THE CONSTITUTIONAL JURISDICTION TO REGULATE THE PROVISION OF TELEPHONE SERVICES IN CANADA

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I. INTRODUCTION

This paper will discuss the allocation of power under the Canadian constitution to regulate telephone services. The term "telephone services" includes telephone voice communication, data message transmission, and essentially all other point-to-point, non-broadcast telecommunication services.

The present federal-provincial debate respecting the power to regulate telecommunications has fragmented itself into two basic areas: regulation of the broadcasting and cable television media; and regulation of telephone services.

The legal position with regard to broadcasting and cable television services has been clarified by recent Supreme Court of Canada decisions.[1] The result is almost total federal control. However, the provinces still wish to have some regulatory control over these media since they are viewed as having great social and cultural impact. In particular, it is felt that local identity can be strengthened and local culture developed through the use of such media.

While there has not been as strong a debate over the allocation of the power to regulate telephone services, the area remains contentious. There is an undoubted federal aspect to the provision of telephone services which cross provincial boundaries or utilize microwave and satellite networks. However, the telephone message area is not without its strong local aspects. In each region the issue of telephone rates and their structure is one of great concern to local businesses and consumers.

All the important local aspects of telephone services are now provincially regulated except in Ontario, Quebec, and British Columbia where all aspects are subject to complete federal regulation. However, whether a valid constitutional basis exists for such provincial regulation is far from clear.

To date there have been no overt challenges to the power of provincial regulators in the telephone service area. But, as this paper will

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[1] *See* notes 54 and 56 *infra*.

point out, various pressures, including those resulting from technological change and from increased demands for the provision of services competing with the established telephone companies, make the possibility of constitutional confrontation increasingly likely.

It will be argued in this paper that despite considerable academic opinion to the contrary, the provinces do possess much of the regulatory power which they now purport to have. There are some areas, however, such as interprovincial telephone messages, where there is an undoubted federal aspect. In these, it will be argued that some form of co-operative regulation by the federal government and the provincial governments is the appropriate solution both from a legal and a practical standpoint.

Briefly, the subject-matter will be dealt with as follows:

1. The present structure of the Canadian telephone industry will be outlined, with emphasis on today's working constitutional division.

2. The question of the division of powers under the British North America Act will be analyzed in an attempt to discern where the real constitutional power lies. The possible impact of technological change on this division of powers will also be examined.

3. Proposals, both practical and legal, will be made for reform of the present constitutional division. The United States' experience and recent Canadian proposals for constitutional reform will be considered.

II. Present Structure of the Industry and Pressures for Change

A. *Basic Structure of the Industry*

The telephone industry in Canada could perhaps best be described as divided on a province-by-province basis. The major provincially based telephone companies (including Bell Canada which operates in Ontario, Quebec and parts of the Northwest Territories) are members of a consortium known as the Trans-Canada Telephone System (TCTS).[2] This arrangement has been described as follows:

> The Trans-Canada Telephone System was established in 1931 as a consortium of telecommunications companies to construct and operate long distance facilities on a coast-to-coast basis within Canada.
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> Each of the present nine TCTS member companies is a fully integrated operating telephone company providing both exchange and long distance

[2] The members of TCTS include Alberta Government Telephone, Bell Canada, British Columbia Telephone Company, Manitoba Telephone System, Maritime Telegraph and Telephone Company (serving Nova Soctia), Newfoundland Telephone Company, Saskatchewan Telecommunications, The Island Telephone Company (serving Prince Edward Island), The New Brunswick Telephone Company, and Telesat Canada. *See* Telesat Canada, Proposed Agreement with Trans-Canada Tel. Sys., Telecom. Decision CRTC 77-10, 111 Can. Gazette Pt. I, 4838, at 4840, 3 C.R.T. 265, at 267 (24 Aug. 1977).

> telecommunications services within an operating territory that, except for Bell Canada's territory which encompasses Ontario, Quebec and parts of the Northwest Territory, is contained essentially within a single province. . . . [T]he TCTS consortium serves two purposes for its members. The first is to establish the standards, planning and co-ordination required for the construction and operation of a national network through which each member can extend its customers' telecommunications traffic to other parts of Canada. This includes coordination with carriers in the United States for the handling of traffic in North America and with Teleglobe Canada for the exchange of traffic with other countries of the world. The second purpose is to provide a mechanism through which the members can cooperate in areas where savings or efficiencies can be achieved through joint action, for example, in the area of technical planning and marketing of services.[3]

In addition to the TCTS members there are many "independent" telephone companies in Canada. These are generally small companies serving municipal or rural areas confined to a given province.[4]

The TCTS consortium operates a Canada-wide microwave system for use in long-distance telecommunications. A competing system is provided by CN/CP Telecommunications. Telesat Canada (Telesat), the Canadian satellite corporation, provides satellite channels which are used for long-distance voice and data communication (in some cases as an alternative to the microwave route) as well as other telecommunications purposes. Telesat is a recent member of TCTS.[5]

In order to provide for maintenance of the national long-distance network, appropriate service standards, and a division of revenues on intercompany voice and data services, the member companies of TCTS have a "Connecting Agreement".[6] The most important aspect of the agreement, for present purposes, is its method of sharing revenues. The profits of the system are divided in accordance with a Revenue Settlement Plan which is agreed to by the Board of Management of TCTS.[7] These profits, in effect, are the revenues from all interprovincial voice and data services which cross more than one provincial boundary.

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[3] *Id.* at 4846, 3 C.R.T. at 272-73. As a result of this decision, Telesat became the tenth member of TCTS.

[4] There are some fifty-seven independent companies in Ontario and Quebec, three in British Columbia, and scattered independents elsewhere. Two of the larger systems are Edmonton Telephones and Québec Téléphone. *See* City of Prince Rupert, Connecting Agreement with B.C. Tel. Co. — Report of the Comm. of Inquiry, CRTC Telecom. Public Notice 1979-11, 4 C.R.T. 857, at 861-62 (7 Mar. 1979).

[5] Telesat was formed by the Telesat Canada Act, R.S.C. 1970, c. T-4. Shareholding in the company is three million shares in the Government of Canada, three million shares in the TCTS companies, and one share in the president of Telesat. Telesat applied to join TCTS and was refused by the CRTC: *Telecom. Decision CRTC 77-10*, *supra* note 2. This decision was appealed to the federal Cabinet under s. 64 of the National Transportation Act, R.S.C. 1970, c. N-17. The Cabinet reversed the CRTC and allowed Telesat to join TCTS: P.C. 1977-3152, 3 Nov. 1977.

[6] *See Telecom. Decision CRTC 77-10*, *supra* note 2, at 4847, 4867-73, 3 C.R.T. at 273, 292-97.

[7] Each TCTS member company has one representative, generally its chief executive officer, on the Board of Management. Decisions require unanimous approval.

Revenue sharing between companies in adjacent provinces is accomplished by means of bilateral agreement.

In essence, then, the TCTS companies, through their representatives on the Board of Management, set the rates on a Canada-wide basis for those interprovincial telephone calls and data services which utilize more than the facilities of two adjoining TCTS members. These revenues, along with those from the relevant bilateral agreements, represent a significant proportion of the individual companies' revenue base.[8]

As well as the TCTS Connecting Agreement, there exist separate agreements between each of the independent telephone companies and the individual TCTS members with which their systems connect. These agreements allow the independents to connect their facilities with those of the TCTS member, and provide for a sharing of revenue on all services which utilize the facilities of both companies.[9]

B. *The Present Regulatory Division*

The present regulatory set-up can best be described as a "one company — one regulator" system. In the Atlantic region the provincial telephone companies are regulated by their respective provincial Public Utilities Commissions.[10] The one exception is Terra Nova Telephone, which serves a portion of the province of Newfoundland and is regulated by the CRTC.[11] Each of the three major companies in the region — Maritime Telegraph and Telephone (M.T. & T.), the New Brunswick Telephone Company (N.B. Tel.) and Newfoundland Telephone (Nfld. Tel.) — are public companies and all are to some degree "controlled" by Bell Canada. The Island Telephone Company is, to an extent, "controlled" by M.T. & T.[12]

In Ontario and Quebec, Bell Canada is regulated by the CRTC. The independent companies in these provinces are regulated by the Ontario

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[8] In the case of Newfoundland Telephone Company, interprovincial revenues amounted to 38% of the total telephone service revenues in 1979.

[9] An excellent general discussion of these agreements is provided in the Report of the Committee of Inquiry in the Prince Rupert decision, *CRTC Telecom. Public Notice 1979-11*, *supra* note 4.

[10] The regulators are the New Brunswick Board of Commissioners of Public Utilities, the Newfoundland Board of Commissioners of Public Utilities, the Nova Scotia Board of Commissioners of Public Utilities, and the Prince Edward Island Public Utilities Commission.

[11] Terra Nova Telephone is a part of CN/CP Telecommunications, a crown corporation.

[12] Bell Canada owns 66% of the shares of Nfld. Tel., and approximately 40 to 45% of the shares of both M.T. & T. and N.B. Tel. Effective control of M.T. & T. was removed in 1966 by an amendment to the company's provincial statutory charter which limited the voting rights of any shareholder to a maximum of 1,000 shares. An Act to Amend Chapter 156 of the Acts of 1910, An Act to Incorporate the Maritime Telegraph and Telephone Company Limited, S.N.S. 1966-67, c. 5, s. 1 (amending S.N.S. 1910, c. 156.). M.T. & T. owns approximately 45 to 49% of the shares of The Island Telephone Company.

Telephone Service Commission and the Quebec Public Services Board respectively.

The three prairie telephone companies — Manitoba Telephone System, Saskatchewan Telecommunications and Alberta Government Telephones — are all provincial crown corporations. Saskatchewan does not have a regulatory agency, while the other two companies are regulated by the Manitoba and Alberta Public Utilities Boards respectively. In British Columbia, the British Columbia Telephone Company (B.C. Tel.) is a public company regulated by the CRTC. The independent telephone companies in the province are regulated by the British Columbia Motor Carrier Commission.[13]

Under the present "one company — one regulator" system each regulator assumes responsibility for the protection of customers of its regulated enterprise (in the sense of ensuring good service at reasonable rates), while maintaining the financial health of that enterprise. To do this the regulator establishes the company's "rate base", essentially the amount of its capital investment, and then allows expenses and charges for the various services provided so as to give the company a "fair rate of return". In this sense, then, each regulator purports to regulate the complete set of rates which are charged to the company's customers.[14] This may seem a difficult process when one considers that the TCTS system rates, agreed by the members to be uniform across Canada, must either be approved or acquiesced in by each of the provincial regulators. To date the TCTS rates have been uniformly approved without scrutiny.[15]

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[13] Bell Canada and B.C. Tel. Co., increase in Trans-Canada Tel. Sys. Rates, CRTC Telecom. Public Notice 1978-18, 112 CAN. GAZETTE PT. I, 4857, 4 C.R.T. 825 (4 Aug. 1978).

[14] In fact, the actual extent of regulation goes far beyond this. Regulators generally have powers of supervision and control over major management decisions including, for example, approval of major construction expenditures, approval of stock or debenture issues and other methods of financing, approval of an extension or discontinuation of service to a geographical area, and the approval of all contracts for the interconnection of facilities with other companies.

In the area of regulation of revenues and pricing of services, there are also specific statutory mandates to ensure that "just and reasonable" rates are charged and that there is no "unjust discrimination" between customers or users. (*See, e.g.*, Railway Act, s. 320(7), (8), (9), (11)).

The statutes under which the federal regulator, the CRTC, operates are the Railway Act, R.S.C. 1970, c. R-2 and the National Transportation Act, R.S.C. 1970, c. N-17.

Typical of provincial statutes are those of the Atlantic region: *see* Public Utilities Act, R.S.N.S. 1967, c. 258; Public Utilities Act, R.S.N.B. 1973, c. P-27; Public Utilities Commission Act, R.S.P.E.I. 1974, c. P-31; Electric Power and Telephone Act, R.S.P.E.I. 1974, c. E-3; The Public Utilities Act, R.S.N. 1970, c. 322.

[15] Bell Canada, B.C. Tel. Co. and Can. Nat'l Telecommunications, Increases and decreases in rates for services and facilities furnished on a Canada-wide basis, Telecom. Decision CRTC 78-9, 112 CAN. GAZETTE PT. I, 6531, at 6532, 4 C.R.T. 465, at 466 (23 Oct. 1978).

Although all the provincial regulators have approved interprovincial rates without scrutiny, three of them — Alberta, Nova Scotia and Newfoundland — have stated that they do have the power to regulate these rates. None of the other provincial regulators has expressly denied this power.

The same has been true of the bilateral revenue sharing agreements between adjoining telephone companies.

C. *Current Attitudes to the Present Regulatory Division*

The current division of regulatory responsibility is one which is ripe for constitutional challenge. The last, and only, significant case to consider the question of the constitutional competence to regulate a telephone enterprise was *City of Toronto v. Bell Telephone Co. of Canada*.[16] There it was held that Bell Canada's telephone undertaking was totally subject to federal authority. However, the competence of the provincial regulators to regulate their companies' provision of services — be they local, long distance, or even interprovincial — has not been judicially considered. Until very recently there seemed to be a general reluctance even to consider the question. The members of TCTS and the independent telephone companies made their "bilateral" and "system" revenue sharing agreements and the various regulatory agencies were willing to approve them without question. This avoided the potential problem of approval by some, but not all, of the regulators.

