Trust [1958] O.W.N. 330 with Campbell-Bennett Ltd. v. Comstock Midwestern Ltd. and Trans Mountain Pipe Line Co. [1954] S.C.R. 207. Both involved federal undertakings but one way of explaining their apparent inconsistency is that a mechanics lien, if applied to any portion of a pipeline would effectively dismember the pipeline and prevent the pipeline from operating, whereas a lien attached to an uranium mine would not necessarily interfere with its operations as the lien could be discharged by the sale of some non-essential assets.

Similarly provincial labour laws will not apply to federal undertakings but provincial workmens compensation laws do: compare, Commission du Salaire Minimum v. Bell

Telephone Co. of Canada (1966), 59 D.L.R. (2d) 145 (S.C.C.) and Workmen's Compensation Board v. C.P.R. (1920) 48 D.L.R. 218.

A plausible conclusion to draw from some of these decisions is that the courts attempt to balance the degree to which the provincial law interferes with the management, operation or structure of a federal undertaking against the importance or necessity of the provincial legislation.

Whether the provinces are limited to regulating educational broadcasters or all broadcasters the courts are still going to be confronted with the problem of defining education. Ronald Atkey discusses the problem of definition in "The Provincial Interest in Broadcasting under the Canadian Constitution" in Ontario Advisory Committee on the Constitution, Background Papers & Reports, Volume 2, p. 189, where he outlines the possible range that can be afforded this word "education." At 217 he states:

> . . . one might consider formal education of a scholastic nature: in-school instruction at the elementary, secondary and university levels. Or one might consider vocational training and trade schools or non-credit adult education in the home or the school. Finally one might consider education in its broadest sense: drama, music, public affairs, news, and sports.

Although the choice of definition is obviously for the courts it is likely that they would lean towards the scholastic end of the education spectrum in order to maintain some workable distinction between provincial and federal powers in the field of broadcasting.

Federal laws relating to educational broadcasting face

similar problems. It is not likely that the courts will allow the federal government to set up a parallel education system merely because the classroom is replaced by a television set. Parliament, it is submitted, would not be allowed to grant credits and degrees for courses taken on television. But the fact that Parliament has undoubted jurisdiction over program content makes it fairly easy to defend federal laws which impose educational programming content quotas on all broadcasters. In order to transform the television set into a teaching tool and to examine student-viewers and award college credits, there would have to be a co-operative effort between Parliament and the provincial legislatures. This cooperative approach was taken in Bill C-179 (March 10, 1969) which created the Canadian Educational Broadcasting Agency. The Bill, however,was only given first reading and then shelved. The Bill essentially authorized a federal agency to broadcast educational programs on behalf of provincial authorities. "Educational programs" was defined as follows:

> (d) "educational programs" means programs that are designed to be presented in a structured context to provide a continuity of learning content aimed at the systematic acquisition or improvement of knowledge by members of the audience to whom such programs are directed, and under circumstances such that the acquisition or improvement of such knowledge is subject to supervision by any appropriate means, including
> (i) the registration or enrolment of members of such audience in a course of instruction that includes the presentation of such programs,
> (ii) the granting to members of such audience of credit towards the attainment of a particular educational level or degree, or

(iii) the examination of members of such audience on the content of such programs or on material of which that content forms a part,

and "educational program material" has a corresponding meaning;

Although the Bill purports to grant the Lieutenant Governor in Council the power to designate a provincial authority to implement the educational aspect of the Bill, such authority in fact would have to come from the Provincial Legislature itself. Indeed it may be argued that the provincial legislature would be able to pass a law similar to that proposed by Bill C-179 more easily, from a constitutional perspective, than Parliament. The Agency may require a federal license but other than that it would engage in the type of activity that would be permissible under the rubric of educational broadcasting if such a power is said to rest in the provincial sphere.

C. Taxation

A number of provincial laws presently exist which impose a tax on various aspects of the telecommunications industries. There is certainly nothing constitutionally objectionable about a provincial tax on a telecommunication undertaking simply because the undertaking is a federal undertaking. If the province can tax banks it can tax a television station. However, if the tax is a colourable attempt by the province to regulate banks (or television stations) either because it is so high as to be prohibitive or makes the payment of the tax a condition for the operation of the undertaking, then of course the tax would be invalid: compare, Bank of Toronto v. Lambe (1887) 12 App. Co. s.575 and A.G. Alta. v. A.G. Canada [1939] A.C. 117 (B.C.).

If the provincial tax is not a colourable attempt to regulate a broadcast undertaking it will be valid as long as it is imposed as a direct tax in order to raise revenue for Provincial purposes. Since most economists hold the view that most taxes are indirect, the courts have been forced to create rather artificial rules to preserve the rather unrealistic distinction created by the B.N.A. Act between direct and indirect taxation. In determining the validity of a provincial taxing statute the court asks two basic questions. The first asks whether or not the tax falls within a category of direct or indirect taxes which was well recognized in 1867. In 1867 property or land taxes and income taxes were generally recognized as direct taxes,

whereas excise taxes and custom duties were considered indirect taxes. If a tax fell within one of these well recognized categories the matter would end there and there would not be any attempt to determine the economic tendency of the tax: City of Halifax v. Fairbanks, [1927] A.C. 117.

If, however, the tax does not fall within one of these categories, then a more functional test is employed, a test first enunciated by J. S. Mill in the following way:

> A direct tax is one which is demanded from the very persons who it is intended or desired should pay it. Indirect taxes are those which are demanded from one person in the expectation and intention that he shall indemnify himself at the expense of another.

The courts have added that it is the "general tendency of the tax and not its incidence in particular or special cases which must determine its classification and validity."

One exception to the general tendency test or perhaps better described as the judicial creation of a "new category" is the so-called consumer tax. Sales taxes were always characterized as indirect whether one relied on the categories test or the general tendency test. Traditionally the sales tax was imposed on the vendor of goods who would always be expected to pass the burden of the tax on to the consumer of the good. However simply by redrafting its legislation the provinces were able to transform an indirect sales tax into a direct sales tax without in any way altering the substance of the tax. Instead of taxing the vendor, the province taxed the consumer of the goods and designated the vendor as its (the province's) agent to collect the tax. As the consumer of

goods could not generally pass the tax on, this was now a direct tax: Atlantic Smoke Shops Ltd. v. Conlon [1943] A.C. 550 (P.C.). Complications however developed in defining who qualified as a consumer. In A.G. of B.C. v. Kingcome Navigation Co. Ltd. [1934] A.C. 45 (P.C.) a provincial law requiring anyone who consumes fuel oil to pay a sales tax was upheld notwithstanding that some of those consumers were persons involved in manufacturing goods or in trucking. These consumers would surely pass the burden of the tax onto the ultimate consumers of their goods or services. Similarly in Cairns Construction Ltd. v. Government of Saskatchewan, [1960] S.C.R. 619 a provincial tax on consumers and users of tangible personalty purchased at retail was held to apply to a building contractor who purchased pre-fabricated building materials notwithstanding that he would incorporate these materials into homes that he was building and selling and hence the burden of the tax would ultimately fall on the consumers of these homes.

Therefore it appeared that virtually any commodity could be taxed by the province, be it cigarettes, fuel oil or building products, and that a purchaser of the commodities would be liable to pay the tax if he or she used or "consumed" the product. It is consumed when it generally will not be passed on at all (as in the case of tobacco) or will not be sold in its same or substantially similar form. Merely because the burden of the tax is passed on by means of the by-product of the good consumed does not detract from the

validity of the tax. In the Cairns case if the tax was to be passed on it could not attach to the personalty becuase that was consumed. Rather it would attach to a substantially different product viz. realty.

With that basic background, the constitutionality of some provincial tax laws in the area of telecommunications can be explored. If the province simply imposed a tax on all users or consumers of telecommunication services such as telephones or cable, this would undoubtedly be valid. The householder who subscribes to cable would be no different from the householder who purchases cigarettes. Similarly the company which purchases a telephone service is similar to the company which purchases fuel oil to run their plant. Hence the recent amendment to Ontario's Retail Sales Tax Act, R.S.O. 1970, c.415 by Bill 58 would seem to be beyond reproach, in so far as its constitutionality is concerned. A tax is imposed on a purchaser of tangible personal property in respect of its consumption or use. Tangible personal property includes telecommunication services which is defined as including "telephone and telegraph services, community antenna television and cable television, transmission by microwave relay stations or by satellite and pay television but not including public broadcasting services that are broadcast through the air for direct reception by the public without charge."

A more difficult problem is raised when the province attempts to tax advertisements used on radio and television.

