Whither Goes the Wire?
The Extent of Federal Competence to Regulate CATV

I. Thesis

The past decade has seen a fantastic increase in the number of Canadian households served by community antenna television (CATV) systems. For reasons including our low population density and, perhaps most importantly, the desire of Canadians to watch U.S. TV stations which in most cities cannot be received off-air without expensive antennae, the proportion of households wired for CATV is higher in Canada than anywhere else in the world.[1] This special emphasis afforded CATV by the Canadian populace as a preferred medium of communication demands that the responsible level or levels of government adequately supervise CATV undertakings and exercise a proper planning function over the industry, so as to assure an optimum level of service to all.

It is the thesis developed in the following pages that even the extreme physical limit of a CATV system, its connection lines to tenants in apartment buildings, is a matter falling squarely within the sole purview of the appropriate commissions and departments of the national government.

II. Regulatory Competence Over Radio Communication: Where We Have Been

It is especially worthy of note that the landmark case of *In re Regulation and Control of Radio Communication in Canada*,[2] the first cause in this field to be litigated before a tribunal of ultimate appeal, did not consider the constitutional jurisdiction of Parliament in respect of radiotelegraphy in a vacuum. As early as this 1932 Reference, counsel representing the provinces of Quebec and Ontario specifically pleaded before the Privy Council that the subject-matter of radio communications should be severed, and such facets as educational broadcasting and radio receiving apparatus should be deemed matters of provincial competence as objects of property and civil rights lying exclusively within the provinces' respective spheres of jurisdiction.[3]

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[1] Government of Canada, Telecommission, *Instant World: A Report on Telecommunications in Canada* (Ottawa: Information Canada, 1971), p. 65.

[2] [1932] A.C. 304, 3 Olmsted 18 (J.C.).

[3] *Ibid.*, at pp. 307-08.

While this judgment of the Judicial Committee upholding sole federal competence over all facets of radio communication is founded in part upon the presence in the specific case then at bar of a duty to give effect to an international convention,[4] thus giving rise to additional federal competence under the general, "peace, order, and good government" clause,[5] it was held too that the federal competence over interprovincial "lines of... telegraphs" [6] granted in 1867 is to extend to control over the twentieth century phenomenon of radio.[7]

The specific language used by Viscount Dunedin, speaking for the Board, is especially worthy of note, as one trys to establish whether this same power to regulate "telegraphs" extends to the CATV franchise system carrying a television signal from its head-end to a household receiving set:

> Their Lordships... think broadcasting falls within the description of "telegraphs". No doubt in everyday speech telegraph is almost exclusively used to denote the electrical instrument which by means of a wire connecting that instrument with another instrument makes it possible to communicate signals or words of any kind. But the original meaning of the word "telegraph," as given in the Oxford Dictionary, is: "An apparatus for transmitting messages to a distance, usually by signs of some kind." Now a message to be transmitted must have a recipient as well as a transmitter. The message may fall on deaf ears, but at least it falls on ears.[8]

While note, quite properly, may be taken of the emphasis upon the statement of Viscount Dunedin that apparatus used purely for radio reception necessarily forms a part of a unified undertaking, the *Radio Reference* case is far from conclusive of the present jurisdictional problem.

An extension of the 1932 Privy Council decision, which seems to follow properly therefrom in law, is the decision of a five-judge panel of the British Columbia Court of Appeal in *Public Utilities Commission v. Victoria Cablevision Ltd.*[9] While it had to admit sole federal competence to regulate the defendant's, "receiving... and operating machinery" at the outset,[10] the appellant commission in that case had contended that respondent's lines of cable represented a separate undertaking severable for regulatory purposes. Note that

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[4] International Radiotelegraph Convention, Washington, 1927.

[5] *Per* the residual "general power" described in the opening words of s. 91 of the *British North America Act, 1867:* [1932] A.C. 304, at pp. 312-13.

[6] *Per* s. 92(10) (a) of the Act of 1867.

[7] [1932] A.C. 304, at p. 314.

[8] *Ibid.*, at pp. 315-16.

[9] (1965), 52 W.W.R. 286.

[10] *Ibid.*, at p. 288.

the pleadings disclose no notion that some other rational division of the undertaking might be made, as at the point of connection to the internal wiring of residential buildings, for example.