A good example is a dispute regarding bilateral rates which arose in the late 1960s and early 1970s between Bell Canada and Québec Téléphone. Québec Téléphone had agreed to accept the Bell Canada long distance rates for calls between their two territories, but was eventually forced to apply "other line" charges to certain of the calls to get sufficient compensation. When the Canadian Transport Commission (CTC), predecessor of the CRTC,[17] approved a further decrease in Bell Canada's rates, Québec Téléphone applied for an injunction to prevent their application to calls between the two territories.[18] The case reached the Supreme Court of Canada,[19] where Bell Canada declined to make the constitutional argument — arguably a very strong one — that regulation of the bilateral rates was solely within the jurisdiction of the CTC.[20]

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[16] [1905] A.C. 52, C.R. [13] A.C. 361 (P.C. 1904) (Ont.).

[17] For the historical development of this regulatory body, *see* Kane, *The New CRTC Telecommunications Rules of Procedure: A Practitioners' Guide*, 12 OTTAWA L. REV. 393, at 395 (1980).

[18] *CRTC Telecom. Public Notice 1979-11*, *supra* note 4, at 864.

[19] Québec Tél. v. Bell Tel. Co. of Canada, [1972] S.C.R. 182, 22 D.L.R. (3d) 69 (1971).

[20] Following the decision in this case, the two companies agreed that the rates applied by each of them would be those approved by their separate regulators. Québec Téléphone then received a higher rate schedule from its regulator, the Quebec Public Service Board. The CTC subsequently approved Bell Canada's imposition of "other line" charges to equalize its rates with those of Québec Téléphone. This compromise has not lasted, however, as a recent CRTC rate decision for Bell Canada has deplored the "other line" charges and ordered them removed. The situation is once again ripe for conflict. *See CRTC Telecom. Public Notice 1979-11*, *supra* note 4, at 864-65.

See also the recent case of Northern Telecom. Ltd. v. Communications Workers of Canada, [1980] 1 S.C.R. 115, 28 N.R. 107, 98 D.L.R. (3d) 1 (1979), where the

It is interesting to consider the probable motivation of the various players in the telephone regulatory scene for wishing to avoid a decision on the constitutional question. In the case of the provincial regulators and their governments, this reluctance reflects academic opinion that the provincial regulators exercise more power than the constitution actually gives them. There is a great desire on the part of the provinces to keep as much control as possible in provincial hands. There seem to be three major reasons for this.

First, there is a fear that federal regulators will be insensitive to local needs and may impose rules which are appropriate in some regions, but not in others.

Secondly, there appears to be a relatively more protective attitude among provincial regulators and governments towards their telephone companies. This may arise from the feeling that while Bell Canada is large and has huge urban rate-generating centres to help support it, the provincial companies are burdened with a higher proportion of rural and sparsely populated areas which require service. As well, the CRTC hearings for federally regulated companies have attracted more in the way of public interest, interveners, news coverage and general public awareness, than their provincial counterparts. Thus, the attitude of "the public versus the phone company" has not achieved the same prominence in provincial proceedings. This protective attitude on the part of the provinces was evidenced in the recent CRTC hearings on the Telesat application to join TCTS[21] and on the CN/CP application to interconnect with certain Bell Canada facilities.[22] In both cases the majority of provincial governments intervened on behalf of Bell Canada and TCTS. In the result, the CRTC decisions were adverse to Bell and TCTS for reasons perceived by the Commission to be in the public interest. The general view of the provinces seems to be that they want their telephone companies to have no part in the competitive free-for-all which the CRTC envisages for the industry.

Finally, and this seems to be a view shared by all parties, there is a fear that the real division of powers envisaged by the constitution might result in a "two-tiered" system of regulation similar to that now found in the United States. This would mean that each company would be regulated by two bodies, a federal one in respect of interprovincial rates and a provincial one in respect of local or intraprovincial rates. It is

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appellant objected to the constitutional jurisdiction of the Canada Labour Relations Boards to certify a bargaining unit of its employees. This objection, however, was not taken at the Board's hearing but only on appeal. The Court found that "Telecom, by its actions, effectively deprived a reviewing Court of the necessary 'constitutional facts' upon which to read any valid conclusion on the constitutional issue." The Court ventured to call Telecom's tactics "equivocal, and . . . questionable". *Id.* at 140, 28 N.R. at 132, 98 D.L.R. (3d) at 20.

[21] *Telecom. Decision CRTC 77-10*, *supra* note 2.

[22] CNCP Telecommunications: interconnection with Bell Canada, Telecom. Decision CRTC 79-11, 113 CAN. GAZETTE PT. I (No. 29, Supp.), 5 C.R.T. 177 (17 May 1979).

widely felt by companies and regulators alike that the United States system has resulted in cost separations (to determine the relative rate base from which each regulator works) which are arbitrary, and in regulation which often works at cross-purposes. The general view seems to be that Canada should not risk repeating the U.S. experience.[23]

The provincial telephone companies seem to share the concerns of their respective governments on the constitutional issue. A comment frequently made is that when you have a telecommunications system among the world's best you should not "mess" with the regulatory framework which has put it there.[24] As previously indicated, it would seem that provincial regulators have been far less demanding of their companies in terms of requiring justification for costing and other procedures.[25] Any erosion of the provincial power would thus not be desirable for these companies.

The desire of the federally regulated companies, Bell Canada and B.C. Tel., to maintain the *status quo* can probably be traced to the fear of two-tiered regulation,[26] coupled with a feeling that the system works well as it is. In addition, it is probably felt that additional federal power over provincial companies will lead to more scrutiny of the various inter-system contracts.

To date the attitude of the federal government towards the constitutional issue has largely been one of "hands off". Federal officials seem to feel they possess considerably more power than they have exercised[27] but that the proper solution is one of compromise, inter-governmental co-operation and the use of inter-jurisdictional delegation.[28]

D. *Pressures which may Result in a Constitutional Confrontation*

In recent years the CRTC has produced a series of decisions which make constitutional confrontation more likely. Though it is far from clear

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[23] *See, e.g.*, Thompson, *Comment*, in TELECOMMUNICATIONS REGULATION AT THE CROSSROADS 169, at 171 (H. Janisch ed. 1976); Dalfen, *Comment*, in NEW DEVELOPMENTS IN CANADIAN COMMUNICATIONS LAW AND POLICY 493 (P. Grant ed. 1980) [hereafter cited as NEW DEVELOPMENTS]; H. JANISCH & P. HUBER, A CRITIQUE OF PROVINCIAL REGULATION OF TELECOMMUNICATIONS IN THE ATLANTIC PROVINCES 3.37 (1974).

[24] Thompson. *supra* note 23, at 170.

[25] *Compare* the attitude evidenced in H. JANISCH & P. HUBER, *supra* note 23, at 3.47-.49 *with* the recent investigatory initiatives of the CRTC with respect to TCTS rates, *CRTC Telecom. Public Notice 1978-18*, *supra* note 13, and *Telecom. Decision CRTC 78-9*, *supra* note 15.

[26] For example, the Chairman of the Board of Bell Canada has stated: "Experience in the United States with a two-tier system, has provided ample evidence that this kind of divided authority tends to result in adversary attitudes between the two levels of regulation, and is not something we should import into Canada." Address by A. Jean de Grandpré, Bell Canada Annual Shareholders' Meeting, 17 Apr. 1980.

[27] *See* DEPARTMENT OF COMMUNICATIONS, PROPOSALS FOR A COMMUNICATIONS POLICY FOR CANADA, A POSITION PAPER OF THE GOVERNMENT OF CANADA (1973).

[28] *See* Bill C-16, 30th Parl., 4th sess., 1978-79, cls. 7, 27(6).

what the CRTC's attitude is towards the present constitutional division,[29] these decisions certainly intensify the pressures for change.

The first two decisions of note are those involving Telesat's application to become a member of TCTS[30] and CN/CP's application for interconnection with Bell Canada.[31] The reasons behind the CRTC's decision not to approve the Telesat/TCTS agreement[32] were that it would make effective regulation impossible and thwart competition. This latter "competitive" rationale was reconsidered in the CN/CP case and formed the underlying basis of that decision.

Allowance, in this way, for more competition, poses several problems for the continued federal-provincial jurisdictional split. Both the CRTC and the TCTS members admitted that allowing CN/CP interconnection with Bell would have significant Canada-wide effects.[33] In responding to this, the CRTC decided that it must consider the interests of subscribers of provincially regulated companies.[34] The implication is that as the industry becomes more competitive it will be harder to resist the argument that monolithic federal regulation is the only possible form which will be effective.

It is also clear from the CN/CP decision that the provincial governments, and presumably their regulators, are far less willing to allow competition with their regulated companies.[35] The knowledge that the federal regulator is more sympathetic to their cause is apt to make applicants before provincial boards more likely to challenge their constitutional competence.

Two other recent matters before the CRTC are also of significance. The first is the decision in the *Prince Rupert* case.[36] This decision arose from a dispute between B.C. Tel. and the independent telephone company run by the city of Prince Rupert. The two parties were unable to reach a proper revenue sharing agreement. Prince Rupert applied to the CRTC for relief under section 320(7) of the Railway Act.[37] The CRTC recognized that the British Columbia Motor Carrier Commission purported to exercise an approval right over all of Prince Rupert's connecting agreements. In order to avoid the same sort of clash between

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[29] The former Vice-Chairman of the CRTC has stated that "a relatively excellent system has evolved within present constitutional arrangements; and . . . it is far from clear that the system would be improved, or that people using it would be better off if jurisdictions were altered". Dalfen, *supra* note 23, at 492.

[30] *Telecom. Decision CRTC 77-10*, *supra* note 2.

[31] *Telecom. Decision CRTC 79-11*, *supra* note 22.

[32] This decision was later reversed by the federal Cabinet. *See* note 5 *supra*.

[33] *Telecom. Decision CRTC 79-11*, *supra* note 22, at 98, 232, 5 C.R.T. at 258, 358.

[34] *Id.* at 104, 5 C.R.T. at 262.

[35] The Atlantic provinces' governments intervened against the CN/CP application. *Id.* at 5, 5 C.R.T. at 186.

[36] City of Prince Rupert, Connecting agreement with B.C. Tel. Co., Telecom. Decision CRTC 79-21, 113 CAN. GAZETTE PT. I, 7263, 5 C.R.T. 666 (24 Nov. 1979).

[37] R.S.C. 1970, c. R-2. This section empowers the Commission to order interconnection on "just and expedient" terms.

opposing regulators as occurred in the *Québec Téléphone* case,[38] the CRTC introduced a unique procedure. A Committee of Inquiry was appointed consisting of one CRTC staff member, one staff member from the British Columbia Motor Carrier Commission, and one staff member from the Ontario Telephone Service Commission.[39] The report of the Committee was made available for public comment.[40] Finally, the CRTC release a decision which largely embodied the recommendations of the Report.[41]

Clearly the method used in the *Prince Rupert* case is one which decreased the possibilities of constitutional challenge. The CRTC was allowed, in effect, to take precedence over the provincial regulator which nonetheless participated in the final decision. Yet, it is difficult to see how such a procedure could work if there was not a clear attitude of compromise between the provincial and federal bodies. It is worth noting that this case took over two years to be decided. This indicates that the procedure may be unduly cumbersome.

The second recent matter of interest before the CRTC is the proposed re-structuring of TCTS System Rates.[42] As previously mentioned, these rates had never before received scrutiny.[43] Following the application of Bell Canada and B.C. Tel. for approval to implement the new rate structure, the CRTC decided to hire a firm of consultants to carry out "an extensive study of TCTS settlement procedures and other matters".[44] In addition, an inter-regulatory committee, consisting of members nominated by each of the provincial regulators, was formed. Its function was to monitor the consultants' work and to advise the CRTC of its views.[45]

The entire procedure is now complete and the final public hearing of the application has taken place. Unfortunately, what may have started as an admirable attempt at inter-jurisdictional co-operation has only served to accentuate the conflict between the CRTC and the provincial regulators.

In its initial public notice commencing the inquiry, the CRTC refused to grant interim approval to the applicants to implement the TCTS rate schedule.[46] This decision was not acceptable to the provincial telephone companies, all of which implemented the rates. At the time,

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[38] *Supra* note 19.

[39] City of Prince Rupert, Connecting Agreement with B.C. Tel. Co., Appointment of Comm. of Inquiry and Directions on Procedure, Telecom. Decision CRTC 77-9, 111 CAN. GAZETTE PT. I, 4835, at 4836-37, 3 C.R.T. 262, at 264 (22 Aug. 1977).

[40] *CRTC Telecom. Public Notice 1979-11*, *supra* note 4.

[41] *Telecom. Decision CRTC 79-21*, *supra* note 36.

[42] *CRTC Telecom. Public Notice 1978-18*, *supra* note 13.

[43] *Telecom. Decision CRTC 78-9*, *supra* note 15, at 6532, 4 C.R.T. at 466.

[44] The three phases of the consultants' report, prepared by Peat, Marwick and Partners, have now been filed with CRTC. *See* note 162 *infra*.

[45] *CRTC Telecom. Public Notice 1978-18*, *supra* note 13, at 4862-63, 4 C.R.T. at 827.