This is now being done in Quebec pursuant to the Broadcast Advertising Tax Act.

This Act imposes a tax of 2% on the purchaser for the price of air-time of an advertisement by a radio, television or cable-delivery station in Quebec. Some of these words are defined in the Act.

> "Purchaser" means any person who buys or takes a lease of air-time for his own purposes and not for resale, letting or re-letting.
>
> "Advertisement" means a commercial advertisement or any message of public interest of not over three minutes duration.
>
> "Price of air-time" means the total amount payable for the broadcast of an advertisement.

The vendor of the air-time is nominated to collect the tax as agent for the Minister of Revenue. In an attempt to ensure that the tax be imposed only "in the province" section 2 reads:

> Where the price of air-time for the broadcast of an advertisement includes broadcasting by stations outside Quebec, the amount of the tax otherwise payable is adjusted proportionately to the ratio between the price of air-time reasonably ascribable to the broadcast of advertisements by stations in Quebec and the price of air-time for the broadcast of the advertisement by all the stations.

Hence when an advertiser purchases air-time to be broadcast on a number of radio or television stations, some of which are in the province and some of which are outside the province, the tax is adjusted proportionately in the manner described.

There are also restrictions on the vendor of the air-time but discussion of them will be deferred until after the basic issue of the taxation of the purchaser is discussed.

As this tax is novel and hence does not come within any well-recognized tax category, the general tendency test could be used to determine its constitutionality. But before that is resorted to a good case can be made that the tax falls into the "new category" as a consumer tax. The purchaser is taxed and the purchaser is by definition using the air-time for his own purposes and not for resale. The purchaser may be a manufacturer, wholesaler, retailer or advertising agent. Hence there is no doubt that the tax will be passed on by increasing the price of the goods which were the subject of the advertisement. But if past cases are a reliable guide then it seems that the court would nevertheless characterize the tax a consumer tax and hence direct and therefore valid. It is really no different from the purchase of fuel oil. The advertisement — the commodity — is consumed. It is not passed on to any other consumer. The fact that there is a "by product" from the consumption of the commodity would not affect the validity of the tax.

However this tax is unlike the fuel oil tax or tobacco tax or tangible personal property tax, in that almost every purchaser of an advertisement will be a vendor. That could not be said of all purchasers of the product of fuel oil, tobacco or tangible personal property. This factor should not

be very significant if the purchaser is otherwise characterized as a consumer. But if my analysis of what constitutes a consumer is wrong then the tax may be invalid. The courts may simply ask what is the general tendency of the tax. With this tax, the tax will in every case be passed on to the ultimate consumer. (Note, that a purchaser of air-time for a message of public interest was also taxed and this tax would not usually be passed on. But the court could sever the invalid tax on the commercial advertiser from the valid tax on the "public interest advertiser".) That was not necessarily true in Kingcome (the fuel oil case) as many purchasers were householders. Although it's likely that the largest quantity of fuel oil was purchased by those in the commercial sector, there were probably more householders purchasing the fuel oil than there were merchants, etc. Hence it is possible that the court would characterize this advertising tax as an indirect tax by resorting to Mill's definition or simply characterize it not as a consumer tax but a commodity tax thus falling into a well-recognized category of indirect taxation. This, in my opinion, would seem to be at variance with the approach taken in the past but it could nevertheless be the approach taken today by the court.

A recent decision by the Supreme Court of Canada, Simpson-Sears Ltd. v. Provincial Secretary of New Brunswick et al. (1978) 82 D.L.R. (3d) 321 is illustrative of the ambiguity in this area and also provides support for a conclusion that the Quebec Tax law is invalid. The court split 5:4 on

the constitutionality of a provincial taxing statute. The statute is analogous to the Quebec Broadcast Advertising Act since it attempted to impose a tax on inter alia the consumer of catalogues. Although much of the decision revolved around the questions of statutory interpretation as to whether the tax was intended to be imposed on a free distributor or only on a purchaser at retail, the court also addressed the constitutional issue. In essence the court was asked to determine whether a tax on a consumer of a Simpson-Sears catalogue when the consumer was Simpson-Sears, would be valid. The dissenting members of the court said that it would be valid —that the tax is no different than the tobacco tax or building product tax. Although the tax would be passed on to the ultimate consumer of the goods advertised in the catalogue, Simpson-Sears was nevertheless the final user of the commodity taxed—or in other words "the consumer." Although the tax would be passed on, it was likened to all the other general expenses of Simpson-Sears which obviously would be covered by the mark-up of the goods sold.

But the majority quite surprisingly ignored the consumer test that, as I have suggested, had crystallized prior to this decision. In a very brief judgment Chief Justice Laskin stated:

> However "consumer" is defined, it must be related to direct taxation, and it would be strange indeed if, under the terms of a definition of "consumer" a Province could validly tax a seller or a distributor, regardless of the subsequent impact or general tendency of the tax. Constitutional limitations cannot be evaded by such a bootstrap exercise.

Although Laskin C.J.'s view seems clear, his words may be branded as obiter since he did not consider the constitutional issue relevant since the tax would be inapplicable by the reading of the statute. Although an economist would surely agree with Laskin C.J., his reasons for invalidating this law are difficult to reconcile with previous jurisprudence particularly Kingcome (fuel oil tax) and Cairns (building products tax). It would be defensible if the New Brunswick tax law applied only to consumers of trade catalogues because in that case only vendors are taxed. But that was not the case. The New Brunswick tax was imposed on "every consumer of goods consumed in the province" and hence would encompass the purchase of ordinary articles in retail trade by ordinary non-commercial consumers. The fact that some of these consumers would be vendors such as Simpson-Sears is not really any different from what occurred in Kingcome (fuel oil tax) where some of the consumers were manufacturers or vendors and yet the law was held valid even when imposed on them. However, the Quebec law (i.e. broadcast advertising tax) is different in this respect from the New Brunswick law (catalogue tax). The Quebec tax applies only to vendors (subject to the minor exception of public interest messages which could be severed and saved). Hence Laskin C.J.'s reasoning would apply with even greater force to invalidate the Quebec law. This, of course, assumes that catalogues are essentially the same as advertisements made through the broadcast media, which I would submit is the case.

Ritchie J. with three other justices concurring, held that Simpson-Sears was not a consumer since they were not the "last purchaser" or "last user" of the article. If he meant that the "home" consumer who received the catalogue was the ultimate consumer then catalogues are different from advertisements on television which can not be physically passed on to anyone else unless the transmission into the living room of the consumer is considered analogous.

But the reason Ritchie J. seemed to say that Simpson-Sears was not the "final purchaser" was that the consumer of the goods advertised in the catalogue would be the final purchaser. They were the final purchasers because, in his view, "it is the purchase which the recipient makes from the catalogue and not the catalogue itself which attracts the tax." The reasoning, however, is also difficult to reconcile with the decisions in Kingcome (the fuel oil tax) or Cairns (the building product tax). That is why either Pigeon J.'s judgment (the dissent) or Laskin C.J.'s judgment (one member of the majority) is to be preferred when the Quebec law is challenged. Pigeon J. would probably uphold Quebec's broadcast advertising tax whereas Laskin C.J. would probably invalidate it. Pigeon J. would slot the tax into the consumer tax category; Laskin C.J. would deny that it was a consumer tax when all the consumers were sellers or distributors.

Hence in conclusion, prior to the Simpson-Sears decision, I would have predicted that the Quebec advertising

tax legislation would have been valid. But in light of the very split Supreme Court of Canada in the Simpson-Sears case its validity is now much more uncertain. If the composition of the court today was identical to its composition in the Simpson-Sears case I would predict a ruling 5:4 against the validity of the advertising tax act. But since that decision two members of the court have left, one of whom was in the majority, the other of whom was in the dissent. Whether the two new judges will feel bound to follow the majority if the Quebec advertising tax law is challenged or whether they would find it sufficiently distinguishable to treat it res integra and hence possibly follow the minority view, is of course anyone's guess. Simpson-Sears is apparently directly challenging the constitutionality of the New Brunswick law (now amended to deal expressly with Simpson's catalogues) which hopefully will shed more light into this area.

Up to this point I have only been discussing one portion of the Quebec advertising tax law. Even if that portion is valid there remains another part which is suspect. If the latter is invalid and cannot be severed from the former, then the whole Act will be struck down. I therefore now address this second issue.

