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CULTURE AND COMMUNICATIONS: THE CONSTITUTIONAL SETTING

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THE DEFINITIONAL PROBLEM

When discussing constitutional options with respect to both culture and communications, the first difficulty is to define the area of legislative or regulatory power involved. The original *Constitution Act, 1867*, refers to neither culture nor communications (with the exception of "telegraphs") as areas of legislative jurisdiction, and the existing constitutional situation has evolved from how courts have inferred jurisdiction from other, specifically mentioned, classes of subjects, such as "property and civil rights within the province" (provincial jurisdiction) or "inter-provincial works or undertakings" (federal jurisdiction). Conversely, any constitutional amendment that makes specific reference to either "culture" or "communications" will impinge upon the existing interpretation of other areas of jurisdiction.

It is always difficult to anticipate how any new head of power, or class of subject, might affect the overall jurisdictional structure because modern economic and cultural structures are both complex and inter-related; the problem is magnified when the potential new head of power is itself unclear.

The concept of "culture," in particular, is not easily defined. In 1979, the Task Force on Canadian Unity described it as follows:

> In day-to-day usage, culture is often considered to be the intellectual and artistic aspect of life in a community or society.
>
> Culture has a broader meaning, however, when related to the character of a whole community. In this context, culture may be defined as the sum of the characteristics of a community acquired through education, training and social experience. It includes knowledge in all fields, language, traditions and values. It adds up to

> a collective way of thinking, feeling, and doing, a collective way of being.
>
> Culture draws individuals together, supports thought, judgment and action, gives a community its character and personality, differentiates it from other communities and encourages its members to seek common objectives.(1)

If we look only at the first, or day-to-day, usage, culture would seem to come within provincial powers over education and civil rights. If we look at the broader meaning, "culture" is so all-pervasive that it becomes difficult to anticipate the extent to which a legislative power over "culture" might impinge on other heads of power.

The issue of the "environment" is perhaps an instructive example of the problems involved in defining "culture" for purposes of constitutional jurisdiction. The main federal powers over the environment are similar to those over culture: inter-provincial or international issues; the concept of "national interest"; and the criminal law power with respect to public health, safety and welfare. The provincial power, which is very extensive, comes from the fact that most environmental issues involve property and civil rights within the province.

In 1988, the Australian Constitutional Commission reported back after several years of deliberation on all aspects of the Australian constitution. It rejected the idea of creating a new provision dealing with the environment, primarily because of the difficulty in restricting the scope of any such power:

> "environment" includes all aspects of the surroundings of man, whether affecting him as an individual or in his social groupings, and "environmental" has a corresponding meaning; . . .
>
> If environmental law is to be defined more helpfully than simply as the law relating to the environment, it needs a considerable refinement and careful circumscription, for *prima facie* the expression "environment" may include literally almost anything and everything.(2)

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(1) The Task Force on Canadian Unity, *Coming to Terms: The Words of the Debate*, Ottawa, 1979, p. 4.

(2) Final Report of the Constitutional Commission, 1988, Vol. 2, Australian Government Publishing Service, Canberra, 1988, p. 765.

Attempts to formalize the role of culture within our constitutional structure would most likely lead to similar definitional problems.

"Communications" involves a somewhat different issue, but one that has created even more controversy within constitutional circles. Communications can refer to either the content of a message, the means of transmission of the message, or both. The content of a message is often a matter of property and civil rights within a province (provincial jurisdiction) but the means of transmission is increasingly likely to involve an inter-provincial or even international undertaking (federal jurisdiction).

Traditionally, public communications transmission has involved either broadcast technology (through the airwaves from a single transmitter to many receivers) or telecommunications (point-to-point communications). In the early days of communications regulation, radio exemplified broadcast technology and telephones exemplified telecommunications. Radio seemed to fall most naturally under federal jurisdiction, as the transmission waves could not necessarily be confined within provincial boundaries, while telephone regulation seemed most amenable to provincial regulation because telephone "networks" were geographically controllable.