[46] *Id.* at 4865, 4 C.R.T. at 828.

two of the provincial regulators involved, those of Alberta and Nova Scotia, expressly approved the full rate schedule for their companies. The CRTC subsequently altered its plans and granted interim approval.[47]

The use of an inter-regulatory committee has also failed to produce co-operation. It would seem that the endeavour was doomed from the start, since the committee had neither decision-making input nor, as in the *Prince Rupert* case, the right to make an important submission of which the CRTC was bound to take notice. In the result, the committee produced nothing of significance. The provinces were left to view it as an example of CRTC bad faith.

The most significant disagreement occurred when the CRTC required Bell Canada, B.C. Tel. and Telesat to respond to various interrogatories concerning revenue, expenses and investments. The terms of the interrogatories required that revenue settlement information provided by TCTS members be revealed as well. Bell Canada and B.C. Tel. were unanimously refused when they requested this information from the other members and were thus forced to *subpoena* the president of TCTS to produce the information required by the CRTC. Alberta Government Telephones resisted this procedure and sought a writ of prohibition against Bell Canada, B.C. Tel., Telesat and the CRTC.[48] This action was unsuccessful and, significantly, Alberta Government Telephones did not raise a constitutional argument.

Given the radical disagreement between the CRTC and the provinces in the TCTS rate application, any decision by the CRTC other than mere approval of the rates may precipitate constitutional challenge. However, provincial regulators and governments may be slow to move in this direction, fearing that they stand only to lose given the present division of powers. What is more likely is that the legal challenge will be initiated by disgruntled competitors or public interest groups appearing before provincial regulators. It is also possible that the challenge will come from other quarters as it did, for example, recently in Nova Scotia, when M.T. & T. employees tried to get themselves certified by the Canada Labour Relations Board as employees of a "federal undertaking".[49]

The remainder of this paper will consider the current legal constitutional position, and the possibilities for reform.

III. The Constitutional Authority to Regulate

To ascertain the division of the power to regulate telephone services, two provisions of the British North America Act are relevant. The first is

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[47] *Telecom. Decision CRTC 78-9*, *supra* note 15, at 6533, 4 C.R.T. at 466.

[48] Alberta Gov't Tels. v. CRTC (not yet reported, F.C. Trial D., 23 Jun. 1980). The applicant alleged that it was denied natural justice because it was not allowed to be heard with regard to the CRTC's decision on the interrogatories. A constitutional argument was not raised. The application was denied.

[49] Maritime Tel. & Tel. Co. v. Canada Lab. Rel. Bd., [1976] 2 F.C. 343, 67 D.L.R. (3d) 55 (Trial D.).

section 92(10) which assigns exclusive legislative authority to the provinces for

> Local Works and Undertakings other than such as are of the following Classes:—
> (*a*) Lines of Steam or other Ships, Railways, Canals, 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:
> . . . .
> (*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.

The section has been held to give the provinces legislative authority over "local" works and undertakings while the federal government is given authority over what are commonly called "connecting" works and undertakings and over works which are declared to be for the general advantage of Canada.[50] It is the authority over the works and undertakings of the telephone industry with which this Part will be concerned.

The second relevant provision is found in the opening words of section 91 which give Parliament the power "to make Laws for the Peace, Order, and good Government of Canada, in relation to all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces. . . . " This provision is known as the federal general power. Its application will be discussed later in this Part.

A. *The Meaning of the Terms "Work" and "Undertaking"*

Before classifying the telephone systems of Canada under the categories of "local" or "connecting" works or undertakings, it is necessary to consider the concepts of "work" and "undertaking".

It is clear, first of all, that in the interpretation of the B.N.A. Act these two concepts have been given very different meanings. "Works" are regarded as physical things which have a separate and distinct existence. Hence such things as cables, waveguides, microwave radio towers and telephone central offices are all works.[51]

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[50] *See* City of Montreal v. Montreal St. Ry., [1912] A.C. 333, C.R. [1912] 1 A.C. 435, 13 C.R.C. 541 (P.C.) (Can.). This case is discussed, in another aspect, at p. 68 *infra*.

[51] Professor W.R. Lederman holds the view that this meaning is necessary for "works" since otherwise the distinction between works and undertakings which runs through s. 92(10) would have no point. Also, the use of the qualifier "local" in s. 92(10) means that even connecting works must have a local aspect. Their physical location in a province provides this. Lederman, *Telecommunications and the Federal Constitution of Canada*, in TELECOMMUNICATIONS FOR CANADA: AN INTERFACE OF BUSINESS AND GOVERNMENT 339, at 367 (H. English ed. 1973) [hereafter cited as *Telecom. and the Constitution*].

An "undertaking", however, has been held to be equivalent to such concepts as "organization"[52] or "enterprise".[53] It is also clear that an "undertaking" must be directed towards the provision of a specific and unified service. Hence, in the recent case of *Capital Cities Communications Inc. v. C.R.T.C.*[54] the Supreme Court of Canada held that a cable television (or "CATV") system, consisting of an antenna for reception of broadcasts from outside Canada and a cable system for subsequent distribution of these signals to home viewers, was a connecting undertaking. Notwithstanding that all its works were local, the total enterprise was held to be a connecting undertaking since it received radio signals from across the border. This "broadcast receiving" function was the cornerstone of its service.[55] In the case of *Public Service Board v. Dionne*[56] the Court further justified its "single undertaking" reasoning in *Capital Cities*. It held that the vital factor in determining the extent of the connecting undertaking was the content of the service provided. In this case a similar CATV system was held to be "functionally and [*sic*] interrelated system of transmitting and receiving television signals" directed towards the provision of one basic service.[57] Thus, it became an indivisible undertaking, all within federal jurisdiction.

With this basic introduction to the characteristics of works and undertakings, it is now necessary to probe the extent of both concepts in some detail. The first question of some importance is whether it is possible to have divided ownership of a single work or undertaking. The authority on the point would seem to put the question beyond doubt in the case of undertakings, though not in the case of works. The early case of *Ottawa Valley Power Co. v. Hydro-Electric Power Commission*[58] provides a good starting point. There the plaintiff and defendant companies reached an agreement under which power for use in Ontario

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[52] C.P.R. v. Attorney-General for British Columbia, [1950] A.C. 122, at 142-43, [1950] 1 W.W.R. 220, at 231-32, 64 C.R.T.C. 266, at 276-77, [1950] 1 D.L.R. 721, at 730 (P.C. 1949) (B.C.).

[53] Attorney-General for Ontario v. Winner, [1954] A.C. 541, at 580, 13 W.W.R. (N.S.) 657, at 678, 71 C.R.T.C. 225, at 248, [1954] 4 D.L.R. 657, at 678 (P.C.) (N.B.).

[54] [1978] 2 S.C.R. 141, 18 N.R. 181, 36 C.P.R. (2d) 1, 81 D.L.R. (3d) 609 (1977).

[55] The Chief Justice stated:

> The fallacy in the contention [of the appellants] is in their reliance on the technology of transmission as a ground for shifting constitutional competence when the entire undertaking relates to and is dependent on extra-provincial signals. . . . The system . . . is no more than a conduit for signals from the telecast. . . .

Id. at 159, 18 N.R. at 197-98, 36 C.P.R. (2d) at 13-14, 81 D.L.R. (3d) at 621 (Laskin C.J.C.).

[56] [1978] 2 S.C.R. 191, 18 N.R. 271, 38 C.P.R. (2d) 1, 83 D.L.R. (3d) 178 (1977). The decision in this case was handed down on the same day as that in *Capital Cities*, *supra* note 54.

[57] *Id.* at 197, 18 N.R. at 275-76, 38 C.P.R. (2d) at 9-10, 83 D.L.R. (3d) at 181 (Laskin C.J.C.).

[58] [1937] O.R. 265, [1936] 4 D.L.R. 594 (C.A. 1936).

would be transported by means of cables across a provincial boundary. The cables through which the electricity was to flow were continuous, yet their Quebec portion was owned by the plaintiffs and their Ontario portion by the defendants. This was sufficient for Masten J.A. to conclude that "the physical works do not extend beyond the limit of each Province".[59] Despite this finding, Masten J.A. still concluded that the undertaking was a connecting one.[60] It was significant that the two parties were engaged in a joint venture.

The same result occurred in the *Dionne* case where Laskin C.J.C. refused to recognize the contention that the undertakings were separate because different controlling entities were involved in the television and cablevision operations.[61] The principle to be drawn from these decisions is clear. Separate entities or functions will be characterized as part of a single undertaking if they contribute to the provision of the same service or fulfillment of the same purpose. While divided ownership of the physical items may help establish that there are indeed different services being provided, this need not be so.[62] In *Ottawa Valley Power* the existence of a contract, under which the separately owned physical assets were used towards the same end, suggested that the total undertaking was singular. In *Dionne* the evidence was that both radio reception and cable systems were used in the provision of a single service. In both, the undertaking was indivisible.

This dichotomy between works and undertakings can be explained on a theoretical level. Ownership of property is a paramount legal characteristic of physical things. If the ownership is not a sham, it would seem to be a valid consideration for legal and constitutional purposes when dividing one thing from another. Undertakings or enterprises, however, can still have a singular purpose requiring a singular form of regulation despite divided ownership. On another level it would seem anomalous to say that such "works" as a continuous cable system or an international bridge are not connecting works merely because the ownership is divided at a border. The practical answer is simple: if a work is used in an interprovincial undertaking it will be regulated as part of that undertaking despite divided ownership. If in fact two separate undertakings utilize the two separately owned portions of the work, then singular regulation of the work is neither necessary nor desirable.[63]

In order to give a complete view of works and undertakings, three other cases of some importance deserve mention. The earliest of these is

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[59] *Id.* at 318, [1936] 4 D.L.R. at 610.

[60] *Id.*

[61] *Supra* note 56, at 196-97, 18 N.R. at 275-76, 38 C.P.R. (2d) at 9-10, 83 D.L.R. (3d) at 180-81.

[62] This views is supported in the *Northern Telecom* case, *supra* note 20, at 134, 28 N.R. at 126-27, 98 D.L.R. (3d) at 15.

[63] With separate undertakings utilizing the separately owned portions of the work there is presumably no problem of ensuring continuity — be it for the purpose of enabling a free flow of electrons or car traffic — since a need for continuity would almost certainly establish that the undertaking was connecting and singular.

Luscar Collieries, Ltd. v. McDonald.[64] The issue there was whether the federal Railway Board could order Luscar to give the respondent McDonald access to its railway line. Luscar's line was in fact only a branch which connected to the CNR line, itself a connecting work. Thus the case turned on whether or not the Luscar line was within federal regulatory jurisdiction.

The Privy Council held that Luscar was indeed subject to federal jurisdiction because it was "part of a continuous system of railways". The line need not cross a border so long as it was "a link in the chain of connection".[65] The important fact to be remembered is that Luscar's line existed only as a "feeder" of the CNR line. It carried no local traffic of its own. In other words, its only functional existence was as part of a connecting undertaking. However, the fact that removal of Luscar's branch would still leave the CNR with a working system is irrelevant. This follows from the logic in *Attorney General for Ontario v. Winner* where it was said:

> 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. Is there one undertaking, and as part of that one undertaking does the respondent carry passengers between two points both within the province, or are there two?[66]

Perhaps it is the *Winner* case which provides the greatest insight into the constitutional effect of the interaction of local and connecting works. The facts were, briefly, that Winner operated an interprovincial bus service which ran through the province of New Brunswick. The province sought to prevent the pick-up and discharge of passengers whose journeys were solely within the provincial borders. The Supreme Court of Canada agreed with the province. It was held that the intraprovincial carriage of passengers was not an essential part of the undertaking and could be severed with only incidental effect. Such carriage was therefore within provincial jurisdiction.[67] However, the Judicial Committee of the Privy Council did not agree. It held Winner's undertaking to be a connecting one which was indivisible.[68] This result makes good sense if it is recalled that the view of Laskin C.J.C. in the *Dionne* case was that the vital issue is the service provided. Winner's local carriage of passengers was clearly very much a part of his total service. Local passengers were picked up by interprovincial buses and dropped off on

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[64] [1927] A.C. 925, [1927] 3 W.W.R. 454, 33 C.R.C. 399, [1927] 4 D.L.R. 85 (P.C.) (Alta.).

[65] *Id.* at 932, [1927] 3 W.W.R. at 458, 33 C.R.C. at 405, [1927] 4 D.L.R. at 89-90.

[66] *Supra* note 53, at 581, 13 W.W.R. (N.S.) at 679, 71 C.R.T.C. at 248-49, [1954] 4 D.L.R. at 679.

[67] [1951] S.C.R. 887, at 924, 68 C.R.T.C. 41 at 78-79, [1951] 4 D.L.R. 529, at 562.

[68] *Supra* note 53, at 581-83, 13 W.W.R. (N.S.) at 679-81, 71 C.R.T.C. at 249-51, [1954] 4 D.L.R. at 680-81.

the interprovincial route. Without the interprovincial service it is clear that the local one would have been non-existent. As a matter of business and economic reality there was only one integrated service offered. This had to be characterized as a connecting undertaking.

