PRIVACY, COMPUTER DATA BANKS COMMUNICATIONS AND THE CONSTITUTION

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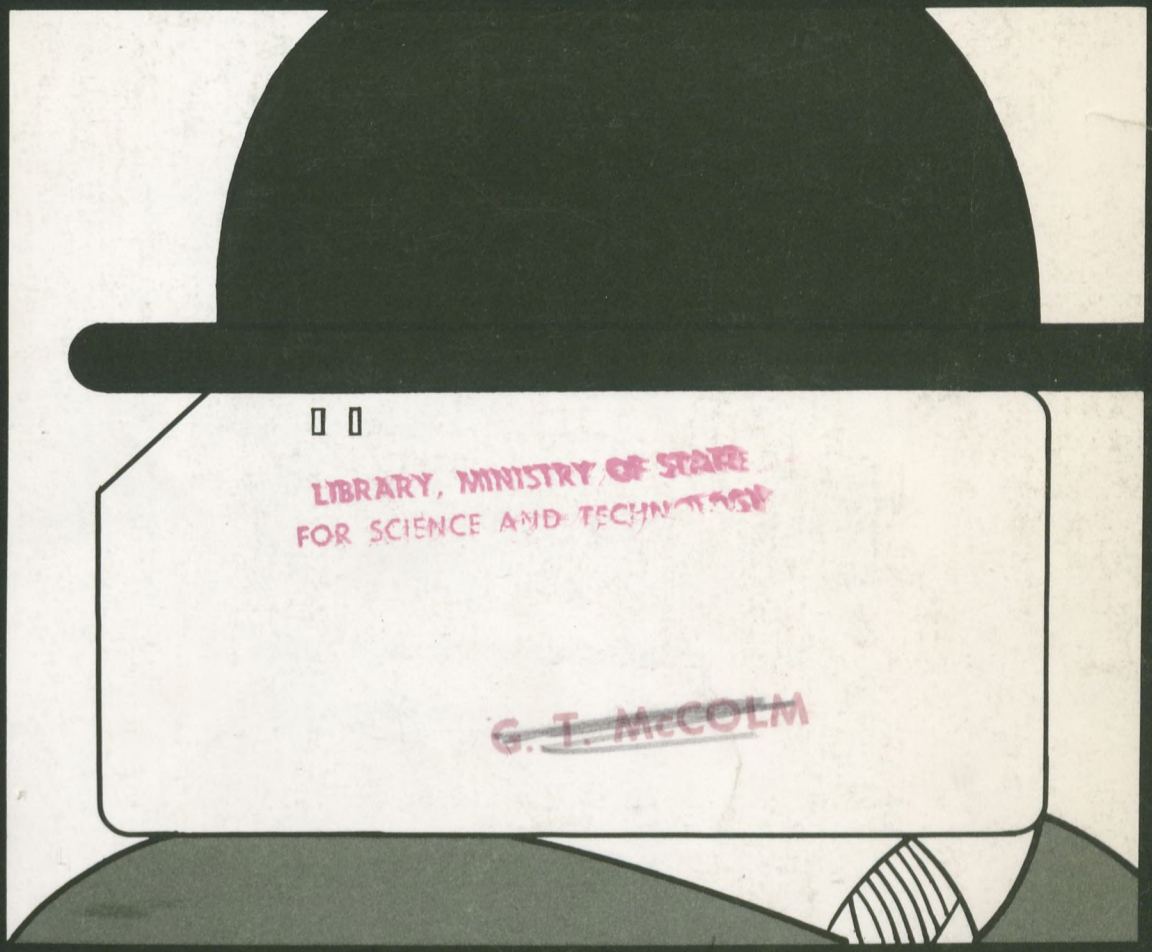

A study by the Privacy and Computer Task Force

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A STUDY FOR THE
CANADA TASK FORCE ON
PRIVACY AND COMPUTERS ~~TASK FORCE~~

DEPARTMENT OF COMMUNICATIONS
DEPARTMENT OF JUSTICE

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This report was prepared for the Privacy and Computers Task Force, an inquiry sponsored by the Departments of Communications and Justice, and should not be construed as representing the views of any department or of the Federal Government. The views expressed herein are exclusively those of the authors, and no inference of any commitment for future action by any department or by the Federal Government should be taken from any recommendations contained herein.

This report is to be considered as a background working paper and no effort has been made to edit it for uniformity of terminology with other studies.

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I. Introduction

Privacy, like most legal rights falling into the class known as civil liberties, is an amorphous legal concept in Canada with virtually no judicial or legislative definition. As a legal concept, privacy has been variously described as the right "to maintain one's intellectual and emotional personality free from offensive intrusion by conduct calculated to annoy and induce emotional distress" or "the right to be let alone to live one's own life with the minimum degree of interference".

As a legal right, however, privacy becomes meaningful only when placed in the context of a particular society where it can be measured against the various goals of that society. For, like any civil liberty, privacy can never be an absolute. Its claim as a right must be measured against other legitimate competing claims, and it will be modified accordingly. In Canada, this presumably means, for example, that a right to privacy will be offset or limited by the claims for freedom of communication of information. At a higher level, perhaps, it means seeking for a balance between the demands for openness of a social democracy and the desire for securing the greatest degree of individual privacy.

In any case, ours is not the task of defining the existence or scope of a right to privacy. Rather, assuming that it does or should exist in some form in Canada and, relying upon what others tell us should be done to safeguard the legal right, our job is to undertake the equally difficult task of describing the scope of constitutional authority in Canada to deal legislatively with protecting the right of privacy in a computer-oriented society.

II. Computer Data Banks and Privacy

In order to discuss the questions of constitutional jurisdiction in relation to computer data and its privacy, it is first necessary to identify with some degree of specificity the matters with which legislators may wish to deal in order to protect the interests of privacy. In doing this, reliance has been placed on the information and assertions contained in a number of studies including the Ontario Law Reform Commission *Report on the Protection of Privacy in Ontario* (1968), *Instant World: Report on Telecommunications in Canada* (1971), Sharp, *Credit Reporting and Privacy* (1970), Miller, *The Assault on Privacy* (1971), Rosenberg, *The Death of Privacy* (1969) and Westin, *Privacy and Freedom* (1967). The studies suggest that the main issues of concern are insuring the accuracy, protecting the confidentiality and controlling the uses of the data that is gathered, assembled and stored in the computer data bank and transmitted to and from the bank. As matters for legislative consideration, these issues are outlined below in the context of three identifiable phases of the information process, namely, data acquisition, data storage and data dissemination.

A. Acquisition of Data

In the area of information gathering, there are a number of matters to which the legislature may wish to direct its attention for the purpose of enacting laws. It may wish to consider,

(1) authorizing acquisition or collection of information: specifying the types of data that may be obtained; by whom and for what purposes;

(2) establishing standards for classification of data obtained: statistical, intelligence, etc;

(3) specifying methods of obtaining information: directly, indirectly; forbidding illicit methods;

(4) specifying qualifications of data gatherers: licensing and regulating;

(5) ensuring accuracy of information recorded;

(6) characterising rights of individual and gatherer in information obtained: consent of individual.

B. Storage of Data

The input, integration and storage of data in a computer raises another series of matters for legislative concern including,

(1) controlling quality and method of input: mechanical accuracy; human accuracy; coding and identity of subjects; translation of data from record to machine;

(2) controlling quality and integrity of storage: mechanical accuracy; human care;

(3) regulating segregation and integration of data: types of data that may be combined from different sources; classification of data;

(4) specifying qualifications of computer personnel: code of ethics;

(5) establishing security of storage from unauthorized access: mechanical and human control;

(6) providing for updating and purging of information stored: cut-off dates;

(7) describing rights of individual to examine information in storage on him.

C. Dissemination of Data

Again, the dissemination of computer-stored data raises additional matters on which legislative action may be considered. These include,

(1) ensuring reliability and accuracy of output data: misinterpretation of cryptic or coded output; integration of several data bases; errors in identity and transmission; validity of computer analyses of data;

(2) providing for security of information: right of access and unauthorized access; eavesdropping on remote access transmission; computer sharing and accidental access; classification of information;

(3) dealing with unauthorized disclosure or sale of data;

(4) controlling access by law enforcement agencies;

(5) describing rights of subject to verify data released;

(6) describing rights of subject to control dissemination of personal data;

(7) establishing remedies of subject for wrongful disclosure;

(8) regulating methods of data transmission.

III. Legislative Control

Given this wide range of matters to which the legislators may be asked to address themselves, what kinds of legislative control might be anticipated as the means to protect privacy in the information process? It seems evident, in examining the matters outlined above, that all of them do not likely lend themselves to a single type of legislative treatment.

Some, for example the rights of subjects when information is misappropriated or misused, would suggest the provision of civil remedies against the wrongdoers, somewhat in the manner set out in the British Columbia *Privacy Act*[1] and in the Manitoba *Privacy Act*.[2]

Some matters such as illicit gathering of information, breaches of confidence, release of information, unauthorized access to information, failure to provide required security, etc. might be subjected to criminal sanctions where the conduct is prohibited. A few of these matters are dealt with in the context of controlling electronic eavesdropping as set out in Bill C-252, the *Protection of Privacy Act*, now before Parliament.

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(1) S.B.C. 1968, c.39.