The second issue relates to the enforcement of the tax law. Not only are sellers of air-time deemed to be agents for the government in collecting the tax, but section 7 also requires every person who sells air-time to obtain a "registration certificate" issued under the Act. If a

person sells air-time without a certificate he violates the Act and is guilty of an offence punishable by a fine. Moreover if a person is found guilty of an offence against the Act either because he sold air-time without a certificate or because he refused to collect the tax, he can be refused a certificate in the future or have his certificate suspended or cancelled if presently held, as the case may be. Since most sellers of air-time are likely to be broadcasters, the province could effectively prevent that broadcaster from operating since his operation depends so heavily on the sale of air-time. This provision is very likely invalid. As it would be seen as potentially sterilizing the capacity of the broadcast undertaking, it would probably be characterized as an "undertaking law" and hence invalid. Although a tax law requires an enforcement provision, that could adequately be achieved by a stiff fine or penalty against the broadcaster. To prevent the broadcaster from selling air-time and hence to effectively prevent them from broadcasting would be a blatant invasion of Parliament's jurisdiction.

As with most constitutional issues, there is always a counter argument. This admits of no exception, though it is submitted that the counter argument is weak. It lies in the Supreme Court of Canada's decision of Canadian Indemnity Co. et al. v. A.G. B.C. (1976), 73 D.L.R. (3d) 111. There, a provincial law was held valid even though it effectually put a federally incorporated company out of business. Because the law was otherwise valid and was not a "company law" the

fact that it had disastrous effects on the company was considered constitutionally irrelevant. But there is a crucial difference in these two laws. A federally incorporated company is only protected against provincial "company laws." A law which prevents a company from operating is not necessarily a company law unless it deals with its corporate status such as the right to sue or its right of limited liability. But a federal undertaking is guaranteed the right to operate and this right can only be taken away by Parliament and not by the province. Even if the provincial law is valid vis-a-vis provincial undertakings, it will be invalid vis-a-vis federal undertakings where it substantially impairs the operation of that undertaking; it then becomes an "undertaking law."

It seems that only section 7 would be ultra vires. This is the section which requires all sellers to obtain a certificate and authorizes the suspension or refusal of a certificate. This can probably be severed from the rest of the Act, assuming of course that the rest is held to be a valid direct tax. The penalty section (i.e. s.9) would be valid on the basis of s.92(15) of the B.N.A. Act which enables the province to impose a penalty to enforce a valid provincial law.

As a final matter, it should be noted that even if the province can impose a tax on broadcast undertakings, there is some doubt as to whether the province can tax the C.B.C. because the C.B.C. is a Crown Corporation. Professor La Forest in The Allocation of Taxing Power Under the Canadian

Constitution (Canadian Tax Foundation, 1967), 145 states that the "province cannot levy a tax against the federal authorities because of the paramount position of the Dominion, and this exemption applies to corporations or other entities that are emanations of the Crown such as the Central Mortgage and Housing Corporation." There is however little judicial authority for such a proposition. Indeed a contrary proposition can be made by the fact that s.125 of the B.N.A. Act prohibits provincial taxation only of lands or property of the federal government. Supposedly gross or net revenues would not fall within the phrase "lands or property" and hence by the application of the maxim inclusio unius est exclusio alterius it could be argued that the province can tax things other than land or property of Canada.

In Recorder's Court et al. v. C.B.C. [1941] 2 D.L.R. 551 the Quebec's King's Bench held that a provincial sales tax would not apply to a purchase by the C.B.C. of a piano. However that holding was not a result of constitutional theory. The taxing statute did not apply to sales to the Federal Government. The only issue then was whether the C.B.C. was the Crown or agent of the Crown and thus "the Federal Government." The court concluded that it was. But this holding in fact would imply that had the provincial statute imposed the tax on the C.B.C. then it would have been valid. However the editors of the case drew an opposite conclusion: They said, without citing any authority:

The provisions of the bylaw rendering its provisions

> inapplicable to sales to the Dominion Government would appear to be mere surplusage since a Provincial Legislature could not confer power on a subordinate body to impose taxation on the Dominion Government, a power which it could not confer on itself.

This conclusion is undoubtedly based on the wider proposition as created by the courts, although not dictated by the B.N.A. Act, that the province can not bind the Federal Crown: Gauthier v. The King (1918) 56 S.C.R. 176 and tax laws are probably no different. If the C.B.C. is considered to be embraced within the concept of the "Federal Crown," then the inapplicability of a tax law follows. Professor P. W. Hogg in his recent treatise Constitutional Law of Canada (Carswell: Toronto, 1977) at 179 and 413 questions the logic of this position and it may be that this issue will have to be settled by the courts.

CHAPTER III

AN EXAMINATION OF SOME PROPOSALS FOR CONSTITUTIONAL REFORM

This portion of our report will deal with a number of issues which arise as a result of some of the proposals thus far presented by others on constitutional reform in general and on telecommunications specifically. The proposals which are of primary concern are:

a) The Pepin-Robarts Task Force on Canadian Unity (hereinafter referred to as the Pepin-Robarts Report)

b) The Canadian Bar Association's Committee on the Constitution, Towards a New Canada (hereinafter referred to as the C.B.A. Report).

c) Draft Federal Proposals on Cable Distribution as presented to the Conference of First Ministers on the Constitution, February 5-6, 1979 (hereinafter referred to as the First Ministers Report (see Appendix A)).

d) Quebec Proposal to Federal-Provincial Conference of Communications Ministers, Charlottetown, May 29-30, 1978 (see Appendix B).

We have not attempted to analyse any of these reports either exhaustively or intensively. However, a number of general issues dealing with the basic principles of constitutional law and constitutional reform are considered. These are:

A. The criteria to be used in determining how Legislative powers are to be divided and to which level of government

B. Concurrency and Paramountcy

C. The Residual Power

D. Legislative Interdelegation, Legislative Adoption, Administrative Delegation.

A. The Criteria to Be Used in Determining How Legislative Powers are to Be Divided and to Which Level of Government

Both the C.B.A. report and the Pepin-Robarts report turn their attention to the premises and principles underlying the division of powers in a federal constitution. The present B.N.A. Act allocates fifty "classes of subjects" between Parliament and the provincial legislatures. Aside from three areas (immigration, agriculture and old age pensions), these classes of subjects are within the exclusive jurisdiction of either Parliament or the provincial legislatures. The principle of exclusivity would seem to be a classic characteristic of a federal constitution. Although some have disputed the value of this doctrine (most notably P. J. O'Hearn, Peace, Order & Good Government, 1964, Toronto), most students of federalism support the principle of exclusivity. The principle of exclusivity is endorsed by both the C.B.A. report and the Pepin-Robarts report. The C.B.A. report at p. 66 sets out the disadvantage of concurrent jurisdiction (the alternative to exclusive jurisdiction) in that it leads to duplication of bureaucracies and hence increases the cost of government. They state that it can also create more opportunities for federal-provincial bickering. There are areas, they say, in which it is either essential or highly desirable that one level of government or the other has exclusive jurisdiction.

The Pepin-Robarts report also recognizes that concurrent jurisdiction is potentially a greater source of conflict than exclusive jurisdiction. One of the primary reasons given for

concurrent jurisdiction is to increase the flexibility of the Constitution. However, as was noted by the C.B.A. report (p. 66), the courts have been able to achieve flexibility by the use of the aspect doctrine which recognizes the overlapping nature of the various legislative powers.

However both the C.B.A. and the Pepin-Robarts reports have acknowledged the need for more concurrent areas of jurisdiction. This is particularly evident in the C.B.A. report which recommends that seven areas in the Constitution be areas of concurrent jurisdiction:

> Taxation (Recommendation 12.1)
> Retirement Insurance (14.4)
> Family Benefits, Old Age Security (14.5)
> Atomic Energy (19.7)
> Broadcasting & Cable (21.1)
> Intra-Provincial Telephones (21.4)
> Immigration (23.3)

As the Pepin-Robarts does not attempt to provide a draft constitution, the areas of concurrent jurisdiction it proposes are less precise. But it gives some examples: language, culture, civil law, research, communications, taxation, and some aspects of foreign relations (p. 86). Two questions must be asked: (1) how did the respective reports determine which level of government would be entrusted with the power which was to be exclusive; and (2) what factors determined whether a particular power should be exclusive or concurrent (shared).