The decision in *Winner* raises the interesting question of whether local and connecting undertakings can in fact co-exist. The broad implication of all the decisions just mentioned — *Dionne*, *Ottawa Valley Power*, *Luscar* and *Winner* — would seem to be that if a single business entity, or even several entities operating under a contract or arrangement, were to provide a single generic type of service which had a connecting aspect then that, without more, would result in exclusive federal jurisdiction. However, this is a misleading impression. In the decisions just mentioned the local service or aspect had no existence of its own. Its very existence was predicated on either feeding or being fed by the interprovincial undertaking. Were a strong and distinct local service to exist, it would still be possible for it to be constitutionally separate even if it were using some common facilities with a connecting undertaking or under a common management. Clearly in such a case there would be incidental effects on the connecting undertaking, but this would not be fatal. This is best illustrated in the case of *City of Montreal v. Montreal Street Railway*.[69] In this case two railways operated entirely within the province of Quebec. One was a work declared to be for the general advantage of Canada and hence federally regulated, while the other was a local, provincially regulated railway. The two railways connected at several points and a dispute arose as to whether the agreements between the railways for the exchange of traffic between their two lines were exclusively within federal jurisdiction. The Privy Council held that while proper "through traffic" agreements were indeed incidental to the proper functioning of the federal railway, this did not mean that exclusive federal jurisdiction was needed. Provincial and federal regulation could co-exist provided there was a probability that the local and federal railways would co-operate.[70]

This case illustrates that given a strong local aspect or service the courts will be ready to recognize some form of division of powers. As will be pointed out shortly, application to the telephone industry of the division of powers solution will hinge on the ability to find distinct local and interprovincial services within each company's offerings and will result in an area of concurrency within which the regulators of the local and connecting undertakings may both operate.

B. *What "Jurisdiction" over a Work or Undertaking Entails*

Until now, only the question of jurisdiction over a "work" or an "undertaking" has been discussed. Before proceeding to apply the

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[69] *Supra* note 50.

[70] *Supra* note 50, at 344-46, C.R. [1912] 1 A.C. at 491-93, 13 C.R.C. at 553-55.

principles previously discussed it is necessary to decide just what "having jurisdiction" over a work or undertaking involves.

In *Quebec Railway Light & Power Co. v. Town of Beauport*[71] the works involved were within federal jurisdiction. Thus it was held "Parliament may enact such further legislation as is necessarily incidental to the exercise of its jurisdiction over them. . . ."[72] In *The Queen in Right of Ontario v. Board of Transport Commissioners (GO Transit)* a purely local commuter service was found by the Supreme Court of Canada to be totally under federal jurisdiction because it was run on an interprovincial railway line.[73] Despite the breadth of this last decision it would seem arguable that a local service, using a federal work only as an incidental or minor part of its undertaking, need not be subjected to uniform federal power. It would not, however, be immune from federal regulation in respect of its use of the work.

Most important for our present purposes is what is involved in the jurisdictional power over an "undertaking". The Supreme Court of Canada addressed this question in the case of *Commission du Salaire Minimum v. Bell Telephone Co. of Canada*.[74] In that case the Government of Quebec attempted to make Bell, admittedly a connecting undertaking, subject to Quebec's Minimum Wage Act.[75] The Court held that federal jurisdiction was exclusive with respect to all matters vital to the management and operation of the undertaking. Thus Bell was not subject to the provincial Act:

> In my opinion all matters which are a vital part of the operation of an interprovincial undertaking as a going concern are matters which are subject to the exclusive legislative control of the federal parliament within s. 91(29). It was not disputed in argument that the regulation of the rates to be paid by the respondent's customers is matter for federal legislation....Similarily, I feel that the regulation and control of the scale of wages to be paid by an interprovincial undertaking, such as that of the respondent, is a matter for exclusive federal control.[76]

It follows that the powers of regulation currently exercised by the CRTC and the provincial regulators (*e.g.*, regulation of rates, financing, and major business costs) are those that would be permitted if there were jurisdiction over the full undertaking of the companies involved.

While recognizing that jurisdiction over the undertaking carries with it extensive powers of regulation, it is also important to recognize the possibility of some judicially implied concurrency of powers in matters normally within the exclusive jurisdiction of the regulator of the undertaking. The recent case of *Attorney General of Quebec v. Kellogg's Co. of Canada*[77] provides an excellent example. In the *Dionne*[78] and

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[71] [1945] S.C.R. 16, 57 C.R.T.C. 245, [1945] 1 D.L.R. 145 (1944).
[72] *Id.* at 33, 57 C.R.T.C. at 262, [1945] 1 D.L.R. at 158-59 (Kerwin J.).
[73] [1968] S.C.R. 118, at 126-27, 65 D.L.R. (2d) 425, at 432-33 (1967).
[74] [1966] S.C.R. 767, 59 D.L.R. (2d) 145.
[75] R.S.Q. 1941, c. 164.
[76] *Supra* note 74, at 772, 59 D.L.R. (2d) at 148-49.
[77] [1978] 2 S.C.R. 211, 19 N.R. 271, 83 D.L.R. (3d) 314.
[78] *Supra* note 56.

Capital Cities[79] judgments immediately preceeding *Kellogg's*, the Supreme Court of Canada left no doubt that typical CATV and televison systems were subject to federal regulation, not merely in their technical aspects but in programme content as well. In *Kellogg's* the Court was faced with a Quebec regulation prohibiting children's advertising which used cartoons. Speaking for the majority, Martland J. made it clear that this regulation was *intra vires* the province, even in its application to television advertising, since in pith and substance it was an attempt "to regulate and control the conduct of a commercial enterprise in respect of its business activities within the province". He went on to hold that it would not be fatal to a provincial law if it incidentally affected broadcast undertakings.[80]

This reasoning illustrates the idea in constitutional law of the concurrent field. In one aspect and for one purpose the regulation of television programme content is within federal jurisdiction as part of the regulation of a connecting undertaking. In another aspect and for another purpose the regulation of programme content is within provincial jurisdiction as part of the regulation of local business activities. In *Kellogg's* the provincial regulation was allowed to stand because it did not conflict with any federal regulations.[81] Had there been conflict, however, the application of the doctrine of federal paramountcy would have allowed the federal enactment to prevail.

The *Kellogg's* case is thus important because it shows that some concurrency can be implied as regards matters normally considered incidental to the regulation of a connecting undertaking. As will be seen, the most important implication of this is that local and connecting undertakings in the telephone industry may be allowed to co-exist by the use of the concurrent field argument.

C. *Works and Undertakings in the Context of the Telephone Industry*

It remains to apply to the Canadian telephone industry the principles just developed with regard to the regulation of local and connecting works and undertakings.

The application of these principles to the interprovincial operations of Bell Canada yields an obvious result. In 1905, in *Toronto v. Bell Telephone*,[82] the Judicial Committee of the Privy Council declared Bell's

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[79] *Supra* note 54.

[80] *Supra* note 77, at 222, 225, 19 N.R. at 283, 286, 83 D.L.R. (3d) at 320, 322-23.

[81] Some caution must be exercised in deciding that a concurrent field exists since almost all matters will contain both federal and provincial aspects. It is only when both these aspects are strong that an area of concurrence may be judicially implied. *See, e.g.*, Lederman, *The Balanced Interpretation of the Federal Distribution of Legislative Powers in Canada*, in CANADIAN CONSTITUTIONAL LAW 4-6 (J. Whyte & W. Lederman eds. 1977).

[82] *Supra* note 16.

whole undertaking to be exclusively within federal jurisdiction. Lord MacNaghten's reasoning appears to be based on the fact that Bell's federal charter[83] authorized one single and connecting undertaking to carry on the totality of Bell's business: "The undertaking authorized by the Act of 1880 was one single undertaking, though for certain purposes its business may be regarded as falling under different branches or heads."[84]

The case might be viewed as decided on the special grounds that a federal charter conclusively made Bell's operations a single undertaking.[85] Nonetheless, Lord MacNaghten went on, in what may be regarded as *obiter dictum*, to imply that Bell's operations formed a connecting and singular undertaking as a matter of business and economic fact.[86] It is this latter argument which may be applicable to a consideration of the provincial phone companies.

In considering the position of the provincial telephone companies it will be useful to utilize a hypothetical model of two separate telephone companies with facilities confined to the limits of a province, but connected at a provincial border in order to exchange services across that border. The analysis of the Ontario Court of Appeal in *Ottawa Valley Power*[87] would seem to preclude any argument that either telephone company's works will be federal since any cable or microwave connection at the border would presumably entail a division of ownership at that point.[88] Even if a cable system crossing the border was regarded as a single connecting work, regulatory power would attach only to those matters incidental to the management of the work. One would assume

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[83] An Act to incorporate The Bell Telephone Company of Canada, S.C. 1880, c. 67, *as amended by* S.C. 1882, c. 95.

[84] *Supra* note 16, at 59, C.R. [13] A.C. at 371. In fact, Bell's lines at that time did not provide any interprovincial connection. However, it sufficed that such a connection had been prospectively authorized in the incorporating statute. *See* An Act to incorporate The Bell Telephone Company of Canada, S.C. 1880, c. 67, s. 2.

[85] There seems to be little doubt, on a careful reading of the Privy Council's decision, that Bell's statutory charter was found to be conclusive in making all the undertakings authorized thereunder part of the same and singular connecting undertaking. The validity of this reasoning has been called into serious question. *See* McNairn, *Transportation, Communication and the Constitution*, 47 CAN. B. REV. 355, at 363-65 (1969). It is the present author's view that McNairn is correct and that insofar as undertakings are actually local and not connecting they must fall within the provincial power under s. 92(10). It would be an illegitimate use of the federal incorporation power to allow a declaration in a federal statutory charter to deem a local work "connecting".

[86] *Supra* note 16, at 59-60, C.R. [13] A.C. at 370-73.

[87] *Supra* note 58.

[88] It was said in *Winner*: "In the *Radio* case there was no connecting work, only a connecting undertaking, unless the somewhat fanciful suggestion were to be adopted that the flow of an electric discharge across the frontier of a province is to be regarded as a physical connection." *Supra* note 53, at 574, 13 W.W.R. (N.S.) at 672, 71 C.R.T.C. at 241, [1954] 4 D.L.R. at 672 (footnotes omitted).

that this would be limited to transmissions utilizing the work and would not include the whole undertaking of the owner company.[89]

The interesting question is the classification of each company's undertakings. The implication of Lord MacNaghten's *dictum* in the *Toronto v. Bell Telephone* case[90] is that in offering local, long-distance and interprovincial telephone and data services, each telephone company is in reality offering a single service and hence engaged in a single undertaking. It could be argued that even if this is the case no federal jurisdiction thereby attaches. All the cases mentioned previously could be distinguished because in each the single service or undertaking was based on its connecting aspect. In *Dionne*,[91] for example, the television signals, admittedly connecting, fed the cable system and formed the very basis of the service. To return to the model, the argument would be that there was a strong and viable group of "local" services, including local calls and long-distance calls made intraprovincially, which were in no way fed by or dependent for their existence on "connecting" services. These, then, would form the basis of a single and indivisible local undertaking. But, only if the total service could be characterized as primarily local, without significant and distinct federal offerings, could exclusive provincial jurisdiction be allowed to attach. If the connecting services did not form a merely incidental part of a basically local undertaking (and clearly in present day Canada connecting services are very significant[92]) then exclusive federal authority would have to attach to them. That is simply a product of the "aspect" theory of constitutional interpretation.

Before continuing, some justification should be given for the statement that there are in fact "connecting undertakings" between the two hypothetical provincial telephone companies. The fact of split ownership is irrelevant, as revealed in the *Ottawa Valley Power* and *Dionne* cases. If there is a common service or enterprise which necessarily extends across a border, then a connecting undertaking will arise. Doubtless this is the case with these two provincial telephone companies. Their bilateral contracts establishing the connection and providing for revenue-sharing, as did the contract in *Ottawa Valley Power*, serve to brand the service as an interprovincial one.

If, as has been asserted, the connecting undertaking of the hypothetical provincial telephone company is not merely a secondary aspect of an essentially local system, does this mean that it is necessary to follow Lord MacNaghten's rationale in *Toronto v. Bell Telephone* and declare the company's total undertaking federal? The answer would seem to be no. The decision in that case was based on the fact that Bell's

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[89] In the *GO Transit* case, *supra* note 73, the arguably "local" undertaking was carried out entirely over a federal work, which explains why in that case the entire enterprise was tainted.

[90] *Supra* note 16.

[91] *Supra* note 56.

[92] *See* note 8 *supra*.

statutory charter treated it as a single undertaking. It must be remembered that the charter contemplated one homogenous telephone network with the same company operating local and long-distance services in adjoining provinces. In such a system it would not be necessary to distinguish between "local" and "connecting" (interprovincial) calls. Such a charter does not exist in the case of the hypothetical provincial companies. Nonetheless, some weight must be given to Lord MacNaghten's *dictum* that Bell's undertaking, as a practical matter, was singular. What must also be remembered, however, is that this *dictum* is seventy-five years old. It cannot account for changes which have taken place in the industry. In fact, the current practical division of regulatory power treats provincial companies as completely local undertakings. Recognizing the strong local aspect which has thus arisen, it seems inconceivable that a court would completely shift power to the federal arena without at least an attempt to preserve some provincial authority.

If it is conceded that there is in fact a connecting undertaking between the two provincial companies, it may also be possible to recognize the existence of a separate local undertaking. The appropriate segregation of local and connecting undertakings prescribed by the constitution would seem to be, as advocated by Professor Lederman,[93] between intraprovincial and interprovincial transmissions. As a matter of business and economic fact it would seem possible to separate these services despite their common ownership. While common works are used to a great extent, those which are "connecting" are within the exclusive use of interprovincial calls. As well, there is separate billing of the two types of calls. Different procedures are used to determine the rates for the two types of service. Local rates are determined within the company, while interprovincial rates are determined by negotiation between the connecting companies. Finally, the intraprovincial service could operate independently and undiminished if interprovincial links were removed.

