A history of broadcasting policy in Canada as it relates to the development of educational television in the provinces. This article especially considers policy consequences of continuing uncertainties relating to the constitutional question of jurisdiction.

Un morceau d'histoire des politiques de télédiffusion au Canada qui traite du développement de la télévision educative dans les provinces. Cet article examine particulièrement les conséquences qu'ont eu, sur les politiques, les incertitudes continues concernant la question constitutionnelle de juridictions.

The issue of jurisdiction over educational broadcasting in Canada has engendered much debate in recent years. Historically, Canadian communications policy has evolved in a highly centralized fashion, the federal government having insisted since the earliest days of broadcasting upon exercising almost exclusive control in the field. The long-accepted principle of public ownership of the airwaves suggests that broadcast licensees are holders of a public trust, thereby justifying regulatory oversight to ensure the public interest. That the governmental authority should be at the federal level is justified by a constitutional provision allocating to the Parliament of Canada jurisdiction over undertakings extending beyond the limits of provincial boundaries.

This principle has been extended to include broadcasting. Federal regulatory responsibility is further justified by the need to ensure that Canada carried out its international treaty obligations with respect to frequency allocations. Based upon these fundamental considerations,
the federal claim to jurisdiction in the field has been reinforced over the years by a longstanding policy objective relating to the maintaining of an integrated "single system," of both private and public broadcasting elements, intended to serve as an instrument of national purpose.

Against this background, the federal government historically has prohibited the issuing of licenses to provincial governments or their agents. But confrontation over jurisdiction was never seriously forced until the arrival on the scene of the concept of educational television less than two decades ago. Relying on s. 93 of the Constitution Act, 1867, (which grants exclusive jurisdiction to the provinces to "make laws in relation to education"), various provincial governments began to apply pressure to acquire control over provincially-owned educational broadcasting stations, and the federal government eventually acquiesced to a degree, relaxing its policy of complete prohibition of provincial ownership. An agreement negotiated in 1972 resulted in a directive which gave the provinces full control over the content of programming on educational stations, but licensing power remained with the federal authority.

The political processes that led to the establishment of this agreement reflect the provinces' challenge of the predominance of federal control over all aspects of communications policy. This paper describes the development of the political debate over one aspect of communications policy, that of jurisdiction over educational broadcasting. It will then identify issues engendered by rapidly changing communications technology, and conclude by suggesting how these issues will have an impact upon the regulatory process as it affects educational broadcasting.

The Evolution of Broadcasting Policy in Canada

The evolution of Canadian broadcasting policy reflects the view that control of the broadcasting system is deemed to be essential to the
maintenance and development of national unity and a strong national identity. This policy has been sustained in the four broadcasting acts\(^2\) enacted since the **Radiotelegraph Act** of 1913. Like its predecessors, the **Broadcasting Act** of 1967-1968, proclaimed April 1, 1968, reflects a sense of national purpose. This goal is articulated in s. 3 of the **Broadcasting Act**, which sets forth a broadcasting policy for Canada, and which states the objectives of the system in terms of a "single system" concept "comprising public and private elements." Section 3(a) declares that broadcasting undertakings in Canada "make use of radio frequencies that are public property." Section 3(b) then sets out a policy which is essentially one of ensuring the establishment of a Canadian-owned system which will "safeguard, enrich and strengthen the cultural, political, social and economic fabric of Canada...." 

In order to implement these policies, Part II of the Act establishes the Canadian Radio-Television Commission,\(^3\) a single independent authority, to regulate and supervise the system. The role of the CRTC is that of an administrative tribunal acting in a supervisory and policy-making capacity to implement Canadian broadcasting philosophy as it is laid down by Parliament and embodied in the Act. In its first policy statement the Commission articulated its commitment to the achievement of national priorities:

*Broadcasting is not an end in itself. It is subject to higher and more powerful imperatives of national development and survival. Thus broadcasting is an integral part of the larger constitutional domain; a national priority itself, it may at certain times be subject to realignment with other national priorities, be they economic, social, political or cultural. The **Broadcasting Act** itself is an organic part of the body of Canadian legislation and subject to the legislative activities of the Canadian Parliament in allied fields.*

The basis for this highly centralized communications policy, as this Report suggests, lies in the "larger constitutional domain." The
framework for communications policy in Canada was determined by the provisions of the division of powers between the federal and provincial governments, laid down by the Constitution Act, 1867. The original Act, (like any federal constitution), defines the kinds of laws which may be enacted by the federal Parliament, and the kinds of laws which may be enacted by each provincial legislature. These are set out, in the main, in sections 91 and 92 of the Constitution Act, 1867, section 91 listing the "kinds of laws which are competent to the federal parliament" and section 92 listing the "kinds of laws which are competent to the provincial legislatures." This distribution of legislative power is accomplished by an enumerated list of subject matters in each of sections 91 and 92. Section 92(10)(a) of the Constitution Act, 1867, makes direct reference to the only form of electronic communication known to our Fathers of Confederation, the telegraph, as explicitly coming under federal jurisdiction:

...telegraphs and other works and undertakings connected the Provinces with any others of the Provinces or extending beyond the limits of the Provinces.