1. The Allocation of Exclusive Powers

Both reports provided the more traditional arguments in determining to whom the exclusive powers should go. Matters

of national concern should be entrusted with the central government; matters of local concern with the provincial governments. This was further developed to recognize that matters relating to economic policy should be federal whereas matters relating to the community, family, education, and culture should be left with the provinces. (See C.B.A. report p. 64 and the Pepin-Robarts report, p. 85.) This division however essentially represents the present division of powers in the B.N.A. Act. (See the interesting article by A. Abel, "The Neglected Logic of 91 and 92" 19 U. Toronto L. J. 487 1969.) But the Pepin-Robarts report attempts to articulate other criteria that should be looked to when determining whether a matter should be allocated to either the federal or provincial legislatures. This is a welcome approach to constitutional reform where the underlying premises for the division of powers are often ignored or subordinated to what may be considered political considerations. However it is respectfully submitted that the criteria chosen by the authors of the Pepin-Robarts report, are with some exceptions, less than satisfactory.

Criteria 1. Public activities of Canada-wide concern should normally be handled by Ottawa and activities of provincial or local concern by the provinces.

Comments

This is quite obviously a valid criterion but because it is so general and more in the nature of a conclusion than an explanation, it is generally unhelpful. Sound criteria are

needed to determine when something is of national or local concern.

Criteria 2. Consideration should be given to which order of government can fulfill a responsibility most efficiently and most effectively in relation to cost. In measuring effectiveness consideration must include not merely administrative and economic efficiency but political responsiveness, sensitivity and closeness to the concerns of the individual citizen.

Comments

The major difficulty with this criterion is that it may be instrumental in creating a deadlock rather than a means of resolving the problem of allocating the various powers. If economic efficiency is the criterion one would suspect that in most instances, simply due to economies of scale, the subject matter would be allocated to the federal government, whereas it would invariably be the provincial legislatures who are closer to the concerns of the individual citizens. Which factor should assume greater importance?

If administrative efficiency refers to the type of bureaucracy then this is not a function of any particular subject matter; rather it is a function of the type of administrative structure created to deal with the problem, the resources available to the administrators and the people appointed to be administrators. Some subject matter may be intrinsically more complex and require a complex administrative scheme. Others may involve very little government intervention. But assuming the former type of matter, which level of government will be chosen to administer it? Some would

argue that neither the Federal nor provincial governments are inherently more efficient administrators. Even if some would contend that the federal government is more efficient, then this would require all subject matter (or at least those requiring some administrative scheme) to go to the Federal government. If the opposite claim is made by others in favour of the provincial governments, we arrive at a standstill. Both conclusions depend upon a priori assumptions that, as a general proposition, either the federal or provincial government has a more efficient bureaucracy. It obviously could not depend on the particular government of the day as the constitution must be a relatively permanent document.

It may be that matters of local concern should be dealt with by local administrators and national concerns by a central administrator, but now the matter is being allocated on the basis of criteria #1, not criteria #2.

If criteria #2 refers not to the efficiency of the bureaucracy but rather to the feasibility and practicality of implementing a particular program, then it would be a valid criteria. In this sense it helps determine which matters are of national concern and which can effectively be dealt with on the local level. Hence confusion would result if the allocation of radio frequencies or airline routes were granted to ten different governments. Therefore, with certain subject matter, a single authority is required to ensure that the activity can be carried out effectively and without harm to others. The point is made by Dale Gibson (1967) 7 Man. L. J.

and again by Professor Hogg in his recent treatise, Constitutional Law of Canada at p. 260 when he says:

> There are . . . cases where uniformity of law throughout the country is not merely desirable but essential . . . This is the case when the failure of one province to act would injure the residents of the other (cooperating) provinces.

He then cites some well known examples of matters entrusted by the national concern doctrine to Parliament: aeronautics, broadcasting, the national capital region. Indeed the C.B.A. report gives another example: currency (p. 66).

Political responsiveness would also seem to be unhelpful as a criterion for dividing legislative power. It seems that if a problem is local then the local legislature is going to be more sensitive and responsive to the problem than the national legislature. There do not seem to be any classes of subjects which by their nature would indicate which order of government would be more responsive. If anything the existence of political responsiveness may be undesirable. If a subject matter is entrusted to a provincial legislature then,because of the principle of delegation, the same can be delegated to the local municipal councils. There may arise some volatile issue of "local concern" that ought to be dealt with by an authority which is less subject to local pressures and is capable of dealing more rationally and dispassionately with the problem. This is particularly true when the "local problem" involves the action by a minority whose civil liberties are at stake. The criminal law would probably be left with the provinces if political responsiveness was a

governing criteria. But the importance of that factor would seem to be overridden by a desire to have a uniform criminal law which reflects the fundamental values and norms of all Canadians and not the values of any particular group. It should be noted however that the Supreme Court of Canada has recently recognized the importance of "local evils" as a basis for provincial jurisdiction in A. G. of Canada v Dupont(1978)84 D.L.R. (3d) 423.

Criteria #3. Where there is already common agreement there is an advantage in incorporating that agreement. It would also be advisable to respect existing federal-provincial agreements such as the recent ones concerning the selection and settlement of immigrants.

Comment

This seems to suggest that politics are to be paramount over policy. It seems that the authors are saying that even if the "agreement" is inconsistent with the kind of arrangement dictated by the other criteria, it is nonetheless to be adopted into the Constitution.

This criterion would seem to take into account the reality that constitutional amendment involves a good deal of political compromise and should therefore be recognized. As long as this criterion is treated only as one factor, not in itself determinative, then there would not appear to be any serious objection to it. However as a guide to the formulation of an ideal constitution it does seem to be overly pragmatic. Although no one expects to have a Utopian constitution it

would have been better for the authors to think in terms of realizing an ideal and providing criteria which will help reach that objective. The political compromises will happen anyway but there seems little reason to elevate them to the status of normative criteria.

Criteria #4. Where there is no contention, this is an advantage to maintaining continuity with past practices . . . Furthermore, in the interests of continuity whenever there is agreement, the retention of existing wording is likely to produce greater certainty regarding future judicial interpretation.

Comment

The criticisms of criteria #3 would seem to apply here as well. As a pragmatic consideration it is beyond reproach. But is it too pragmatic? It says 'let sleeping dogs lie' and would imply that it is only where an area becomes contentious should it be ripe for constitutional amendment. It seems that before this course of action be adopted the framers of the new constitution should attempt to discover, if they can, why certain areas are uncontentious. Is it because the powers are rarely used or is it because both levels of government recognize that the present arrangement is workable? Some foresight should be employed to attempt to determine whether what is now a non-contentious area will remain that way or whether change in sociological, economic or technological forces will inevitably result in new areas of contention.

Criteria #5. The allocation of competence over specific subject matters should be evaluated in terms of the effects upon the overall balance of responsibilities which each order of government will have.

Comment

This appears to be an eminently sensible proposition but I quite frankly have a difficult time understanding how it would be applied. What kind of balance is envisaged? The wording suggests not only that federal and provincial powers should be balanced but also a certain balance must exist within each order of government. One example suggested in the report is that at present there is in the provincial sector "an imbalance between their legislative responsibilities and their fiscal capacity . . . "(p. 84). Perhaps what is also meant is a balance between the cultural and economic aspects of society. It would,however, have been very worthwhile had a few illustrations been provided by the Task Force so that the intention behind the criterion be better known.

2. Concurrency or Exclusivity?

Both the C.B.A. and Pepin-Robarts report recognized that some powers in the Constitution ought to be shared or concurrent. The C.B.A. recommended that concurrency be adopted only in clear or compelling cases. It however suggested that seven areas should be concurrent. The Pepin-Robarts report said that concurrence should be kept to a minimum but proposed six areas that could be concurrent (supra p.94). What seems to be lacking in both reports are reasons for this shift,

albeit limited, toward concurrency. The C.B.A. report stated that the main argument for concurrency is to increase flexibility but it responded by saying that flexibility can be bought at too great a cost and in any event the authors felt that because of the aspect doctrine a constitution consisting of exclusive powers can be very flexible. What then were the reasons that some powers should be concurrent?

The C.B.A. report states (p. 124)

> . . . in the case of certain matters the granting of concurrent jurisdiction is necessary because it is not possible to determine in the abstract the boundary line between national and local interests and that it must be worked out in the context by the two levels of government.

One way in which the Pepin-Robarts report seems to resolve this problem is to allocate jurisdiction over very specific and detailed subject matters. This avoids the "all or nothing approach" which results when large domains of jurisdiction are allocated to one level of government or the other. It is obviously very difficult to reach an agreement as to which level of government should have exclusive jurisdiction over the vast field of telecommunication. But if the field is broken down into smaller subject matters it will be much easier for Parliament to agree to give exclusive jurisdiction on one or more small areas to the provinces if it can obtain exclusive jurisdiction on other smaller areas in the same field. Hopefully the choice of the areas and the allocation to one level of government or the other will be dictated primarily by sound principle as well. Hence resort

to concurrent power can be avoided if the general field of powers are subdivided and then allocated on an exclusive basis. The broader field may be shared but now in a highly regulated and defined manner.

