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Robert P. Doherty\*

The Case for Provincial  
Regulation of Community  
Antenna Television Systems  
in the Wake of *Capital Cities*  
and *Dionne*

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I. *Introduction*<sup>1</sup>

While observers of the Canadian Constitution may believe that jurisdiction over cable television in this country was finally and clearly given to the federal government and its Canadian Radio-Television and Telecommunications Commission, by the *Capital Cities*<sup>2</sup> and *Dionne*<sup>3</sup> cases, there is still much to be decided. If there are any doubts, then consider news reports of November 1978, and January and February 1979 which highlighted the prominence of cable television as a negotiable federal/provincial subject at several conferences. Vibrations from several provincial governments<sup>4</sup> indicate that cable television and data communications are two areas of communications that provinces would dearly like to have under their jurisdiction.

Yet even if the current negotiations are not successful, the provinces have a solid, although restrictive, constitutional ground

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1. The author is indebted to Robert Oxner, Atlantic Region Director of the Canadian Radio-Television and Telecommunications Commission, and David Colville (Assistant to the Minister responsible for Telecommunications Policy in Nova Scotia). Both were valuable sources of information. Thanks are also extended to Professor R. Harrison and Research Fellow R. Paul Davis of Dalhousie Law School for criticisms and comments.

2. *Capital Cities Communications Inc. et al. v. Canadian Radio-Television Commission*, [1978] 2 R.C.S. 141 (S.C.C.)

3. *Public Service Board for Quebec et al. v. Francois Dionne et al.*, [1978] 2 R.C.S. 191 (S.C.C.)

4. Saskatchewan has indicated it wants to control all of cable TV (See "Saskatchewan sees CATV Victory in CRTC Ruling" John Twigg, *Financial Post* 71:26 08 1977.) and David Colville indicated that Nova Scotia has the same attitude. Quebec already expressed its views in the *Capital Cities* and *Dionne* cases and several other provinces intervened. Prime Minister Trudeau offered the provinces licencing authority over CATV at the February 1979 Constitutional Conference, but this was rejected by Quebec which wants all communications under its wing. How the other provinces will react is another matter.

for assuming control and regulation of some aspects of cable television, and for reaping any consequent benefits of tax revenues.

The reasons for seeking regulatory power extend beyond financial bases, since regulation of cable also gives effective media control over some aspects of provincial educational and cultural development.

This article will examine the constitutional grounds on which that assumption of provincial power is based, review present municipal, provincial, and federal regulation and control of cable television, and finally, propose what the author believes are realistic regulatory schemes.

On constitutional grounds, and in view of present provincial and federal governmental structures, the proposals would give the provinces an additional taxing avenue and an area of educational and cultural autonomy, while at the same time allowing the federal government continuing control of most CATV enterprises, and a continued watchful eye on the broadcasting industry's presentation of the Canadian cultural mosaic.

## II. *The Constitutional Base*

Federal jurisdictional claims over cable television<sup>5</sup> are derived from a base of "broadcasting". Since broadcasting was not specifically defined as a federal or provincial item under the *British North America Act*, it remained for the courts to define jurisdiction. It was in the *Radio Reference*<sup>6</sup> case that the technological jurisdiction, or regulation of the transmission and reception of broadcast signals, was decided to be a federal matter.

In Viscount Dunedin's reasoning, there is the suggestion that like aeronautics, radio broadcasting is a matter of national interest and Canada's signature to an international convention gives the central government authority to pass legislation in respect to it. The argument of the provinces that intra-provincial broadcasting (*i.e.* within the province) should be under provincial control was dismissed with the same reasoning of the *Aeronautics Case*:

Once you come to the conclusion that the convention is binding on Canada as a Dominion, there are various sentences of the Board's judgment in the aviation case which might be literally transcribed to this. The idea pervading that judgment is that the

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5. The correct terminology is *Community Antenna Television Systems* (CATV), but cable, cablevision, and cable television are currently used.

6. *Re Regulation and Control of Radio Communication*, [1932] A.C. 304 (P.C.)

whole subject of aeronautics is so completely covered by the treaty ratifying the convention between the nations. . . .<sup>7</sup>

The Privy Council then went on to note that the provincial argument, *i.e.* the transmission and reception were two different undertakings subject to different regulations, failed.

Broadcasting as a system cannot exist without both a transmitter and a receiver.<sup>8</sup>

Using the exceptions to provincial jurisdiction of s.92(10) of the *British North America Act*<sup>9</sup> Viscount Dunedin noted that broadcasting by its nature is an inter-provincial undertaking with signals transcending provincial boundaries, and that it could also be considered under "telegraphs".

What emerges from the case is that "broadcasting" in all its technical aspects is under federal jurisdiction; that receivers as well as transmitters are part of that "broadcasting"; that broadcasting is to be considered as a "telegraph" type of communication; that broadcast signals transcend provincial boundaries in transmission; and that an international convention can be used at least as a partial base for federal legislation.