Even though "local" service may be distinguished from "connecting" service in a number of practical ways, it is clear that this is not enough to create a genuinely different aspect. If, in fact, the service is one which the public does not separate into component parts, as in *Dionne* where the technological separation was held irrelevant, then the service would probably be held a "connecting undertaking". However, there is a publicly discernable local aspect in the various policies and procedures which are necessary for the provision of telephone service. Intraprovincial and interprovincial rate schedules and discount times are different. Such issues as the rate for basic telephone service, subsidization of residential by business customers, payphone charges, and billing procedures are all very local in their impact. These issues concern the operation of local businesses and the life-style in each community.

When one examines these local services, which are easily severable from the trans-border services, a strong contrast is provided with several

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[93] *Telecom. and the Constitution*, *supra* note 51, at 373-74.

of the constitutional cases in which single connecting undertakings were found to exist. In *Dionne* the local cable service could not be severed from the connecting broadcasting undertaking as it merely provided a conduit for its distribution. Similarly, in *Luscar Collieries*[94] the branch-line train service did nothing more than feed the CNR's interprovincial line. It provided no local service of its own. The most striking comparison is with the *Winner*[95] case where there was a local service as in the hypothetical telephone model. However, it was entirely dependent on the interprovincial bus service and was little more than an incidental part of the connecting undertaking. Nonetheless, the Supreme Court of Canada found this local service to be separate from the interprovincial one.[96] In overruling this decision, the Privy Council asserted that the Supreme Court was stripping local portions from what was a single undertaking.[97] In the telephone case outlined above this argument cannot have similar force. The local aspect is much stronger here and, significantly, would survive the death of the interprovincial undertaking.

If the local (intraprovincial) and connecting (interprovincial) undertakings are recognized as separate, then it is possible to have two distinct spheres of legislative power. But, as in the *Kellogg's* case,[98] these spheres will have an area of overlap in which both federal and provincial enactments are permitted. For example, suppose the federal government, whether via primary or delegated regulation, were to prohibit use of a certain terminal device because its signal characteristic caused excessive noise on interprovincial microwave networks. Such a regulation, clearly made pursuant to a power to protect a connecting undertaking, would render inoperative all provincial regulations allowing this device.

More to the point is an examination of the possible conflicts which could arise if the federal government attempted to set interprovincial rates and the provincial governments attempted to set intraprovincial rates. Clearly the legislative mandate to the federal and provincial boards need not include protection of the public from unfair rates or assurance of the financial viability of the telephone enterprises. Were this the case, it might be said that there was no possibility of conflict since neither level need be concerned with the other's rate-setting activities. But this is the ludicrous case. In setting their respective rates, both levels would certainly be given a mandate by their legislatures, as they are now,[99] to take into account both the cost to the consumer and the financial viability

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[94] *Supra* note 64.

[95] *Supra* note 67.

[96] *Id.* at 910-11, 68 C.R.T.C. at 65, [1951] 4 D.L.R. at 550.

[97] *Supra* note 53, at 581, 13 W.W.R. (N.S.) at 678-79, 71 C.R.T.C. at 248, [1954] 4 D.L.R. at 679.

[98] *Supra* note 77.

[99] The regulatory rate-setting procedure is outlined in Part II of the paper. *See* note 14 and accompanying text *supra*.

of the particular companies concerned. In such an environment it would clearly be possible for one of the levels to set rates which interfered with the rate-setting procedure of the other. In such a case, it would be difficult to decide when a conflict arose. Nonetheless, when a conflict did arise the federal decision would have to prevail by an application of the doctrine of paramountcy. This situation would seem ideal for the application of the principle enunciated in the *Montreal Street Railway*[100] case. The fact that the mandates overlap should give no cause for concern since it should not be assumed that the two bodies will not co-operate to achieve their common goals. Until direct conflict or deadlock arises, the mere fact that there is potential conflict due to overlapping mandates would not seem to be constitutionally fatal.

Following this analysis of the position of two hypothetical provincial telephone companies, it is necessary to apply the results to the situation as it exists in Canada today.

D. *The Prairie Telephone Companies*

The position of the three prairie telephone companies is identical to that of the hypothetical companies. The fact that connections exist with federally regulated companies at two provincial borders (*i.e.*, Alberta Government Telephones with British Columbia Telephone and Manitoba Telephone System with Bell Canada) would seem to be irrelevant. The nature of neither the connecting undertaking nor the local undertaking is affected as a result.

E. *Bell Canada and British Columbia Telephone*

The position of Bell Canada has already been outlined and it would seem that B.C. Tel. is similarly subject to total federal regulation.[101]

F. *The Atlantic Provinces' Telephone Companies*

In the Atlantic provinces the solution would be identical to that of the prairie provinces if the various provincial companies could be considered independent and at arm's length. However, as pointed out in Part II, both N.B. Tel. and Nfld. Tel. may be considered "controlled" by Bell Canada, as indeed may M.T. & T.[102] As well, the Island

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[100] *Supra* note 50, at 346, C.R. [1912] 1 A.C. at 492, 13 C.R.C. at 555.

[101] *See* pp. 70-73 *supra*. The case of the British Columbia Telephone Company will not be discussed here. For an excellent treatment, *see Telecom. and the Constitution*, *supra* note 51, at 371.

[102] *See* p. 56 and note 12 *supra*. Lederman argues that the same applies to M.T. & T. since the provincial legislation purporting to take away Bell's corporate control is an *ultra vires* attempt to subvert federal constitutional control over the regulation of the company's total undertaking. *See Telecom. and the Constitution*, *supra* note 51, at 368-69.

Telephone Company might be considered "controlled" by M.T. & T.[103]

Lederman submits that this shareholder control by Bell Canada operates to bring the companies involved within exclusive federal jurisdiction by two possible routes:[104] first, as part of Bell's singular connecting undertaking; or secondly, as composed of the "works" of Bell Canada which are declared by its charter to be "for the general advantage of Canada".[105]

The first of these contentions will be dealt with shortly. As previously discussed,[106] the decision of the Privy Council in *Toronto v. Bell Telephone*[107] seems to suggest that Bell's statutory charter can and does declare its total undertaking to be connecting. While it is not doubted that a federally incorporated company, in this case Bell Canada, can be given the capacity to operate anywhere in Canada, this capacity is of necessity one governed by law. While the provincial legislatures cannot legislate to prejudice that capacity,[108] or to discriminate against federal companies in comparison with other legal entities, they may regulate this new federal legal person just as they regulate other legal persons. To suggest otherwise is to confuse the concepts of "incorporation" and "regulation". The correct position would seem to be that the Atlantic companies are only part of Bell's "connecting undertaking" if they are so in business and economic fact. The statements in Bell's corporate charter are, for this purpose, irrelevant.[109]

In dealing with the question of whether the Atlantic companies are indeed part of Bell's undertaking, the sole matter for consideration is the "service" which is offered. In all cases Bell's control is one of corporate policy at the senior managerial level and not at the operational level.[110]

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[103] *See* note 12 *supra*.

[104] *Telecom. and the Constitution*, *supra* note 51, at 368-70.

[105] An Act to amend the Act incorporating "The Bell Telephone Company of Canada", S.C. 1882, c. 95, s. 4.

[106] *Supra* note 85.

[107] *Supra* note 16.

[108] *See*, *e.g.*, John Deere Plow Co. v. Wharton, [1915] A.C. 330, 7 W.W.R. 706, 18 D.L.R. 353 (P.C. 1914) (B.C.).

[109] *See* McNairn, *supra* note 85, at 365.

[110] Contrary to Lederman's notion of lifting the corporate veil to find common Bell Canada ownership, the author advocates that ownership in fact, be it common or separate, is irrelevant to the question of undertakings. In Bell Canada's Ontario and Quebec operations common ownership has resulted, of course, in an operational unity which brands the undertaking as singular. That such a unity need not follow from common ownership is shown by the mix of separate "intra" and "inter" provincial undertakings discernable within the provincial telephone companies.

This view is supported by *obiter dicta* in *Northern Telecom*, *supra* note 20, where the test to be applied when deciding if a subsidiary company's operations are part of its parent's undertaking was outlined as follows by Dickson J.:

> [T]he first step is to determine whether a core federal undertaking is present and the extent of that core undertaking. Once that is settled, it is necesary to look at the particular subsidiary operations . . . to look at the "normal or habitual activities" of that department as "a going concern", and the practical and functional relationship of those activities to the core federal undertaking.

Id. at 133, 28 N.R. at 125, 98 D.L.R. (3d) at 14.

This would seem insufficient to make these companies different in any practical way from the hypothetical provincial companies. Hence, it must be concluded that the companies of the Atlantic region are composed of the same mix of "intra" and "inter" provincial undertakings as were the hypothetical companies.

While no opinion will be given as to the effect of the relationship between M.T. & T. and Island Telephone, the vital question must be the operational unity of their services.[111] It would seem likely that whatever "control" is exercised by M.T. & T. would not be sufficient to make the result different from that in the two hypothetical provincial companies. Nevertheless, were their organizational unity similar to that of Bell Canada within Ontario and Quebec, this might be sufficient to brand them as a single, connecting undertaking.

The next question to be answered is whether the declaration in Bell's corporate charter that the works "thereunder authorized" are "to be for the general advantage of Canada" is sufficient, given Bell's interest in the Atlantic companies, to include all their works. If these works are included then it seems, based on the *GO Transit* decision,[112] that the companies are brought within total federal jurisdiction.

The relevant portions of the Bell statute which may be considered as encompassing the works of the Atlantic telephone companies are as follows: "The said Company shall have power . . . to build, establish, construct, *purchase*, *acquire or lease*, and maintain and operate, or sell or let any line or lines for the transmission of messages by telephone, in Canada or elsewhere. . . . "[113] and "to enter into any arrangement with any person or company possessing, as proprietor, any line of telegraphic or telephonic communication . . . or to become a shareholder in any such corporation".[114]

It would seem that there are two arguments to support the statement that the statutory declaration is insufficient to attach to the works in question. The first is that advanced by Lord MacNaghten in the *Toronto v. Bell Telephone* decision. In *obiter dictum* he observed that the works referred to in the Bell statute were not "wholly situate within the province" as required by section 92(10)(*c*) of the B.N.A. Act. The declaration was therefore "unmeaning".[115] This view was further supported by McRuer C.J.H.C. in *Regina v. Ontario Labour Relations Board ex parte Dunn*[116] where the factories of Northern Electric, now

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[111] *Id.*

[112] *Supra* note 73.

[113] An Act to incorporate The Bell Telephone Company of Canada, S.C. 1880, c. 67, s. 2, *as amended by* S.C. 1882, c. 95, s. 1 (emphasis added).

[114] An Act to incorporate The Bell Telephone Company of Canada, S.C. 1880, c. 67, s. 4.

[115] *Supra* note 16, at 60, C.R. [13] A.C. at 372.

[116] [1963] 2 O.R. 301, 39 D.L.R. (2d) 346 (H.C). The court, however, seems to have confused the distinction between works and undertakings. The decision cannot, therefore, be given much weight.

Northern Telecom, a Bell subsidiary, were held not to have been effectively declared works for the general advantage of Canada.

The MacNaghten/McRuer view has been criticized[117] and, it would seem, rightfully so. Lederman points out that all works, by their nature as physical things, can be located "locally" within a province. Hence, the requirement of section 92(10)(*c*) that the works be wholly within the province is not compromised by the fact that the company's undertaking includes both connecting and local works. It would seem that one need not even go this far if one is willing to sever from the operative parts of the declaration those which are unnecessary, since they apply to works already federal due to their "connecting" character.

The second argument is simply that the works of the Atlantic telephone companies are not specifically identifiable as objects of the declaration. The courts have been unwilling to allow sweeping declarations such as that involved here to extend too far. This is based on the rationale that the federal government should not easily be allowed to unilaterally alter the division of powers. Such declarations must therefore be construed strictly to embrace only those works clearly within their intent. An example of this is provided in the judgment of Duff J., as he then was, in *Luscar Collieries Ltd. v. McDonald*.[118] In that case the use of the declaratory power under section 6(*c*) of The Railway Act, 1919,[119] was questioned. This section declared railways owned or operated by companies wholly or partly under Parliament's authority to be works for the general advantage of Canada. Duff J., however, found it ineffective by reason of indefiniteness:

> If a declaration in respect of all works comprised within a generic description be competent, the necessary consequence would appear to be that, with regard to the class of works designated by the description, provincial jurisdiction would be excluded, although Dominion jurisdiction might never be exercised, and although no work answering the description should ever come into existence.
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> In support of this view it may be said that the purport of the declaration authorized appears to be that the work which is the subject of it either is an existing work, beneficial to the country as a whole, or is such a work as ought to be executed, or, at all events, is to be executed, in the interests of the country as a whole. An affirmation in general terms, for example, an affirmation that all railways owned or operated hereafter by a Dominion company are works which ought to be or will be executed, as benefical to the country as a whole, could be almost, if not quite, meaningless, and could hardly have been contemplated as the basis of jurisdiction.[120]

In the present situation the declaration at issue suffers from the same weakness as that considered in *Luscar Collieries*. While it is possible for such a declaration to apply to the future works of a company[121] it is not at

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[117] *See Telecom. and the Constitution*, *supra* note 51, at 366-68.