Nothwithstanding the suggestion by the Pepin-Robarts report which would seem to obviate the need for concurrency, the authors of that report still acknowledge that in some areas concurrency will still be necessary. Again the question arises as to why? At p. 90 they state that there are areas which are particularly contentious. If this is the reason (and it reflects the view held in the C.B.A. report), then the decision to opt for concurrent power can be viewed as a last resort measure or a cop-out, depending on one's point of view. In effect they seem to be saying if no agreement can be reached by the politicians at the time of the creation of the new constitution, then the decision will be deferred until such time as agreement can be reached and failing that, the decision will ultimately be one for the courts. It should be noted that there is one valid reason for resorting to concurrent jurisdiction, if the matter is arguably both of national and provincial concern. If the power was allotted exclusively to one level of government but it chose not to exercise its jurisdiction, the other level of government could not choose to do so. But where the power is concurrent, either level of government can exercise their jurisdiction and in the event of a conflict, the power would be exercised by the paramount legislature.

One other reason is provided by the Pepin-Robarts report, and again it is akin to a "lesser-of-evils"-type argument. The Pepin-Robarts report stated that Quebec had distinctive needs which should be recognized and accommodated in the Constitution. One way of achieving this would be to afford Quebec a "special status" whereby it would have legislative power not granted to the other provinces. This method however was not favoured, basically because it would suggest that Quebec was superior to the other provinces,which was contrary to their basic position that all provinces are equal,albeit "different."

The C.B.A. report however expressly gives four reasons why special status should not be afforded. (These were in fact adopted from the Special Joint Committee of the Senate and the House of Commons on the Constitution.)

1) That it isolates a particular Province and in effect, destroys the minimum requirements for a federal state;

2) That it places the special-status Province and its representatives in an untenable position in Federal institutions;

3) That it creates different classes of citizenship within the same state;

4) That it jeopardizes the integrity of the state, internally and externally.

To avoid granting Quebec a special status, the Pepin-Robarts report opted for concurrency. Indeed this seemed to be the main reason for concurrent powers. Thus they recommended placing under concurrent jurisdiction those areas needed by Quebec to maintain its distinctive culture and heritage, with

provincial paramountcy, and leaving the other provinces with the option of exercising these powers as well, or if they did not want to exercise these powers, they would be left to Parliament instead.

One has to wonder whether the use of concurrency for this reason is somewhat irrational. It was resorted to, to avoid allegations of favouritism towards Quebec. But that allegation should only hurt if there is some truth to it, and then obviously, any such acts of playing favourite should be avoided. However if Quebec does have some legitimate needs, then is it being treated as superior to the other provinces if only it is given certain powers not granted to other provinces? By the same token, other provinces may have certain special needs and they too could be specially accommodated. If policy and sound principle dictate that only Quebec have certain powers, then arguably only Quebec should receive those powers. To do otherwise could lead to a deluge of concurrent power. The Prairie provinces might claim to have a distinctive need to have exclusive power over national resources and Indian rights. The Maritime provinces may have a distinctive need over fisheries and off-shore minerals. Do we therefore add all of those powers to the lot of concurrent powers? If in fact so many of our provinces do have many distinctive needs, then perhaps one has to rethink very seriously our present federal model.

The concern expressed by the C.B.A. and the Joint Committee cannot be underrated or overlooked. They are unquestionably valid. No choice will be made at this juncture. The matter is raised for the purpose of further discussion, the choice being: "Do we avoid the appearance of favouritism by resorting to distribution of power that cannot be justified on the basis of sound principles?" The other question of course is: "Does Quebec have needs that are so distinctive that we are forced to alter the basic framework of the Constitution to accommodate her?"

B. Concurrency and Paramountcy

Having decided that there will be certain areas of concurrent jurisdiction, some attention should be paid to the way in which it will work in practice. Neither the C.B.A. nor Pepin-Robarts reports do so. The doctrine of paramountcy is well known in Canadian constitutional law. Where a valid provincial law conflicts with a valid federal law, the federal law is paramount and the provincial law is rendered inoperative. This does not mean that the provincial law is repealed. Indeed if the federal law is subsequently repealed by Parliament, the provincial law is revived and becomes operative.

Although this doctrine is simple to state, it is very difficult to apply. The thorny problem has been when a "conflict" arises. On the one hand the court may take the approach that a conflict only arises when there is an express

contradiction, i.e. where one law expressly contradicts the other. On the other hand the courts could activate the paramountcy doctrine when a provincial law is simply inconsistent with the spirit and intent of the federal law. The jurisprudence in the area will not be analyzed or canvassed at this point, but an excellent discussion of the paramountcy doctrine is provided by Hogg, Canadian Constitutional Law, 1977, 101 to 114. Suffice to say at this juncture that our courts have adopted a very restrictive approach to the paramountcy doctrine, thus leaning towards the former rather than the latter method. In effect very few provincial laws are rendered inoperative, even though to most people there is an obvious conflict.

The paramountcy doctrine has only been applied when two laws, each within the exclusive jurisdiction of the enacting legislature are concerned. There have been no instances, to my knowledge, of paramountcy arising within the existing areas of concurrent jurisdiction in the B.N.A. Act. One wonders therefore if the paramountcy doctrine would be treated any differently when the conflict exists between two laws in a concurrent field. This of course depends upon the reasons why the courts have adopted the present approach to paramountcy. If the restrictive approach stems from an attitude of judicial restraint, "leaving all but the irreconciable conflicts to be resolved in the political arena" (Hogg, p. 102), then the same approach will be taken when the conflict arises in a concurrent field. If the present approach reflects

a pro-provincial bias,then a concurrent power with provincial paramountcy (which is recommended in some areas by both the C.B.A. and Pepin-Robarts reports) would result in a more common invocation of the paramountcy doctrine. It is highly unlikely that this latter reason is a valid explanation for the way the paramountcy doctrine is used.

Another reason can be suggested,which is somewhat related to the first one, i.e. judicial restraint. Judicial restraint may simply be a function of the court's perception of the judicial role particularly in a democratic country,where the will of the legislature should be accorded deference. However judicial restraint may be more compelling when the clash is between two valid laws, each of which are enacted by equal legislatures and each of which have exclusive jurisdiction to enact the law in question. However one might argue that a concurrent field is one which implicitly recognizes the need for cooperation. Cooperation is not contemplated when powers are by definition mutually exclusive. If cooperation is the byword of a concurrent field, the courts may be more ready to invalidate those laws which frustrate the implementation of policies in the concurrent field. Hence if both legislatures are given jurisdiction over immigration,the primary consideration should be the implementation of sound immigration policies. But where one legislature is given exclusive jurisdiction over highways and the other exclusive jurisdiction over criminal law, the court may strain to allow both the highway laws (policies) and the criminal laws (policies) to operate not-

withstanding some obvious inconsistencies.

An argument can be made which supports an opposite conclusion: viz., that the courts may take an even more restrictive approach to paramountcy when two laws exist in a concurrent field. If a provincial law is allowed to interfere with the operation of a law which is in the exclusive domain of Parliament, then it is arguable that an even greater interference will be permitted when Parliament (or the paramount legislature whichever that is) only shares the field.

The C.B.A. report (p. 117) grants Parliament and the provincial legislatures concurrent legislative power respecting broadcast undertakings (radio and television stations and cable television systems) and closed circuit cable systems, with federal paramountcy. Analogizing to other fields of jurisdiction where the paramountcy doctrine has been applied, the following situations might arise (assuming the paramountcy doctrine is applied in the same restrictive fashion):

a) A broadcast undertaking could be required to obtain a license from both the federal authorities and the provincial authorities before it could operate. Parliament might authorize the license to last for five years, where the province could require that the license be renewed every year.

b) If Parliament imposed a 40% Canadian content rule, the provinces could impose a 50% requirement: O'Grady v Sparling [1960] S.C.R. 804.

c) If a broadcaster violates a federal law and Parliament authorizes only a monetary penalty, the provinces could

authorize the revocation of the broadcaster's license: Ross v Registrar of Motor Vehicles [1975] 1 S.C.R. 5. Similarly the provinces could require that an additional monetary penalty be paid to them.

d) If Parliament prohibits pay television, the provinces probably could not permit it. However if Parliament does not prohibit it (thus implicitly but not expressly permitting it), the provinces may be able to prohibit it. Even if the province could not expressly prohibit it, they might be able to deter its use by stating that it will be taken into consideration as a negative factor when the broadcast license comes up for renewal: Reference the s.92(4) of the Vehicles Act 1957 (Sask.) [1958] S.C.R. 608.

e) The area of identical or duplicitous legislation is somewhat in doubt. In Multiple Access v McCutcheon 78 D.L.R. (3d) 701, the Ontario Divisional Court rendered inoperative a provincial insider trading law which was identical to a federal law. It is submitted that the paramountcy doctrine was not invoked simply because the legislation was duplicitous. Rather it was because the two laws could not co-exist. The laws required an insider who made a profit by trading shares as a result of the misuse of corporation information, to compensate any person or corporation for any loss suffered as a result. This was not akin to a double penalty; rather here there was only "one pot of gold" and both levels of government authorized the taking of all of it. Since the insider should logically only repay what he improperly received (and indeed

in many cases that is all the individual will have to pay), it meant that the action could be instituted by one authority or the other, but not by both. Instead of relying on the administrators to cooperate, the court used the constitution to prevent a potential administrative conflict. The decision was affirmed by the Ontario Court of Appeal.