In *Re C.F.R.B. and the Attorney General of Canada*<sup>10</sup> an Ontario radio station unsuccessfully attempted to narrow the *ratio decidendi* of the *Radio Reference* case so as to exclude regulation of programming content. The court noted:

I am of the opinion that the exclusive legislative authority with

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7. *Id.* at 313. It is interesting to note that the convention itself was held not to be binding on the CRTC in the *Capital Cities* case. Some have contended that "peace, order and good government" as per the opening words of s.91 of the *BNA Act* were the base upon which the Privy Council gave the federal government jurisdiction, but in the Labour convention case, *A. G. Can. v. A. G. Ont.*, [1937] A.C. 326 at 351, the Privy Council noted this was not a correct interpretation, and that broadcasting fell to Parliament under the residuary clause of s.91. The Privy Council in *In Re Regulation and Control of Aeronautics in Canada*, [1932] A.C. 54 (P.C.) came to the same conclusion on aviation as it did for radio in the *Radio Reference*, for generally the same reasons.

8. *Id.* at 315

9. 30 & 31 Vict. c.3; R.S.C. 1970, App II No. 5. Under s.92(10) local undertakings are designated as being under provincial jurisdiction with specifically noted exceptions listed under s.92(10) (a), (b) and (c). Exception (a) notes "... telegraphs, and other works and undertakings connecting the Province with any other or others of the Provinces, or extending beyond the limits of the Province." These exceptions are declared to be under federal jurisdiction by s.91(29) of the *British North America Act*.

10. (1974), 38 D.L.R. (3d) 335 (Ont. C.A.). Application for leave to appeal to the Supreme Court of Canada was dismissed on November 13, 1973.

respect to radio communication extends to the control and regulation of the intellectual content of radio communication.<sup>11</sup>

Application of the principles of the *Radio Reference* to cable television was first undertaken by the British Columbia Court of Appeal in the *Victoria Cablevision* case.<sup>12</sup> It involved a refusal by the respondent cablevision companies to supply information on the number of subscribers and cable rental charges of the company to the provincial public utilities commission.<sup>13</sup> The commission argued unsuccessfully that the companies operated two undertakings: the receiving antenna, which the B.C. commission admitted was under federal jurisdiction under s.92(10) of the *British North America Act*, and the distribution of the programming by cable to the customers, which it contended was a "local work" under provincial jurisdiction by virtue of s.92(10).

The Court held that the distribution by cable was as much a part of the "business" as was the reception. Continuing with the reasoning of the *Radio Reference* that linked transmitter and receiver, Sheppard J. A. noted:

the cable merely extends the effective range for transmitting the programs received by the antennae.<sup>14</sup>

Applying the *Winner*<sup>15</sup> case, he asked "What is the undertaking which in fact is being carried on?" Once it is decided that it is an interprovincial undertaking under federal jurisdiction, and that it is not "severable", local aspects fall under federal control as well.

In the author's view, the significance of the *Victoria Cablevision* case lies in the courts' reluctance to extend the definition of broadcasting beyond the "Hertzian" waves of the *Radio Reference*.

11. *Id.* at 340

12. *Re Public Utilities Commission and Victoria Cablevision* (1965), 51 D.L.R. (2d) 716 (B.C.C.A.); actually there was an earlier significant cable case *Rediffusion Inc. v. Canadian Admiral Inc.* [1954] Ex. C.R. 382 (Ex. Ct.) but it dealt with copyright. It is interesting to note, however, that in defining publication to the general public, the court voted that cable subscribers were not members of the public, but that viewers in a Canadian Admiral Television showroom receiving the transmissions were.

13. Kenneth Alyluia seems to believe that the information was wanted for municipal taxation purposes, but this seems hard to accept since a tax on that basis would be indirect and subject to federal control. See Alyluia, *Constitutional Aspects of Cable Television: Notes on the Case Law and a Questionnaire to Municipalities*, [1969] Can. Com. Law Rev. 47

14. *Supra*, note 12 at 719

15. *A.G. for Ont. v. Winner*, [1954] A.C. 541 (P.C.) decided that once an undertaking was in "pith and substance" interprovincial, it mattered not that it had local aspects.

Instead it reasoned that since a cable operation was linked to broadcasting by physical means, and broadcasting was interprovincial in character, a cablevision operation was also "interprovincial". The Supreme Court of Canada continued this reasoning in *Capital Cities* and *Dionne* and thus left a gap for the provinces to enter and perhaps regulate, *i.e.* in the case of the cablevision company which received no broadcast signals, and transmitted its own programmes only within one province.

The *Capital Cities* case involved Rogers Cable TV,<sup>16</sup> a Toronto firm that had begun random deletion of commercials from several Buffalo, N.Y. television signals emitting from stations owned by Capital Cities and others. The Canadian Radio-Television and Telecommunications Commission had instituted a policy in July, 1971, whereby cable television operators were permitted to delete U.S. commercial messages at their discretion. Rogers had done this and substituted its own advertisements for cable service. The Buffalo stations, at the time the deletions were begun, were receiving significant revenue from Canadian advertisers.