By extension from s. 92(10)(a), the courts have recognized a wide-ranging federal jurisdiction over most aspects of communications policy, for

...federal jurisdiction over broadcasting is interpreted as an inter-provincial undertaking because of the nature of broadcast technology which necessarily overlaps boundaries.

A distinguished constitutional authority has noted that the federal and provincial categories of power are expressed in quite general terms, permitting considerable flexibility in constitutional interpretation. He also observed that it brings much overlapping and potential conflict between the various definitions of powers and responsibilities, giving rise to disputes between the two levels of government. Thus, as might be expected, one of the most critical areas of Canadian public
policy involves decisions concerning overlapping jurisdictions, where boundaries and responsibilities are not clearly defined. The area of educational broadcasting presents a case in point.

The arrival of educational broadcasting brought into being a host of constitutional problems which created an immediate jurisdictional conflict between the federal government and the provinces. Unlike communications policy, the history of educational policy has evolved in a highly decentralized fashion. As we have seen, s. 93 of the Constitution Act, 1867, clearly assigns exclusive jurisdiction over education to the provinces: "In and for each Province the Legislature may exclusively make Laws in relation to Education." Section 93 of the Act, however, does not specify what comprises the domain of education. Because jurisdiction over educational broadcasting is inherently divided, the determination of federal and provincial jurisdiction required legislative interpretation. The process of devising suitable legislation, however, was a delicate one for, as one author notes, federal authorities were afraid that granting a licence for a broadcasting station to a provincial government for educational purposes "would give away control over a segment of the Canadian broadcasting system." Similarly, provincial authorities were afraid that "accepting a federally licensed educational broadcasting system would give federal authorities control over a segment of the educational system."9

The provinces pressed the federal government to allow them the authority to own and operate educational stations. Individual departments of education made arrangements with the federal government, on an ad hoc basis, to disseminate educational material. These arrangements varied from "provincial or local co-operation and agreement with the CBC or CTV networks" to "federally licensed private broadcasters, provincial or local production," as described by Atkey:

Quebec has asserted a vital constitutional interest in the field which embraces new structures and proposals, going considerably further than the mere ad hoc arrangements
above. Other provinces in varying degrees, have expressed a desire to clarify and/or establish a provincial constitutional interest. Quebec had for some time held aspirations in the field of broadcasting, for as early as 1945 that province’s government had created a provincial administrative council called "Radio Quebec," the intent of which was someday to establish provincially-owned broadcasting stations and facilities. Judy LaMarsh, who in 1969 was Secretary of State and the federal government's spokesperson on broadcasting in Parliament, expressed her concern regarding this potentially "dangerous" situation:

Quebec...was anxious to set up its own Radio Quebec network. That is dangerous, for it could easily be transformed to one for general broadcasting, far beyond anyone's legitimate definition of "education." If the federal licensing authority was ignored, what sanctions had Ottawa to use to enforce constitutional diversions?

Meanwhile, Ontario and Alberta had not been idle. They too became actively engaged in seeking licenses for educational broadcasting stations in their respective provinces. Further pressure was provided by the publication of a Report released by a special advisory committee which had been appointed by Prime Minister Pearson to study broadcasting.

The Unfolding of Federal Policies and Educational Broadcasting

The 1965 Report, issued by the Federal Advisory Committee on Broadcasting, chaired by Robert Fowler, devoted an entire chapter to the newly-emerging field of educational broadcasting. One of its recommendations, that provincial authorities be established to control broadcasting providing they were effectively independent of direct ministerial control, was taken into consideration by the federal government.

In response to the "Fowler Report," Secretary of State LaMarsh released a "White Paper on Broadcasting" in 1966, declaring the
federal government's intention to enact new legislation which, (among other things), would address the issue of educational broadcasting. A new federal educational broadcasting agency was proposed, which would be empowered to enter into agreements with individual provinces in order to meet the needs of provincial educational systems. The legislation was drafted but not completed, however, for LaMarsh's energies were deflected to a matter of higher priority: Obtaining the passage of a new broadcasting act. LaMarsh's memoirs describe her determination to pass the new Act before an impending federal election early in 1968. On October 17, 1967, she moved that the House of Commons go into committee to consider legislation relating to a new broadcasting policy. The Broadcasting Act, 1967-1968 was passed by the House of Commons February 7, 1968, and proclaimed April 1, 1968.