The technological revolution of the past decade or two, however, makes it increasingly difficult to separate means of transmission. Telecommunications companies have taken advantage of the airwaves by using microwave and satellite systems to improve point-to-point communications, while broadcasting companies have enlarged their audiences through local cable television networks.

As a result of these trends, the difference between "broadcasting" and "telecommunications" has become less related to technology and more related to purpose. Broadcasting tends to remain a public function, with important cultural and educational implications. Telecommunications, however, involves economic and technological issues, and a modern, efficient telecommunications infrastructure is generally considered an essential component of a successful business environment.

THE HISTORICAL PERSPECTIVE

Throughout most of Canadian history, constitutional law has been concerned with a very few sections of the *Constitution Act, 1867*. Prior to 1982, nearly every constitutional case

dealt only with the issue of whether the federal or provincial government had legislative jurisdiction in a particular situation. Unlike the case in the United States, where the issue is often whether any level of government has the power to interfere with individual rights, in Canada the question was always which level of government had the power in question. All emerging jurisdictional areas, therefore, had to be assigned by the courts to one or the other level of government. Working with a document written in a pre-technological era, the courts constructed an elaborate structure of judicial precedents that have had as much, if not more, effect on federal-provincial jurisdiction than the *Constitution Act, 1867* itself.

For example, the fathers of Confederation felt that they had ensured a strongly centralized economic union, while allowing the provinces continuing control over non-economic matters. Donald Creighton, in a study done for the 1939 Royal Commission on Federal-Provincial Relations, suggested that they:

> ... attempted to separate the affairs and interests associated with commerce from certain rights and customs dependent upon land. The former, which covered the great bulk of economic activities of British North America as they knew it, they gave to the control of the Dominion; the latter, which included matters of minor economic, or of largely cultural, importance, they entrusted to the provinces.(3)

The Constitution of 1867 was based on the realization that a strong economic union was necessary if the British North American colonies were to survive as a separate entity from the much larger, newly unified, and occasionally aggressive nation to the south. Local issues of property and civil rights, however, were to rest with the provinces and, in a general way, these issues included culture. On the other hand, long-distance communications were both slow and uncertain in the mid-nineteenth century, and tended to be associated with methods of general transportation that were largely inter-provincial undertakings. In addition, the relatively new discovery of the telegraph was placed firmly under federal regulation.

In order to ensure the primacy of the economic union, the federal government was given the regulation of trade and commerce, a phrase which by 1867 had "come to acquire the greatest importance and the widest amplitude";(4) the peace, order and good government power;

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(3) Donald G. Creighton, *British North America at Confederation: A Study Prepared for the Royal Commission on Dominion-Provincial Relations*, Ottawa, 1939, p. 50.

(4) *Ibid*.

the power to disallow provincial acts; and the power to implement imperial treaties. However, early judicial decisions in Britain by the Judicial Committee of the Privy Council, then Canada's highest court of appeal, severely limited these federal powers, in large part by expanding the meaning of section 92(13) of the Constitution, "property and civil rights within the province." The Lords of the Privy Council, used to the British unitary system, expanded this provincial power beyond anything conceived of by the original framers of the Constitution.(5)

> In Canada the provincial heads of power include one of great extent and importance. This is s. 92(13), "property and civil rights in the province," a phrase which is apt to include most of the private law of property, contracts and torts and their many derivatives. Indeed, at the hands of the Privy Council, s. 92(13) became a kind of residuary power itself, and one which was much more important than the federal peace, order and good government power.(6)

In short, national economic standards were considered a necessity but, given the fact that the nation was constructed from three distinct communities (as represented by the three divisions in the original Senate), the provinces were to retain control over all local matters. Neither "culture" nor "communications" was referred to in the original Constitution, but there was a fundamental understanding that the national government would not interfere with local or cultural interests. Even in 1867, however, it was difficult to draw an exact line between national economic issues and poverty and civil rights within the province. It is far more so today.