After Capital Cities sued Rogers for a violation of copyright and breach of trademark, Rogers sought firmer legal authority for its action by applying to the CRTC for a licence amendment allowing it to delete U.S. commercials at random. Despite a strong intervention by Capital Cities, the Commission granted the amendment but required Rogers to fill in the gaps with public service announcements. It was from that decision that the Buffalo TV stations appealed.

There were five stated issues in the case, but for the purposes of this article, only the constitutional question will be examined. In the majority opinion, Chief Justice Laskin relied heavily on what he referred to as the "common sense" approach of the Privy Council in the *Radio Reference*. He said that it seemed:

. . . even more applicable here to prevent a situation of divided jurisdiction in respect of the same signals or programs according to whether they reach home television sets and the ultimate viewers through Hertzian Waves or through co-axial cable.<sup>17</sup>

16. Rogers has become in 1979 the largest cablesystem conglomerate in Canada. See *Toronto Globe and Mail*, Jan. 9, 1979

17. *Supra*, note 2 at 159. Although not discussing television, the Privy Council answered the following question in the affirmative in the *Radio Reference*, [1932] A.C. at 310: "Has the Parliament of Canada jurisdiction to regulate and control radio communication, including the transmission and reception of signs, signals, pictures and sounds of all kinds by means of Hertzian waves and including the right to determine the character, use and location of apparatus employed?"

In his decision in *Capital Cities* the Chief Justice also borrowed the U.S. judicial interpretation of CATV in the *Fortnightly*<sup>18</sup> copyright case, which in turn used the same arguments of the *Radio Reference*, i.e. where there is a broadcast there is a receiver and both are part of the same package. The U.S. case, to the agreement of the Chief Justice, indicated that a CATV system was to broadcasting what an antenna was to a television set.

Using (as did the B.C. Court of Appeal in *Victoria Cablevision*) the *Winner* case, the majority also held that you cannot separate the legislative jurisdiction of cable at the point where the system receives the "Hertzian waves".<sup>19</sup> If it's interprovincial it's federal, regardless of it's local aspects.

. . . I do not see how legislative competence ceases in respect of those signals merely because the undertaking which receives them and sends them on to its local subscribers does so through a different technology.<sup>20</sup>

If the court had opted on the constitutional question for a definition of broadcasting that included wire transmissions<sup>21</sup> rather than linking CATV with an already defined broadcast undertaking, it is probable that this negotiating edge for the provinces would never have arisen. Concerned with the consistency of definition, the court was reluctant to leave its "Hertzian waves", and relied more on the interprovincial character of CATV to reason its conclusion. It could have been because the provinces relied heavily on the "local work or undertaking" argument under their jurisdictional banner of s.92(10) of the *British North America Act*. Or it could have been the

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18. *Fortnightly Corporation v. United Artists Television Inc.* (1968), 392 U.S. 390 at 399 in *Capital Cities*, *supra*, note 2 at 158

19. *Supra*, note 2 at 159

20. *Id.* at 160

21. The present Minister of Communications, Mme. Jean Sauve, is also reluctant to define broadcasting. When questioned about what was in her area of jurisdiction, she merely replied "If it's broadcasting it's mine." See *Halifax Chronicle Herald* Canadian Press story, Monday, November 6, 1978. Perhaps her and the courts' reluctance is derived from the *Broadcast Act* R.S.C. 1970, c.B-11, s.2, which defines "broadcasting" as "any radiocommunication in which the transmissions are intended for *direct reception* by the general public," and "radio communication" means "any transmission, emission, or reception of signs, signals, writing, images, sounds, or intelligence of any nature by means of electromagnetic waves or frequencies lower than 3,000 Gigacycles per second propagated in space without artificial guide." The Supreme Court of Canada cited that definition in the jurisdictional argument of *Capital Cities* but used it only with reference to the jurisdiction of the CRTC over CATV not to the constitutional question. See *supra*, note 2 at 164

reasoning of the preceding *Victoria Cablevision* case. But whatever the cause, the implication would be that if a system does not receive signals from another province, it is intra-provincial and consequently under provincial jurisdiction.

This implication is only partly removed by the *Dionne* case, but at any rate this reluctance to redefine broadcasting has opened the door for the provinces in the Cablevision field. The door opens even wider when one considers the stated avoidance of the Chief Justice to discuss the regulation of the "community channel" on three occasions in the *Capital Cities* case.