(2) S.M. 1970, c. P125.

Many of the matters, however, do not suggest a ready solution of control by civil remedy or criminal penalty but rather indicate the need for licensing and regulation. In most of the activities involving the acquisition, compilation, storage and dissemination of information, it is likely that the legislation will take the form of rules and regulations that establish standards for the facilities used and the individuals involved in the information process. This is not to suggest that civil remedies and criminal sanctions will have no place in protecting privacy; rather that they will perhaps be ancillary to the regulatory laws governing computer data bank operations.

The matters outlined above also indicate that, in considering legislative controls, we are dealing with two distinguishable objects. First, we are concerned with the physical aspects of the computer data bank operation -- the information gatherers and computer operators, the computer machines and the transmission facilities -- the operational facilities, if you will, of the information process. Second, we are concerned with the information itself - the data that is gathered, stored, analysed and disseminated. This distinction of objects may be important in assessing the legislative capacities of the two levels of government over the whole information process.

IV. Constitutional Considerations

Constitutional problems can never be answered definitively in the abstract as the Judicial Committee of the Privy Council and the Supreme Court of Canada have noted on several occasions. Nevertheless, it can be useful to consider the problem in abstraction initially if for no other reason than to provide a perspective from which to view the problem in a concrete fashion.

Thus, we will first consider the question of constitutional jurisdiction over computer data banks in the abstract with reference only to general facts. Then, within the constitutional framework outlined, we will examine several specific fact situations as they may exist now or in the near future to ascertain the potential scope of federal and provincial jurisdiction.

In looking through the various heads of legislative power in sections 91 and 92 of the *B.N.A. Act*, there are a number in each section that suggest themselves as having some relation to the control of computer data bank operations. Some heads are tangential in their relation and need be mentioned only briefly. Others are more direct and pertinent and it will be useful to discuss their general scope as defined by the courts.

A. Federal Powers

Several classes of subjects in section 91 of the *B.N.A. Act* may be characterised as enabling Parliament to exercise a limited legislative jurisdiction over computer data banks and the information involved therein. Included in this category are section 91(15) banking and incorporation of banks, section 91(23) copyrights, section 91(6) census and statistics, section 91(2) regulation of trade and commerce and the general power to make laws for the peace, order and good government of Canada. Here also, we might consider Parliament's power to deal with civil liberties.

s.91(15) Section 91(15) accords to Parliament full jurisdiction over the incorporation of banks and the banking business. Banks, of course, as saving and lending institutions accumulate extensive information records concerning their customers' financial and personal affairs that is of value for credit purposes. In addition, banks are increasingly turning to computers both to process their information and to expedite their business transactions, as for example the use of electronic systems of transfer payments. Over all of these activities, Parliament's power to legislate is complete and exclusive.

s.91(23) Under its power over copyrights (section 91(23)), Parliament could conceivably deal in a limited way with the ownership and disposition of collected information in which copyright property may be described.

s.91(6) Parliament's power to make laws relating to the census and statistics (section 91(6)) is an interesting one. It might be construed narrowly to read statistics as that information relating to the census. More properly, the words are to be read disjunctively in which case the term "statistics" takes on a much broader meaning.

"Census" is defined as an official enumeration of the population of a country with statistics relating thereto.[3] "Statistics" encompasses the collection and arrangement of numerical facts or data relating to human affairs and natural phenomena[4] and includes data on population, revenue, trade and commerce and "moral, social and physical conditions of people."[5]

Given this inclusive definition, "statistics" would encompass a great deal of data that is gathered and perhaps eventually stored in a computer bank, concerning people and business. There are, however, several possible limitations on this power that must be suggested. First, there is no doubt a field of statistics gathering that properly belongs to the provinces as a matter of property and civil rights or as a local matter within the province and this is reflected in the provincial legislation governing

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(3) *The Shorter Oxford English Dictionary* (3d. rev., 1969), p.282.

(4) *The Shorter Oxford English Dictionary* (3d. rev., 1969), p.2007.

(5) *Black's Law Dictionary* (4th rev., 1968), p.1580.

the collection and use of vital and other statistics. Second, the federal power over statistics has generally been viewed as relating to depersonalized data rather than to personalized information, although the justification for this attitude is unclear. Third, according to the definition given above, while the federal statistics power would clearly appear to include all factual information, it is not so evident that it would extend to evaluative or opinion information that is often the subject of collection.

Despite these possible limitations on the scope of the term "statistics" as found in section 91(6), it is not unreasonable to suggest that Parliament might go beyond the provisions of present legislation such as the *Statistics Act*[6] and the *Corporations and Labour Unions Return Act*[7] which deal only with the collection, use and protection of census and other statistics by the federal government, and deal with similar activities by other persons. It may be of interest to note that section 34 of the *Statistics Act* makes it an offence for anyone to attempt to obtain information by purporting to have authority under that Act.

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(6) S.C. 1970-71, c.15.

(7) R.S.C. 1970, c. C-31.

s.91(2) With some caution, one may consider Parliament's power to regulate trade and commerce as a vehicle for exercising control over data banks. If one were to view the operation of a computer data bank service as a business activity, i.e. a commercial venture whereby data compiled and stored was sold to clients as might be the case in a credit bureau operation, it could be contended that the extra-provincial aspects of the business fall to regulation by Parliament as involving trade in a commodity. As the Chief Justice of Canada has stated in *Reference re the Natural Products Marketing Act*,[8] "Once an article enters into the flow of interprovincial or external trade the subject matter and all its attendant circumstances cease to be a mere matter of local concern".

There are, however, several limitations that must be considered in relation to this power. First, the vending of data may be more analogous to non-commodity trade than to products trade. In the products trade cases (mainly items of farm produce) the courts have been willing to describe a meaningful scope for the trade and commerce power. In non-commodity trade cases, however, such as those involving insurance and securities, there has been less judicial inclination to find much scope for the federal power. The matter is, of course, by no means closed and a reasonable argument can be made for federal jurisdiction over extra-provincial non-commodity transactions.

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(8) (1957) S.C.R. 198. For a more recent discussion of the trade and commerce power see A.G. *Manitoba v. Manitoba Egg and Poultry Association*, 1971 Supreme Court of Canada, (unreported).

Even if one succeeds in establishing a federal jurisdiction under section 91(2) of the *B.N.A. Act*, two additional limitations on its effectiveness must be considered. The trade and commerce power, of its nature, goes to economic regulation. In relation to computer data banks and privacy, however, we are concerned primarily with the non-economic aspects of regulation and thus the scope for this power may be somewhat limited. Again, the trade and commerce power will not reach intraprovincial data bank operations.

P.O.G.G. Turning to the general power of Parliament to make laws for the peace, order and good government of the nation, this is always a possible locus of federal jurisdiction. There are basically two grounds that the courts have recognized for invoking this power, either that the matter is one of national interest or of urgent national concern or that the matter is one that is not included in the enumerated heads of sections 91 or 92 and therefore must fall to the general power of section 91. These grounds are not necessarily mutually exclusive and a particular matter may find support under the general power on both grounds.

It is possible to contend that the operation of a nationwide computer data bank system, with its capacity for almost instantaneous communication anywhere of vast amounts of information concerning everyone in the nation, is indeed a subject of national

interest concerning the body politic. It is also possible to suggest that computer facilities, like radio, aeronautics and the national capital, are a subject not enumerated in sections 91 and 92 of the *B.N.A. Act* and therefore fall to be dealt with under the general power. While these propositions may be attractive in their simplicity as a means for deciding jurisdiction over computers and their uses, one must avoid abstractions and consider realities in applying the general power.

As to the first proposition, at the present time there is no monolithic computer data bank system in Canada and consequently it is difficult to visualize the situation as one of broad, national concern. It might be otherwise, of course, if Parliament were to contemplate legislation to create such a national system but if it is to be merely legislation to regulate existing facilities, then it is doubtful that the general power could be invoked to support the legislation.

Similarly with the second proposition, one must concede that computer facilities are not unlike a number of other inventions (cars, telephones) that have been created since the *B.N.A. Act* was drafted. The courts have had no difficulty in finding within the existing heads of sections 91 and 92 sources of legislative jurisdiction to deal with these objects and there is no reason to suggest that computers would be treated differently.

There is one other argument that may be advanced to support, under the general power, the authority of Parliament to deal with the protection of privacy of individuals and that is to characterise the right of privacy as a fundamental civil liberty essential to the continued and effective functioning of our democratic society under the constitution.[9] That there are fundamental values underpinning our democratic system of government has been recognized by a number of judges on the Supreme Court of Canada over the years.[10] These values, such as freedom of discussion, freedom of religion and freedom of movement, are, according to the judicial data, to be regulated only by the Parliament of Canada. As Cannon J. put it,

> Democracy cannot be maintained without its foundation: free public opinion and free discussion throughout the nation of all matters affecting the State within the limits set by the Criminal Law and the common law ... The Province may deal with (an inhabitant's) property and civil rights of a local and private nature within the province; but the Province cannot interfere with his status as a Canadian citizen and his fundamental right to express freely his untrammelled opinion about government policies and discuss matters of public concern ... The federal Parliament is the sole authority to curtail, if deemed expedient and in the public interest, the freedom of the press in discussing public affairs and the equal rights in that respect of all citizens throughout the Dominion.[11]

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(9) See Westin, *Privacy and Freedom* (1967), ch. 2 for development of this theme.