In the case of telecommunications, a strong national infrastructure is essential to any economic growth. At the provincial or local level, however, there are major decisions to be made, such as the degree of cross-subsidization in basic personal services such as telephones. Urban subscribers subsidize rural users. Business users tend to subsidize non-business users. Traditionally, inter-provincial and international traffic has tended to subsidize intra-provincial traffic. However, what is appropriate for Toronto may not work in Prince Edward Island. At one level, therefore, telecommunications is a vital national economic issue requiring federal regulation; on the other, it is an essential local service that is critical to provincial cultural policy.

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(5) See *Parliamentary Debates on the Subject of the Confederation of the British North American Provinces*, 3rd session, 8th Provincial Parliament of Canada, Hunter, Rose & Co., Quebec, 1865.

(6) Peter Hogg, *Constitutional Law of Canada,* (2nd ed.), Carswell, Toronto, 1985, p. 370.

The Supreme Court of Canada has often referred to the Constitution as "a living tree" that continues to grow, albeit sometimes in a disorganized fashion, but is constantly tended and pruned by the courts. The common law approach to the Constitution has been organic and inductive, dealing with specific fact situations, from which general principles gradually evolve. What may now be at issue is whether we replace this with an inclusive, deductive approach: a comprehensive set of principles that defines the contractual relationship. The difficulty, from a legal point of view, is that major jurisdictional changes upset the evolving base of judicial interpretation, and there would be a time of considerable uncertainty before we knew how the courts would interpret the amendments approved by the legislatures.

CULTURE

Culture is not specifically referred to in our present Constitution, with one exception. Section 40 of the *Constitution Act, 1982*, states that if an amendment transferring provincial legislative powers over education or other cultural matters is passed from the provincial legislatures to Parliament, any province to whom the amendment does not apply, because it has not approved it, is entitled to reasonable financial compensation. If, for example, seven provinces with 50% of the population were to approve an amendment transferring jurisdiction over universities from the provinces to the federal government, the three provinces that did not agree would be entitled to reasonable compensation from the federal government so that they could continue running their own universities.

It seems clear, however, that the provincial legislatures were originally intended to have legislative jurisdiction over most cultural issues as matter of a merely local or private nature within the province. The exceptions to this rule were areas where national standards were desirable or necessary, such as copyright, patents, naturalization, and marriage and divorce.

In fact, the provincial legislatures do have exclusive legislative jurisdiction over most cultural matters. On the whole, the federal government's role involves only the spending power — the ability to fund cultural institutions and programs such as the Canada Council, the National Film Board and the national museums. It is possible that the federal government could also justify some legislative control over national cultural institutions through the use of the "national concern" branch of the POGG power ("peace, order and good government"), as was done with the National Capital Commission, or by declaring various works, such as museums, to

be for the general advantage of Canada. They have not done so to date, however, and the spending power seems to be the more relevant issue.

The concept of a federal "spending power" is a relatively recent constitutional development. It arises from federal government initiatives immediately following the Second World War, and is closely linked with efforts to centralize the taxing power. By providing program funds, either unilaterally or in co-operation with the provinces, for a variety of health, social assistance, education and cultural programs, the federal government dramatically altered the national approach to issues which were essentially within provincial control.(7)

The spending power thus became the main lever of federal influence in fields within provincial legislative jurisdiction, such as health care, education, welfare, regional development, and culture. By making financial contributions to specified programs, the federal government can exercise considerable influence over provincial policies, priorities and program standards.(8)

The spending power is thus a fiscal mechanism, but it has been increasingly discussed in terms of a constitutional concept. It seems probable that the use of the term "spending power" first emerged as a constitutional term at the Federal-Provincial Constitutional Conference of 1969, when the federal government submitted a working paper entitled "Federal-Provincial Grants and the Spending Power of Parliament." As recently as 1977, however, such a noted constitutional commentator as E. A. Dreidger was "unable to find the expression 'spending power' in Canadian judicial decision or statute."(9)