I leave to one side, so far as the present case is concerned, the determination of regulatory authority over programs carried by such systems which are of their own origination and which are transmitted to their subscribers in the Province of such origination, and hence not received by other owners of television sets in the province.<sup>22</sup>

Reacting to the local undertaking argument of the provinces, Laskin C. J. restated that "programmes of local origination are not involved."<sup>23</sup>

Speaking on the jurisdictional question involving the CRTC, the Chief Justice widened his qualification:

The present case, I should emphasize, is not concerned with close circuit systems independent of broadcasting as defined by the Act.<sup>24</sup>

So from the *Capital Cities* case,<sup>25</sup> and its predecessors evolve the following conclusions, of which "interprovincial" and "broadcasting" are the key words:

- 1) CATV is a passive element of interprovincial broadcasting and falls as much under federal jurisdiction as the "receivers" of the *Radio Reference*.
- 2) While transmission of received programs through cable is a local operation, it cannot be severed from the entire CATV undertaking which is interprovincial in nature and hence federally controlled.
- 3) But "broadcasting" seems to be limited to operations involving

22. *Supra*, note 2 at 157

23. *Id.* at 163

24. *Id.* at 167. As the reader will note the Chief Justice used "close" not "closed" circuit.

25. The dissent accepted federal jurisdiction over CATV using foreign signals and concerned itself with whether the CRTC had the power to authorise deletion of U.S. television commercials on Canadian CATV operations. It answered that question in the negative.

transmission of Hertzian waves, and does not involve systems exclusively “community channel” or closed circuit.

4) By implication, if a CATV system carried only local TV stations and even though intra-provincial in character in its operations, it would still be under federal jurisdiction since it remains part of “broadcasting” which is under federal jurisdiction by virtue of the *Radio Reference*.

5) Community Channel Programming is not necessarily under federal control, but under the above reasoning, it seems logical to conclude that if it were part of a system involving reception of broadcast signals it would be definitely under federal control.

6) Regulation of closed circuit broadcasting, *i.e.* transmission and reception by wire exclusively, would be under federal jurisdiction only if it crossed provincial boundaries.

This also seems to be the conclusion of Alyluia ten years ago,<sup>26</sup> but he failed to consider the possible interprovincial closed circuit systems.

The above conclusions are bolstered by the *Dionne* decision,<sup>27</sup> which involved the jurisdictional test of the CRTC and the Quebec Public Service Board. The case was heard after *Capital Cities*, but judgment was rendered at the same time. The Chief Justice relied heavily on his reasoning in *Capital Cities* in writing the majority decision. However, he closed most gaps that were left in the Constitutional circle.

I should emphasize that this is not a case where the cable distribution enterprises limit their operation to programmes locally produced by them for transmission over their lines to local subscribers. Admittedly, they make use of television signals received both from within and without the Province: and the fact that they may make changes or deletions in transmitting the off-air programmes to their subscribers does not affect their liability to federal regulatory control. The suggested analogy with a local telephone system fails on the facts because the very technology employed by the cable distribution enterprises in the present case establishes clearly their reliance on television signals and on their ability to receive and transmit such signals to subscribers. In short, they rely on broadcasting stations, and their operations are merely a link in a chain which extends to subscribers who receive programmes through their private receiving sets. I do not think that any argument based on relative percentages of original programming, and of programmes

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26. *Supra*, note 13 at 49

27. *Supra*, note 2

received from broadcasting stations can be of more avail here than it was in *Re Tank Truck Transport Ltd.*<sup>28</sup>

Pigeon, J., in dissent, argued that the court was dealing with cable in an outmoded technological framework, and implied that "Hertzian waves" had clouded the real picture of what was essentially a local undertaking subject to provincial jurisdiction.<sup>29</sup> It is possible, therefore, that should the issue of closed circuit broadcasting come before the court, Pigeon, J.'s dissent may be a pivotal reference.

While both cases changed the scope of the federal-provincial playing field,<sup>30</sup> they do not, as they could not, discuss the areas of CATV that are indirectly already controlled by provincial and municipal bodies. It is to this area of present indirect control that we now turn to discover why the provinces want to control cable television systems completely.

### III. *Municipal and Provincial CATV Regulation*

For municipal regulation of cable television to be constitutionally valid, the regulation must first derive its authority from enabling provincial legislation. All municipal corporations have been established by the provincial legislature, and they are thus limited in their authority to make by-laws by the express authority granted by the legislature. Secondly, the provincial legislation giving that authority must fall under powers assigned to the provinces under s.92 of the *British North America Act*. That is also to say that the provincial legislation or municipal bylaw must not be in "pith and substance" a statute or statutory instrument that is designed to or in effect regulates broadcasting. The courts, as we have already noted, have assigned that area to the federal government. The legislation, however, can "incidentally" affect the federal regulation or control of broadcasting if its primary purpose falls under a valid provincial heading under s.92.

Perhaps the best example of the courts delineating the "regulatory" from the "incidental" was in *Toronto v. Bell*

28. *Id.* at 198-99; (*Re Truck Transport Ltd.*, [1960] O.R. 497, aff'd [1963] O.R. 272.)

29. *Supra*, note 3 at 198-210

30. Depending on the viewpoint the field has been narrowed or widened. Those who have favoured complete federal jurisdiction would find the field narrowed and those who favour a provincial jurisdiction that has never come into effect would find their field expanded.