Although the new act was largely based on the recommendations of the White Paper and the Fowler Report, the recommendation concerning educational broadcasting eventually was rejected by Parliament. The new act merely granted educational broadcasting a place in the Canadian system. The only reference is s. 3(i) of the Act, which reads: "Facilities should be provided within the Canadian broadcasting system for educational broadcasting...." Thus, educational broadcasting was made subject to the federal authority, like all other broadcasting undertakings.

The matter of educational broadcasting had been referred to the Standing Committee on Broadcasting, on November 17, 1967. This committee held extensive hearings, but its report was never presented to Parliament. The committee ceased to exist at the dissolution of Parliament in April of that year, and a federal election was called for June 25, 1968, leaving the issue of educational broadcasting unresolved.

**Bill C-179: Draft Legislation to Establish a Canadian Educational Broadcasting Agency**

On October 24, 1968, the new Secretary of State, Gerard Pelletier,
announced the establishment of a task force to develop legislation for the implementation of the Canadian Educational Broadcasting Agency, and March 10, 1968, he introduced Bill C-179. This draft legislation provided for the establishment of a new federal agency to hold licences, to operate educational broadcasting facilities, and to negotiate with provincial authorities for their use. The principal use of these broadcasting facilities was proposed as being for matters coming under provincial jurisdiction. The provinces would have the responsibility for the production and programming of educational material to be broadcast over the federal facilities; the federal government would have responsibility for transmission facilities only. Part of the government's plan was to open up television channels on the UHF band, in addition to the VHF allocations already provided for educational broadcasting. The draft legislation defined "educational programs" as having three primary characteristics: First, the objective of educational programs as providing a systematic acquisition or improvement of knowledge; second, achievement of the objective through regular and progressive programming; third, the results achieved would be subject to supervision.

Representatives from each of the provinces criticized this definition of educational broadcasting as being too restrictive. At a meeting of the Council of Ministers of Education, Canada, held in Ottawa, October 20, 1969, it was agreed that a more suitable definition should be found. A working committee consisting of officials of the Council of Ministers of Education and the Secretary of State was established. In the meantime, the federal government announced the withdrawal of Bill C-179, an event which occurred less than one month after the Quebec Broadcasting Bureau Act became law in Quebec.

A Quebec provincial election, in March 1969, had brought the new Bertrand government into being. Soon after the election, the
government introduced legislation which was to become the new broadcasting act.  

The effect of this bill was to update a 1945 Act under which Radio Quebec had been established as a provincially owned service for radio and television broadcasting to disseminate educational and cultural programming. The powers conferred on the Bureau under the new Act, (passed October 17, 1969), were much broader than those provided in the proposed federal legislation. This development was the reason why the federal government withdrew Bill C-179 just three weeks later.  

Encouraged by Quebec's initiative in establishing a provincially owned broadcasting facility, Alberta and Ontario applied pressure on the federal government to change its policy of not issuing broadcasting licences to provincial governments of their agents. Early in 1970, both provinces successfully negotiated interim agreements whereby educational television broadcasting facilities were provided under special licensing agreements with the CBC, and provincial educational broadcasting authorities were set up by provincial orders in council.  

In Alberta, the Canadian Broadcasting Corporation applied for a licence to carry on a new television broadcasting undertaking in Edmonton, with French language CBC programs and educational television programs on Channel 11 (VHF). The CBC's application was approved on August 1, 1969, and a license granted for three years.  

In order to make it possible for the province of Alberta to have access to educational broadcasting facilities, the federal government insisted that the licence be held by the CBC. The Metropolitan Edmonton Educational Television Association (MEETA), and the CBC, formed an agreement whereby MEETA would use the CBC facilities for a specified number of hours per week to broadcast English language educational programs and the CBC would retain the licence and remain responsible for all programming, of which the educational programs formed a part.
MEETA went on-air on Channel 11 in early 1970 as Canada's first community ETV station, leasing forty hours each week.

A few months later, a similar arrangement was negotiated in Ontario. On January 30, 1970, the CRTC issued a public announcement stating that the CBC had been licensed to carry on a new television broadcasting undertaking at Toronto "to provide a transmission facility for educational programs under provincial authority." The undertaking was to operate on Channel 19 on the UHF band, and an Ontario Educational Communications Authority was established in order to supervise and assess the station's programming. A few months later, the Ontario Educational Communications Authority Act was passed, designating a Board of thirteen members to be appointed by the Ontario Cabinet to serve as the provincial authority.

Alberta followed suit, establishing its provincial authority by an Order in Council in February, 1970. This authorized the provincial Minister of Education to enter into agreement with the federal government for the use of educational television broadcasting facilities.

Meanwhile, a definition of educational programming was finalized by the working committee comprising Officials of the Council of Ministers of Education and the Secretary of State.