(10) See, for example, the dicta of several judges in *Reference re Alberta Statutes*, (1938) S.C.R. 100; the dicta of Rand J. in *Winner v. S.M.T. (Eastern) Ltd.*, (1951) S.C.R. 887 and the views of Rand J. and other judges in *Saumur v. A.G. Quebec*, (1953) 2 S.C.R. 299.

(11) *Reference re Alberta Statutes*, (1938) S.C.R. 100@146.

Could not an equal argument perhaps be made for Parliament's power to enact laws designed to preserve our democratic system through protecting the individual against undue encroachment on his private life?

The main difficulty here is framing legislation that would, in the context of protecting privacy, effectively regulate the operation of computer data banks. Certainly, it would have to be legislation of a kind more extensive and explicit than that contained in section 1 of the *Canadian Bill of Rights*.[12]

Turning to the federal powers that seem more directly relevant to the control of computer data banks, four may be suggested: the criminal law power, the incorporation power, the declaratory power and the power over extra-provincial works and undertakings.

s.91(27) Parliament's jurisdiction over matters of criminal law and procedure is very broad, including the power to legislate for prevention of as well as cure for criminal activities. Under this power, Parliament might enact a number of provisions relating to the control of information gathering and dissemination via computer banks. For example, it might prohibit the gathering and possession of certain types of information, it might prohibit the interception of information contained in data banks or transmitted to and from remote terminals or it might prohibit the communication of information to other than those authorized to receive it.

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(12) S.C. 1960-61, c. 44.

There are two limits on the exercise of the criminal law power that must be noted. First, Parliament may not employ the criminal law power as a colourable device to encroach on matters of provincial jurisdiction. In other words, Parliament must demonstrate that the purpose of the legislation is genuinely to prohibit offensive conduct and not, under the guise of criminal law, to control, for example, trade in a commodity.[13] Second, criminal law is by its very nature prohibitory rather than regulatory. While some degree of regulation may be achieved by criminal law prohibitions as, for example, in the *Combines Investigation Act*,[14] where regulation rather than prohibition becomes the dominant theme of the legislation, the criminal law power will not support it.[15]

P.O.G.G. Incorporation Power Parliament's power to incorporate businesses, apart from banks which is expressly covered by section 91(15) of the *B.N.A. Act*, is attributable to the general power of section 91.[16] The federal power is to incorporate companies with

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(13) See *Canadian Federation of Agriculture* v. *A.G. Quebec*, (1951) A.C. 179. See also the observations of Lord Atkin in *A.G.B.C.* v. *A.G. Can.*, (1937) A.C. 368.

(14) R.S.C. 1970, c. C-23.

(15) *In re Board of Commerce Act and the Combines and Fair Prices Act*, (1921) 1 A.C. 191.

(16) *Citizens Insurance Co.* v *Parsons* (1881-82), 7 A.C. 96@116-17.

other than provincial objects but what this limitation means has never been clearly defined. Certainly, it permits Parliament to create corporations capable of carrying on business beyond the confines of a single province. Whether Parliament may also create a corporation confined in its activities to a single province is an open question.

Through the act of incorporating a business, whether by special statute or under the *Corporations Act*, [17] Parliament may, by specifying the objects and purposes of the corporation, exercise control over the nature and scope of the company's activities. However, it must be recognized that Parliament may not, simply by virtue of its incorporation power, necessarily gain exclusive jurisdiction to regulate all activities of the business. In most cases, jurisdiction to regulate is determined functionally on the basis of the nature of the activity carried on rather than on the basis of incorporation. For example a federally incorporated insurance company is nevertheless subject to provincial regulation in the conduct of its business within the province. On the other hand, a radio or television station, though provincially incorporated, is governed in its operations by federal laws.[18]

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(17) R.S.C. 1970, c. C-32.

(18) For a discussion of the incorporation power, see Laskin, *Canadian Constitutional Law*, (3d. rev. 1969), pp. 567-588.

There is, however, a way in which the Parliament's power to incorporate companies may be employed to place the operations of the business under federal jurisdiction and this is by characterising the business in the incorporation document as one of an extra-provincial work or undertaking so as to bring it within the scope of section 92(10)(a) of the *B.N.A. Act.* This proposition is borne out by the opinion of the Privy Council in *Toronto v. Bell Telephone Company of Canada.*[19]

Bell, incorporated by special Act of Parliament in 1880, was authorized by its articles to carry on the business of a telephone company, including the acquisition and maintenance of transmission lines, "in Canada and elsewhere". When it was claimed by the City of Toronto that, at least with regard to its local operations, Bell was subject to regulation under provincial authority, the Privy Council ruled otherwise, holding that in all of its operations it was subject only to the jurisdiction of Parliament.

In so ruling, it should be noted, the Privy Council did not base its conclusion that Bell's operations fell under section 92(10)(a) on the facts of the company's actual operations in more than one province but rather on the existence of such authority as evidenced in the Act of incorporation. This distinction is made clear by Lord Macnaghten in rejecting the trial judge's reasoning and adopting that of the Ontario Court of Appeal.

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(19) (1905) A.C. 52.

> The view of Street J. apparently was that, inasmuch as the Act of incorporation did not expressly require a connection between the different provinces, the exclusive jurisdiction of the Parliament of Canada over the undertaking did not arise on the passing of the Act, and would not arise unless and until such a connection was actually made. In the meantime, in his opinion, the connection was a mere paper one, and nothing could be done under the Dominion Act without the authority of the legislature of the province. This view, however, did not find favour with any of the learned Judges of Appeal. In the words of Moss C.J.O., "the question of the legislative jurisdiction must be judged of by the terms of the enactment, and not by what may or may not be thereafter done under it. The failure or neglect to put into effect all the powers given by legislative authority affords no ground for questioning the original jurisdiction." If authority be wanted in support of this proposition, it will be found in the case of *Colonial Building and Investment Association v Attorney-General of Quebec* ((1883) 9 App. Cas. 157, at p. 165) to which the learned Judges of Appeal refer.[20]

In light of this judgment, Parliament's power to incorporate companies can be, in appropriate circumstances, a useful device to secure federal jurisdiction over the activities of businesses in, for example, the telecommunications field. This power has been employed by Parliament not only in relation to Bell Canada, the operations of which do in fact extend beyond the confines of a

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(20) *Ibid.*, 52 @ 58.

single province, but also in relation to the B.C. Telephone Company which operates essentially within a single province. Insofar as one may contemplate the development of computer data banks systems on a provincial, regional or national basis not unlike the telephone utilities, it is possible that there will be occasions for the exercise of the federal power to incorporate the companies that operate some of these systems.

There are, however, two possible limitations on the use of the incorporation power that might be mentioned. First, it is normally up to the founders of a corporation to determine whether to seek federal or provincial incorporation of their enterprise. Thus, Parliament may not unilaterally exercise its incorporation power. Second, it may be that a court would view with some suspicion a federal incorporation of a work or undertaking that was patently of a local nature and the terms of the federal incorporation were but a ruse to circumvent provincial control. This situation has never come before the courts however and thus can be but speculative.

s.92(10)(c), s.91(29) Parliament's ability under section 92(10)(c) to bring within it exclusive jurisdiction "such works as, although wholly situate within the Province, are before or after their execution declared by the Parliament of Canada to be for the general advantage of Canada or for the advantage of two or more of the Provinces" is, as Laskin (now Laskin J.) has observed, an extraordinary power. One might add that it is also a politically sensitive power because it is potentially so great.

Because the exercise of this declaratory power is discretionary with Parliament, the only limits of a legal nature on its exercise go to the form of the declaration, the nature of "works" and the scope of "works" included in a declaration.

On the first question, the courts have made no authoritative conclusion but the preponderance of judicial views suggest that in form the declaration must have statutory, enacting force in order to be effective. Embodying the declaration in a resolution or in a preamble to a statute may prove to be an insufficient manifestation of Parliament's solemn and considered intention.

As to what constitutes "works", one can but note the observation of the Privy Council that "works are physical things not services"[21] and indicate that declarations covering such things as railways, grain elevators and mills, telephone systems, uranium mines, atomic energy plants and munition factories have not yet met with constitutional challenge. The physical things must be, by the terms of section 92(10)(c), wholly situated within a province and the subsection does not, like the other subsections of section 92(10), encompass "undertakings" but refers only to "works". This latter limitation is, as we shall see, more apparent than real, for while Parliament cannot reach an undertaking without works, it can deal with the activities of a declared work.

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(21) *City of Montreal v. Montreal Street Railway* (1912) A.C. 334.

On the question of the scope of works covered by a declaration, two issues arise: the existing works that are included and the future works that may be included in the declaration. Two decisions of the Privy Council indicate that the declaration must be specific on the works intended to be covered, otherwise those works not specified, even though they belong to the same enterprise, will not be deemed to be included in the declaration unless they are an integral part of the specific works so declared.[22] Section 92(10)(c) is, however, by its wording prospective, covering both existing works and future works and this interpretation was adopted by Mignault and Newcombe JJ. in *Luscar Collieries Ltd. v. McDonald* [23] but the four other judges of the court disagreed that the power of Parliament could be so broadly cast. The Privy Council, on appeal, left the question open. It would seem logical to argue, however, that future works of a nature identical to those covered by the original declaration should be brought within federal jurisdiction if Parliament makes this intention clear.[24]

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(22) See *Wilson v. Esquimalt and Nanaimo Railway*, (1922) 1 A.C. 202 and C.P.R. v. A.G.B.C., (1950) A.C. 122.