*Telephone*<sup>31</sup> where the court noted that the city could not deprive a company under federal jurisdiction from operating by requiring it to seek city permission for the laying of telephone cable. However, the court noted that the company would be subject to city direction and regulations as to where cable could be laid.

Grant gave further practical examples of this delineation in 1970, and it is worth noting his analysis, since it would appear that, subject to individual provincial restrictions, his conclusions are still valid in 1979.

1. A municipality cannot validly prohibit a federally-licensed CATV operator from commencing operation within the municipality, whether by a general prohibitory by-law or by setting up a licensing system which enables the council to refuse permission to an otherwise qualified applicant.<sup>32</sup>
2. A municipality, if given this authority by the province, can, however, set reasonable restrictions on the use of its highways by CATV operators and can probably enforce these restrictions by requiring the operator to obtain municipal permission before proceeding to construct his plant.
3. The restrictions permitted to be imposed on the use of municipal highways, easements and airspace by CATV systems must be reasonably related to such matters as public safety, traffic control, maintenance and upkeep of the highway, and perhaps aesthetic value. The restrictions must not be unreasonable or discriminatory, but might include such requirements as:
  - a) the overall coordination of the work through the supervision of a municipal official so that pole erection or plant construction can take place in conjunction with similar work by hydro or telephone companies.
  - b) the prior notification and arrangement with municipal officials if or when traffic is to be stopped or impeded and the provision that this be done in accordance with local police requirements.
  - c) the posting of a bond and/or the obtaining of liability insurance to ensure that the erection and maintenance is

31. [1905] A.C. 52 (P.C.)

32. (1966), 55 D.L.R. (2d) 613, aff'd 50 D.L.R. (2d) 277 (B.C.C.A.). Perhaps the most interesting case, which goes against Mr. Grant's conclusion was *Regina v. City of New Westminster, ex parte Canadian Wirevision*. A municipality was held to be acting *intra vires* in attempting to regulate broadcasting by refusing a local trade licence to one of two CATV companies who had Department of Transport licences to operate. This decision is clearly wrong in that it was in effect regulating a broadcast undertaking under federal jurisdiction and by ignoring the *Victoria Cablevision* case.

carefully done, and that no loss or injury be done to the public, and that whatever repairs are necessary to restore the street to a proper condition will be performed.

d) safety restrictions (subject to any federal regulations on the question) requiring cables over streets to be a minimum height, or that poles be built within certain stress or construction standards, or that electrical outlets be properly grounded or protected.

4. Municipal restrictions or by-laws affecting CATV operators will probably be held to be inoperative if they
  - a) affect subscriber rates or installation charges
  - b) require an operator to use municipal utility commission poles (although if no other poles are in fact available, the operator may find himself obliged to negotiate for their use out of economic necessity)
  - c) require an operator to set aside one or more channels for municipal or educational use, or require other programming commitments;
  - d) require an operator to provide service free to schools or other institutions;
  - e) relate to the operation, management or ownership of the CATV undertaking — *e.g.* requiring local ownership or financing, or requiring ownership in the cable to revert to the town;
  - f) make municipal permission conditional upon the execution of a contract between the operator and the municipality stipulating any of the above requirements.<sup>33</sup>

Provincial and municipal taxation of CATV operations is permissible if the tax is direct as stated under s.92(2) of the *British North America Act* — “direct taxation within the province. . .” In *Oshawa Cable TV and Town of Whitby*<sup>34</sup> the court held that the municipality could not tax a CATV operation on the basis of gross revenue. Such taxation was held to be indirect and *ultra vires* the municipality.

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33. Grant, *Canadian Broadcasting and Administrative Policy*, Ch. 2, cited in Shaw, “Municipal Regulation of CATV; a Case Study in Vaughan Township,” (1970), 2 Can. Com. Law Rev. 70 at 76

34. [1969] 2 O.R. 18 at 26 (Ont. H.C.). It should be noted here that a direct tax is one designed and intended to be borne by the one who pays it and not passed on. Hence a retail sales tax is a direct tax if paid by the customer, as is also a property tax, but an import or customs duty to an importer, or a tax based on gross revenue, would be indirect since it would be taxing the subscriber and not the cable company.

Since *Bank of Toronto v. Lambe*<sup>35</sup> it has been recognised that the provinces and the municipalities under enabling legislation may directly tax companies that are exclusively controlled by the federal government. However, even that direct taxing power may be reduced. In *Re the Metropolitan Winnipeg Act, the Municipal Act, Metro Videon Limited et al.*<sup>36</sup> the court implied that land owned by a CATV company was taxable by a municipality, but that a leasehold interest in the cable used by a CATV system and owned by the provincial telephone system was not, since it was not land as defined by the province's municipal assessment act, but was rather immovable personal property.