The two principal judgments rendered make the point very strongly that a telecommunications undertaking is, of necessity, a unified and indivisible whole. Sheppard, J.A., quotes Lord Porter's words in *Attorney-General for Ontario v. Winner and S.M.T. (Eastern) Limited:*

> The question is not what portions of the undertaking can be stripped from it without interfering with the activity altogether; it is rather what is the undertaking which is in fact being carried on.[11]

Given the emphasis upon the functional unity of an undertaking, which Viscount Dunedin had termed, "not a physical thing, but... an arrangement, under which of course physical things are used,"[12] the following conclusions of Maclean, J. A., seem valid:

> I should observe at this point that the case clearly shows that the undertaking of the respondent consists of *an arrangement* whereby broadcasting signals are conveyed *to the private receiving stations of its subscribers.*
>
> In my view, *the exclusive legislative jurisdiction of Parliament extends up to the point where the T.V. signal is received by the subscriber* and that the undertaking of the respondents is nothing more or less than an integral part of the receiving facilities.[13]

Should "exclusive [federal] legislative jurisdiction" extend at least to the point of physical connection to the home TV receiver, there is no doubt left as to the validity of actions by the Government of Canada relating either to standards of CATV connections within apartment buildings, or to the terms upon which such connections shall be effected.

The only possible question might relate to the issue of whether or not the final link, the feed line within the building (or the building's existing master antenna television system) are somehow serverable from the rest of the CATV system for regulatory purposes.

Judging by constitutional jurisprudence in allied areas, and applying normal processes of juridical exegesis, it appears that the *obiter dictum* of Maclean, J.A., in the *Victoria Cablevision* case represents the correct view of the law. The most recent decision of the Supreme Court of Canada directly in point gives unqualified support of this view.

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[11] [1954] A.C. 541, at p. 581; 3 Olmsted 775; cited 52 W.W.R. 290.
[12] [1932] A.C. 304, at p. 315.
[13] 52 W.W.R. 286, at pp. 293-94, emphasis added.

The *"GO Train"* case[15] involved a federal/provincial dispute over authority to regulate fares charged on an autonomous Ontario government-operated commuter rail service, which operated on the lines of a section 92(10)(a) undertaking, the Canadian National Railway. The judgment of the Court, in finding for the respondent federal Commission, reached the following important conclusion:

> It is clearly established that the Parliament of Canada has jurisdiction over everything that physically forms part of a railway subject to its jurisdiction.[16]

Applying this rule, the strict *ratio decidendi* of *"GO Train"* to the present problem, and in view of the definition of the scope of a telecommunications undertaking established in the *Radio Reference* case, additional support is to be found for federal regulation in the present sphere. It is to be acknowledged that not all property or enterprises of a CATV organization are to be federally regulated. If Victoria Cablevision Limited were to purchase the famous Empress Hotel located in the British Columbia capital, the hours of work of the hotel's chambermaids would remain a matter of provincial law: the hotel would not serve as a part of a section 92(10)(a) undertaking, connecting two or more provinces.[17]

As regards other constitutional decisions in the telecommunications field, the courts appear to have evolved a test which, if applied in the present case, seems certain to place the matter of CATV hook-ups within apartment buildings squarely under federal competence.

The manufacturing activities of Bell Canada's subsidiary Northern Electric, in a plant producing goods principally for Bell Canada, have been held by McRuer, C.J.H.C., to fall outside of the section 92(10)(a) power.[18] Unlike the case of stevedoring services provided to interprovincial and international shipping,[19] he found the services of Northern Electric's plant and its production workers not "necessary to the successful operation" of the section 92(10)(a) undertaking.[20] The services, he said, "could be carried on by any other company . . . if Northern Electric ceased to manufacture."[21]

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[15] *The Queen in right of Ontario v. Board of Transport Commissioners*, [1968] S.C.R. 118, 65 D.L.R. (2d) 425.

[16] 65 D.L.R. (2d) 425 at p. 432.

[17] *Cf. Canadian Pacific Railway Company v. Attorney-General for British Columbia*, [1950] A.C. 122 at p. 145; 3 Olmsted 637.

[18] *Regina v. Ontario Labour Relations Board, Ex parte Dunn*, 39 D.L.R. (2d) 346, [1963] 2 O.R. 301.

[19] *Reference re Industrial Relations*, [1955] S.C.R. 529, at p. 568.

[20] 39 D.L.R. (2d) 346, at p. 357.

[21] 39 D.L.R. (2d) 346, at pp. 358-59.