Peter Hogg agrees that the spending power is nowhere explicit in the *Constitution Act, 1867*, but says it must be inferred from the powers to levy taxes in section 91(3); to legislate in relation to "public property" in section 91(1A); and to appropriate federal funds, as in

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(7) "In addition to its general policy of reconstruction and a more activist approach, particularly in welfare, the government considered it essential to centralize taxation power to promote the Keynesian economic policies which it proposed to embark upon..." G.V. La Forest, "The Allocation of Taxing Power under the Canadian Constitution," 2nd ed., Canadian Tax Paper No. 65, Toronto, May 1981, p. 28.

(8) Technically, there is no reason why the spending power should be an exclusively federal mechanism. Fisheries, for example, is within exclusive federal jurisdiction and yet is of considerable economic concern to many provinces. Theoretically, the provinces could present a joint fisheries program, and offer to fund it if the federal government were prepared to implement the program as federal legislation. The reason no one speaks of a "provincial spending power" is financial and pragmatic rather than constitutional.

(9) A.E. Dreidger, "The Spending Power," *Queen's Law Journal* (1979), 124, at p. 124.

section 106.[10] Arguably, the "spending power" is simply the expansion of the taxing power to the point that the federal government has sufficient revenues to underwrite national social or cultural programs, in addition to fulfilling its more specific constitutional mandates.

One of the provisions of the 1987 Meech Lake Accord would have added a new section 106A to the Constitution immediately after section 106. Depending upon one's point of view, this would have either strengthened national programs and standards by formally recognizing the spending power, or weakened national programs and standards by allowing the provinces to opt out with compensation.

Regardless of how the constitutional status of the spending power is perceived, however, there are definitely limitations on how it can be used. The first involves the manner in which the money is raised, the second the way in which it is spend. Despite the wide general taxing powers of the federal government, taxing legislation could be questioned if it were explicitly combined with a spending program outside federal jurisdiction. For example, environmental concerns are largely within provincial jurisdiction, but the federal government can nonetheless spend money on environmental programs that affect local concerns within the provinces. If, however, the federal government implemented a tax for the express purpose of enforcing or funding a local environmental objective, the legislation might well be struck down.

Even when money is raised through a proper exercise of the federal taxing powers, there are limits on how it can be used. The federal government can spend or grant its money as it chooses,[11] but it may not directly regulate activities within the provincial sphere of jurisdiction.

> Parliament . . . is entitled to spend the money that it raises through proper exercise of its taxing power in the manner that it chooses to authorize. It can impose conditions on such disposition so long as the conditions do not amount in fact to a regulation or control of a matter outside federal authority.[12]

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(10) Hogg (1985), p. 124.

(11) A number of cases confirm that the federal government can spend its revenue on matters outside its legislative competence: *Angers* v. *M.N.R.*, [1957] Ex. C.R. 83 sustains the validity of federal family allowances; and *CMHC* v. *Co-op College Residences* (1975), 13 O.R. (2d) 394 (OCA) sustains the validity of federal loans for student housing.

(12) *Winterhaven Stables Ltd*. v. *Canada* (1988), 53 D.L.R. (4th), (Alta. C.A.) at p. 434.

Some commentators have argued that the spending power should be formally restricted since otherwise the federal government can directly fund programs within provincial jurisdiction and thereby disrupt provincial priorities. If the spending power is simply a fiscal incentive to adopt certain conduct or policies, then financing can be withdrawn or curtailed under certain circumstances without difficulty. Theoretically, at least, the elimination of the spending power should involve simply the elimination of the programs involved.