[118] [1925] S.C.R. 460, 31 C.R.C. 267, [1925] 3 D.L.R. 225.

[119] S.C. 1919 (1st sess.), c. 68.

[120] *Supra* note 118, at 476, 31 C.R.C. at 279-80, [1925] 3 D.L.R. at 236-37.

[121] *See* Quebec Railway Light & Power Co. v. Town of Beauport, *supra* note 71, at 22-24, 57 C.R.T.C. at 250-52, [1945] 1 D.L.R. at 150-51 (Rinfret C.J.C.).

all clear that it can be extended to future works in undertakings not contemplated at the time of the declaration unless its words clearly envisage such an extension. Here, the "authorized" works include those "purchased" or "acquired". But is acquisition of control of a company, unaccompanied by its integration into one's own operational structure, equivalent to a purchase or acquisition of that company's works? In the case of the Atlantic telephone companies, which were historically independent of Bell and remain functionally separate, to answer yes to the above question requires a stretching of the words which they cannot bear.

Hence, it seems there is legitimate doubt as to the extent of the works included in the declaration in the Bell statute. The works of the Atlantic companies are within that region of doubt. In the result, it is unlikely the declaration would be held to extend to them.[122] Therefore the Atlantic provincial telephone companies, like the prairie companies, should be subject to separate regulation in their "intra" and "inter" provincial aspects.[123]

G. *The Federal General Power*

Some commentators also feel that the telephone industry may be drawn within exclusive federal jurisdiction by use of the federal general power.[124] This power arises from the use of the introductory words of section 91 of the B.N.A. Act which give Parliament the power to legislate for the "Peace, Order and good Government of Canada". When a matter is found not to fall within one of the specifically enumerated heads of sections 91 or 92 but within this federal general power it is treated as if it were specifically assigned to Parliament's jurisdiction as an enumerated head of section 91.

Both emergencies and matters having a national dimension can be brought within the general power. It is the latter which are of concern

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[122] The most recent case enunciating this test for the extent of a declaration is Jorgenson v. Attorney General of Canada, [1971] S.C.R. 725, at 736-37, [1971] 3 W.W.R. 149, at 157-58, 3 C.C.C. (2d) 49, at 56-57, 18 D.L.R. (3d) 297, at 305 (Laskin J.).

[123] It follows from the line of reasoning expounded with regard to the provincial telephone companies that independent telephone companies will be subject to a similar division of constitutional regulatory power. Those services which extend interprovincially (*e.g.*, telephone calls crossing a provincial boundary) will fall within federal jurisdiction. Those limited to the facilities of the independent, and the intraprovincial facilities of the TCTS member company in the province of the independent, will be within provincial jurisdiction. Those independents operating inside the territory of Bell Canada or the British Columbia Telephone Company will be provincially regulated only with regard to their local facilities. The calls or services which flow outside the independents' territory involve the federally regulated TCTS member company, and will be within the federal jurisdiction.

[124] *See, e.g., Telecom. and the Constitution*, *supra* note 51, at 379-81; Mullan & Beaman, *The Constitutional Implications of the Regulation of Telecommunications*, 2 QUEEN'S L.J. 67, at 78-79 (1973).

here. Matters which have come within the general power on this basis include aviation,[125] atomic energy,[126] and the National Capital Region.[127] The test used to decide that each was within the operation of the general power is perhaps best described by Locke J. in the case of *Johannesson v. West St. Paul*. There, it was held that aeronautics came under federal power because the field was "one which concerns the country as a whole" and one which was not "capable of division in any practical way".[128]

Professor Lederman, positing that telephone systems may be subject to the general power, commented on the similarity of the two cases: "The parallel is rather a striking one between the inherent Canada-wide significance of aviation transportation systems as described by Mr. Justice Locke, and the inherent national Canada-wide significance of electronic telecommunications systems, especially under the impact of technological change."[129]

However, one must not be too quick to approve of the analogy. It must be remembered that the matters brought into the federal sphere under the national dimension argument were all relatively new types of undertakings. Those with technological implications all defied confinement to provincial boundaries so that no practical division of powers could even be envisaged.[130] But telecommunications systems, and particularly telephone systems, are not of this ilk. Like railroads, they can be located and held within provincial boundaries.[131] Far from being impossible to manage under separate federal and provincial regulation they have a long history of success and technological excellence under just such a system.

The recent Supreme Court of Canada decision in *Reference Re The Anti-Inflation Act*[132] took a very cautious view of the federal general power, at least in its national dimension aspect.[133] The fear expressed there was that almost any matter could be regarded as of national

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[125] Johannesson v. West St. Paul, [1952] 1 S.C.R. 292, 69 C.R.T.C. 105, [1951] 4 D.L.R. 609.

[126] Pronto Uranium Mines Ltd. v. Ontario Lab. Rel. Bd., [1956] O.R. 862, 5 D.L.R. (2d) 342 (H.C.).

[127] Munro v. National Capital Comm'n, [1966] S.C.R. 663, 57 D.L.R. (3d) 753.

[128] *Supra* note 125, at 327, 69 C.R.T.C. at 131, [1951] 4 D.L.R. at 633.

[129] *Telecom. and the Constitution*, *supra* note 51, at 381.

[130] *See* P. HOGG, CONSTITUTIONAL LAW OF CANADA 260 (1977) where the author states that matters subject to the general power are "cases where uniformity throughout the country is not merely desirable, but essential, in the sense that the problem 'is beyond the power of the provinces to deal with it'". This is the so-called "provincial inability" test enunciated in Gibson, *Measuring "National Dimensions"*, 7 MAN. L.J. 15 (1976).

[131] Satellites and microwave transmisions cannot be held within provincial boundaries but these need merely be regulated as connecting works (for example, with regard to frequency allocations) and need not taint the whole undertaking which employs them.

[132] [1976] 2 S.C.R. 373, 9 N.R. 541, 68 D.L.R. (3d) 452.

[133] Only five of the nine judges (Ritchie, Martland, Pigeon, Beetz and de Grandpré J.J.) considered the point, but they were in agreement.

importance and thus subject to federal jurisdiction under the general power. Mr. Justice Beetz put the view as follows:

> It could equally be argued that older subjects such as the business of insurance or labour relations, which are not specifically listed in the enumeration of federal and provincial powers and have been held substantially to come within provincial jurisdiction have outgrown provincial authority whenever the business of insurance or labour have become national in scope. It is not difficult to speculate as to where this line of reasoning would lead: a fundamental feature of the Constitution, its federal nature, . . . would disappear not gradually but rapidly.[134]

Mr. Justice Ritchie felt the same concern. In his opinion, unless the matter in question was something new and special and could not be characterized under the traditional section 91/92 division, the use of the general power was inappropriate.[135]

It seems that this is precisely the situation which exists in the telephone industry. Canada's telephone systems fit into the section 91/92 division in such a way that undertakings with a very strong national aspect come within section 91 leaving equally strong local undertakings to be dealt with under section 92. In the event that co-operation is impossible, federal authority will prevail under the doctrine of paramountcy. Given this arrangement, the arguments in the *Anti-Inflation* case considerably weaken contentions that the federal general power could be applied to telephone undertakings.

To summarize, it appears in the Canadian telephone industry today that there is a structure in which strong local concerns with respect to quality of service, rates and other matters, can be expressed through the vehicle of provincial regulation. At the same time those matters which require national, or at least interprovincial, co-ordination, can be managed by the federal regulator. There are, of course, areas of concurrency and possible conflict. But, this is inevitable in a federal system and it must be assumed, as in the *Montreal Street Railway*[136] case, that the regulators involved will co-operate for the mutual benefit of their respective jurisdictions.

The key to this whole submission, of course, is that this overlapping of regulatory jurisdictions is manageable in terms of the ability to draw some reasonably clear jurisdictional boundaries. So far, the actual workings of the industry have shown that such a boundary is ascertainable and in fact constitutes a very natural division.

However, the possibility that technological changes will blur the boundaries between previously distinct services cannot be overlooked. It is these changes which may some day alter the face of the telecommunications industry so drastically that any form of control, other than monolithic federal regulation, will be difficult.

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[134] *Supra* note 132, at 445, 9 N.R. at 606-07, 68 D.L.R. (3d) at 514.
[135] *Id.* at 437, 9 N.R. at 599-600, 68 D.L.R. (3d) at 507-08.
[136] *Supra* note 50.

H. *The Impact of Technological Change*

The first impact of technological change is to increase competitive pressure in the industry. Of particular significance are the areas of terminal equipment and data communications. Already, manufacturers have available a wide array of terminal devices such as word processors, printers, photo-composition systems and innumerable other items, all of which can or should be able to "talk" to each other and to computers, over the telephone or telecommunications system.[137]

The CN/CP application[138] can be looked upon as just the beginning of demands by large and small competitors of TCTS to gain access to the lucrative market for the supply of terminal equipment and data services. In fact, the CRTC has already made an interim decision to allow attachment of outside terminals to Bell's lines.[139] It may be only a matter of time before provincial regulators begin acceding to some of the demands for more competition.

If more competition is allowed in the provision of different terminal equipment and data services it will become increasingly necessary to regulate both the local and connecting aspects of the telephone undertaking in order to effectively control either.[140] The situation will no longer be one where the federal regulator is only concerned with being able to set its rates properly in the light of possible interference from intraprovincial rates. Other considerations which may have to be decided on a national basis will begin to arise. One example is the technological characteristics of terminal equipment connected to the network, including the type of signals generated over both the local and connecting parts.

The introduction of sophisticated new data communications equipment and systems also has implications which go far beyond the problems associated with an increase in demand for competitive terminal attachment policies. This new technology makes possible such systems as electronic funds transfer, electronic mail and publishing, and remote control of plant and machinery.[141] All of these possibilities will have

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[137] *Bureaucracy Hurdle to Convergence of Computers, Telecommunication*, The Globe & Mail (Toronto), 24 Mar. 1980, at B-8.

[138] *Telecom. Decision CRTC 79-11*, *supra* note 22.

[139] Bell Canada — Interim Requirements Regarding the Attachment of Subscriber-Provided Terminal Equipment, Telecom. Decision CRTC 80-13, 114 CAN. GAZETTE PT. I, 4937 (5 Aug. 1980). The order allows connection of some outside equipment pending the hearings and final decision in the matter.

[140] In Canada, as a result of City of Montreal v. Montreal St. Ry., *supra* note 50, the principle is that regulators can be assumed to co-operate in such concurrent areas unless effective regulation through co-operation is impossible. In the United States the "Shreveport Doctrine" was developed in Houston East-West Tex. Ry. v. United States, 234 U.S. 342, 34 S.Ct. 833 (1914). At issue was the division of regulatory power between interstate and intrastate commerce. The decision has been used to allow the federal regulator to set not only the relationship between interstate and intrastate rates, but also purely intrastate rates. The theory is that this was necessary to foster and protect activities within federal competence. *See, e.g.*, McNairn, *supra* note 85, at 390-91.

[141] *See, e.g.*, Madden, *Telidon in Canada*, in NEW DEVELOPMENTS, *supra* note 23, at 301.

nation-wide impact, not only on the technological aspects of the communications network but also on the way in which business and trade are conducted.

These changes will undoubtedly increase the need for national regulation and co-ordination of all aspects of the communications network. However, they will also introduce new ideas, modes of conducting business and strong influences on life-style. It is posssible that everyday life in all regions of the country will be drastically affected. The threat to regional diversity and the imposition of what may be an unpalatable way of life to some regions but not to others, make some form of provincial input and control very desirable. Nonetheless, an increase in federal power over the regulation of the telephone system would seem to be inevitable, whether by way of increased occupancy of the concurrent area of jurisdiction or by an actual shrinking in the concurrent area's size.

The introduction of new data systems and terminal equipment is not the only technological change which may tend to enhance the federal power over telecommunications. Satellites, at present, do not create any severe division-of-power problems. They would not seem to have any effect on the local/interprovincial division since their facilities are only used to hop from province to province and hence are as much restricted to the connecting undertaking as are the interprovincial microwave networks. Even were they to take over from microwave or other networks that operate intraprovincially this would not seem to pose a problem. As works they would certainly be connecting (and in fact they might be more appropriately regulated under the general power or, since they are in space, as part of the external affairs mandate) but, as with ground microwave routes, it would still be possible to separate the regulation of the intraprovincial services and the regulation of the work over which they incidentally flowed.

The new transmission technologies — those of fibre optics, satellites, and perhaps some of the high-capacity coaxial and waveguide systems — may, however, create problems in the long run. They enhance the future possibility of all telecommunications signals (cable TV, telephone, data, and various inter-active data services) flowing over the same "wire" into a home or business where, conceivably, they may be handled by a single piece of terminal equipment. Proposals for such a transmission system have already been made. In Manitoba, Project Ida, undertaken by the Manitoba Telephone System, is aimed at testing possible transmission of all telecommunications services on a single coaxial cable.[142] In Saskatchewan a similar project is being undertaken, the object of which is to provide a province-wide fibre-optic transmission system.[143]

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[142] *Id.* at 318.

[143] *Sask Tel planning to start this fall on $56 million fibre optic network*, The Globe & Mail (Toronto), 7 Mar. 1980, at B-4.