(23) (1925) S.C.R. 460.

(24) This was the view taken by the Manitoba Court of Appeal in *R. v. Jorgenson* (1970), 12 D.L.R. (3d.) 652.

As to what is brought within the scope of Parliament's jurisdiction as a result of a declaration under section 92(10)(c), Laskin asserts, and this seems borne out by the cases, that it includes not only the physical thing, "but also the integrated activity carried on therein; in other words, the declaration operates on the work in its functional character."[25] This means that Parliament may legislate in relation to declared works (which by section 91(29) of the *B.N.A. Act* are brought within the ambit of section 91) to the same extent that it may legislate on other classes of subjects enumerated in section 91. It can deal not only with the physical object but also with the activities of persons employing or using the physical object. While the works remain physically in a province and hence subject to the general laws of the province concerning ownership, taxation and other local matters, the works are not amenable to provincial laws that would prevent or interfere with the exercise of powers conferred by Parliament under section 92(10)(c) and section 91(29).[26]

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(25) *The Queen v. Thumlert* (1959), 20 D.L.R. (2d.) 335 and see Laskin, *Canadian Constitutional Law* (3d. rev.), pp. 504-509 generally on the subject of the declaratory power.

(26) *C.N.R. v. Trudeau*, (1962) S.C.R. 398.

It would thus appear that Parliament might, under the declaratory power, acquire extensive jurisdiction over computer data bank systems that are physically located in a single province since computers are physical things. This, however, assumes that such action by Parliament would be politically acceptable to the people of Canada. While the declaratory power has been employed some 470 times since 1867, it has not been invoked since 1961[27] and it may be increasingly difficult to justify its use. Today, it may be necessary to demonstrate an overriding national interest in computer data bank operations generally before Parliament could justify the exercise of the declaratory power. If such were the case, it is more likely that Parliament would move under the general power rather than use the declaratory power.

s.92(10)(a), s.91(29) Many computer data bank operations are likely to be tied into a communications network either through their own transmission lines connecting central banks to numerous terminals or through existing transmission facilities of the telephone and telegraph companies for the same purpose. Such operations may be nation-wide, regional or local. In view of this prospect, it is necessary to consider the jurisdiction that Parliament may exercise over telecommunications operations in Canada.

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(27) See Andrée Lajoie, *Le Pouvoir Déclaratoire du Parlement*, (1969), pp. 123-151.

Under section 92(10)(a) of the *B.N.A. Act*, Parliament is empowered to make laws in relation to public utilities such as railways and telegraphs and other works and undertakings connecting one province with others or extending beyond the physical limits of a single province. It is important to note at the outset the operative words underscored above. Parliament's power embraces both "works" and "undertakings" (unlike the declaratory power) and covers both those things that "connect" two or more provinces and those things that "extend" beyond one province.

We have already indicated the meaning given to the term "works"; it covers physical things and not services. "Undertaking" has been characterised by the Privy Council as being an arrangement under which physical things are used.[28] Thus, between the two categories, Parliament is given an apparently broad jurisdiction to regulate and control both physical assets and the operations of physical assets where they connect provinces or extend beyond a province.

It was precisely into this class of subjects that the Bell Telephone operations were placed by the Judicial Committee in the 1905 opinion. As Lord Macnaghten observed: "It can hardly be disputed that a telephone company the objects of which as defined by its Act of incorporation contemplated extension beyond the limits

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(28) *Reference re Regulation and Control of Radio Communication in Canada*, (1932) A.C. 304.

of one province is just as much within the express exception (to section 92(10)) as a telegraph company with like power of extension".[29]

In another case in 1905, the Privy Council ruled that a power utility operating generation facilities in Ontario and, like Bell, authorized by federal law to lay cables and lines beyond Ontario into the United States, was by virtue of this extension of its operations an undertaking under section 92(10)(a).[30]

Although other transportation and communication utilities are perhaps less analogous to a computer data bank system, it should be noted that subsequent cases have placed extra-provincial railways and their telegraph systems, radio and television broadcasting and receiving, inter-provincial pipelines, and extra-provincial bus lines all within the jurisdiction of Parliament under section 92(10)(a) and, in the case of aeronautics, under the general power of section 91 of the *B.N.A. Act*.

The first question that arises from the cases is the circumstances in which a work or undertaking may be characterised as one under section 92(10)(a). Where the operation is one that extends beyond the confines of a particular province either physically or in a service sense, the courts have found little

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(29) *Toronto v. Bell Telephone*, (1905) A.C. 52 @ 57.

(30) *Hewson v. Ontario Power Co.*, (1905) 36 S.C.R. 596.

difficulty in characterising the entire operation as one falling within federal jurisdiction. The *Bell*[31] and *Ontario Power*[32] cases already cited adopt this view in relation to the extension of telephone and power services beyond a provincial boundary. One may, in addition, cite cases where the courts have adopted a similar view regarding railways,[33] bus lines[34] and truck lines[35] as well as airlines[36] and television.[37] Nor have the courts displayed any willingness in these cases to separate the local services from those extending beyond the provincial boundaries, holding in each case that the operation was an organic whole. As Lord Macnaghten answered counsel for Toronto in the *Bell* case in his argument for severing the operations for jurisdictional purposes:

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(31) *Toronto v. Bell Telephone*, (1905) A.C. 52 @ 57.

(32) *Hewson v. Ontario Power Co.*, (1905) 36 S.C.R. 596.

(33) *The Queen (Ont.) v. Board of Transport Comm.* (1968), 65 D.L.R. (2d.) 425 (S.C.C.).

(34) *A.G. Ont. v. Winner*, (1954) A.C. 541.

(35) *Re Tank Truck Transport Ltd.*, (1960) O.R. 497; aff'd. (1963) 1 O.R. 272 (C.A.).

(36) *Johanneson v. West St. Paul*, (1952) 1 S.C.R. 292.

(37) *Public Utilities Comm. v. Victoria Cablevision Ltd.* (1965), 52 W.W.R. 286 (B.C.C.A.).

> But there, again, the facts do not support the contention of the appellants. The undertaking authorized by the Act of 1880 was one single undertaking, though for certain purposes its business may be regarded as falling under different branches or heads. The undertaking of the Bell Telephone Company was no more a collection of separate and distinct businesses than the undertaking of a telegraph company which has a long-distance line combined with local business, or the undertaking of a railway company which may have a large suburban traffic with miles of railway communicating with distant places.[38]

A similar argument was rejected by the Privy Council in the *Winner* case[39] and by the Supreme Court of Canada in the *Go Train* case.[40] In the latter case the arguments for a separation of the local rail service operated by Ontario and the extra-provincial operation of the CN were more cogent in the sense that the two services were quite separate and distinct except that both used CN lines between Pickering and Hamilton in Ontario. However, the court seized upon the common rail used by both operations as the tie that bound them inseparably.

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(38) *Toronto v. Bell Telephone*, (1905) A.C. 52 @ 59.

(39) *A.G. Ont. v. Winner*, (1954) A.C. 541.

(40) *The Queen (Ont.) v. Board of Transport Comm.* (1968), 65 D.L.R. (2d.) 425.

> In the present case, the constitutional jurisdiction depends on the character of the railway line, not on the character of a particular service provided on that railway line. The fact that for some purposes the commuter service should be considered as a distinct service does not make it a distinct line of railway. From a physical point of view the commuter service trains are part of the over-all operations of the line over which they run. It is clearly established that the Parliament of Canada has jurisdiction over everything that physically forms part of a railway subject to its jurisdiction.[41]

In the case of a work or undertaking connecting one province with another, however, there is judicial authority holding that a mere connection of a local work or undertaking with a similar operation outside the province is not sufficient to give rise to federal jurisdiction over the otherwise local operation. In B.C. *Electric Railway* v. *C.N.R.*[42] it was held that a provincial railway line that operated in B.C. and connected with the C.N.R. lines was nevertheless a local work and undertaking subject to provincial jurisdiction. The Privy Council had taken a similar view in *Montreal* v. *Montreal St. Railway*[43] with regard to a claim for federal jurisdiction over the through traffic on interconnecting provincial and federal lines. In this case the rail line subject to federal jurisdiction was not an extra-provincial line but a local line declared by Parliament to be a work for the general advantage of Canada. However, the Privy Council dealt with the issue

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(41) *Ibid.*, 425 @ 432.

(42) (1932) S.C.R. 161.

(43) (1912) A.C. 333.

of the scope of federal jurisdiction in the broader context of section 92(10) and thus the case has relevance for our purposes.

Similarly, it has been held that the connection of provincial highways at the common boundary of two provinces does not render the road system a connecting work under section 92(10)(a)[44] and in the *Winner* case[45] the Privy Council did suggest that if the bus line operations of Mr. Winner had been two separate services merely connecting at the provincial boundary the court might have ruled otherwise on the question of jurisdiction over the local operations.