The Definition of Educational Programming

The public statement released on November 5, 1969 by the Secretary of State, Mr. Pelletier, had not only announced the withdrawal of Bill C-179, but also had pledged the federal government's commitment to arriving at a definition of educational programming to be incorporated into subsequent federal regulations. A definition of "educational programming" eventually was finalized, and on December 2, 1969, the working committee submitted this definition to the Secretary of State.
and the provincial Ministers of education. The federal and provincial governments subsequently approved the following:

1. programming designed to be presented in such a context as to provide a continuity of learning opportunity aimed at the acquisition or improvement of knowledge or the enlargement of understanding of members of the audience to whom such programming is directed and under circumstances such that the acquisition or improvement of such knowledge or the enlargement of such understanding is subject to supervision or assessment by the provincial authority by any appropriate means;

2. programming providing information on the available courses of instruction or involving the broadcasting of special educational events within the educational system.

Broader in its scope than that of Bill C-179, this definition contained changes which acknowledged the provinces' exclusive constitutional jurisdiction in the field of education. The changes have been described as follows:

By adding the requirement of "assessment" as an alternative to "supervision," and by deleting the specific and rigid methods of supervision or assessment, provincial authorities will be left with a much freer hand in broadcasting educational programs to persons in "out-of-school" situations while at the same time providing for some form of feed-back relationship considered so essential to most accepted concepts of "educational broadcasting" (as opposed to "general broadcasting"). And this definition is expanded to include the broadcasting of special educational events within the educational system, or information on available courses of instruction.

This definition of "educational programming" came to determine the respective jurisdictions of federal and provincial educational broadcasting authorities. The subsequent Direction to the CRTC issued by Cabinet on March 19, 1970 incorporated it almost verbatim. The
policy of not granting provincial governments or their agents broadcasting licences was continued, but conditions were created whereby educational channels would be set aside by licensed cable television undertakings. Appendix A of this document states:...at least one channel of a cable transmission facility be set aside for the use of a provincial authority for educational broadcasting.24

But the provinces still dissatisfied with the federal government's position in continuing to deny their right to be licensed for educational broadcasting, continued to press for further negotiations.

The federal government, was faced with a dilemma: Although s. 3(i) of the Broadcasting Act states that "facilities should be provided within the Canadian broadcasting system for educational broadcasting." s. 22(i) of the Act reads as follows:

No broadcasting licence shall be issued, amended, or renewed... (a) in contravention of any direction to the Commission issued by the Governor-in-Council under the authority of this Act respecting...(iii) the classes of applicants to whom broadcasting licences may not be issued....25

The dilemma was one of devising a compromise which would satisfy both the provinces and the Governor-in-Council regarding the eligibility of provincial governments to hold educational broadcasting licences.

The Federal Compromise

Quebec had been a reluctant participant in the negotiations which resulted in the 1970 legislation. Regardless of the party in power, Quebec governments consistently have opposed centralized policies of federal control. After the emergence of separatism in the 60's, communications was perceived as being of even greater importance in the development and maintenance of a cultural identity. This renewed nationalism inspired a strong reaction to the 1970 federal Direction.
On September 19, 1971, a government news release stated that the provincial Cabinet wished to make clear that the Quebec government would be prepared to broadcast educational television programs "without a permit if negotiations with Ottawa are not concluded within the time limit set by Quebec." The release quoted the Minister of Communication, Jean-Paul L'Allier, as saying:

...if the province's educational television plans are to be realized, agreement on this aspect of broadcasting must be reached with the federal government because at that point we must start building our broadcasting antennas.

This forced the federal government to back away from its policy regarding the licensing of educational broadcasting stations, and move to a position of allowing provincial governments to own and operate educational broadcasting facilities under certain conditions. These conditions were specified in a new direction issued to the CRTC on July 13, 1972. Section 2 of the direction specified that the following were ineligible as applicants for educational broadcasting licences:

(a) Her Majesty in right of any province; and
(b) agents of Her Majesty in right of any province.

An agent of a province did not include independent corporations, for s. 3 of the new direction specified eligible applicants to be "independent corporations" which were defined as follows:

...a corporation that the Canadian Radio-Television Commission is satisfied is not directly controlled by her Majesty in right of a province or by a municipal government and that is designated by statute or by the Lieutenant-Governor in Council of a province for the purpose of broadcasting the following types of programming, namely:

(a) programming designed to be presented in such a context as to provide a continuity of learning opportunity aimed at the acquisition or improvement of knowledge or at the enlargement of understanding of members of the audience to whom such programming is directed and under such circumstances such that the acquisition or improvement of such knowledge or the enlargement of such
understanding is subject to supervision or assessment by a provincial authority by any appropriate means; and

(b) programming providing information on the available courses of instruction or including the broadcasting of special education events within the educational system, which programming, taken as a whole, shall be designed to furnish educational opportunities, and shall be distinctly different from general broadcasting available on the national broadcasting service or on privately owned broadcasting undertakings.