If such a multi-service transmission and terminal system were put into effect, then jurisdictional problems might be inevitable. Let us take the example of a system carrying cable T.V. signals, data, and standard telephone messages. At present, conventional cable T.V. systems are totally within federal jurisdiction since they take their signals from a broadcast transmission and are therefore branded a single connecting undertaking. Technological advances may make many data systems sufficiently national in scope that they also must be federally regulated. If the telephone messages flowing over the system were local it could still be said that there were merely three separate services or "undertakings" utilizing the same work. It would therefore be constitutionally possible to regulate each "undertaking" separately. However, while there may still be three separate "undertakings" it might be impossible to establish appropriate technical standards and co-ordination as well as effective cost separations (for the purposes of rate base determination). Hence, the reality may be that separate regulation would be impractical.

While this scenario may seem remote it is interesting to note that Canada is already developing a system ("Telidon") in which one terminal device might eventually provide access to interactive data transmissions of all kinds.[144] Far from a mere conception, the system is now being tested over a number of different transmission systems in most provinces.[145]

A further problem arising from the technology explosion is the easy access to an increasing amount of data. It may be necessary to impose strict privacy laws on the use of data. In order for such laws to be effective all access to data would have to be regulated. This includes access across national and provincial boundaries, as well as access within a province. Hence, one more area would arise where greater federal occupancy of the concurrent field, or perhaps even federal exclusivity, would be required. This would further reduce the area of any co-existing local regulation.[146]

In summary then, the progress of technology in the telecommunications area will make it increasingly necessary to have more national input in order to regulate the industry properly. Nevertheless, local concerns will remain strong, particularly given the large potential effect of new communications systems on the way of life in each local community. The desirability of provincial input to the regulatory scheme will remain. The challenge then, it would seem, will be to enable the provincial

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[144] Madden, *supra* note 141, at 302-06.

[145] *Id.* at 323. *See also Telidon System at Crossroads*, The Ottawa Citizen, 10 Dec. 1980, at 11.

[146] These laws might be valid under either the federal general power or the federal power over connecting works, as incidental to the management of interprovincial telecommunications services. In both cases there are possibilities of concurrency but they may be small. For a discussion of issues involved in the implementation of data privacy laws, *see* Salzman, *Home Videotex Services: Some Legal Issues*, in NEW DEVELOPMENTS, *supra* note 23, at 399.

contribution to remain strong, even as more co-ordinated national action is required.

IV. Proposals for Reform

As seen in Part II of this paper, the present working arrangement for the regulation of telephone services in Canada is best described as a "one company-one regulator" system. Bell Canada and B.C. Tel. are both regulated federally. The other telephone companies are regulated in their undertakings by the various provincial regulators. To date there has been no actual scrutiny of interprovincial rates by any regulator.

As was also pointed out in Part II, the CRTC has recently taken the initiative to regulate the TCTS rates for calls which connect non-adjacent provinces,[147] despite some provincial protestations that the CRTC cannot bind the provincial companies by any ruling it may make.[148] The examination of the constitutional allocation of powers in Part III revealed that the CRTC probably possesses the power to regulate these rates as well as the rates for calls between adjacent provinces because both are within the designation "interprovincial undertakings".[149]

A. *Canadian Proposals for Constitutional Reform*

This Part will discuss the various proposals for the proper division of powers. As a starting point it is useful to consider the most significant recent proposals for constitutional division — those of the Canadian Bar Association,[150] the Task Force on Canadian Unity,[151] and the Quebec Liberal Party.[152]

All proposals suggest a division of responsibility between the federal and provincial governments along much the same lines as currently provided. The Canadian Bar Association study is the most detailed of the three. It proposes that there be exclusive federal jurisdiction over interprovincial rates and provincial jurisdiction over

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[147] *See CRTC Telecom. Public Notice 1978-18*, *supra* note 13, and *Telecom Decision CRTC 78-9*, *supra* note 15.

[148] *Id.*

[149] Notwithstanding these findings it should be noted that there is considerable academic opinion to the effect that all Canadian telephone companies are subject to exclusive federal jurisdiction in respect of both their intraprovincial and interprovincial services. *See* Mullan & Beaman, *supra* note 124; Dalfen, *Constitutional Jurisdiction over Interprovincial Telephone Rates*, 2 CAN. COMM. L.R. 177 (1970).

[150] REPORT OF THE CANADIAN BAR ASSOCIATION COMMITTEE ON THE CONSTITUTION, TOWARDS A NEW CANADA (J. Viau Chairman 1978).

[151] REPORT OF THE TASK FORCE ON CANADIAN UNITY, A FUTURE TOGETHER: OBSERVATIONS AND RECOMMENDATIONS (J.-L. Pepin & J. Robarts Co-chairmen 1979).

[152] REPORT OF THE CONSTITUTIONAL COMMITTEE OF THE QUEBEC LIBERAL PARTY (R. Langlois Chairman 1980).

intraprovincial rates, subject to the concurrent field doctrine.[153] The Task Force report appears to endorse in principle the same mix of exclusivity and concurrency.[154] Finally, the Quebec Liberal Party proposal follows the lead of the other two, though it is not clear whether it envisages any area of concurrency.[155]

All three studies, significantly, find that there is an important local aspect which must be recognized. The Quebec Liberal proposal states the local need as follows: "Telephone companies provide a service used mainly for local communications and their activities touch important issues of land use and planning. Moreover, control over telephone rates is closely related to consumer protection."[156]

This argument for a recognition of the local interest involved in the regulation of telephone systems is very similar to those arguments advanced in Part III of this paper, where it was sought to establish the existence of a local or intraprovincial undertaking. If, as argued there, it is conceded that there is a valid provincial concern with the regulation of intraprovincial rates and other matters concerned with the local undertaking, then the question becomes one of whether provincial and federal regulation can be allowed to co-exist. The easy way out would be to accept monolithic federal power. However, if provincial concerns are to be recognized, then some attempt must be made to find an acceptable method of dividing power.

B. *The United States Experience*

The experience in the United States with a federal/state division of power over telephone undertakings may provide some guidance. In the initial stages of the telephone industry's development state commissions constituted the only form of regulation.[157] Later, the Interstate Commerce Commission began to regulate interstate rates, but these were merely accepted by the state commissions as reducing the amount of revenue required by the state telephone companies to meet their total expenses.[158]

It was under this system of operation that the landmark case of *Smith v. Illinois Bell Telephone Co.*[159] was decided. In that case the Illinois

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[153] TOWARDS A NEW CANADA, *supra* note 150, at 123.

[154] A FUTURE TOGETHER: OBSERVATIONS AND RECOMMENDATIONS, *supra* note 151, at 91.

[155] REPORT OF THE CONSTITUTIONAL COMMITTEE OF THE QUEBEC LIBERAL PARTY, *supra* note 152, at 112-13.

[156] *Id.* at 112.

[157] J. SICHTER, SEPARATIONS PROCEDURES IN THE TELEPHONE INDUSTRY: THE HISTORICAL ORIGINS OF A PUBLIC POLICY 11 (1977).

[158] *Id.* at 31. This was based on the "rate base/fair rate of return" principle outlined in Part II. *See* p. 57 *supra*.

[159] 282 U.S. 133, 51 S.Ct. 65 (1930). This was the second action to reach the United States Supreme Court as a result of the "Chicago rate case" which commenced in 1923 and was not finally decided until 1934. The matter came before the Supreme Court three times in all.

Commerce Commission, the state regulator, ordered the Illinois Bell Telephone Company to reduce certain of its rates. Illinois Bell appealed to the federal courts to enjoin the enforcement of these rate reductions, alleging that they were "confiscatory" and thus contrary to the U.S. Constitution which prohibits such laws.[160]

The Supreme Court of the United States held that it could make no determination of the issue until the costs associated with the state jurisdiction had been separated from those associated with the federal jurisdiction.[161] Hence, it required that the capital property, revenues, and expenses of the company be allocated as between the intrastate and interstate services. In the aftermath of *Smith* the use of "separations" in order to delimit the boundaries between state and federal regulation has become universal.

The scheme now in force is based on the NARUC-FCC separations formula[162] which has been accepted by the federal regulator, the Federal Communications Commission (FCC), and the state regulators, whose association is known as the National Association of Railroad and Utility Commissioners (NARUC). The formula allocates the cost of capital, property and expenses between the intrastate and interstate services primarily on the basis of relative usage coupled with certain weighting factors. Once these costs have been allocated, each regulator can set the rates in its own jurisdiction to ensure a fair profit from the costs thus assigned.[163]

It is interesting to note that the approach taken in the United States has been one of federal and state co-operation in setting up the

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[160] U.S. CONST. amend. V.

[161] *Supra* note 159, at 148-49, 51 S.Ct. at 68-69. The Court said:

> The separation of the intrastate and interstate property, revenues and expenses of the company . . . is essential to the appropriate recognition of the competent governmental authority in each field of regulation. . . . In view of the questions presented in this case, the validity of the order of the state commission can be suitably tested only by an appropriate determination of the value of the property employed in the intrastate business and of the compensation receivable for the intrastate service under the rates prescribed.

The precedent followed was Simpson v. Shepard, 230 U.S. 352, 33 S.Ct. 729 (1912).

[162] Co-operation between the FCC and NARUC was prescribed by the Communications Act, 47 U.S.C.A. c. 5 (West 1962). The most recent version of the separations formula is known as the "Ozark Plan". *See* A Review of Revenue Settlement Practices and Procedures Employed by the Members of the Trans-Canada Telephone System, Phase Three Report, at IX-24 - IX-27 (Jun. 1980) (study by Peat, Marwick & Partners for the CRTC).

[163] *Id. See also* Irwin & Trebing, *A Survey of Problems Confronting the Communications Industry in the United States*, in TELECOMMUNICATIONS FOR CANADA: AN INTERFACE OF BUSINESS AND GOVERNMENT 213, at 229 (H. English ed. 1973).

The main concern in making separations is with telephone equipment used in common by both the "intra" and "inter" state services. This equipment includes the subscriber telephone set and line to the local telephone exchange, the exchange itself, and telephone circuits used or usable by both intrastate and interstate calls. The theory of separations is that one allocates a portion of the value of this common equipment to each service according to its percentage usage of the equipment.

separations formula. One can only imagine the consequences if the two levels of regulators failed to agree on a separation formula. Presumably, each regulator would decide which "costs" belonged to its jurisdiction and approve rates accordingly. If the cost allocations of each regulator were different, a likely situation, then the telephone company involved might be given no return, or a double return, on some of its costs.[164] This situation could provoke endless litigation.

In addition, it is important to note that separations are probably not the solution required by the Canadian constitutional system. Confiscatory legislation is not prohibited in Canada, as it is in the United States by the private property clause in their Constitution. One would suspect that the more likely response of a Canadian court would be to utilize the *Montreal Street Railway*[165] rationale. The two regulatory levels would be assumed to co-operate in the concurrent area of the rate-setting. The decision of the federal regulator would prevail in the event of conflict unless its decision were manifestly unreasonable.[166]

Given the difference in the United States and Canadian constitutional systems it would seem that the only good rationale for importing the notion of separations into Canada to establish the federal/provincial division of regulatory responsibility would be one of practicality. It is interesting to note that even though separations are constitutionally prescribed in the United States as the appropriate way to divide powers, they are seldom used by the states to determine their own intrastate toll and local telephone charges.[167] Hence, as a rate-making and cost allocating tool they have not been adopted where not constitutionally required. The NARUC-FCC formula itself provides direct evidence that separations are little more than an arbitrary joint decision by the federal and state regulators on the method of settling rates. As one commentator has said:

> Since the relative use criterion has no intrinsic justification and can, in fact, be calculated and modified in an infinite number of ways to produce any desired result, and since jurisdictional separations as cost allocations techniques have no relationship to ratemaking except in the grossest sense of defining jurisdictional revenue requirements, separation procedures could be, and were, manipulated at will to adjust economic relationships within the industry. In practice, although not in theory, separations have closely followed the precepts of the value-of-service method of recovering joint costs.[168]

It thus appears that the system of using cost separations in the United States has major flaws. It is only feasible where the separation scheme

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[164] J. SICHTER, *supra* note 157, at 36-37.

[165] *Supra* note 50.

[166] For example, it would be unreasonable if the interprovincial rates were so low that they were clearly an attempt to sterilize telephone undertakings. *See* Reference *Re* Alberta Bills, [1938] S.C.R. 100, [1938] 2 D.L.R. 81, *aff'd sub nom.* Attorney General for Alberta v. Attorney General for Canada, [1939] A.C. 117, [1938] 3 W.W.R. 337, [1938] 4 D.L.R. 433 (P.C.).

[167] J. SICHTER, *supra* note 157, at 127.

[168] *Id.* at 128.

can be worked out by compromise. In addition, the schemes utilized have been extremely arbitrary and the very high administrative costs of a separation scheme are hard to justify when only an arbitrary result is obtained.[169]

Several other problems also exist with the United States approach. It has been described as a "two-tier" form of regulation because each company is regulated on two levels. There are two very serious problems with such a "two-tier" form of regulation. First, in the final result, no one regulator has full responsibility for the financial condition of the regulated company. Since each regulates only a portion of the company's business neither need accept responsibility if the company does not obtain enough total revenue or conversely, obtains too much. Secondly, it has been argued that a two-regulator system enables the regulated company to manipulate cost information between the local and federal regulators. This frustrates proper regulation.[170]

C. *The Suggested Solution for Canada*

So far in Canada there have not been problems similar to those in the United States. There has been no "two-tiered" regulation of Canadian telephone companies. However, as discussed in Part II, the CRTC is now attempting to regulate TCTS system rates. If this attempt comes to fruition, and it seems that it will, then a jurisdictional split very similar to that in the United States will result. Nonetheless, this does not mean that the same problems will necessarily arise. The "cost separations" solution required of American regulators need not and should not be imported into Canada. As the United States experience has revealed, the system does little more than achieve a form of "value-of-service" pricing, which we already have without using separations.