Again, in *British Columbia Power v. A.G.B.C.*,[46] the B.C. Supreme Court ruled that the interconnection of the B.C. Electric railway lines and gas pipelines with those of the C.P.R. in the first case and those of Westcoast Transmission Pipelines in the second case did not render these two local operations a part of the larger extra-provincial works and undertakings. However, it must be noted that in this same case, the court held that B.C. Electric's power distribution system which inter-connected at the Washington boundary with the Northwest power grid did constitute a connecting work and undertaking under section 92(10)(a). A similar view of power lines connecting at the provincial boundary

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(44) *S.M.T. (Eastern) Ltd. v. Ruch*, (1940) 1 D.L.R. 190.
(45) *A.G. Ont. v. Winner*, (1954) A.C. 541.
(46) (1963), 44 W.W.R. 65.

was expressed by Masten J.A. in *Ottawa Valley Power Co. v. H.E.P.C.O.*,[47] where he spoke of the connection between power facilities in Ontario and Quebec on the Ottawa River in the following terms: "While the physical works do not extend beyond the limit of each Province yet the undertaking as a whole appears to be inter-provincial and a cable or conduit no doubt 'connects' one Province with another". Without deciding the question, the Judge assumed that the undertaking was one that could be regulated by Parliament under section 92(10)(a).

Another point to consider in relation to the scope of a section 92(10)(a) work or undertaking is whether all parts of an enterprise that is so characterised fall within federal jurisdiction. In *C.P.R. v. A.G.B.C.*,[48] the Privy Council believed not and held that the Empress Hotel, owned and operated by the C.P.R. in Victoria, was not an integral part of the rail operations so as to subject it to federal regulation. The court did concede, however, that if the hotel had been used exclusively for persons travelling on the rail line, their answer would have been otherwise. The case nonetheless indicates that it may be possible to exclude certain parts of a single business enterprise from federal jurisdiction.

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(47) (1936) 4 D.L.R. 594 @ 610.

(48) (1950) A.C. 122.

What conclusions may be drawn from these judicial expressions on the meaning and scope of section 92(10)(a)? First, it seems quite clear that where there is a single, integrated operation extending physically or operationally beyond the boundaries of a single province, the operation will fall wholly to federal jurisdiction. Second, it is unlikely that a simple connection of local operations with extra-provincial operations will give rise to federal jurisdiction over the local part of the operations unless the local operations are, from a physical point of view, an integral part of the over-all operations. Third, it is not certain that a mere connection at the provincial boundary of two local operations will give rise to federal jurisdiction in the absence of integration of the operations. Finally, it may be possible to sever for jurisdictional purposes some parts of an extra-provincial operation where those parts are not integral to the operation.

Assuming that we are able thus to identify with some certainty an extra-provincial work or undertaking, we must next consider the scope of Parliament's jurisdiction over the operation. By the terms of section 91(29) (the head of section 91 into which section 92(10)(a) operations are placed) Parliament is given "exclusive legislative authority" over this class of subjects and this view has been affirmed in judicial pronouncements. However, as with all matters confided to Parliament's exclusive jurisdiction,

the courts have long recognized that provincial laws of general application (dealing with property, taxation, civil liability, workmen's compensation, etc.) may also apply to these matters.

There seem to be two general limitations fashioned by the courts on applying provincial laws to works and undertakings under section 92(10)(a) of the *B.N.A. Act*. First, the application of provincial laws may be ousted in a particular instance by paramount federal legislation governing the work or undertaking. This rule is illustrated in a case where the Supreme Court held that a federal law governing the ownership of mineral rights by railways under the *Railway Act* superseded the general provincial property statutes dealing with this matter.[49]

Second, and more important, even in the absence of specific federal laws, provincial laws cannot be applied to section 92(10)(a) operations where such laws affect the vital activities of the operation. Thus, in *A.G. Ontario v. Winner*,[50] the Privy Council ruled that provincial laws regulating the use of highways cannot be applied to prevent or interfere with an extra-provincial bus line operation. Similarly, in *Reference re Validity of Industrial Relations and Disputes Act (Canada)*,[51] the Supreme Court of Canada stated that provincial laws (in this case laws governing

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(49) *A.G. Can. v. C.P.R. & C.N.R.*, (1958) S.C.R. 285.

(50) (1954) A.C. 541.

(51) (1955) S.C.R. 529.

labour relations) were excluded from any aspect of a section 92(10)(a) operation that was "a vital part of the management and operation of any commercial or industrial undertaking". More recently, the same court canvassed the question in relation to the application of a provincial minimum wage law to a section 92(10)(a) operation and concluded (per Martland J.):

> In my opinion all matters which are a vital part of the operation of an interprovincial undertaking as a going concern are matters which are subject to the legislative control of the federal Parliament within s.91(29).[52]

It would appear from the foregoing that once an operation has been characterised as extra-provincial in nature, the jurisdiction of Parliament over its activities is very extensive. The precise application of section 92(10)(a) to computer data bank operations will be considered later.

B. Provincial Powers

The most important heads of provincial power to deal with computer data banks are those relating to local works and undertakings, to property and civil rights and to matters of a local and private nature. Before considering these heads of power, however, we should consider several others that may apply in a limited way to jurisdiction over privacy in relation to computers.

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(52) *Commission du Salaire Minimum v. Bell Telephone Co. of Canada* (1967), 59 D.L.R. (2d.) 145 @ 148-49.

s.92(6),(7) and (8) Under section 92, the provincial legislature is assigned jurisdiction over the establishment, maintenance and management of public reformatory prisons (section 92(6)), hospitals and asylums (section 92(7)) and municipal institutions (section 92(8)) in the province. Through each of these heads, the province might legislate to control computer data bank operations as they relate to these institutions, including the gathering and dissemination of information about persons and businesses.

s.92(11) By section 92(11) the province has legislative jurisdiction over incorporation of companies with provincial objects and may thus, by dealing with the objects of incorporation, control in a limited manner the activities of computer data bank activities. However, it must be remembered that the general power to regulate such companies is not necessarily coextensive with the power to incorporate; for example, extra-provincial works and undertakings, though provincially incorporated, do not fall to provincial regulation. Jurisdiction to regulate is to be determined by function rather than by object.

s.92(14) Under its jurisdiction to administer justice in the province (section 92(14)), a provincial legislature may also control the assembly and dissemination of information relating to judicial and administrative matters. However, this may be subject to the exercise of the federal powers over statistics and criminal law.

The more broadly based provincial powers relevant to privacy and computer data banks are those confiding legislative jurisdiction over local works and undertakings, property and civil rights and matters of a merely local or private nature in the province.

s.92(10) Jurisdiction over local works and undertakings under section 92(10) of the *B.N.A. Act* is, of course, the provincial counterpart to the federal power over all other kinds of works and undertakings already discussed. There is virtually no jurisprudence on the scope of the provincial power (mainly because local works and undertakings can also be subsumed under the broader provincial powers over property and local matters in the province) but two cases have held local power systems and railways to come within section 92(10) and the provincial power appears to be the same as that of Parliament in relation to the exceptions to section 92(10).[53] Thus, the provincial legislature may control all local businesses and operations whether federally or provincially incorporated with the following exceptions as the law now stands:

(a) aeronautics, radio and television operations,

(b) local works declared federal under section 92(10)(c) and,

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(53) See *Smith v. London* (1909), 20 O.L.R. 133 (O.C.A.) and *European and North America Ry. v. Thomas*, (1872), 14 N.B.R. 42 (N.B.C.A.).

(c) local works and undertakings that are functionally under federal jurisdiction, e.g. postal services, navigation and shipping.

While it is often fairly easy to identify local operations in the communications and transportation fields, there are, as we have seen, some cases where the problem is very difficult. Two such situations might be considered here. First, what of the case where the extra-provincial aspects of the operation are a minor part of the activities and irregular in occurrence? While *Re Tank Truck Transport Ltd.*[54] discussed earlier suggested that such extra-provincial activity, no matter how minor, places the whole operation under federal jurisdiction, there are two cases that indicate that if the extra-provincial activity is irregular as well as minor, the whole operation may be considered as a local work or undertaking. In the first case a freight transport business operated mainly in Manitoba with infrequent and unscheduled trips outside the province. Matas J. ruled that the operation was essentially local with the following pertinent observation:

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(54) (1960) O.R. 497 aff'd. (1963) 1 O.R. 272.

> In constitutional cases, no less than in other cases coming before the Court, it is necessary that the realities of the situation be assessed. The operations of the applicant, when examined from a practical aspect, are in pith and substance provincial in character. The applicant's extra-provincial transport of horses is incidental to what is essentially and basically an intra-provincial business.[55]

In another case, the Supreme Court of Canada ruled that a Quebec shipping operation that transported cargo among several Quebec ports along the St. Lawrence was a local operation despite the facts that its ships made infrequent trips outside the province and that the ships regularly crossed the boundaries of the inland waters of Canada while sailing from Quebec City to the town of Gaspé.[56]

Second, what of the situation where the extra-provincial operation is but an appendage or incidental part of an over-all operation that is itself neither a work nor an undertaking within section 92(10)? As illustrations here one might suggest stock brokerage firms in several provinces that use, as a means to expedite business, a connected teletype or computer system or a chain of retail stores across the country that are similarly connected. Two views of jurisdiction may be considered in such a situation.