The latter case can be contrasted to *Regina v. Ontario Labour Relations Board, Ex parte Northern Electric Company Limited*,[22] a 1970 decision of Mr. Justice Lacourciere. Power to regulate the labour relations of employees engaged by the company to install electrical equipment in the telecommunications systems of Bell Canada, the Canadian Broadcasting Corporation, the Canadian Overseas Telecommunications Corporation, and Canadian National/Canadian Pacific Telecommunications was this time in question. The 1963 decision was found to be distinguishable from the situation before Lacourciere, J.,[23] on the ground that the installers' activities contributed directly and immediately to, "connecting one Province with another, within the meaning of ... section 92(10)(a)."[24] The judgment reiterated, on the basis of *Victoria Cablevision*, the *Radio Reference* case, and *City of Toronto v. Bell Telephone Co. of Canada*,[25] that,

> On a proper reading of the cases, it would appear that, once the work or undertaking extends extra-provincially in some aspects,[26] the *whole* work falls under federal competence.[27]

He continues:

> There is also the element of the physical connection of the works, which are linked through the air waves and otherwises as effectively as if a wire connection, or a rail connection existed. Thus, the reasoning of the *GO Train* case ... would appear to be here applicable.[28]

One further passage in this judgment is of special interest in the present circumstances. Lacourciere, J., reminds us that only a "consistent and regular" use of any physical facility as part of a section 92(10)(a) undertaking is necessary to allow that facility to be regulated federally, rather than provincially under the authority of sub-sections 92(13) and (16) of the *British North America Act of 1867*.[29] In *Regina v. Cooksville Magistrate's Court, Ex parte Liquid Cargo Lines Ltd.*,[30] which is cited in *Ex parte Northern Electric*, Haines, J., upheld federal regulatory competence over the labour relations of a trucking firm, on the basis of section 92(10)(a), though it had only one truck depot — in Ontario; it only employed

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[22] 11 D.L.R. (3d) 640.
[23] *Ibid.*, at pp. 644-46.
[24] *Ibid.*, at p. 653.
[25] [1905] A.C. 52, 1 Olmsted 507.
[26] All radio communications appear to so extend in the *Radio Reference* decision: [1932] A.C. 304, at p. 315.
[27] 11 D.L.R. (3d) 640, at pp. 653-54, emphasis added.
[28] *Ibid.*, at p. 654.
[29] *Id.*
[30] [1965] 1 O.R. 84, 46 D.L.R. (2d) 700 (High Ct.).

residents of Ontario; it hauled 98.4% of its loads intraprovincially; and it carried goods through 90% of its annual cargo miles without leaving Ontario.[31]

The *Liquid Cargo* line of reasoning, extended to telecommunications undertakings, as suggested by Lacourciere, J., would recognize an overriding federal competence to regulate circuits in apartment buildings used both by CATV signals and other electronic transmissions. A coaxial cable, for example, carrying a CATV hookup plus a closed circuit T.V. picture of callers at the front door is thus placed under a paramount federal regulatory competence.

III. Regulatory Competence Over CATV Circuits: How Far We Can Go.

The foregoing examination has concentrated upon the specific interpretations afforded the scope of federal competence under section 92 (10)(a) of the *British North America Act, 1867* to regulate interprovincial telecommunications undertakings. Good logic demands, though, that a more basic and fundamental jurisprudential question be asked — a question which the courts are likely to pose, in the event that the matter presently being considered gives rise to the litigation of the extent of federal power to "trench" upon provincial authority, under sub-sections (13) and (16) of section 92, regarding the respective rights of apartment residents and CATV franchisees on the one hand, and building owners on the other. This question is, When federal and provincial spheres of authority necessarily conflict, which level of government is to be deemed paramount?

The final clause of section 91 of the *British North America Act, 1867* reads as follows:

> And any matter coming within any of the Classes of Subjects enumerated in this Section shall not be deemed to come within the Class of Matters of a local or private Nature comprised in the Enumeration of the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces.

While there is here a hint of the paramountcy of the federal sphere, there also seems to be present a suggestion that the list of federal powers is to be read restrictively, with provincial powers to be viewed expansively. Furthermore, the concluding sub-section of

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[31] [1965] 1 O.R. 84, at pp. 85-86. See also *Re Tank Truck Transport Ltd.* (1960), 25 D.L.R. (2d) 161 (Ont. High Ct.); *Regina* v. *Borisko Brothers Quebec Limited* (1969), 29 D.L.R. (3d) 754 (Que. Ct. Sess., appeal to C.A. refused, *loc. cit.*).

section 92 states that the respective legislatures' competence shall extend to include,

> 16. Generally all Matters of a merely local or private Nature in the Province.

From the simple textual statements, though far from clear, one is rather inclined to conclude that any situation of conflicting or overlapping jurisdiction might properly be decided in favour of the provinces.