Hence applied in the context of broadcasting,if both the province and the federal government had an identical "fairness rule," a broadcaster who showed one side of an issue would only have to show the other side of the issue once and not twice. However if both Parliament and the provinces prohibited the use of cartoons when advertising for children, the broadcaster could be required to pay the penalty, if a fine, to both authorities.

The problems of paramountcy in a concurrent field are exacerbated when the paramount legislature alternates between Parliament and the provincial legislatures. Both the C.B.A. and Pepin-Robarts reports contemplate a list of concurrent powers with federal paramountcy and a list with provincial paramountcy. For example, the C.B.A. proposal makes retirement insurance a concurrent field with provincial paramountcy, and also makes atomic energy a concurrent field,but with federal paramountcy. Suppose the <u>provincial</u> legislature enacts a law requiring the operators of all uranium mines to contribute a certain amount to a fund which will provide a worker with a pension when he or she retires. However a person will only be entitled to the pension if they work more than ten years in

the mine. Suppose also, that Parliament requires that all workers in a uranium mine must retire after ten years in the mine (supposedly because of the health hazard of extended exposure to the uranium). Which law is paramount? The courts would have to characterize the provincial law and decide whether its "pith and substance" or leading feature is atomic energy or retirement insurance. Assume the law is characterized as a retirement law. The federal law must then be characterized and it could be characterized as a law in relation to atomic energy. Now we have a situation with two paramount laws. Both should be operative but obviously both can not practically coexist. The federal law frustrates the provincial, and the provincial frustrates the federal. The courts would probably make the federal law paramount to the provincial, although it is not at all clear that such an option is available under the C.B.A. proposals.

The problem becomes more complex if in our hypothetical case, the provincial and federal laws are reversed. If Parliament passes the law on retirement insurance and the province passes the law on atomic energy, which would be paramount? Now we have a valid federal law in an area of provincial paramountcy versus a valid provincial law in an area of federal paramountcy. Should the field resolve the problem? Is atomic energy more important than retirement savings laws, or should federal law, as a matter of policy, always be paramount to provincial laws?

This problem could also occur as a result of the proposals

on cable provided in the First Ministers report. Both the province and the federal government have concurrent jurisdiction over cable distribution with provincial paramountcy and it seems (although it is not perfectly clear) that both levels have jurisdiction over Canadian content (as one example) on cable systems. If a provincial cable distribution law is "inconsistent" with a federal Canadian content law then the federal law is probably paramount. (Query: will the word "inconsistent" be interpreted differently than the paramountcy doctrine which renders inoperative laws that "conflict"?) But what would occur if a federal cable distribution law conflicted with a provincial Canadian content law? No answer is provided in the proposals.

Another complication arsies in the First Ministers proposals. Instead of providing a comprehensive and exhaustive code on the distribution of powers in the field of telecommunications, the First Ministers reached agreement only on the area of cable distribution. Even if this is not a valid assumption, as that may have been the only area in which reform was sought, the problem remains. Section 5 of their proposals preserves the status quo except where it was expressly changed by the preceding four sections. The result of a piecemeal approach to constitutional reform can be that the past will return to haunt and complicate the interpretation of the newer provisions. One example will suffice. It is generally agreed that educational broadcasting is still a contentious constitutional issue. Suppose one day in the future, but after

the First Ministers proposals come into force, a court decides that the provincial legislatures have exclusive jurisdiction over the content of educational broadcasting. This power would be deemed to have always existed and will therefore become part of the status quo preserved in s.5. If the provinces enacted a law relating to educational broadcasting over cable which conflicted with a federal law on Canadian content, which would be paramount? According to s.2 the federal laws on Canadian content are only paramount to provincial laws on Canadian content or cable distribution. Would the province's exclusive jurisdiction over educational broadcasting be paramount to a federal law in an area of concurrent jurisdiction? The court would probably invoke the more usual approach of federal paramountcy but it is by no means certain.

C. The Residual Power

The C.B.A. and the Pepin-Robarts reports adopted differing positions with respect to the residual power. The Pepin-Robarts report recommended that the residual power should be assigned to the provincial legislatures, as is the case in most other federations. The Pepin-Robarts report suggested that at present, the residual power in Canada "is largely vested in Ottawa" (p. 29). Although on a literal reading of the B.N.A. Act, this would appear to be accurate, in fact it is not. The C.B.A. report recognizes the reality that in Canada there is a shared residual power. At the present time,

if a matter does not fall within the enumerated classes of subjects in either the provincial or federal sphere, the court is required to determine whether it is a matter of national concern or a matter of local concern. If the former, it falls within the federal residual power (the Peace, Order & Good Government clause) but if local,it comes within the provincial 'residual power', s.92(16). In practice the courts have construed the federal residual power very narrowly. The C.B.A. report recommends that the present practice be expressly entrenched. Recommendation 25.1 reads:

> Any legislative matter not expressly granted by the Constitution should be within the exclusive legislative power of the provinces, unless it is clearly beyond provincial interests, in which case it should be within the exclusive legislative power of the federal Parliament. A matter ordinarily falling within provincial competence should not fall within federal jurisdiction merely because it had "national dimensions."

Although one might argue with the limitation on the "national dimensions" issue, it is surely not as restrictive as the approach advocated by the Pepin-Robarts report. Denying Parliament any residual power, effectively locks Parliament into only those issues which are conceived to exist in 1979 or the immediate future. If a matter of national concern arises in the future which does not fall within the Parliament's list of subjects,it would have to be allocated to the provinces. Not only is this a ludicrous situation but it is inconsistent with the quest for flexibility considered so important by the authors of the Pepin-Robarts report. One might ask how the federal government fares in such countries as the United States

where the states possess the residual power. The C.B.A. report provides the answer: " . . . in these countries the courts have interpreted the enumerated heads of federal power so widely that there is little need for a federal residual power" (p. 140). This situation however would not exist under the new Constitution as proposed by the Pepin-Robarts report. Earlier it was noted that the Pepin-Robarts report advocated a listing of powers that were very detailed and specific to reduce the confusion and controversy that exists when general classes of subjects are relied on to describe the division of powers. It is because the Pepin-Robarts report advocates a detailed description of the division of powers that a shared residual power is now even more necessary to insure that the Constitution does not soon become outdated.

D. Legislative Interdelegation, Legislative Adoption, Administrative Delegation

The Pepin-Robarts report also recommended that there be a provision in the constitution which would enable one order of government to delegate legislative power to the other order of government. The C.B.A. report, on the other hand, rejected such a proposal and instead approves only administrative delegation. Under the present B.N.A. Act, this trading of legislative powers is unconstitutional.

The Pepin-Robarts report supported the principle of interdelegation of legislative power for the same reason it supported concurrency, viz., primarily to "enable the distinctive requirements of various provinces (in particular Quebec) to be met without having to apply those arrangements to all provinces" (p. 104). Although the C.B.A. report also recognized that Quebec may have some distinctive needs, it concluded that these needs could be accommodated by administrative delegation. It is submitted that the C.B.A. proposal is the preferable one. The benefits of legislative interdelegations are far outweighed by their costs. The only obvious benefit would be to increase the flexibility of the Constitution, but that can be achieved by less drastic measures. From a policy perspective, it might be more rational and is obviously more precise, than the option of concurrency. However if special powers are to be transferred to any one province, it seems that it should be entrenched in the constitution rather than allowing the constitution to consist of a shifting sea of powers.