In *Cablevision Montreal v. Deputy Minister of Revenue of the Province of Quebec*.<sup>37</sup> the province had tried to assess a provincial retail sales tax on the sale of a cable TV network on the basis that it was "moveable property" and subject to such a tax, but the Supreme Court held that it was "immovable property" and hence not taxed on its sale. The significance of these decisions is that provincial municipalities have been restricted in taxing CATV operations not only constitutionally, but also in narrow interpretations of taxing statutes by the courts. The end result may be reasonable in view of the federal jurisdiction over broadcasting, but it has been frustrating to provincial and municipal bodies seeking a reasonable share of local tax revenues in view of CATV's profitability.

It is true that licensing taxes imposed on all businesses operating in a municipality bring revenue from CATV, but the amounts are nominal. If a municipality attempted to make such a licensing fee too substantial, it would probably be considered *ultra vires* because it would in effect be regulating CATV.<sup>38</sup>

Regulation of labour relations in Cable TV operations is important from several standpoints. From an economic standpoint, whether federal or provincial legislation governs could affect the profitability of an enterprise. Or culturally it could in effect allow operations to be administratively and artistically controlled either from within or without a province. Both possibilities are not posed as everyday practical problems, but rather as long term factors in the development of cable systems.

35. (1887), 12 App. Cas. 575 (P.C.)

36. (1969), 5 D.L.R. (3d) 444 (Man. Q.B.)

37. [1978] 2 R.C.S. 64 (S.C.C.)

38. *Supra*, note 32 at 76

The question of who regulates such labour relations is fairly clear. While there have been no CATV cases on the subject, the evidence in other areas seems to suggest that CATV labour would come under federal jurisdiction. The two cases analogous to the point are *Regina v. Ontario Labour Relations Board, ex parte Dunn*,<sup>39</sup> and *Regina v. Ontario Labour Relations Board ex parte Northern Electric Co. Ltd.*,<sup>40</sup> and both involved labour at Northern Electric Co. plants. In the first case goods were produced for Bell Canada, a federally incorporated and regulated company. The court held that the services of the workers at the plant were not essential to an undertaking under federal control, *i.e.* interprovincial "telegraphs" under s.92(10) (a) of the B.N.A. Act; and hence the labour was subject to provincial regulation.

The latter case involved the installation of electrical equipment in the telecommunication systems of Bell, CBC, CNCP, and others. There the court noted that the activities were directly related to an interprovincial connection and hence under federal control.

In essence, then, it would seem that a company producing CATV equipment may or may not be under federal labour jurisdiction. However, labour directly employed by a CATV operation which receives and transmits other broadcast signals would be federally regulated.

In summary, what do the provinces or municipalities actually regulate? The number of areas at the moment seems very meagre, and perhaps explains why the provinces are so eager to gain control of a cultural and financial entity in their own backyards.

Any regulation that exists or revenue produced, arises as a secondary element of the regulation of tax. The only exception to this would be in the area of contracts over which provinces would have jurisdiction under the property and civil rights provision (s.92(13)) of the *British North America Act*. Ordinary licensing, pole agreements for the laying of cable, property taxes, hours of business (but not operation) are the apparent sum total of the provincial toehold.

With such little control and meagre revenues arising from CATV operations, it is no wonder that the provinces would view hungrily any possibility of effective regulation, whether direct or indirect, over profitable cable enterprises.

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39. (1963), 39 D.L.R. (2d) 346 (Ont. H.C.)

40. (1970), 11 D.L.R. (3d) 640 (Ont. H.C.)

#### IV. *Provincial Ownership and Control as a Form of Regulation*

Some provinces already regulate indirectly some aspects of cablevision, without having any formal cable regulatory programmes. In the three prairie provinces, the telephone and telecommunications systems are provincially owned, and where the cable companies use their facilities, the governments effectively control cable placement and some line charges. In a CRTC decision, Saskatchewan Telecommunication was allowed to own the hardware from the street to the house in the Battlefords, Sask. System, but the licensed cable company had to own the hardware from the house to the television set.<sup>41</sup> Some have argued that this was not as much a decision of the CRTC as recognition of a *fait accompli*. In Manitoba, Mme. Jean Sauve, federal Minister of Communications, allowed cable companies to lease cables from the provincial carrier, *i.e.* telephone system. After this agreement, Winnipeg companies who were leasing went back to the CRTC for approval of their actions and received it.

There are also some closed circuit educational TV systems that appear to have avoided CRTC regulation to the author's knowledge. Manitoba has some, and Calgary has one.<sup>42</sup> In Nova Scotia, ETV is being offered on an experimental basis on the local community channel at King's Cable Ltd. in the Annapolis Valley. The station is piped into local schools, uses Department of Education resources, and was made possible by the Department of Education. There is also a closed circuit system in operation at Dalhousie University's Medical School, in Halifax.

Ontario has prepared to sign an agreement with the federal government regarding control of cablevision. The agreement would have allowed the federal government (read CRTC) to control CATV but the province would have been delegated the implementation of regulatory power through a provincial board. The CRTC, however, would reserve the right to control the "programming" aspects of CATV on a day to day basis and it is here the negotiations have run into difficulty. The federal government and the province have some fundamental differences on the definition of programming.