However, if the spending power involves a federal intrusion into provincial jurisdiction, as some provinces argue, then perhaps the disruptive potential of eliminating these grants could be assuaged only if the federal government were required to turn over to the provinces the funds or tax room necessary to continue the programs.(13) The 1991 Allaire Report (Report of the Constitutional Committee of the Quebec Liberal Party, "A Quebec Free to Choose"), for example, suggested that the federal spending power would be "eliminated in [Quebec's] areas of exclusive authority" together with "a complete reassessment of the distribution of taxing powers." "Culture" and "communications" would be within exclusive Quebec authority, and the federal government would be unable to spend money directly in these areas.(14)

In the absence of a restricted definition of "culture," therefore, the only real alternative to the existing constitutional situation is for restraints to be placed on the ability of the federal government to fund cultural programs, whether with or without compensation to the provinces. This could be done by (1) federal-provincial agreement, or (2) a constitutional amendment prohibiting or regulating federal government spending in areas outside its express legislative authority. The first option would be far simpler and more flexible, but would not be constitutionally binding or enforceable. As the Supreme Court of Canada pointed out in its 1989 decision on federal-provincial transfer payments:

> [S]upervision of the spending power is not a separate head of judicial review. If a statute is neither *ultra vires* nor contrary to the *Canadian*

(13) "Tax room" or "tax points" are difficult concepts and have limited practical application. To oversimplify, the total capacity of Canadians to bear tax is seen as a large pie divided between the two levels of government. Thus, if the federal government reduces its portion of the total pie, the provinces have "tax room" available to fund additional programs.

(14) "A Quebec Free to Choose: Report of the Constitutional Committee of the Quebec Liberal Party," Quebec, 1991, p. 37-8.

> *Charter of Rights and Freedoms*, the courts have no jurisdiction to supervise the exercise of legislative power.(15)

A constitutional amendment would be more definitive, but would also have broad consequences, restricting federal-provincial relations in a range of activities extending far beyond the cultural field. In addition, unless the flow of funds to the provinces was increased, by inter-provincial transfer or by restricting the federal taxing powers, at least some provinces would have difficulty in picking up the slack and existing programs would suffer.

COMMUNICATIONS

The constitutional background to the evolution of Canadian communications regulation is complex and even somewhat chaotic. One commentator has gone so far as to suggest that:

> [T]hose sources of law which might normally be expected to guide the decision-making processes of telecommunications service providers and users alike as regards required, permitted, and/or illegal market conduct and the enforcement thereof, are so fragmented and lacking in consistency and overall perspective as to be all but incoherent.(16)

The possible transfer of greater constitutional powers over broadcasting and telecommunications to the provinces is a complicated issue. This paper therefore merely summarizes the salient points.

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(15) *Reference Re Canada Assistance Plan (B.C.),* 15 August 1989 S.C.C., unreported, p. 48.

(16) Bohdan Romaniuk and Hudson Janisch, "Competition in Telecommunications: Who Polices the Transition?", 18 *Ottawa Law Review* 561 (1986), p.564. Romaiuk and Janisch go on to note:

> As will be seen, there exists at the federal level alone well over a dozen statutes (dating from 1880 to 1986) bearing directly upon one or another aspect of market conduct in various telecommunications markets. *Yet, no single federal statute concerns itself exclusively with the telecommunications industry as a whole*. Rather there exists a hodge-podge of legislation dealing with individual companies, individual market-segments and different departmental and regulatory bodies. . . There are statutes focussing specifically on broadcasting, radio-communication and telegraphy, but not with their interrelation, either among themselves or with telephony. Other statutes concern themselves with different industries altogether, particularly railroads, touching upon telecommunications only incidentally, although with enormous impact.

From 1867, legislative jurisdiction over communications has generally followed the same principles as jurisdiction over transportation, and important aspects of communications regulation are still to be found in the *Railway Act* and the *National Transportation Act*. By far the most important reference in the *Constitution Act, 1867*, is section 92(10), which gives the provincial governments control over "local works and undertakings" with several exceptions that are placed expressly under federal jurisdiction:

> (a) lines of steam or other ships, railways, canals, telegraphs, and other works or undertakings, connecting the province with any other or others of the provinces, or extending beyond the limits of the province;
>
> (b) lines of steam ships between the province and British or foreign country;
>
> (c) 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.