The 1972 direction marked the culmination of a long period of extensive negotiations between the federal and provincial governments. As has been observed:

As a result...the provincial governments were able to consolidate and legitimate their opening activities in the area of educational broadcasting while the federal government continued to preserve its overarching jurisdictional and regulatory authority.

But there was a problem inherent in the federal direction: that of setting up a provincial corporation sufficiently independent to satisfy the CRTC that it was eligible for a broadcast licence, while at the same time being under the aegis of its provincial government in order that the latter might assert its constitutional jurisdiction over education.

The problem arose in the course of examining a single case of policymaking in Alberta. The findings of the Alberta study reveal that vagueness in the federal direction with regard to the role of provincial authorities and their control over the content of educational broadcasting came to be reflected in Alberta's provincial legislation. A former counsel to the CRTC described the issue as follows:

Establishing the "independence" of such corporations [authorities] has not been easy in all cases in light of the fact that they are totally funded by their respective provincial governments. The Act establishing the Alberta
Educational Communications Corporation, for example, makes all of the Corporation's dealings in programs subject to any directives that may be given by the "provincial authority," which in that case is the Minister of Education. The desire of the Alberta Government to keep this kind of check on the Corporation stems from a concern that the Corporation not become so independent of the Department of Education that it begins to run its own province-wide educational system separately from that of the Department. From the CRTC's viewpoint, the existence of the direction power represents a potential for direct government interference with the independence of the Corporation and the Commission's various licensing decisions involving the Corporation have voiced this concern.

Discussion

A major implication drawn from this author's analysis of the Alberta case is that the ambiguity of the federal legislation governing the divided jurisdiction of educational broadcasting is reflected in the difficult dilemma which becomes manifest at the provincial level. The dilemma, (having to do with establishing a policy which furnishes public support without political control), was perhaps best expressed by Mr. Justice Michael O'Byrne, in 1976, when he was Chairman of the Board of Directors of the Alberta Educational Communications Corporation:

"[it] does seem almost a paradox to me that we talk about independence, and yet our funding comes from that government which we claim to be independent from. It's a kind of mystery."

Is it indeed possible for a provincially-funded corporation to remain sufficiently independent from its funding source while at the same time maintaining accountability to that government in order to fulfill its mandate of meeting the province's educational needs? The problem becomes one of reconciling what are often two irreconcilable views: Policies made at the provincial level, with policies made at the federal level. It is this dilemma which lies at the root of the problems posed by the divided jurisdiction of educational broadcasting.
But federal and provincial policymaking are not discrete processes. Although the federal and provincial governments act "autonomously, they do so within a necessarily interdependent context." In a federal state such as ours, there is a sharing of legislative powers which produces "two distinct levels of government, each supposedly operating independently in its own sphere of operation." Further, although each provincial legislative body is "confined to its own jurisdiction," there is at the same time a requirement for "joint or at least complementary action" vis-a-vis the federal government.

Such interdependence necessitates an awareness that policies made at one level affect policies made at the other level, and that public policy in the area of communications reflects and expresses the broader issues of this reality. The nature of this "interdependent context," however, has drastically changed over time, as has the nature of the Canadian federation itself.

In the early days of Confederation, there was little need for federal-provincial consultation. Increasingly over the years, however, the federal-provincial arena has become noticeably larger in its scope, bringing with it a co-operative form of federalism, characterized by a relatively more powerful position for the provinces. The phenomenon of provincial governments being committed to building strong provinces and determining their own future development has been termed "province-building" and province-building is viewed as being responsible for a growing challenge to the federal policy of centralized domination over all aspects of communication. Speaking of the 1970's, an observer has written:

All provinces saw communications as integral to "province building." Consequently, they wanted a significant degree of control over areas previously federal and thus a transfer of decision-making power from the federal government.
It is not only the phenomenon of "province-building," however, which has facilitated a steady expansion of provincial involvement in various aspects of communications policy. The advent of more sophisticated communications technology is bound to change the very nature of jurisdictional responsibilities and regulatory arrangements, rendering it increasingly difficult to determine what they should be. (More is said about this below.) As has been said, "there is the increasingly serious danger that technological developments may overtake the capacity of political arrangements--both jurisdictional and regulatory--to handle them." 38

The decade of the '70s, characterized by the phenomenon of "province-building," saw an "emergence of communications as a strategic and contentious issue in Canada public policy." 39 A number of federal-provincial communications conferences were held, all of which ended in failure. The provincial governments affirmed their position that the federal government has no right of jurisdiction over matters which fall into the category of "Intra-provincial" communications, a position which the provinces continue to maintain.