However, if some separations method is not used it can be argued that any system in which the CRTC regulates interprovincial matters and the provincial boards regulate local matters will still suffer from the problems associated with two-tier regulation in the United States. There would still be two regulators, neither with ultimate financial responsibility for the regulated enterprise. In addition, the principle of federal paramountcy might leave the CRTC free to set interprovincial rates while forcing the provincial regulators to set rates which will make up the company's remaining revenue requirements. The provincial regulator would thus have no discretion to take into account the local needs and concerns which form the basis of provincial interest in such matters.

It is suggested that the proper solution was foreshadowed in the *Prince Rupert*[171] and *TCTS Rate Inquiry*[172] cases referred to in Part II. In

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[169] *Id.* at 18.

[170] D. SMYTHE, RELEVANCE OF THE UNITED STATES LEGISLATIVE — REGULATORY EXPERIENCE TO THE CANADIAN TELECOMMUNICATIONS SITUATION 146 (1971).

[171] *CRTC Telecom. Public Notice 1979-11*, *supra* note 4.

[172] *See CRTC Telecom. Public Notice 1978-18*, *supra* note 13, and *Telecom. Decision CRTC 78-9*, *supra* note 15.

both cases provincial regulatory representatives were appointed to a joint committee and given a role in making the regulatory decision.[173] If this concept were extended, and a similar committee formed to be the actual interprovincial regulator, then many of the problems of the "two-tier" approach to regulation could be minimized.[174]

First, since the provincial and federal regulators would have common personnel, the financial responsibility for the regulated enterprise would not be split to the extent that it would be in the case of a pure "two-tier" system. Provincial officials who approved a TCTS rate structure would do so with the knowledge that they would have to live with that structure in setting provincial rates.

Secondly, there would still be a national regulatory body which could make the necessary decisions concerning the national network and its co-ordinated response to technological change. Not only would there be a co-ordinating body, but one in which each member was acutely aware of the local and provincial concerns to be balanced against the need for national policies and technological advancement. This would also make any future accretions to the federal power much less objectionable to provincial concerns.

It has been suggested that the increased demands for competition in the industry, particularly in the area of terminal attachment, will make the use of cost separations necessary, at least to distinguish between the costs associated with monopoly telephone service and those associated with competitive services.[175] This, however, does not mean that separations need be used as the basis for constitutional division.

It is also suggested that should a large competitive sector arise there is still no requirement for separations. The value-of-service method of rate-making can continue. Telephone companies and regulators will

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[173] The TCTS committee was less successful, probably because of its largely nominal role.

[174] Such an arrangement was also advocated by the chairman of Bell Canada, when he stated:

> 1. Federal jurisdiction could be focussed on such matters as the allocation of frequencies or management of the spectrum, as well as national technical standards.
> 2. Matters pertaining to rates, quality of service and other operational matters of a local or intra-provincial nature, would be exclusively under provincial jurisdiction.
> 3. Matters of inter-provincial nature, such as rates and division of revenues for the exchange of traffic, would be under the jurisdiction of an interprovincial committee. This could be composed of provincial regulators representing the five regions of Canada, with or without federal representation.

Speech by A. Jean de Grandpré, *supra* note 26.

[175] The former TCTS president (now president of Telesat Canada) has proposed that the industry be broken down into three cost centres — local, long-distance and competitive — so that rates of cross-subsidization could be discerned and the whole industry thus "opened up" to competition. Address by Eldon D. Thompson, Symposium on Canadian Telecommunications Law and Policy, University of Ottawa, 24 Jan. 1980.

merely need to decide the appropriate charge to those in the competitive segment. If telephone company participation in the competitive segment is desired then, of course, these costs must be separated. The use of arm's length subsidiaries to provide the competitive services may present the best solution.

To reiterate, the solution proposed for the regulation of telephone services in Canada is one in which provincial regulatory boards would have jurisdiction over the local undertaking, and the federal regulatory board, composed of provincial officials, would have jurisdiction over the interprovincial undertaking. It is suggested that the decisions of the federal board be by majority vote because it is unrealistic to expect that a consensus would be reached in every case.[176] This will mean, of course, that some provinces or regions might be dissatisfied with the final decision of the regulator. However, there are two mitigating factors. First, each province or region's concerns will have a voice and a vote in the final federal decision. Individual provinces can hardly ask for more in what is essentially a federal matter. Secondly, in the case of rate regulation, the federal regulator will be approving or varying a rate schedule to which the provincial companies have already agreed. Any general reductions in the requested rates will affect all companies more or less equally (local rates will have to rise by similar amounts for all the companies). Thus, on this issue a certain commonality of interest among the provincial representatives can be expected.

Finally, it should be noted that despite an increased probability of co-operation between the provincial and federal regulators in the proposed system, the existence of concurrent powers means that constitutional dispute may still arise. The only way to avoid this would be to impose either a strict separations scheme — which the United States' experience has shown unworkable without co-operation — or accept monolithic federal power, a solution which ignores legitimate provincial concerns. It is suggested that the possibility of constitutional dispute is one which has to be accepted.

D. *Achieving the Desired Constitutional Division*

The constitutional division which has been proposed for the Canadian telephone industry is quite similar to the present division. The key characteristic which the two have in common is, in the case of provincial telephone companies, the federal government power to regulate interprovincial undertakings and the provincial government power to regulate intraprovincial undertakings. This means that the federal government already has the power to appoint a regulator for all

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[176] Although decisions by the TCTS Board of Management in approving the Revenue Sharing Agreement are required to be unanimous, the same requirement as regards the regulator is probably not realistic. The individual regulators would not be faced with the same necessity of "business survival" as their regulated companies.

interprovincial services. Therefore all it need do is appoint provincial regulatory officials to this proposed federal board. Appointment of provincial regulatory personnel to federal boards has been recognized as a constitutionally valid form of delegation.[177]

However, the case of Bell Canada and B.C. Tel., both of which are totally federal undertakings, presents more problems. First, it is submitted that there are no good reasons for altering the proposed scheme of regulation to make an exception for Bell Canada because of its presence in two provinces. It has been admitted by senior Bell management that functional operations are already divided between Ontario and Quebec, and that provincial regulation of its local undertakings is not, in itself, objectionable.[178]

In order to bring Bell Canada and B.C. Tel. within the general scheme, the first prerequisite would be a removal from their empowering statutes of both the declarations making them federal undertakings, and any statutory prescriptions that might have the effect of deeming their undertakings to be singular. This should be sufficient to bring B.C. Tel. within the general scheme. It may be, however, that Bell Canada has sufficient functional unity between its Ontario and Quebec operations that it remains a connecting undertaking apart from its statute. A specific constitutional amendment would then be required. In addition to this potential requirement it should also be recognized that there is a possibility that the Canadian telephone system may be classified as entirely federal.[179] If such is the case then the proposed constitutional division would require substantial constitutional amendment.

Since there are these two areas where constitutional amendment might be required it is important to realize that there are non-constitutional means by which the proposed working division of powers can be achieved. These means are of some importance since constitutional amendment is a difficult process which may not be feasible in today's political climate.

The first "non-constitutional" solution would be to accept those areas where there was full federal jurisdiction and merely allow the

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[177] *See*, e.g., P.E.I. Potato Marketing Bd. v. H.B. Willis Inc., [1952] 2 S.C.R. 392, [1952] 4 D.L.R. 146. In this case the scheme of the Agricultural Products Marketing Act, S.C. 1949, c. 16 (*amended by* S.C. 1956-57, c. 15, now R.S.C. 1970, c. A-7) was approved. This authorized the federal Cabinet to delegate regulatory power over the interprovincial and export marketing of agricultural products to provincially created and operated boards. A similar ability to delegate is contained in cl. 7 of the proposed Telecommunications Act, Bill C-16, 30th Parl., 4th sess., 1978-79.

[178] Speech by A. Jean de Grandpré, *supra* note 26. Mr. de Grandpré notes that the company has undertaken a decentralization along regional lines and that the effect is beneficial:

> This decentralization process has proven highly efficient. The particular needs of the Ontario and Quebec markets are more readily addressed than would be the case with a large monolithic structure. These communities have their specific needs, attitudes and habits which are best met by bringing the managers and staff closer to the people they serve.

[179] *See* note 149 and accompanying text *supra*.

federal government to delegate administrative responsibility for intra-provincial services to the provinces involved. This might be feasible since the present federal and provincial statutes are very similar.[180] However, this solution would not be ideal since the provincial regulator would be bound to administer using federal policies and might not be able to take into account provincial political input.

The second solution would be to attempt some form of inter-legislative delegation. It is generally stated that such delegation is *ultra vires*;[181] however, the courts have striven to allow various forms of legislative delegation. In the case of *Coughlin v. Ontario Highway Transport Board*,[182] for example, the federal government delegated its administrative power to the various provincial boards. It was provided that the boards would be governed by those provincial statutes already applying to intraprovincial highway regulation. This was held not to constitute a forbidden delegation of legislative power but merely an adoption by the federal Parliament of provincial laws as they existed from time to time. If the breadth of this decision is upheld then it would seem that the federal government could allow each provincial regulator to operate under its provincial Act as it existed at any time. This, of course, would enable the federal government to achieve virtually any division of powers, even if the federal constitutional jurisdiction were found to be absolute.

There are problems with the *Coughlin* approach, however. It has been pointed out that a legislative delegation can be revoked at any time by the delgating legislature. This, it has been argued, leads to uncertainty and the possibility that the basic principle of political accountability would be undermined.[183] In addition, there would be strong incentives

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[180] *See* note 14 *supra*. If one looks at the most recent proposed Telecommunications Act, Bill C-16, 30th Parl., 4th sess., 1978-79, which allows delegation to provincial boards (cl. 7), the regulatory powers which are given consist almost solely of the common powers found in most federal and provincial regulatory statutes. These are approval of tariffs, prevention of unjust discrimination and preference, and approval of construction programs and major financing. The only "positive law" would seem to be contained in clauses 3 and 9 which specify, and enable future specification of, the basic policy goals of the regulation of telecommunications service in Canada.

[181] The classic statement is found in Attorney General of Nova Scotia v. Attorney General of Canada, [1951] S.C.R. 31, [1950] 4 D.L.R. 369.

[182] [1968] S.C.R. 569, 68 D.L.R. (2d) 384. It is interesting to note in this case that the federal government delegated to the provinces (both legislatures and regulatory boards) the unwanted power to regulate connecting transport undertakings which it was given in *Winner*, *supra* note 53.

[183] The wisdom of constitutional separations based on the use of delegation has been seriously questioned on the basis that it erodes the principle of basic political responsibility:

> It would be all too easy to engage frequently in such delegation under strong but temporary political pressures of the moment, thus creating a patchwork pattern of variations Province by Province in the relative powers and responsibilities of the Federal Parliament and the provincial legislatures. This could seriously confuse the basic political responsibility and accounta-

for the federal government not to go all the way in delegating the authority for *intra*provincial services to the provinces. By adopting provincial legislation as it exists from time to time the federal government assigns not only the regulatory decision itself, but also control over judicial review and possible political appeals. There would not be, as with the federal regulator, any appeals to the federal Cabinet.[184] In addition, provincial acts would prescribe various degrees of judicial review. This situation may lead to "piecemeal" federal intervention to preserve certain functions, especially political ones such as Cabinet appeals. This, of course, would defeat the very purpose of the delegation which is to allow unfettered provincial political direction on local matters.

V. CONCLUSION

It has been argued throughout this paper that the actual, and indeed the desirable, constitutional division in the telephone services area is one in which the provinces control intraprovincial telephone services and the federal government controls interprovincial services. There are strong local issues involved such as the cost and availability of basic service and the control of the impact of technological change on the life of each community. These local needs deserve no less recognition than the need to ensure proper co-ordination of the industry on a nation-wide basis. The major recommendation of this paper, that the national regulator be one composed of representatives of each of the provinces, represents an attempt to rationalize the competing factors of local input and national co-ordination. It is recognized that the success of this scheme would, in the end, depend on a high degree of co-operation between the two levels of government. It is realized, in light of current attitudes, that co-operation may be difficult to achieve. Nevertheless, a high degree of co-operation has been seen within the industry itself and it is suggested that no less should be demanded from the political sector.

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bility of members of the Federal Parliament and the Federal Cabinet and too much of this could destroy these federal institutions.

Lederman, *Some Forms and Limitations of Co-operative Federalism*, 45 CAN. B. REV. 409, at 426 (1967). This rationale was approved in the Canadian Bar Association's proposal for constitutional reform. *See* TOWARDS A NEW CANADA, *supra* note 150, at 66-67. The Rowell-Sirois Report suggests that this danger can be avoided by delegation which is irreversible, or at least of a long and fixed duration. *See* REPORT OF THE ROYAL COMMISSION ON DOMINION-PROVINCIAL RELATIONS, BOOK II RECOMMENDATIONS 72-73 (J. Sirois Chairman 1940).

[184] *See, e.g.*, note 5 *supra*.