This last exception is generally referred to as the federal "declaratory power," and has been used in the Acts incorporating the two largest telephone companies in Canada: Bell Canada (serving Ontario and Quebec) and the British Columbia Telephone Company. The declaration power has, however, fallen somewhat into disuse and federal jurisdiction over these companies is also based on other aspects of the telephone network.

The word "undertakings" involves both physical and organizational elements. In one of the last Canadian cases decided by the British Privy Council, the concept was defined as follows:

> Such communications can be provided by organizations or undertakings, but not by inanimate things alone. For this object, the phrase "line of ships" is appropriate: that phrase is commonly used to connote not only the ships concerned but also the organization which makes them regularly available between certain points.(17)

(17) *C.P.R.* v. *Attorney-General for British Columbia*, [1950] A.C. 122, at p. 141.

As communications networks have become more inter-connected, the courts have used the test of "functional integrality" to find that a particular service is part of a inter-provincial undertaking, organization or system rather than a work within the province.

In 1927, Canada signed the *International Radiotelegraph Convention*. In the face of a jurisdictional challenge by Quebec, the matter was referred to the courts. The Privy Council ultimately decided that the power to legislate with respect to broadcasting fell within the exclusive jurisdiction of the federal level of government, both because of the international aspects of broadcast regulation and because the transmitter and receiver formed an integral system involving an inter-provincial undertaking analogous to telegraphy.(18)

As cable television networks developed during the 1960s and 1970s, the argument was made that cable companies, which distributed their programming within the local community by coaxial cable, were local works or undertakings. In the late 1970s, however, the Supreme Court of Canada extended exclusive federal jurisdiction to the regulation of cable television on the grounds that the local companies received their signals "off air," or by broadcast receivers, and thus became an integral part of an inter-provincial system.(19)

Although the federal government has exclusive authority over the national broadcasting system, provincial governments retain some control over content. In *Attorney-General of Quebec* v. *Kellogg's Company of Canada*,(20) and again more recently in *Irving Toy Ltd*. v. *A.G. Quebec*,(21) the Supreme Court of Canada upheld provincial legislation restricting specific types of advertising on the grounds that the legislation dealt with consumer protection rather than broadcasting, and aimed at advertisers rather than a broadcast undertaking.

With respect to legislative authority over telecommunications, there was a surprising lack of judicial involvement for some time. This is partially because neither level of government had an interest in upsetting the status quo, which, although inconsistent in theory, worked well in practice.

By far the largest telephone company in Canada has always been Bell Canada, which services the Ontario and Quebec market and is federally regulated as an inter-provincial

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(18) *In Re Regulation and Control of Radio Communication in Canada*, [1932] A.C. 304.

(19) *Capital Cities Communications* v. *C.R.T.C.*, [1978] 2. S.C.R. 141; *Public Service Board* v. *Dionne,* [1978] 2 S.C.R. 191.

(20) [1989] 2 S.C.R. 211.

(21) [1989] 1 S.C.R. 929.

undertaking. With the exception of that in British Columbia, provincial phone systems were provincially regulated and Crown corporations operated the telephone systems of the three prairie provinces.

Because telephone services were a public service utility or monopoly, cross-subsidization was a major component of rate policy and the public policy varied from province to province. All of the major phone companies, including Bell Canada, however, ran a joint venture known as Telecom Canada (formerly the Trans-Canada Telephone System or TCTS). Although Telecom Canada was not itself regulated, the federal regulatory body (the CRTC) played a crucial role in cross-subsidization policy through its regulation of the major partner, Bell Canada.

For example, long distance rates tend to subsidize local rates and Telecom Canada agreements took this into account in rate-splitting agreements. If the CRTC, however, refused to approve the long-distance rates of Bell Canada as too high relative to local rates, the expected long-distance revenues were no longer available to the other provincial partners in the national network for the subsidization of local rates.(22) However frustrating the other provinces found the arrangement, there was little desire to have the matter adjudicated because of the probability that all provincial networks would be found to be a part of an integral national telephone network under exclusive federal jurisdiction.