The western provinces have been vocal for some time in expressing their interest in controlling "intra-provincial" communications. This area includes all broadcasting and non-broadcasting enterprises which are conducted within provincial borders. Of particular significance here is the potential for provincial control offered by cable television systems, which in practice are "intra-provincial" undertakings licensed by the CRTC to operate within provincial borders. According to s.92(10(a) of the Constitution Act, 1867 the provincial legislatures may make laws in relation to "local works and undertakings." Section 92(16) permits provincial legislatures to make laws relating to "generally all matters of merely local or private nature in the province." Section 92(13) provides that "property and civil rights" are within the jurisdiction of the provinces. The stand taken by the Western provinces has been that cable distribution systems are "local works and
undertakings" subject only to provincial legislation.\textsuperscript{40} Indeed the federal government accepted that proposition and reached an agreement reflecting that view with nine of the ten provinces, at a First Ministers Conference held in Ottawa, in February, 1979. However, a series of political events intervened,\textsuperscript{41} and the conflict over communications policy became caught up in what one author has described as "the broader movement toward constitutional reform."\textsuperscript{42} The period of the late 1970's has been described as the time "when the cacophony of provincial demands for more jurisdictional power with the federation had reached a crescendo."\textsuperscript{43}

When the historic constitutional talks began in the summer of 1980, both levels of government could look back on no significant agreement on matters to do with communications, despite "almost a decade of negotiations that included six federal-provincial and five inter-provincial conferences and innumerable ministerial and official meetings."\textsuperscript{44} Another author makes the point that because communications proved to be an insoluble issue during the negotiations that took place between the First Ministers, these matters were not resolved in the constitutional review process, and as a result the Constitution Act, 1982 did no more than preserve the original allocation of responsibilities established at the time of Confederation in 1867.\textsuperscript{45} Since that time, the provinces have continued to challenge the federal government's exclusive right to make major communications policy decisions.

**Emerging Issues**

Provincial governments, still intent on realigning legislative and administrative frameworks negotiated in the past, persist in pressing for control over "intra-provincial" communications and calling into question the old established pattern of centralized federal dominance over communications. The federal position regarding the cable television industry in Canada has been one of including it in the
Canadian broadcasting system as an extension of broadcasting, defining cable as "broadcasting receiving undertakings."\(^{46}\)

But this situation is changing. On December 1, 1984 a new set of draft cable regulations was released by the CRTC, accompanied by a request for comments from the public. The proposed new regulations address a number of matters, among which is the matter of satellite-delivered educational channels. Because the CRTC that has required since 1971 cable systems apply a priority list as a basis for determining the channel allocation in any given system,\(^{47}\) educational stations must be carried by all cable systems. The timing of the proposed new regulations is of particular interest in Alberta. On January 13, 1985, the Alberta Educational Communications Corporation (ACCESS) proceeded with the implementation of a province-wide, satellite-based delivery system, or "network" of educational communications. Such "networks"\(^{48}\) raise some interesting jurisdictional issues, for in terms of regulation, the question of satellite carriage is one which was not expressly addressed by the 1968 Broadcasting Act. It is not surprising that the 1968 Act was silent on this issue, as satellite transmission was not an in-place technology when the Act was given Royal assent. Since then, judicial decisions have to some extent considered whether when television channel signals are transmitted by satellite, received by a receiving device and distributed to other persons, such an operation constitutes a "broadcasting undertaking" as defined in the Broadcasting Act, and therefore falls under the jurisdiction of the regulatory agency, the CRTC.\(^{49}\)

An emerging technology, even more subversive of the ability of the regulatory agency to exercise control within the powers now granted to it, arises from what has been called "the ultimate application of satellites for broadcasting...in the form of direct broadcasting to home receivers."\(^{50}\) Such satellites, known as Direct Broadcast Satellites, are now in existence, but not yet readily available at low cost to individual home owners. The ramifications of such reception,
(once it becomes available at low cost), are even more revolutionary than the issues previously discussed, from the point of view of the ability of the national regulatory agency (the CRTC) to exercise significant control.

Other developments in the explosion of new technologies to deliver programs (such as cable and fibre optics) have greatly expanded both channel capacity and band-width, virtually removing the traditional spectrum constraints faced by broadcast technology in the past. Because the broadcasting policy set out in s. 3 of the Broadcasting Act was established on the basis of a scarcity of frequencies on the broadcasting spectrum, the very rationale of the existence of the present Broadcasting Act is being brought into question by the reality that what has been a scarcity of frequencies is being transformed to a virtually boundless channel capacity.

The emergence of this phenomenon demonstrates that new technologies are creating a new communications environment, which in turn demands fresh policy responses. The Broadcasting Act requires revision in order to reflect polices that should be developed in the light of this radically changed environment.

In addition to a need for reconsideration and revision of the scope of activities governed by the Broadcasting Act, the very concept of centralized regulatory control is challenged by the dramatic changes in the broadcasting environment. For example, it is far from clear that the present regulatory system is capable of coming to terms with the major policy issues brought about by the technological revolution. Perhaps the new technology will become the ultimate deregulator and exact the creation of an entirely new regulatory infra-structure for the communications system of the future.