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(55) *Regina v. Manitoba Labour Board ex p. Invictus Ltd.* (1968), 65 D.L.R. (2d.) 517. (M.Q.B.).

(56) *Agence Maritime Inc. v. Can. Labour Relations Board* (1970), 12 D.L.R. (3d.) 722.

It might well be argued that the communication facilities are merely incidental to the main activities of the business and therefore fall to be regulated provincially. On the other hand, it may be contended that the communication facilities are severable from the other activities of the business and, because they constitute an extra-provincial operation, are subject to federal jurisdiction. This latter view is perhaps more consistent with the approach taken by the Supreme Court of Canada in the *Empress Hotel* case.[57] It is also consonant with practice where, for example, the radio system of a local taxicab operation is subject to federal regulation.

Despite these problem areas to which there are no clear answers, there are nevertheless a good number of situations in which the provincial legislature may invoke section 92(10) of the *B.N.A. Act* to assert jurisdiction over local computer data bank operations in a province.

s.92(13), s.92(16) Provincial jurisdiction over property and civil rights (section 92(13)) and over matters of a merely local and private nature (section 92(16)) in the province can be conveniently discussed together. These two general powers of a provincial legislature offer the broadest scope for provincial jurisdiction over computer data banks and privacy since they can

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(57) *C.P.R. v. A.G.B.C.*, (1948) S.C.R. 373.

be employed to create civil rights and obligations, to establish "quasi-criminal" offences and penalties and to regulate generally activities within a province, whether we are concerned with local works and undertakings or with other enterprises.

For example, the legislature may, as those in B.C. and Manitoba have done, establish rights of individuals in relation to privacy and prescribe the remedies flowing from a breach of these rights. Such laws could have application to all computer data bank operations in the province unless federal law provided otherwise or unless such laws interfered with the vital operations of a system under federal jurisdiction.

Again, the province may establish standards of conduct relating to the gathering and dissemination of information in the province and prescribe penalties (section 92(15)) for failure to observe these standards. The only limitation here is that the province cannot invade the realm of criminal law. Whether a provincial law has a criminal law character is determined either by the nature of the subject matter dealt with and the way in which the provincial law deals with it[58] or by the fact of the existence of federal criminal law dealing substantially with the same matter.[59] However, the Supreme Court of Canada has given the provinces a fairly wide scope to deal with offensive conduct of persons.[60]

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(58) *Switzman v. Elbling and A.G. Que.*, (1957) S.C.R. 285.

(59) *Bedard v. Dawson and A.G. Que.*, (1923) S.C.R. 681.

(60) *Mann v. The Queen*, (1966) S.C.R. 238.

More importantly, the province may under these powers regulate directly the activities of information dealers in the province in a detailed manner, licensing the machines and persons involved and spelling out rules to govern their activities and procedures for handling information. Such laws, would, of course, not have application to those operations that are found to fall to federal jurisdiction.

C. The Constitution and Computers

It remains to fit the constitutional law to some facts about computer data bank operations and privacy. This task will be done at two levels. First we shall look at three general aspects of computer data bank operations that are relevant to the question of jurisdiction irrespective of operation that may be described. Then we shall turn to consider the several types of computer data bank operations that may exist or be established for the purpose of ascertaining the scope of federal and provincial jurisdiction that may be asserted in each case.

Central to the issue of jurisdiction over computer data bank operations are the answers to three major questions that relate to an information process centered in a computer system. In answering these questions we shall be seeking to characterise the main aspects of a computer-oriented information process so that we

may determine the constitutional values involved in each part. The three questions may be simply stated; the answers are more difficult to formulate.

1. What is the constitutional jurisdiction over existing telephone and telegraph operations in Canada?

2. Do computer data bank operations, when connected to a telephone or telegraph system, constitute an integral part of the work or undertaking?

3. Does jurisdiction to regulate a computer data bank operation encompass all facets of the information process?

1. Telephone and Telegraph Operations

As we observed earlier, many computer data bank operations in Canada will be dependent for the transmission of data on the use of land lines and airwave facilities. Initially, at least, these facilities will be those now operated by the telephone and telegraph companies whether the computers are owned by the communication utilities and leased to users or owned by the users and operated on lines leased from the utilities. If separate communication facilities

are eventually established for transmitting computer data, the situation will be analogous to the present communication operations. Thus, it is necessary to consider the question of legislative jurisdiction over telegraph and telephone utilities in Canada in some detail.

With regard to telegraph operations the answer for our purposes is fairly clear. Two major utilities that are merged for service purposes as CN/CP Telecommunications dominate the telegraph activities in Canada. Both utilities are clearly extra-provincial operations and hence are under exclusive federal jurisdiction as one of the subjects expressly mentioned in section 92(10)(a). The few remaining local carriers do provide limited commercial services but their main purpose is to serve the internal needs of the local railroads which own and operate the service lines.[61]

Jurisdiction over telephone utilities is less certain. Of the thirteen major telephone utilities operating in Canada, which together own over 95 per cent of the country's telephones, only two are now under federal regulatory jurisdiction -- Bell Canada and B.C. Telephone Company. Bell is clearly an extra-provincial operation; B.C. Telephone is more properly within the province. But both are federally incorporated with the power to

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(61) See *Instant World*, p. 71.

construct and to operate telephone facilities outside a single province and both operations have been declared works for the general advantage of Canada, and hence are undoubtedly within federal jurisdiction.

The remaining utilities are now regulated by the laws of the provinces in which they operate. Some are government-owned (Alberta Government Telephones, Manitoba Telephone System, Saskatchewan Telecommunications, Ontario Northland Communications) while others are privately owned. Maritime Telegraph and Telephone, New Brunswick Telephone, Newfoundland Telephone, Island Telephone and Northern Telephone are all owned in majority by Bell Canada. Quebec Telephone and B.C. Telephone mentioned above are subsidiaries of General Telephone and Electronics of New York. Each of these utilities provides a service confined essentially to its province of incorporation although all are connected to form a national and international long distance communication system.[62]

Despite the fact that all telephone utilities except Bell and B.C. Telephone are subject to provincial regulation, there are several arguments that may be marshalled toward the view that the major provincial utilities could, if not in all of their

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(62) For a description of the telephone utilities in Canada, see *Instant World*, pp. 67-71.

operations, at least in their extra-provincial operations, be brought under federal jurisdiction.[63]

Let us look first at the utilities in the north and in the Maritimes that are owned in majority by Bell Canada. It may be argued that for constitutional purposes the corporate identity of each of these companies must be discarded and the issue of jurisdiction be decided on the basis of effective ownership. Bell is, by its federal charter, authorized to acquire the telephone facilities of other companies. It is with both these facilities and those it builds that Bell is authorized by charter to carry on a telephone business throughout Canada. In addition, the declaration of a work for the general advantage of Canada contained in Bell's Act of incorporation includes all works covered by the Act, not just those constructed by Bell.

If one takes this view of Bell's factual and legal position, it is possible to conclude that, apart from the corporate veils of the subsidiary companies, Bell owns and operates a single system of telephones that includes not only the facilities in

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(63) In the following analysis (pp. 46-49) I am indebted to Professor W.R. Lederman, Faculty of Law, Queen's University, who kindly permitted me to make use of a study which he prepared in June 1971 entitled "*Telecommunications and the Federal Constitution of Canada.*" This paper will be published in the near future.

Ontario, Quebec and Labrador but also those in the four Maritime provinces. Should the corporate veils be allowed to cloak the existence of this Bell System, an operation contemplated by the very Act of incorporation? There are no cases governing the question but it is clear that, in deciding constitutional law questions, the court will look beyond the four corners of a statute to discover its true import.[64] The same approach might be suggested in dealing with the charter of a corporation.

Another argument for federal jurisdiction is based on the fact of physical interconnection across the country of the major provincial telephone utilities. Every provincial system provides, in addition to its purely local services, a long distance service whereby its lines at the provincial border connect the system with utilities in the adjoining province. The lines carry without distinction both local and long distance services. In addition, it may be noted that both Alberta Telephones and Manitoba Telephone extend their provincial lines into the Province of Saskatchewan.[65] All of the provincial telephone systems make use of micro-wave facilities in their long-distance transmissions, facilities that are under federal control.

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(64) *Texada Mines Ltd. v. A.G.B.C.*, (1960) S.C.R. 713.

(65) See *Instant World*, p. 216.

While the jurisprudence dealing with a situation such as this is, as we have discovered, by no means definitive, there is judicial support for the argument that the facts stated above are sufficient to ground federal jurisdiction on the basis of section 92(10)(a) over the operations of the major provincial telephone utilities, as works or undertakings connecting the provinces.

A third argument supporting federal jurisdiction over at least the out-of-province operations of the provincial telephone utilities is the existence and activities of the Trans-Canada Telephone System. This unincorporated, contractual entity is a consortium of the eight largest telephone companies (B.C. Telephone, Alberta Telephones, Saskatchewan Telecommunications, Manitoba Telephone, Bell Canada, Maritime T. & T., New Brunswick Telephone and Newfoundland Telephone which among them provide over 90 per cent of the telephone services in Canada) the object of which is to provide a complete communications network from coast to coast. The tasks of the Board of Management of TCTS are to plan and coordinate nation-wide services and facilities, to establish common design standards and operating procedures and to arrange for the division of system revenues among the members.[66]

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(66) See *Instant World*, p. 70. It may also be noted that TCTS has now appointed its first president, a position to be paid by TCTS itself. In the past the chairman of TCTS was paid by the member company from which he was drawn.