The disadvantages of legislative interdelegation can be listed as follows:

a) It could result in a partial or wholesale amendment of the Constitution which should only be effected by a strict and formal procedure.

b) Taken to its extreme, it could result in Canada becoming either a unitary state or a loosely formed confederal state. Admittedly (as the Pepin-Robarts report points out) it is unlikely that any massive delegation would occur.

c) It could create dissension amongst the provinces. Conceivably Parliament could delegate jurisdiction over communications to Quebec, but not to any other province. This would effectively result in granting Quebec a special status, which the Pepin-Robarts expressly disapproves of. Admittedly the special status would not be entrenched, and the potential exists for the delegation of the same legislative power to all the provinces, but other political factors may prevent that from occurring.

The C.B.A. report also recognizes this possibility. On p. 67 it states that interdelegation "could as well be used to create a special status for a province . . ." If "special status" is to be afforded one or more provinces in recognition of their special needs, then it should be a constitutional decision and not a political one.

d) The converse is also true. As stated in the C.B.A. report, " . . . the very existence of the power to delegate can give difficulty by encouraging pressure by one level of

government on the other to transfer powers, sometimes powers that clearly should only be exercised by the level of government to which they were given." (p. 66)

e) The C.B.A. report also states that legislative inter-delegation could "add to the confusion in the electorate regarding who is responsible for certain functions." (p. 67) As well it can impair the political process itself. A matter may be inherently one of local concern, but is traded away to the federal government in return for some coveted federal power. If the federal government passes a law on this local matter, the provincial citizens would not have an effective voice in the political process to express their disapproval of the law. The federal government's fate would rarely depend on the disaffection of only one province,particularly a small province. Since the Pepin-Robarts report advocates a division of legislative powers that takes into account political responsiveness, this would clearly be inconsistent with that criterion.

f) The C.B.A. report also cites a very practical problem that would exist if only one provincial legislature were given jurisdiction over a matter otherwise within federal jurisdiction. At p. 67 the author states:

> Suppose, . . . Parliament retained divorce jurisdiction except in the case of Quebec, and the government wanted to introduce a bill on the subject. What legitimacy would the members from Quebec have to vote on the Bill? Yet the government might well have need of its supporters from that province to ensure passage of the Bill. If any significant number of other legislative powers were involved, Parliament would find it extremely difficult to function.

This would also militate against any formula whereby a province

was given jurisdiction over a subject matter that is otherwise within federal jurisdiction.

g) There presently exist a number of mechanisms of cooperative federalism which enhances the flexibility of the constitution without resorting to legislative interdelegation. Some examples are:

(i) Parliament can delegate the administration of federal laws to a provincial board. (Similarly the provincial legislature can do the same vis-a-vis a federal board.) This is the approach proposed by the federal government in Bill C-16, The Telecommunication Act. Under this scheme a provincial board would be able to assume the powers exercised by, for example, the CRTC. The policies administered however are still those of Parliament, not the provincial board and not the provincial legislature. Admittedly the more discretion that is delegated to the board, whether it be a provincial or federal board, the more power the board has to make policy choices. This raises the question whether or not Parliament could enact a Telecommunications Act which consists of only one sentence: "The C.R.T.C. (or a provincial board) shall regulate broadcasting in the public interest." If it could do so then broadcast policy would effectively be determined by a board rather than Parliament. The traditional view is that this is simply a lawful delegation of legislative power to an administrative board. In the U.S. this might be regarded as violating the doctrine of separation of powers, since it effectively transfers legislative powers to the executive. Although the separation of power doctrine has

little application in Canada, one might argue that this would amount to an abdication rather than a delegation, and hence should be invalid. Professor Laskin (as he then was) has written that abdication is a political, not a justiciable concern, and that in fact no abdication exists if the delegating authority can always retrieve its law. However the Supreme Court of Canada has recently recognized that a legislature can abdicate its law-making function, although it provided little guidance on how to recognize when that occurs: Manitoba Government Employees Association v. Government of Manitoba, [1977] 6 W.W.R. 247, at 257 (S.C.C.). It can now be argued that where Parliament does not at least provide some standards or principles to act as guidelines to the administrative body, then an unlawful delegation occurs. This however is still an unproven thesis.

(ii) One legislature can adopt some laws of the other legislature and then delegate these laws to its own board or a board of the other level of government. This scheme of "adoption plus administrative delegation" has been widely used in the field of transportation and the marketing of agricultural products. It enables the legislature to circumvent, to a very large degree,the holding in the Nova Scotia Interdelegation case which forbade legislative interdelegation. However there are still some significant differences in the two approaches.

A legislature can "adopt" the law of another legislature if two conditions are present (for ease of illustration,

assume Parliament is adopting a provincial law):

a) The provincial law must be valid in its own right

b) Parliament would have been able to enact the law itself had it wanted to.

Legislative interdelegation can be contrasted with adoption with the following simple example. Under a scheme of legislative interdelegation, Parliament, which has exclusive jurisdiction over postal workers, could transfer that jurisdiction to the provincial legislature. The province could then in enacting labour legislation, prohibit postal workers from striking, but at the same time allow all other "provincial workers" (e.g. teachers) the right to strike. This today would be invalid.

Under a scheme of legislative adoption, Parliament could adopt provincial labour laws and apply them to its postal workers. If the provincial labour laws prohibited teachers from striking, then the postal workers would also be prohibited from striking. Since Parliament could itself pass labour laws for its postal workers it can adopt the provincial labour laws. The provincial labour laws are valid because they apply to provincial workers (teachers) not postal workers. In effect Parliament has simply seen an attractive law and instead of rewriting it, it just adopts it. The policy to prohibit postal workers from striking is still Parliament's; it simply coincides with the provincial labour policy vis-à-vis teachers.

The courts have allowed this mechanism to be taken to

even greater lengths. Parliament can adopt not only existing provincial labour laws but also all future labour laws and have them apply automatically to postal workers. This now appears to come close to abdication of law making power, but it can still be constitutionally defended. The class of subject 91(5) "Postal Service" does not dictate any particular postal service law or policy. It is simply the vehicle through which Parliament enacts postal service laws. When Parliament adopts all provincial labour laws to be applied to postal workers it is making a policy decision, viz, that postal workers are to be treated the same as all workers in the province. If this is a valid policy, constitutionally, then the most effective way of implementing it is through the mechanism of adopting all provincial labour laws present or future. Unlike legislative interdelegation, the provincial legislature is not empowered to legislate for postal workers. The province legislates for teachers; Parliament legislates for postal workers.

This form of cooperative federalism can be taken even further. When Parliament adopts all present and future provincial labour laws to be applied to postal workers, it can then delegate the administration of those laws to its own board or to the same provincial board which administers the labour relations of teachers. Here in Mr. Justice Rands' words a "twin-phantom" is created. When the Ontario Labour Relations Board applies a labour law to a teacher, it is deemed to be applying a provincial law, but when it applies

a labour law to a postal worker, it is deemed to be applying a federal law. Both laws of course are identical.

In R v. Smith [1972] S.C.R. 359 the Supreme Court of Canada approved a scheme of adoption plus administrative delegation that seemed to obliterate any differences that might have existed between that and legislative interdelegation. To some, the Supreme Court went too far. There, a provincial highway board was administering both inter-and intra-provincial trucking pursuant to an adoption/delegation scheme. However the board was imposing conditions on the federal truckers that it was not imposing on the provincial truckers. It appeared, therefore, that the province was able to legislate for interprovincial trucks in a manner different from intraprovincial trucks, and this was the very reason legislative interdelegation was invalidated. However the problem with this scheme was not one of interdelegation but of delegation. Because the law adopted vested so much discretion in the board, it chose to exercise its discretion in an inconsistent manner. Theoretically it could have treated one provincial trucker differently from another provincial trucker. By "coincidence" however it only treated federal truckers differently from provincial truckers. Although the spirit of the Nova Scotia Interdelegation case has been violated by this decision, its letter remains intact.

Even if the two levels of government are now able to achieve by this procedure something they sought to achieve by legislative interdelegation, there is still a built-in check or limit to its use. Essentially it is only workable when there

are semi-concurrent areas of jurisdiction in the constitution. It involves norms -- e.g. labour laws -- which are constitutionally neutral,or at least within the jurisdiction of both levels of government, but become exclusively federal or provincial when applied to particular persons or things (e.g. Indians, postal workers, railways and banks). Since it involves areas which are "almost" concurrent, the fact that it results in something akin to fields of concurrent jurisdiction is not inconsistent with the spirit of the Constitution. Hence both levels of government can pass marketing laws but their constitutionality depends upon whether the marketing law affixes to a commodity in interprovincial trade or local trade. The content of the marketing law is irrelevant, and hence it should not concern anyone that,as a result of a legislative adoption,all goods in trade are treated the same.