This has not been the interpretation given the *British North America Act, 1867* by the courts. At least since 1887, the Privy Council has considered the matter to have been a long-settled issue:

> And [their Lordships] adhere to the view which has always been taken by this Committee, that the Federation Act exhausts the whole range of legislative power, and that whatever is not thereby given to the provincial legislatures rests with the parliament.[32]

The point has arisen over the last century in numerous contexts. Perhaps the most off-quoted determination of the conflict is that of Lord Tomlin, speaking for the Privy Council in the *Fisheries Act Reference*:

> There can be a domain in which provincial and Dominion legislation may overlap, in which case neither legislation will be *ultra vires* if the field is clear, but if the field is not clear and the two legislations meet the Dominion legislation must prevail...[33]

Instances in which this formulation has been applied by the Supreme Court of Canada are innumerable[34]; it was last adopted in a unanimous decision of a full, nine-judge panel of the Court last year.[35]

While such a situation of conflict involving federal power over telecommunications and a provincial power over property and civil rights in the province has not been litigated at the Supreme Court of Canada level, one regarding the similar aeronautics power has. In *Johanneson v. West St. Paul*,[36] a city bylaw, passed pursuant to the Manitoba *Municipal Act*, purported to regulate an airport established by a federal licence holder. The following opinions were given by Kellock and Locke, JJ., respectively; they are representative of the views of the entire Court:

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[32] *Bank of Toronto v. Lambe*, (1887), 12 App. Cas. 575, at p. 588, 1 Olmsted 222.

[33] *Attorney-General for Canada v. Attorney-General for British Columbia*, [1930] A.C. 111, at p. 118; 2 Olmsted 617.

[34] *E.g., Smith* v. *The Queen*, [1960] S.C.R. 776, 25 D.L.R. (2d) 225; *O'Grady* v. *Sparling*, [1960] S.C.R. 804, 25 D.L.R. (2d) 145; *Stephens v. The Queen*, [1960] S.C.R. 823, 25 D.L.R. (2d) 296.

[35] *Caloil Inc. v. Attorney-General of Canada*, (1971), 20 D.L.R. (3d) 472, at p. 477. (*per* Pigeon, J.).

[36] [1952] 1 S.C.R. 292.

> It is no doubt true that legislation of the character involved in the provincial legislation regarded from the standpoint of the use of property is normally legislation as to civil rights, but use of property for the purposes of an aerodrome, or the prohibition of such use cannot, in my opinion, be divorced from the subject matter of aeronautics or aerial navigation as a whole. If that be so, it can make no difference from the standpoint of a basis for legislative jurisdiction on the part of a province that Parliament may not have occupied the field.[37]

> In my opinion, the position taken by the province ... cannot be maintained. Whether the control and direction of aeronautics in all its branches be one which lies within the exclusive jurisdiction of Parliament, and this I think to be the correct view, or whether it be a domain in which Provincial and Dominion legislation may overlap, I think the result must be the same.[38]

The delimitation of federal authority in the present matter is hinted at by Stark, J., in *Re Oshawa Cable TV Ltd. and Town of Whitby*.[39] While holding (in *obiter*) that, "... CATV operations are outside of provincial jurisdiction and are *completely* within the power of the federal Legislature," he acknowledged the fact that this does not allow disregard of provincial laws of general application, as contrasted with those statutes which would tend to "sterilize" the undertaking.[40]

IV. Conclusion

If, on a practical basis, the effect of not regulating the terms and manner of entry of cable signals into apartment buildings is to jeopardize the whole CATV undertaking, in layman's language, to render it of significantly more cost to the consumer, it is then submitted that all necessary interference with provincial property and civil rights laws will be rendered *intra vires* the federal government. The key word in the preceeding sentence, however, is *necessary*. Just as the aeronautics power will not validate federal actions akin to zoning of lands near airports,[41] so too the Government of Canada, acting through the Minister of Communications or the Canadian Radio-Television Commission, by Order-in-Council

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[37] *Ibid.*, at p. 311.

[38] *Ibid.*, at p. 325. See also *Jorgenson v. North Vancouver Magistrates* (1959), 28 W.W.R. 265 (B.C. C.A.).

[39] (1969), 4 D.L.R. (3d) 224 (Ont. High Ct.).

[40] *Ibid.*, at p. 231, emphasis added; following *Attorney-General for Ontario v. Winner and S.M.T. (Eastern) Limited*, [1954] A.C. 541, 3 Olmsted 775.

[41] *Bramalea Consolidated Developments Ltd. v. Attorney-General for Ontario and the Minister of Municipal Affairs of Ontario*, [1971] 2 O.R. 570 (C.A.).

or otherwise, cannot regulate the over-all design of apartment buildings, except as is necessary to control the quality and cost of residents' CATV services.

In concluding the analysis of the constitutional basis for federal action in this sphere, the attention of the general reader is drawn to the fact, that, although the limited area is one of federal regulatory competence, in the absence of any action by the Government of Canada general provincial laws governing property and civil rights shall prevail. The relationships between and among the lessee, proprietor, and CATV franchisee will continue to be governed by the common law and civil law of property and contract of the respective provinces.

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