While TCTS does not own or operate the physical facilities of the member companies, it does control the undertaking of their external operations that in total constitute a single, integrated communications network extending both physically and operationally across the country. It is thus possible to identify for jurisdictional purposes an undertaking (an arrangement under which physical things are used) that both connects provinces and extends beyond the limits of a single province. In an operational sense, it would appear that Trans-Canada Telephone System is every bit as much an extra-provincial undertaking as is the Bell System in Ontario and Quebec.[67]

What conclusions can we draw from these arguments? First, the purely local telephone utilities (municipal and cooperatives) are probably, despite their interconnection with an extra-provincial system for long-distance services, subject to the

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(67) This is not to suggest that the minor utilities in the provinces that have contractual agreements with members of TCTS for long distance services are also a part of the extra-provincial undertaking. The relationship of such utilities to those under federal jurisdiction was recently raised before the Supreme Court of Canada in *Quebec Telephone v. Bell Telephone Co.* (judgment pronounced April 5, 1971, as yet unreported). However, the court did not find it necessary to rule on the issue of constitutional jurisdiction to regulate rates on interconnecting calls, it being conceded by both parties that Quebec Telephone was under the jurisdiction of the Quebec Public Service Board while Bell was subject to regulation by the Canadian Transport Commission.

legislative jurisdiction of the provinces in which they operate under the doctrine enunciated in *Montreal v. Montreal St. Railway*[68] and *B.C. Electric Railway v. C.N.R.*[69] Second, the principal provincial telephone utilities would appear to be, along with B.C. Telephone and Bell Canada, subject to regulation by the Parliament of Canada. Whether the federal jurisdiction extends to all of the operations of the provincial utilities or only to those that are extra-provincial is an uncertainty. If one views the provincial operations as a series of works and undertakings connecting the provinces then it is possible to conclude, on the basis of such cases as *Ottawa Valley Power Co. v. H.E.P.C.O.*[70] and *B.C. Power v. A.G.B.C.*,[71] that the federal power is comprehensive, but this issue is by no means settled. On the other hand, if one views the network operation through the framework of TCTS, it is possible to conclude that Parliament's jurisdiction extends only to the network operations of the utilities. In proposing such a separation of services, however, one must not forget the judicial view rejecting a separation of services expressed in the *Go Train* case.[72]

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(68) (1912) A.C. 333.

(69) (1932) S.C.R. 161.

(70) (1936) 4 D.L.R. 594.

(71) (1963) 44 W.W.R. 65.

(72) *The Queen (Ontario) v. Board of Transport Commissioners* (1968), 65 D.L.R. (2d.) 425.

2. Computer Facilities

Telephones and telegraphy machines are naturally enough an integral physical part of a telephone or telegraph undertaking because neither unit is or can be of any use without the rest of the facilities such as the exchanges and transmission lines. Thus the instruments for receiving and sending information are subject to regulation as a part of the work or undertaking. Computers, on the other hand, are capable of performing their functions independent of switching and transmission facilities. All these facilities do is expand the geographical accessibility of the machine and its services.

In these circumstances, is it correct to consider the computer facility as an integral physical part of a work or undertaking within the meaning of section 92(10) of the *B.N.A. Act*, akin to other communication facilities, because it is connected by lines for purposes of communication? Put another way, does a computer fall to regulation as a part of a communication facility because it is hooked to lines that enable it to communicate? People do not become a part of a work or undertaking when they are "connected" to a telephone system; therefore, should computers?

Two views may be taken of the computer facility. Because all operations of the machine in relation to the data that it contains are performed by the facility quite independent of its connection with transmission lines, one may consider the computer as a work separate and distinct from the communications facilities. Viewed in this way, no federal jurisdiction over the computer and its operations would arise by virtue of section 92(10)(a) since the computer is merely a local work in a province, incidentally connected with an extra-provincial operation in much the same way as the B.C. Electric railway connected with the C.N.R.[73] The federal jurisdiction would arise only when the information was being transmitted by extra-provincial facilities to and from the computer.

On the other hand, one may view the computer-oriented information process as a single, integrated undertaking in which the computer facility is one part of the physical system, all parts of which are employed in the storage and transmission of data. This view is appropriate if one considers certain facts. Computers are not entirely unlike the existing telephone facilities that permit recording of messages from transmission at a later time; both store the information in the interim. Again, when it is

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(73) *B.C. Electric Railway v. C.N.R.*, (1932) S.C.R. 161.

connected to transmission lines, the computer can be operated by persons remote from it by use of the terminals and lines. Thus, it is a part of the communications system that the computer serves these people, not as a separate, independent work. Characterised in this manner, the computer falls to regulation by the level of government possessing jurisdiction over the particular undertaking. In the case of an unconnected computer, the province would possess jurisdiction, as it would in the case of an on-line, local undertaking. Where the computer and its terminals are an integral part of an extra-provincial utility, the whole operation will fall to federal regulation.

Of the two possible characterisations, the latter would appear to be the better approach in most cases where the computer is connected to transmission facilities. In these cases, the primary purpose of the operation is the communication of information over distances and hence the undertaking must logically be viewed as a whole that includes the operation of the computer facility. This is particularly the case where the computer and terminals are operated as a part of the telephone or telegraph system or where they constitute a complex network. There may, however, be situations where the communication links are merely an incidental part of the computer operation and, in these cases, it is perhaps more logical to view the computer as a local work under provincial jurisdiction, despite its connection, because it is not in reality an integrated part of the communications system.

3. Information Processing

Even if jurisdiction over computers can be characterised on the basis of their degree of integration in a communications system, does it follow that the information that goes into a data bank can be controlled jurisdictionally on the same basis? Put another way, does the jurisdiction to regulate computers extend to the information that is placed in the computer's bank? This question raises the problem noted at the outset of distinguishing between the operational facilities of a work or undertaking and the information that is contained or carried in the facilities.

First, let us consider the information process in relation to computer data banks. The initial stages of this process -- the gathering of data -- may bear no particular relationship to the use of computer facilities. In some cases, it may be that the data gathering is quite clearly a part of the computer-based information process as, for example, where the credit bureau obtains data on subjects to place in its computer bank. In these circumstances, it is not difficult to view the gathering activities as an integral part of the computer operation and hence to be regulated by the level of government possessing jurisdiction over the machine.

There will be other cases, however, where the data being assembled is not clearly destined for computer processing. It may be gathered for quite different purposes and only at a later date be placed in a data bank. In these circumstances, it is difficult to suggest that the gathering activities are to be associated with the computer operations for jurisdictional purposes in order that the level of government possessing jurisdiction over the computer may regulate such things as classification of data, qualifications of gatherers, confidentiality and accuracy of information and rights of the subject at the gathering stage.

The provincial legislatures may, of course, quite apart from their jurisdiction over the computer operations, regulate data gathering activities generally under their authority over property and civil rights and over matters of a local and private nature in the provinces. They may also control the information that goes into computers under their jurisdiction. Parliament may, to some extent, employ its statistics and criminal law powers to control information gathering and could possibly regulate the gathering activities indirectly be stipulating the conditions under which data assembled may be placed in computers under its jurisdiction. Here, however, the question of colourability of such legislation might arise as an attempt by Parliament to do indirectly what it could not do directly.

A third situation may also be described where the data gathered is undifferentiated, some of it may go to computer storage while other parts may not. Here we have a case not unlike that raised in the marketing cases where the products being produced may ultimately be marketed either locally or in extra-provincial trade. In these circumstances, the regulation of data gathering cannot be clearly divided and may require cooperative action by both levels of government.

Next, we must consider the data once it is clearly associated with the computer and the communication process. We observed earlier that our concern at the input, storage and output stages of the information process for protecting privacy is not only with the physical operations of the facilities (the reliability of the equipment and the operators, the security of the information in the computers and during transmission and the integration of data) but also with the information itself in terms of its quality and integrity (the accuracy of the information, the identity of subjects, the classification of data, the misappropriation of data and the rights of access by subjects). All of these matters must be regulated to provide for the protection of privacy. Do all of them fall to be regulated on the basis of jurisdiction over the computer facilities? Can the legislature possessing jurisdiction to control the operations of a computer purport to deal not only with the physical aspects of the activity but also with the quality and content of the information?

At the provincial level, one may not need to pose this dichotomy because the provincial legislature possesses the power to legislate generally to protect the privacy of information and thus may deal with all aspects of the matter as one concerning property and civil rights in the province.

Parliament, on the other hand, may not possess an equivalent general power to deal with privacy of information and, apart from what it may accomplish under its jurisdiction over criminal law, statistics, banks and the like, it must rely upon the scope of its power to regulate extra-provincial works and undertakings to assert control over protection of privacy. The scope of Parliament's jurisdiction, as we have already seen, is to control "all matters which are a vital part of the operation... as going concern."[74] In the context of computer facilities that are an integral part of an extra-provincial communications system, it seems clear that the physical aspects of the operation are matters vital to the undertaking, but can the same be said for the quality, content and integrity of the information?