Already there is a general recognition in the federal government that the rapid changes in communications technology demand a more flexible regulatory system. Indeed, such flexibility is anticipated by s.
3(1) of the Broadcasting Act which declares: "the regulation and supervision of the Canadian broadcasting system should be flexible and readily adaptable to scientific and technical advances."

The present Progressive Conservative government's intention to create such flexibility was declared with its introduction of Bill C-20 in the House of Commons. This bill, originally put forward by the previous Liberal government, proposed amendments to the 1968 Broadcasting Act regarding telecommunications issues. The bill did not receive Parliamentary approval before the federal election of September, 1984, but was revived by the Conservatives. Although the bill has been further delayed and remains unpassed at the time of writing, the fact that the present government chose to reintroduce it should be taken as an indication of continuing interest. 

New Directions for Educational Broadcasting

What does the future hold in terms of the jurisdictional issues concerning educational broadcasting? One might speculate that an already well-entrenched province-wide educational broadcasting system would offer excellent leverage for future negotiations with the federal government. Since provincial governments already exercise authority over provincially-owned educational broadcasting systems, such systems offer a possible avenue for augmenting provincial powers over other "intra-provincial" broadcasting endeavours. This would suggest the importance of clarifying the role of provincially-owned educational authorities which hold licences to broadcast educational programming, and of eliminating ambiguities in federal legislation so as to render clearer the jurisdictional boundaries of both levels of government.

In this paper's earlier discussion of the broad and rather ambiguous definition of educational programming contained in the federal legislation, it was noted that the definition was a product of a long process of negotiations between the two levels of government. This definition allowed educational content to be left within the domain of the
provinces. In the absence of more precise definitions of the words "educational" and "general" programming than those found in the 1972 federal Direction and a more recent Order in Council,53 almost any kind of programming can be shown to be educational in its content. To add to the confusion, the federal legislation requires such programming to be "distinctly different from general broadcasting available on the national broadcasting service, or on privately owned broadcasting undertakings." The difficulty of enforcing the requirement that educational programming be "distinctly different from general broadcasting" becomes self-evident since matters of education are of exclusive provincial jurisdiction.

As one observer has said, "the CRTC finds itself somewhat on the horns of a jurisdictional dilemma."54 Should the Commission attempt to impugn the educational value of a given program, it could be accused of overstepping its jurisdictional bounds.

This distinction, or more accurately, this lack of distinction, could be overcome by implementation of a recommendation of the Report of the Consultative Committee on the Implications of Telecommunications for Canadian Sovereignty, (the Clyne Committee).

Established in 1979 to study broadcasting, this committee suggested that "the fiction about educational programming be abandoned," and recommended that the federal government permit educational stations to "enter the field of general broadcasting."55 Certainly an expansion of the definition of educational programming to include more general programming would seem to offer a promising solution. Given a more relaxed federal-provincial climate, it is conceivable that the provinces' efforts to gain control over their intra-provincial communications might well be realized. In the event of such an occurrence, whether the provinces will limit themselves to the educational field or lay claim to a broader interpretation of educational programming is a matter for conjecture. A precondition of the
establishment of a new framework for communications policy would first require renegotiation of the definition of educational programming as found in the federal legislation. This might resolve the dilemma posed by the divided jurisdiction over educational broadcasting, if the negotiations were to produce a formula more appropriate to the changing broadcasting environment than that found in the present statute.

Footnotes
1. Formerly known as the British North America Act, 1867.
3. The CRTC's powers were later, (April 1, 1976), expanded to include telecommunications, becoming the Canadian Radio-television and Telecommunications Commission. The term CRTC throughout this paper refers to the Commission both before and after April 1, 1976.
12. The report (1965) issued by the Fowler Committee appointed May 25, 1964. It was one of the many bodies established to study broadcasting in Canada. It succeeded the Fowler Commission appointed in 1957, the Massey Commission appointed in 1949, and the Aird Commission appointed in December, 1928.
13. White Paper on Broadcasting, issued by the Secretary of State (1966:13) which stated the following:
   Federal policies in the field of communications must not work to impede but must facilitate the proper discharge of provincial responsibilities for education. For this purpose, it will be necessary to work directly with the provinces to study the technical facilities required and to plan and carry out the installation of educational broadcasting facilities throughout Canada.
14. For an interesting anecdotal reference to this event, see, LaMarsh's memoirs (1969:276-277):
   The Government, to my great relief, survived long enough to get the Broadcasting Bill past the House, through the Senate, and to be given Royal assent. That was all I really cared about.
I poured champagne all around for my staff and for members of the Broadcasting Committee of all parties. For me it was to end the last piece of legislation. I had written "Finis" to my parliamentary career.


16. The Council of Ministers of Education, Canada (CMEC) emerged in the mid-sixties. It was officially established in 1967 for the purpose of providing a structure for co-operation between the ministers responsible for education in the ten provinces.