In Nova Scotia, with the exception of Halifax and Dartmouth, the

41. Twigg, *supra*, note 4 at 71. Clauses in the rental agreements may allow the Manitoba Companies to go even further and expropriate the home pickups. See "Let You Cables do the Walking", *Macleans*, Feb. 12, 1979

42. Dixon, *Constitutional Issues of Educational Television* (1968), 3 Manitoba L.J. 75

cable used in the system is owned by the cable companies themselves, and the companies merely negotiate pole agreements with Maritime Tel. & Tel. In Halifax-Dartmouth, the two companies lease the cable from M.T.&T., but they must own their own dropwires and amplifiers. While some provincial control is already exhibited in the prairie provinces through the provincial ownership of the cable, in Nova Scotia this indirect method of control is impractical because of the leasing system.

The Nova Scotia Public Utilities Board has begun testing the "regulatory" atmosphere in recent months. At a recent hearing, the Board asked Maritime Tel. & Tel. to discuss regulation of non-broadcast telecommunications. At the moment the Board has regulatory power over all aspects of telephonic communication.<sup>43</sup> However, it is conceivable that two way visual and audio communication systems would fall under the Public Utilities Act and under s.111 of that Act might fit "other communications" since the statute "is to be construed liberally".

In Nova Scotia, for all practical purposes, the video link-up at Dalhousie medical school and intraprovincial data (computers) systems are unregulated. CN/CP telecommunications are regulated federally by virtue of s.92(10) of the *British North America Act*. Maritime T. & T. is not entirely free of regulation in that it must prove regularly to the Public Utilities Board that operation of its data systems are not a burden to telephone subscribers.

While the proposed telecommunications bill has been tabled at the federal level, the CRTC has not been idle. It has already heard applications for non-broadcast licences from Ontario applicants. The licence applications do not deal with cablecasts from local supermarkets, but are rather in the nature of requests to establish burglar alarms and smoke detector systems.

### V. Other Federal Regulation

The irony of the provincial failure to achieve some significant taxing revenues, or regulate labour, or direct cultural development in the cablevision area is that the federal government has not exercised its jurisdiction *per se* in these fields. It does regulate each of these areas indirectly through the *Income Tax Act*<sup>44</sup> in taxation,

43. See Public Utilities Act, R.S.N.S. 1967, c.258, s.1(3) (iii) and 1(g) as amended

44. S.C. 70-71-72, c.63 as amended particularly s.19(1) (1) in S.C. 1977-78, c.1, s.12

and the *Canada Labour Relations Act* in labour. However, the direct regulation of broadcasting is done through the Canadian Radio-Television and Telecommunications Commission and the Department of Communications. The former essentially regulates the entire broadcasting (including CATV) industry through its licensing procedures, while the latter concerns itself with the technical standards of a broadcasting or CATV operation. The two overlap, but it is important to realise that theoretically one could be in possession of a valid broadcasting licence or CATV licence, but lack a valid certificate of approval from DOC, and if the operation continued on the air the broadcaster is liable to prosecution. Such a certificate of approval is issued only when federal DOC personnel are satisfied that the system meets numerous technical requirements.

If the provinces were to attain jurisdiction in part or in whole over cablevision systems, it would represent initial difficulties both of an administrative and technical nature since the provinces would not have mechanisms similar to the federal ones already in place.

Yet even if jurisdiction were given to the province, and it could assume the licensing and technical situations, there could in some instances still be some forms of federal regulation, as the following two cases indicate.

In *Weatherby v. Minister of Public Works*,<sup>45</sup> the federal minister of public works, not the CRTC, was the body deemed to have the right to sever cable in use by an unlicensed U.S. cable company. The company was situated in Calais, Maine, and was servicing homes in St. Stephen, New Brunswick, through cable laid across the International Bridge. The CRTC had successfully prosecuted the company for broadcasting without a licence, and the licensed cable operator in St. Stephen sought an order of mandamus from the federal court to compel the Minister of Public Works to remove or sever the cable. The court held that the power of the Ministry was discretionary, and there was no legal duty to remove or sever the cable. It implied that, as a broadcasting situation, the matter was under the CRTC's, not the courts', jurisdiction.

*Ottawa Cablevision Ltd. v. Bell Canada*<sup>46</sup> involved a situation where the cable companies were using cable of the federally controlled Bell Telephone. The companies wanted to use their own

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45. [1972] F.C. 952 (Fed. Ct.)

46. [1974] F.C. 373 (F.C.A.)

cable, and not lease that of Bell, and they wished to have the Bell restriction on one way flow of messages over the cable removed. The several companies involved applied to the Canadian Transport Commission to accomplish the above and force Bell to lower its rates. This was to be done by the Commission coercing Bell to enter a new contract with the companies. The Commission refused jurisdiction and the appeal was dismissed at the federal court level.