In the early 1980s, the rapid expansion of telecommunications services and the consequent pressure for a more competitive approach forced the jurisdictional issue. CNCP Telecommunications (now known as Unitel) applied to the CRTC for interconnection with the various phone systems, including Alberta Government Telephone (AGT). AGT went to court, claiming that the CRTC lacked jurisdiction, both because the provincial phone system was a local undertaking and because AGT was an agent of the provincial Crown.

In 1989, the Supreme Court of Canada held that the national telecommunications network was an integral network under exclusive federal jurisdiction. The federal government

(22) "One measure of the extent of cross-subsidization involved is suggested by Bell Canada figures which, in 1982, indicated that $1.2 billion in non-competitive long distance revenues were used to pay for local services." Nis Moller, "Communications: Selected Constitutional Issues," Research Branch, Library of Parliament, 12 March 1991, p. 29-30.

introduced Bill C-41 to implement this decision, but the bill died on the order paper when Parliament was dissolved in the spring of 1991.(23)

There have been numerous federal-provincial negotiations and proposals on legislative jurisdiction with respect to communications over the past 20 years. On occasion, there has even been something close to agreement.

The Pepin-Robarts Task Force on Canadian Unity addressed the problem of communications policy concisely in its 1979 report *A Future Together*:

> In communications, the clash arises between the central government's view of communications as an integrated Canada-wide system serving as a powerful instrument for nation-building and the insistence of the provinces, particularly Quebec, that the impact of communications on local and provincial responsibilities is so pervasive that provincial control is necessary for them to meet the demands place upon them and for the provinces to safeguard regional and local distinctiveness.(24)

In general, therefore, it seems clear that any resolution of the communications issue that might be satisfactory to a majority of Canadian governments would have to involve some degree of (1) concurrent jurisdiction, (2) legislative interdelegation or (3) intergovernmental mechanisms.

The second, interdelegation of legislative authority between the two levels of government, is not permissible under the existing Constitution, but both the Pepin-Robarts Report and, more recently, the Report of the Special Joint Committee on the Process for Amending the Constitution of Canada have suggested a constitutional amendment to allow for such legislative delegation. This could allow the federal government to delegate to the provinces, or to specific provinces, various legislative authority over communications. The delegation could presumably be revoked or expanded as technological change altered the situation.

The third possibility, intergovernmental mechanisms, is generally discussed in terms of jointly appointed regulatory boards. While this might be palatable to the provincial governments, it is difficult to see how it could provide a coherent national policy.

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(23) See James R. Robertson, Legislative Summary, "Bill C-41, An Act to amend the Railway Act (Telecommunications)," Research Branch, Library of Parliament, 3 October 1989.

(24) Canada, Task Force on Canadian Unity, *A Future Together*, Minister of Supply and Services Canada, Ottawa, 1979, p. 91.

Fundamentally, the problem lies with the increasing convergence between broadcasting, especially cable distribution, and telecommunications. It is generally accepted that an efficient and effective telecommunications network is essential to national competitiveness:

> Telecommunications is seen as increasingly important in the competitiveness of the country and the well-being of business, so cost has to be as low as possible and quality as high as possible. Telecommunications is as important as the railways were, or more so. It is recognized as the underpinning for entering the future.(25)

Some communications issues, such as provincial educational networks, can be treated separately from the general telecommunications network, which is essential to a national economy and so regulated. However, ongoing technological developments make it increasingly difficult to discern aspects of the national communications system that are not functionally integral to the overall telecommunications network.

(25) Edward Trapunski, "Federal Regulator Casts a Wide Net," *Globe and Mail* (Toronto), 10 September 1991, p. C2, quoting Guido Henter, Executive Director of Telecommunications, CRTC.