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(74) *Commission du Salaire Minimum v. Bell Telephone Co.* (1967), 59 D.L.R. (2d.) 145 @ 148-49.

If one adopts a restrictive view of Parliament's function in regulating a communications operation, i.e. to ensure the transmission of information about people and business in an orderly and efficient manner, then it is reasonable to suggest that Parliament's jurisdiction goes only to regulating the operational aspects of the undertaking and not to regulating the contents of the product carried on the facilities. One might cite as an illustration of this distinction the federal legislation governing carriage of goods and persons by rail. Under the *Railway Act*[75] Parliament deals with such matters as connections among rail systems, quality of equipment, time schedules, access to services, tariffs and safety of goods and passengers carried. It does not, however, purport to deal with the passengers and the goods themselves.

On the other hand, one may conceive Parliament's regulatory function more broadly, to encompass both the effectiveness and quality of the service and the quality of the product carried. There is precedent for this view, both in the case of radio and television broadcasting, where both aspects of the undertaking are regulated comprehensively by federal law,[76] and in telephone and postal communications where the content of messages is regulated in terms of obscenity and confidentiality.

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(75) R.S.C. 1970, c. R-2.

(76) *Broadcasting Act*, R.S.C. 1970, c. B-11, ss. 3 and 16.

Of the two views concerning the scope of Parliament's jurisdiction, the latter may be preferable both in terms of logic and of effectiveness. Logically, the service and the information are both matters vital to the undertaking as a going concern if we are to have a communications system that is not only orderly and efficient but also accurate and reliable in terms of the product stored and transmitted. In terms of effectiveness, it is preferable to have one level of government able to deal with all aspects of the computer-oriented information process once its jurisdiction over the work or undertaking is established.

One remaining question concerning jurisdiction over the information process relates to the legislative ability to prescribe penalties and civil remedies for wrongful acts in relation to the information. To the extent that it exercises jurisdiction over computer systems as extra-provincial undertakings, Parliament may (assuming this jurisdiction extends to the information) provide both for civil remedies and for penal consequences flowing from mis-handling or misappropriation of information contained in the system. Parliament may also employ its criminal law power generally to protect the integrity of the system and the information. Beyond this, however, the issue of civil remedies will fall to be dealt with by the provincial legislatures.

It remains finally to look at specific computer data bank operations to examine the application of the constitutional law to them. Five situations may be considered.

1. The government owned and operated facility.

2. The privately owned and operated facility confined to a single province.

3. The privately owned and operated facility under federal charter with extra-provincial powers.

4. The privately owned and operated facility with regional and national operations.

5. The privately owned and operated facility that is an adjunct to another business.

1. Government facilities

It is indeed likely that governments in Canada (federal, provincial, and possibly local) are or will be one of the major operators of computer data bank facilities. They are primary gatherers of information of many kinds concerning individuals and businesses and this activity is likely to increase rather than diminish.

The activities of government in the information field may be of two forms. They may be carried on as an ancillary function of departmental operations as is now the case in all instances with the exception of Statistics Canada, or it may be that, in the future, one or more governments will decide to establish Crown agencies, the express function of which is to gather, process, store and disseminate information through a computer system.

At the federal level there is no question that a government computer operation would be subject exclusively to whatever laws Parliament decided to enact concerning the privacy of individuals in relation to the information. This would include laws governing the civil remedies to be had for injuries occurring as a result of mishandling the information.

At the provincial level, provincial laws would govern the operation by a government of a computer facility although Parliament could assert regulatory jurisdiction in the event that a provincial government operation came to constitute an extra-provincial undertaking.[77] Such an operation could also be subjected to any criminal laws enacted by Parliament to protect the privacy of information.

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(77) *The Queen (Ontario) v. Board of Transport Commissioners* (1968), 65 D.L.R. (2d.) 425.

2. Private, intraprovincial facilities

A number of computer data bank facilities will undoubtedly operate privately on a purely local basis, such as in hospitals, universities, municipalities and businesses. In these operations, the scope for federal jurisdiction is very limited, apart from possibly the criminal law and statistics powers. However, where the operation is connected by a public utility such as Bell Canada, B.C. Telephone or CN/CP Telecommunications, that is totally under federal regulation, that operation may be subject to federal jurisdiction if the computer facility is an integrated part of the communications undertaking. If the link is merely incidental, then only the transmission of the data over the communications lines may be regulated federally.

3. Private, federally incorporated facilities

It is not inconceivable that Parliament may act to establish a computer utility under federal charter authorized to carry on a data bank business throughout Canada on existing communications lines or on a newly constructed system. If this were done, Parliament may have the necessary jurisdiction to regulate all of its activities, both local and extra-provincial, under the principle laid down in *Toronto v. Bell Telephone.*[78] The important

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(78) (1905) A.C. 52.

point to note in this situation is the fact that Parliament's jurisdiction arises immediately the undertaking is authorized and need not await the existence of an actual extra-provincial operation. Again, it is important to note that through the company's charter, Parliament may also be able to control the data gathering activities if these could not be brought under federal jurisdiction as an integral part of the undertaking.

4. Private regional or national facilities

There will no doubt be a number of private computer data bank facilities that will be operated in Canada on a regional or national basis. These may be facilities that are tied into several geographically-separate offices of a single business (a credit bureau operation), facilities that connect a number or related institutions (universities or hospitals) or facilities of a business (a Bell Canada computer) that serves numerous customers across the country. The businesses may operate their own transmission lines or lease facilities from existing common carriers.

In these cases, it will be necessary to examine the operations in each case to ascertain if the whole operation is a single, integrated one or if local operations can be separated from those that are extra-provincial. In most cases, it is likely that the operation will be one of an extra-provincial nature and

consequently subject to federal jurisdiction. However, there may be cases where the connection of the computer facility to the communications system is merely incidental and thus the computer may be considered essentially a local work, subject to provincial jurisdiction.

5. Private, ancilliary operations

There will be some cases where a business such as Eatons or Imperial Oil will operate a computer data bank as a mere adjunct to its principal business which is to merchandise goods across Canada. Its data bank is nevertheless a collection of credit information on its customers that is transmitted across the country to the various branches of the business via the telephone or telegraph wires. What is the basis for regulatory jurisdiction in such a case? As we noted earlier, two approaches to the question are possible and they result in different conclusions. The better view, perhaps, is that the computer operations are a distinct business subject to federal jurisdiction as an extra-provincial undertaking, but the situation is by no means clear.

V. Summary

The scope of the federal power over the protection of privacy in relation to a computer-oriented information system appears to be primarily a factor of the degree to which computers evolve as an integral part of the Canadian telecommunications systems. The power of Parliament over telecommunication operations, at least as these function extra-provincially, appears to be fairly comprehensive, encompassing certainly the service and physical aspects of the operation and possibly the quality and content of the information as well. It must be noted, however, that caution needs be exercised in determining what constitutes an extra-provincial work or undertaking in order to invoke federal power. A mere connection of a local operation with an extra-provincial operation may not permit federal regulation of the local operation. Neither is it clear that a simple connection at the provincial boundary of two local operations will result in an extra-provincial operation. Again, the simple connection of a computer to an extra-provincial communications system may not constitute the computer a part of the system. To invoke federal jurisdiction in these cases, it seems essential to demonstrate an organic integration of the various parts. Another possible limitation on the federal power under section 92(10)(a) of the *B.N.A. Act* that must be noted relates to the data gathering phase of the information process. Unless

data gathering can be characterised as an integral part of the computer data bank operation, Parliament may not be able to deal with this activity as a part of the extra-provincial undertaking.

In addition to its jurisdiction over extra-provincial computer data bank operations, Parliament may exercise some power to safeguard privacy by virtue of its legislative jurisdiction over statistics, banks, criminal law, incorporation of companies and declared works. Each of these heads of jurisdiction, however, has limitations so that Parliament may only invoke them as supplemental aids to its power over extra-provincial works and undertakings.

To the extent that computer data bank operations are confined to the boundaries of a province, the provincial legislature will have substantial scope to deal with most aspects of privacy relating to information. Under its jurisdiction over local works and undertakings, property and civil rights and matters of a local and private nature in the province, the legislature may regulate the computer-oriented information process over the entire spectrum of activities from the gathering stage to the dissemination stage and, in addition to regulating, the legislature may provide civil remedies generally for the interference with the privacy of the subjects.

It is thus apparent that, as with most questions of legislative jurisdiction in Canada, effective control of computer data bank operations in relation to privacy will necessarily require cooperation between the two levels of government.

STUDIES COMMISSIONED BY THE TASK FORCE

The Nature of Privacy - D.N. Weisstub and C.C. Gotlieb.

Personal Records: Procedures, Practices, and Problems - J.M. Carroll and J. Baudot, Carol Kirsh, J.I. Williams.

Electronic Banking Systems and Their Effects on Privacy - H.S. Gellman.

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Vie Privée et Ordinateur Dans le Droit de la Province du Québec - J. Boucher.

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Regulatory Models - J.M. Sharp.

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The Theory and Practice of Self-Regulation - S.J. Usprich.

Privacy, Computer Data Banks, Communications and the Constitution - F.J.E. Jordan.

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[1] A joint Study by the Privacy and Computers Task Force and the Canadian Computer/Communications Task Force, to be published by the latter.