20. The broadcast licence was issued in the name of a federal agent, the CBC, as this took place January 30, 1970, prior to the 1972 federal "Direction," which phased out the requirement that the CBC must act as licence holder for the provincial authority. Although the federal cabinet had previously recommended that only UHF frequencies be made available for transmitters dedicated to educational broadcasting, the Metropolitan Edmonton Educational Television Association agreement with CBC for the sharing of Channel 11 was an exception.


23. Pursuant to s. 27 of the Broadcasting Act, 1967-68, the Governor General in Council is given the power to issue directions to the Canadian Radio-Television Commission. These "directions" are issued as a means of realizing the fundamental objective of the Broadcasting Act, namely "to safeguard, enrich and strengthen the cultural, political, social and economic fabric of Canada," which is always the overarching guide in shaping and implementing policy.


29. Zolf (1984). This study documented what was described as "the battle for the independence" of the Corporation. The battleground on which the Corporation's independence was contested surrounded the interpretation and application of the word "directions" in s.6(1)(b) of the Alberta Educational Communications Act (1973). The Alberta Educational Communications Corporation Act, S.A. 1973, c.3 (R.S.A. 1980, c. A-18).
32. Minutes of Proceedings, CRTC Hearings, Sept. 8, 1976, at p. 27.
41. The major political event which intervened was the movement toward constitutional reform. Another event of importance was that of the federal election of May 22, 1979, which brought the Progressive Conservatives to power. The new government's policy was one of allowing the provinces greater control over communications. Their defeat in Dec. 1979 left the issue of the proposed legislation unresolved, and the debate continues.
43. Sheppard and Valpy (1982:2,3).
44. Schultz (1982:64).
46. In Part I, "General Interpretation of the Broadcasting Act (1967-68): "broadcasting undertaking" is defined as including: "a broadcasting transmitting undertaking, a broadcasting receiving undertaking, and a network operation." Because cable systems are "broadcasting receiving undertakings" (in that they capture and distribute off-air broadcast signals through a coaxial cable), they come under federal jurisdiction within s.3 of the 1968 Broadcasting Act. Cable systems are still regulated according to the 1968 Broadcasting Act, and the 1976 Cable Television Regulations. There have been amendments to the Cable Regulations, namely SOR/91-943, SOR/81-944, and SOR/83-782, but they do not pertain to any issues raised in this paper.
47. The CRTC's policy statement on cable television entitled Canadian Broadcasting: "A Single System" (Ottawa: 16 July, 1971) specified a priority list which must include an educational channel if requested by a provincial authority.
48. There are three other educational networks operating in Canada: TV Ontario (the Ontario Educational Communication Authority), Radio Quebec and the Knowledge Network of the West (KNOW) in British Columbia.
49. See the judgment of Judge Seabright in the Provincial Court of Newfoundland in The Canadian Radio Television and Telecommunications Commission v. Shellbird Cable Limited (1982) 67 P.R. (2d)148, 38 Nfld. and P.E.I.R. 224. Also see the judgment of Mr. Justice J. Muldoon of the Federal Court of Canada, Trial Division in Lount Corporation, Atlantic Inc., and Satel Consultations Ltd. v. Attorney General of Canada, Minister of Communications and the CRTC. His judgment was upheld by the

50. Rabinovitch (1983:1). The author points out that because satellites (which are increasingly being used to transmit signals to cable systems) are such an ideal technology for overcoming the "tyranny of distance and population dispersion" which characterizes the vast territory of Canada, the ultimate application of satellites will be "D.B.S.," in the form of direct broadcasting to home receivers.

51. Ibid. The author goes on to explore the almost limitless programming possibilities and specialty services available with new technology.

52. In 1976, the CRTC's jurisdiction was extended to include telecommunications. (The Canadian Radio-television and Telecommunications Commissions Act, S.C. 1974-75-76, C.49). This Act was intended as the first phase of broader legislation to take into account a range of telecommunications objectives. In fact, a number of bills were introduced all of which died on the Order Paper: Bill C-43, in March, 1977; Bill C-24, in January, 1978; Bill C-16, in November, 1978; and Bill C-20, in February, 1984. The latter, Bill C-20, an Act to Amend the Canadian Radio-television and Telecommunications Commissions Act, the Broadcasting Act, and the Radio Act, died with the dissolution of the 32nd Parliament, and was subsequently reintroduced by the Progressive Conservatives, where it reached the stage of second reading in February, 1985. It was later withdrawn, however, and its fate remains unclear at the time this article went to press. It is reasonable to assume that new legislation will be introduced reflecting recommendations of the recently released Report of the Task Force on Broadcasting Policy. The task force, which reported in September, 1986, was appointed April 9, 1985 to review the Canadian broadcasting system.


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