#### VI. *Conclusion: A Suggested Regulatory Formula*

In the light of the recent Supreme Court decisions, it would be unrealistic for the provinces to hope for jurisdiction over community antenna television systems that involve both the reception and transmission of broadcast signals, and transmission of a community channel.

Despite its revenue and cultural appeal, the proposal that federal regulatory jurisdiction over CATV should be executed through a provincial board seems unrealistic. Broadcasting including CATV is, as the courts have said, a matter of national concern. If the CRTC has been at times inept in recognising the independent local component's rightful place in that national mosaic, it would seem that this is more a fault of implementation than structuring. Local culture is not swallowed up because of a national viewpoint, but rather its place is rightly preserved if local educational and cultural leaders and audiences make their viewpoints known.

On the other hand, it would seem reasonable for the local Public Utilities Board to represent federal jurisdiction on pure economic and hardware decisions of CATV, *e.g.* location of facilities, antennae, microwave links, *etc.*, and for requests on rate increases, but at the same time the Federal Department of Communications would continue to regulate technical standards.

It would also seem reasonable that provinces should be able to regulate their own original wire transmissions via cable so long as no provincial boundaries were crossed. These operations would not be CATV and would be closed circuit in nature, and would involve no reception and retransmission of other broadcast signals. The local cultural aspect of a communication system, be it oneway or two, would thus be preserved even further than local guarantees under a national system through complaint and hearing procedures, or licensing policies.

It is also suggested that the provinces control their own pay television systems as long as such systems are not connected to or

do not receive broadcast undertakings. Again, such systems regulated would only be those within a province.<sup>47</sup>

Finally, it would also seem that the province should regulate educational content of programmes in cooperation with the CRTC or through delegation to the Department of Education. It should regulate closed circuit ETV exclusively. Cooperation is suggested in the former case, because constitutional conflict would occur unless some sort of regulatory system, similar to the way advertising was regulated in *Quebec Television*, was established.<sup>48</sup>

In the latter situation, it would be original wire transmissions and not subject to CRTC control anyway.

In summary, the proposals are as follows:

1. The federal government *i.e.* CRTC, should continue to regulate CATV, but should delegate the control of hardware and rates to the Public Utilities Board;
2. Original wire transmission, both one-way and two-way, visual and audio, should be provincially regulated;
3. Pay television should be provincially regulated;
4. Educational programming on CATV should be regulated provincially by delegation from the CRTC to provincial Departments of Education and on a closed circuit basis exclusively by the provinces' Departments of Education.

While some or all of these proposals may not be agreeable to either federal or provincial authorities, they are reasonably consistent with the recent court decisions and provincial demands for autonomy in telecommunications.

Saskatchewan to some degree in the *Community Cablecasters Act*,<sup>49</sup> and the *Educational Communications Act*,<sup>50</sup> as Mathew M. Miazga so ably points out, incorporates some of these recommendations.<sup>51</sup> The federal governments *Telecommunications*

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47. Like *Maritime Tel. & Tel.*, it could be argued that such systems remain local undertakings even connecting across a provincial boundary, or with a federally regulated company, but anything here crossing a provincial boundary would probably not be crossing on an incidental basis, *i.e.* it would be part and parcel of an interprovincial closed circuit system.

48. The provinces have regulatory power over education by virtue of s.93 of the *B.N.A. Act*. In *A. G. Que. v. Kellogg's*, [1978] 2 R.C.S. 211 (S.C.C.) the court held that the province could prohibit cartoon advertising on children's T.V. programmes by moving against the advertiser and not the broadcast system.

49. S.S. 1976-77, c.12

50. S.S. 1973-74, c.35

51. See *Cablevision: A Case for Co-operative Federalism?* (1978), 43 Sask. L. Rev. 1

*Bill*, Bill C-24<sup>52</sup> which has been tabled also suggested some of the cooperative federalism aspects which the author recommends. But clearly the Act must recognise provincial autonomy in the area of closed circuit cable systems and their educational programming, and the provinces must give up their hopes to control broadcasting systems other than hardware and licensing by federal appointment. To allow otherwise would either mean that the courts are to be overruled by arbitrary mechanisms or Parliament has to redefine "broadcasting".

The only other provincial alternative would be monitoring of CATV by a provincial office of telecommunications policy (in provinces where they exist) and laying of complaints by that office before the CRTC or by initiating prosecutions for "broadcasting without a licence" against CATV operators who add or delete elements from their system without CRTC approval. Such actions, it is arguable, have made in effect a new broadcast and require a new licence. Under s.29 of the *Broadcast Act*, the fine is up to \$1,000 per day.

Such provincial policing would require the expense of additional staff, and would be at best an indirect power. Although the author's suggestions noted above would also involve additional expense, the regulation would be direct, revenue producing, practical, and in harmony with the latest wisdom of the Supreme Court of Canada.

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52. Third Session, Thirtieth Parliament, 1977-78