However there are some classes of subjects in the constitution which are clearly the exclusive domain of one level of government or the other. The provinces could not adopt Parliament's criminal laws (although some adoption of criminal procedure is possible), or Parliament's currency laws. But by legislated interdelegation these exclusive powers could be transferred to the provinces. Where the framers of the Constitution decide that a power should be within the exclusive domain of one level of government, it is inconsistent and illogical to then allow it to be transferable.

The feasibility of this being used in the field of broadcasting depends upon whether or not the province has any

constitutional foothold in that field. If the provincial legislatures have exclusive jurisdiction over closed-circuit cable, as was suggested in obiter by the Supreme Court of Canada, then such a scheme can be implemented. Hence Parliament could adopt all provincial communication laws which are enacted for closed-circuit cablecasters and apply them where applicable to open-circuit cablecasters and broadcasters. The administration of these laws can be delegated to the provincial board. However if the court ultimately decides that Parliament alone has jurisdiction over all aspects of broadcasting, including closed-circuit cable, then no adoption could occur. The most that could happen is that Parliament could delegate its communication laws to be administered by a provincial board as is contemplated by Bill C-16.

The difference between the two approaches is significant, for in the former (i.e. adoption) the provincial legislature is given a greater role in forming communication policy, rather than just administering it.

At the Charlottetown Federal-Provincial Conference of Communications Ministers in May 1978, the Province of Quebec advocated a system of adoption plus administrative delegation which was analogous to that used in the field of trucking as described earlier. However that proposal either seems to ignore the vital requirement that where a provincial law is to be adopted, it must be valid in its own rights, or, it is simply assumed that the provincial law is valid. Quebec proposes therefore that Parliament enact the Bill C-X which

contains the following provisions.

> s.3(1) where in any province a licence is by the law of the province required for the operation of a provincial telecommunication undertaking, no person shall operate a federal telecommunication undertaking in that province unless he holds a licence issued under the authority of this Act.
>
> (2) The provincial regulatory body in each province may in its discretion issue a licence to a person to operate a federal telecommunication undertaking into or through the province upon the like terms and conditions and in like manner as if the federal telecommunication undertaking operated in the province were a provincial telecommunication undertaking.

Hence, in essence the provincial board could require federal broadcasters to obtain a licence from the provincial board and that licence would be granted on the same terms and conditions that licences are granted to provincial telecommunication undertakings.

But provincial telecommunication undertakings are defined in the following way:

> "telecommunications" means any transmission, emission or reception of signs, signals, writing, images, sounds or intelligence of any nature by wire, radio or other electromagnetic system or by any optical or technical systems.
>
> "provincial telecommunication undertaking" means a work or undertaking for the purpose of providing telecommunication facilities or services for gain or profit or otherwise, not being a federal telecommunication undertaking.

The problem with this definition is it assumes that the province has jurisdiction over these provincial telecommunication undertakings. Although at one time there may have been some doubt, there no longer is, as a result of the two Supreme Court of Canada decisions, Capital Cities and Dionne. Hence if the province has no right to require such a "provincial telecommunication

undertaking" to obtain a licence to operate and stipulate the terms of such a licence, then Parliament can not adopt such a law to be applicable to federal undertakings.

If the province does have jurisdiction over closed-circuit cable then this scheme can work if a provincial telecommunications undertaking is redefined to mean only closed-circuit cable undertakings. It could arguably be implemented even if there were no closed-circuit systems in existence or in operation as long as there were laws in existence for them. However if this last area of the communications field is held to be also within exclusive federal jurisdiction, the whole scheme would collapse. Parliament could not adopt provincial telephone laws and apply them to federal broadcast undertakings. This would be like pouring gravy on your cornflakes.

In sum, if the field of communications becomes totally within the federal domain, the adoption/delegation scheme will not work and the only recourse will be simply to administrative delegation as in Bill C-16. If there is recognized a need to allow some provincial jurisdiction in this field, then the choice should be toward some measure of concurrency entrenched in the constitution, rather than allowing legislative interdelegation. The latter is not only antithetical to a federal constitution but it knows no bounds and can be used indiscriminately in all areas of the constitution, rather than in only those areas in which concurrency is desirable.

Appendix A

Draft Federal Proposal on Cable Distribution

(as presented to the Conference of First Ministers on the Constitution, February 5-6, 1979.)

Cable Distribution

1. **In each province the legislature may make laws in relation to cable distribution within the province, including the reception and re-distribution of broadcast signals; Parliament may also make laws in relation thereto for each of the provinces.**

Relationships between laws of the provinces and laws of Parliament

2. **Any law enacted by the legislature of a province pursuant to section 1 shall prevail over any law of Parliament enacted thereunder except in relation to the following matters:** Canadian content, Canadian broadcast programs and services, and technical standards, in which case any law of Parliament shall prevail to the extent of the inconsistency.

Consultations

3. The government of Canada shall consult the government of the province concerned before Parliament makes a law in relation to cable distribution within that province pursuant to section 1.

Telecommunications undertakings

4. **Telecommunications undertakings coming under the jurisdiction of Parliament as well as those coming under the jurisdiction of the legislature of a province and engaging in activities coming under section 1 other than as carriers shall be subject, in so far as such activities are concerned, to the laws enacted under section 1.**

Powers continued

5. **Except where otherwise expressly provided in section 1 to 4, nothing therein shall derogate from the legislative powers that Parliament and the legislatures of the provinces had immediately before the coming into force of these sections.**

APPENDIX B

BILL C-"X" : An Act respecting federal telecommunication undertakings

SHORT TITLE

1. This Act may be cited as the "Federal Telecommunication Undertakings Act".

INTERPRETATION

2. In this Act,

"provincial regulatory body" means

a) a commission, board, tribunal or other body established by or pursuant to an Act of the legislature of a province, or

b) a person designated by the lieutenant governor in council of a province,

to regulate telecommunications in the province;

"telecommunication undertaking" means an undertaking that is carried on within Canada for the purpose of providing telecommunication facilities or services for gain or profit or otherwise;

"telecommunication" means any transmission, emission or reception of signs, signals, writing, images, sounds or intelligence of any nature by wire, radio or other electromagnetic system or by any optical or technical system;

"federal telecommunication undertaking" means a work or undertaking for the purpose of providing telecommunication facilities or services for gain or profit or otherwise, to the extent that it is subject to the legislative authority of the Parliament of Canada;

"provincial telecommunication undertaking" means a work or undertaking for the purpose of providing telecommunication facilities or services for gain or profit or otherwise, not being a federal telecommunication undertaking;

"law of the province" means a law of a province or municipality not repugnant to or inconsistent with this Act;

OPERATION OF UNDERTAKING:

3. (1) Where in any province a licence is by the law of the province required for the operation of a provincial telecommunication undertaking, no person shall operate a federal telecommunication undertaking in that province unless he holds a licence issued under the authority of this Act.

(2) The provincial regulatory body in each province may in its discretion issue a licence to a person to operate a federal telecommunication undertaking into or through the province upon the like terms and conditions and in the like manner as if the federal telecommunication undertaking operated in the province were a provincial telecommunication undertaking.

TARIFFS AND TOLLS

4. Where in any province tariffs and tolls to be charged by a provincial telecommunication undertaking are determined or regulated by the provincial regulatory body, the tariffs and tolls to be charged by a federal telecommunication undertaking in that province may in its discretion be determined and regulated by the provincial regulatory body in the like manners and subject to the like terms and conditions as if the federal telecommunication undertaking were a provincial telecommunication undertaking.

GENERAL

5. Subject to agreements between the government of Canada and the government of a province, the Governor in Council may exempt any person or the whole or any part of federal telecommunication undertakings from all or any of the provisions of this Act.

6. (1) Every person who violates any provision of this Act or who fails to comply with any order or direction made by a provincial regulatory body under the authority of this Act is guilty of an offence and is liable on summary conviction to a fine of one thousand dollars or to imprisonment for a term of one year, or to both.

(2) A fine imposed under subsection (1) shall be paid over by the magistrate or officer receiving it to the treasurer of the province in which it was imposed.

JURISDICTIONS AND DECISION-MAKING IN CANADIAN BROADCASTING : A REVIEW OF PRESENT CONFIGURATIONS AND AN ANALYSIS OF FUTURE POSSIBILITIES